REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2018-04003

IN THE MATTER OF AN ARBITRATION PURSUANT TO THE ARBITRATION ACT CHAPTER 5:01 OF THE LAWS OF TRINIDAD AND TOBAGO

AND

IN THE MATTER OF AN ARBITRATION BETWEEN THE ENVIROTEC LIMITED AND EDUCATIONAL FACILITIES COMPANY LIMITED

BETWEEN

EDUCATIONAL FACILITIES COMPANY LIMITED

Claimant

AND

ENVIROTEC LIMITED

Defendant

Before The Honourable Madam Justice Margaret Y Mohammed

Date of delivery: December 6, 2019

APPEARANCES:

Ms Deborah Peake SC leads Mr Ravi Heffes-Doon instructed by Ms Alana Bissessar Attorneys at law for the Claimant.

Mr. Christopher Hamel-Smith SC instructed by Mr Dennis Gurley SC Attorneys at law for the Defendant.

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JUDGMENT

INTRODUCTION

1. The Claimant and the Defendant entered into a contract on 19 March 2008 ("the Contract") for the construction of the Mount Hope Junior Secondary School at Maingot Street, Mt Hope. The Contract Price in the Contract was the sum of $ TTD 144,664,725.00 and the Contract's original period was for 730 calendar days commencing 19 March 2008 with a completion date of 19 March 2010. The Contract also specified that the Letter of Acceptance dated 30 October 2007 ("the Letter of Acceptance"); the Letter of Tender dated 3 October 2007 ("the Letter of Tender") and the 1999 First Edition (Red Book) General Conditions of Contract for Construction for Building and Engineering Works ("the GC") formed part of the Contract.

2. By letter dated 7 January 2015 the Claimant issued a Notice to Correct ("the Notice to Correct") to the Defendant and on 15 January 2015, 1763 days after the original completion date, the Claimant issued a Notice of Termination of the Contract to the Defendant for failure to comply with the Notice to Correct.

3. The Defendant (who was the Claimant in the arbitration) issued a Notice of Arbitration on 11 August 2016 pursuant to sub-clause 20.6 of the GC, which provided for arbitration of any disputes between the parties arising from the Contract. Mr James T Guyer was appointed Arbitrator ("the Arbitrator") by Court Order dated 3 January 2018.

4. The Defendant alleged that the Contract was wrongfully terminated due to the delay by the Claimant in (1) issuing instructions in relation to air conditioning works which began on 14 October 2008; and (2) delays in

issuing instructions in relation to electrical installation works, which began on 6 October 2009.

5. On the 3 August 2018 the Arbitrator awarded the Defendant the sum of (TTD) $94,957,873.54 ("the Award"). The breakdown of the Award was as follows:

a.	Unpaid Measured Works/Final Account	$ 8,269,767.23
b.	Unpaid Preliminaries	$ 5,150,948.60
c.	Loss of Profits on Unfinished Works	$ 5,401,503.71
d.	Financing Charges	$ 3,056,535.10
e.	Head Office Overhead Costs	$ 51,358,157.25
f.	Cost Escalations	$ 2,322,432.77
g.	Unpaid Design Cost	$ 896,800.00
h.	Sub Total	$76,456,144.66
i.	Claimant Legal Fees@ 10%	$ 7,645,614.47
j.	Costs of Arbitration	$ 305,236.58
k.	Sub Total	$84,406,998.70
l.	Value Added Tax @12.5%	$10,550,874.84
m.	Total	**$94,957,873.54**

6. In the Fixed Date Claim issued in the instant action the Claimant is seeking to set aside the Award pursuant to section 19(2) of the **Arbitration Act**[1] ("the Arbitration Act") and/or the inherent jurisdiction of the Court; to stay the Award pending the determination of the instant action and costs of the Award and the instant action.

7. The Claimant's case is that the Award must be set aside due to the glaring errors of law on the face of the Award and that the Arbitrator's reasoning

[1] Chapter 5:01

and formations of judgment and conclusions were irrational and unsupportable in light of the evidence. In particular the Claimant asserted that the errors on the face of the Award made by the Arbitrator are : (a) he treated as evidence the expert report of Mark Hood ("the Hood Report"); (b) he misread/misconstrued Clause 20.1; (c) he applied the wrong the Limitation Period; (d) his reasoning for awarding sums for Unpaid Preliminaries, Unpaid Measured Works/Final Account; Costs Escalations, Design Costs and Legal Costs of the Arbitration were irrational and not supported by the evidence.

8. The Defendant's position is that there was no error on the face of the Award since the parties authorized the Arbitrator under Item No 56 Procedural Order No 1[2] to give the Arbitrator the power to decide the issues in the Arbitration *ex aequo et bono* (from equity and conscience). As such the Arbitrator had the power to choose not to apply the strict rules of law and to decide according to what is fair and just.

9. As the Claimant has alleged that, the items in the Award should not have been made for various reasons I have decided to deal with the impugned items under the various heads of challenge. Certain items are challenged on more than one ground, which means that necessarily they appear under more than one ground.

10. Before I deal with the issues, it is important to set out the law on the Court's jurisdiction and the Court's approach in considering the setting aside of an award.

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[2] Exhibit D.C. 5 of the affidavit of Danielle Campbell

THE COURT'S JURISDICTION TO SET ASIDE AN AWARD

11. Section 19(2) of the Arbitration Act states that:

> "where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the Court may set the award aside"

12. In **ICS (Grenada) Limited v NH International (Caribbean) Limited**[3] Jamadar J (as he then was) succinctly summed up the basis of the Court's jurisdiction to set aside an award made by an Arbitrator at page 4 as:

> "…the courts in Trinidad and Tobago have the power to set aside an award based on either a statutory and/or the inherent jurisdiction. Thus, under section 19(2) of the local Act [see, section 11(2) of the 1889 UK Act and section 15 of the 1934 UK Act] the court has a statutory jurisdiction to set aside an award where an arbitrator has misconducted himself or the proceedings or where an arbitration or award has been improperly procured.
>
> However, the court also has an inherent jurisdiction to set aside an award which was:
>
> i. subject to an error on the face of the award;
> ii. wholly or in part in excess of jurisdiction; or
> iii. subject to a patent substantive defect."

13. The Privy Council decision of **Champsey Bhara and Company v Jivraj Balloo Spinning and Weaving Company Limited**[4] explained at pages 487-488 what is meant by an error on the face of the award as:

[3] HCA 1541 of 2002
[4] [1923] AC 480

> "An error in law on the face of an award means in their Lordships' view that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' right depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the Arbitrator made. The only way that the learned judges have arrived at finding what the mistake was is by saying: "in as much as the Arbitrator's award so-and-so, an in as much as the letter shows that the buyer rejected the cotton, the Arbitrators can only have arrived at that result by totally misinterpreting r.52. But they were entitled to give their own interpretation to r.52 or any other article, and the award will still stand unless, on the face of it, they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound"

14. Mendonca JA in **NH International (Caribbean) Limited v NIPDEC**[5] discussed the Court's jurisdiction to set aside an arbitral award for errors of fact. He stated at paragraph 19 that:

> "As regards errors of fact, the Court may only remit for the arbitrator's reconsideration in the following three cases:
>
> 1. where the arbitrator has stated a case on whether there is any evidence to support his findings;

[5] Civil Appeal No 246 of 2009

2. where there is such an irreconcilable conflict between the arbitrator's conclusion and the facts found in the award as to show that he must have misdirected himself when arriving at the conclusion; and

3. where there is a sufficient conflict between various findings of fact to make it uncertain what the arbitrator meant. In such an event the Court will remit the award for clarification. (See **Overseas Buyers Ltd. v Granadex** S.A. [1980] 2 Lloyd's LR 608, 613.)"

15. In another appeal between **NIPDEC v NH International (Caribbean) Limited**[6] Bereaux JA opined at paragraph 40 that:

"The court's discretion to remit or aside an arbitral award is also circumscribed by the nature of the dispute. The court will refuse to remit or to set aside the award if what is referred is a specific question of fact or law or some principle of construction for the determination of the arbitrator. This is so even if the error is clear on the face of the award. Neither will the award be remitted or set aside because the court disagrees with the conclusion to which the arbitrator came unless of course it is clear on the face of the award that the arbitrator has proceeded illegally".

16. The Judicial Committee of the Privy Council, in **NH International (Caribbean) Limited v NIPDEC**[7] stated the appropriate approach of the Court in its exercise of its jurisdiction in setting aside arbitral awards was:

"29. Where parties choose to resolve their disputes through the medium of arbitration, it has long been well established that <u>the courts should respect their choice and properly recognise that the</u>

[6] CA No 281 of 2008

[7] [2015]UKPC 37

arbitrator's findings of fact, assessments of evidence and formations of judgment should be respected, unless they can be shown to be unsupportable. In particular, the mere fact that a judge takes a different view, even one that is strongly held, from the arbitrator on such an issue is simply no basis for setting aside or varying the award. Of course, different considerations apply when it comes to issues of law, where courts are often more ready, in some jurisdictions much more ready, to step in"

…

31. In his judgment in the Court of Appeal, with which Mendonça and Jamadar JA agreed, Bereaux JA relied on the fact that whether the evidence provided under clause 2.4 was "reasonable" was a matter of law. That is only true in the sense that there would be an error of law if the Arbitrator had reached a conclusion on this issue which was unsupportable in the light of the evidence, or if, which may well be the same thing, it was irrational." (Emphasis added)

17. Mendonca JA in **NH International (Caribbean) Limited** referred with approval to the learning in **Meyer v Leanse**[8] which stated that the approach of the Court "has always been to support the validity of the award and to make every reasonable intendment and presumption in its favour".

18. Therefore, while the Court should be cautious in making a decision to set aside or remit an arbitral award, the Court's jurisdiction to set aside an arbitral award is not limited only to errors of law, but extended to findings of fact, assessments of evidence and judgments which were shown to be unsupportable or irrational in light of the evidence.

[8] [1958] 2 QB 371 at 80

THE ISSUES

19. The issues to be determined are:

    (a) Did the Arbitrator err in law in arriving at the Award?

    (b) Did the Arbitrator arrive at conclusions in the Award which were unsupportable, irrational, illogical and or which no reasonable arbitrator could have made?

ERRORS OF IN LAW IN ARRIVING AT THE AWARD

THE INTERPRETATION OF ITEM 56 PROCEDURAL ORDER NO. 1

20. Senior Counsel for the Claimant submitted that on a proper construction, Item 56 of Procedural No. 1 did not authorise the Arbitrator to jettison the law and the provisions of the Contract but instead the Arbitrator was under a duty to apply the law, decide in accordance with the terms of the Contract, and the reference to *ex aequo et bono* in Item 56 authorised the Arbitrator, to do "what equity did in the old days. And it is what arbitrators may do under such a clause as this[9]."

21. In this regard Senior Counsel submitted that the Arbitrator erred in law in four aspects in arriving at the Award namely; (a) by permitting inadmissible evidence in the form of the Hood Report; (b) in misreading/misconstruing clause 20.1 of the GC; (c) by failing to apply the Limitation Period; and (d) by ignoring the terms of the Contract.

22. Senior Counsel for the Defendant submitted that the parties did not agree in Item 56 of Procedural Order No. 1 to oust the jurisdiction of the Court but rather to restrict the basis of the Arbitrator determining the issues in

[9] Lord Denning in **Eagle Star Insurance Company Ltd. v Yuval Insurance Company Ltd.** 1 Lloyd's Rep 357 (1977)

the Arbitration on *ex aequo et bono* principles where the Arbitrator had the power to choose not to apply the strict rules of law in deciding what is fair and just. Senior Counsel also submitted that the case law supported the position that an Arbitrator who had been expressly authorised to do so, may determine a matter on equitable grounds i.e on the basis of what he or she had concluded is fair and just in the circumstances of the particular case, rather than applying the strict legal position. In support Senior Counsel relied on the learning of **Russell on Arbitration 24th Ed**; the rules of various International Arbitration Institutions[10]; **Dicey & Morris Conflict of Laws 11 ed**; **Musawi V RE International (UK) Ltd and ors**[11]**; Eagle Star Insurance Company Limited v Yuval Insurance Company Ltd**[12]**; Home and Overseas Insurance Co. Ltd v Mentor Insurance Co, (U.K.) Ltd (in Liquidation)**[13]; and **Deutche Schachtbau-Und Tiebohrgesellschaft MBH v Ras Al-Khaimah National Oil Co**[14].

23. In the instant case, the parties agreed that Arbitration was the dispute resolution mechanism which was to be used to determine any disputes arising from the Contract[15]. The parties also agreed to the rules which the Arbitrator had to apply in determining the issues arising from the arbitration which were set out at Item 56 of Procedural Order No 1 which stated:

> "The Arbitral Tribunal shall state the reasons upon which the award is based (Art 34- 3 of the UNCITRAL Rules). In doing so the Arbitral Tribunal shall (Art 35 of the UNCITRAL Rules):

[10] At page 14 of the Defendant's written submissions filed on the 5 July 2019.
[11] [2007] EWHC 2981
[12] [1977] 1 Lloyd's Rep 357
[13] [1990] 1 WLR 153
[14] [1990] 1 AC 295
[15] See Page 13 paragraph 20.6 of the Contract exhibit D. C. 5 of the affidavit of Danielle Campbell file don the 2 November 2018.

a) **Apply the rules of law of Trinidad and Tobago** as applicable to the substance of the dispute;

b) **Decide in accordance with the terms of the contract**, if any, and shall take into account any usage of trade applicable to the transaction; and

c) The Parties have expressly authorized the Arbitral Tribunal to decide *ex aequo et bono* (**from equity and conscience**) when at its sole discretion, the Arbitral Tribunal determine to be appropriate."

24. Article 35 of the UNCITRAL Arbitration Rules provides:

1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.
2. The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so.
3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction."

25. Based on paragraph (a) of Item 56 of Procedural Order No. 1, the parties had agreed that the laws of Trinidad and Tobago was the appropriate law which the matters in dispute are to be determined. The parties also agreed based on paragraph (b) of Item 56 of Procedural Order No. 1 that the Arbitrator was to decide the issues in accordance with the terms of the Contract. Further, at paragraph (c) of Item 56 of Procedural Order No. 1 the

parties expressly authorised the Arbitrator to decide matters ex aequo et bono.

26. I agree with Senior Counsel for the Defendant that there is no provision in the Arbitration Act which expressly prohibits the parties from agreeing to the Arbitrator deciding matters ex aequo et bono. In my opinion, the approach which the parties agreed that the Arbitrator was to apply in determining the issues arising from the Arbitration was clearly set out in Item 56 of Procedural No. 1.

27. In my judgment, the plain and ordinary meaning of the words in Item 56 of Procedural Order No. 1 was that in determining the issues which arose during the Arbitration, the parties agreed that the Arbitrator was obliged to apply the laws of Trinidad and Tobago, the terms in the Contract and the basis of equity and conscience. It is clear that the parties did not agree to authorise the Arbitrator to *only* decide the issues on equity and conscience and ignore the laws of Trinidad and Tobago and the terms of the Contract. In my opinion, if they did then it would have been so reflected in Item 56 of Procedural Order No.1.

28. In any event, I do not agree with Senior Counsel for the Defendant's submissions that the case law cited by him supported his submission.

29. **Eagle Star Insurance Company Ltd** was a decision of the English Court of Appeal decided in 1977. In that case, the Treaty of Reinsurance contained an arbitration clause which provided that all disputes arising out of the agreement should be referred to arbitration, and that the arbitrators should settle disputes according to an equitable, rather than a strictly legal, interpretation of the agreement. In July 1969, the Treaty was renegotiated

by the parties' agents. The Plaintiff's retention increased from 15 per cent to 42 ½ per cent, the shares of the reinsurers being reduced proportionately. In 1976, the Plaintiff claimed £70,000 from the Defendant as being due under the Treaty. On 3 December 1976, the Plaintiff issued a specially indorsed writ. The indorsement was defective, and the Defendant applied to strike it out. The Plaintiff reissued the statement of claim, and took out a summons under RSC Order 14 for summary judgment. The Defendant resisted the summons and applied to stay the proceedings on the ground that there was an arbitration clause.

30. The issue before the Court was whether the arbitration clause was valid and of full effect. In finding that the arbitration clause was valid, Lord Denning stated at page 11:

> "I do not believe that the presence of such a clause makes the whole contract void or a nullity. It is a perfectly good contract. If there is anything wrong with the provision, it can only be on the ground that it is contrary to public policy for parties so to agree. I must say that I cannot see anything in public policy to make this clause void. On the contrary the clause seems to me to be entirely reasonable. It does not oust the jurisdiction of the courts. It only ousts technicalities and strict constructions. That is what equity did in the old days. And it is what arbitrators may properly do today under such a clause as this. Even under an ordinary arbitration submission, it was a mistake for the courts in the beginning to upset awards simply for errors of law.
>
> …
>
> So I am prepared to hold that this arbitration clause, in all its provisions, is valid and of full effect, including the requirement that the arbitrators shall decide on equitable grounds rather than a strict legal interpretation."

31. There was no dispute in the instant case that Item 56 of Procedural No 1 which authorised the Arbitrator to also apply the principle of ex aequo et bono in determining the issues in the Arbitration, was valid. The contention was whether the Arbitrator's interpretation and application of the said Item 56 was in accordance with the terms set out therein. In my opinion, the case of **Eagle Star Insurance Company** Ltd can be distinguished from the instant case since the issue was different than that in the instant case.

32. **Home and Overseas Insurance Co Ltd** was another decision of the English Court of Appeal decided in 1990. In **Home and Overseas Insurance Co Ltd**, Mentor Insurance entered in a number of reinsurance contracts with Home and Overseas Insurance under a standard form of contract. Clause (18), stipulated that disputes arising between the parties were to be referred to arbitration. Clause (18) also provided that arbitrators were to "interpret this reinsurance as an honourable engagement", and their award shall effect "the general purpose of this reinsurance in a reasonable manner, rather than in accordance with a literal interpretation of the language. When Mentor went into liquidation, Home and Overseas Insurance applied for a summary judgement for recovery of sums pursuant to the terms of the contract. Clause (18) stated:

> "The arbitrators and the umpire shall interpret this reinsurance as an honourable engagement and they shall make their award with a view to effecting the general purpose of this reinsurance in a reasonable manner rather than in accordance with a literal interpretation of the language."

33. One of the issues before the Court of Appeal was the effect of the words "honourable engagement" in the arbitration clause on the construction of

the contractual terms as a point of law, and whether the parties should be, accordingly, permitted to a summary judgement by the court.

34. The Court of Appeal held that the effect of the “honourable engagement” provision within the arbitration clause was to permit arbitrators to, as in previous authorities, apply the principle that arbitrators should construe the terms of commercial contracts with a view to achieving the commercial purpose of the transaction. Thus, the principle of construction allowed the arbitrator to depart from the literal and ordinary meaning of the words in view of the commercial context and purpose of the contractual agreement, as well as in light of the stipulated purpose of the contract in its preamble. This applied particularly to ambiguous terms. However, this principle of contract construction did not permit arbitrators to depart from the law itself. The Court of Appeal held that the requested summary judgment would require interpretations as to the proper construction of ambiguous contractual terms, which ought to be, instead, referred to arbitration to be determined according to the arbitration clause.

35. Parker LJ stated at page 161 that:

> “I have no hesitation in accepting Mr. Clarke’s submission that a clause which purported to free arbitrators to decide without regard to the law and according, for example, to their own notions of what would be fair would not be a valid arbitration clause”

36. Lloyd LJ stated at pages 163-164:

> “I accept of course that the arbitration clause is a subsidiary clause, ancillary to the main contract. But this does not mean that we should disregard the clause when determining whether the case is a suitable one for summary judgment. The clause provides that any dispute as to

the rights of the parties should be referred to arbitration. In determining the rights of the parties, the arbitrators are required to approach their task "with a view to effecting the general purpose of the reinsurance in a reasonable manner rather than on a literal interpretation of the language." A similar clause came before Megaw J. in *Orion Cia Espanola de Seguros v. Belfort Maatschappij* [1962] 2 Lloyd's Rep. 257. He held that arbitrators are, in general, bound to apply a fixed and recognisable system of law. When the same clause came before the Court of Appeal in *Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd.* [1978] 1 Lloyd's Rep. 357, Lord Denning M.R. said of Megaw J.'s decision, at p. 361:

> "He was of opinion that such a clause was invalid and should be given no effect. Despite its presence, the arbitrators were to decide in accordance with the ordinary rules of law. If the arbitrators did not do so, their award could be set aside by means of a case stated."

Lord Denning M.R. did not accept that view:

> "I must say that I cannot see anything in public policy to make this clause void. On the contrary the clause seems to me to be entirely reasonable. It does not oust the jurisdiction of the courts. It only ousts technicalities and strict constructions."

A little later he said:

> "So I am prepared to hold that this arbitration clause, in all its provisions, is valid and of full effect, including the requirement that the arbitrators shall decide on equitable grounds rather than a strict legal interpretation."

37. Lloyd LJ continued at page 164:

> "It is implicit in the decision of the Court of Appeal in the **Eagle Star** case that arbitrators, appointed under a clause which entitles them to look to the general purpose of the contract, rather than the literal interpretation of the language, may properly reach a result which would not be the same, or not necessarily the same, as a court would reach in the absence of the clause. This does not mean that the arbitrators can re-write the contract, or ignore the language altogether, or "be a law unto themselves," which Mr. Clarke suggested was the only alternative. That states the question far too starkly. On most questions of construction two views are possible. I see no reason why the parties should not require the arbitrators to adopt, in the words of Goff L.J., the more lenient view, even if a court would be likely to adopt a stricter view. By way of illustration, the arbitrators might give greater weight to the preamble to the contract, in which it is stated that the reinsurance is to cover the liability of the reassured, as indicating the general purpose of the contract, in preference to clauses 1, 5 and 15 on which Mr. Clarke relied. They might regard the latter clauses as not applying in accordance with their strict terms when the reassured is in liquidation. But I mention that only by way of illustration. I am not expressing any view."

38. The learning in **Home and Overseas Insurance Co Ltd** is instructive on the approach the Court should take in examining the Clause which parties agreed to be bound by. In my judgment, this case can be distinguished from the instant matter since Item 56 of Procedural Order No. 1 was different from that in **Home and Overseas Insurance Co Ltd.**

39. **Deutche Schachtbau-Und Tiebohrgesellschaft MBH v Ras Al-Khaimah National Oil Co** was a 1990 House of Lords decision. The House of Lords did not reverse the Court of Appeal's position on the arbitration clause. In the Court of Appeal Donaldson MR found that the parties had intended to delegate to the Arbitrators the choice of law governing the substantive contract, applying what they considered to be appropriate principle.

40. In my opinion, this case dealt with the interpretation of the arbitration clause with respect to the choice of law which was not an issue in the instant case since by Item 56 Procedural Order No. 1 the parties had expressly agreed that the relevant law was that of Trinidad and Tobago.

41. **Musawi v RE International UK Ltd** was a decision of the English High Court in 2007. The case centred on the acquisition, development and ownership of a piece of land which were the subject of a number of agreements and alleged agreements between 1987 and 2002 involving the claimant and some or all of the parties. It had, originally, been the position of the parties that the agreements were governed by Shia Sharia law. In light of the Contracts (Applicable Law) Act 1990 and subsequent case law it was accepted by the parties that Shia Sharia law, as a non-national system of law, could not be the applicable law for any of the agreements made after the coming into force of that Act.

42. One of the issues to be determined by the Court was whether at common law an agreement could be governed by a system of law which was not the law of a country. The Claimant argued that an agreement could be governed by such a system of law, and that the agreements concluded prior to the coming into force of the 1990 Act were governed by Shia Sharia law.

The Defendant contended that that was not the position at common law and that the relevant agreements were governed by English law.

43. The High Court found that at common law the proper law of a contract had to be either English law or the law of another country, and the courts would not apply any other system to a contract. The Court also found that whilst the Arbitration Act 1996 s.46(1)(b) enabled parties to choose principles other than the law of a country as the basis on which a dispute was to be decided by the arbitrator, the law that might be chosen under s.46(1)(a) or that might be applied under s.46(3) of the Act had to be the law of a country. In **Musawi** s.46(1)(b) of the Act had entitled the parties to require the arbitrator to apply to the subject matter of the dispute and its resolution the principles of Shia Sharia law. However, all the agreements at issue, including the arbitration agreement, had been governed by English law.

44. At paragraph 21 the Court stated:

> "The dicta of Donaldson MR in the *DST* case [1987] 2 All ER 769 at 779, [1990] 1 AC 295 at 315–316 and of Lloyd LJ in the *Home and Overseas Insurance Co* case [1989] 3 All ER 74 at 84–85, [1990] 1 WLR 153 at 166–167 were concerned with the principles by which arbitrators could decide the substantive issues. The first case concerned the enforcement of a foreign award, but the second concerned an English arbitration. In the years immediately before the 1996 Act, there was some uncertainty as to whether the conventional and established rule, that in an English arbitration the arbitrators had to apply the law of a country, remained good law."

45. In my opinion, **Musawi** can be distinguished from the instant matter on the basis that Item 56 of Procedural Order No. 1 clearly stated the applicable law to the Contract.

TREATING THE HOOD REPORT AS EVIDENCE

46. It was argued on behalf of the Claimant that there is an error of law on the face of the Award in that the Arbitrator expressly treated the Hood Report as evidence in the arbitration when it did not form part of the evidence adduced by either party in compliance with his Procedural Orders. It was also argued that the Arbitrator made no decision that any party was entitled to rely on the Hood Report pursuant to paragraph 53 of Procedural Order No 1[16]. The Claimant asserted that the Arbitrator in his Award never suggested that it was admitted into evidence by agreement of the parties but he simply received it into evidence as is clear from the Award and he was guided by it in determining the damages awarded to the Defendant in making the Award.

47. The Defendant referred to a factual dispute arising from the affidavits filed in the instant claim to argue that, on a balance of probabilities, the more likely position was that, at the Arbitration, both parties agreed for the Hood Report to be admitted into evidence and as such the Arbitrator did not make any error in admitting it into evidence and by relying on it in arriving at the Award.

48. It was not in dispute that Part M of Procedural Order 1 expressly dealt with expert evidence in the Arbitration. Paragraph 53 stated:

> "Unless the Tribunal decides otherwise in the case of **exceptional circumstances,** no party shall be entitled to rely upon an expert

[16] Exhibit "D.C. 5" to the affidavit of Danielle Campbell

report unless the expert in question has been made available for cross-examination, and examination by the Arbitral Tribunal, at the evidentiary hearing."

49. It was also not in dispute that the expert Mr Hood did not attend the Arbitration for cross-examination and examination by the Arbitral Tribunal during the evidentiary hearing.

50. The factual dispute concerning whether the parties agreed for the Hood Report to be admitted into evidence was set out in the affidavits filed in the instant matter. In paragraphs 18 to 21 of the affidavit of Danielle Campbell filed 2 November 2018 the Claimant set out the reasons it contended that the admitting into evidence of the Hood Report was erroneous and as such serious misconduct by the Arbitrator.

51. The Defendant filed an affidavit of Wazid Amaralli on the 23 November 2018 in response to the Ms. Campbell's evidence with respect to the Hood Report. He stated at paragraph 11:

> "I also confirm that it is true that Envirotec submitted an expert Report of Mark Hood dated 7th June 2018 ("the Hood Report"), a copy of which is marked "DC11" and annexed to the Campbell Affidavit, that Mr Hood as not called to be cross-examined, and that Counsel for Envirotec indicated to the Arbitrator that he was not relying on the Hood Report. Counsel for Envirotec explained to the Arbitrator that this was by reason of Mr Hood's undisclosed absence from the jurisdiction (on another assignment in Jakarta, Indonesia) at the time of engagement and his concomitant unavailability to properly investigate the facts in the matter. However, while Envirotec did not rely on the Hood Report, Counsel for both parties agreed at the

hearing that the Arbitrator was at liberty to consider the Hood Report if, and to the extent that, he considered it would be useful to do so."

52. The Claimant replied in the affidavit of Danielle Salandy on 6 December 2018. She stated at paragraphs 3, 4 and 5 respectively that:

    i. She attended the hearing of the arbitration proceeding before Mr. James T. Guyer on Monday 2 July, 2018 and Tuesday 3 July 2018.

    ii. At the hearing, Counsel for Envirotec requested that the arbitrator "disregard" the Hood Report.

    iii. At no time before, during or after the arbitration either party agreed or submitted to the Arbitrator that the Hood Report could be received into evidence.

53. In reply to Ms. Salandy's affidavit, the Defendant filed a further affidavit by Mr Jesse Ghent (Instructing Attorney for the Defendant) dated 2 January 2019, in which he stated at paragraphs 4 to 7 that:

    i. Ms. Salandy attended the hearing but she was not present for the full duration of it.

    ii. He did not recall if Ms. Salandy was present when the matter of the admissibility and use of the Hood Report was dealt with by the Arbitrator.

    iii. In the Opening Statement of Counsel for Envirotec, he indicated that it was not the intention of Envirotec to call the Mr. Mark Hood.

    iv. In response, Counsel for the Claimant (Ms. Shobna Persad) objected to the said request for the Arbitrator to disregard the Hood Report.

    v. The Arbitrator informed Counsel for the parties that he had already read the Hood Report and he found some parts useful. He

then stated that notwithstanding the absence of oral evidence from Mr. Hood, if there was no objection from the Parties, he would give it whatever weight he determined to be appropriate.

vi. Counsel for EFCL thereupon indicated that she had no objection to the Arbitrator considering the Hood Report and that indeed it was proper that he should do so.

vii. Counsel for Envirotec thereafter indicated that he would withdraw his request for the Arbitrator to disregard the Hood Report.

54. In response to Mr. Ghent's affidavit, the Claimant filed one further affidavit by Ms. Salandy on the 10 January 2019 in which:

i. She confirmed that she was present at the arbitration when issue of the admissibility and/or use of the Hood Report arose.

ii. She stated that "Counsel for Envirotec did not indicate, as alleged in the Jesse Ghent affidavit, that he withdrew his request for the Arbitrator to disregard the Hood Report."

55. In the Award the Arbitrator made the following statements with respect to the Expert Report:

(a) At pages 5 to 6 " the documents received into evidence were Claimant

i. Statement of Claim

ii. Witness statements of Wazid Amarilli, Latchman Bassoon, Ian Gookoo, Junior Mangaroo and Steve Smith.

iii. Expert Report of Mark Hood.

iv. Answer to Respondent's submissions of Statute of Limitation.

Respondent

i Statement of Defense.

ii Witness statement of Karlene Jones.

Iii Submissions of Statute of Limitation."

(b) At page 59 as footnote 6 which stated " See Hood Expert Opinion Report (Report) pages 21-42 and Appendices B through J of which the Arbitrator is guided more or less by, in its determination of damages due Claimant".

56. The Award is noticeably silent on the Hood Report being admitted into evidence with the consent of the parties.

57. In my opinion, the alleged factual dispute referred to in the affidavits filed in the instant matter is immaterial in determining if the Arbitrator acted properly by considering the Hood Report. What is material is the information contained in the Award and any document which was actually incorporated into the Award. The Defendant's submissions were not incorporated as part of the Award. It is clear on the face of the Award that the Arbitrator did not admit the Hood Report into evidence with the consent of the parties or that the Hood Report was admitted into evidence based on exceptional circumstances as provided by paragraph 53 of Procedural Order No.1. Indeed there is nothing in the Award indicating the Arbitrator's basis for admitting the Hood Report into evidence.

58. It is therefore apparent on the face of the Award that the Arbitrator erred in law by admitting the Hood Report into evidence. He also erred in law by using it to determine the damages. As such all the damages under the

various headings were awarded based on the Hood Report which must be set aside.

THE CONSTRUCTION OF CLAUSE 20.1

59. The construction of Clause 20.1 of the GC of the FIDIC Red Book is a question of law.

60. Clause 20.1 of the GC[17] stated:

"**20.1 Contractor's Claims**

If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.

If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply.

The Contractor shall also submit any other notices which are required by the Contract, and supporting particulars for the claim, all as relevant to such event or circumstance.

[17] Exhibit "D.C. 1" at page 58 of the GC

The Contractor shall keep such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Engineer. Without admitting the Employer's liability, the Engineer may, after receiving any notice under this Sub-Clause, monitor the record-keeping and/or instruct the Contractor to keep further contemporary records. The Contractor shall permit the Engineer to inspect all these records, and shall (if instructed) submit copies to the Engineer.

Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Engineer, the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect:

(a) this fully detailed claim shall be considered as interim;

(b) the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further particulars as the Engineer may reasonably require; and

(c) the Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Contractor and approved by the Engineer.

Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may

be proposed by the Engineer and approved by the Contractor, the Engineer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time.

Each Payment Certificate shall include such amounts for any claim as have been reasonably substantiated as due under the relevant provision of the Contract. Unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the Contractor shall only be entitled to payment for such part of the claim as he has been able to substantiate.

The Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 [*Extension of Time for Completion*], and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract.

The requirements of this Sub-Clause are in addition to those of any other Sub-Clause which may apply to a claim. If the Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause." (Emphasis added)

61. The Claimant contended that the established learning is that the plain words of Clause 20.1 of the FIDIC Red Book impose a strict requirement for a Contractor to give notice of a claim in the event that it wishes to claim "an extension of time" or "any additional payment…in connection with the Contract". In the absence of so doing the Contractor is deprived of any right to compensation or any additional payment. As such the Arbitrator committed an error of law on the face of the Award, by finding that the Particular Conditions of Contract, made the condition precedent notice requirement obsolete.

62. It was submitted on behalf of the Defendant that:

(a) Notice under Clause 20.1 was not an issue to be determined by the Arbitrator since the Claimant had not raised it in the Arbitration and therefore the Arbitrator did not make any finding on the issue;

(b) The part of the Award objected to by the Claimant must be taken in context of the issue which the Arbitrator was determining;

(c) The Arbitrator decided that Notice was given when he stated at page 48 of the Award "the greater weight of the evidence indicates the Claimant kept the Respondent advised of the work to be performed, that the works were likely to be delayed or disrupted, its programme effects on Time for Completion and costs";

(d) The Arbitrator may have held ex aequo et bono that the Defendant had met the requirements of Notice or was excused from it; and

(e) It was open to the Arbitrator to decide that the damages awarded to the Defendant were not pursuant to Clause 20.1 but rather as common law damages for wrongful termination.

63. According to page 11 of the Award the Arbitrator identified the breaches by the Claimant which a Notice under Clause 20.1 was required:

"Sub-clause 13 and sub-Clause 13.5 [Provisional Sums] by the Respondent's inaction, indecisiveness and failure to instruct on the use of the Provisional Sums in the Preliminaries section of the Bills of Quantities, and to nominate key Sub-contractor's work;

"Sub- Clause 1.9 [Delayed Drawing or Instructions] by failing to provide the Claimant with drawings and instructions regarding key items such as the HVAC and associated electrical system and was very indecisive resulting in a failure to make a final decision regarding same."

64. At page 44 of the Award the Arbitrator sets out the issue which he addressed namely "Did Respondent breach its obligations under the Contract, Sub-Clause 1.9 [Delayed Drawing or Instructions] by a failure to provide the Claimant with drawings and instruction regarding key items such as the HVAC and associate electrical system".

65. The Arbitrator dealt with the issue by stating the following at pages 44 to 47 of the Award:

"*Sub-Clause 1.9 [Delayed Drawing or Instructions] States:*

'The Contractor shall give notice to the Engineer whenever the Works are likely to be delayed or disrupted if any necessary drawing or instruction is not issued to the Contractor within a particular time, which shall be reasonable. *The notice shall include details of the necessary drawing or instruction, details of why and by when it should be issued, and details of the nature and amount of the delay or disruption likely to be suffered if it is late.*

If the Contractor suffers delay and/or incurs Cost as a result of a failure of the Engineer to issue the notified drawing or instruction within a time which is reasonable and is specified in the notice with supporting

details, the Contractor shall give a further notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to:

(a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 {Extension of Time for Completion], and

(b) payment of any such Cost plus reasonable profit, which shall be included in the Contract Price. After receiving this further notice, the Engineer shall proceed in accordance with Sub Clause 3.5 [Determinations] to agree or determine these matters. However, if and to the extent that the Engineer's failure was caused by any error or delay by the Contractor, including an error in, or delay in the submission of, any of the Contractor's Documents, the Contractor shall not be entitled to such extension of time, Cost or profit.' ***[Emphasis added].***

The allegation that necessary drawings or instruction were not issued to the Contractor for key items within a reasonable time is supported by the greater weight of the evidence.

The greater weight of the evidence indicates that the Claimant kept the Respondent advised of the work to be performed, that the Works were likely to be delayed or disrupted, its programme effects on Time for Completion and its cost.

Regarding drawings, in October 2008, the HVAC drawings were outstanding. As of April 2009 the drawings for the relocation of panels in the Block A control room had not been provided by the Respondent. In 2009 the HVAC drawings were outstanding. By mid-2009, the gas-piping drawings for some blocks on the Project site were outstanding and

those applicable for Block E were received nine (9) months after they were due. In April 2009 the change from a gas supply to electrical feed impacted drawings and designs. The contract completion date was scheduled for March 19, 2010. In March 2012, the Bernado AC Solutions for the HVAC system drawings had still not been provided to the Claimant by the Respondent. In April 2013, the Claimant informed the Respondent that no major work could be progressed without the necessary HVAC drawings.

Regarding instruction, in September 2008 the instructions regarding the supply and installation of supply generators were to be provided, by October 2008, the Bill of Quantities for electrical infrastructure work was outstanding, by February 2009, instructions were to be provided to the Claimant regarding the relocation of panels in the Block A control room and were not, in December 2009 the Respondent's had not issued timely instructions, and variations in accordance of the Contract for the HVAC system, on May 2013 the Claimant was still awaiting instructions from the Respondent in connection with the HVAC system, in 2013 Respondent's change from natural gas to electrical of HVAC system required further instructions from the Respondent to vary the works and remove what was really installed, electrical delays were prolonged by the Respondent's instruction on the placement of meter stations and on the final point of entrance of the power supply, in July and August 2014 the Claimant was awaiting on instructions and variation from the Respondent regarding external electrical Works, T&TEC's confirmation of the location of the meter room, IT,PA, and Fire Alarm systems design and specifications, and in late December, 2014, the no instructions had been provided for confirmation of external electrical works, details on the

transformer and main switch gear, IT/Fire Alarm Systems Information regarding the construction and information of the elevator shafts.

Load information from designers regarding electrical load which was required by the T&TEC's; specify the location of the electrical meter room and the design of the entrance of the power supply.

If the Claimant suffers delay and/or incurs Cost as a result of a failure of the Respondent to issue the notified drawing or instruction within a time which is reasonable it has rights and entitlement under Sub-Clause 20.1 [*Contractor's Claims*] and an extension of time under Sub-Clause 8.4 [*Extension of Time for Completion*].

To the extent that an Extension of Time for Completion is requested in accordance with Sub-Clause 8.4 [*Extension of Time for Completion*] of the Contract and for additional payment in accordance with Sub-Clause 20.1 [*Contractor's Claims*] of the Contract, notice is required to be submitted by the Contractor within 28 days of the start of the delay event in accordance with Sub-Clause 20.1 [*Contractor's Claims*] of the Contract. If the Contractor fails to give notice of a claim within 28 days,
'the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim.' "(Emphasis added)

66. The Arbitrator then set out the Particular Conditions at Clause 20.1 [Contractor's Claim] which stated:

"However, **in the event of the Contractor not complying with the submission of particulars within the times outlined** above or if

the Engineer is not satisfied with the particulars submitted, then in the event of:

a) the amount or nature of extra or additional work, or
b) **any cause of delay referred** to in these Conditions, or
c) exceptional adverse climatic conditions, or
d) **any delay, impediment or prevention by the Employer,** or
e) **other special circumstances which may occur**, other than through a default of or breach of contract by the Contractor for which he is responsible

being such that in the opinion of the Engineer to fairly entitle the Contractor to an extension of Time for Completion of the Works, or any section or part thereof, the Engineer shall, after due consultation with the Employer and the Contractor, determine the amount of such extension and shall notify the Contractor accordingly, with a copy to the Employer.' [Emphasis Added].

67. At page 47 the Arbitrator gave his interpretation of the effect of the Particulars of Condition on Clause 20.1 where he stated:

"This clause effectively makes obsolete the condition precedent notice requirement and makes the Respondent responsible for the determination of an extension of time.

The minutes of meeting No. 21 dated 7 May 2010 recorded by the Engineer stated: '*A formal instruction is to be issued on Extension of Time.'*

This indicates that some discussion or oral notice probably occurred between the Claimant and the Engineer between the Contract

Completion Date of 19 March 2010 and 7 May 2010 with respect to Extension of the Time for Completion. Further, the Respondent has made no specific assertion that Claimant was the responsible party for the drawing or instruction delays.

Furthermore, Progress Reports were submitted every month, which is inclusive of photographs, stock inventory, safety, financial information etc., there is also a Progress Report Chart in tabulated form, which has a list of all activities that have been undertaken or are to undertaken, for each Block/Building and the overall progress percentages are indicated in it as well. From this chart, the Respondent could assess the current state of the project and from the detailed breakdown/per building, and gain an insight as to the works to be completed or not.

The greater weight of the evidence indicates that the Claimant kept the Respondent informed of the schedule programme impact along the way. No formal time extension was or has been added to the Contract to date.

The greater weight of the evidence supports the Claimant's allegations that the Respondent DID breach the language of Sub-Clause 1.9 [*Delayed Drawing or Instructions*].

Also, the greater weight of the evidence indicates the Respondent DID breach the flow-down provision Sub-Clause 20.1 [Contractor's Claims] for failing to issue the commensurate time extensions to the contract finally amounting to 1763 days due to the controlling delays to the HVAC System and its electrical.

68. Contrary to the submission on behalf of the Defendant, I am of the opinion that in determining the issue outlined by the Arbitrator at page 4 of the Award, he did make a finding on the issue of Notice under Clause 20.1 which he set out at page 47 of the Award. Therefore, I do not agree with the Defendant that the issue of Notice was not raised in the Arbitration and that as a new issue in these proceedings the Court should disregard it.

69. The issue before me is whether the Arbitrator erred in law in his interpretation of Clause 20.1.

70. The Defendant did not refer to any authorities on the interpretation of Clause 20.1. Senior Counsel for the Claimant referred the Court to the learning in the **FIDIC Contracts Guide, First Edition 2000** produced by the FIDIC, the text **Understanding the FIDIC Red Book, a Clause by Clause Commentary** by Jeremy Glover ad Simon Hughes QC and the judgment of Akenhead J in **Obrascon Huarte Lain**[18].

71. **FIDIC Contracts Guide, First Edition 2000** at 300 stated the following on Clause 20.1:

> "Sub-Clause 20.1 specifies the procedures which the Contractor must follow in pursuit of a claim, and the consequences of a failure to do so.
>
> Firstly, he must give notice as soon as practicable, not later than 28 days after becoming aware of the relevant event or circumstance giving rise to his claim. In practice, it may be easier to establish whether notice was given within 28 days after the Contractor "should have become aware [,] of the relevant event or circumstance" giving rise to a claim.

[18] [2014] EWHC 1028

The notice must describe “the event or circumstance giving rise to the claim” for an extension of time or additional payment, to which “the Contractor considers himself to be entitled”. Generally, there is no need for this notice to indicate how much extension of time and/or payment may be claimed, or to state the Clause or other contractual basis of the claim. Notices must comply with Sub-Clause 1.3. Sub-Clause 4.21(f) requires progress reports to list all notices which have been given under Sub-Clauses 2.5 and 20.1.

….

This first notice is the start of the detailed procedure specified in Sub-Clause 20.1. The Contractor must ensure that notices are given in due time, in order to protect his rights under the Contract. Failure to give notice in accordance with the first paragraph deprives the Contractor of his entitlement to an extension of time and compensation, as stated in the second paragraph. The third paragraph confirms that notice may also be required to be given under another Sub-Clause, although it may be possible for one notice to satisfy, the requirements of different Sub-Clauses”.

72. At paragraph 20-008 of **Understanding the FIDIC Red Book, a Clause by Clause Commentary** the authors stated the following on Clause 20.1:

“Sub-clause 20.1 deals with Contractor claims, setting out both a procedure for the notification and substantiation of those claims and the mechanics of the decision-making process to be adopted by the Engineer. Further, sub-cl.20.1 requires that the Contractor, if it considers it has a claim for an extension of time and/or any additional payment, must give notice to the Engineer “as soon as practicable, and not later than 28 days after the event or circumstance giving rise to

the claim". This makes it clear that the Contractor must submit its claims during the course of the project. The initial notice at first instance does not need to indicate, (for the very god reason that usually it cannot) the total extension or payment sought. The scheme of the FIDIC from is thus that where possible disputes should be resolved during the course of the project rather than waiting until the works are complete.

73. The authors continued at paragraph 20-009:

> "It is important that it is understood that compliance with the notice provisions is intended to be a condition precedent to recovery of time and/or money. This potentially provides the Employer with a complete defence to any claim for time or money by the Contractor if it is not started within the required time-frame. Certainly parties, particularly the Contractor should treat the sub-clause in this way.
>
> Generally, in the UK the courts will take the view that timescales in construction contracts are directory rather than mandatory, unless that is, the contract clause in question clearly states that the party with a claim will lose the right to bring that claim if it fails to comply with the required timescale. In the case of *Bremer Handelgesellschaft mbH v Vanden Avenne Izegem P.V.B.A.*[19] the House of Lords held that a notice provision should be construed as a condition precedent, and so would be binding if:
>
> *(i) It states the precise time within which the notice is to be served, and*

[19] [1978] 2 Lloyd's Rep. 113.

(ii) It makes plain by express language that unless the notice is served within that time the party making the claim will lose its right under the clause.

Here, sub-cl 20.1 expressly makes it clear that:

If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim.

Further, the English courts have confirmed their approval for conditions precedent, provided they fulfil the conditions laid out in the *Bremer* case. For example, in the case of *Multiplex Construction v Honeywell Control Systems*[20], Mr. Justice Jackson (as he was then) held that:

Contractual terms requiring a Contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes give the employer the opportunity to withdraw instructions when the financial consequences become apparent"

74. In **Obrascon Huarte Lain v The Attorney General of Gibraltar,** the Claimant, a substantial Spanish civil engineering contractor, issued proceedings against the Defendant Government of Gibraltar in relation to a contract for the design and construction of a road and tunnel under the runaway of Gibraltar airport. The contract was terminated after over two

[20] [2007] EWHC 447 (TCC).

and a half years of work on the two-year project, and when little more than 25% of the work had been done and no permanent work done for seven months.

75. The Court considered three issues. Firstly, whether the extent and amount of contaminated materials in the ground to be excavated had been reasonably foreseeable by an experienced contractor at the time of tender. Secondly, whether the defendant had been entitled to serve a notice of termination by reason of the claimant's failure to comply with the contract by: (i) failing to remedy the defaults notified in notices to correct; (ii) demonstrating an intention not to continue with the performance of its obligations under the contract; and (iii) failing to proceed with the works without reasonable excuse. Thirdly, whether the fact that the notice of termination had been sent to the claimant's site office, rather than its Madrid office as specified in the contract, had undermined its effectiveness as a termination notice. The Court also considered the approach to take to sub-clause 20.1.

76. The Judge decided that the contractor, OHL was entitled to no more than seven days extension of time (rock and weather). However, this was subject to compliance with sub-clause 20. It was accepted by OHL that sub-clause 20.1 imposed a condition precedent on the contractor to give notice of any claim. The Judge held that properly construed and in practice, the "event or circumstance giving rise to the claim" for extension must occur first and there must have been either awareness by the contractor or the means of knowledge or awareness of that event or circumstance before the condition precedent bites."

77. Akenhead J discussed the meaning of Clause 20.1. At paragraphs 311 to 313 he opined:

> "311. In conclusion, as at termination, OHL was entitled to no more that 7 days extension of time (rock and weather), subject that is to compliance with Clause 20. It is to this latter topic I now turn. It is clear and indeed was unequivocally and properly accepted by Mr While QC for OHL in closing that Clause 20.1 imposes a condition precedent:
>
> "20.1 If the Contractor considers himself to be entitled to any extension of the Time for Completion…under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.
>
> If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in the connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply …"
>
> 312. Properly construed and in practice, the "event or circumstance giving rise to the claim" for extension must first occur and there must have been either awareness by the Contractor or the means of knowledge or awareness of that event or circumstance before the condition precedent bites. I see no reason why this clause should be construed strictly against the Contractor and can see reason why it should be construed reasonably broadly, given its serious effect

> on what could otherwise be good claims for instance for breach of contract by the Employer…
>
> 313. Additionally, there is no particular form called for in Clause 20.1 and one should construe it as permitting any claim provided that it is made by notice in writing to the Engineer, that the notice describes the event or circumstance relied on and that the notice is intended to notify a claim for extension (or for additional payment or both) under the Contract or in connection with it. It must be recognisable as a "claim". The notice must be given as soon as practicable but the longstop is 28 days after the Contractor has become or should have become aware. The onus of proof is on the Employer or GOG here to establish that the notice was given too late."

78. The aforesaid learning suggests that a literal interpretation of Clause 20.1 provides for a two-step process for the Contractor to validly make a claim for additional monies in connection with the Contract. The first step, which is the notice of the claim, must be taken within 28 days of the event giving rise to the claim. The second step, after the Contractor becomes aware of the event giving rise to the claim, is for the Contractor to send to the Engineer full supporting particulars of the basis of the claim. This must be done 42 days after the Contractor became aware of the event.

79. The importance of complying with the first step of giving notice is set out in Clause 20.1. It provides that failure by the Contractor to comply with the giving of notice to the Employer meant that the Contractor is not entitled to any additional payment and the Employer is discharged from liability in connect with that claim. The Particulars of Conditions deals with the

second step under Clause 20.1 which is the provision of the particulars of the claim to the Employer.

80. In my opinion, on the face of the award, the Arbitrator did not decide that Notice was given, but the Arbitrator recognised the importance of Notice and he held that since the Contractor, ie the Defendant, kept the Employer, ie the Claimant informed, the former was aware of and the reasons for the delay. In any event there was nothing stated by the Arbitrator that the damages which he was awarded was common law damages for wrongful termination.

81. I have therefore decided the Arbitrator erred by concluding that the Particulars of Conditions removed the requirement of the first step in making a claim for additional monies under the Contract.

82. It was submitted on behalf of the Claimant that any sums in the Award which the Arbitrator permitted in respect of which the Defendant should have issued a notice of claim under Clause 20.1, should be set aside. The Claimant submitted that the particulars sums awarded were: Head Office Costs of $51,358,157.25; Unpaid Design Costs of $896,800.00; Unpaid/Increased Preliminaries of $5,150,948.60; and Costs Escalations of $2,322,432.77.

83. It was not in dispute that the Defendant did not issue any Notice to the Claimant in compliance with Clause 20.1. At page 64 paragraph 6(e) of the Award, the Arbitrator stated that "a lost contribution to head office overheads is generally recoverable as a foreseeable loss resulting from prolongation." Therefore, on the face of the Award the Arbitrator awarded

Head Office Overhead Costs in the sum of $51,358,157.25 due to delay for which a Clause 20.1 Notice was required but which was not given.

84. Clause 1.9 provides that where the Contractor incurred cost as a result of the failure by the Employer to issue any drawings a Clause 20.1 Notice of claim was required before the Contractor could recover the payment for the Design Costs. Without any Notice being issued under Clause 20.1 the Arbitrator erred by awarding the sum of $869,800.00 for Unpaid Design Costs.

85. **Emden's Construction Law by Crown Office Chambers** at paragraph 13.61 described "preliminaries as:

> "Preliminaries are included by a contractor in his pricing to reflect the provision of resources which are intended to facilitate the works generally but which are not themselves incorporated into the works. They may be things which are intended to be used by a number of different sub-contractors employed in connection with the works, such as rubbish removal, storage, or common-use scaffolding. …
>
> Preliminaries are frequently time-dependent and a delay in completion will usually mean that their cost has increased because certain resources have been required for a longer period. They may therefore be included in a contractor's claim for delay…Accurate evaluation of the additional cost of preliminaries may require detailed consideration of the contractor's working methods".

86. At page 36 of the Award the Arbitrator addressed the "question of contract work and variations relative to Unpaid Preliminaries up to Termination". The Arbitrator concluded at page 36 paragraph 4 a. that "The greater weight of the evidence indicates that the Respondent [EFCL] continuously

failed to adequately instruct regarding numerous necessary variations up to the time of termination. In effect the Arbitrator concluded that the Claimants delay caused the increased Preliminaries. However, the Arbitrator ignored that any claim for additional payments due to delay must first comply with notice under Clause 20.1. In the absence of any notice under Clause 20.1 the Arbitrator erred by awarding the sum of $5,150,948.60 as Unpaid/Increased Preliminaries.

87. At page 66 paragraphs (d) and (e) of the Award the Arbitrator stated that he awarded the sum of $2,322,432.77 for Costs Escalation due to increased labour costs, and increased plant, materials, and site costs as a result of delay. By Clause 20.1 if the Contractor considers himself entitled to "any additional payment in connection with the Contract", he must issue a notice of claim. As no notice was ever issued additional payments for cost escalations ought not to have been awarded.

88. It therefore follows that the sums for Head Office Costs of $51,358,157.25; Unpaid Design Costs of $896,800.00; Unpaid/Increased Preliminaries of $5,150,948.60; and Costs Escalations of $2,322,432.77, which the Arbitrator awarded where a notice of claim should have been issued must be set aside since the Arbitrator's reasoning for awarding damages for these sums were based on his erroneous interpretation of the clause.

THE APPLICABLE LIMITATION PERIOD

89. The third error of law which the Claimant asserted that the Arbitrator made was his determination at page 37 paragraph 4 (d) of the Award that the cause of action in respect of certain heads of damage "*accrued when the Contract was terminated on 15 January 2015*" was plainly an error of law on the face of the record. Senior Counsel submitted that it is settled

law that the cause of action in contract accrues at the date of the breach of the contract, not the date the contract was terminated.

90. It was also argued on behalf of the Claimant that the Arbitrator's decision that "*Oliver J.'s judgment in Midland Bank Trust Co. Ltd. v Hett, Stubbs & Kemp [1979] Ch 384, 438 which holds that…the limitation period does not begin to run until the contract finally becomes impossible of performance*"[21] was confirmed by the Privy Council in **Maharaj and Anor. v Johnson and Anor**[22] was an error of law since **Maharaj** did not confirm **Midland**, but rather suggested that **Midland** was decided on its own facts and did not apply it.

91. In response, the Defendant submitted that the Arbitrator was entitled to decide the limitation issue on the basis of equity and conscience and to ignore the law and that the Court should be slow to find that the Arbitrator erred in law with his application of the law to continuing contractual duties since the law is difficult and uncertain. In support the Defendant relied on the learning in **Bell v Peter Browne and Co**[23] and **Capita Banstead 2011 Ltd v RFIB Group**[24].

92. One of the issues in dispute which the Arbitrator identified at page 13 of the Award which he had to address in the Arbitration was " Is the Claimant [Envirotec] time-barred and precluded from obtaining any relief because the matters in dispute occurred more than four (4) years before the date of the Notice of and/of the claim for the Arbitration?". The matters in dispute were identified by the Arbitrator at page 34 of the Award as:

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[21] Page 38 paragraph 8 of the Award
[22] [2015]UKPC 28
[23] (1990) 2 QB 495
[24] 2016 QB 835

(i) Unpaid Preliminaries Up to Termination $ 6,867,931.46

As these would have been activated from the inception of the contract on 19 March 2008.

(ii) Financing Charges $ 9,613,372.80

As these would have been accrued on the IPC which would have been generated and become payable prior to 2012.

(iii) Head Office Overhead Costs $52,406,282.91

No comment provided

(iv) Cost Escalations $ 1,416,115.54

No comment provided

(v) Unpaid Design Cost $ 1,793,600.00

As these designs would have been generated from inception of the contract on 19 March 2008."

93. At pages 36 to 38 of the Award, the Arbitrator set out his findings and his reasons that the matters in dispute were not time barred. He stated:

3. Regarding the question of finance charges:

a. Clause 14.8 *[Delayed Payment],* states in pertinent part: *"The Contractor shall be entitled to this payment without formal notice or certification [meaning; Interim Payment Certification of IPC], and without prejudice to another rights or remedy."*

b. Therefore, <u>the finance charges are contractual remedies and claims triggered by the termination itself where the date on which the cause of action accrued was January 15, 2015, nineteen (19) months from the Notice of Arbitration served on August 11, 2016.</u>

4. Regarding the question of contract work and variations relative to Unpaid Preliminaries up to Termination:
    a. The greater weight of the evidence indicates that the Respondent continuously failed to adequately instruct regarding numerous necessary variations up to the time of termination.
    b. Sub-Clause 15.3 *[Valuation at Date of Termination]* States:

       "*As soon as practicable after a notice of termination under Sub-Clause 15.2 [Termination by Employer] has taken effect, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine the value of the Works, Goods and Contractors Documents, and any other sums due to the Contractor for work executed in accordance with the Contract.*"
    c. The law states that if the breach *"consists in a failure to act, it may be held to continue die in diem until the obligation is performed or becomes impossible of performance or until the innocent part elects to treat the continued non performance as a repudiation of the contract" (Guerra v Delta Logistics CV 2009-02074).*
    d. <u>*Therefore, this cause of action accrued when the Contract was terminated on 15 January 2015 which is within the four (4) years limitation period of Act.*</u>

5. Regarding Provisional Sums in Bill Quantities relative to Head Office Overhead Costs, Cost Escalations, and Unpaid Design Cost:
    a. Clause 13.5 [Provisional Sums] states in part that:

"Each Provisional sum shall only be sued, in whole or in part, in accordance with the Engineer's instruction, and the Contract Price shall be adjusted accordingly. The total sum paid to the Contractor shall include only such amounts, for the work, supplies or services to which the Provisional Sum relates, as the Engineer shall have instructed.

b. The greater weight of the evidence indicates that up until the date of termination the Claimant was still awaiting instruction regarding significant works on the critical path, namely the HVAC, Electrical works. Also, the Building Management System (BMS), the IT/PA/Fire Alarm Systems, the Driveway/Entrance, the Ironmongery for all buildings, the Master-key system, the demo of the existing junior secondary school, the football field, and the running track.

c. <u>Therefore, this cause of action accrued when the Contract was terminated on 15 January 2015 which is within the four (4) year limitation period of the Act.</u>

6. The damages stem from breaches that continued until the termination.

7. In accordance with Chitty on Contracts, 32nd Edn. (London, UK: Sweet & Maxwell, 2004), at para. 28-035, *"[T]he breach may be a continuing one, e.g. of a covenant to keep in repair. In such a case the claimant will succeed in respect of so much of the series of breaches or the continuing breach as occurred within the [relevant limitation period] before action brought*. ***If the breach consists in***

a failure to act, it may be held to continue die in diem until the obligation is performed or becomes impossible or performance or until the innocent part elects to treat the continued non-performance as a repudiation of the contract' [Emphasis Added]

8. This finding was also confirmed in a Trinidad & Tobago case that proceeded to the House of Lords in the UK, with the court confirming Oliver J's judgment in Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp [1979] Ch 384, 438 which holds that, in a case where there is a continuous contractual obligations, ***the limitations period does not begin to run until the contract final becomes impossible of performance." [Emphasis Added].***

9. The greater weight of the evidence shows that the Respondent, including but not limited to, failed to provide instructions regarding the critical HVAC and Electrical works, and failed to provide designs among other ongoing breaches extending all the way to the termination on 15 January 2015.

10. During the Evidentiary Hearing testimony was heard by Karlene Jones that **Claimant had no design responsibility.**

11. Karlene Jones testimony is consistent with the FIDIC Red Book, titled *'Conditions of Contract for Construction, FOR BUIDLING AND ENGINEERING WORKS* ***DESIGNED BY THE EMPLOYER'*****. [Emphasis added].**

12. Mr. Wazid Amarali illustrated that the Claimant performed designs, not at inception of the Contract, but in 2014 when the Claimant attempted to mitigate the damages to the Project.

13. The Contract finally became impossible to perform when the Respondent terminated the Contract on the 15 January 2015.

14. Therefore, consistent with the law and the evidence admitted on record, the accrual date of the cause of action was the date of the Respondent's termination and Claimant is not time-barred." (Emphasis added)

94. Section 3 (1) of the **Limitation of Certain Actions Act**[25] provides:

"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;

(b) actions to enforce the award of an arbitrator given under an arbitration agreement (other than an agreement made by deed); or

(c) actions to recover any sum recoverable by virtue of any enactment

95. **Chitty on Contracts**[26] at paragraph 28-032 states that:

"The general rule in contract is that the cause of action accrues not when the damage is suffered, but when the breach takes place…The gist of an action for breach of contract is the breach and

[25] Chapter 7:09

[26] 32 ed published in 2015

not any resulting damage that may be occasioned thereby. Consequently the act runs from the time when the contract is broken and not from the time at which any damage resulting therefrom is sustained by the claimant":

96. Lord Nicholls in **Nykredit Mortgage Bank plc v Edward Erdman Group Ltd**[27] repeated the position at page 308 when he stated that: "As every law student knows, causes of action for breach of contract and in tort arise at different times. In cases of breach of contract the cause of action arises at the date of the breach of contract."

97. The settled principle that the cause of action for a breach of contract arises at the date of the breach of contract is also applicable where there is a breach in construction contracts. **Keating on Construction Contracts**[28] at paragraph 16-026 stated that:

> "for breaches by the Employer against the contractor, time runs from the breach, so that , for example, if drawings and instructions are not supplied at the proper time, it runs, it is submitted, from the date when they should have been supplied."

98. In arriving at his conclusion that "in a case where there is a continuous contractual obligation, the limitation period does not begin to run until the contract finally become impossible of performance"[29], the Arbitrator relied on the learning of **Chitty on Contracts**[30] at paragraph 28-035 which stated:

> "If the breach consist in a failure to act it may be held to continue die in diem until the obligation is performed or becomes impossible

[27] (No 2) [1998] 1 All ER 305
[28] 10 ed
[29] At page 38 of the Award
[30] 32nd Ed (published in 2015)

of performance or until the innocent party elects to treat the continued non-performance as a repudiation of the contract”.

99. According to **Chitty**, the aforesaid learning was premised on the decision of Oliver J in **Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp**[31]**.** At page 38 of the Award, the Arbitrator stated that the decision in **Midland** was confirmed by the Privy Council in **Maharaj** which was an appeal from Trinidad and Tobago.

100. In **Midland**, a father and son instructed the defendant solicitors to draft an agreement which would confer upon the son an option to purchase the father’s farm. In March 1961 they both executed it. In breach of their duty to the son, the Defendant omitted to register the agreement as an estate contract within the relevant time (six years). In August 1967, aware that the agreement had not been registered, the father conveyed the farm to his wife. By action brought in July 1972 the son’s executors successfully sued the solicitors for negligence both in tort and in contract.

101. The issue Oliver J had to determine was whether the action against the Defendant firm, which was continued by the son’s executors, was barred by the Limitation Act 1939, and had already become barred before the date of the sale and conveyance of the farm to his father’s wife.

102. Oliver J held that the solicitors were under a continuing contractual duty to register the option until the expiry of the six-year period when the terms of conveyance made registration of an estate option impossible. He stated that since the negligence relied upon was not the giving of wrong and negligent advice, in which case the breach of contract would necessarily

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[31] [1979] Ch 438

have arisen at a fixed point of time, but was a simple nonfeasance, the duty of the defendant firm of solicitors to register the option continued to bind them until it ceased to be effectively capable of performance on August 17, 1967, and therefore, since the action against the Defendant in contract was not statute barred, they were also liable to the plaintiffs in contract.

103. In **Maharaj** the Defendants acted as the attorney at law for the Claimants in the purchase of land in 1986. The Deed of Conveyance was executed on behalf of the seller pursuant to a power of attorney. In February 2008, the Claimants entered into a contract for the sale of the land. It then emerged that there was some doubt as to the Claimants' title, due to potential issues with the power of attorney. Although the original seller was located and agreed to enter into a Deed of Rectification, by that time the third party purchaser had backed out of the deal. On 27 February 2012, the Claimants issued a claim against the Defendants in which they alleged that the latter were negligent in failing to procure good marketable title to the land in 1986. They claimed the difference between the sale price of $20 million and the current value of the land, said to be around $4 million.

104. The claim was struck out in the High Court on the grounds that it was time-barred and an appeal against that decision was subsequently dismissed.

105. The Claimants appealed to the Privy Council on the grounds that: the cause of action in negligence had not arisen until February 2008, when the sale contract fell through; or alternatively that the Claimants should be permitted to amend their case to include a claim in contract, specifically that the Defendants had a continuing contractual duty to them and remained in breach of that duty until April 2008 when the Deed of Rectification was entered into.

106. The Privy Council dismissed the appeal and found that to have a contract claim that was not time-barred, the claimants needed a cause of action arising on or after 27 February 2008. To achieve this, the Claimants needed to show a continuing contractual duty which the Defendants continued to breach thus generating a fresh cause of action.

107. The Privy Council noted that the authority of **Midland Bank** had been substantially weakened by the decision of the Court of Appeal in **Bell v Peter Browne and Co**[32], in which the Court held that there was a single breach of duty in circumstances where solicitors failed to protect their client's interests in a property by procuring a declaration of trust and a mortgage in his favour.

108. The majority of the Privy Council (Lord Clarke dissenting) said **Midland** could be distinguished from **Maharaj** on the grounds that it was a case of simple non-feasance (i.e. where a party has failed to do something which was required of it). By contrast, the complaint in **Maharaj** before the Privy Council was that the action by which the Defendants had purportedly performed their contract was negligently wrong. It was at the point when the Claimants paid the purchase price that they did not receive marketable title which they had been contracted to receive. There was no reference in the contract, either express or implied, to any future contractual obligation (such as to procure a Deed of Rectification). Moreover, the Defendants could not have procured execution of a Deed of Rectification without the participation of the third party seller. The majority held therefore that the proposed claim in contract was "*factitious".*

[32] [1990] 2 QB 495

109. In arriving at the decision in **Maharaj v Johnson** the Privy Council s referred to the learning in **Bell** and stated the following at paragraphs 32 and 33:

> "32. But, as the editors of Jackson and Powell on Professional Liability, 7th ed (2011) correctly observe, at para 5-030, the authority of Oliver J's conclusion in favour of the continuation of the duty in such circumstances was substantially weakened by the decision of the Court of Appeal in **Bell v Peter Browne and Co [1990] 2 QB 495**. There the claimant agreed with his wife, from whom he was separating, that he should transfer his interest in the home to her in consideration of her grant to him of an interest in one sixth of the gross proceeds of any sale of it; and that his interest should be protected by her making a declaration of trust to that effect or entering into a mortgage in his favour. In 1978 he executed the transfer but, in breach of duty, his solicitors failed to procure the declaration or the mortgage. It was a flawed transaction. Nor did the solicitors secure registration on his behalf of a caution against dealings. Eight years later the wife sold the home and spent the proceeds. The court held that the claimant's action against the solicitors was time-barred. It held that the claimant had suffered not merely potential but actual damage as soon as he had transferred his interest to the wife without obtaining protection for his substituted interest and thus that the claim in tort was barred. It held that, following the husband's execution of the transfer, the solicitors were under no continuing duty to him and that, had they thereafter been requested to lodge the caution, their obligation to do so reflected not a continuing duty of care but a duty to mitigate the consequences of their original and only breach: see the judgment of Mustill LJ at p 513. Nicholls LJ, at p 501, distinguished the Midland Bank case on the basis that there the defendants had at no material time treated their obligation to the son as discharged and that they

had continued for the following six years to have dealings with him in relation to the option. But Beldam LJ, at p 508, declined to distinguish the Midland Bank case; he seems to have concluded that it was wrong."

110. In **Bell** the comments of Nicholls LJ at page 501 are instructive:

"A remediable breach is just as much a breach of contract when it occurs as an irremediable breach, although the practical consequences are likely to be less serious if the breach comes to light in time to take remedial action. Were the law otherwise, in any of these instances, the effect would be to frustrate the purpose of the statutes of limitation, for it would mean that breaches of contract would never become statute-barred unless the innocent party chose to accept the defaulting party's conduct as a repudiation or, perhaps, performance ceased to be possible.

For completeness I add that the above observations are directed at the normal case where a contract provides for something to be done, and the defaulting party fails to fulfil his contractual obligation in that regard at the time when performance is due under the contract. In such a case there is a single breach of contract. By way of contrast are <u>the exceptional cases</u> where, on the true construction of the contract, the defaulting party's obligation is a continuing contractual obligation. In such cases the obligation is not breached once and for all, but it is a contractual obligation which arises anew for performance day after day…"

111. In the more recent case of **Capita Banstead 2011 Ltd. v RFIB Group Ltd**[33], the Court held that the continuing failure to remedy previous breaches which involved a share transfer transaction did not constitute a fresh cause of action accruing day to day. Henderson J described the type of continuing obligations which are continuing and are therefore exceptional as:

> "49. In the normal way, it is impossible to construct a continuing contractual obligation, in the sense of one which gives rise to a fresh breach on a daily basis, from the mere failure to perform the original obligation in due time. This remains the case, as Nicholls LJ explained in *Bell v Peter Browne & Co* [1990] 2 QB 495, even if the party in breach is asked to make good his default but fails to do so…
>
> 50. Conceptually, there is of course a class of contractual duties which do give rise to a continuing obligation to perform them which arises afresh from day to day. Examples are given by Nicholls LJ in the *Bell* case, at p 501D–E (repairing clauses in a lease), and by Dixon J in *Larking v Great Western (Nepean) Gravel Ltd* (1940) 64 CLR 221, 236 cited by the judge at the end of para 11 of his judgment [2014] EWHC 2197 (Comm). To quote Dixon J, a duty of this nature is one "to maintain a state or condition of affairs"."

112. The cases of **Midland, Bell** and **Maharaj** were concerned with obligations by attorney at law in a transaction and **Capita** concerned a share transfer transaction. None of these cases concerned obligations under a construction contract.

113. In my opinion, based on the learning, the general rule in law is that a cause of action for breach of contract accrues when the breach occurs. However,

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[33] [2016] QB 835

there are exceptions to this general rule since there can be contractual duties which give rise to continuing obligations to perform which arise afresh from day to day. In such a case the onus is on the party alleging the continuing contractual duty to so prove.

114. In the instant case, on the face of the Award, the Arbitrator treated the date of the breach as the date the Contract was terminated. The Arbitrator did not state in the Award that the obligations in the Contract for Preliminaries, Financing Costs, Head Office Overhead Costs, Design Costs and Costs Escalations were continuing contractual obligations under the Contract. In my opinion, the Arbitrator's finding that the cause of action arose when the Contract was terminated and not when the breach occurred was flawed since it was premised on an erroneous principle of law.

115. It follows that any sums which the Arbitrator awarded based on his finding that time started to run when the Contract was terminated was based on an error of law. In particular Unpaid Preliminaries; Financing Charges; Head Office Overhead Costs; Costs Escalation and Unpaid Design Costs.

THE APPLICATION OF THE TERMS OF THE CONTRACT

116. Having concluded that the parties had agreed by Items 56 of Procedural Order No. 1 that the Arbitrator was obliged to determine the issues arising from the arbitration in accordance with the terms of the Contract, I will now examine if he failed to do so.

117. It was submitted on behalf of the Claimant that there were two sums which the Arbitrator awarded which he did not apply the terms of the Contract

in determining the issues namely Loss of Profits on Unfinished Works and Costs Escalations.

Loss of Profits on Unfinished Works

118. It was submitted on behalf of the Claimant that the Arbitrator's award for Loss of Profits on Unfinished Works should be set aside for three reasons namely (a) the FIDIC Red Book only entitles the Contractor to claim Loss of Profits pursuant to Clause 16.4 where the Contract is terminated by the Contractor under Clause 16.2; (b) the Defendant was contending that the profit margin on the Contract was a smaller sum which was 10%[34]; and (c) there was double counting since the sum claimed by the Defendant in the Arbitration as Loss of Profits on Unfinished Works was also included in the sum claimed for Provisional Sums.

119. Senior Counsel for the Defendant submitted that this was not an issue which was raised by the Claimant in the Arbitration; the Arbitrator was entitled to make the determination ex aequo et bono; and the Arbitrator was justified in awarding the sum since the Defendant's audited financials showed that it had an average profit margin of 11.7%.

120. The Arbitrator's reasoning for awarding the sum of $5,401,503.71 for Loss of Profits on Unfinished Works was set out at pages 60 to 61 of the Award. It stated:

> "4. Regarding Loss of Profits on Unfinished Works Claimant's demand is reduced from $6,086,274.66 to $5,401,503.71 as follows:
>
> a. The Claimant has produced its audited financial accounts for the years 2008 to 2015 which when analysed (Appendix D),

[34] The Arbitrator stated that he was guided by the Hood Report which had stated at page 26 that the Defendant's loss of profit was 10%

shows an average profit margin of 11.7% over the Project duration.

b. The FIDIC Contract provides for

    i. Termination by the Employer for cause under Sub-Clause 15.2 *[Termination by Employer],*

    ii. Termination by Employer for convenience under Sub-Clause 15.5 *[Employer's Entitlement to Termination], and*

    iii Contractor's termination for cause Sub-Clause 16.2 *[Termination by Contractor]*

c. Under the contract, only the Contractor's termination for cause entitles it to be paid for lost profits, which did not happen.

d. Otherwise consequential damages are disallowed by Sub-Clause 17.6 [Limitation of Liability] which states,

    > *'Neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with the Contract, other than under Sub-Clause 16.4 [Payment on Termination] and Sub-Clause 17.1 [Indemnities].'*

e. The SCL Protocol 2017, Guidance Part C, Item 2.4 does not support the recovery of lost opportunity profit when it is not recoverable under the Contract, unless as a claim for damages.

f. Claimant's Loss of Profits on Unfinished Works is a claim for damages.

g. It is determined that Contractor was wrongfully terminated and is entitled to damages of breach of Contract, but to eliminate any duplication or overlap in lost profit damages, lost profits are calculated as:

   i. The Contract remaining measured works at Pay Application #36 was $59,587,414.23.

   ii Less $8,269,767.23 balance due, and less $5,150,948.60 costs exceeding income, equals $46,166,698.

   iii Loss of Profits at 11.7% of $46,166,698.41 equals $5,401,503.71"

121. It was not in dispute that the Claimant, the Employer terminated the Contract and not the Defendant, the Contractor. Therefore, on a literal interpretation of Sub Clause 16.2 of the Contract the Defendant was not entitled to be paid loss of profits.

122. The Text **FIDIC- A Guide for Practitioners** confirmed that it is only where the Contractor terminates that a claim for loss of profit allowed. Page 293 of that text states:

> "However only after a notice of termination under Sub-Clause 16.2 [Termination by Contractor] the Contractor is entitled to the amount of any loss of profit or other loss or damage sustained by the Contractor as a result of this termination."

123. The Arbitrator recognised that based on Sub Clause 16.2 Loss of Profit was not applicable when he stated: "Under the contract, only the Contractor's termination for cause entitles it to be paid for lost profits, which did not

happen". Therefore, on the face of the Award, the Arbitrator did not apply the terms of the Contract in determining this issue.

124. The basis the Arbitrator awarded a sum for Loss of Profit on Unfinished Works was Item 2.4 of Part C of the SCL Protocol 2017. Senior Counsel for the Claimant attached a copy of the SCL Protocol which was the **Society of Construction Law Delay and Disruption Protocol, 2nd ed. 2017** to the Claimant's written submissions[35].

125. In its Introduction, the SCL Protocol clearly stated that the object of the SCL Protocol is to provide useful guidance on some of the common delay and disruption issues that arise on construction projects, where one party wishes to recover from the other an extension of time and/or compensation for the additional time spent and resources used to complete the project. There is nothing in the SCL Protocol which suggested that it was concerned with providing any guidance on issues of Loss of Profits which a Contractor would have incurred but for the termination of a contract.

126. In any event, at paragraph B of the Introduction, the SCL Protocol clearly stated that it is not intended to take precedence over express terms of a contract or to be a statement of law.

127. In my opinion, the Arbitrator erred in law by failing to apply the terms of the Contract in awarding Loss of Profits on Unfinished Works and he relied on the SCL Protocol which was not applicable to the issue as a basis for making the award.

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[35] The Protocol was annexed as TAB 23.

128. With respect to the margin of profit awarded, if the Arbitrator was correct in making an award for this claim, he was entitled to rely on the financial documents which the Defendant had produced at the Arbitration.

Costs Escalations

129. It was submitted on behalf of the Claimant that the Arbitrator erred since he awarded a sum for Costs Escalations based on Clause 13.8 of the FIDIC Contract which was deleted by the Particular Conditions from the Contract. As such it was an error on the face of the Award.

130. The Defendant's position was that it was not an issue which was raised by the Claimant in its pleadings in the Arbitration and it cannot complain about the Arbitrator's reasoning.

131. At paragraph 7 pages 65 to 66 of the Award the Arbitrator dealt with the award for Costs Escalation. At paragraph (c) the Arbitrator acknowledged that "Sub-Clause 13.8 [Adjustments for Changes in Cost] of the Particular Conditions of Contract deletes the Sub-Clause". Notwithstanding this acknowledgement by the Arbitrator that there was no term in the Contract to permit him to award a sum, yet he still proceeded to do so. In my judgment, this was an error on the part of the Arbitrator since by Item 56 of Procedural Order No 1, the parties expressly agreed that the Arbitrator was to decide the issues based on the terms of the Contract.

UNSUPPORTABLE, IRRATIONAL AND/OR ILLOGICAL CONCLUSIONS IN THE AWARD

132. In addition to the other objections raised aforesaid it was submitted on behalf of the Claimant that the sums awarded by the Arbitrator for 3 heads of damages were irrational namely; (a) Unpaid Preliminaries; (b) Unpaid

Design; and (c) Unpaid Measured Works/Final Account. Senior Counsel for the Claimant also submitted that the sum awarded for Legal Costs of the Arbitration was without any evidential basis.

Unpaid Preliminaries

133. There were four reasons the Claimant contended that the Arbitrator's Award for Unpaid Preliminaries was irrational namely: (i) on the face of the Award there is double recovery since the Arbitrator already made an award for this sum in the award for Final Account for Measured Works; (ii)the reasoning of the Arbitrator in the Award reflected that the claim for "Unpaid Preliminaries" included sums not instructed in relation to Provisional Sums; (iii) the Defendant's calculation of Preliminaries included an element of profit and by the Arbitrator making an award for both Loss of Profits and Preliminaries there was overcompensation and duplication of elements of the Award; and (iv) the Arbitrator erred in awarding both Loss of Profits and damages for Unpaid Preliminaries.

134. In response Senior Counsel for the Defendant submitted that the Arbitrator made a typographical error and the words "Unpaid Preliminaries" should be substituted in the sentence for "Unmeasured Works/ Final Account" at page 60 paragraph 3 (b) of the Award; this was not an issue which was raised by the Claimant during the Arbitration and that it was open to the Arbitrator to decide the issue ex aequo et bono.

135. At page 60 paragraph 3 of the Award the Arbitrator sets out his reasons for awarding the sum of $5,150,948.60 under this head. He stated that:

> "Regarding Unpaid Preliminaries Up to Termination, Claimant's demand is reduced from $6,867,932.46 to $5,150,948.60 as follows:

a. All of the Works were not completed at Termination date and recognition must be made of this.

b. The value of the Measured Works/Final Account by including the reasonable value of plant, labour, materials costs plus Contract percentage totals $6,867,931.46.

c. In recognition that all works were not completed and in the absence of formal variations adjusting the Contract price, the damages are reduced by a reasonable factor of 75%.

d. Unpaid Preliminaries Up to Termination at 75% of 6,867,931.46 equals $5,150,948.60."

136. Even if the Arbitrator was correct with his interpretation of the law on Notice under Clause 20.1, he still erred in awarding the sum of $5,150,948.60 for Unpaid Preliminaries because on the face of the Award at paragraph 3 (b) page 60 of the Award the Arbitrator on his own reasoning had already included this claim in his award for Measured Works/Final Account.

137. Further at pages 9-10 paragraphs 8 and 9 of the Award the Arbitrator recognised that the Provisional Sums were part of the Preliminaries when he stated:

"8. Provisional Sums in the Contracts for *Defined Work* were:

a. Supply and Installation the Air- Conditioning Installation exclusive only of the Chiller Units all as shown on the drawings and described in the Specification including all labour, materials, plant and fuels for testing and the like;

b. Supply and Installation of the Air Conditioning Chiller Units to be supplied and Installed others all as by shown on the drawings and in the described Specifications

including ; labour, materials, plant and fuels for testing and the like;

c. Installation of generator all in accordance with the drawings and specifications;

d. Landscaping;

e. Computers, site offices, and schedule programme software;

f. Demolition of existing buildings;

g. Track, construction of football filed and running track, including all sub-surface drainage works; and

h. Building Management System (BMS).

9. These Provisional Sums works were to be performed by nominated Subcontractors and nominated Suppliers at the Respondent's option. Provisional Sums were provided to cover the Prime Cost of the Nominated Subcontractor or Suppliers work and the 10% Profit and Overheads. It was also specified for the Respondent to allow in its pricing of the Preliminaries and General Bills of Quantities for the provision of General Attendance In accordance with Cause 13.5 (c) of the Particular Conditions of Contract."

138. Clause 13.5 of the GC provided that Provisional Sums were only to be paid when instructed. The Arbitrator stated in the Award that one of the issues he had to determine in the Arbitration was "Did Respondent breach its obligations under the Contract, Sub-Clause 13 [*Variations and Adjustment*] and Sub-Clause 13.5 [*Provisional Sums*] by a failure to properly and timely instruct on the use of the Provisional Sums in the Preliminaries section of the Bill of Quantities, and to nominate key Sub-contractor's work?" In my

opinion, it was clear from this issue that the Claimant did not give any instructions for the use of Provisional Sums. If there were no instructions for the use of Provisional Sums, then on the Arbitrator's own reasoning in the Award, Provisional Sums could not have been paid. Therefore, there was no rational basis for the Arbitrator including the Provisional Sums in the award for Unpaid Preliminaries and this is another basis that the sum awarded under this head must be set aside.

Unpaid Design

139. The Claimant contended that that there was no evidence to support the Arbitrator's award for the sum of $896,800.00 for Unpaid Design Costs.

140. The Defendant's position was that although the Claimant's evidence before the Arbitrator disputed the design costs its pleadings did not address the issue. Further, it was not disputed that the Defendant produced designs which the Arbitrator could have used his experience as a civil engineer to determine the issue.

141. At page 67 paragraph 8 of the Award, the Arbitrator addressed the Defendant's claim in the arbitration for Unpaid Design Costs. The Arbitrator stated:

> "8. Regarding Unpaid Design Costs, Claimant's demand is reduced from $1,793,600.00 to $896,800.00 as follows:
>
> a. The Claim documents ten (10) instances where design work was conducted.
>
> b. Sub-Clause 4.1 [Contractor's General Obligations] of the FIDIC conditions requires the Contractor to design only in respect of the temporary works:

'*and not otherwise be responsible for the design or specification of the Permanent Works'.*

c. The Claimant has conducted design works for which it was not responsible and it should be compensated for same.

d. However, the costs claimed are lump sums without back-up, breakdown, or invoices. Additionally, Bissoon stated in testimony that he did most of the design costs himself.

e. The Respondent has not denied that the designs were performed, nor that the Project benefited from incorporating into it the said designs, in whole or in part.

f. Therefore, by the greater weight of the evidence, a reasonable reduction of factor 50% of the design cost is applied to $1,793,600.00 equalling $896,800.00".

142. While the Arbitrator stated his basis for making an award for Unpaid Design Costs, by his own admission he had no evidence on the costs of the said designs. Therefore, he had no basis to award the quantum which he did and he had no basis to make his finding at page 67 paragraph 8(f) of the Award. Further, there is nothing stated in the Award by the Arbitrator to indicate that the sum he awarded under this heading was based on ex aequo et bono principles.

Unpaid Measured Works/Final Account

143. Senior Counsel for the Claimant submitted that there was an error on the face of the Award in the Arbitrator's determination of the Defendant's entitlement to Unpaid Measured Work. The Claimant submitted that the Arbitrator's rejection at page 60 paragraphs (a) to (c) of the Award of the Final Account figure supplied by the Engineer was done for reasons which

were wrong in law since Clause 15.3 of the FIDIC Red Book empowers the Engineer to determine the value of the works done by the Contractor and the Arbitrator could not in law disregard this.

144. In response, the Defendant contended that in reliance on the pleadings and arguments before the Arbitrator that this was a new issue being raised by the Claimant and that consequently, the Court cannot determine whether there was an error on the face of the award. Senior Counsel also argued that the Arbitrator was entitled to disregard the Engineer's determination of the value of works because the previous Engineer's assessment was in error and as the Arbitrator had special expertise in relation to technical issues of the valuation of works the Arbitrator was entitled to make use of his expertise.

145. At page 60 paragraph 2 of the Award the Arbitrator set out the sum he awarded for Unpaid Measured Works/Final account and his reason. He stated:

"2. Regarding Unpaid Measured Works/Final Account, Claimant's demand of $8,269,767.23 is confirmed for Variations/ Premeasures/Retention release.

a. Respondent asserts that there is an over certification of $8,681,415.27 based on its Engineer CEMAS final accounts statement.

b. However, CEMAS 10 February 2015 letter to EFCL states that EFCL's previous Engineer's quantity surveyor's assessment was in error, and there are significant difference between the assessments. Comparatively, CEMAS's reflects a substantial overpayment to the Claimant, exceeding the retention being held by EFCL.

c. In light of the fact that the Respondent's own Engineers are in dispute, the Arbitrator gives no weight to either analysis.

d. The Summary of the Bills of Quantities indicates a Contract Sum (excluding VAT) of $144,664,725.00 of which the cumulative amount of measured work completed is $84,631,084.00

e. The total amount of work claimed to have been completed is $101,288,424.61 which includes measured work, variations, and remeasured quantities.

f. Less the amount paid of $93,018, 657.38 leaves a balance due of $8,269,767.23 including release of intention held of 5% (excluding VAT).

146. From the aforesaid information in the Award, the Arbitrator explained the reasons he did not give any weight to any of the Engineer's analysis and he adopted the Defendant's Summary of Bill of Quantities. He gave no reason for adopting the said Bill of Quantities and he did not indicate that he made use of his own expertise in adopting it.

147. Therefore, on the face of the Award the Arbitrator's reasoning for awarding the sum for Unpaid Measured Works/Final Account was not rational and must be set aside.

Legal Costs of the Arbitration

148. It was submitted on behalf of the Claimant that Article 40 (2) (e) of the UNCITRAL Rule, which govern the arbitration, required the Arbitrator to determine whether the costs claimed were reasonable and that the

Arbitrator failed to do so but accepted the Defendant's submissions that legal fees should be at 10% of an award.

149. The Defendant's position was that it was implicit that the Arbitrator determined that the legal costs of the arbitration were reasonable.

150. According to Item 21 of Procedural Order No. 1 the arbitration was to be conducted in accordance with the UNCITRAL Arbitration Rules (2010). Article 40 (2) (e) of the UNCITRAL RULES defined "costs" as " the legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable."

151. The Arbitrator awarded the sum of $7,645,144.66 as the sum for "Claimant's [Envirotec] Legal @10%. He stated his reasoning at page 68, paragraph 9 of the Award as "At the oral hearing the Claimant affirmed its legal fees are at ten percent (10%) of an award."

152. In my judgment, on the face of the Award, the Arbitrator failed to comply with Article 40 (2) (e) of the UNCITRAL RULES, which the parties agreed that the Arbitrator must apply in determining the amount of costs, since he failed to indicate his basis for determining if the 10% of the claim was reasonable. He also failed to set out in the Award his basis for apportioning all the costs to be paid by the Claimant. In the absence of the Arbitrator indicating his reasons for awarding "10% of the Claimant's costs" and for awarding the Defendant in the Arbitration to pay all the costs, it appeared to me that he committed an error on the face of the Award and that the damages awarded for this sum must be set aside on the basis that the costs claimed was not reasonable.

CONCLUSION AND SUMMARY OF FINDINGS

153. I have concluded that the plain and ordinary meaning of the words in Item 56 of Procedural Order No. 1 was that in determining the issues which arose during the Arbitration, the parties agreed that the Arbitrator was obliged to apply the laws of Trinidad and Tobago, the terms in the Contract and the basis of equity and conscience. It is clear that the parties did not agree to authorise the Arbitrator to *only* decide the issues on equity and conscience and ignore the laws of Trinidad and Tobago and the terms of the Contract. In my opinion, if they did then it would have been so reflected in Item 56 of Procedural Order No.1.

154. In any event, I do not agree with Senior Counsel for the Defendant's submissions that the case law cited by him supported his submission. There was no dispute in the instant case that Item 56 of Procedural No 1 which authorised the Arbitrator to also apply the principle of ex aequo et bono in determining the issues in the Arbitration, was valid. The contention was whether the Arbitrator's interpretation and application of the said Item 56 was in accordance with the terms set out therein. In my opinion, the case of **Eagle Star Insurance Company** Ltd can be distinguished from the instant since the issue was different than that in the instant case.

155. The learning in **Home and Overseas Insurance Co Ltd** is instructive on the approach the Court should take in examining a Clause which parties agreed to be bound by. In my judgment, this case can be distinguished from the instant matter since Item 56 of Procedural Order No. 1 was different from that in **Home and Overseas Insurance Co Ltd.**

156. Further the case of **Deutche Schachtbau-Und Tiebohrgesellschaft MBH v Ras Al-Khaimah National Oil Co** dealt with the interpretation of the

arbitration clause with respect to the choice of law which was not an issue in the instant case since by Item 56 Procedural Order No. 1 the parties had expressly agreed that the relevant law was that of Trinidad and Tobago.

157. In my opinion, the case of **Musawi** can be distinguished from the instant matter on the basis that in the instant case Item 56 of Procedural Order No. 1 clearly stated the applicable law to the Contract.

158. With respect to the admissibility of the Hood report into evidence, it was also not in dispute that the expert Mr Hood did not attend the Arbitration for cross-examination and examination by the Arbitral Tribunal during the evidentiary hearing.

159. In my opinion, the alleged factual dispute referred to in the affidavits filed in the instant matter is immaterial in determining if the Arbitrator acted properly by considering the Hood Report. What is material is the information contained in the Award and any document which was actually incorporated into the Award. The Defendant's submissions were not incorporated as part of the Award. It is clear on the face of the Award that the Arbitrator did not admit the Hood Report into evidence with the consent of the parties nor that the Hood Report was admitted into evidence based on exceptional circumstances as provided by paragraph 53 of Procedural Order No.1. Indeed there is nothing in the Award indicating the Arbitrator's basis for admitting the Hood Report into evidence.

160. It is therefore apparent on the face of the Award that the Arbitrator erred in law by admitting the Hood Report into evidence. He also erred in law by using it to determine the damages. As such, all the damages awarded

under the various headings which were based on the Hood Report must be set aside.

161. The construction of Clause 20.1 is a question of law. The learning suggests that a literal interpretation of Clause 20.1 provides for a two-step process for the Contractor to validly make a claim for additional monies in connection with the Contract. The first step, which is the notice of the claim, must be taken within 28 days of the event giving rise to the claim. The second step, after the Contractor becomes aware of the event giving rise to the claim, is for the Contractor to send to the Engineer full supporting particulars of the basis of the claim. This must be done 42 days after the Contractor became aware of the event.

162. The importance of complying with the first step of giving notice is set out in Clause 20.1. It provides that failure by the Contractor to comply with the giving of notice to the Employer meant that the Contractor is not entitled to any additional payment and the Employer is discharged from liability in connect with that claim. The Particulars of Conditions deals with the second step under Clause 20.1 which is the provision of the particulars of the claim to the Employer.

163. In my opinion, on the face of the award, the Arbitrator did not decide that Notice was given, but the Arbitrator recognised the importance of Notice and he held that since the Contractor, ie the Defendant, kept the Employer, ie the Claimant informed, the former was aware of and the reasons for the delay. In any event there was nothing stated by the Arbitrator that the damages which he was awarded was common law damages for wrongful termination.

164. I have therefore decided that the Arbitrator erred by concluding that the Particulars of Conditions removed the requirement of the first step in Clause 20.1 in making a claim for additional monies under the Contract. It therefore follows that the sums for Head Office Costs of $51,358,157.25; Unpaid Design Costs of $896,800.00; Unpaid/Increased Preliminaries of $5,150,948.60; and Costs Escalations of $2,322,432.77, which the Arbitrator awarded where a notice of claim should have been issued must be set aside since the Arbitrator's reasoning for awarding damages for these sums were based on his erroneous interpretation of the clause.

165. The applicable Limitation Period was also a question of law. The cases of **Midland, Bell** and **Maharaj** were concerned with obligations by attorney at law in a transaction and **Capita** concerned a share transfer transaction. None of these cases concerned obligations under a construction contract.

166. In my opinion, based on the learning, the general rule in law is that a cause of action for breach of contract accrues when the breach occurs. However there are exceptions to this general rule since there can be contractual duties which give rise to continuing obligations to perform which arise afresh from day to day. In such a case the onus is on the party alleging the continuing contractual duty to so prove.

167. In the instant case, on the face of the Award the Arbitrator treated the date of the breach as the date the Contract was terminated. The Arbitrator did not state in the Award that the obligations in the Contract for Preliminaries, Financing Costs, Head Office Overhead Costs, Design Costs and Costs Escalations were continuing contractual obligations under the Contract. In my opinion, the Arbitrator's finding that the cause of action arose when the Contract was terminated and not when the breach

occurred was flawed since it was premised on an erroneous principle of law.

168. It follows that any sums which the Arbitrator awarded based on his finding that time started to run when the Contract was terminated was based on an error of law. In particular Unpaid Preliminaries; Financing Charges; Head Office Overhead Costs; Costs Escalation and Unpaid Design Costs.

169. It was submitted on behalf of the Claimant that there were two sums which the Arbitrator awarded which he did not apply the terms of the Contract in determining the issues namely Loss of Profits on Unfinished Works and Costs Escalations.

170. In my opinion, the Arbitrator erred in law by failing to apply the terms of the Contract in awarding Loss of Profits on Unfinished Works and instead he relied on a SCL Protocol which was not applicable to the issue as a basis for making the award.

171. With respect to the margin of profit awarded, if the Arbitrator was correct in making an award for this claim, he was entitled to rely on the financial documents which the Defendant had produced at the Arbitration.

172. At paragraph 7 pages 65 to 66 of the Award the Arbitrator dealt with the award for Costs Escalation. At paragraph (c) the Arbitrator acknowledged that "Sub-Clause 13.8 [Adjustments for Changes in Cost] of the Particular Conditions of Contract deletes the Sub-Clause". Notwithstanding this acknowledgement by the Arbitrator that there was no term in the Contract to permit him to award a sum, yet he still proceeded to do so. In my judgment, this was an error on the part of the Arbitrator since by Item 56

of Procedural Order No 1, the parties expressly agreed that the Arbitrator was to decide the issues based on the terms of the Contract.

173. In addition to the other objections raised aforesaid it was submitted on behalf of the Claimant that the sums awarded by the Arbitrator for 3 heads of damages were irrational namely; (a) Unpaid Preliminaries; (b) Unpaid Design; and (c) Unpaid Measured Works/Final Account. Senior Counsel for the Claimant also submitted that the sum awarded for Legal Costs of the Arbitration was without any evidential basis.

174. Clause 13.5 of the GC provided that Provisional Sums were only to be paid when instructed. The Arbitrator stated in the Award that one of the issues he had to determine in the Arbitration was "Did Respondent breach its obligations under the Contract, Sub-Clause 13 [*Variations and Adjustment*] and Sub-Clause 13.5 [*Provisional Sums*] by a failure to properly and timely instruct on the use of the Provisional Sums in the Preliminaries section of the Bill of Quantities, and to nominate key Sub-contractor's work?" In my opinion, it was clear from this issue that the Claimant did not give any instructions for the use of Provisional Sums. If there were no instructions for the use of Provisional Sums, then on the Arbitrator's own reasoning in the Award, Provisional Sums could not have been paid. Therefore, there was no rational basis for the Arbitrator including the Provisional Sums in the award for Unpaid Preliminaries.

175. While the Arbitrator stated his basis for making an award for Unpaid Design Costs, by his own admission he had no evidence on the costs of the said designs. Therefore, he had no basis to award the quantum which he did and he had no basis to make his finding at page 67 paragraph 8(f) of the Award. Further, there is nothing stated in the Award by the Arbitrator

to indicate that the sum he awarded under this heading was based on ex aequo et bono principles.

176. With respect to Unpaid Measured Works/Final Account, at page 60 paragraph 2 of the Award the Arbitrator explained the reasons he did not give any weight to any of the Engineer's analysis and he adopted the Defendant's Summary of Bill of Quantities. He gave no reason for adopting the said Bill of Quantities and he did not indicate that he made use of his own expertise in adopting it. Therefore, on the face of the Award the Arbitrator's reasoning for awarding the sum for Unpaid Measured Works/Final Account was not rational and must be set aside.

177. With respect to the Legal Costs of the Arbitration, in my judgment on the face of the Award the Arbitrator failed to comply with Article 40 (2) (e) of the UNCITRAL RULES, which the parties agreed that the Arbitrator must apply in determining the amount of costs, since he failed to indicate his basis for determining if the 10% of the claim was reasonable. He also failed to set out in the Award his basis for apportioning all the costs to be paid by the Claimant. In the absence of the Arbitrator indicating his reasons for awarding "10% of the Claimant's costs" and for awarding the Defendant in the Arbitration to pay all the costs, it appeared to me that he committed an error on the face of the Award and that the damages awarded for this sum must be set aside on the basis that the costs claimed was not reasonable.

ORDER

178. The Award of the Arbitrator, Mr. James T. Guyer dated 3 August 2018 made in the reference to arbitration before him between the Claimant and the Defendant held pursuant to the Arbitration Act Chapter 5:01 and the UNCITRAL Arbitration Rules 2010 awarding the Defendant the sum of

$94,957,873.54 is set aside pursuant to section 19(2) of the Arbitration Act and/or the inherent jurisdiction of the Court.

179. The Defendant to pay the Claimant's cost of this claim on the prescribed basis of the stipulated sum of $94,957,873.54 which is the sum of $708,789.37.

Margaret Y Mohammed

Judge