REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No.: CV2016-01522

BETWEEN

NAMALCO CONSTRUCTION SERVICES LIMITED

Claimant

AND

ESTATE MANAGEMENT & BUSINESS
DEVELOPMENT COMPANY LIMITED

Defendant

(By Original Action)

And Between

ESTATE MANAGEMENT & BUSINESS
DEVELOPMENT COMPANY LIMITED

Ancillary Claimant

And

ANDREW WALKER

First Ancillary Defendant

And

ATLANTIC PROJECT CONSULTANTS LIMITED

Second Ancillary Defendant

And

BBFL CIVIL LIMITED

Third Ancillary Defendant

And

LEE YOUNG AND PARTNERS

(A Partnership and/or Firm registered under the laws of Trinidad and Tobago and issued pursuant to Section 12 of the Partnership Act Chapter 81:02 and in accordance with Part 22.1 of the Civil Proceedings Rules 1988, as amended)

Fourth Ancillary Defendant

(By Ancillary Claim)

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: April 26, 2022.

Appearances:

Claimant: Mr. A. Fitzpatrick SC, Mr. S. Sharma and Mr. R. Kawalsingh instructed by Mr. J. Mohammed.

Defendant/Ancillary Claimant: Mr. J. A. Davis QC, Mr. G. Hayman QC and Mr. C. Kangaloo instructed by Ms. D. Nieves-Inglefield.

First Ancillary Defendant: Ms. J. Lutchmedial.

Second Ancillary Defendant: Mr. D. Mendes SC, Mr. D. Maharaj and Mr. C. Hackett instructed by Ms. K. Bharat.

Third Ancillary Defendant: absent and unrepresented.

Fourth Ancillary Defendant: Mr. A. Singh.

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INTRODUCTION

1. To say that this case has been somewhat of a challenge would be to underestimate the sheer volume of issues and sub-issues which have been raised. Contrary to the assertion of the Attorneys at Law for the Claimant that it was really a simple matter, its complexity has literally consumed a disproportionate amount of the court's time and resources despite the efforts of the court to minimise that occurrence. In that regard, the court has also intentionally refrained from setting out all of the evidence; as so to do would be to detract from what the court hopes the reader would find to be more interesting and comprehensible than burdensome. That is not to say that the court has not considered all of the evidence that was presented before it as it has. The court has, however, tried to keep the decision within the limits of the reasonable.

2. The nature of the case has presented considerable overlap between the Claim and the Ancillary Claim both in terms of facts and law. To that end, where an issue may not have been dealt with as fully as the court would have liked to treat with it in one area, it has more likely than not been dealt with in the other area. Additionally, having regard to the myriad of findings the court has attempted to make appropriate orders for relief as best suits the case. As with all judgments the longer it lives with the writer the more he wishes he could add to his writing but there comes a time when it must end and the judgment delivered.

3. The court wishes to add that rarely does a court mention the word "politics" in a judgment and for very good reasons, the most important of which is the preservation of the independence of the Judiciary. However, it will not escape the reader that these claims and those similar to them have been the subject of much speculation on all sides of the political fence if one is to accept that which is printed in the newspaper. The courts have never been and ought never to be involved in the business of politics so that the findings made herein are devoid of any such consideration for the absolute avoidance of doubt. It is necessary to remind our people of this steadfast principle from time to time in order to maintain the confidence reposed in the courts throughout our twin island Republic.

OVERVIEW

4. The Claimant ("Namalco") and the Defendant ("EMBD", a state enterprise) entered into contracts for six (6) construction projects at Mahaica, Brickfield, Cedar Hill, Roopsingh Road, Petit Morne

and Picton Monkey Town under which Namalco was to perform infrastructural works. These Contracts were to provide serviced development plots for former employees of Caroni 1975 Limited. The works included roads, sewers and other infrastructure to serve proposed residential properties. The Contracts were intended to be short ranged between ninety (90) days and eighteen (18) months but lasted much longer owing to difficulties with the original surveys, design drawings and site difficulties.

5. By Claim Form filed on May 6, 2016, Namalco sued for sums allegedly due and owing by EMBD in relation to all six (6) Projects. However, parts of Namalco's claim as relates to the Mahaica and Brickfield Projects were stayed to be heard in connection with other proceedings before the court known as the Caroni Roads Proceedings. As such, this judgment deals with the Cedar Hill, Roopsingh Road, Petit Morne and Picton Monkey Town Projects.

6. The Cedar Hill, Roopsingh Road, Petit Morne and Picton Contracts ("the Said Contracts") were governed by the FIDIC Conditions of Contract 1999 edition ("FIDIC Conditions"). According to Namalco, the Said Contracts provided for it to carry out and complete works to the design specification of EMBD and/or its Engineer. The works were subsequently re-measured by the Engineer, with payment being made from time to time upon the issue of certificates called Interim Payment Certificates ("IPCs").

7. Namalco claims that under the FIDIC Conditions, EMBD was obligated to pay the amount certified in each IPC within a specified number of days after receipt of certain stipulated documentation[1]. The same overall regime was applicable to the final payment certificate. As such, it is the case of Namalco that all sums claimed, being the subject of certificates, are indisputably due and owing. Namalco also claims contractual interest for late payment of the certificates.

8. By Re-Amended Defence and Counterclaim filed on October 4, 2018 EMBD averred that as it is a publicly accountable body, whose duty it was to ensure that only sums certified as due or which could be established as due by measurement of work done, were paid. EMBD noted Namalco's concession that its claim is confined to sums certified, however, it is the case of EMBD that Namalco is not entitled to the sums certified, due to the following:

[1] The certificates on which Namalco sues, together with the date of their issue and, where appropriate, their date of payment, are set out in paragraphs 32, 49, 64 and 79 of the Statement of Case. Namalco also claims contractual interest for the late payment of these certificates.

i. Namalco has not met the conditions for payment under the Contracts;

ii. Namalco's conduct in making applications for payment was dishonest and/or negligent, in that the IPCs relied upon by Namalco overstated the quantity of work, which Namalco had completed and Namalco's works were systemically defective. As such, it is the claim of EMBD that no reliance could be placed on the IPCs.

iii. If EMBD proves that the works are worth less than shown on the IPCs, then EMBD is entitled to an abatement of the difference between the true value and that shown on the certificate, such that Namalco is only entitled to the lesser value.

9. As such, EMBD denies that it is in breach of any contract between Namalco and itself since the sums claimed on the certificates are not indisputably due to Namalco.

10. By Amended Ancillary Claim filed October 4, 2018 EMBD in turn instituted claims against four (4) Ancillary Defendants (the Engineers of the Projects) seeking indemnity/contribution should EMBD be adjudged liable to Namalco. EMBD's claim against the First Ancillary Defendant has been stayed to be heard with the Caroni Road Proceedings. Further, the Third Ancillary Defendant, BBFL Civil Limited took no part in the trial.

11. In its opening address, Namalco summarised the respective cases on the Claim as follows. EMBD's Defence falls to be categorised in six (6) broad areas:

a. Its General Defence – EMBD alleges that it was a condition precedent to Namalco's right to receive payment under the IPCs that it first produce to the Engineer for the Projects, sufficient supporting documents in substantiation of its claims. EMBD further alleges that, save for limited exceptions, no such supporting documents were provided with the consequence that the time for payment of the amounts certified in the certificates has not yet begun to run (See paragraphs 81-83, 107-112 and 132 of the Re-Amended Defence and Counterclaim which is hereinafter referred to as ("**the Defence**").

b. Its Over-Certification/Abatement Defence – EMBD variously alleges that the Engineers for the Projects:

i. Certified works that were not done, and/or were defective, and/or were unsubstantiated. (see paras. 86 and 86A to 86E, 88C, 88D, 88S to 88V.3, 114A to 114P, 116, 117A, 118,118A, 120G to 120J, 120K to 120N, 120O to 120R, 120FF to 120HH, 120II to 120JJ, 120YY, 120ZZ to 120CCC, 140A, 140B, 168A to 170, 172 to 172A, 173D to 173I of the Defence);

ii. Certified for payment as variations works that were included in the Original Contract Price, and/or not authorised, and/or unjustified, and/or not carried out, and/or unsubstantiated (see paras 88N to 88P, 88R, 88R.4, 88W to 88CC, 116, 120Z to 120AA, 141E to 141K, 173K to 173N of the Defence);

iii. Certified for payment works that were at the risk of Namalco and unsubstantiated (see paras 88N to 88P, 88R, 88R.4, 173 to 173N of the Defence);

iv. Certified claims for overheads recovery and equipment standby costs that were unsubstantiated (See 88E to 88M, 119 to 119B, 120-120F, 120KK to 120OO and 120PP to 120UU, 141A to 141C, 142B to 142F, 142G to 142K, 173 to 173C, of the Defence);

v. Certified payments based on incorrect entries (See 120S to 120Y of the Defence);

vi. Certified claims for loss of profit as a result of the omission of the detention ponds from the works in circumstances where Namalco was not entitled to this claim (120VV to 120XX, 142 to 142R of the Defence);

vii. Duplicated quantities in the course of valuing works (See 141D of the Defence);

viii. Over-certified payments in respect of interest (120DDD to 120EEE, 142S to 142W of the Defence);

c. Its Clause 20.1 Defence – EMBD further alleges that in relation to the Roopsingh Road Project the Engineer certified Namalco claims which were not subject to Clause 20.1 notices as required by the relevant conditions of contract (See para. 116 of the Defence).

d. Its Conspiracy Defence – EMBD still further alleges that the Roopsingh Road Supplementary Agreement and the Petit Morne Supplementary Agreement were:

   i. Entered into in breach of fiduciary duties owed by EMBD's CEO to EMBD to the knowledge of Namalco as a consequence of which those agreements have been rescinded by EMBD or alternatively are void and unenforceable as are all IPCs issued thereunder (See para. 96 to 97J of the Defence);

   ii. Alternatively, not authorised by EMBD to the knowledge of Namalco who is, therefore, not entitled to make any claim thereunder or in relation to the IPCs issued in connection therewith. (See 97K to 97N of the Defence);

   iii. In the still further alternative, unenforceable against EMBD by reason of Namalco's unlawful means conspiracy as are all IPCs issued thereunder (See para 97O to 97R of the Defence);

e. Its DAB Misrepresentation Defence – In relation to Picton alone, EMBD alleges that the DAB's decision of October 31, 2014 valuing the gross sum due to Namalco at three hundred and sixty-four million, nine hundred and ninety-two thousand, five hundred and thirty-four dollars and sixteen cents ($364,992,534.16) (exclusive of VAT) is null and void, and/or open to review on the basis that Namalco misrepresented to the DAB the true value of the works (See para. 162 of the Defence);

f. Its Interest Limitation Defence – Again, in relation to Picton alone, EMBD alleges that Namalco's claims for interest on IPCs 1,7 and 8 are statute-barred (see para. 158 of the Defence).

12. EMBD has also made a Counterclaim in which it seeks certain declarations and claims loss and damage, and/or repayment of sums which Namalco has received from EMBD to its use, and/or an entitlement to set off such sums against sums owed to Namalco.

13. In its Reply and Defence to Counterclaim ("**the Reply**") Namalco denies EMBD's entitlement to its Counterclaim and makes, amongst others, the following points:

a. If there was a failure by Namalco to achieve specification compliance with respect to the work carried out by it, or if the work was in any way defective, which it denied was the case, that failure had no impact on the market value of the works. (See para 3(iv)(3) of the Reply). EMBD's valuation of alleged defective works was, therefore, misconceived and wrong in principle (See para 3(iv)(5) of the Reply);

b. Some of the defects alleged by EMBD resulted from design issues and/or ground conditions for which EMBD carried the risk (See para. 7(v) of the Reply);

c. In any event, if there were defects in the works (which it denied was the case):

    i. EMBD failed to act reasonably and or to mitigate its loss;

    ii. There was no room for EMBD to abate the value of the works as:

        1. Namalco had indicated without reservation that any non-compliant work would be made good by it at its own expense; and

        2. EMBD's recourse was to the retention held by it in respect of the projects and not to abatement (See para 15(iii) of the Reply);

    iii. The sums purportedly deducted by EMBD from certified amounts did not follow the rules applicable to common law abatement (See para. 15(iv) of the Reply).

d. Assuming but not admitting that Namalco failed to provide sufficient supporting documents to the Engineer as required by the respective conditions of contract, the provision of such documentation was not a condition precedent to payment of Interim Payment Certificates. Even if it was, such a condition has been waived by estoppel or election. (See para. 8 and 15(ii) of Reply);

e. EMBD had failed to establish that the works were over-certified and there was no credible basis to disturb the contemporaneous determination of the Engineers. (See paragraphs 122, 223, 267 and 306 of the Reply);

f. In relation to the Roopsingh Road and Petit Morne Supplemental Agreements that:

   i. There was no basis for EMBD's assertion that Namalco had actual knowledge that EMBD's CEO was acting in breach of his fiduciary duties and/or employment contract;

   ii. The said agreements merely amended the terms of the existing Contracts following commercial negotiations and were ratified by EMBD's Board with full knowledge of all material circumstances; and

   iii. The facts pleaded by EMBD were plainly insufficient to give rise to any inference against Namalco. (See paras. 131, 132, 141 and 142 of the Reply)

g. Where an IPC has been issued in the absence of any supporting documents then on a proper construction of the relevant conditions of contract, time for payment of the certified sum must, at latest, run from the date on which the payment certificate was issued (See para 150(ii)(b), 235(ii)(b) and 270 of the Reply);

h. In relation to the Picton Project that the fraud and/or misrepresentation pleaded by EMBD, in relation to the decision of the DAB dated October 31, 2014, amounted to no more than a statement that Namalco had presented to the DAB figures that differed from those advanced by EMBD (see para 285(i) and 285(iii) of the Reply).

SECTION ONE

DISPOSITION OF THE CLAIM AND COUNTERCLAIM

262. The Court makes the following order on the Claim and Counterclaim:

In relation, to **Roopsingh Road:**

1. It is declared that the Supplementary Agreement entered into between the Claimant and the Defendant is null and void and it is hereby set aside.

2. The Defendant shall pay to the Claimant damages for breach of contract in the sum of three hundred and ninety-four million, four hundred and sixty-eight thousand, one hundred and seventy dollars and seventy-seven cents ($394,468,170.77) inclusive of VAT together with interest at the rate of two percent (2%) per annum from May 6, 2016 to the date of judgment.

In relation to **Petit Morne:**

3. It is declared that the Supplementary Agreement entered into between the Claimant and the Defendant is null and void and it is hereby set aside.

4. It is declared that the decision of the DAB stands.

5. Damages for breach of contract are to be paid by the Defendant to the Claimant on a quantum merit basis inclusive of the sums agreed in the DAB in relation to IPC 12 and IPC 13 together, interest at the rate of two percent (2%) per annum from May 6, 2016 in the case of the damages and in the case of the sum due under the DAB, interest at the rate of two percent (2%) per annum from the expiration of twenty-eight (28) days after the date of the DAB until the date of judgment in the event that the decision of the DAB does not provide for an alternative interest rate. Such damages are to be assessed by a Master in default of agreement on a date to be fixed by the Court Office.

In relation to **Picton:**

6. It is declared that the decision of the DAB stands.

7. The Defendant shall pay to the Claimant damages for breach of contract in the sum of eleven million, six hundred and four thousand, one hundred and seventy dollars and sixty-eight cents ($11,604,170.68) together with interest at the rate of two percent (2%) per annum from the expiration of twenty-eight (28) days after the

date of the DAB until the date of judgment in the event that the decision of the DAB does not provide for an alternative interest rate.

In relation to **Cedar Hill:**

8. The Defendant shall pay to the Claimant damages for breach of contract in the sum of twenty-one million, five hundred and ninety-four thousand, nine hundred and eighty-two dollars and seventy-five cents ($21,594,982.75) together with interest at the rate of zero point five percent (0.5%) per month, compound interest from the expiration of ninety-one (91) days after the issue of each unpaid IPC to the date of judgment.

General

9. The sums above having been ordered as a consequence of the court's partial acceptance of the Defence and Counterclaim, in so far as the court has not found in favour of the Defendants on some of the issues set out in the Defence and Counterclaim against the Claimant, same are dismissed.

THE CLAIM AND COUNTERCLAIM

14. Namalco's claim is for the unpaid balance of the IPCs. That balance is said to total one billion, one hundred and ninety-two million, three hundred and twenty-eight thousand, three hundred and sixteen dollars and fifty-four cents ($1,192,328,316.54). However, EMBD's primary case on abatement is that the works have been over-certified by one billion, two hundred and twenty-three million, one hundred and ninety-five thousand, seven hundred and thirty-two dollars and one cent ($1,223,195,732.01). EMBD has concluded that there is the issue of over-certification and defective works. As such, the true value of the disputed works claimed is twenty-three million, eight hundred and twenty-three thousand, two hundred and seventy-eight dollars and seventeen cents ($23,823,278.17). The actual value of the work carried out was less than was claimed by Namalco and was certified by the Ancillary Defendants (thereby extinguishing Namalco's claim) namely:

Five hundred and sixty-six million, one hundred and seventy-five thousand, one hundred and seventy-six dollars and twenty-three cents ($566,175,176.23) on EMBD's primary case that the Supplementary Agreements are void and unenforceable;

Alternatively, one hundred and eighty-nine million, five hundred and twenty-seven thousand, nine hundred and eighty-four dollars and forty-nine cents ($189,527,984.49) (using the rates in the Supplementary Agreements).

15. EMBD has set out the particular IPCs that it accepts compliance on and those which it says in respect of which there has been no compliance. They are as follows:

PROJECT	COMPLIANT IPCs	NON-COMPLIANT IPCs
Picton[2]	IPCs 1, 6 – 7, 9 – 19, 21	IPCs 2 – 5, 8, 20, 23 – 26
Roopsingh Road[3]	IPCs 26 – 28	IPCs 11 – 25, 29 – 30
Petit Morne[4]	IPCs 19 – 20	IPCs 1 – 18, 21 – 25
Cedar Hill[5]	None	IPCs 1 – 5

Issues

16. The issues to be determined by this court **on the Claim** are as follows:

i. Whether the court has the jurisdiction to hear challenges to the validity and accuracy of the IPCs;

2 Re-Amended Defence and Counterclaim, paragraph 159 **[TB1 018975**]

3 Re-Amended Defence and Counterclaim, paragraph 112 **[TB1 018889-90**]. Given that only interest running on the IPCs issued after the re-commencement of the works is claimed by NAMALCO, EMBD confines itself to those certificates.

4 Re-Amended Defence and Counterclaim, paragraph 132 **[TB1A 018937]**

5 Re-Amended Defence and Counterclaim, paragraph 82 **[TB1A 018929]**

ii. What was the effect of Clause 2.5 of the Conditions of Contract on EMBD's Defences and Counterclaims;

iii. If the court does so have jurisdiction, then whether the provision of supporting documents was a condition precedent to the payment of an IPC;

iv. Whether the decision of the Dispute Adjudication Board on the Picton Contract has become conclusive;

v. Whether the Supplementary Agreements were valid;

vi. What is the value of the works executed by Namalco; and

vii. Whether Namalco is entitled to contractual interest for the late payment of IPCs.

17. **SUMMARY OF FINDINGS ON ISSUES:**

(a) On the first issue, the court finds that it had jurisdiction to hear challenges to validity and accuracy of the IPCs but such jurisdiction is limited to the findings on issue number two.

(b) On the second issue, the finding is that EMBD can only mount the defence of abatement, namely, diminution in value and not the other defences set out in the Amended Defence and Counterclaim.

(c) On the third issue, the finding is that the provision of supporting documents was not a condition precedent to the payment on an IPC.

(d) On the fourth issue, the court finds that the decision of the DAB is binding and conclusive and, therefore, cannot found the basis of a foundation of a challenge by EMBD.

(e) On the fifth issue, the court finds that the Supplementary Agreements would have been invalid owing to breach of fiduciary duty had it not been for ratification by the Board of EMBD. However, the finding of the court is that ultimately the agreements were not valid as a consequence of conspiracy. The agreements are therefore, set aside.

(f) The findings on the sixth issue is project specific and set out in detail hereunder.

(g) On the seventh issue, the court finds on the issue of interest that the Supplementary Agreements for RR and PM having been set aside, simple interest is applicable on those Projects. Simple interest is awarded on the Picton Project in the absence of a provision for compound interest on the DAB and compound interest is awarded on Cedar Hill.

18. By its Amended Ancillary Claim filed on October 4, 2018 EMBD claimed the following against the Second Ancillary Defendant:

i. An indemnity/contribution from the Second Ancillary Defendant in the sum of one billion, one hundred and forty-seven million, six hundred and fifty-four thousand and two hundred and fifty-seven dollars and fifty-four cents ($1,147,654,257.54), being the whole of the Claimant's claim with respect to the Roopsingh Road, Petit Morne, and Cedar Hill Projects, alternatively such other sum as provides a complete indemnity to the Defendant/Ancillary Claimant in respect of any sum which EMBD is ordered to pay to Namalco greater than (a) forty-nine million, two hundred and twenty-one thousand, six hundred and fifty-nine dollars and thirty-seven cents ($49,221,659.37) on the Roopsingh Road Project; (b) NIL on the Petit Morne Project; and (c) NIL on the Cedar Hill Project, alternatively in such other amount which the Honourable Court sees fit;

ii. An indemnity and/or pro-rated contribution against any costs order and all other costs incurred by the Defendant/Ancillary Claimant in defending this action and the costs of this Ancillary Claim as it relates to the Cedar Hill, Roopsingh Road and Petit Morne Projects and/or as it relates to the Second Ancillary Defendant;

iii. *A declaration that its interim payment certificates do not provide good or any evidence of the value of works carried out, and that the value of those works must be proven from first principles*.

19. The **main issue on the Ancillary Claim** is whether the Ancillary Defendants were negligent in their assessments

Issue 1 - ***Whether the court has the jurisdiction to hear challenges to the validity and accuracy of the IPCs***

The FIDIC terms of contract

20. Clause **14.7** of the Contracts provide as follows:

> *"… The Employer shall pay to the Contractor:*
>
> *(a) …*
>
> *(b) The amount certified in each Interim Payment Certificate within 42 (Picton), 56 (Roopsingh Road) or 77 (Cedar Hill & Petit Morne) days after the Engineer receives the Statement and supporting documents; and*
>
> *(c) The amount certified in the Final Payment Certificate within 56 (Roopsingh Road & Picton) or 91 (Cedar Hill & Petit Morne)] days after the Employer receives this Payment Certificate."*

21. All contracts provide as follows by virtue of FIDIC 1999:

> **General conditions**
>
> **20.2** *Disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision]. The Parties shall jointly appoint a DAB by the date stated in the Appendix to Tender.*
>
> *The DAB shall comprise, as stated in the Appendix to Tender, either one or three suitably qualified persons ("the members"). If the number is not so stated and the Parties do not agree otherwise, the DAB shall comprise three persons.*
>
> *If the DAB is to comprise three persons, each Party shall nominate one member for the approval of the other Party. The Parties shall consult both these members and shall agree upon the third member, who shall be appointed to act as chairman.*

However, if a list of potential members is included in the Contract, the members shall be selected from those on the list, other than anyone who is unable or unwilling to accept appointment to the DAB.

The agreement between the Parties and either the sole member ("adjudicator") or each of the three members shall incorporate by reference the General Conditions of Dispute Adjudication Agreement contained in the Appendix to these General Conditions, with such amendments as are agreed between them.

The terms of the remuneration of either the sole member or each of the three members, including the remuneration of any expert whom DAB consults, shall be mutually agreed upon by the Parties when agreeing the terms of appointment. Each Party shall be responsible for paying one-half of this remuneration.

If at any time the Parties so agree, they may jointly refer a matter to the DAB for it to give its opinion. Neither Party shall consult the DAB on any matter without the agreement of the other Party.

If at any time the Parties so agree, they may appoint a suitably qualified person or persons to replace (or to be available to replace) any one or more members of the DAB. Unless the Parties agree otherwise, the appointment will come into effect if a member declines to act or is unable to act as a result of death, disability, resignation or termination of an appointment.

If any of these circumstances occurs and no such replacement is available, a replacement shall be appointed in the same manner as the replaced person was required to have been nominated or agreed upon, as described in this Sub-Clause.

The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Employer or the Contractor acting alone. Unless otherwise agreed by both Parties, the appointment of the DAB (including each member) shall expire when the discharge referred to in Sub-Clause 14.12 [Discharge] shall have become effective.

20.3 *If any of the following conditions apply, namely,*

(a) the Parties fail to agree upon the appointment of the sole member of the DAB by the date stated in the first paragraph of Sub-Clause 20.2,

(b) either Party fails to nominate a member (for approval by the other Party) of a DAB of three persons by such date,

(c) the Parties fail to agree upon the appointment of the third member (to act as chairman) of the DAB by such date, or

(d) the Parties fail to agree upon the appointment of a replacement person within 42 days after the date on which the sole member or one of the three members declines to act or is unable to act as a result of death, disability, resignation or termination of appointment,

then the appointing entity or official named in the Appendix to Tender shall, upon request of either or both of the Parties and after due consultation with both Parties, appoint this member of the DAB. This appointment shall be final and conclusive. Each Party shall be responsible for paying one-half of the remuneration of the appointing entity or official.

***20.4** If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation by the Engineer, either Party may refer the dispute in writing to the DAB for its decision, with copies to the other party and the Engineer. Such reference shall state that it is given under this Sub-Clause.*

For DAB of three, the DAB shall be deemed to have received such reference on the date when it is received by the chairman of the DAB.

Both Parties shall promptly make available to the DAB all such additional information, further access to the Site, and appropriate facilities, as the DAB may require for the

purposes of making a decision on such dispute. The DAB shall be deemed to be not acting as arbitrator(s).

Within 84 days after receiving such reference, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.

If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. If DAB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference, then either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction.

In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated Sub-Clause 20.7 [Failure to Comply with Dispute Adjudication Board's Decision] and Sub-Clause 20.8 [Expiry of Dispute Adjudication Board's Appointment], neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

If the DAB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB's decision, then the decision shall become final and binding upon both Parties.

***20.5** Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.*

20.7 *In the event that:*

(a) neither Party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision],

(b) the DAB's related decision (if any) has become final and binding, and

(c) a Party fails to comply with this decision,

then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [Arbitration]. Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference.

20.8 *If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise:*

(a) Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply, and

(b) The dispute may be referred directly to arbitration under Sub-Clause 20.6 [Arbitration].

59. The **Petit Morne** and **Cedar Hill** Contracts specifically provide the following as **20.6**:

20.6 *If any dispute of any kind whatsoever shall arise between the Employer and the Contractor or the Engineer and the Contractor in connection with or arising out of the Contract, or the carrying out of the Works, whether during the progress of the Works or after their completion and whether before or after the termination, abandonment or breach of the Contract, it shall, in the first place be referred to be settled by the Engineer who shall promptly state his decision in writing and give notice of the same to the Employer and the Contractor. Save as, hereinafter provided, such decision in respect of every matter so referred shall be final and binding upon the Employer and the Contractor, until the*

completion of the Works and shall forthwith be given effect to by the Contractor, who shall proceed with the Works with all due diligence whether or not he or the Employer requires arbitration as hereinafter provided. If the Contractor shall be dissatisfied with any such decision of the Engineer then and in any such case, the Contractor shall, within 28 days after receiving notice of such decision write to the Employer, wherein the Employer shall review the dispute and state his decision in writing and give notice of the same to the Contractor and the Engineer within 84 days after receipt of such appeal from the Contractor.

If the Employer be dissatisfied with any such decision of the Engineer or the Contractor be dissatisfied with any decision of the Employer upon appeal, then in any such case either the Employer or the Contractor may within 28 days of receiving notice of such decision require that the matter shall be referred to an arbitrator to be agreed upon between the parties or, failing agreement, to be nominated on the application of either party by the President for the time being of the Association of Professional Engineers of Trinidad and Tobago and any such reference shall be deemed to be a submission to arbitration within the meaning of the Arbitration Ordinance or any statutory re-enactment or amendment thereof for the time being in force.

Such arbitrator shall have full power to open up, review and revise any decision, opinion, certificate or valuation of the Engineer and neither party shall be limited in the proceeding before such arbitrator to the evidence or arguments put before the Employer for the purpose of obtaining his decision above referred to. The award of the arbitrator shall be final and binding on the parties.

Such reference except as to the withholding by the Engineer of any certificate or the withholding of any portion of the retention money Clause 14.9 hereof to which the Contractor claims to be entitled or as to the exercise of the Engineers power to give a certificate under Clause 14.7 hereof shall not be opened until after the completion or alleged completion of the Works, unless with the written consent of the Employer and the Contractor provided always that the giving of a Taking Over Certificate under Clause 10.1 hereof shall not be a condition precedent to the opening of any such reference.

22. The **Roopsingh Road** and **Picton Contracts** however specifically provide the following as **20.6**:

20.6 *Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by reference at the option of either party to arbitration in accordance with the Arbitration Act Chapter 4:01 of the Laws of Trinidad and Tobago (1980) or any modification, amendment or re-enactment thereof.*

Preliminary issue: Should Namalco be permitted to argue that the court lacks jurisdiction to hear challenges to the validity and accuracy of the IPCs

23. As a preliminary argument, EMBD submitted that Namalco accepted that the IPCs were not conclusive under the Contracts and that EMBD was, in principle, entitled to an abatement.[6] As such, EMBD submitted that in light of its pleaded position, Namalco cannot now argue that the court lacks jurisdiction to consider a challenge to the IPCs. The court is of the view that this was, however, not the case as pleaded by Namalco at paragraph 6 of the Amended Reply. The relevant part of paragraph 6 reads:

> "*The Defendant has neglected to serve any contractual notices which would entitle it to set up cross claims or set offs with the consequence that, in these proceedings, the Defendant is forced to seek to abate the value of the Claimant's work at common law."*

Ruling

24. This, in the court's view, is far from an admission that the EMBD is in principle entitled to an abatement and is merely a juxtaposition of the resort to the common law defence of abatement so as to demonstrate that EMBD is in Namalco's view forced to rely on that defence because it failed to serve notices as required. This aspect of the submission on the part of EMBD must, therefore, fail and the issue should be heard and determined.

The main issue on Jurisdiction

The submissions of Namalco

25. Namalco submitted that if an Employer wished to challenge the accuracy or validity of an IPC and to relieve himself of the obligation to pay the amount certified therein, he could have only done so by accessing the dispute resolution procedures set out in the Contract. Having failed so to do, EMBD cannot now so do by court action.

[6] See para 6 of the Re-Amended Reply and Defence to Counterclaim

26. According to Namalco, the Conditions of Particular Application ("CPA") for Cedar Hill and Petit Morne expressly provide the following:

"…Where the requirements of the Conditions of Particular Application differ from those of General Conditions of Contract, the requirements of Conditions of Particular Application will prevail…"

27. Namalco submitted that Clause 20.6 of the Cedar Hill and Petit Morne Contracts (identical in both Contracts) is not inconsistent with the un-amended Clauses 20.2 to 20.5 but that, in any event, Clause 20.6 being, *ex facie*, a self-contained clause of particular application would take precedence insofar as it is inconsistent with the said clauses.

28. Namalco submitted that it was unclear how a plain reading of Clause 20.4 could lead to the conclusion that the clause is permissive. That the clause is preceded by Clause 20.2, which states that disputes shall be adjudicated by a DAB in the manner, set out in Clause 20.4. Clause 20.4 then provides that either party may refer the dispute to the DAB. According to Namalco, EMBD wrongly placed emphasis on the word "*may*" alone and ignores the words "*either party*".

29. Namalco submitted that the simple intent of Clause 20.4 was to allow either party to trigger the DAB process. That the clause could not have been intended to alter the mandatory nature of the dispute resolution clause in 20.6.

30. According to Namalco, EMBD's argument in relation to Clause 20 was rejected in ***A. SA v B. SA, 4A 124/2014***. As such, Namalco submitted that the contractual dispute resolution clause contained in 20.6 in the Petit Morne and Cedar Hill Contracts is mandatory. Namalco accepted that the dispute resolution clause applicable to the Roopsingh Road Project and the Picton Project was different.

31. According to Namalco, in all four (4) Projects, the contractual dispute resolution requires the following:

    i. There be a claim submitted to the Engineer;

    ii. The Engineer rejects it;

iii. The rejection be referred to the Engineer (either in his capacity as Engineer or as DAB); and

iv. The Engineer rules on it.

32. Namalco submitted that it is only when the aforementioned process is completed that the person dissatisfied with the Engineer's decision can refer the dispute to the appropriate final forum providing that the challenge has been made within the time and the decision is not final and binding.[7]

33. According to Namalco, the stepped-up resolution processes set out above were obligatory upon the parties and conditions precedent, which had to be complied with by EMBD before any dispute it wished to raise was brought before the court.

34. Namalco submitted that the failure of EMBD to plead that it has observed the dispute resolution mechanism mandated by the relevant contractual provision and its failure, in fact, to comply with that process were fatal to its case. According to Namalco, even if the IPCs were as a matter of legal principle reviewable by the court, there was simply no dispute on the IPCs in this case which EMBD could refer to the court or to arbitration for adjudication.

35. Namalco further relied on the case of ***Al-Waddan Hotel Ltd v Man Enterprise Sal (Offshore)***[8], in which the court was faced with a standard FIDIC Clause 67.1 provision that stipulated that if a dispute arose between the Employer and the Contractor, the matter in dispute should first be referred to the Engineer for his decision. In the event that either the Employer or the Contractor was dissatisfied with the Engineer's decision then, provided that the decision had not become binding, either party could give notice of his intention to commence arbitration.

36. The court held that the Engineer's notice of decision in clauses as such, as that was to be taken as a condition precedent as it was an important step in the process between a dispute arising and that dispute going to arbitration.[9]

[7] See Christopher R. Seppälä, International Construction Contract Disputes: Commenting on ICC Awards dealing with the FIDIC International Conditions of Contract (ICC International Court of Arbitration Bulletin Vol. 9/No. 2) November 1999.
[8] [2015] EWHC 4796
[9] See paragraphs 29 & 30 of Al-Waddan Hotel Ltd v Man Enterprise Sal (Offshore) supra.

37. Consequently, Namalco submitted that having failed to engage in dispute resolution, EMBD cannot now seek to challenge the IPCs and the court has no jurisdiction to entertain such challenges.

38. Namalco submitted that, by its pleadings,[10] there has been no waiver or admission as to jurisdiction. That it could only have waived its own right to pursue its claim for the debt created by the IPCs through arbitration proceedings.

39. According to Namalco, the purpose and intent of the DRP, is not to seek enforcement of payment of unchallenged IPCs but rather to consider challenges to IPCs by a party who is dissatisfied with same. As such, Namalco submitted that there was no "dispute" within the meaning of the relevant provisions of Clause 20 since in the present case, it accepted the IPCs and has consequently sued for payment thereof.

40. Namalco submitted that ***Amec Civil Engineering Limited*** supra has been reviewed in this jurisdiction and seriously doubted. In the case of ***Mootilal Ramhit & Sons Contracting Limited v Education Facilities Company Limited & Another[11],*** on an application to stay proceedings on the ground that the contract between the parties had an arbitration provision, Kokaram J conducted an analysis of the legislative frameworks in this jurisdiction and in that of the United Kingdom in relation to arbitration. The Learned Judge highlighted the primacy given to arbitration by section 9 of the UK Arbitration Act 1996 as compared to the much wider discretion for judicial intervention in FIDIC contracts in this jurisdiction by section 7 of the Arbitration Act of Trinidad and Tobago Chapter 5:01. The court considered that the difference in the wording of the legislation in the UK and Trinidad was fundamental to differences in interpretation of "disputes" for the purpose of Clause 20 of FIDIC. ***Amec Civil Engineering Limited*** supra was specifically addressed and it was appreciated that in ***Amec Civil Engineering Limited*** supra and other UK authorities, attributed a wider interpretation to "dispute".[12]

41. Further at paragraphs 44 & 45, His Lordship had the following to say:

> "*44. Even though it can be contended, as the modern authorities on section 9 of the UK Act seems to suggest, that mere silence to a claim in some circumstances can give rise to a*

[10] See paragraph 87 of the Statement of Case
[11] CV2017-02465
[12] See paragraphs 12 to 16 of Mootilal Ramhit & Sons Contracting Limited v Education Facilities Company Limited & Another.

dispute and the arbitrator would equally be best placed to determine if a dispute has arisen, it is ultimately a question of discretion at this stage whether such silence on the Claimant's claim would justify diverting the claim on the doorsteps of a judgment, unless some defence is articulated, to arbitration. It is obvious that EFCL has not paid the sums claimed and that is why the claim has been filed. But is there a dispute that should be arbitrated? One consideration which was not explored in the authorities cited to the court is the purpose for which arbitration has been the preferred mechanism for the resolution of these contractual disputes in the first place. In the commercial world and in some of these building contracts, experts may be required to assist in the unravelling of rivalling contentions which are against a backdrop of a specialist area which courts are not frequently equipped. For this reason, the DAB can comprise persons of expertise relevant to the dispute. Although arbitration may be as complex as court proceedings, its attraction also comes from the suitability of these disputes being determined against the setting in most cases of expert knowledge.

45. In this case, there is nothing here more than simply to say that EFCL is not paying. It then begs the question why must arbitration proceedings be invoked when the Claimant can obtain summary judgment. There are no reasons advanced for the non-payment of the debt and without making any pronouncement on the matter, recognising that the matter is yet in its preliminary stages, one gets the impression that the application is a mere holding device to delay the payment on the IPCs."

42. Namalco submitted that, in any event, EMBD cannot say that it has acted in a manner similar to that suggested by Jackson J in ***Amec Civil Engineering Limited*** supra so as to give rise to the inference that it did not admit the Claim. That the undisputed evidence was that EMBD issued several letters to a commercial banking institution as recently as November 4, 2014 acknowledging the substantial balances owed to Namalco.

43. Additionally, at trial, it was revealed in the previously undisclosed Minutes of EMBD's Board Meeting of June 26, 2014 that following a Board level review of, amongst others, the status of three (3) of the four (4) Contracts this claim concerns, EMBD's Board directed that documents be prepared to send to the Line Minister to support its request for funding in order to complete the Projects.[13]

[13] See Core Bundle [CB.1 EMDB Disclosed Board Minutes: Page 303/390].

44. As such, Namalco submitted that rather than silence for a period of time on EMBD's part, the evidence discloses that EMBD, until this claim was filed, acknowledged the Claim and was seeking funding to meet same. That the inescapable inference is that EMBD did not pay the IPCs simply because it did not have the money to pay.

Submissions of EMBD

45. EMBD submitted that Namalco's argument is wrong for the following two reasons:

    i. By issuing the Original Action before the court, ignoring the arbitration and other requirements of the Contracts, Namalco has waived the effect of those clauses; and

    ii. The dispute resolution clauses do not have the effect for which Namalco contends. Properly interpreted, and contrary to Namalco's argument, those clauses do not amount to a condition precedent, compliance with which was mandatory before the court can have jurisdiction to consider a challenge to the IPCs.

46. According to EMBD, when Namalco filed its Statement of Case, it pleaded that the court was the appropriate forum.[14] As such, EMBD submitted that by voluntarily submitting to the jurisdiction of the court, Namalco has waived any right it may previously have had to insist on compliance with the dispute resolution provisions of the Contracts.

47. EMBD submitted that Namalco has not complied with any of the four stages with respect to its claim for payment under the IPCs alleged. That if Namalco was correct in its argument with respect to the existence of a condition precedent, the court would not have jurisdiction to hear Namalco's claim.

48. According to EMBD, Namalco attempted to avoid the aforementioned objection by arguing that there was no dispute with respect to the IPCs on which it sues. EMBD submitted that whether a dispute exists cannot be judged by the position of one party. That a dispute existed between EMBD and Namalco from the simple fact of the non-payment of the IPCs.

[14] See paragraph 87 of Namalco's Statement of Case

49. EMBD relied on the English case of ***Amec Civil Engineering Limited v Secretary of State for Transport***[15] wherein Jackson J (as he then was) stated the following:

> *"The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The Respondent may prevaricate, thus giving rise to the inference that it does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference."*[16]

50. Moreover, EMBD submitted that the dispute resolution clauses present in the Contracts do not have the effect for which Namalco argued. According to EMBD, Namalco's argument that the terms of Sub-Clause 20.6 in the Petit Morne and Cedar Hill Contracts amount to a condition precedent, requiring all disputes to be referred to the Engineer, rested on reading Sub-Clause 20.6 in isolation. That it is trite law that a contract has to be read as a whole. As such, EMBD submitted that the meaning of Sub-Clause 20.6 has to be ascertained in light of Clause 20 as a whole.

51. According to EMBD, the starting point is Sub-Clause 20.2, which provides that disputes between the Parties are to be adjudicated "*in accordance with Sub-Clause 20.4"*. EMBD submitted that the terms of Clause 20.4 are not mandatory, but permissive. Sub-Clause 20.4 provides as follows:

> "*If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation by the Engineer, either Party may refer the dispute in writing to the DAB for its decision, with copies to the other party and the Engineer. . ."*

52. According to EMBD, the permissive nature of the referral to the DAB under Sub-Clauses 20.2 and 20.4 was underlined by the terms of Sub-Clause 20.8, which provides as follows:

[15] [2004] EWHC 2339 (TCC)

[16] See also, on appeal in the same case ([2005] EWCA Civ 291]) May LJ at [31] and Rix LJ at [63] – [69]

"*If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise:*

(a) Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply, and

(b) The dispute may be referred directly to arbitration under Sub-Clause 20.6 [Arbitration]."

53. EMBD submitted that Sub-Clause 20.8 did not simply provide for a situation, in which a DAB has been appointed, but also where the appointment has expired. Further, Sub-Clause 20.8 applied to a situation in which the Parties have chosen not to engage the DAB procedure at all. That was made clear by the catchall "*or otherwise*" in Clause 20.8. As such, EMBD submitted that sub-Clause 20.8(b) was explicit that the Parties may refer their dispute directly to arbitration under Clause 20.6.

54. According to EMBD, its construction of Clause 20 would not render the first paragraph of Sub-Clause 20.6 inoperative. EMBD submitted that the effect of the first paragraph was to make clear that any dispute of any nature may be referred to the Engineer, and if the Parties chose to refer a dispute to the Engineer, they could not abandon that reference and proceed straight to arbitration without first engaging in the intermediate step of review by the Engineer. Conversely, if the Parties chose not to engage in a reference to the DAB or to the Engineer, then they were free to refer their dispute straight to arbitration.

55. According to EMBD, although the dispute resolution clause under the Roopsingh Road and Picton Contracts was different, the construction of same would be identical to the clause under the Petit Morne and Cedar Hill Contracts. EMBD submitted that the words "*if any*" in Clause 20.6 reinforced the correctness of that approach. That those words made the following clear:

i. The nature of the DAB was optional; and

ii. If a process short of arbitration has been commenced, then arbitration was not available unless intermediate steps have been taken (such as the giving of a notice of dissatisfaction, which is what prevents the DAB from being "final and binding"). However, where no other

process has been commenced, there is nothing in Clause 20.6 to prevent the parties from referring their disputes to arbitration at their option.

56. As such, EMBD submitted that the court should prefer its construction and hold that it does have jurisdiction under the Contracts to hear challenges to the validity and accuracy of the IPCs.

Findings

Waiver

57. The court finds that the refusal of Namalco to engage the DRP provided in the Contracts does not amount to waiver of the contractual requirements imposed on EMBD to challenge the IPC assessments as provided in both versions of Clause 20.6 of the Contracts. In that regard, it appears to the court that the argument on the issue of waiver appears to be somewhat misconceived. The Party that may be entitled to waive is the Party that alleges that a dispute exists.

58. Under Clause 20.6 of the Petit Morne and Cedar Hill Contracts for there to be a referral in the first instance to the Engineer there must arise a dispute between the Employer and the Contractor or the Engineer or the Contractor. It is clearly the case for Namalco that they were not dissatisfied with the certifications by the Engineers as set out in the IPCs. Should EMBD have been dissatisfied, however, the said clause provided for EMBD to trigger the mechanism of dispute resolution by referral to the Engineer as a primary step in the process. This they clearly failed to do so that there was at the material time no dispute in respect of which the DRP could have been engaged by Namalco.

59. The non-engagement by the Contractor Namalco of the process cannot therefore be seen as being that of waiver of the expectation that should the Employer EMBD have been dissatisfied with the sums certified on the IPCs it ought to have triggered the DRP. In that regard, heavy submissions have been made on the issue of the meaning of dispute.

60. In ***Amec Civil Engineering Ltd*** (supra) the court set out the interpretation of "dispute" having regard to the UK statute as follows:

1. The word "dispute" should be given its normal meaning.

2. Litigation over the meaning of the word "dispute" has produced helpful guidance but no hard-edged legal rules as to what is or is not a dispute.

3. The mere fact of notification of a claim does not automatically and immediately give rise to a dispute; a dispute does not arise unless and until it emerges that the claim is not admitted.

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

5. The period of time for which a Respondent may remain silent before a dispute is to be inferred, depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the Respondent who has a legal duty to consider the claim independently and then give a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.

6. If the Claimant imposes upon the Respondent a deadline for responding to the claim, that deadline does not automatically curtail what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the court comes to consider what is a reasonable time for responding.

7. If the claim as presented by the Claimant is so nebulous and ill-defined that the Respondent cannot sensibly respond to it, neither silence by the Respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication.

61. Applying the tests set out above, which although wide in applicability, the court is of the view remains good law in this jurisdiction, it would have been the case that the prolonged period of

non-payment would at the very least have made it abundantly clear that there existed a dispute between the Employer and the Contractor on the issue of the payment of the IPCs. This is so having regard to the context and circumstances surrounding the non-payment of the IPCs. However, it is equally clear that reasons for the non-payment of the IPCs would have resided within the knowledge of EMBD who was equally entitled to refer the basis of its concern to the Engineer but failed so to do. In the circumstances therefore, it appears to the court that Namalco's exercise of its entitlement to file the original claim in preference to the DRP did not amount to a waiver of the expectation that should EMBD have had an issue with the IPCs, it would have likewise engaged the DRP.

62. In this regard, the court also noted the reliance placed on the dicta of Kokaram J as he then was, in ***Mootilal Ramhit & Sons Contracting Limited*** (supra) and is of the view that the dicta in that case did not seek to derogate from the dicta set out in ***Amec*** but engaged in a discussion in the wider context of the issue of the test for the grant of a stay under section 9 (4) of the UK Arbitration Act as opposed to that under section 7 of the Arbitration Act of Trinidad and Tobago, the discretion to stay being wider under the latter than the former. In treating with the issue of when a dispute arises, the court had the following to say at paragraph 17:

> *"The interpretation of what amounts to a dispute is an inclusive interpretation and eschews opportunistic technical obstacles to achieving this beyond those which the clause necessarily requires. The argument that a dispute has not arisen because the claim is unanswerable or has not been admitted may not always find welcome reception by the court in determining whether the dispute ought not to be arbitrated. See* ***Halki Shipping Corp v Sopex Oils Ltd***
>
> ***('The Halki')*** *[1998] 1 Lloyds Rep. 465. However, as Rix LJ observed "dispute" takes its flavour from its context."*

63. The court is of the view that the same principles apply to the DRP contained in the Contracts for Roopsingh Road and Picton.

Are the requirements set out in the DRP prerequisites to challenging the IPCs in court or put another way, does the fact that the DRP process was not engaged by a party prohibit that party from challenging the IPC in court

64. The court has found much assistance from the authority relied on by Namalco namely ***A. SA v B. SA, 4A_124/2014***; an opinion of the Swiss Federal Supreme Court in interpreting the relevant clauses and whether compliance is mandatory. A. SA was a State Company in charge of highways and national roads in the relevant country in which B. SA, a French law company, specialised in road works. The State Company and the Contractor had entered into contracts to carry out restoration road works. The framework of the contracts was the 1st Edition 1999 FIDIC. The court stated the following at pages 15 to 17:

> *"3.4.3.2. Contrary to the view of the majority arbitrators, systematic interpretation of the provisions using the words "shall" and "may" does not lead to a different result. In this respect, one does not see why the first paragraph of Sub-Clause 20.4 would be a lex specialis to the first paragraph of Sub-Clause 20.2 just because the former gives a less detailed definition of the word "dispute" than the latter, or for what reason the wording "either Party may (emphasis added by the Federal Tribunal) refer the dispute in writing to the DAB for its decision, which is contained there," would turn the implementation of the DAB into a mere option. Indeed, once replaced in its context, namely in the situation in which a DAB is already constituted, the aforesaid wording simply means that when a dispute arises between the Parties, each may seize the DAB; it says nothing else and certainly not that seizing the DAB is optional. Moreover, the text of the first paragraph of Sub-Clause 20.6 clearly establishes that the existence of a decision by the DAB is a sine qua non condition to the initiation of arbitral proceedings, except in the specific case of paragraph 5 of Sub-Clause 20.4, i.e., the absence of a decision of the DAB within 84 days after its implementation. This is indirectly confirmed by the second sentence of paragraph 6 of Sub-Clause 20.4, which reserves direct access to arbitration in two exceptional cases considered by Sub-Clauses 20.7 (failure to comply with an enforceable decision of the DAB) and 20.8 (expiry of the DAB mission).*
>
> *3.4.3.3. The broad interpretation of Sub-Clause 20.8 of the General Conditions by the majority of Arbitral Tribunal is not more convincing. According to it and insofar as it actually has such a meaning, it would be sufficient for a DAB not to be operational at the time*

arbitration proceedings are initiated, no matter for what reason, for a decision of this body to become optional. Such a conclusion would ultimately turn the alternate dispute resolution mechanism devised by FIDIC into an empty shell. Moreover, the reasons advanced in support are of little weight. First, while it is true that pursuant to Art. 1.2 of the General Conditions the titles do not have to be taken into consideration when interpreting the aforesaid conditions, comparing their text with that of the Sub-Clause they are a title to is still of some interest to understand it properly. As to Sub-Clause 20.8, it appears that what is contemplated here is primarily the exceptional situation in which the mission of a standing DAB expires at the end of the time limit it was given before a dispute arises between the parties. As to the reason for this Sub-Clause, some Red Book commentators emphasise that in its absence there would be uncertainty as to whether the dispute could nonetheless be submitted to arbitration or instead to the competent state court (Baker, Mellors, Chalmers and Lavers, op. cit., p. 552, n. 9.222), whilst other commentators even go as far as excluding any legal recourse other than an amicable settlement in such a case (Glover and Hughes QC, op. cit., p. 409, n. 20-080). Furthermore, the majority arbitrators give great weight to the wording "or otherwise" at the first paragraph of Sub-Clause 20.8. This very vague expression doubtlessly does not facilitate understanding the Sub-Clause in question. Yet, interpreting it literally and extensively would short-circuit the multi-tiered alternative dispute resolution system imagined by FIDIC when it came to a DAB ad hoc procedure because, by definition, a dispute always arises before the ad hoc DAB has been set up, in other words, at a time when "there is no DAB in place," however, such interpretation would clearly be contrary to the goal the drafters of the system had in mind (Baker, Mellors, Chalmers, and Lavers, op. cit., p. 553, n. 9.224). The expression "or otherwise" must, in reality, permit taking into consideration other occurrences than the mere expiry of the mission of the DAB without limiting them to any objective circumstances independent of the will of the Parties, as the Appellant would like – without substantiating its opinion in this respect on the text of Sub-Clause 20.8. According to the guide published by FIDIC and quoted in the award under appeal, these other occurrences could include the inability to constitute a DAB due to the intransigence of one of the Parties (The FIDIC Contracts Guide, 2000, p. 317 i.f.). The finality of the Sub-Clause in question is ultimately to preserve the capacity of the Parties in any circumstance to avail themselves of one of the dispute resolution mechanisms they agreed upon and in particular of the most important one, namely arbitration (Baker, Mellors, Chalmers, and Lavers, op. cit., p. 553, n. 9.223). The excerpt of the aforesaid English case (see 3.1.1., paragraph 4, i.f., above) does not help

the argument of a voluntary recourse to the DAB, no matter what the majority arbitrators think. As can be seen easily when reading § 11 of the decision, the Parties agreed in an amendment to the General Conditions that the DAB should be constituted within 42 days from the starting date of the Contract, a condition which was not met, so that Sub-Clause 20.8 was effectively applicable. The extrapolation in which the majority of the Arbitral Tribunal indulges on the basis of the words general exception in a short passage of an ICC arbitral award reproduced in the award under appeal, which would allegedly qualify Sub-Clause 20.8, is not more decisive. Finally, the same applies to the aforesaid passage of the FIDIC guide in which the intransigence of a party is given as an example of a situation in which the implementation of the DAB may be omitted. That the mandatory recourse to the DAB may suffer certain exceptions does not suggest that resorting to this body would allegedly be voluntary but rather confirms the general rule making the recourse to this alternate dispute resolution mechanism compulsory before introducing a request for arbitration…

3.4.4. The writers who addressed the issue consider that the DAB dispute resolution proceeding foreseen by Art. 20 of the General Conditions is mandatory insofar as it must be finished for an arbitration procedure to begin (Ahrens, op. cit., p. 192 f.; Brown-Berset and Scherer, op. cit., p. 283; Baker, Mellors, Chalmers and Lavers, op. cit., p. 552 f., n. 9.222 and 9.224 i.f.; Glover and Hughes QC, op. cit., p. 388, n.20-026, p. 394, n. 20-041, p. 399, n. 20-053 and p. 405, n. 20-068). They must be followed for the reasons mentioned above."

65. This court readily accepts the dicta set out above but in so doing notes that the issue under review appeared to be one of the mandatory nature of resort to the DAB as a pre-requisite to the institution of arbitration proceedings. To that extent, Clauses 20.2 and 20.4 do not in the court's view attempt to restrict the available remedy of the aggrieved Party to that of arbitration only. The conjoined effect of 20.2 and 20.4 appears to be that prior to a contracting Party pursuing arbitration, recourse must be first had to the DAB. Under 20.2 it is mandatory that disputes are adjudicated on by the DAB in accordance with Clause 20.4, the dispute having been referred to the DAB under 20.4. The DAB does not act as an Arbitrator. Within eighty-four (84) days after the referral or at such agreed time, the DAB would give its decision. If a Party is dissatisfied with the decision a notice of dissatisfaction is given by the dissatisfied Party to the other Party. A notice of dissatisfaction may also be given by either Party if the DAB fails to give its decision within the relevant time allotted. Clause 20.4 makes it pellucid that failure to engage the above disentitles

the Parties from commencing arbitration proceedings. This is the mandatory effect of the clauses set out in ***A. S.A.*** (supra)

66. In the present case there is, additionally, the intervention as it were of Clause 20.6 in all the Contracts. These must be considered separately.

Cedar Hill and Petit Morne

67. Clause 20.6 of the above Contracts are Conditions of Particular Application as opposed to those of 20.2 and 20.4 which are General Conditions of Contract, the Parties having chosen to contract specifically outside of the generally applicable 20.6. It follows that contractually where there arises differences between the General Conditions and the Conditions of Particular application the latter takes precedence[17]. An examination, therefore, of Clause 20.6 in the Cedar Hill and Petit Morne Contracts reveals that the clause provides a mechanism for the resolution of disputes by reference to the Engineer in the first place who shall give his decision in writing. Such decision is final and binding. If the Contractor is then dissatisfied with the decision then within twenty-eight (28) days, the Contractor may write to the Employer who then shall make a decision and communicate same to both Parties within forty-eight (48) days of such "appeal" from the Contractor. Arbitration follows thereafter in the event of dissatisfaction.

68. The court must, therefore, decide whether the provisions of 20.6 differ from the provisions of 20.2 and 20.4 and if so, to what extent. It is instructive that the first sentences of 20.4 and 20.6 are almost identical. The first sentence of 20.4 reads:

> *If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation by the Engineer, either Party may refer the dispute in writing to the DAB for its decision (emphasis mine) with copies to the other Party and the Engineer.*

The first sentence of Clause 20.6 reads in part:

[17] *"…Where the requirements of the Conditions of Particular Application differ from those of General Conditions of Contract, the requirements of Conditions of Particular Application will prevail…"*

<u>If any dispute of any kind whatsoever shall arise between the Employer and the Contractor or the Engineer and the Contractor</u> in connection with or arising out of the Contract, or the carrying out of the Works, whether during the progress of the Works or after their completion and whether before or after the termination, abandonment or breach of the Contract<u>, it shall, in the first place be referred to be settled by the Engineer.</u> (Emphasis mine).

69. When juxtaposed in such a manner it becomes clear to the court that Clause 20.6 essentially prevails over Clause 20.4 in so far as the body to whom the dispute is to be referred is concerned. In that regard, the mandatory referral whether a DAB exists or not, is firstly to the Engineer in the case of the Cedar Hill and Petit Morne Contracts. 20.6 then provides a clear pathway to the appointment of an Arbitrator thereafter without any recourse to the DAB. The parties, therefore, having agreed to the Conditions of Particular Application at 20.6, that clause prevails thereby rendering both 20.4 and 20.5 of the General Conditions somewhat otiose but not replaced. In that regard, it must be noted that the Conditions of Particular Applications present in this case were not present in the ***<u>A. S.A.</u>*** case and therefore the dicta of that case must be understood within the context in which it arose.

70. It must follow, therefore, that 20.6 prevails over 20.4. The Parties would have had recourse to the process under Clause 20.6 to settle disputes, however, if a DAB was appointed by the Parties under Clause 20.4, the Parties may have also had the option of engaging the DAB prior to arbitration.

<u>Roopsingh Road and Picton Contracts</u>

71. Clause 20.6 of these Contracts provide:

> *Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by reference at the option of either Party to arbitration in accordance with the Arbitration Act Chapter 4:01 of the Laws of Trinidad and Tobago (1980) or any modification, amendment or re-enactment thereof.*

72. It follows that Clauses 20.2 and 20.4 remain the active DRP procedure in relation to these Contracts and it equally follows that the process of recourse to the DAB is mandatory should the dissatisfied Party wish to enter into arbitration. . In fact, the EMBD appeared to have engaged the DAB process in relation to Picton in an acknowledgment that the DAB process was also available. It also follows in the court's view, that the Parties are not debarred from seeking relief before the courts in light

of the DRP processes set out. However, in respect of the Employer, EMBD, the position is somewhat different for the reasons that follow on the second issue.

Issue 2: ***What was the effect of Clause 2.5 of the Conditions of Contract on EMBD's Defence and Counterclaim***

All Contracts

Clause 2.5

73. The General Conditions of Contract contained in 2.5 remains the same for all of the Contracts. It must be noted that this clause relates to claims by **the Employer only, namely EMBD**. Clause 2.5 of the construction Contracts provides as follows:

> *"If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, and/or to any extension of the Defects Notification Period, the Employer or the Engineer shall give notice and particulars to the Contractor […]*
>
> *The notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the Claim. A notice relating to the extension of the Defects Notification Period shall be given before the expiry of such period.*
>
> *The particulars shall specify the Clause or other basis of the Claim, and shall include substantiation of the amount and/or extension to which the Employer considers himself be entitled in connection with the Contract. The Engineer shall then proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine (i) the amount (if any) which the Employer is entitled to be paid by the Contractor, and/or (ii) the extension (if any) of the Defects Notification Period in accordance with Sub-Clause 11.3 [Extension of Defects Notification Period].*
>
> *This amount may be included as a deduction in the Contract Price and Payment Certificates. The Employer shall only be entitled to set off against or make any deduction from an amount certified in a Payment Certificate, or to otherwise claim against the Contractor, in accordance with this Sub-Clause."*

74. Clause 2.5 (which appears to have been a new clause contained in the 1999 Redbook), was the subject of scrutiny by Their Lordships of the Privy Council in ***NH International (Caribbean) Limited (Appellant) v National Insurance Property Development Company Limited (Respondent) (No 2) (Trinidad and Tobago)*** [2015} UKPC 37. This clause prevents the Employer, except in limited circumstances, from making any deductions from Interim Payment Certificates or to otherwise claim against the Contractor without first notifying its claim under this Sub-Clause, thereby giving the Contractor the opportunity to respond to the Employer's claim prior to any deductions being made. The notification process is then followed by the mechanism provided in Sub-Clause 3.5 whereby the Engineer is required to agree or determine the matter following a consultation period. It is the amount determined by the Engineer that is then deducted from the Interim Payment Certificate or claimed against the Contractor.

75. In ***NH International***, one of the issues for determination was the correctness of the Arbitrator's decision to permit set offs and cross claims although there had been no compliance with Clause 2.5. In one of three awards, having found what sums were owing to NHIC from NIPDEC, the Arbitrator went on to consider "NIPDEC's Counterclaims", in respect of which he rejected NHIC's contention that Clause 2.5 barred all or some of the Counterclaims, because "clear words are required to exclude common law rights of set-off and/or abatement of legitimate cross-claims" and (by implication) the words of Clause 2.5 were not clear enough.

76. Beginning at paragraph 38 Lord Neuberger after setting out disagreement with the Court of Appeal on the issue, set out the following:

> *86……. In agreement with the attractively argued submissions of Mr Alvin Fitzpatrick SC, it is hard to see how the words of Clause 2.5 could be clearer. Its purpose is to ensure that claims which an employer wishes to raise, whether or not they are intended to be relied on as set-offs or cross-claims, should not be allowed unless they have been the subject of a notice, which must have been given "as soon as practicable". If the Employer could rely on claims which were first notified well after that, it is hard to see what the point of the first two parts of Clause 2.5 was meant to be. Further, if an Employer's claim is allowed to be made late, there would not appear to be any method by which it could be determined, as the Engineer's function is linked to the particulars, which in turn must be contained in a notice, which in turn has to be served "as soon as practicable".*

39. Perhaps most crucially, it appears to the Board that the Court of Appeal's analysis overlooks the fact that, although the closing part of Clause 2.5 limits the right of an Employer in relation to raising a claim by way of set-off against the amount specified in a Payment Certificate, the final words are "or to otherwise claim against the Contractor, in accordance with this sub-clause". It is very hard to see a satisfactory answer to the contention that the natural effect of the closing part of Clause of 2.5 is that, in order to be valid, any claim by an Employer must comply with the first two parts of the clause, and that this extends to, but, in the light of the word "otherwise", is not limited to, set-offs and cross-claims.

40. More generally, it seems to the Board that the structure of Clause 2.5 is such that it applies to any claims which the Employer wishes to raise. First, "any payment under any clause of these Conditions or otherwise in connection with the Contract" are words of very wide scope indeed. Secondly, the clause makes it clear that, if the Employer wishes to raise such a claim, it must do so promptly and in a particularised form: that seems to follow from the linking of the Engineer's role to the notice and particulars. Thirdly, the purpose of the final part of the clause is to emphasise that, where the Employer has failed to raise a claim as required by the earlier part of the clause, the back door of set-off or cross-claims is as firmly shut to it as the front door of an originating claim.

41. The reasoning of Hobhouse LJ in Mellowes Archital Ltd v Bell Products Ltd (1997) 58 Con LR 22, 25-30, supports this conclusion. It also demonstrates that a provision such as Clause 2.5 does not preclude the Employer from raising an abatement argument – e.g. that the work for which the Contractor is seeking a payment was so poorly carried out that it does not justify any payment, or that it was defectively carried out so that it is worth significantly less than the Contractor is claiming.

<u>The submissions of EMBD</u>

77. EMBD submitted that Clause 2.5 is only relevant to its alternative case on abatement, which takes the IPCs issued as the starting point for the value of the works. That its alternative case is subsidiary to its primary case that Namalco's conduct in making applications for payment was dishonest and/or negligent. According to EMBD, if the court finds in its favour on its primary case, then the IPCs were obtained by means analogous to fraud, and Namalco cannot rely on the IPCs in such circumstances.

78. In so submitting, EMBD relied on the English Court of Appeal case of ***Mayor, Aldermen and Burgess of Kingston-Upon-Hull v Harding & Anor***,[18] wherein the Contractors were employed to construct certain sewers. Whenever the Contractor saw the approach of the supervising Engineer's representative, it would give a signal to its workers, allowing the latter to cover up brickwork, which was defective. The result was that the Engineer never observed anything wrong, and the defective character of the work was not observed during the progress of the works.[19]

79. As such, the Contractor applied for, and the Engineer duly issued, the Certificate of Completion, entitling the Contractor to the final ten percent (10%) of the Contract Price. The Court of Appeal held that the Employer was entitled to avoid the Certificate of Completion. Bowen LJ stated as follows:

> *"…It was said that the final certificate had been given. It was, however, obtained by fraud, and the corporation, as against the persons who so obtained it, were unquestionably entitled, on discovery of the fraud, to elect within a reasonable time to avoid the certificate. As soon as they did so, it was gone as against the Contractors, and all persons who had not previously acted upon the faith of it, so as to alter their position. It would no doubt stand, unless avoided; and, if the corporation had taken no steps to repudiate it, it would have been good enough; but it has been impugned by the corporation, from whose engineer it was obtained, in such a way as to entitle them to treat it as not binding upon them..."*

80. As such, EMBD submitted that if Namalco cannot rely on the IPCs, then it equally cannot rely on Clause 2.5 because of the following:

    i. that would leave EMBD without remedy to recover money paid by means analogous to fraud, which would allow Namalco to benefit from its own dishonest conduct; and

    ii. Clause 2.5 is dependent upon the IPCs being valid, because it anticipates deductions being made in subsequent Payment Certificates, including IPCs.

[18] [1892] 2 QB 494
[19] See page 496

81. With respect to its alternative abatement case, EMBD accepted that the leading case on the effect of Clause 2.5 is that of the Privy Council in ***NH International (Caribbean) Ltd v National Insurance Property Development Co Ltd***[20].

82. In relation to the effect of ***NH International (Caribbean) Ltd.*** supra, EMBD submitted that there were three key points, which were common ground between EMBD and Namalco. Those were as follows:

    i. Clause 2.5 applies to any claim for the payment of money by EMBD against Namalco;

    ii. To the extent that EMBD did not comply with the notification provisions of Clause 2.5, EMBD cannot make a claim for the payment of money against Namalco, nor can EMBD claim payment by way of a set-off against Namalco's claims or by a cross-claim; and

    iii. EMBD is however entitled to the defence of abatement to the extent that it demonstrates that the work for which Namalco is claiming payment was either not carried out at all or is worth less than claimed.

83. According to EMBD, the issue for the court is exactly how the abatement available to EMBD operates. EMBD submitted that its abatement claim operates in the following way:

    i. An abatement is a defence which may operate to extinguish the Claim for works done entirely, or it may diminish it;

    ii. Namalco is claiming for the unpaid balance of the IPCs. That balance is said to total one billion, one hundred and ninety-two million, three hundred and twenty-eight thousand, three hundred and sixteen dollars and fifty-four cents ($1,192,328,316.54). However, EMBD's primary case on abatement is that the works have been over-certified in the sum of one billion, two hundred and twenty-three million, one hundred and ninety-five thousand, seven hundred and thirty-two dollars and one cent ($1,223,195,732.01);

    iii. Accordingly, the purely defensive abatement to which EMBD is entitled diminishes Namalco's claim in its entirety, such that Namalco is entitled to recover $NIL.

[20] [2015] UKPC 37

84. EMBD also submitted that the aforementioned does not involve the "revision" by the court of any of the IPCs, nor does it involve any recovery by EMBD of amounts already paid. It simply extinguishes Namalco's claim. As such, EMBD submitted that there is nothing in the abatement claimed which is precluded by Clause 2.5 of the Construction Contracts.

The submissions of Namalco

85. Namalco submitted that on a plain reading of the Clause 2.5, it is clear that if an Employer wishes to raise a claim he must do so in a particular manner and in a particularised form. That the following were the two essentials:

    i. A Clause 2.5 Notice must be issued as soon as practicable; and

    ii. The notice itself must give particulars of the basis of the Employer's claims and include substantiation of the amount to which the Employer considers himself entitled.

86. According to Namalco, the Privy Council in ***NH International (Caribbean) Ltd.*** supra carefully reviewed Clause 2.5. The Board commenced its consideration of Clause 2.5 at paragraph 38 of its judgment. It expressed the view that the purpose of the clause was to ensure that claims which an employer wished to raise whether or not they were intended to be relied on as set-offs or cross-claims, should not be allowed unless they have been the subject of an appropriate notice.

87. Based on Clause 2.5 and ***NH International (Caribbean) Ltd.*** supra, Namalco submitted as follows:

    i. Clause 2.5 itself provides for the consequence of non-compliance and is a condition precedent to the bringing of any claims by EMBD against Namalco;

    ii. Since EMBD has admittedly failed to issue a Clause 2.5 Notice in relation to any of the Projects it cannot recover any payments already made by it for those projects and, to that extent, the Counterclaim must fail. Quite simply, those claims (whatever their juridical basis and whether restitutionary in nature or not) would amount to claims for payment by the Employer under or in connection with the subject contract and, lacking the appropriate notice are precluded by the closing part of Clause 2.5.

iii. Since EMBD cannot recover any payments already made by it for the Projects, the court is precluded from revising any certificates issued in relation thereto below the value of the payments made thereunder. By way of example, an IPC for one million dollars ($1,000,000.00) that was paid as to six hundred thousand dollars ($600,000.00) cannot be reduced below six hundred thousand dollars ($600,000.00); and

iv. As a consequence, Namalco is entitled, at a minimum, to contractual interest on all payments made by EMBD pursuant to the IPCs from the date that payment was due to the date it was made. For example, if the sum of one million dollars ($1,000,000.00) was due, on January 1, 2019 and part payment of six hundred thousand dollars ($600,000.00) was made on May 1, 2019 then Namalco would be entitled to claim contractual interest on the sum of six hundred thousand dollars ($600,000.00) from January 1, 2019 to April 30, 2019.

88. As such, Namalco submitted that EMBD's entire Counterclaim including its relief for re-payments for sums must be dismissed with costs.

89. Namalco further submitted that EMBD has sought to confuse and complicate the matter by introducing, for the first time, the issue of fraud into its case in relation to Clause 2.5. According to Namalco, the aforementioned submission must be rejected since EMBD has not by its pleadings or otherwise sought to raise any allegation of fraud against Namalco in procuring the IPCs.

90. Consequently, Namalco submitted that EMBD is left with no alternative but to seek to abate the value of Namalco's work at common law. That the aforementioned is EMBD's only defence.

Finding

91. The dicta in ***NH International*** is pellucid in its effect on this case. The court understands the position to be that the Defendants, EMBD, did not on the evidence before the court give the required notice pursuant to Clause 2.5 promptly and in the particularised form prior to making its challenge to the IPCs in court whether in its Defence or by Counterclaim. EMBD, therefore, cannot raise or pursue set-offs or cross-claims but are not prohibited from challenging the IPCs in court on the limited basis of the common law defence of abatement. In that regard, the court does not accept the submission of EMBD that a finding otherwise means that Namalco cannot pursue its claim on that very basis as Clause 2.5 is specific to the Employer.

92. Additionally, the court agrees that the issue of fraud is not a live one in this case as fraud is not the pleaded case of EMBD. Issues such as negligence and dishonesty in certification are issues that would have been germane to whether the IPCs were to be paid and whether EMBD would have been entitled to be compensated for acts of negligence and dishonesty and so could have validly formed the basis for notices under Clause 2.5 However, EMBD failed to issue such notices pursuant to Clause 2.5 and are now bound by that failure. To that end, the court does not accept the submission of EMBD that the Clause 2.5 issue is only relevant to the issue of abatement and not to what it has termed its primary defences.

93. It, therefore, follows that EMBD will be permitted to challenge the IPCs on the basis of abatement, namely, that the amounts due are incorrect because of defects in the work. The IPCs are not otherwise challengeable as between the Employer and the Contractor on the other grounds raised by EMBD in their Defence and Counterclaim, namely, negligence, dishonesty and conspiracy in so far as there was an attempt to rely on the conspiracy defence. Further, it also follows that EMBD cannot, therefore, pursue its Counterclaim for repayments.

Abatement and the alleged extinguishment of Namalco's claim

The distinction between abatement and set off

94. At common law, from the early nineteenth century, when A sued B for the cost of goods or for work and labour, B was permitted to deduct from the amount due to A, a sum representing the diminution in the value of the goods or services caused by A's breach of contract. This would also give B a true defence at law to A's claim. In so far as it applies to a breach of warranty embodied in contracts for the sale of goods. Such a defence may, and usually does, rely on an unliquidated cross-claim for damages. The rule is confined to contracts for the sale of goods and for work and labour, and does not extend to contracts generally. For a party to rely on the right of abatement he must establish that the breach of contract directly affected and reduced the actual value of the goods or work, so that any other loss or damage, if it is to be relied on as an answer to a claim for the price, will arise from the principle of equitable set-off.[21]

[21] **Halsbury's Laws of England, Vol 11 (2020), para. 384**

95. In that regard, it is to be noted, firstly, that the remedy of set off is not available to EMBD for the reasons set out above and the defence of abatement does not operate by way of a set off in any event. Secondly, it appears that the burden of proof lies with he who raises the defence of abatement to establish that the breach of contract directly affected and reduced the actual value of the work and not the other way around as argued by EMBD. In that regard, EMBD has submitted that Namalco was required to lead evidence as to the value of work performed in keeping with the value of the IPCs. This, however, is not the evidential requirement when treating with common law abatement as opposed to set off, EMBD's case lying with the former and not the latter.

96. The court, therefore, does not agree with the submission that the effect of the common law defence is that the claim of Namalco is extinguished.

<u>Issue 3</u> - ***Whether the provision of supporting documents was a condition precedent to the payment of an IPC***

97. The starting point for the interim payment process is the submission of Namalco's 'Statement' or application for payment. Clause 14.3 prescribes the content of that statement, and included the following:

> *"The Contractor shall submit a statement in two copies to the Engineer after the end of each month, in a form approved by the Engineer, showing in detail the amounts to which the Contractor considered himself to be entitled, together with supporting documents which shall include the report on the progress during this month in accordance with Sub-Clause 4.21 [Progress Reports]."*

98. The content of the supporting documents was set out in further detail at Clause 4.21 which provides as follows:

> *"Unless otherwise stated in the Particular Conditions, monthly progress reports shall be prepared by the Contractor and submitted to the Engineer in six copies. . .*
>
> *Each report shall include:*

i. *Charts and detailed descriptions of progress, including each stage of design (if any), Contractor's Documents, procurement, manufacture, delivery to Site, construction, erection and testing. . .*

ii. *Photographs showing the status of manufacture and of progress on the Site;*

iii. *For the manufacture of each main item of Plant and Materials, the name of the manufacturer, manufacture location, percentage progress, and the actual or expected dates of:*

a) *Commencement of manufacture;*

b) *Contractor's inspections;*

c) *Tests; and*

d) *Shipment and arrival at the Site.*

iv. *The details described in Sub-Clause 6.10 [Records of Contractor's Personnel and Equipment];*

v. *Copies of quality assurance documents, test results and certificates of Materials;*

vi. *Lists of notices given under Sub-Clause 2.5 [Employer's Claims] and notices given under Sub-Clause 20.1 [Contractor's Claims];*

vii. *Safety statistics, including details of any hazardous incidents and activities relating to environmental aspects and public relations; and*

viii. *Comparisons of actual and planned progress, with details of any events or circumstances which may jeopardise the completion in accordance with the Contract, and the measures being (or to be) adopted to overcome delays."*

99. Clause 14.6 provides as follows:

"[…] The Engineer shall, within 28 days after receiving a Statement and supporting documents, issue to the Employer an Interim Payment Certificate which shall state the amount which the Engineer fairly determines to be due, with supporting particulars.

[…] An Interim Payment Certificate shall not be withheld for any other reason, although:

a) *If any thing supplied or work done by the Contractor is not in accordance with the Contract, the cost of rectification or replacement may be withheld until rectification or replacement has been completed; and/or*

b) *If the Contractor was or is failing to perform any work or obligation in accordance with the Contract, and had been so notified by the Engineer, the value of this work or obligation may be withheld until the work or obligation has been performed.*

The Engineer may in any Payment Certificate make any correction or modification that should properly be made to any previous Payment Certificate. A Payment Certificate shall not be deemed to indicate the Engineer's acceptance, approval, consent or satisfaction."

100. Further, Clause 14.7 provides as follows:

"The Employer shall pay to the Contractor:

[…] (b) the amount certified in each Interim Payment Certificate within 56 days after the Engineer receives the Statement and supporting documents […]"

<u>The submissions of EMBD</u>

101. According to EMBD, pursuant to Clause 14.6, the Engineer's obligation to issue an IPC runs from the date that the Engineer received both the application for payment and the supporting documents. As such, EMBD submitted that its obligation <u>to pay</u> IPCs under Clause 14.7 only begins to run from the date the Engineer receives both the application for payment and the supporting documents. That under Clauses 14.6 and/or 14.7, the supporting documents were a condition precedent to the issue of an IPC by the Engineers.

102. According to EMBD, at every stage, the remainder of the payment provisions of the Construction Contracts reinforce the importance of the Engineer receiving the supporting documents. For example, with respect to the Taking Over Certificate and the Final Statement, the same process of submission by Namalco is required under Clauses 14.10 and 14.11 which provide as follows:

> *"14.10 Within 84 days after receiving the Taking Over Certificate for the Works, the Contractor shall submit to the Engineer six copies of a Statement at completion with supporting documents in accordance with Sub-Clause 14.3 [Application for Interim Payment Certificates…]*
>
> *14.11 Within 56 days after receiving the Performance Certificate, the Contractor shall submit, to the Engineer, six copies of a draft final statement with supporting documents showing in detail in a form approved by the Engineer. . ."*

103. Further, Namalco's right to terminate the Construction Contracts for non-payment under Clause 16.2(c) is also expressed to accrue "*within 42 days after the expiry of the time stated in Sub-Clause 14.7 [Payment] within which payment is to be made*". According to EMBD, the learned editors of FIDIC Contracts: Law and Practice noted that that clause is to be construed as meaning "*i.e. within 56 days after the Contract Administrator has received the Statement and supporting documents from the Contractor*".

104. Consequently, EMBD submitted that on the plain words of the payment provisions of the Construction Contracts, time does not begin to run for the payment of any IPC that has been issued in default of compliance with the requirement to submit supporting documents with an application for payment.

105. According to EMBD, the parties' agreement that time would not start running until Namalco submitted the documents in support of its application for payment is readily understandable in the context of a re-measurable contract. EMBD submitted that it was wholly reliant on the Engineers with respect to the sums certified as due for payment. That in order to adequately certify in a manner in accordance with their obligations, the Engineers required substantiation of the quantities claimed by Namalco which the Engineers could then verify (for example, by re-measuring the works).

106. Khalil Baksh ("Baksh"), Project Manager, gave detailed evidence on EMBD's reliance on Namalco and the Engineers with respect to the accuracy of the quantities of works for which payment was sought. Further, during cross-examination when Baksh was challenged on the aforementioned, he rejected the suggestion that EMBD was in any position to independently interrogate the applications for payment made by Namalco. The court notes, however, that his evidence, in that regard, goes somewhat further. The material parts are set out later.

107. EMBD submitted that without adequate supporting documentation, it was wholly at the mercy of the Contractor and the Engineers. That the requirement that payment is not due until supporting documents are submitted was designed to prevent exactly the situation which has arisen on Namalco's claim, namely an attempt by a contractor to force payment from an employer long after the fact without having demonstrated that it actually undertook the works in respect of which payment is claimed.

108. Moreover, EMBD submitted that it neither waived the requirement for Namalco to submit the supporting documents with its applications for payment, nor is it estopped from relying on that requirement. That although it has paid a number of the IPCs, EMBD denied that by that fact, it elected not to enforce, or has waived, any of its rights. EMBD submitted that it did not itself interrogate the applications for payments made by Namalco. That at the time those payments were made as against the IPCs, EMBD was wholly unaware of any inadequacy in the supporting documents.

109. EMBD submitted that it is trite law that any election or waiver, in order to be effective, must be made with actual knowledge of the true state of affairs. EMBD further submitted that even if it had such knowledge of the inadequacy (which it did not); it had no knowledge of its right to withhold payment as against such documents. That it is also trite law that a party must have actual knowledge of his rights as a result of the true state of affairs.

110. EMBD submitted that it is not estopped from enforcing the clear terms of the payment provisions of the Construction Contracts against Namalco. According to EMBD, its payment of certain IPCs did not constitute a representation by it to Namalco. To Namalco's knowledge, EMBD was reliant on the Engineers to perform all assessments of the applications for payment. Moreover, Namalco knew (or must be taken to have known) that this was the position under the

Construction Contracts. As such, EMBD submitted that payment by it as against any particular IPC could not be taken as a representation by it as to the sufficiency of any document or set of documents since it was not itself performing that assessment.

111. EMBD submitted that even if there was such a representation (which is denied), it was difficult to see how Namalco relied on it, let alone relied on it to its detriment. As was apparent from the IPCs, which EMBD conceded, were compliant with the terms of the Construction Contracts, Namalco did at times submit monthly progress reports, which complied with its obligations, including up to the end of the works on the projects. As such, EMBD denied that there was any reliance by Namalco.

112. According to EMBD, it was open at all times for Namalco to submit the monthly progress reports in accordance with its obligations under the Construction Contracts. EMBD submitted that there was nothing irreversible about its decision not to pay any particular IPC. That Namalco could have chosen to resubmit its applications for payment in a way, which complied with the terms of the Construction Contracts but chose not to do so.

The submissions of Namalco

113. Namalco submitted that the provision of supporting documents was not a condition precedent to payment and/or issue of the IPCs. That even if it was, such a condition has been waived by estoppel or election.

114. Namalco submitted that a provision will only be a condition precedent to the liability of another where the following is present:

a) The relevant Contract sets out clearly the consequences of failing to comply with the requirements of the subject provision; or

b) Clear language effectively describing it as a condition precedent is used.

115. Namalco relied on the case of ***Steria Limited v. Sigma Wireless Communications Limited***[22], which was an example where clear language served to characterise a provision as a condition precedent notwithstanding that the clause itself did not contain an express warning as to the

[22] 118 Con LR 177

consequence of non-compliance. The words used in that case, in relation to an extension of time clause, were "*provided that the Sub-Contractor shall have given within a reasonable period written notice to the Contractor of the circumstances giving rise to the delay*".[23]

116. Namalco further relied on the case of ***City Inn Limited v. Shepherd Construction Limited***,[24] which was an example of a notice provision in an extension of time clause that was made a condition precedent by the draftsman expressly providing for the consequences of non-compliance. The relevant provision stated "*If the Contractor fails to comply with any one or more of the provisions of Clause 13.8.1…the Contractor shall not be entitled to any extension of time…*"

117. According to Namalco, Clause 14.7 does not contain the phrase "*provided that the Contractor shall have supplied supporting documents*" or any other language utilising similarly strong words. Neither does it set out the consequences for payment if a contractor fails to supply the requisite supporting documents. Rather it adopts directory language broadly similar in terms to the following provisions considered by the court in **Hong Kong (Sar) Hotel Ltd. v. Wing Key Construction Co. Ltd.[25]**:

> *"(d) The Main Contractor shall allow or pay to the Employer in the manner, hereinafter, appearing the amount of any direct loss and/or damage caused to the Employer by the determination. Until after completion of the Works under paragraph (a) of this sub-clause the Employer shall not be bound by any provision of this Contract to make any further payment to the Main Contractor, but upon such completion and the verification within a reasonable time of the accounts therefore the Architect shall certify the amount of expenses properly incurred by the Employer and the amount of any direct loss and/or damage caused to the Employer by the determination and, if such amounts when added to the monies paid to the Main Contractor before the date of determination exceed the total amount which would have been payable on due completion accordance with this Contract, the difference shall be a debt payable to the Employer by the Main Contractor; and if the said amounts when added to the said monies be less than the said total amount, the difference shall be a debt payable by the Employer to the Main Contractor."[26]*

[23] See paragraphs 90 and 91 of the judgment of Davies J.
[24] 2011 SC 127
[25] 166 Con LR 186
[26] See page 10 of the Judgment of Chan J58F

118. Chan J. held that the certification by the Architect of the amount of expense incurred by the Employer and the amount of direct loss and/or damages caused to the Employer by the determination of the Contract was not a condition precedent for the Employer's claim for loss and damage under the provision. The court noted that if it was intended that the Architect's notional final account should be a condition precedent, there was no reason why the provision itself should not have so expressly stated so. In the circumstances, the obligation to provide an account must be treated as directory.[27]

119. According to Namalco, the arbitration clause, found at Clauses 20.4 to 20.6 of the General Conditions made clear that an arbitrator could open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer. Namalco submitted that if the Arbitrator can determine what was due in respect of an application for payment notwithstanding that supporting documents had not been provided, then the provision of such documents to the Engineer could not amount to a condition precedent to payment. That if it was intended that those supporting documents should be a condition precedent to payment, it would have been easy to oust the application of Clauses 20.4 to 20.6 in circumstances where payment claims were unsupported.[28]

120. Namalco submitted that the position that clauses such as 14.7 are not to be construed as conditions precedent was made clear by the case of ***Penwith District Council v. VP Development***[29], which concerned three contracts incorporating the JCT standard form of building contract 1980 ed. as amended. Clause 30 of the relevant conditions provided, in material part, as follows:

> "30.6 .1 .1 Not later than 6 months after Practical Completion of the Works the Contractor shall provide the Architect/the Contract Administrator, or if so instructed by the Architect/the Contract Administrator, the Quantity Surveyor, with all documents necessary for the purposes of the computations required by the Conditions including all documents relating to the accounts of Nominated Sub-Contractors and Nominated Suppliers.
>
> 30.6 .1 .2 Not later than 3 months after receipt by the Architect/the Contract Administrator or by the Quantity Surveyor of the documents referred to in clause 30.6.1.1.2.2 the

[27] See paragraphs 83 and 86 of the Hong Kong judgement.
[28] See paragraphs 81 to 83 of the *Hong Kong* judgment.
[29] 1999 APP. L.R. 05/21

Quantity Surveyor shall prepare a statement of the computation of the Ascertained Final Sum as referred to in Clause 30.6.2 other than any to which Clause 30.6.1.2.1 applies 30.8 The Architect/the Contract Administrator shall issue the Final Certificate…not later than 2 months after whichever of the following occurs last:

….

The date on which the Architect/the Contract Administrator sent a copy to the Contractor of any ascertainment to which Clause 30.6.1.2.1 refers and of the statement prepared in compliance with Clause 30.6.1.2.2. The Final Certificate shall state:

…

30.8 .2 the Ascertained Final Sum calculated in accordance with Clause 30.6.2 and the difference (if any) between the two sums shall (without prejudice to the rights of the Contractor in respect of any Interim Certificates which have not been paid by the Employer) be expressed in the said Certificate as a balance due to the Contractor from the Employer or to the Employer from the Contractor as the case may be, and subject to any deductions authorised by the Conditions, the said balance shall as from *the 28th day after the date of the said Certificate be a debt payable as the case may be by the Employer to the Contractor or by the Contractor to the Employer."*

121. The question before that court was whether the steps set out in Clause 30.6 of the Contract were conditions precedent to the issue of a final certificate.[30] The court held that:

a) the language of the relevant sub-clauses was not couched in terms typical of a condition precedent;[31]

b) compliance with the obligation placed upon the Contractor pursuant to Clause 30.6.1.1 to provide the Contract Administrator with documents necessary for the purpose of the computations required by the Contract was not a necessary prerequisite to the creation of the Contract Administrator's authority to issue a final certificate and accordingly

[30] See paragraphs 16 and 17 of the judgement
[31] See paragraph 16

compliance with that sub-clause was not condition precedent to the exercise of that authority; and

c) if the Contractor did not submit the documents required by Clauses 30.6.1.1 then the Contractor Administrator and the Quantity Surveyor had to do the best they could using such information as was provided by the Contractor and their own knowledge. They could not, however, decline to act under Clause 30.6.1.2 for the purpose of preparing a statement of the computation of the Ascertained Final Sum and the Contract Administrator could not refuse to issue a final certificate under Clause 30.8.[32]

122. Conclusively, Namalco submitted that EMBD could not justifiably refuse payment, after the issuance of IPCs, on the ground that there were no supporting documents provided to the Engineer.

123. Further, Namalco submitted that even if the submission of supporting documents was a condition precedent to payment under Clause 14.7, the fulfilment of that condition precedent was waived by EMBD.

124. Namalco relied on the case of ***Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA***[33]**,** wherein the issue of waiver was considered. This case concerned a defective force majeure notice served under Clause 22 of the GAFTA 100 Contract. The House held that since the conduct of the parties subsequent to the service of the notice, as evidenced by their communications and continued negotiations and disputation, proceeded on the basis that the notice was valid, any defect in the notice must be deemed to have been waived.[34]

125. Lord Salmon expressed his views of waiver and the force majeure notice issued by the buyers to the seller in the following way:

"There was no suggestion of any kind either in that Telex or any of the others (sent by the buyers) that there was anything else wrong with the notice for e.g. that it was defective or served out of time. I think that any reasonable sellers would rightly have inferred that the buyers were accepting the notice as a valid and effective notice under Clause 22 to save

[32] see paragraph 20
[33] [1978] 2 Lloyd's Rep 109
[34] See page 117 col. 1 of the judgement.

that the reference to 500 tonnes should be altered to 280 tonnes. To put it another way, the buyers made an unequivocal representation that they were treating the notice as a valid and effective notice on the Clause 22. To make an unequivocal representation or waiver it is not necessary for the buyers to say, "We hereby waive it". It is quite enough if they believe or write in such a way that reasonable sellers would be led to believe that the buyers were waiving any defect in the notice and were accepting it as effectively extending the date for delivery in accordance with the provisions of Clause 2263."

126. According to Namalco, in ***Euro Brokers Holdings Ltd v Monecor (London) Ltd,***[35] the court referred to **Bremer** supra and described the form of waiver relied upon by the Claimant, which was akin to the waiver relied on by Namalco in these proceedings, in the following terms:

"[72] The form of waiver relied upon by Euro Brokers is that which is sometimes referred to as 'equitable forbearance'. It arises where a party to a contract leads another to believe that the strict rights arising under the Contract will not be insisted upon and that, in effect, he will forbear from enforcing his strict rights. Typically, what is waived is the right to challenge the validity of a notice given by the other contracting party, on grounds of failure strictly to comply with the procedure laid down by the Contract."

127. In analysing the type of conduct required to establish waiver of a strict procedural requirement of a contract, Mummery L.J. stated as follows:

"[74] … Moreover, conduct can be sufficient to show that a party is waiving a strict procedural requirement of a contract, whether it is aware of the particular defect or not. The court will draw appropriate inferences from the conduct of a party. The test is not whether the party relying on the waiver has pleaded and proved actual detriment in consequence, but whether he had been led to act differently from the way in which he would otherwise have acted…."

128. According to Namalco, the threads of the principles discussed in ***Bremer and Euro Brokers Holdings Ltd.*** supra were pulled together in ***City Inn Ltd. v Shepherd Construction Ltd*** supra where the subject of the court's attention was a clause (Clause 13.8) dealing with delay arising out of Architect's instructions. Sub-Clause 13.8.5 stated inter alia, the following:

[35] [2003]1 BCLC 506

"…if the Contractor fails to comply with any one or more of the provisions of Clause 13.8.1…the Contractor shall not be entitled to any extension of time under Clause 25.3"

129. As the aforementioned provision provided for the consequences of non-compliance with Clause 13.8.1, it was accepted that the requirements of that clause were conditions precedent to the grant of an extension of time. The question, however, arose as to whether those conditions were capable of waiver. Lord Osborne delivering the judgment of the court held that they were. Having considered a number of authorities, the Judge found that the concept of a right can be waived was broad enough to cover the right to rely on a condition precedent by way of defence to a contractual claim.[36]

130. Whether that right had in fact been waived was, in the absence of a case of express waiver, to be determined based on inference from primary facts proved[37] and based on the general presumption that Parties must be taken to be aware of their own Contracts and the rights given to them thereunder.*[38]*

131. Importantly, in the context of the requirement of waiver that the person asserting the argument must have acted in reliance on the representation alleged, Lord Osborne accepted that it was sufficient that such person conducted his affairs in reliance on the waiver; it is not necessary for him to have acted to his detriment. In that regard, His Lordship recognised, *inter alia*, the following factors as relevant to the court finding that the Respondent Contractor in ***City Inn Ltd.*** supra conducted its affairs in reliance of the waiver alleged;[39]

i. On March 31, 1998 the Respondent applied for an extension of time on the basis of delay caused by the Architect's instructions issued eight (8) days earlier. The application was expressly made pursuant to Clause 25 of the relevant conditions and in circumstances where the requirements of Clause 13.8.1 had not been fulfilled;

ii. The matter of the application was subsequently discussed at a project review meeting held on April 8, 1998 attended by representatives of the Claimant Employer and the

[36] S*ee paragraphs 67 to 75 of the judgement*.
[37] S*ee paragraph 82 of the judgement.*
[38] See paragraph 86 of the judgement.
[39] *see paragraph 85 to 9170of the judgement*

Respondent. No mention of Clause 13.8 was made at that meeting and a limited extension of time was granted. The extension of time awarded was not acceptable to the Respondent which continued for many months to pursue their extension of time claim notwithstanding that, had Clause 13.8 been operated such a claim would have been doomed from the outset; and

iii. Following the meeting, the Respondent proceeded to make a number of applications for extensions of time on several grounds in each case relying on Clause 25. Those cases were dealt with by the Architect under reference to that clause only no mention being made of Clause 13.8.

132. According to Namalco, in ***City Inn Ltd.*** supra it was recognised that waiver of a contractual condition precedent in a particular instance may reasonably lead a party to arrange its future affairs on the basis that the provisions of that condition would no longer be invoked. Where that occurred, and the party entitled to the benefit of the condition precedent did not object, then it was established that compliance with the condition precedent had been waived generally. Lord Osborne summarised the aforementioned position in the following way:

> "*The position in relation to those other elements was that instructions were issued from time to time, the works instructed were carried out by the Respondents over a period of time, without the Respondents seeking to operate the provisions of cl 13.8 and, thereafter, an extension of time application was made by them upon the basis of the provisions of cl 25. Those sequences of events are plainly inconsistent with the invocation of the provisions of cl 13.8. At no point in this sequence of events did the pursuers, or the Architect, take a stand upon the basis that cl 13.8 had not been complied with and that therefore the provisions of cl 13.8.5 eliminated the possibility of any extension of time….Subsequently the Architect dealt with the other instructions only on the basis of cl 25… That course of action was wholly inconsistent with any insistence upon the operation of cl 13.8… In my view these circumstances clearly demonstrate that the pursuers had altogether departed from and abandoned their contractual right to insist upon the observance of cl 13.8."*[40]

[40] See paragraph 94 of the judgement

133. The Witness Statement of Lenny Sookram ("Sookram")[41] summarised the history of payment applications and certification process in respect of each Project including the submission of supporting document (and monthly progress reports as the case may be) in support of certification.

134. Consequently, Namalco submitted that the evidence from Baksh negated the suggestion that EMBD was unaware that monthly progress reports were not submitted with Namalco's applications for payment. That instead, it confirmed the position that EMBD had knowledge that some progress reports were not included and nevertheless did not object to the validity of Namalco's applications for payment. EMBD treated the IPCs as valid and paid several of it.

135. Namalco submitted that the course of action adopted by EMBD was wholly inconsistent with the operation of Clause 14.7 as a condition precedent. That it clearly demonstrated that EMBD had waived any contractual right, which it might have had to insist upon the observance of such a provision. Namalco acted on that representation by retaining the same form and content for all its payment applications and at no time, did EMBD take any objections to those applications. Namalco submitted that in those circumstances, EMBD cannot now rely upon any alleged failure by Namalco to provide the supporting documents required by Clause 14.7 to buttress a contention that it was not obliged to pay IPCs.

136. Namalco submitted that while it did voluntarily submit progress reports in some instances, the purpose of such a report was to ensure that all Parties were kept fully apprised during the respective Projects. That the monthly progress meetings also served that purpose. Namalco further submitted that the IPAs submitted by it, have all been certified thereby confirming that sufficient information to the satisfaction of the Engineers and EMBD had in fact been provided to the extent of the certificate value. All payment applications made by Namalco were similar in form and content, some did not include monthly progress reports and calculation sheets supported claims for measured works.

137. Lastly, Namalco submitted that it acted in reliance on EMBD's representation that it was prepared to treat, as valid, applications for payments and IPCs issued pursuant thereto. That EMBD

[41] Lenny Sookram was one of Namalco's non-expert witnesses, the Project Director of Namalco.

cannot now allege that same were invalid and it would be estopped from so doing. In so submitting, Namalco relied on Halsbury's Laws of England[42] which provides as follows:

> *"Where two Parties act, or negotiate, or operate a contract, each to the knowledge of the other on the basis of a particular belief, assumption or agreement (for example about a state of fact or of law, or about the interpretation of a contract), they are bound by that belief, assumption or agreement. This is known as "estoppel by convention", the common assumption or agreement between the Parties (the "convention") constituting the representation."*

Findings

138. It is clear that the requirement that supporting documents accompany the statement by the Contractor to the Engineer is a term of the Contract for good reason. The duties and obligations of the Engineer as to issuing the IPC involves an assessment of the amount which the Engineer fairly determines to be due pursuant to Clause 14.6. Such a determination must of necessity involve a perusal of the supporting documents to ascertain whether they are consistent with the contents of the statement submitted for payment but also extends to site visits and other matters. The supporting documents include but are not limited to progress reports set out in Clause 4.2(1). It is not in dispute that some progress reports were not submitted.

139. The importance of the documents is highlighted by the further duty of the Engineer set out at 14.6 to submit the IPC together with supporting particulars. But the Clause makes a purposeful distinction between the use of the words "supporting documents" and "supporting particulars" for a reason. Firstly, the inference is that both phrases do not mean the same thing. That being said, it appears to the court that while the purpose of the provision of supporting documents is that of assisting the Engineer to fairly determine the amounts due, there is no requirement for supporting documents to be sent to the Employer. Instead what is required is that of supporting particulars, namely particulars that the Engineer has chosen to forward which may or may not include relevant or other supporting documents submitted to him by the Contractor. The distinction is important as its effect is that the Employer is, therefore, not entitled to withhold payment based on the non-supply of supporting documents to the Engineer. In fact, the only bases upon which payment can be withheld are those set out at 14.6 (a) and (b).

[42] Volume 47 (2014), paragraph 368

140. The fulcrum of the agreement is that of an inherent trust in the Engineer manifested by a clear contractual obligation to certify a fair amount due. So that once certified by the Engineer the presumption arises that he has satisfied himself that the amount certified is a fair amount. It should be noted that under Clause 14.6, his certification is not to be considered as approval or acceptance. His duty is confined within the four walls of a finding that a particular sum is fair one for the work done, a decision having been made after consideration of the supporting documents and other matters such as site visits and consideration of other information.

141. In that regard, a clear distinction must be made between contractual obligations and the reckoning of time periods set out in the Contract. The issue of the time during which the obligation to pay on the IPA arises in this case, falls to be considered within the latter and not the former. Clause 14.6 imposes a contractual obligation between the Contractor and the Engineer in so far as the requirement to provide supporting documents is concerned but that contractual obligation cannot be assigned to the Employer so as to operate between the Contractor and the Employer. The obligation to pay within a time period arises specifically by virtue of Clause 14.7 and not 14.6. As a matter of pure drafting, it appears that the time set out in 14.7 is to be reckoned by the act prescribed in Clause 14.6, however the duties and obligations set out by both clauses are separate and distinct.

142. It follows that 14.7 imposes a timeline for payment but not an obligation to provide supporting documents to the Employer before time is to run. Put another way, the certification of the Engineer presumes that supporting documents have been provided on the date stated in the IPC as being the date the claim was submitted for the purpose of reckoning the time for payment of the IPC only. Satisfaction as to the contents of supporting documents is a matter for the Engineer who is duty bound to provide the Contractor with copies (if received) and any other relevant information. It means that the provision of supporting documents, while a requirement to be satisfied as between the Contractor and the Engineer on the one hand and the Engineer and the Employer on the other is not a condition precedent between the Contractor and the Employer on the issue of the reckoning of time for payment of the IPC and the court so finds.

143. This rationale applies equally to Clause 16.2(c) that reckons time to Clause 14.7 for Namalco to terminate the Contract for non-payment.

144. Further, the court accepts the submission of EMBD that on the evidence it did not waive any entitlement to call for supporting documents as there appears to be no such entitlement embodied in the Contract as between the Employer and the Contractor. The obligation lies between the Engineer and the Employer. It also may, of course, be prudent for the Employer to satisfy itself of supporting documents by calling for same from the Engineer in the case where none are provided or concerns are raised that the amount certified may not be fair. The submission of EMBD, in that regard, is that it would have no way to suspect that the amount is not a fair amount if it is not supplied with the documents. But this does not necessarily follow in this case.

145. The evidence shows that on many occasions EMBD did not call for or scrutinise any supporting documents prior to making payments. In that regard, EMBD submitted that it simply had no reason to suspect at that time that the figures recommended in the IPCs were not fair. Should that have been the case, in the court's view, nothing prevented EMBD from requesting the supporting documents from the Engineer so as to satisfy itself of the accuracy of the claims in respect of each and every IPC. In fact it was entitled so to do under Clause 14.6 and its failure so to do appeared to be an intentional one having regard to the evidence that follows.

146. Baksh and Sookram, the respective Project Managers, elaborated on the process in the course of evidence given under cross-examination. The process testified to was, that subsequent to monthly progress meetings joint measurement were recorded upon which Namalco would prepare its application for payment. The application for payment would be submitted together with supporting documents and if further information was required, the Engineer would request same from Namalco. This evidence was clear and unambiguous as Baksh confirmed that EMBD was in a position to ascertain whether the supporting documents backed the IPAs and accepted that EMBD would scrutinise the documentation and supporting items whilst reviewing the IPCs. He also accepted that if information was missing which EMBD felt was needed, EMBD would request such documents before payment. Moreover, when Baksh was asked if information was missing whether EMBD would have requested it. He identified that a missing report would have been an obvious document that EMBD would notice was missing and would have asked for it[43].

147. The evidence from Baksh therefore demonstrated in any event that EMBD was aware that some monthly progress reports were not submitted with Namalco's applications for payment and

[43] See Transcript Day 5, 12.11.19, Page 32, lines 29-38

did not ask for them, the inference being that it was satisfied and so proceeded to pay the amount certified on the IPC. The actions of EMBD also demonstrate, in the court's view, that the production of supporting documents was not a pre-requisite and EMBD acknowledged this to be the case.

148. The following is taken from the cross-examination of Baksh by Attorney for Namalco[44]:

Q I see from the IPAs, all the IPAs that were sent, that they were copied to you as well as to Mr. Balroop. All of the IPAs.

A Okay. There had -- there were instances where we had documents that said was copy but they were -- they have no records of the IPA coming to EMBD but they was written at the bottom of the letter copied to EMBD.

Q And IPAs were all sent with supporting documents.

A Yeah, well some they were sent with some documents, yes.

Q They were sent with some documents. As a representative of EMBD you were in a position if you wished to do so, to ascertain whether the supporting documents supported the IPAs.

A If I -- if we wish to do so we could have.

Q But you didn't.

A No. It's not our practice.....[45].

Q The information that was sent, you said it wasn't to you, they would have been at they would have been at the site office.

[44] Transcript Day 3, page 70, line 22
[45] Transcript day 3, from page 71 line 25

A No. Even though those -- you saw the application, there was some information you had to have from being on the site. For instance, measurement, quality of work. There are some works that are covered up so we would -- without the information you can't -- there is no way of knowing that the -- what is claimed is done.

Q All right. Let us talk a bit about the information. Now, you had monthly progress meetings.

A Yeah. Monthly and fortnightly -- I think some were fortnightly, yes.

Q Fortnightly...

A Fortnightly.

Q ...are more regularly than monthly. And you attended most of the meetings.

A Yeah, whatever the minutes said I attended some, yes and the Project Engineer attended some.

Q And the Project Engineer attended...

A And some with both -- probably attended both.

Q All of these Projects -- progress meetings every fortnight, either yourself or another representative of EMBD would have attended.

A Yeah. Most times or at least one person may have attended.

Q And at these meetings we're told what was discussed among other things were the measurements of the works, the financial matters and then there was a walkthrough of the site prior to the issue of the IPCs.

A No. Measurements weren't discussed. There was -- progress discussed at the meetings, but measurements -- detailed measurements weren't discussed at the meeting.

What will -- at the meeting because they weren't in the minutes so they weren't discussed detailed measurements.

Q Well, my instructions are that there were walkarounds, walkthroughs rather, to look at the state of the works...

A Okay.

Q ...for the confirmation by EMBD that what was being requested as payment, was in fact justified.

A No, that -- EMBD couldn't give that confirmation without being on the site full time and it's not EMBD's role to give confirmation that yes, the works -- that is the role of the Engineer to certify.

Q It was not EMBD's responsibility as a project team to ensure that EMBD was not being done some injustice on -- didn't you think...

A There are some general checks we could do but lack of resources and the reason why we hired the external Engineer is that for there -- to do the detailed measurements, to do the detailed test results and so on. We could have an overall -- an overall look at the site. Okay, for instance we know that there are certified sewer works, we know that sewer works are ongoing, we have an idea of how much –- buy in terms of the detailed measurements we are -- we don't do that…….[46]

A I'm saying that I never attended such meeting. It's not the practice of EMBD to go item by item to evaluate an IPA. It is the role of the Engineer and as I say, EMBD would not have all the information to properly agree to any figures on --in -- on an IPA because most of the works are underground, covered up and EMBD at a meeting would not be able to sit down and say yes these works were...

Q At each stage of the works that were carried out...

[46] Transcript day 3, from line 7 of page 75.

A Yes.

Q You would have various stages and what Mr. Rajpatty is saying is that each stage...

A Uh huh.

Q ...prior to interim certificate, payment certificate, certificate being issued, that the Interim Payment Application will be discussed by all parties following a walkthrough and an examination of the work which had been done so far. Are you saying that is incorrect?

A That is not -- I am saying I was not present and is not the practice of the EMBD to do those walkthroughs or to go through item by item. In a general sense if there is an issue about one item we -- it could be discussed but not item by item on an IPA.

Q You do accept -- You do accept that at the fortnightly progress meetings...

A Yes.

Q ...following those meetings there was a joint walkthrough by the parties.

A It would -- there were -- there would have been walkthroughs, yes. Either before or after the meetings.

Q Every fortnight.

A I can't say for every fortnight. I didn't attend all meetings so.

Q All right. For those that you attended, there was a walkthrough.

A In -- yes. Just a walkthrough not to measure quantities, but a walkthrough. And the walkthrough, that's to walk about the site and have a chat.

A Normally it's a large site. These are large sites. They will show the work that is ongoing not a detail measurement.

Q You must show that the work was ongoing...

A Yes.

Q ...what work was completed and -- so that EMBD would be in a position to judge whether the payments applications were justified.

A In a general sense, yes.

Q He also goes on to say Mr. Rajpatty that, "At these meetings Namalco's IPA and supporting documents were reviewed by all in attendance." So, that would include those in which you attended and you don't know about the others and you say that is not true.

A No.

Q So you've never reviewed.

A An IPA, no.

Q You never reviewed the supporting documents for the IPA?

A Together in a meeting, no.

Q Oh. You were -- you were there independently?

A No -- when the certificate is issued and it comes to us, to -- we -- if they ask about it and attach -– we do review it sometimes, we go through it to look at the works that were -- that they are -- to see if it matches back up.

Q And of course if you're dissatisfied having reviewed it, you would raise it with the Engineer and the Contractor.

A If there is an issue we would raise it, yes.

Q And there were no issues in which you raised dissatisfaction?

A No. No. No.

149. The court has, therefore, understood the evidence above to demonstrate that the witness would have attended some on site meetings and would have been generally satisfied that the amount applied for was justified and so were the relevant IPCs. He did not make site visits on all occasions. His evidence confirms that where there were concerns about whether the amount claimed was justifiable in the absence of documents supplied by the Engineer, EMBD could have requested the documents from the Engineer (who bore the responsibility to receive same and certify the amount claimed as being fair and due). However, EMBD failed to do this as a matter of practice. The evidence, therefore, demonstrated that the failure to request the supporting documents (which may not have been provided by the Engineer) lay with the EMBD which chose to make payments without sight of those documents, which they were of course entitled to do. When placed in context, therefore, the obligation of the Contractor to supply the documents to the Engineer, while a requirement cannot be considered a prerequisite for payment by the Employer.

150. Further, the court accepts the submission of Namalco that the analysis and conclusion of the court in ***Penwith District Council*** supra were entirely apposite to the present case. In particular, the following:

a. The wording of Clause 14.7 mirrored the directory language used in the sub-clauses considered in ***Penwith District Council*** supra. There was no clear and unambiguous indication in the clause that a condition precedent was intended;

b. The production of supporting documents by Namalco cannot, therefore, be a prerequisite to payment, in circumstances, where the Engineer has issued an Interim Payment Certificate;

c. In the absence of supporting documents, the Engineer was required to do his best using information as is available to him and his own knowledge of the state of works and to issue a certificate which could amount to "nil". The terms of the Contract, give him the means

to be intimately familiar with the Projects. Further, any such certificate was always subject to the "open up and review" provisions of the arbitration clauses set out at Clause 20.4-20.6 of the respective conditions of contract.

Issue 4 - ***Whether the decision of the Dispute Adjudication Board on the Picton Contract has become conclusive***

The submissions of EMBD

151. EMBD does not dispute that the DAB gave a decision under the Picton Contract, nor that it did not challenge the decision of the DAB within the period required by Clause 20.4 of the Picton Contract. However, EMBD submitted that the decision of the DAB was procured by Namalco misrepresenting the value of the works on the Picton Project.

152. According to EMBD, Sarah Pattinson ("Pattinson")[47] considered each item of pleaded over-certification on that Project, and concluded that on the basis of Namalco's representations as to the value of the work, the DAB vastly over-valued Namalco's claims. EMBD submitted that as Pattinson's evidence was unchallenged, same must be accepted by the court.

153. As such, EMBD submitted that the decision of the DAB should be set aside. That Namalco has to either prove the value of the works undertaken (to the extent that the court concludes that the IPCs on the Picton Project are to be set aside), or EMBD is entitled to abate the value of the unpaid sums claimed by Namalco under those IPCs.

The submissions of Namalco

154. According to Namalco, the DAB decision is final and binding since EMBD did not challenge same within the expressly stipulated timeframe set out in the Contract. Namalco submitted that having engaged the DRP, the Parties were bound by it.

155. In so submitting, Namalco relied on the case of ***PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation***[48]. In that case, the Singapore Court of Appeal held that a DAB decision made pursuant to the standard Clause 20.4 of the 1999 FIDIC Red Book was both final and binding on both Parties unless one of the Parties gave notice of its dissatisfaction with the decision. The

[47] EMBD's Expert Witness
[48] 161 ConLR 173

judgment of the court further made clear that in the aforesaid circumstances, the DAB's decision would be both final and binding in the following circumstances:

i. an interim decision was made with respect to a dispute which arose during the course of works performed under a contract; or

ii. a final decision was made with respect to a dispute which arose in relation to a final certificate or upon the conclusion of works.

156. At paragraph 57, the Chief Justice had the following to say:

> *"In our judgment, the following propositions cannot persuasively be disputed and bear emphasis:*
>
> *(a) A DAB decision is immediately binding once it is made. This may be distinguished from a DAB decision in respect of which no NOD has been issued within the stipulated 28-day time frame. Such a DAB decision, under cl 20.4[7], becomes "final and binding".*

157. Namalco submitted that the evidence adduced by EMBD has fallen woefully short of establishing that the DAB decision should be set aside on the ground that Namalco knowingly misrepresented the value of the works to the DAB.

158. According to Namalco, the DAB, by its very DRP nature, permitted the parties to put forward their respective cases on the value of works. Namalco submitted that it was for the DAB to determine the value of the works having heard all of the evidence and considered all of the relevant material. The DAB concluded that the value of works executed by Namalco was three hundred and sixty-four million, nine hundred and ninety-two thousand, five hundred and thirty-four dollars and sixteen cents ($364,992,534.16).

159. According to Namalco, EMBD's case on misrepresentation was based entirely on the *ex post facto* assessment of Pattinson. Namalco submitted that the aforementioned was insufficient to establish a case of knowing or reckless misrepresentation. That it simply represented a different

view as to value and does not approach the threshold required to establish that Namalco made representations as to the value of the work, which it knew to be false.

Findings

160. A convenient starting point is for the court to remind itself of the relevant clauses of the Contract:

> ***20.4*** *If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation by the Engineer, either Party may refer the dispute in writing to the DAB for its decision, with copies to the other party and the Engineer. Such reference shall state that it is given under this Sub-Clause.*
>
> *For DAB of three, the DAB shall be deemed to have received such reference on the date when it is received by the Chairman of the DAB.*
>
> *Both Parties shall promptly make available to the DAB all such additional information, further access to the Site, and appropriate facilities, as the DAB may require for the purposes of making a decision on such dispute. The DAB shall be deemed to be not acting as arbitrator(s).*
>
> *Within 84 days after receiving such reference, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.*
> *If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. If DAB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference, then either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction.*

In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated Sub-Clause 20.7 [Failure to Comply with Dispute Adjudication Board's Decision] and Sub-Clause 20.8 [Expiry of Dispute Adjudication Board's Appointment], neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

If the DAB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB's decision, then the decision shall become final and binding upon both Parties.

***20.5** Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.*

161. Further, it is also necessary to repeat that which has been stated by this court earlier in this judgment in relation to the interplay between Clauses 20.2, 20.4 and 20.6 of the Picton and Roopsingh Road Contracts. Clause 20.6 of these Contracts provide:

Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by reference at the option of either party to arbitration in accordance with the Arbitration Act Chapter 4:01 of the Laws of Trinidad and Tobago (1980) or any modification, amendment or re-enactment thereof.

162. It follows that the processes set out at Clauses 20.2 and 20.4 remain the active DRP procedure in relation to these contracts and it equally follows that the process of recourse to the DAB is mandatory should the dissatisfied party wish to enter into arbitration. In fact, EMBD appeared to have engaged the DAB process in relation to Picton in an acknowledgment that the DAB process was also available.

163. The Parties not only agreed to be bound by the decision of the DAB by virtue of the terms of 20.4 of the Contract but they have also agreed to engage other dispute resolution mechanisms

should either Party be dissatisfied with the outcome of the decision by the DAB. The fact that one Party is now of the view that the values accepted by the DAB were overvalues does not derogate from the obligation agreed upon for challenge of the decision of the DAB. EMBD having failed to engage the agreed process for challenge, namely the issuance of a Notice of Dissatisfaction within twenty-eight (28) days of the decision, it must now suffer the consequences of its agreement so to do, even if it now possesses expert evidence to the contrary of that presented to the DAB.

164. This is the case because of the unambiguous words set out in the final paragraph of Clause 20.4 that the Parties agree that the decision of the DAB in the absence of a challenge within an agreed period for such challenge will be final and binding upon both Parties at the expiration of that period. The court finds that the relevant clause of the Contract is not open to any other legal interpretation other than the literal meaning of that which is set out. The literal interpretation does not lead to any uncertainty or ambiguity. In fact to the contrary, the provision by way of agreement of a period of twenty-eight (28) days for a challenge provides an untrammelled level of certainty between the Contracting Parties as to not only a reflection on the approach that must be taken at the DAB by way of submissions of relevant positions of the parties on values but also certainty in the decision of the DAB and that of a cut-off date for any challenge thereby providing good and proper commercial practice between Contracting Parties. Further, the court is of the view that should the Parties have intended there to be exceptions to the clause same would have been specifically set out. In that regard, the clause seems clearly designed to prevent the very thing which EMBD now seeks to do from happening.

165. The decision of the DAB in relation to Picton in the sum of three hundred and sixty-four million, nine hundred and ninety-two thousand, five hundred and thirty-four dollars and sixteen cents ($364,992,534.16), therefore, stands.

<u>Issue 5</u> - Whether the Supplementary Agreements are valid

The Roopsingh Road Project

166. On October 22, 2010, EMBD's then Engineer, Planviron, instructed Namalco to suspend works under the Roopsingh Road Project which had been ongoing since April 2010. The Original Contract was made April 1, 2010 (RR Original Contract). After it issued a Notice of Termination on March 3 2011, Namalco submitted claims for outstanding payment due under the RR Original Contract. Negotiations took place between Namalco, BBFL, (the new Engineer) and EMBD. It is a

feature of the outcome of the negotiations that Namalco withdrew its Notice of Termination. On April 25, 2012, a Notice to Commence was issued to Namalco by BBFL and works re-commenced on the said day.

167. May 9, 2012, Namalco and EMBD entered into the RR Supplementary Agreement. Namalco carried out works between June 2012 and October 2015 at the rates agreed in the Supplementary Agreement. EMBD's Engineer, BBFL issued IPCs for this period but Namalco received payment for IPCs 11-15 and not 16-30.

168. On June 8, 2015 EMBD's Board of Directors ratified the RR Supplementary Agreement.

The Petit Morne Project

169. Under the Original Agreement, EMBD contracted Namalco to carry out works on approximately one hundred and thirty-four (134) acres of land called Phase 2 Works (PM Phase 2 Works). The Contract between the Parties was concluded in or around February 7, 2012 (PM Original Contract), and Namalco began works on February 8, 2012. This is not in dispute although the Notice to Commence was given on March 27, 2012.

170. By letter dated March 15, 2012 Namalco received instructions to carry out works on an additional forty-seven hectares (47ha) of land called Phase 2A.

171. On May 9, 2012, Namalco and EMBD entered into the PM Supplementary Agreement, which superseded the original Petit Morne Contract and included both the PM Phase 2 Works and the PM Phase 2A Works. This Contract was as a result of negotiations held in relation to new rates for the entire work to be performed by Namalco on Petit Morne.

172. EMBD's Engineer, BBFL issued IPCs for this period but Namalco received payment for IPCs 1-6 and not 7-25.

173. On June 8, 2015 EMBD's Board of Directors took a decision to ratify the PM Supplementary Agreement just as it had done with the RR Supplementary Agreement.

174. The issue, therefore, concerns the validity of the RR Supplementary Agreement and the PM Supplementary Agreement in respect of which Namalco claims money owning at the rates set

out in those agreements and not in the original agreements. It is to be noted that both Supplementary Agreements were entered into on the same day namely May 9, 2012 with the same person, the then CEO of EMBD, Seebalack Singh.

The submissions of EMBD

175. EMBD submitted that the Contracts entered into on May 9, 2012, with Mr. Singh (CEO) were highly irregular and are void. In this regard, they claim that they are entitled to avoid them because:

i. Namalco knew of the fiduciary duties owed by Mr. Singh and of his breach.

ii. Mr. Singh lacked actual or apparent authority to enter into those Contracts.

iii. There was a conspiracy between Namalco and Mr. Singh to injure EMBD.

iv. Namalco cannot rely on the subsequent ratification of the Contracts by the Board.

176. EMBD, therefore, submitted four (4) essential points for the court to determine.

Whether Mr. Singh procured or caused EMBD to enter into the Supplementary Agreements in breach of his statutory fiduciary duties and not in best interests of EMBD/preferring interests of Namalco and/or without actual authority to do so.

177. EMBD's argument is that its CEO, Mr. Seebalack Singh breached his Statutory Fiduciary Duty under section 99 of the Companies Act Chapter 81:01.Those duties included the duty to act honestly and in good faith in the best interests of the EMBD and a duty not to prefer the interests of others over the interests of EMBD.

178. Mr. Singh also breached his contractual duty (as set out in his employment contract) by failing to use his best endeavours to promote the interests and welfare of EMBD. In addition, Mr. Singh breached EMBD's Tender Rules dated January 8, 2009 (the Tender Rules), Procurement Procedures, and Normal Procurement Practices that governed EMBD's procurement.

179. The value of the Roopsingh Road Supplementary Agreement was two hundred and sixty-two million dollars ($262M) and the value of the Petit Morne Supplementary Agreement was three hundred and thirty-one million dollars ($331M). The Contracts appear to be two, one page contracts which amount in total to about five hundred and ninety-three million dollars ($593M) and according to EMBD was an extraordinary four and one half times, the then turn over of Namalco on the ongoing Projects.

180. According to EMBD, Mr. Singh's authority did not extend to approving contracts above the value of one million dollars ($1M). Importantly, the Tender Rules provides that in respect of any works in excess of ten million dollars ($10M), the Tenders Committee shall make recommendations to the EMBD Board for Board approval.

181. EMBD relied on its Board minutes from previous years and rejected the contention that compliance with the Tender Rules with respect to the Supplementary Agreements was unnecessary and any variation or amendment would engage the Tender Rules and Tenders Committee.

182. The testimony of Mr. Baksh supports the view that Mr. Singh contravened the tendering rules. According to EMBD, it is puzzling as Mr. Singh followed the tendering process on the issuance of the Original Contracts. He also did not reveal the contents of terms of the Supplementary Agreements to recommence works on the Roopsingh Road Project and the Petit Morne Project at a Board meeting a day after nor the Tendering Committee for consideration.

183. EMBD referred to the testimony of Mr. Baksh and Mr. Sookram that Mr. Singh only invited Namalco in relation to restarting the Roopsingh Road Contract. Similarly, the tendering process was not adhered to in the Petit Morne Project.

184. In support, EMBD also relied on the Report of Ms. Pattinson using the methodology 'Derived Market Rate' at a rate of seven percent (7%) per annum for both the Roopsingh Road and Petit Morne Contracts. The difference between the rates under the Supplementary Agreements and market rates.

185. Mr. Duggan, however, testified that it was inappropriate for Ms. Pattinson to have used rates of general inflation, as there were no construction section inflation indices available.

186. EMBD referred to contemporaneous evidence that the percentage increase for material and labour were excessive compared to the Original Contract rates and market rates.

187. EMBD cited an example in relation to Petit Morne where the price for clearing and grubbing increased under the Supplementary Agreement. In addition, Roopsingh Road rates differed from January 2010 to 2012 despite Namalco owning their asphalt plant and equipment. Therefore, Namalco has provided no justification for the increased rates in the Supplementary Agreements.

Whether Namalco knew that Mr. Singh acted not in the best interests of EMBD/preferring the interests of Namalco, and was thereby acting in breach of his Statutory Fiduciary Duties, and/or without actual authority

188. EMBD raised the preliminary point that the Court ought to draw an adverse inference against Namalco as it failed to call its Managing Director, Naeem Ali as a witness.[49] Ali would have supported EMBD's case that Namalco knew that Mr. Singh was acting not in the best interests of EMBD and preferring interests of Namalco.

189. Ali was involved in the Original Tendering Process for the Roopsingh Road Project. In relation to the Petit Morne Project, Ali signed the Tender Submission letter. Importantly, Ali was also central to Namalco entering into the Supplementary Agreements compared to Sookram who was not an employee at the time that the tenders took place. During cross-examination, Sookram testified that the Instructions to Tender (ITT) provides guidance for any other tenders.

190. EMBD submitted that Namalco knew of EMBD's Tender Rules (a public record) and the Tenders Committee. Further, Namalco attended pre-tender meetings and answered queries from BBFL's tender evaluation.

191. According to EMBD, Namalco knew of Mr. Singh's irregularity after the execution of the Supplementary Agreements.[50] An example is the Petit Morne Project, where months earlier in February 2012, Namalco knew there was a tender process for infrastructure projects.

[49] See ***Sieunarine v. Doc's Engineering Works (1992) Limited*** [No. 2387 of 2000]

[50] See letter dated May 10, 2012 Mr Sookram purported to finalise the charging rates applicable and by letter dated May 11, 2012 Namalco was sent a revised bill of quantities.

192. EMBD submitted that the removal of Clause 2(i) of each of the Supplementary Agreements solidified Mr. Singh's breach of his duty.[51]

Whether it can be inferred in all the circumstances that Namalco and Mr. Singh conspired together to procure the award of the Supplementary Agreements with an intention to injure or cause financial loss to EMBD by the use of unlawful means (namely Mr. Singh's breaches of fiduciary duties procured by Namalco).

193. EMBD accepted that there was no direct evidence of a conspiracy between Namalco and Mr. Singh. However, the court should consider Ali did not testify on behalf of Namalco. In addition, the court should makes inferences due to the demand of Namalco to fire the Engineer, Planviron and Mr. Singh's contravention of the Tender Rules.

Whether EMBD's purported ratification of the Supplementary Agreements is of no effect, by reason of EMBD not knowing (i) that the Supplementary Agreements had been entered into in breach of Mr. Singh's fiduciary duties and/or without authority, and (ii) that Namalco knew this

194. EMBD argued that the purported ratification of the Supplementary Agreements occurred three (3) years later. The EMBD Board was not informed by its then CEO, Gary Parmassar of the true circumstances leading up to the execution of the Supplementary Agreements. In addition, the Board's in-house Counsel, Beena Poliah mislead the Board and failed to consider Clause 6 of the Tender Rules as well as the non-approval of the Tender Committee.[52]

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[51] Clause 12.3 of the FIDIC Red Book reads:

Except as otherwise stated in the Contract, the Engineer shall proceed in accordance with Sub-Clause 3.5 Determinations to agree or determine the Contract Price by evaluating each item of work, applying the measurement agreed or determined in accordance with the above Sub-Clauses 12.1 and 12.2 and the appropriate rate or price for each item.

For each item of work, the appropriate rate or price for the item shall be the rate or price specified for such item in the Contract or, if there is no such item, specified for similar work. However, a new rate or price shall be appropriate for an item of work if:

(i) The measured quantity of the item is changed by more than 10% from the quantity of this item in the Bill of Quantities or other Schedule […]

Each new rate or price shall be derived from any relevant rates or prices in the Contract, with reasonable adjustments to take account of the matters described in sub-paragraph (a) . . . as applicable […]

[52] See Parmassar's Note at [**TB2 049879 2C**], and Poliah's Note at [**TB2 049888 2C**]

The submissions of Namalco

195. Namalco submitted that the evidence presented by EMBD is wholly unreliable and invited the court to draw adverse inferences against EMBD especially as Mr. Singh was a material witness and EMBD chose not to call him to testify.

196. According to Namalco, upon a review of the contemporaneous documents,[53] it is improbable that EMBD was unaware of the salient details relating to the Supplementary Agreements. These documents, including minutes of meeting held between the Parties revealed that Mr. Baksh and EMBD's Board had knowledge of the contents of the Supplementary Agreements prior to the ratification of it. Namalco cited the decision of ***Gencon Limited v Haroun Beekhan***[54] that dealt with the issue of an acute conflict of evidence.

197. In addition, Mr. Baksh was the Project Engineer on Cedar Hill alone. As such, the Court should consider that EMBD failed to join Mr. Singh in these proceedings to support its allegation that Mr. Singh breached his fiduciary duties.[55] Further, EMBD failed to call any of EMBD's former Directors who sat on its Board on June 8, 2015 and decided to ratify the Supplementary Agreements.

198. Namalco submitted that Mr. Baksh's testimony that he is the only person presently employed with EMBD with knowledge, does not provide a sufficient explanation for the said Directors' and indeed any other critical witness's non-attendance.

199. Namalco, therefore, raised four (4) substantive issues for the court to consider.

[53] See the submissions of Namalco filed on August 14, 2020, page 83, 84.
[54] CV2016-01170, per Seepersad J at para. 29
[55] See the submissions of Namalco filed on August 14, 2020, [Bundle of Authorities: TAB 16 (Page 0350)] - ***British American Insurance Company (Trinidad) Limited v Lystra Sebro***, CV2014-03812, per Rajkumar J (as he then was) paras. 92-95.

Whether EMBD has established on the evidence that Singh breached any of his duties or non-fiduciary duties.

200. According to Namalco, Mr. Singh had a fiduciary duty to EMBD to exercise the care, diligence and skill that a reasonably prudent person would exercise as well as a fiduciary duty pursuant to section 99 (1) of the Companies Act.[56]

201. Breach of a non-fiduciary duty would involve a breach of duty of care and a lack of prudence and diligence by the Director.

202. In response to EMBD's submission that there was no competitive tender prior to entering into the Supplementary Agreements, Namalco submitted that there was no need for a tender for amendments and/or variations of the existing Contracts awarded by a tender.

203. EMBD's Tender Rules is an internal document. Namalco's interpretation is that the Tender Rules did not apply to variations and/or amendments of existing Contracts. Namalco invited the court to examine the Tender Rules having regard to the *contra proferentem* rule of interpretation[57] and highlighted that EMBD has an existing obligation towards Namalco.

204. It cited examples of competitive tenders awarded to other contractors for additional works after Mr. Singh resigned from his position.

205. Namalco argued that the evidence of Mr. Baksh demonstrated that it was not always the practice of EMBD to comply with the Tender Rules on matters of procurement.[58] As such, Mr. Singh did not breach his fiduciary duty.

206. In response to the excessive rates in the Supplementary Agreements, Namalco submitted that the court must consider the information, which was reasonably available to Singh during negotiation and execution of the Supplementary Agreement as well as the contemporaneous documents at that time.

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[56] See the decision of ***Thema Yakaena Williams v Trinidad and Tobago Gymnastics Federation and Ors***, CV2016-02608 per Seepersad J at p. 120. His Lordship described breach of a fiduciary obligation as *disloyal*, making an unfavourable decision on behalf of a company.

[57] See the submissions of Namalco filed on August 14, 2020 p.99 citing the authors of Halsbury that defined the rule.

[58] See the testimony of Mr. Baksh at p. 101, 102 of Namalco's submissions filed on August 14, 2020.

207. Importantly, the rates were low and below market rates in the Original Agreements. Namalco defended its increased rates or *better rates*, stating that a period had passed (2009) since it submitted the Original Tender.

208. Further, Mr. Singh relied on the advice of BBFL during negotiation of the Supplementary Agreements.[59] As such, there is no evidence of dishonesty against BBFL. Following the minutes of negotiation meeting, BBFL conducted its own assessment of rates in respect of both the Roopsingh Road Project and the Petit Morne Project and provided EMBD with it.

209. Namalco pointed out that EMBD invited it to negotiate the terms of a possible re-commencement of works after the prolonged suspension of the said Project. In addition, the Petit Morne Project expanded to include the Petit Morne Phase 2A Works. At these meetings, no party complained of the lack of tender and the proposed rates.

210. Despite the concerns of EMBD's Director, Khan Kernahan, EMBD allowed works to continue under the Supplementary Agreements.

211. Further, BBFL issued all of the IPCs in relation to the Roopsingh Road Project and the Petit Morne Project.

212. Namalco submitted that the non-disclosure of the Minutes of June 26, 2014 Board Meeting is directly relevant to EMBD's contention of a conspiracy defence.

Whether Namalco's Representatives were, in any event, aware of Singh's alleged breaches of his duties owed to EMBD

213. EMBD raised the issue that Namalco failed to call Naeem Ali, one of its Directors, as a witness. However, Namalco submitted that there is no evidence that its representatives was alleged to have participated in the *conspiracy*.

[59] See 2C EMDB. WS (1) Khalil Baksh [TB2 049397 2C] and 2C EMDB. WS (1) Khalil Baksh [TB2 049427 2C].

214. Further, the allegations of fraud and dishonesty were not properly particularised by EMBD.[60] It did not identify any person in Namalco to whom knowledge of Mr. Singh's alleged breaches of duty was attributing to.[61]

215. Namalco also submitted that the assumption that the *knowledge* of a company such as Namalco would be attributed to one particular servant and/or agent, namely, Ali. Therefore, there was no apparent need to call him as a witness.

216. Instead, Sookram who is the Project Director of Namalco as well as the disputed projects and was intricately involved in the day-to-day affairs of the Projects testified on Namalco's behalf.

217. Namalco also made the point that EMBD disclosed its Tender Rules upon the filing of Mr. Baksh's witness statement.

218. In response to the allegation that Namalco was part of an unlawful means conspiracy, it submitted that there is no evidence to suggest that Namalco knew that Mr. Singh had breached any of his duties.

219. In further response, there is no evidence that Namalco's representatives were aware of the contents of either the Tender Rules or Procurement Procedures. EMBD's conflation of the ITTs and the Tender Rules/Procurement Procedures is misleading.

220. Moreover, Namalco was entitled to engage in commercial negotiations and agree to terms, which were beneficial to it under the Supplementary Agreements and this does not impute dishonesty. Notwithstanding this, Namalco was unaware that EMBD had to engage the Tenders Committee in respect of variations to the said agreements.

221. In relation to the Petit Morne Project, the increased rates from February to May 2012 were attributable to an expansion of the Project, an additional use of resources and the period of the Original Tender.

[60] See the decision of ***McEneaney & Others v Ulster Bank Ireland Limited and Anor*** [2015] EWHC 3173 (Comm) in the Namalco's [Bundle of Authorities: TAB 25 (Page 0583)]

[61] See paragraph 271I of the Defence [TB1 018876]

222. Moreover, the contract price and negotiated rates in the Supplementary Agreements were set out in the Agreed Bill of Quantities for each Project. Namalco relied on the testimony of Sookram and Baksh that the Supplementary Agreements were not in isolation but understood by the Parties as the final contract prices calculated under the Agreed Bills of Quantities.

223. In response to EMBD's contention that Namalco knew of the removal of Clause 12.3 of FIDIC from the Original Contracts, Namalco submitted that it was also deprived of the possibility of claiming for an increase in rates. Noteworthy, the removal of Clause 12.3, suggested by BBFL was to benefit EMBD and protect it against any potential increase in rates.

224. Finally, by letter dated June 27, 2014 EMBD wrote to Republic Bank Limited and acknowledged that it owed Namalco outstanding sums for works completed up to that date (one hundred and ninety million, seven hundred and sixty-one thousand, four hundred and thirty-three dollars and thirty-two cents ($190,761,433.32) – Petit Morne Project and one hundred and twenty-eight million, nine hundred and seven thousand, one hundred and forty-nine dollars and sixty-four cents ($128,907,149.64) – Roopsingh Road Project).

Whether Singh had Apparent or Ostensible Authority to enter into the Supplementary Agreements on behalf of EMBD

225. Namalco submitted that based on section 6 of the Tender Rules, Mr. Singh as the CEO of EMBD had apparent or ostensible authority, which *includes all the usual authority of a managing director* to enter into the Supplementary Agreements.[62]

226. EMBD submitted on the other hand, that the Board having taken the decision that the Tendering Rules (TR) were to be used in the interim, that document prescribed the limits of the powers of the CEO in relation to contracts.

227. The evidence before the court on the issue comes primarily from the witness Khalil Baksh, the Project Manager of EMBD. His evidence is that there were Tender Rules that carried the date January 8, 2009 which were in force at the date of time the Supplementary Agreements were negotiated and entered into. Those rules although in draft were to be used until full adoption by

[62] See Namalco's [Bundle of Authorities: TAB 30 (Page 0658)- ***Hely-Hutchinson v Brayhead Ltd. and Another*** [1967] 3 All ER 98, per Lord Denning at p.6

the Board. This was a decision of the Board taken at the 48th meeting. A decision was taken by the Board at its 49th meeting on February 12, 2009 that the Draft Rules be forwarded to the Ministry of Finance for consideration and approval. Baksh set out in his evidence the process by which contracts were awarded pursuant to the Tender Rules for the Original Awards in Roopsingh Road and Petit Morne 1. It is not necessary to repeat the process here as it is not in dispute.

228. The witness also set out a table at paragraph 204 of his first witness statement in which he gives examples of projects in which awards were made by EMBD between 2010 to 2015 using the said Tender Rules. The table shows quite starkly that the only instances in which the Tender Rules were not followed were those in relation to two (2) Supplementary Agreements which are the subject of this claim and two (2) others to LCB Contractors Limited for Cedar Hill 2 SA and Petit Morne 3/3A SA also on the same day, namely, May 9, 2012. These were, therefore, the only four (4) sole select awards out of the award of thirty five (35) contracts. He also testified that there were other awards made on a sole select basis from 2013 forward far in excess of the original contractual sums but a breakdown of these was not put before the court.

Actual (express or implied) authority

229. The TR provides for the establishment of a Tendering Committee comprising three officers whose obligation would be to invite, consider, reject and accept tenders for the supply of works with the approval of the EMBD Board. That Committee was empowered to deal with contracts for works that carried the total value of between one million dollars ($1M) and ten million dollars ($10M). For contracts in excess of ten million dollars ($10M), the decision would be that of the Board of EMBD after considering the recommendations of the Committee. The power of the CEO is however confined to inviting quotations and placing requisitions where the value was less than one million dollars ($1M)[63].

Finding

230. It is clear that the scheme of the TR provides for a tiered basis of approvals based on the quantum of public funds being expended. In other words, the discretion of the CEO is exercisable at the lowest tier whereas the Board becomes involved at the highest tier. There is no gainsaying that there is in principle good reason for this structure of approvals having regard to the source of funds and the public duties owed by the various office holders. The mechanisms that are employed

[63] Rules 3, 5(a), 5(b) and 6 of the Tender Rules.

in the tendering process give teeth to the need for accountability for the use of public funds particularly expenditure on the higher end of the scale[64].

231. It follows as a matter of interpretation and also as a matter of the unchallenged evidence of the witness Baksh that the limit set out in relation to the CEO in the TR must apply to new expenses on new contracts or variation of existing works. The gravamen of the prescription is that whatever the purpose of the expense, either by way of a fresh contract or variation of an existing contract, the CEO is not specifically authorised to expend or approve sums that are more than one million dollars ($1M) unless authorised by the Committee or the Board.

232. The legal effect is that the scope of Mr. Singh's actual authority was limited by the provisions of the TR in the context of the Board having resolved that the TD was to be used in all awards.

233. In this case, the value of the RR Supplementary Agreement entered into by Singh was two hundred and sixty-two million dollars ($262M) and the value of the PM Supplementary Agreement was three hundred and thirty-one million dollars ($331M) reflecting an increase of one hundred and eighty-five million dollars, three hundred and fifty-three thousand, six hundred and eighty-four dollars and two cents ($185,353,684.02) on the Original Contract price of the former and an increase of one hundred and twenty-nine million, fifty-three thousand, two hundred and two dollars and sixty-three cents ($129,053,202.63) on the latter. When taken in context of the above, it is pellucid that even if the increases were variations, the TR did not authorise the CEO to enter into an agreement to vary for such amounts.

234. Namalco's answer is that the CEO either possessed actual or ostensible authority. In its written submissions, Namalco, however, seems to have taken no issue with the submission of EMBD on lack of actual authority. In the courts' view, there is no substantive answer to the argument of EMBD on the issue and a finding must be made in their favour thereon. The court, therefore, finds that the CEO Mr. Seebalack Singh possessed no express authority to enter into the Supplementary Agreements.

235. In relation to whether the authority of Mr. Singh was implied, the court finds that there was no implied authority to enter into contracts or make variations that exceeded the express

[64] See the evidence of Baksh at his witness statement paragraph 34.

amount set out in the TR by virtue of his office having regard to the nature and apparent purpose of the limitation, the role of both the CEO and the Board, and the fundamental distinction in this case that the funds being used were in essence public funds.

236. Further, the evidence in this case shows that Mr. Singh's actions in relation to these Supplementary Agreements were followed by similar acts on his part in relation to other agreements that were entered into by him on the basis that he possessed the authority to do so. According to the evidence of Baksh supra, in addition to the Cedar Hill 2 SA and Petit Morne 3/3A SA also entered into on the same day as the Supplementary Agreements under review, there were several others from 2013 onwards that were entered into which went beyond the scope of the tier set out in the TR and these decisions were subsequently ratified by the Board. The evidence of the other Contracts have not been put before the Board but the evidence of Baksh shows a course of dealings by Singh which seems to have been ratified subsequently by the Board.

237. This raises the issue of whether the conduct of dealings between both the Board and Mr. Singh gave rise to implied authority to act on the part of Singh. While an examination of the conduct of both Parties is fundamental in such a case, such conduct must be considered in the context of the circumstances as a whole. The circumstances of this case shows that the EMBD is funded by the Government of the Republic of Trinidad and Tobago (GORTT) with funds which are essentially public funds. It follows that while the EMBD is essentially a limited liability company established for limited purposes, it is publicly funded and so the ambit of authority of its actors must carry a level of certainty and scrutiny. In those circumstances, this court is of the view that the evidence does not disclose a sufficient course of dealing between the CEO and the Board overtime so as to provide satisfactory evidence that Singh had the implied authority to enter into contracts or vary contracts to an extent over and above that which necessitated either Committee or Board approval. Evidence of ratification years after the event does not, in the court's view, open the door to such an implication in this case.

Ostensible authority[65]

238. The doctrine of 'holding out', also known as apparent or ostensible authority, is based on estoppel. Such agency by estoppel arises where one person has acted… so as to lead another to believe that he has authorised a third person to act on his behalf, and that other in such belief… enters into transactions with the third person within the scope of such ostensible authority… In

[65] Halsbury's Laws of England Volume 1 (2017)/6.

this case, the first-mentioned person is estopped from denying the fact of the third person's agency under the general law of estoppel, and it is immaterial whether the ostensible agent had no authority whatever in fact…,or merely acted in excess of his actual authority."

239. Where the act complained of is not expressly authorised by the principle, the principle is, while the agent is acting within the scope of his implied authority or within the scope of his apparent or ostensible authority, jointly and severally responsible with the agent, however, improper or imperfect the manner in which the authority is carried out. It is immaterial that actual malice is an essential ingredient of the wrongful act, that the wrongful act is also a crime, or that the act in question has been expressly prohibited by the principle. This principle must be considered together with the rule in ***Turquand's case***.

240. Namalco has relied on the dicta of Lord Denning MR in ***Hely-Hutchinson v Brayhead Ltd. and Another***[66], a case in which the court set out principle of ostensible authority as it relates to an individual charged with the responsibility of managing a company. At the final paragraph of page 6 of his judgement, His Lordship said the following:

> "Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the Board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the Board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the Board. In that case his actual authority is subject to the £500 limitation, but his ostensible authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation. He may himself do the holding-out. Thus, if he orders goods worth £1,000 and signs himself "Managing Director for and on behalf of the company", the company is bound to the other Party who does not know of the £500 limitation…Even if the other Party happens himself to be a director of the company, nevertheless the company may be bound by the ostensible authority. Suppose the managing director orders £1,000 worth of goods

[66] [1967] 3 All ER 98 [TAB 30]259

from a new director who has just joined the company and does not know of the £500 limitation, not having studied the minute book, the company may yet be bound."

Discussion

241. The court is of the view that the law on ostensible authority is clear. In ***Dorado Limited v Republic Bank Limited***[67] the Plaintiff claimed that the Defendant without its knowledge and authority wrongly debited certain sums of monies and paid it to third persons and has failed to repay the Plaintiff the said sums. The central issue was whether an agency by estoppel arose on the facts of the case. Jones J, as she then was, opined at paragraph 28:

> *28. The onus lies on the person dealing with the agent to prove either real or ostensible authority and it is a matter of fact in each case whether ostensible authority existed in respect of the particular act for which it is sought to make the principal liable.*

242. In ***Wellington Baynes v Vanguard Hotel Ltd***[68] the Defendant averred that Ms. Charles (the Golf Course Manager at the Defendant's hotel) was authorised to negotiate and/or give final approval for contracts. It was held that it was reasonable for the Claimant to have relied on the representation by the Defendant that Ms. Charles had the authority to act as its agent and to contract on behalf of the Defendant. Charles J stated the following:

> [48] I, therefore, hold that it was reasonable for the Claimant to have relied on the representation by the Defendant that Ms. Charles had the authority to act as its agent and to contract on behalf of the Defendant. He could not have been expected to know the limits of Ms. Charles' authority without that information being expressly conveyed to him by the Defendant.
>
> [49] Very importantly, given the fact that Ms. Charles exercised full authority to contract with clients before 2014, it was incumbent on the Defendant, if there was a change in the scope of her duties with respect to this issue, to make this clear to the client, especially those who predated 2014, such as the Client. The failure to do so while allowing Kathy Charles to function as before – negotiating and signing contracts amount to a holding out by the Defendant that she was duly authorised to negotiate/finalise contracts and I so hold.

[67] H.C.38/1999
[68] CV2017-00215

243. In ***Trinidad Agro Supplies Services Limited v Caroni (1975) Limited, The Attorney General of Trinidad and Tobago and Wayne Innis***[69] the Court of Appeal affirmed the decision of the trial Judge. At the High Court, one of the issues was whether the Ministry and/or the Third Defendant (Respondents) had authority, real or apparent, to act on behalf of the First Defendant at any material time. Des Vignes J, considered that from previous correspondence, the Claimant was aware of the required formal arrangements with the First Defendant. He, therefore, found that the Third Defendant was not vested by the First Defendant with apparent authority to create any binding legal obligation upon the First Defendant to permit the Claimant to remain in occupation of its lands and to allow the Claimant to retain possession of its equipment.

244. At the Court of Appeal, Jones J.A. made the following point:

> *133. The difficulty with this submission is that for the statement in Halsbury's to have any application to this case the Appellant first must establish that the relationship of principal and agent existed between Caroni and Innis and/or the Ministry. The Appellant's case is predicated on there being an agency relationship between Innis and/or the Ministry and Caroni or that Innis and/or the Ministry held themselves out as being the agent for Caroni and having the authority on Caroni's behalf to permit the Appellant to occupy the land for the purpose of the 2006 crop. There was no evidence of such a relationship nor was there evidence that either Innis or the Ministry held themselves out as being authorised by Caroni to grant permission for the 2006 crop. In the absence of any such evidence the case presented by the Appellant fails.*

245. In ***New Falmouth Resorts Ltd v International Hotels Jamaica Ltd***[70] , one of the issues considered was whether J (principal shareholder and one of the first directors) had ostensible authority to bind NFR. Lord Diplock at paragraph 23 set out the learning in Freeman and Lockyer:

> "apparent' or 'ostensible' authority . . . is a legal relationship between the Principal and the Contractor created by a representation, made by the Principal to the Contractor, intended to be and in fact acted upon by the Contractor, that the agent has authority to enter on

[69] C.A.CIV.P.148/2014
[70] [2013] UKPC 11

behalf of the Principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract . . . . The representation, when acted upon by the Contractor by entering into a contract with the agent, operates as an estoppel, preventing the Principal from asserting that he is not bound by the contract . . .”

246. The Board held that J could not have had ostensible authority. There was nothing on the face of the contract for sale to indicate what position J had had in NFR. He had certainly not been held out as the Managing Director. Although J had been named as a director in annual returns for NFR in 1981 and 1982, those returns had not been filed until 1992. The representations contained in those late returns could not have been made with the intention that they be acted upon or that they were in fact acted upon by the purchaser. Further, there had been nothing to show when or by whom he had been re-elected as a director following his disqualification from holding office. Furthermore, the Court of Appeal had been correct in concluding that there had been no evidence whatever of any purported (or defective) reappointment of J as a director in the post-1974 period[71] .

247. In ***East Asia Company Ltd v PT Satria Tirtatama Energindo (Bermuda[72])*** the Board provided clarification on the proper approach to apparent/ostensible authority. The Appellant company (PT) was incorporated in Indonesia and was part of a larger group (SGR). PT's business included the development of geothermal energy sites in Indonesia. The Respondent company (EACL) was incorporated in Bermuda. EACL was the holder of all the registered shares of another company (BEL). In February 2015, a document was executed (the HOA), between S, PT's representative, and J, one of the directors of EACL. It was witnessed by H, the Chief Executive Officer of BEL. One of the issues to be determined was whether J had possessed ostensible authority to enter into the HOA. The Board found that J did not have ostensible authority. Lord Kitchin stated the following:

[58] Thirdly, the Board recognises that Mr. Joenoes and Mr. Hata carried on the day-to-day business of EACL and BEL, that they conducted the search for a potential investor in or purchaser of BEL, and that they acted on behalf of EACL in the negotiations with PT Satria in 2011 and 2012. But none of this implies that either of them had authority to enter into

[71] See para 24, 25 of the judgment
[72] [2019] UKPC 30

an agreement to sell EACL's only asset on the terms of the HOA; and that was particularly so in light of the fact that the HOA was, as Clarke JA put it, manifestly to the benefit of both of them because, by virtue of it, over five hundred thousand American dollars (US$500,000) said to be owed to them by BEL, of which, absent the HOA, they had practically no hope of recovery, would be paid within three months. The action of entering into this HOA was fundamentally different from any activity they had previously conducted on behalf of EACL.

248. Lord Kitchin went further and addressed the question which concerned the state of mind of the person alleging apparent authority. He stated the following:

[75] As the Board has explained, ostensible authority is a relationship between a principal and a third party created by a representation made by the principal, which the third party can and does reasonably rely upon, that the agent of the principal has the necessary authority to enter into a contract on its behalf: The Raffaella [1985] 22 Lloyd's Rep 36, para 41. This may be thought to lead naturally to the conclusion that if the third party has reason to believe that the agent does not have actual authority and fails to make the inquiries that a reasonable person would have made in the circumstances to verify that the agent has authority, then the estoppel cannot arise, for in such a case reliance on the representation would hardly be reasonable.

[79] In Rolled Steel Products (Holdings) Ltd v British Steel Corp [1986] Ch 246, 284-285, Slade LJ said that the nature of a proposed transaction may put a third party on inquiry as to the authority of the directors of a company to effect it. Further, Browne-Wilkinson LJ, at p 304, provided this helpful exposition of the limits of the principle of ostensible authority and the indoor management rule:

"As an artificial person, a company can only act by duly authorised agents. Apart from questions of ostensible authority, directors like any other agents can only bind the company by acts done in accordance with the formal requirements of their agency, e.g., by resolution of the board at a properly constituted meeting. Acts done otherwise than in accordance with these formal requirements will not be the acts of the company. However, the principles of ostensible authority apply to the acts of directors acting as agents of the company and the rule in Turquand's case, 6 E & B 327 establishes that a third party dealing in good faith with directors is entitled to assume that the internal steps requisite for the formal validity of the directors' acts have been duly carried through. If, however, the third party has actual

or constructive notice that such steps had not been taken, he will not be able to rely on any ostensible authority of the directors and their acts, being in excess of their actual authority, will not be the acts of the company."

[92] ……As Lord Simonds explained in Morris v Kanssen [1946] AC 459, 475, both the indoor management rule and the doctrine of ostensible authority allow the smooth operation of business by protecting those who are entitled to assume that the person with whom they are dealing has the authority which he claims. But this general principle cannot be invoked if he who would invoke it is put upon inquiry. He cannot presume in his favour that things are rightly done if the inquiry that he ought to make would tell him that they were wrongly done. (Emphasis mine). Similarly, Houghton [1927] 1 KB 246 and Rolled Steel [1986] Ch 246 involved an attempt by a third party to rely on the indoor management rule. The attempt failed in both cases because, among other things, the principle of ostensible authority applied to acts of a director acting as an agent of the company and, if the third party had actual or constructive notice that the steps necessary for the formal validity of the acts of the director had not been taken, the third party could not rely upon the principle.

[93] The Board therefore concludes that PT Satria could not rely upon the apparent authority of Mr. Joenoes to enter into the HOA on behalf of EACL if it failed to make the inquiries that a reasonable person would have made in all the circumstances in order to verify that he had that authority.

The Indoor Management Rule/Rule in Turquand

249. The Indoor Management Rule is targeted at a situation where a company fails to fulfil one of its internal requirements regarding the authority of its agents to contract. Third parties dealing with the company are entitled to presume regularity, or at least, are not to be affected by the company's non-compliance with its own internal formalities. This rule was derived from the case of ***Royal British Bank v Turquand***[73].

250. In ***Turquand***, an action was brought for the return of money borrowed by the company. The company argued that it was not required to pay back the money because the manager who negotiated the loan should have been authorised by a resolution of the general meeting to borrow but he had no such authorisation. As a result of constructive notice the bank was deemed to know

[73] [1843-60] All ER Rep 435. See p. 437 per Jervis CJ

this. In attempting to mitigate this effect the court held that the public documents only revealed that a resolution was required, not whether the resolution had been passed. The bank had no knowledge that the resolution had not been passed and thus it did not appear on the face of the public documents that the borrowing was invalid. Outsiders are, therefore, entitled to assume that the internal procedures have been complied with. This is known as the Indoor Management Rule.

251. The rule in ***Turquand's case*** was based on the proposition that if what a company and its officers propose to do is not inconsistent with anything stated in the memorandum and articles, an outsider is bound to enquire no further: he can assume that the transaction is regular and legitimate. The court held that the company was bound, since there was nothing to suggest that the authority was wanting, and no facts to put the outsider on enquiry.

252. The rule in ***Turquand's case*** is set out in Halsbury's Laws of England[74] as follows:

> ***Powers of directors to bind the company***
> *In favour of a person dealing with a company in good faith, the power of the directors to bind the company, or to authorise others to do so, is deemed to be free of any limitation under the company's constitution.*
>
> *For these purposes:*
>
> 1. *a person 'deals with' a company if he is a party to any transaction or other act to which the company is a party; and*
>
> 2. *a person dealing with a company:*
>
> *a. is not bound to inquire as to any limitation on the powers of the directors to bind the company or authorise others to do so;*
>
> *b. is presumed to have acted in good faith unless the contrary is proved; and*
>
> *c. is not regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution.*

[74] Volume 14 (2016), para 262

These protections do not affect any right of a member of the company to bring proceedings to restrain the doing of an action that is beyond the powers of the directors; but no such proceedings lie in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the company. Nor do the statutory protections affect any liability incurred by the directors, or any other person, by reason of the directors' exceeding their powers.

253. The learned authors of Halsbury's[75] also stated the following in relation to presumption as to matters of internal company management:

Persons contracting with a company and dealing in good faith have always been entitled to assume that acts within its constitution and powers have been properly and duly performed, and were never bound to inquire whether acts of internal management have been regular. This rule does not, however, apply to a director, or de facto director, who contracts with the company, as he should know the true position. In any case, persons contracting with the company must take the articles of association in force to be those registered, and they are not entitled to assume that a special resolution has been passed pursuant to the articles, for that would have to be registered, and where the act is within the company's power only on the fulfilment of a statutory condition, persons dealing with the company are bound to ascertain whether the condition has been fulfilled. An irregularity may be cured by a special article validating certain acts of the officers notwithstanding any irregularity; but the particular act to be protected must on the face of it comply with the articles.

STATUTORY PROVISIONS

UK

254. Section 40 of CA 2006 (Companies Act) provides that a person dealing with a company in good faith is not bound to enquire as to any limitation on the powers of the directors to bind the company, and so the question of constructive notice will not arise (save in relation to transactions in which directors themselves are interested).

40 Power of directors to bind the company

[75] Volume 14 (2016), para 266

(1) In favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorise others to do so, is deemed to be free of any limitation under the company's constitution.

(2) For this purpose—

(a) a person "deals with" a company if he is a party to any transaction or other act to which the company is a party,

(b) a person dealing with a company—

is not bound to enquire as to any limitation on the powers of the directors to bind the company or authorise others to do so,

(ii) is presumed to have acted in good faith unless the contrary is proved, and

(iii) is not to be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution.

(3) The references above to limitations on the directors' powers under the company's constitution include limitations deriving—

(c) from a resolution of the company or of any class of shareholders, or

(d) from any agreement between the members of the company or of any class of shareholders.

Canada

255. The Indoor Management Rule is set out at sections (18) of the Canada Business Corporations Act ("CBCA") and (19) of the Ontario Business Corporations Act ("OBCA"). Section 18 of the CBCA reads:

"18 (1) No corporation and no guarantor of an obligation of a corporation may assert against a person dealing with the corporation or against a person who acquired rights from the corporation that

(a) the articles, by-laws and any unanimous shareholder agreement have not been complied with;

(b) the persons named in the most recent notice sent to the Director under section 106 or 113 are not the directors of the corporation;

(c) the place named in the most recent notice sent to the Director under section 19 is not the registered office of the corporation;

(d) a person held out by a corporation as a director, officer, agent or mandatary of the corporation has not been duly appointed or has no authority to exercise the powers and perform the duties that are customary in the business of the corporation or usual for a director, officer, agent or mandatary;

(e) a document issued by any director, officer, agent or mandatary of a corporation with actual or usual authority to issue the document is not valid or genuine; or

(f) a sale, lease or exchange of property referred to in subsection 189(3) was not authorised."

Section 19 of the OBCA reads:

"19. A corporation or a guarantor of an obligation of a corporation may not assert against a person dealing with the corporation or with any person who has acquired rights from the corporation that,

(a) the articles, by-laws, or any unanimous shareholder agreement have not been complied with;

(b) the persons named in the most recent notice filed under the Corporations Information Act, or named in the articles, whichever is more current, are not the directors of the corporation;

(c) the location named in the most recent notice filed under subsection 14(3) or named in the articles, whichever is more current, is not the registered office of the corporation;

(d) a person held out by a corporation as a director, an officer or an agent of the corporation has not been duly appointed or does not have authority to exercise the powers and perform the duties that are customary in the business of the corporation or usual for such director, officer or agent;

(e) a document issued by any director, officer or agent of a corporation with actual or usual authority to issue the document is not valid or not genuine; or

(f) financial assistance referred to in section 20 or a sale, lease or exchange of property referred to in subsection 183(3) was not authorised, except where the person has or ought to have, by virtue of his position with or relationship to the corporation, knowledge to that effect."

256. The rule in Turquand affords, therefore, another example in which English case law has established fundamental principles in company law which were generally accepted as the law in the Commonwealth Caribbean and other Commonwealth countries such as Canada, the Companies Act of Trinidad and Tobago being similar to that of Canada. The rule remains the law in the Bahamas, Belize, Jamaica and St Christopher/Nevis. (See- Andrew Burgess, Commonwealth Caribbean Company Law, (Routledge, 2013), p. 430, 651.)

257. The statutory version of the Indoor Management Rule is set out at sections 24 and 25 of the Companies Act Chapter 81:01 of Trinidad and Tobago.

258. Section 24 which deals with the operation of constructive notice reads:

24. (1) Subject to subsection (2), no person is affected by, or presumed to have notice or knowledge of, the contents of a document concerning a company by reason only that the document has been filed with the Registrar or is available for inspection at any office of the company.

(2) Subsection (1) shall not apply to a charge, the particulars of which are required to be registered under Part IV.

259. **Section 25,** however, is a restatement of the rule in ***Turquand***. The section reads:

25. A company or a guarantor of an obligation of the company may not assert against a person dealing with the company or with any person who has acquired rights from the company—

(a) that any of the articles or Bye-laws of the company or any unanimous shareholder agreement has not been complied with;

(b) that the persons named in the most recent notice sent to the Registrar under section 71 or 79 are not the directors of the company;

(c) that the place named in the most recent notice sent to the Registrar under section 176 is not the registered office of the company;

(d) that a person held out by a company as a director, an officer or an agent of the company has not been duly appointed or had no authority to exercise the powers and perform the duties that are customary in the business of the company or usual for such a director, officer or agent;

(e) that a document issued by any director, officer or agent of the company with actual or usual authority to issue the document is not valid or not genuine; or

(f) that the financial assistance referred to in section 56 or the sale, lease or exchange of property referred to in section 138 was not authorised,

(g) *except where that person has, or ought to have by virtue of his position with or relationship to the company, knowledge to the contrary*.

Authorities

262. In ***Anderson Lumber Co v Canadian Conifer Ltd***[76] , the Alberta Court of Appeal dealt with the issue of insiders attempting to rely on the Indoor Management Rule. The Defendant's articles of association gave authority to the directors to raise or borrow or secure the payment of money for the benefit of the company subject to the requirement that, if the money involved was greater than the nominal capital of the company, the sanction of a general meeting was necessary. The court found that Anderson Lumber was an insider, with knowledge of the defect and, therefore, was not entitled to rely on the Indoor Management Rule.

263. In ***D'mars Stone Company Ltd v Orange Walk Town Council 2014***[77] the company carried out works on the public roads in Orange Walk. The works were expanded by a purported contract entered into with the Council. A contract and agreement were purportedly signed by the Mayor on behalf of the then Council without the council's seal. The current Council averred that neither it nor the past Council knew of the contract and agreement.

264. The Supreme Court of Belize held that the rule in ***Turquand's case*** applied. The Council had no regard for the circumstances in which the contract was made or the specific terms of the contract. Further, it made no attempts to control the Mayor when it was clear that he exceeded his powers and breached all manner of laws and regulations. Madam Justice Young stated the following:

> *….No one objected and they fully participated in the discussion which followed in relation to the subject matter of that contract. Whether that contract was written or oral is of no moment now. None of the Council members questioned its existence, requested terms or even asked how much the entire project would be or how much the payment plan would cover. Throughout the debate no one objected to The Mayor's contracting without their authority or even rebuked him for doing so. There was a distinct absence of disapproval and this tells loudly.*

265. Notwithstanding the local statutory provisions, ***Turquand's case*** was nonetheless relied on in relatively recent decisions of our local courts.

[76] 77 D.L.R. (3d). See also p. 138, 139 of the judgment.
[77] 158 of 2013

266. In ***Daniel Chookolingo v William Carpenter and others***[78] summary judgment was granted to the Ninth Defendant and the shareholders on record. The Claimant was a director, chairman of the board of directors and chief executive officer of DNL (Ninth Defendant). The Claimant claimed that in 1993 he paid one thousand dollars ($1000.00) into DNL's account in exchange for all its issued share capital. Aboud J, as he then was, held that the Claimant could not rely on the rule in ***Turquand's*** case as he was an 'insider'. The Honourable Judge cited the case of ***Morris v Kanssen and Ors*** [1946] A.C. 459, where Lord Simmonds stated the following at p 475:

> *…..An ostensible agent cannot bind his principal to that which the principal cannot lawfully do. The directors or acting directors or other officers of a company cannot bind it to a transaction which is ultra vires. Nor is this the only limit to its application. It is a rule designed for the protection of those who are entitled to assume, just because they cannot know, that the person with whom they deal has the authority which he claims. This is clearly shown by the fact that the rule cannot be invoked if the condition is no longer satisfied, that is, if he who would invoke it is put upon his inquiry. He cannot presume in his own favour that things are rightly done if inquiry that he ought to make would tell him that they were wrongly done. What then is the position of the director or acting director who claims to hold the company to a transaction which the company has not, though it might have, authorised? Your Lordships have not in this case to consider what the result might be if such a director had not himself purported to act on behalf of the company in the unauthorised transaction. For here Morris was himself purporting to act on behalf of the company in a transaction in which he had no authority. Can he then say that he was entitled to assume that all was in order? My Lords, the old question comes into my mind, "Quis custodiet ipsos custodes?" It is the duty of directors, and equally of those who purport to act as directors, to look after the affairs of the company, to see that it acts within its powers and that its transactions are regular and orderly. To admit in their favour a presumption that that is rightly done which they have themselves wrongly done is to encourage ignorance and condone dereliction from duty.*

267. In ***Lu-Ann Forbes v MKJ Tobago Limited and others***[79] one of the issues for determination was whether the purchasers (Second and Fifth Defendants) could avail themselves of the Indoor Management Rule, having dealt with purported agents of the company. Donaldson-Honeywell J

[78] CV2014-00489
[79] CV2016-03038, delivered April 9, 2018

pointed out (paragraph 39-43) that overall the transaction was filled with many suspicious circumstances. The Honourable Judge also considered the following at paragraph 68:

> *As propounded in K.P. McGuinness Canadian Business Corporations Law (Second Edn, Lexis Nexis) at [6.82] p. 330:*
>
> *"[A] person may not rely on the Indoor Management Rule where he or she has notice of the defect in authority. More generally, at common law, a person is not entitled to rely upon apparent authority where the circumstances are such as to put a reasonable person on notice that something is out of the ordinary and that there may be a defect in authority.*

268. In ***CLICO Investment Bank Limited v Louis A Monteil, Richard Trotman, Stone Street Capital Limited, First Capital Limited***[80] the Claimant, CLICO Investment Bank (CIB) claimed that First Defendant (former director and chairman of CIB) and the Second Defendant (president and CEO and director of CIB) breached their legal obligations to CIB. The claim revolved around a loan from CIB to Stone Street (Third Defendant and a long-standing customer of CIB) and subsequently a transfer and substitution for that loan from the Third Defendant to First Capital Limited (Fourth Defendant). The Board of CIB was ultimately responsible for all lending decisions.

269. It was held inter alia that loan was voidable on the basis that they were entered into without proper authority and/or in breach of fiduciary duty. The Third and Fourth Defendant knew, through the First Defendant that they were unauthorised and entered into in breach of the First and Second defendant breaches of fiduciary duties and dishonestly. My sister Quinlan-Williams J opined the following:

> *257. It is argued by many that Turquand Rule was formulated as a means of counteracting the rigid doctrine of constructive notice by protecting 'bonafide third parties' dealing with a company, by entitling them to assume that all internal management and procedures have been complied with. The effect of the Turquand rule is that a third party, acting above board and in good faith, when dealing with a company is not required to inquire about the internal constitutional formalities of a company. Such third party is entitled to assume that the contracting officer has authority and has complied with the company's internal management and other required policies. An inspection of the public documents will not*

[80] CV2010-01352

reveal what these internal formalities are and if they have been followed so, bonafide third parties should not suffer from the management's failure to comply with its internal management rules of the company.

259. Under the common law as stated in Hely-Hutchinson v. Brayhead Ltd (1968) 1 QB 549 [fn. at pages 562-571], a Director acting in his capacity as a Director is different from one acting not as a Director but as an outsider contracting with the company. The latter will be able to seek the application of the Turquand Rule, so the common law Turquand Rule is not entirely outside of an insider's reach such as Monteil. Therefore, a Director standing in the position of a third party (such as Monteil) enters into a contract on behalf of the company in which he has an interest, with Company B (such as CIB) through an officer of Company B (such as Trotman) who is vested with apparent or ostensible authority to bind Company B, then Company B is estopped from asserting that it is not bound by the contract.

260. However, based on the court's findings of fact, Monteil while acting as the outsider for Stone Street, has not acted with good faith.

263. It is trite law that the Turquand Rule applies only when the third party is acting in good faith. So a third party cannot be protected by the Turquand Rule if he knows or ought to have known that internal management requirements have not been complied with and failed to make reasonable enquiries. This position has been adopted in various common law jurisdictions such as Hong Kong, Singapore and Australia.

270. This court must, therefore, ascertain the following:

a. Did Namalco have knowledge of the fact that Singh had no actual authority to enter into the Supplementary Agreements for a sum above one million dollars ($1M)?

b. If not, ought it to have been put on inquiry that Singh had no such authority. If the answer is yes, then the presumption afforded in Turquand's Case cannot apply to Namalco so as to protect it from the unauthorised action of Singh.

c. Is the subsequent ratification by the Board valid, and if so, what is the effect on the validity of the supplementary contracts.

Did Namalco have knowledge of the fact that Singh possessed no actual authority to enter into the Supplementary Agreements for a sum above $1M

271. The evidence of Baksh shows that the original works on both Projects had been tendered and Contracts awarded based on such tenders. In respect of Roopsingh Road, the Contract was awarded in April 2010 and in respect of Petit Morne Contract the Original Contract was awarded on February 7, 2012 again after a tendering process. In the case of Roopsingh Road, Namalco had terminated and then negotiated with Singh for the restart at rates considerably higher than the awarded rates. In the case of Petit Morne, Namalco had been contracted to perform additional works and so renegotiated the rates under the Original Contract and new rates for the additional works. According to Baksh, this Contract was approved by the Board upon recommendation of Singh. However, the Supplementary Agreements were entered into by Singh just about two (2) months after the award.

272. This court finds that Namalco knew that Singh possessed no authority to enter into the Supplementary Agreements either by way of inference. This was the case of a well-established construction company that on the evidence appeared to be well acquainted with the tendering process having tendered for contracts before and having been awarded same. Namalco was aware that EMBD operated only by way of tender for all major contracts. In that regard, the court is of the view that it is not merely a matter of speculation but that of a clear and reasonable inference that Namalco would have known that Singh had no such authority because they were required to and did in fact tender for the Original Contracts.

273. To that end, both sides have submitted that the court ought to draw adverse inferences against the other on the issue as Namalco has failed to call Mr. Ali to give evidence and EMBD has failed to call Singh. However, it is clear that the witness Baksh did in fact provide direct evidence of the meetings that led to the Supplementary Agreements being entered into and the process for tendering. The absence of Singh, in that regard, is not a matter that weighs in favour of an adverse inference being drawn against EMBD.

274. Further, while Singh could not reasonably have been expected to possess information of the knowledge of Namalco as to whether it knew that Singh did not have authority, certainly it is reasonable to infer that Ali as the controlling mind of Namalco may have assisted the court in

determining whether Namalco knew of the restriction on Singh as to authority. It was, therefore, up to Namalco to call Ali to testify on that issue but it has failed to do so without an explanation. However, Namalco called Lenny Sookram, Project Manager, who was the person delegated to attend some of the meetings so that Sookram, it is reasonable to find, would have been in a position to treat with the issue, therefore, the criteria for the drawing of an adverse inference against Namalco also does not arise.

275. The court, therefore, finds that Namalco did have knowledge that Mr. Singh possessed no authority to enter into the Supplementary Agreements.

Should Namalco have been put on inquiry that Singh had no such authority

276. In any event, without recourse to the finding above, the answer to this issue must be a resounding yes as a matter of the proven experience of Namalco. These two projects were not the only projects that Namalco would have tendered for over the years and so it was no doubt aware that there existed such a process by which contracts were awarded. While it may not have had knowledge of the quantum award ceiling of the CEO as compared to that of the Tenders Committee or the Board, it was certainly aware that for the award of the Original Contracts for hundreds of millions less than the Supplementary Agreements, it would have proceeded via a tendering process.

277. The evidence shows that Namalco was entering into two one-page Supplementary Agreements negotiated and executed by the CEO for sums far in excess of the original sum amounting in total to over five hundred and ninety million dollars ($590M) without tendering. The court finds that the actions of Singh must have reasonably been cause for concern on the part of Namalco as to whether they would in fact be paid the sums agreed if Singh did not have the authority to enter into agreements for such larger sums that those awarded after tender. So it is reasonable that Namalco ought to have put on inquiry as to Singh's authority so to do.

278. Further, Namalco was purporting to and indeed attempted to, rescind its Notice of Termination of the Contract with a view to continuing work but under new terms as to pricing. It, therefore, knew that it was entering into a new price arrangement supposedly based on the award made on the Original Contract but based this time on much more favourable prices without the approval of the Tenders Committee of the Board, it not having communicated directly with either in an attempt to agree to new prices. The fundamental question of whether Singh was authorised

to enter into such an agreement would not only be obvious but ought to reasonably have been at the forefront of the controlling mind of Namalco.

279. It follows as a matter of law that the rule in ***Turquand's*** case cannot operate in favour of Namalco so as to protect it from the unauthorised actions of Singh and the court so finds. **But for the issue of ratification which follows, the court would, therefore, have held that Supplementary Agreements are not valid on the basis of breach of fiduciary duty by Singh.**

Is the subsequent ratification by the Board valid and if so what is the effect on the validity of the supplementary contracts

280. Namalco submitted that the ratification of the Supplementary Agreements had the effect of rendering them valid and binding. In addition, the testimony of Baksh supports the fact that at the time the EMBD Board ratified the Supplementary Agreements, the Board was aware of the effect of the said Agreements.

281. EMBD disclosed Minutes of Board Meeting held as far back as 2009. Inclusive therein are the minutes of a meeting of June 26, 2014[81] in which the Board is appraised of the suspension of both the Petit Morne and Roopsingh Road Projects between the period October 2010 to March 2011. The minutes set out that the Projects were reviewed and recommenced. After recommencement, EMBD entered into negotiations with the Contractors resulting in the preparation of the Supplementary Agreements. The minute states that the Supplementary Agreements were submitted to the tendering committee in early 2012 and then to the Audit Committee for review. The Audit Committee then "re-sent" the matters to the Board which noted that it discussed the matters with the Audit Committee. As of that meeting on June 26, 2014, the Board noted that there was no evidence that the Board approved the Agreements.

282. Further, the said minutes record that on May 9, 2012, Singh entered into Supplementary Agreements with Namalco for Roopsingh Road and Petit Morne without the approval of the previous Board and so implemented revised rates. It appears, therefore, that the inference is that the Supplementary Agreements were those forwarded to the Board and the Tenders Committee but which had not received approval. The minutes set out the original sums awarded and the increase. The table set out in the minutes shows an increase of over one hundred and eighty-five

[81] Page 299 (electronic PDF) of EMBD Disclosed Board Meeting bundle.

million dollars ($185M) in respect of Roopsingh Road and an increase of over two hundred and fifty-five million dollars ($255M) for Petit Morne.

283. The minutes clearly set out that EMBD implemented the new sums and commenced payments on certified works with an upper ceiling of the new contract sums without the approval of the Board. The sums, in respect of the existing Contracts, were also raised to a level on par with the Supplementary Agreements. The Board then set out that it had not received enough funding to pay that which was owed and instructed the Deputy Chairman to examine the various Contracts for the Projects and prepare a paper to present to the Line Minister on the status of the Projects to support the request for funding to complete the Projects.

284. Subsequent minutes demonstrate that the ceiling of approval of the CEO was increased to two hundred and fifty thousand dollars ($250,000.00) and an acting Chairman was appointed upon resignation of another. The above minute demonstrates to the Court that the Board (which appeared to be a new one at the time) was fully appraised of the actions of Singh of entering into the two Supplementary Agreements without the permission of the former Board. Indeed this was accepted by the witness Baksh in cross-examination[82].

285. The other instructive record is to be found in the minutes of the meeting of June 8, 2015. The issue of the Supplementary Agreements were raised once again in the context of the Board having obtained legal advice on the validity of the Agreements. In summary, the advice provided was as follows:

a. Singh was appointed CEO with permission to manage the affairs of the Company and to negotiate with Contractors.

b. EMBD, therefore, represented that Singh had the authority to execute Agreements on behalf of it.

c. The execution of the Agreements were within the ordinary ambit of the Powers of the CEO.

d. In the subsequent course of dealings with the Contactors, the EMBD would have led the Contractors to believe that approvals had been granted.

[82] See transcript day 3, pages 64 to 66.

e. EMBD, in any event, accepted the Agreements and proceeded to make payments in accordance with them having obtained the benefits under them.

286. The minutes then record that the Agreements were ratified and the Board proceeded to approve further variations. These minutes were also accepted by the witness Baksh as being that in possession of EMBD. The witness also expressed a level of discomfort at the time the negotiations were on-going as can be seen in both his witness statement and cross-examination:

Paragraphs 238 and 239 of his witness statement:

> "I distinctly recall telling Mr Singh that, if he were to total the contract sums which the individual rates in those Bills made up, it would come to almost one billion dollars ($1B). I also reminded him that before executing these Agreements, the terms proposed would require submission to the Tenders Committee and approval by the Board of Directors.
> Mr Singh's response to me was to say that he knew all of that but that he was under "pressure" from the Chairman to sign the Supplementary Agreements. I now know from Mr Singh's witness statement in the defamation proceedings that he was frequently under such improper pressure from the Chairman and from Ministers of the Government".

287. Under cross-examination, he stated:

> *Q You were not involved in any way in the negotiations for the Supplemental Agreements.*
>
> *A I was present at one or two meetings in the early stages of the Supplementary Agreement, yes…*
>
> *Q I see you have exhibited minutes of the meetings of which you were so involved.*
>
> *A Yes.*
>
> *Q And you felt that the rates that were being negotiated were not in the interest of EMBD.*

A Yeah, I found -- yeah some of the rates were high, higher than normal rates.

Q And you walked out of one of the meetings.

A Yes, I did Sir.

Q Now, as a Project Manager, senior employee of EMBD, did you not think it was your duty and your responsibility to bring it to the attention of the Board that the CEO was intending to enter into an agreement which was not in the best interest of EMBD. You didn't think that prudent?

A No. At the time I just notified the CEO of my concerns. The CEO was not part of the early agree -- the early negotiations.

Q You informed the CEO of your position.

A Of my concerns, yes.

Q Of your concerns and did -- did the CEO take on your concerns and bring it to the attention of the Board?

A Well, I can't say if he did or did not take it to the Board. I would not be part of the, the Board meetings but the Supplementary Agreements did go ahead so I assume -- I don't know if he got permission and so on from the -- but I know he...

Q But...

A ...the Supplementary was signed afterwards.

Q You did not think it was part of your responsibility if the CEO was not heeding your concerns, to bring it to the attention of the Board -- of your employers.

A No. Well, normally we -- our -- we report to the CEO at the time and I take my concerns to the CEO.

Q So you felt your responsibility ended there.

A Yes[83]*.*

288. EMBD submitted that the Board as constituted at the time the Supplementary Agreements were entered into had not been fully informed of all of the material facts. It relies on the minutes of the meeting of May 10, 2012 in which no mention is made by Singh that he entered into Supplementary Agreements mere days before and the fact that the Supplementary Agreements themselves recite that EMBD had accepted Namalco's tender as the basis for contracting. The court accepts this to be the position. However, in the court's view, at the time of the decision to ratify in 2015, the Board as constituted was clear in its view that Singh had not been given actual authority to enter into the Contracts and so had done so without the required permission of the then Board. This is clearly set out in the minutes above.

289. Further, in its submissions at paragraph 100.3, EMBD argued that the Board that ratified the Agreements in 2015 appeared from the minutes to have been under the impression that a competitive tendering process had been engaged when in fact it had not. In that regard, the court does not agree with the interpretation of the minutes of June 26, 2014 as proffered by EMBD. The court finds that those minutes clearly set out that the Tenders Committee had been engaged but that the Committee remitted the engagement back to the Board. In other words, the Tenders Committee was essentially saying that there had been no tendering process. These are the facts that the Board had before it in 2015. The court also finds that this is the context in which the 2015 Board asked for the paper to be prepared as it was clear that work had been carried out by Namalco on reliance on the Supplementary Agreement and payments made. So that the inquiry was necessary in order to ascertain whether the Agreements were valid.

290. The court is, therefore, clear that on the evidence before it, the 2015 Board was acting under no misconception as to the existence of a previous competitive tendering process. The minutes demonstrated to the Board that at the highest, Supplementary Agreements may have been prepared but never approved for execution on the part of EMBD. Finally, the court accepts

[83] Transcript day 3, pages 62 to 63 lines 12 to 18.

the argument of EMBD that the lack of approval from the then Board is not reflected in the contents of the internal Audit report of May 20, 2013 as this report relates to additional works on some forty-seven (47) acres. What it does in fact demonstrate is what appears to have been the practice of Singh as CEO of entering into contracts without first seeking approval.

291. The subsequent ratification in 2015, acted so as to vest the CEO with ostensible authority, in all of the circumstances, in the view of the court. It is clear that this was the decision of the Board acting on advice it received even if such advice appears to have been partially erroneous. The act of ratification of the Board in 2015 was clearly one by which the Board was accepting with full knowledge of the lack of actual authority, that the CEO had ostensible authority to enter into the Supplementary Agreements and the court so finds.

292. Further, the Board also accepted with eyes wide open as it were that it had obtained the benefit of the Agreements and had in fact made payments on the Agreements, thereby accepting the validity of same.

Breach of fiduciary duty

293. Section 99 of the Companies Act reads:

> "99. (1) Every director and officer of a company shall in exercising his powers and discharging his duties—
>
> (a) act honestly and in good faith with a view to the best interests of the company; and
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."

294. So that section 99(1)(a) speaks of the exercise of acting honestly and in good faith with a view to the best interests of the Company and section 99(1)(b) speaks to the exercise of care, diligence and skill. There are, therefore, two statutory categories in relation to the actions of directors. 99(1)(a) treats with fiduciary duties. The law on the breach of the statutory duty is not in issue in this case. The duty is one on loyalty to the Company. It is a duty that is owed only to the Company.

295. Section 99(2) reads:

> "99. (2) In determining what are the best interests of a company, a director shall have regard to the interests of the company's employees in general as well as to the interests of its shareholders."

296. So that the statute has, therefore, sought to codify the common law. The relevant features of the common law are as follows:

a. The directors and officers are under a subjective duty to act bona fides in what they consider and what the court may consider is in the best interest of the Company.

b. The directors and officers are also under a duty not to act for a collateral or improper purpose[84].

c. The directors and officers are under a duty to avoid conflict between his self-interest and the interests to the Company[85].

d. The directors or officers shall not, unless otherwise expressly allowed, be entitled to profit from their position. This rule is often referred to as the rule in ***Keech v Sandford***.[86]

297. The essential question to be answered would have been whether Singh breached his fiduciary duty by causing EMBD to enter into the Supplementary Agreements which were not in the best interests of EMBD and in preference to the interests of Namalco.

298. In the court's view, however, the issue becomes an academic one having regard to the ruling of this court above on the issue of ratification. Put another way, even if there was a breach of fiduciary duty on the part of Singh, the subsequent ratification of the Agreements by the Board would have laid to rest any effect that such a breach may have had on those Agreements as between the EMBD and Namalco. It bears repeating that the court has found that at the time the

[84] See ***Re Smith and Fawcett Ltd (1942)*** CH 304 and ***Hogg v Cramphorn*** (1967) CH 254 judgment of Buckley J. See also the dicta of Lord Wilberforce in ***Howard Smith Ltd v Ampol Petroleum Ltd*** (1974) UKPC 3.
[85] See ***Guinness plc v Saunders*** (1990) UKHL 2.
[86] (1726) EWHC CH J76

decision was taken to ratify, the Board was privy to all of the relevant information as regards the actions of Singh.

299. It should also be noted that the court should not be understood as saying that the Board would have waived the breach of fiduciary duty between it and Singh which is a wholly separate matter not relevant to these proceedings. In the circumstances therefore, the issue of breach of fiduciary duty and its effect on the Supplementary Agreements no longer arise as an issue for determination.

CONSPIRACY

Whether it has been established that Namalco and Singh conspired together to procure the award of the Supplementary Agreements

300. Unlike with the issue of breach of fiduciary duty, the effect of proven conspiracy is that of invalidation of the decision of the Board to ratify because of the concerted act to deceive EMBD and obtain financial or other benefits from it under false pretence. Thus, the essence of conspiracy goes to the heart of the decision to ratify.

301. Namalco has attacked this issue on several fronts. Firstly, it submitted that EMBD failed to particularise or plead its case on unlawful means conspiracy.[87] Importantly, EMBD did not identify any individual who had the relevant alleged knowledge of unlawfulness for attributing this knowledge to Namalco.

302. Secondly, there has been no allegation of fraud against BBFL, especially, as it played a major role in the negotiation and preparation of the Supplementary Agreements.

303. Thirdly, that in any event EMBD failed to meet the standard and burden of proof required to establish unlawful means of conspiracy on the evidence.[88] There was no evidence that it intended to injure EMBD.

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[87] See Namalco's [Bundle of Authorities: TAB 31 (Page 0669)] - ***Three Rivers DC v Bank of England*** (No 3) [2003] 2 AC, per Lord Hope at para. 51. The Honourable Judge pointed out that, *the more serious the allegation of misconduct, the greater is the need for particulars to be given which explain the basis for the allegation*

[88] See Namalco's [Bundle of Authorities: TAB 34 (Page 1006)] - ***Alesco Risk Management Services Ltd and other companies v Bishopsgate Insurance Brokers Ltd and others*** , [2019] EWHC 2839 (QB)

304. Finally, the elements of unlawful means of conspiracy were not established namely:

a. an agreement or "combination", between an alleged conspirator and one or more others;

b. an intention to injure the party who alleges the conspiracy;

c. unlawful acts carried out pursuant to the agreement or "combination" (the unlawful means);

d. knowledge of unlawfulness; and

e. loss to "injured party" suffered as a consequence of those acts.

EMBD on Conspiracy

305. EMBD has submitted that the circumstances give rise to an inference that Singh and Namalco conspired together to enter into a contract knowingly in breach of the Singh's Statutory Fiduciary Duties and/or the absence of actual authority with the intention of causing harm to the Company.

306. It also submitted that in determining whether the elements of the tort on unlawful means conspiracy exists it is often difficult to so do by way of direct evidence. In the court's view, this of course is a truism owing to the nature of conspiracy and the attempts by parties to a conspiracy to hide all relevant facts that might point towards them. To that extent the courts have had to examine the evidence carefully to determine whether there also exists evidence from which permissible inferences can be drawn in the absence of direct evidence. The EMBD has quite helpfully set out the relevant law on the issue of the tort and the court accepts that there is no dispute on the law. To that extent the court does not repeat the propositions of law set out in the submissions but shall have recourse to same where applicable. It is, however, important to underscore that knowledge by the party to the conspiracy that the act is unlawful is not a pre-requisite as what is required is sufficient knowledge by that party that unlawful acts are being carried out so as to implicate it in liability for same[89].

[89] See ***Belmont Finance Corp v Williams Furniture Ltd (No.2)*** [1980} 1 All ER 393 at 404-405

The pleading point

307. In relation to the pleading, it is clear that EMBD has pleaded unlawful means conspiracy but Namalco takes issue with the fact that it has not been pleaded as to who would have possessed the knowledge of the unlawful act. In that regard, the court agrees with the answer provided by EMBD in its reply submissions that this argument ignores the law as set out above that all that is required is sufficient knowledge that unlawful acts are being carried out. In this case, the allegation on the evidence is that Mr. Ali of Namalco would have been aware that unlawful acts were being carried out.

308. In the court's view, the absence of that particular of pleading is not fatal on its own. In any event, the ruling of the court is that Namalco was not aware of the restrictions imposed on Mr. Singh in relation to the approval of contracts above a certain sum but that it certainly ought to have been put on inquiry that he was acting outside the terms of his remit. Equally, therefore, in light of that finding merely being placed on inquiry would not in the court's view have been sufficient to vest Namalco with knowledge of the unlawful act of Mr. Singh. It follows that the point taken on the pleading becomes of no moment.

The evidence of conspiracy

309. The court must examine the evidence with a broad view so as to see the entire picture in one frame.

310. The evidence of the witness Baksh in chief is that on March 21, 2012, Singh telephoned Namalco and invited its representatives including Mr. Naeem Ali of Namalco Managing Director) to attend a meeting regarding the restarting of Roopsingh Road 2 Residential Development. A few days later, Singh wrote to Namalco inviting it to a further meeting on March 27, 2012 and to submit its suggested rates along with build-up, prices imbalances and outstanding claims. On April 12, Singh wrote to Namalco requesting its attendance the following day at a meeting regarding the possibility of re-starting the Roopsingh Road 2 Residential Infrastructure Project.

311. On April 13, 2012, the meeting was attended by the witnesses Baksh, Andrew Walker, Ms. Hector all of EMBD, Mr. Aguilar of BBFL and Mr. Lenny Sookram of Namalco (Project Manager). It is to be noted that Lenny Sookram signed the Supplementary Agreements on behalf of Namalco. The meeting was chaired by Mr. Aguilar. The historical context, it must be remembered, was that Namalco had terminated the works after the suspension notice by EMBD and had made a claim

for the works performed during the period of suspension and prior to termination. The discourse of the meeting as set out by Baksh at paragraph 226 of his first witness statement demonstrates that Namalco sought to obtain higher rates in keeping with increased rates than that which it tendered for some two (2) years before and upon which the Original Contracts were based. The witness gave his understanding of the minutes of the meeting which was that Namalco agreed to forgo the certified claim for loss of profit and prolonged suspension and EMBD agreed to pay higher rates which would be capped at fifteen percent (15%). Part of the suggested agreement was the retraction of the termination.

312. The next meeting was held on April 19, 2012 and was attended by the same persons. At this meeting however, the compromise position seemed to have been changed by Aguilar and it appeared that enormous rate increases were being considered and agreed to by EMBD. As a consequence, Baksh walked out of the meeting after commenting that the perception may be given that the Project was stopped so that it could be awarded to other Contractors who are friends to the Minister so that more money could be made. It is his evidence that an example was that of the clearing and grubbing rates which seemed to be headed to a figure that far exceeded the fifteen percent (15%) increase.

313. The witness also sought to give evidence that Namalco was given preferential treatment by Singh when making the Original Award in that the award was made by sole select. Of course, the sole select mechanism was approved by the Tenders Committee at the time so that the only evidential value of this is that Singh was the one who made the recommendation that Namalco be the preferred Contractor. The evidence of Baksh is that the Tenders Committee appeared to want to restart the process of tendering but Singh informed them that the need for housing was urgent in order to relocate people who had been displaced by the construction of the new highway. It is in these circumstances that the Committee made the recommendation for the Original Contracts. This evidence is but a link in the chain of evidence.

314. Baksh also recalled that while the suspension of works on Roopsingh Road in 2010 directly affected Namalco, the suspension of the Petit Morne Project, also, in 2010 did not affect Namalco because it was not the Contractor on that Project. Namalco was only awarded a contract for Petit Morne by Singh on February 7, 2012 for Petit Morne II and IIA as by then the Contractor Sawh had terminated its contract with EMBD. It is the prices agreed to on February 7, 2012 that were

substantially increased by the award of the Supplementary Agreement in April 2012, some two (2) months after the Original Award.

315. Further, at the time the original RR Contract was negotiated the Engineer was Planviron. Planviron was subsequently removed as engineer by Singh. Baksh testified that having conducted full searches of the records he could find no report addressed to the Board as to the reason for removal of Planviron. Further, the record of minutes at a meeting of March 23, 2012 showed that Namalco asked for Planviron to be removed on the ground of incompetence. In the result, BBFL Civil Limited (BBFL) eventually became the Engineer on RR and was selected as the Engineer for the PM Project, both being awarded to Namalco. Mr. Aguilar was the representative of BBFL and so this is how he came to be present at the meetings.

316. On May 8, 2012, Mr. Aguilar wrote to Mr. Ali asking him to confirm the new Agreement for the new prices on RR. The prices were attached by way of a document entitled "Agreed Rates" which contained a detailed Bill of Quantities. The effect was to revise the total contract price to over two hundred and four million dollars ($204M). In exchange, Namalco agreed to withdraw the Termination Notice, forego its loss of profit on the stoppage, restrict interest and security charges up to March 31, 2021, no claims to be made for a change in unit prices due to escalation in costs, inflation or unforeseen circumstances unless the increase was more than fifteen percent (15%).

317. BBFL then drafted the Supplementary Agreements on the instructions of Singh and at the direction of Aguilar. There is no evidence that any legal advisor advised EMBD or vetted the Supplementary Agreements on behalf of EMBD.

318. The witness Baksh testified that he subsequently spoke to Singh about it saying to him that the Bills of Quantities for all of the projects under the Supplementary Agreements totalled almost one billion dollars ($1B) and reminded him before executing that the terms required submission to the Tenders Committee and approval of the Board. In reply, Singh said he knew but he was under pressure from the Chairman to sign.

319. Four (4) Supplementary Agreements were signed by Singh and witnessed by Andrew Walker. None of them had been submitted to the Tenders Committee or approved by the Board.

320. In sum, the evidence of conspiracy as submitted by EMBD can be summarised as follows:

a. Namalco was awarded the Roopsingh Road Contract in 2009. BBFL was the Engineer appointed.

b. The Petit Morne Contract was subsequently awarded to Contractor Sawh with Planviron as the selected Engineer.

c. Both Contracts were suspended in 2010 after the conduct of general elections in Trinidad and Tobago that resulted in a change of government.

d. Singh was hired in 2011.

e. The suspension remained in effect and Namalco issued a Notice of Termination. Sawh also issued a Notice of Termination.

f. Singh recommended that Planviron be removed as Engineer from the Petit Morne Contract and recommended that BBFL be appointed. BBFL, under the guidance of Mr Aguilar, therefore, became Engineer on both projects.

g. Singh contacted Namalco with a view to restarting the Roopsingh Road Project. He negotiated prices that were much higher than the Original Tender in exchange for concessions on the part of Namalco in relation to its claim on the termination.

h. Singh also negotiated with Namalco to take over the Petit Morne Project at the same higher prices than that originally awarded to Sawh.

i. Without actual authority, Singh then entered into two (2) Supplementary Agreements committing EMBD to higher prices without the approval of the Tenders Committee or the Board, thereby making EMBD liable for several million dollars in excess of that which the Board had approved.

Discussion

321. One of the first matters that jumps out to the court is that of the explanation provided by the witness for EMBD, Baksh for the stoppage of the works after the election. This is what he had to say:

> *"67. The final point I wish to make by way of introduction is that EMBD, as a state enterprise, is always at the risk of the changing priorities of the Government of the day. As I have said, EMBD is dependent upon the Government both for the funding for EMBD's day-to-day operations and for funding EMBD's ability to develop projects. Accordingly, when the Government changes following an election, there is a risk that EMBD's ability to pursue a particular project may be affected.*
>
> *68. The major example of this, to which I will return on a number of occasions below, was after the election of May 2010, at which the Government changed. Before May 2010, EMBD, as a state enterprise, was operating under the direction of the Ministry of Finance, as the relevant Line Ministry. As a result of the election, and the reorganisation which this entailed, EMBD's Line Ministry changed from the Ministry of Finance to the Ministry of Food Production. As the name suggests, the priority of the Ministry of Food Production is agricultural, as distinct from residential, land, and an approach based on that priority was brought by the Ministry to each of the Projects, all of which had both a residential and an agricultural element, as I have described.*
>
> *69. As a result, the Ministry of Food Production wanted to suspend the progress of those active Projects in order to undertake a review of each of the respective areas of land in order to assess whether the land was being put to its best use as residential land or whether it could be more usefully used (to the Ministry of Food Production's way of thinking) as agricultural land. The Government, therefore, directed EMBD to cease the progress of the works on all active sites. Accordingly, on 21 or 22 October 2010, Namalco received two (2) sets of letters from the relevant Engineer instructing it to demobilise (on the Picton and Roopsingh Road Projects – at this time, Sawh was the Contractor working on the Petit Morne Project and LCB was working on Cedar Hill 2).*
>
> *70. The results of the exercise carried out by the Ministry of Food Production were mixed. In respect of some sites – such as the Picton Project – the decision was made to*

resume works in accordance with the original design intent. Accordingly, works on the Picton Projects were restarted in April 2011. However, the Roopsingh Road and Cedar Hill Projects were not the subject of an instruction to restart. As such, the Contractors engaged on those sites (Namalco and LCB, respectively) terminated their employment."

322. In so saying, Baksh appeared to articulate that the decision to stop was not that of EMBD but that of the new government for reasons of policy considerations in relation to a review of all of the Projects having regard to the focus on agriculture. So that in the court's view the suspension of the Projects in 2010 shortly after the general election appears to carry with it a perfectly legitimate explanation well within the remit of then new government. He is, however, clear that no decision had been taken to restart the two (2) Projects that eventually became the subject of the Supplementary Agreements. The cross-examination of the witness did not treat with this bit of evidence so that his evidence, in that regard, remains unchallenged.

323. The clear inference of course is that while no decision was taken by the legitimate body authorised to make such a decision, the actions of Singh demonstrated that he in fact took it upon himself to make such a decision without actual authority so to do and the court draws such an inference (laying aside for the purpose of discussion the finding of the court that he vas vested with ostensible authority).

324. Lenny Sookram, the Project Director of Namalco set out his involvement in the Supplementary Agreements in his witness statement beginning at paragraph 97. In summary, he testified that in relation to Roopsingh Road after the Original Award, Namalco had at first to clear and grub the site which was a substantial undertaking owing to the fact that the site was banked and not level. Further, the site was former cane lands, therefore, Namalco was required to remove much more material than the anticipated one hundred and fifty millimetres (150mm). Additionally, there were soft spots throughout the site which required treatment by way of excavation of the soft spots and its replacement with firm compacted fill material imported to the site. Both the relevant surveys and photographs were annexed to his witness statement. It is also his evidence that the rates awarded in 2009 were extremely low. This evidence is not in issue.

325. The works were then suspended by instructions received from Planviron by letter of October 22, 2010 and an explanation for the suspension was not provided (not that one was required, in any event, it appears to the court). Having heard nothing, Namalco wrote to Planviron

on January 17, 2011 requesting permission to proceed but no answer was forthcoming. Namalco terminated by notice of March 3, 2011. As a result of the prolonged suspension, Namalco accumulated numerous claims against EMBD some of which were agreed to and certified by Planviron in IPCs and sent to EMBD. A comprehensive claim on termination was submitted to EMBD by Planviron. This claim related to costs incurred during the suspended period, demobilisation of the site office and utilities, security on site, materials on site, aggregate on site, capital expenses, restocking charge, costs due to losses from bonds and insurance, loss of profit due to termination and reinstatement of the access roadway.

326. Namalco then sought to negotiate the claims with Planviron, however, there remained disputes between Namalco and the Engineer Planviron on some of the claims. EMBD then agreed to have BBFL conduct an independent check on earthwork quantities and BBFL certified payments it considered to be due for earthworks. These sums were accepted by Namalco. In relation to some of the other claims, a Notice of Dissatisfaction was lodged by Namalco.

327. It is the evidence of Sookram that while the negotiations were proceeding, "somewhat out of the blue" in or around March 23, EMBD invited Namalco to attend a meeting to discuss the re-commencement of the Project. The first meeting centred on negotiations to restart and the unresolved issue of the account settlement by Planviron. He stated that Namalco suggested that Planviron be replaced and they were incapable of doing the job. He said that Namalco's issue with Planviron was not only the claim but also numerous design issues in the early phase of the works which Planviron had been very slow to address. It is in this context that EMBD subsequently removed Planviron and appointed BBFL as Engineer for RR.

328. Namalco was invited to a second meeting on April 13, 2012. Sookram made mention of Singh being present at the first meeting but gave evidence of those present at the second meeting. It appears on his evidence that Singh was not present at the second meeting in April. It is also his evidence that between the date of the first and second meetings, EMBD had supplied a template to Namalco to provide new rates or what he referred to as market rates. He also testified that given the suspension and termination there was no way that Namalco could have restarted and completed at the old rates.

329. His evidence on the process of negotiations was that Namalco put forward a schedule of rates with a breakdown. These were the prices being sought by Namalco. BBFL produced a work

sheet for the purpose of negotiating the final revised rates. The Parties worked through each item on the worksheet in an attempt to come to an agreement which they did. In Namalco's view, the rates proposed by BBFL were in keeping with rates that were reasonable market rates at the time.

330. It is his evidence that the Supplementary Agreement for RR was negotiated by Namalco with EMBD at arm's length and in good faith as EMBD was at all times being advised by BBFL. In relation to Singh's authority and the allegation of conspiracy he had this to say:

> *"111. In terms of the EMBD tender procedures and Mr. Singh's own authority, I am not aware of and can't comment on the internal processes of policies of EMBD, and I did not consider there to have been anything unusual about the way in which the Project was restarted at EMBD's instigation having previously been terminated following the suspension. Given that Mr. Singh was CEO of EMBD, I considered (and would still consider) that he possessed the authority to carry out business on EMBD's behalf and had any necessary approvals and authorisation to do so. Furthermore, given the allegations which EMBD is now making, it is worth bearing in mind that EMBD could at any time have terminated the Contract or suspended Works, but did not do so. Ultimately, I believe that EMBD wanted to restart the Roopsingh Road Works as a result of its aggressive construction programme to complete residential development sites across the country, amongst other projects, and I think it is quite wrong for EMBD to now attempt to suggest, after Namalco has done all of the relevant work based on the rates negotiated, that its agreement with Namalco – which was in any event negotiated based on market rates – should somehow be 'set aside'. In addition, the rates proposed and which formed part of the Supplementary Agreement were consistent with other Projects that Namalco has since been instructed on, including Cedar Hill Phase B and the Hermitage Project [RR9], and are as I understand it also consistent with works awarded to other contractors during the period post 2012."*

331. Both Namalco and EMBD called expert evidence from Quantity Surveyors on the issue of whether the new rates were grossly excessive. It is Namalco's case that the rates were not excessive having regard to prices at the time. The inferential argument is that the evidence of the increase in rates can, therefore, not be considered to be probative of any conspiracy. EMBD argued the opposite. Namalco called Phillip Duggan[90] and EMBD called Sarah Pattinson. It must

[90] See Expert reports at 2H Expert report bundle TB2 131785, Day 9 of Transcript from page 25

be noted that the use of the term "rates" by the court is to be ordinarily understood as being "prices" set out in either the Bills of Quantity in the Original and Supplementary Agreements.

332. The evidence of both Duggan and Pattinson are relevant in large measure to the issue of the value of the works done by Namalco, an issue that is dealt with later. On the issue of the increase in prices, the evidence of Pattinson appears, however, to be more on point. Suffice it to say that even without such evidence there is a reasonable inference to be had that the Supplementary Agreements would have increased prices substantially. The court does not, therefore, see the need to consider their evidence in detail in treating with the issue of whether there existed a conspiracy.

Agreement or combination between Namalco and EMBD and Others

333. Having examined all of the evidence and considered all of the arguments, the court is satisfied that the evidence makes it more likely than not that there was a conspiracy between Singh, Namalco and BBFL against EMBD with the intention to injure EMBD. The following questions appear to have stood out upon deliberation:

i. **Why did EMBD agree to have BBFL re-measure the works when Planviron (the contracted Engineer) had already done so?** The evidence is that there were issues between Namalco and Planviron on the measure and intended certification by Planviron. **Is it that the agreement by EMBD was itself part of a conspiracy to get Planviron out of the way and to bring in an Engineer who would look more favourably on the works done by Namalco and would be willing to certify a higher sum?** For the court to find this to be the case, there would have to be some evidence from Planviron or other evidence that points in that general direction. Otherwise, such an inference would be highly speculative in the court's view. The fact that BBFL certified higher sums cannot by itself lead the court to such an inference. Further, the evidence of Baksh was that the request to remove Planviron was made and put before the Board on the basis of the incompetence of Planviron. There appears, therefore, prima facie to have been a perfectly plausible explanation for these questions.

ii. **Why did Singh recommended that Planviron be removed as Engineer from the Petit Morne Contract and recommend that BBFL be appointed?** The result was

that BBFL, under the guidance of Mr. Aguilar, therefore, became Engineer on both Projects. Was this a part of the efforts to move BBFL into place so as to facilitate the certification of higher sums? Again there is no direct evidence of an agreement of such a nature nor does this item of evidence, on its own, lead the court to a clear inference of such an agreement. This is so in the context of what may have been a legitimate business decision by EMBD to remove the issues of discord between an Engineer and a Contractor so as to facilitate a relation that works towards the fulfilment of the Contract in an amicable manner. The court has, therefore, had to ask itself whether an innocent explanation such as the one above has been provided. On the evidence there appears to have been no such explanation provided. The recommendation to choose BBFL appears to have come solely from Singh for reasons which can only be provided by him. But he has not been called in this case and so there is no evidence in that regard.

iii. **What caused EMBD to invite Namalco "somewhat out of the blue" (according to Sookram) in or around March 23, to attend a meeting to discuss the recommencement of the Project while negotiations were proceeding in relation to Namalco's claim? Is it that there was a back door agreement between Singh and Namalco that EMBD would be made to pay higher prices to the benefit of Namalco and Singh and others but in order to accomplish that, the Parties had to create a façade of meeting and negotiations?** This is the inference that EMBD asks the court to make. This issue has been scrutinised by this court and has caused much disquiet as there appears on the evidence to be a lurking suspicion of agreement. To resolve this the court has had to consider the possible explanations for such actions. In the court's view, the only innocent explanation would be that of EMBD wanting to achieve the goal of shedding what it may have considered to be valid claims or claims that could incur expenditure of sums that could otherwise be used for other legitimate purposes; while at the same time having the projects completed as a matter of urgency, the evidence being that the information, was that state-provided housing was an urgent paramount concern. The latter explanation was in the court's view an entirely plausible one having regard to the fact that the EMBD was an entity guided not only by a Board but by its very nature, the general direction of a particular Ministry or Government Policy. Those are matters that are legitimate aims. That explanation has not, however, been provided

by EMBD. Neither has Singh been called by the Claimant to give that reason or any other plausible reason.

iv. The only evidence on the point comes from Sookram who has testified as to what transpired at the meetings. The evidence points to what at first blush appeared to be genuine negotiations up to and before the meeting of April 19, 2012 when Baksh walked out of the meeting. It is at this point it appeared that the true intention of the players was coming into the light as the approach of protection of the interest of EMBD seems to have readily given way to the easy facilitation of the prices asked for by Namalco. It would have been obvious that something had fundamentally changed by the date of at that meeting.

v. **Why did Aguilar suddenly agree to much higher prices at the meeting of April 19, 2012?** Is it reflective of some back door agreement between the parties to raise the sums payable to Namalco? This question has also caused this court much discomfort. In the court's view, the only plausible inference to be drawn is that there appeared to have been an agreement arrived at between Singh and Aguilar to agree with the prices being suggested by Namalco. According to evidence of Baksh, this was unexpected. At that meeting enormous increases were being proposed by Aguilar and EMBD appeared to be agreeing to them. Baksh testified that he subsequently spoke to Singh about it saying to him that the Bills of Quantities for all of the projects under the Supplementary Agreements totalled almost one billion dollars ($1B) and reminded him before executing that the terms required submission to the Tenders Committee and approval of the Board. In reply, Singh said he knew but he was under pressure from the Chairman to sign. In this court's view, this was potent evidence that Singh had been instructed and pressured into signing the Agreements by the Chairman of EMBD. As a consequence, the inference is that Aguilar also agreed to facilitate the process. In the court's view, there is no other plausible explanation for what appears to have been a shift in the dynamic of the meeting from the previous meetings.

vi. The effect of this is the tainting of any otherwise plausible explanation (in respect of which there was actual evidence) in relation to the other questions considered above. So that while on its own, the first question above appears to lend itself to

an innocent explanation, the combined effect of the answers to the other questions above when taken in the context of the evidence (or the lack, therefore, by way of rebuttal) tilts the balance in favour of a strong inference of there having been an agreement between Namalco and Singh to injure the very EMBD by having it pay much higher rates than it was entitled to under the Original Award. To be clear, the court is of the view and finds that the combination of evidence as set out above leads to a strong inference that Namalco forged agreement with Singh to have Planviron removed, to have BBFL appointed in its place for RR and to have BBFL appointed for PM so as to have control over approvals of its certificates at much higher prices that originally provided for in the Original Award in RR. This by extension also meant that the prices for PM would be higher than those which would have usually been negotiated and awarded.

vii. It is also the finding of the court that pursuant to that agreement, the Namalco was invited to the first meeting. The court, therefore, does not believe Mr. Sookram when he said that Namalco was invited "out of the blue". In that regard, it may well be that Sookram was personally unaware of the agreement (there appears to be no evidence to the contrary) but the effect of the finding of the court is that the controlling mind of Namalco would have been aware, at the least, that arrangements were being made which would ultimately result in the injury of EMBD. The nature of these types of agreement are such that parties may not immediately have fleshed out the approach, but every plan must start somewhere so that these would have been preliminary steps.

viii. In that regard, it was open to Namalco to call both Singh and Aguilar to give evidence as to the reasons for recommending BBFL as the Engineer (on the part of Singh) and taking the decisions to pay higher prices (on the part of both Singh and Aguilar) thereby rebutting the allegation of conspiracy but it has failed so to do. In the absence of their direct evidence therefore, in addition to its finding above, the court draws an adverse inference against Namalco on the issue, an inference that the court is entitled to draw having regard to the fact that the claim of conspiracy was properly pleaded by EMBD. The burden therefore lay with EMBD to prove that there was an agreement whether by direct evidence or by inference. The court having found that it has done so by way of inference the burden then lay with

Namalco to demonstrate an alternate or innocent explanation for the events. This it could have done by calling Singh although he was once employed by EMBD and by calling Aguilar as they both would likely have been able to speak to the matters of the issue of the agreement and whether there was one. But they have failed so to do.

ix. Additionally, the court finds it more likely than not that the individual with principal control over Namalco, Naeem Ali would have been able to provide answers to the fundamental questions raised above but for reasons which are not known to the court, Namalco chose not to call him as a witness. The court, therefore, draws an adverse inference against Namalco on this issue as a consequence.

x. It must be noted that it was not for EMBD to call Singh or Aguilar on this issue. Evidence of an agreement that may be one forged in conspiracy is often times difficult to find and elicit. This was so particularly in this case where those who once controlled the injured Party are no longer in control. Hence reliance on the drawing of inferences becomes an important and sometimes the only evidence in such cases. In the circumstances, it would be unreasonable to expect EMBD to call the person whom it accuses as being a conspirator to give evidence on its behalf.

xi. Further, the court did not accept the evidence of Sookram that the Supplementary Agreement for RR was negotiated by Namalco with EMBD at arm's length and in good faith as EMBD was at all times being advised by BBFL. This statement is a bold one and does not account for the shift in the position of EMBD at the meeting of April 12, 2012 to the satisfaction of the court and is of much less weight when weighed against the inferences that the court has drawn. It is in the court's respectful view merely a hollow statement.

An intention to injure the party who alleged the conspiracy

334. The court finds that the combination of actions on the part of Namalco, Singh and BBFL, were committed with only one intention. Put simply, to extract more money from the State entity EMBD than Namalco would have been entitled to both as a matter of damages on the Original Award for the stoppage (if allowable) and for future works on the said two (2) Projects. No other intention is apparent on the evidence and this remains the sole reasonable inference of intention

to be drawn having regard to the fact that the sums claimed have since been shown to be much more than that which obtained under the Original Award and which would have been reasonably claimable for new work even at new prices as set out by the witness Pattinson.

Unlawful acts carried out pursuant to the agreement and knowledge of unlawfulness

335. It is important at this stage to remind the reader of the finding of the court in relation to the validity of the Supplementary Agreements in relation to the arguments on breach of fiduciary duty earlier on in this judgment. The court's finding was that Namalco knew that Singh possessed no actual or implied or ostensible authority but that the actions of Singh were subsequently ratified. This court also ruled above that but for the ratification, it would have found the Supplementary Agreements to have been invalid on that basis. It follows that the findings of this court means that at the time the act was committed by Singh, the acts were unlawful, Singh knew they were unlawful and Namalco also knew that they were. In other words, they both came to the agreement for Singh to enter into the Supplementary Agreements without the permission or authority of EMBD which they both knew was necessary at the time to facilitate the agreement to extract funds from EMBD way above that which would have more likely than not have been awarded by the Board had it had oversight by way of the tendering process. The act of subsequent ratification cannot and does not ameliorate that fact for the purpose of conspiracy.

Loss to the injured party as a consequence of the acts

336. The value of the RR Supplementary Agreement entered into by Singh was two hundred and sixty-two million dollars ($262M) and the value of the PM Supplementary Agreement was three hundred and thirty-one million dollars ($331M) reflecting an increase of one hundred and eighty-five million, three hundred and fifty-three thousand, six hundred and eighty-four dollars and two cents ($185,353,684.02) on the Original Contract price of the former and an increase of one hundred and twenty-nine million, fifty-three thousand, two hundred and two dollars and sixty-three cents ($129,053,202.63) on the latter.

337. For the reasons set out in the next issue it was clear to the court that allowing for higher prices for increases generally and for the inclusion of additional works on the Projects other than those which had been contracted for under the Original Award, the evidence of the expert witness Pattinson, which has been accepted by the court, demonstrates that the sums agreed to in the Supplementary Claims were on the whole above and beyond the sum that would have more likely than not been agreed to as being reasonable for such an award in all of the circumstances. It

follows that this was the consequence of the unlawful act conspiracy which did in fact lead to injury of EMBD by way of liability to pay more than it ought to have paid.

338. In the result, the court must answer the issue in the negative, namely that the Supplementary Agreements have been invalidated by the acts of unlawful means conspiracy on the part of Namalco and Singh. Namalco, therefore, cannot recover on the basis of those Agreements. It must be noted that the ruling on this issue does not affect the recovery of the amount owing on the DAB.

339. The court also wishes to make it clear that the finding of the court on the conspiracy in relation to the Supplementary Agreement for RR must apply equally to the Agreement for PM on the same basis although the PM Agreement was essentially a first agreement. In other words, the conspiracy would have extended to PM by way of the intention at the time to use the said unlawful means to secure the PM Agreement at a higher rate than Namalco would have anticipated they might have received if chosen by Tender so that it was more than opportune to have the PM Agreement secured at the same time as the RR Agreement.

Issue 6 – W*hat is the value of the works executed by Namalco*

The Picton Project

340. The court having ruled that the decision of the DAB is binding, EMBD cannot rely on the evidence of Pattinson in relation to the sums payable on this project. The amount payable on the Picton:

> Value of claim (DAB): three hundred and sixty-four million, nine hundred and ninety-two thousand, five hundred and thirty-four dollars and sixteen cents ($364,992,534.16).
>
> VAT at 15%: fifty-four million, seven hundred and forty-eight thousand, eight hundred and eighty dollars and twelve cents ($54,748,880.12).
>
> Sub Total: four hundred and nineteen million, seven hundred and forty-one thousand, four hundred and fourteen dollars and twenty-eighty cents ($419,741,414.28).

Less sum paid: four hundred and eight million, one hundred and thirty-seven thousand and two hundred and forty-three dollars ($408,137,243.00).

Grand TOTAL: eleven million, six hundred and four thousand, one hundred and seventy-one dollars and twenty-eight cents ($11,604,171.28).

The other projects

GENERAL

Defective Work: The Counterclaim.

Namalco's evidence

Jeremy Love

341. EMBD counterclaimed for defective works. Pattinson gave an assessment of the costs of remedial works "identified by Mr. Barmpopoulos" in the sum of sixteen million, eight hundred and fifty-seven thousand, four hundred and sixty-two dollars and forty-five cents ($16,857,462.45). Namalco submitted that the Barmpopoulos Report should be disregarded, rendering Pattinson's assessment groundless and inadmissible. Pattinson valued the remedial works by utilising PURE rates and uplifting same to account for inflation. Namalco argued that this methodology is flawed and artificial. Namalco also argued that there is no evidence that the EMBD intends to carry out the rectification works and therefore the cost of making good the defects is not an appropriate measure.

342. Dr. Love prepared a report dated September 11, 2019 and a supplementary report of October 11, 2019 which was filed in response to the expert reports of EMBD's Geotechnical Engineer Jonathan Palmer and road paving expert Ioannis Barmpopoulos. Love holds a Master of Arts degree in Engineering from Cambridge University and Doctorate in Soil Mechanics from Oxford University. He is a Fellow of the Institution of Civil Engineers London and his expertise lies in the field of geotechnical engineering including ground investigation and the design construction of groundworks generally. His evidence related essentially to the Counterclaim by EMBD for defects arising from breaches of workmanship obligations. In preparing his first report he read the draft expert opinion report of Dr. D. Jones, Namalco's civil engineering expert and agreed with his conclusions. It must be noted that the compaction records of Namalco were compiled during

construction while the tests done by EISL were carried out in 2018, some three (3) years after the completion of works.

343. There are parts of the report from Namalco's own witness Love that appear to highlight serious defects in the RR Base Course material thickness. In that regard, it is pleaded by EMBD in its Defence and Counterclaim that there were widespread deficiencies in the thickness of the road pavement Base Course. This information was obtained from results of an EISL Roads Investigation Report carried out in March 2018. Fifteen (15) samples were taken from locations across the site which consists of ten point five kilometres (10.5km) of roadway. The trial pits were dug at a frequency of approximately one per linear seven hundred metres (700m) of roadway. In thirteen (13) out of the fifteen (15), it was found that the base course layer was less thick than required by the project specification minimum of two hundred and twenty-five millimetres (225mm) (or two hundred and ten millimetres (210mm) if the combined thickness of the Base Course and the allowable tolerance of fifteen millimetres (15mm) of the asphalt surface is used) varying between one hundred and thirty millimetres (130mm) and two hundred and thirty-five millimetres (235mm). There were on average twelve (12) readings per trial pit. The mean thickness of all fifteen (15) pits was one hundred and seventy-eight millimetres (178mm) with a standard deviation of thirty millimetres (30mm). It is the evidence of Dr. Love that these finds should be taken seriously as on average the Base Course layer was thirty-two millimetres (32mm) less than the minimum specified but he attempts to assuage those concerns by saying that caution should be exercised in extrapolating those results to the entire site given the relatively small number of trial pits. In the court's view the assertion is a reasonable one.

344. Dr. Love also offered that even if the findings were replicated everywhere across the site upon further investigation, it would still not necessarily mean that all the roads would need remediating. This may be a correct proposition. Additionally, he commented on what he considered the unreliability of GPR method of testing used for the EISL report. However, in cross-examination he clarified that he accepted that GPR is a reliable method of assessment of the thickness of pavement layers. His precise evidence was under cross-examination by Mr. Davis QCas follows:

> Q So it's right, isn't it, that GPR is a reliable method of assessment of the thickness of pavement layers?

A It can be and it doesn't say what the tolerances here are but depending on what the purpose of the exercise is, it can be useful, yes[91].

345. Additionally, Dr. Love accepted in cross-examination that although the specification required a sand density test, Namalco had obtained dispensation from the Engineer to undertake nuclear density gauge tests instead. Further, in a very technical but interesting discourse during cross-examination by Mendes SC, the witness admitted that some features of the sand density test do not apply to the nuclear density test. Further, that there is usually an adjustment factor having regard to the removal from the test sample of larger stones. While this is easily done at the lab, it may not always be done on site. Crucially, however, was the admission contained in the following exchange on the issue of the density and differences between the Namalco compaction results and the EISL density test results[92]:

Q But in any event, Dr. Love, just as -- I suppose as a general proposition -- I'm trying to understand. If the tests that are done by ESL[sic] and -- well, mainly ESL[sic] -- are assumed to be correct as of the date that they were done and assuming that they also assumed that they spread right across the sites that you would find similar results all the way across the sites, and assuming that the tests done by Namalco were also correct, I think you make the point that it means that it change over time.

A Right. We're talking about the density now again.

Q Yes. But also the thickness.

A I'm not sure the thickness would change. I can't think of any natural process whereby the thickness of the road would change with time, only its density.

Q Okay.

A Certainly not to this degree anyway.

Q Not to this degree?

[91] See transcript Day 8 page 54 lines 26 to 30.
[92] See transcript day 8 page 74 line 21.

A No.

Q But as far as the density is concerned, you make the point that something would have had to have happened in the interim to cause the density to change?

A Yes. If both sets of data are correct.

Q If both sets of data are correct?

A Yeah, it just follows reason.

Q And you do suggest that there may be natural causes –

A Yes.

Q -- that would cause the density to change? And those natural causes are?

A The introduction of water. So drainage and the presence of water in roads is very important. If I can give you a little anecdote that three most important things in road design are drainage, drainage and drainage. This serves to –

Q And the fourth? Drainage?

A It begins with “D”.

Q Yes, go ahead. Yes?

A Yes, so just to carry on, the introduction of excess water has a very deleterious effect on the performance of a road. It's always imperative that you keep water out of road pavements as much as you can to improve their performance. If the drains are not functioning, then you can expect the road pavement to behave -- to perform substandard. It would more quickly break up.

Q And if the site is not maintained –

A That's my point, yes.

Q And you have plant material growing in the roads through cracks and so on.

A Yes, clearly if the drains aren't maintained, that has a very poor effect on the state of the road.

Q So you say in paragraph 10.1.4 -- if you can look at that paragraph, please. Are you with me?

A Yes, 10.1.4.

Q Yes. If NCSL's compaction records and EISL's measurements in 2018 are both accurate –

A I'm not reading the same paragraph as you.

Q 10.1.14.

A Oh, 1-4?

Q Yes, I'm sorry.

A Sorry, 10.1.14, yes, I've got you.

Q "If NCSL's compaction records and EISL's measurements in 2018 are both accurate, then the density of the base material must logically have decreased during the intervening period. This could be caused by the high volume change potential of the underlying subgrade combined with the lack of maintenance of the draining system leading to vertical and lateral differences -- differential movements occurring on a seasonal basis over the last four years." And you refer –

A Correct.

Q You're saying that, I believe, in relation to Roopsingh Road, but would that same statement apply in relation to the others -- to all of the sites?

A To all the sites. Yes, it would.

Q 3.2.2. Dr. Love –

A Sorry, could you give me the –

346. In essence, therefore, the evidence of Dr. Love under cross-examination leads one to the reasonable inference that at the least, the results of the EISL tests coming as it were years after the completion is not reflective of the quality of work done on the roadway because of the change during the intervening period. In that regard, it is well known that the area of the RR Project is one of a general area on the Caroni plains upon which there existed large scale cane farming. The evidence in this case is that as a consequence the soil would have had a very soft strata. Coupled with the facts that the roads appeared never to have been used for years and the drains appeared not to be properly maintained it is more likely than not that the results of the EISL tests in 2018 were an inaccurate guide as to whether the work was properly done at the time. In that regard, the compaction records appear to the court to be of more accuracy, it having been compiled at the time it was being done. It is also to be noted that the RR Project was built on what is essentially flood plains. The court accepts and finds this to be the case. The duty law with EMBD to maintain the sites which it appears they did not do.

347. But there was another issue with the EISL tests that caused concern to the court in relation to its reliability. The following exchange again in cross-examination is demonstrative of the concern[93]:

Q You are again dealing with EISL's test and in the last sentence, "I note that there are up to ten point five kilometres (10.5km) of roads at Roopsingh in total. So the investigation provides information that the frequency of around one test per linear one point two kilometres (1.2km) of roadway, which is very low." Is there a particular standard that you

[93] Transcript day 8 page 77 line 6

are judging the frequency of test by? You must have something in mind to say that it is too low.

A Yes, if I was planning a ground investigation, deciding on the frequency for doing trial pits, for example, there is guidance given in standard documents like BS 5930 which suggests the trial pits should be perhaps spaced at some in between ten metres (10m) and fifty metres (50m) depending on what it is that you're actually trying to achieve, but I would, in this particular case, I would put an upper limit of around fifty metres (50m) as being a sensible number. Of course, there are practical limitations in an exercise like this and I'm not critical that so few trial pits were done on this particular occasion, but it's the inferences which are drawn from that, that I am critical about and that fifteen (15) trial pits across the whole of Roopsingh is rather small to make very definite conclusions from.

Q I see. I get your point. In 3.2.9, you are referring to the CBR values. You say, "The state of the individual pavement layers was estimated by EISL from the DCP low count profiles using a theoretical correlation with CBR values. EISL then judged the resulting CBR values against the CBR requirements stated in the specification, but the CBR requirements stated in the specification are for material selection only and relate to laboratory CBR tests. They're not intended to be a measure of compaction achieved in the field. The appropriate way to determine whether the specified levels of compaction have been achieved in the field is to measure in-situ dry density, not CBR." And you make the reference to the experts' item 12?

A That's right.

Q This is something that was agreed on by the experts you're saying?

A Yes it is…….

Q "There are around one thousand, three hundred and eighty (1380) tests records in total for the compaction of the base course material covering the period January to March. In every case, the base course material is found to be compacted satisfactorily, that is to say in-situ dry density exceeded the minimum of ninety-eight (98)." And then you say, "NCSL's quality control records were also signed off

by the Supervising Engineer." So again the point that you're making is that if that is correct and EISL is correct, then there has to be an explanation as to what happened in the interim, yes?

A That was my point, yes.

348. The evidence, therefore, is that the experts agreed that the comparison done by EISL by judging the CBR values against the CBR requirements in the specification related to material selection only in laboratory tests. The witness then posits that the proper (and in the court's view more accurate) way to determine whether Namalco had attained the specified level of compaction was to measure against in-situ dry density.

349. The final issue with the EISL report appears to be that found in the cross-examination of Dr. Love the following day. The discourse is too long to include in this decision. Suffice it to say that the evidence is an admission that although the tests used for compaction in the EISL Report and Namalco's reports were of different types, they are both accepted standards so long as the recommended correction is applied between the both. In that regard, the witness accepted that the values used by Namalco were extremely high standards for compaction verification purposes.

Barrie Jones

350. Dr. Jones issued a Principal Report on August 27, 2019 and a Report in response on October 11, 2019. He is a Specialist Consulting Engineer previously employed by Halcrow Group Limited, a major international consulting engineer. The witness holds over thirty-five (35) years of experience. He is a graduate of the University of Wales in Civil Engineering, an MSc and PhD for research in soil mechanics and numerical analysis, a Chartered Civil Engineer and Member of the Academy of Experts. His instructions were to ascertain whether there were defects or inadequacy in the condition of work, whether wear and tear and lack of maintenance was a factor in the condition of the works, whether poor design is a factor and whether EMBD's case as to the scope of necessary remedial work is reasonable and proportionate.

351. Dr. Jones visited the RR Site on July 19, 2019. It was his report that the site is flat but is blighted by fly tipping (illegal dumping) and missing manhole chamber covers. The drainage channels appeared to be choked by dense vegetation which would have impeded their efficiency and effectiveness. The roots and vegetation caused accumulations of silt in the channels thereby

progressively reducing their capacity to discharge water away from the site. In his view, during the wet seasons, high water levels would exit across the site. There was cracking in parts along the edge of some roads and smaller transverse cracks in the road surface where the road crossed the culverted drainage channels. The road surfaces had suffered differential settlements in places and there was evidence of past water ponds on the road around and along the line of a sewer.

352. This witness helpfully set out the technical issues raised by EMBD in its Defence and Counterclaim as including defects in the base layer, depressions in the pavement, deficiency in road base compaction and the use of Nuclear Density Gauge method of testing which was not the contractually specified method. In so far as the latter is concerned, the court accepted the evidence that Namalco had been given dispensation to use that particular test in place of the specified test.

353. It was his evidence by way of his report that good and careful design is a fundamental element to the successful outcome of any project. In that regard, it was his understanding that there was probably no pre-works site investigation. If that was the case, then the designers would have had to prepare their drawings and specifications entirely on assumed conditions and geotechnical design. This it appears on the evidence was in fact the case in relation to RR as the evidence of Namalco is that when it proceeded on site it was confronted with many issues in relation to the geotechnical makeup of the site resulting, for example, in more quantities of soil having to be used. As a consequence, Namalco would have had to make its own judgment about what might or might not be on the ground.

354. Under cross-examination by Mr. Davis QC for EMBD, the witness admitted that his visit to the Site would have been brief as he visited all four (4) Sites on the same day. He also admitted, as stated in his report, that he did not have the opportunity to examine the witness statements or the drawings and variation orders to establish what might have been advised over the length and extended duration. He did, however, testify that he focused on the key issues raised in the pleadings. In that regard, it is to be noted that some fifty-seven (57) pages of his report consists of introductory matters summarising the contents of the pleadings. He was challenged on the source of many of his assertions such as his understanding that there had been no pre-works at the Site. In that regard, some of his information appeared clearly to have come from Mr. Soogrim. He, however, added that at the meeting of the experts on August 15th, both of EMBD's experts Barmpopoulos and Palmer stated that they could not find any ground investigation data.

355. Further, he was cross-examined as to whether Namalco had been non-compliant in relation to the obligation in the Contract to use the AHSTO test as opposed to NGD test. He admitted that the Contract imposed such an obligation but averred that the Engineer was entitled to give dispensation for this. He admitted that if Namalco's testing was unsupported by the necessary documents that is something to which the Engineer should have been alerted.

356. In relation to defects set out in his report, he stated that depressions in the road surface over the sewer lines were not defects because it is common occurrence. He also faulted the design for those defects. He testified that under the Contract, the compaction of the roadway was required to be ninety-eight percent (98%) while those over the sewer trenches were to be compacted at ninety-three percent (93%). It is this design requirement in the Contract that he said would have led to the depressions over the sewers caused by the differential movement over the sewer as compared to the adjacent road.

357. He was asked about the minimum width of the trenches and what appeared to be trenches dug beyond that minimum width to which he responded that despite the minimum width for the pipe trench, the opening up of a wide trench provides easy access and is an efficient and safe way of working. He was shown a photograph in which he identified what he saw as open bench excavation, a method of trenching that prevents cave in while the trench is being dug.

358. He was referred to soil tests results taken on May 16, 2018 that showed a liquid limit of sixty (60) and a plasticity index of forty-eight (48) when compared to the specification of works which set out levels of forty (40) and eleven (11), respectively. He accepted that on the one test shown to him, Namalco did not comply with the terms of specification. He also was of the view that this result was not reflective of all of the results obtained throughout all of the samples taken.

359. He was also cross-examined by Mr. Mendes SC for APCL. Quite interestingly, he appeared to resolve the issue as to the need to test widely at least in the court's mind through the following discourse[94]:

> Q Okay, thank you. The next paragraph you say, "EMBD found that the thickness of the subbase exceeded the Contract requirement in all cases by up to three hundred

[94] Transcript day 7 page 61 line 24.

percent (300%)." EMBD reported that the relative compaction of four samples, three others were not tested, fell below the Contract requirement of greater than or equal to ninety-six percent (96%) and the Soaked CBR test was also below the specified standard and then you say, "The number of samples obtained and tested by EMBD was extremely small and it is not known why more samples were not obtained and why tests were not made on all the samples it had recovered." Would the number of samples that they took, you seem to be suggesting was not enough?

A Yes. We discussed this morning about large numbers of tests in order to do a statistical, a meaningful interpretation of what was found. These number of tests are minimal and I also took the view that the ground penetrating radar was commissioned to see if it can be made more widespread because the tests that were being relied on were deficient and totally insufficient to allege that the whole roads were defective. So I think that there is two accounts there that very few samples is always recognised and hence, the GPR was an attempt to gain more information.

Q But couldn't it not be said that "Well, I took random samples from different points and therefore, that would statically indicate that everywhere else is -- would be -- might produce the same results."

A The investigations random means random and it's like a random number generator. It's -- you have to have sufficient number and you have to have them widespread and away from particular structures, cause we know that works contained culvert crossings, road crossings points, there's other services in there, the sewers -- you have to be very sure about where you taking the samples from. And you do need to have a representative number and you have to have an understanding about where they're from before you make generalisations about what the problems may or may not be.

Q So it's not just a matter of quantity but also where you do the -- you take the samples?

A Yes, the -- where I was referring to defects --normally, if there is a defect, a physical defect in the road, you would investigate it to find cause. I've seen photographs and I've seen longitudinal cracks on site. Now, it would be normal practice for all the

parties to investigate and establish the cause of the physical defect. You would then relate that to other areas of the road, such that if you have a defect there but you then got hundreds of metres where there is no defect, you wouldn't take that and compare to that point cause the defects aren't there. So you look for patterns between where there -- let's say there are the longitudinal cracks, what's cause those cracks and get to the bottom of that and then you decide how to progress from there. You don't, you find the cause before insinuating that everything is at fault, and you have to take it as they say in Engineering, you have Civil Engineering Construction, you finish the work and you have a defects correction. It's where defects become manifest and that is allowed for in the Contract. There is nothing, there is no such thing as a perfect construction being adhered to in every single aspect and what we are trying to do is to deliver a road system, a sewerage system, a development site ready for use by people which is what it's all about.

360. The witness appeared to be clearly setting out that whether or not samples are sufficient is dependent on the nature, position and character of the defect alleged along with similarity in defects. Further, that there is a period of defects correction for the very reason that the cause for some defects are not immediately realisable.

361. Further, he was of the view that the information on sub base thickness provided by EISL and the findings of Barmpopoulos are not reliable. His reasoning is set out in the cross-examination although made in relation to a question on a different point. This is what he had to say[95]:

I had the opportunity to look through EISL's data more than I could have done beforehand, 'cause I didn't have everything available to me and had become sort of concerned about the accuracy of the data. So that we have the numbers given about the thicknesses of the different road bases but there is no independent examination of where those layers were actually on the ground and all I've seen is photographs where you see the banding. So that's quite clear that Namalco has constructed the roads in layers but the actual thickness of each layer is somewhat difficult to determine. There's no verification of what the thickness was. The photograph show a staff in the ground and I can't read it. So there's no verification that the subbase layer or the road base layer is actually what it says it is. So that's given me some concern and you also see that in my Supplementary Report, I've been

[95] Transcript Day 7 page 64 line 9

very concerned about the quality of the sand replacement test because Mr. Barmpopoulos says they don't conform with the specification. They didn't do great in analyses on the materials. So he can't justify the correction factors; he applies to his calculations. So that's another issue I have with the EISL report that the data cannot be verified.

Now, I've seen the (indiscernible 1:32:17) test, I still can't verify the thickness of the layers and Mr. Palmer also said in his report that you cannot judge the characteristics of the ground from photographs. There ought to have been a whole range of tests done. So I've got rather sceptical about the accuracy of the data that I've been given. And if you start to have some doubts about the quality of the data, a lot -- I get even more concerned about the validity of what's been said in the pleadings. So it's not just now what I've said here, I've seen more data and I'm finding faults in the test methods and the recording of the factual data.

362. The witness was clearly saying that in his view the results were unreliable and consequentially, the correction factors set out by Barmpopoulos could not be correct.

363. More pointedly, on the issue of the thickness of the roadway and compliance with the specification the witnesses set out that the loss of thickness in one layer can in fact be compensated for by greater thickness in another layer. His evidence was as follows[96]:

> Q ……But assuming for the moment that the test that EISL did were correct and accurate and reliable, the point I am asking you to address your mind to is: you're suggesting in that paragraph that on the basis of their own test, the overall thickness of the different levels was greater than what was specified even though one of the layers may have been less than specified. Yes?
>
> A Yes.
>
> Q What I am asking is whether the overall thickness means that -- what does it mean that the overall thickness is in accordance with specifications, if you find that one of the layers does not conform?

[96] Transcript day 7 page 65 line13.

A Well, we got -- the photograph show categorically that the road pavement was constructed to a thickness which is more than or equal to the design thickness. It is also apparent from the pleadings that Petit Morne -- sometimes get Petit Morne, Picton -- that during the construction period the capping layer was reduced in thickness and asphalt layer was increased in thickness, this is around about September, I think it was, which seemed to me that the Employer's requirement wouldn't seem to have change. I couldn't find any mention of that which means then you can alter the thickness of the asphalt and the capping layer but overall, you'll get the same end product. So there is no one unique solution to the design. You could thicken up one and reduce the other without any net effect on the performance of the road. So in answer then, you got a large thickness of the road pavement and it does seem from the pleadings that you can vary the thickness of the different layers but still achieve the overall.

Q So you might have a -- you might have a road that is not compliant with specifications but nevertheless not defective. Is that what you saying? May not be compliant in that the -- one or two of the layers are not in accordance with specifications, but overall, the road is not defective.

A That's right, we're dealing with -- and I want to be careful with the term I'm going to use because it can be interpreted different ways, but the term "fitness for purpose" comes to mind in that Namalco and the Engineers who were monitoring Namalco's work were endeavouring to produce a road that would be fit for its purpose. In that, things might not be quite right, strictly in (indiscernible 1:36:24) with the specifications but it doesn't necessarily mean the specification was right. But the overall effect is that the road will be suitable for the purpose that it's intended for.

364. Additionally the witness testified that he stated in this report that the number of tests performed and the magnitude by which the samples were found to deviate from the specification is so small that the significance of the findings ought to be dismissed. When he was asked to explain, this is what he said:

A Yes. We seemed to have introduced a large number of detailed points and in my opinion, we're losing sight of what the intent of the scheme was. You know, when we are talking about, I think thirty-five kilometres (35km) of road overall or this one is referring to whichever side it is, Cedar Hill –

Q Cedar Hill.

A -- which is about twelve (12), thirteen kilometres (13km) of road or thirteen hectares (13ha), and we talking about five samples and they may have deviated by three percent (3%), I just -- it's beyond the realms of practical engineering. It's in a world of its own. It's not -- you just ignore it. I can't (indiscernible 1:38:06) it's incidental.

Q If I can take you to paragraph 2.5.21, the following page. You say at paragraph 1.14a "EMBD summarise its findings with respect to the thickness of the base layer. EMBD found that the thickness of the road base layer was less than the minimum thickness of two hundred and ten millimetres (210mm) at thirteen (13) out of fifteen (15) points. The deviation from the specified thickness was of the order of forty millimetres (40mm)." Do you consider that to be significant?

A It's a deviation that I would have preferred not to have known, in that you know, the intent is to construct the road in accordance with the specification but we are dealing with engineering and we're putting layers down and forty millimetres (40mm) is that much -- I can't see it having a material effect on the performance of the road.

365. In that regard, the point was in the court's view succinctly made. In relation to the process of testing the witness also helpfully explained in cross-examination that measurements may be affected by disturbance of the roadway when excavating the trial pits. His evidence was[97]:

Q Yes, if you can look at your paragraph 2.5.22, the next paragraph. You say that "The average of the compaction test was eighty-nine percent (89%) which was below the Contract specification," and you say, "It is not known if the

[97] Transcript day 7 page 67

measurements might have been affected by disturbance of the roadway; so when the trial pits were excavated." Is that something that is something that is likely to happen when you're doing this test?

A Yes, the -- we're doing sand replacement test in trial pits and if you go through the logistics of doing the test and the photographs show that first, you have to cut the asphalt layer out. So you soak it -- that through. You then got to lift that slab of asphalt off and they are using an excavator to pull it off. Then you have to excavate down into the different layers to where you're going to do the test. These tests were -- I'm not sure which layer they were in here, road base. So they have to excavate through the asphalt and then form a platform in order to do the sand replacement test. Now, there are some videos on YouTube that you can actually see how these tests are done, but I have done them myself, and what you do is to have to have a flat plate resting on the surface. You have to prepare the ground surface before you do the test. You then mark a hole and you dig down using hand tools in order to recover a sample of material. Now, on the YouTube examples, they usually show you doing it some kind of sand or a nice clay, but in this situation, Namalco, in this case has used granule material which was being pounded into place by big machines. So they have been designed specifically to ram the soil together and what you are trying to do the sand replacement test is to use a hand tool or a trowel -- I also seen coal chisels, lump hammers, you know, the small sledgehammers -- to break into the ground in order to create the hole. And inevitably, when I was doing them, you start levering the material out to the ground.

Now that has two effects: 1, you're disturbing the ground but it is also disturbing the ground at the top of the hole where you gonna pour the sand into. The net effect is that you underestimate the density of the -- in this case -- the road base layer and that then becomes a vicious circle because that lot's low and then the compaction test in the laboratory, as I mentioned earlier, that the EISL work had some peculiarities about the test they did and the way they interpreted the test which overestimated the maximum density in the laboratory and then these test under estimate so I think you have to take it with a pinch of salt.

366. In the opinion of the witness, therefore, it is unlikely that the compaction results performed on site would have given accurate results because of the inevitable disturbance when excavating. Again he was asked for an explanation as to whether in his view the deviation between a ninety-five percent (95%) and ninety-eight percent (98%) compaction rate was a significant one his evidence was as follows[98]:

> A No, it's three percent (3%) on information that been derived by suspect values, as I mentioned earlier compaction test data that the EISL did were not strictly in accordance with the specification. The sand replacement test as Mr. Barmpopoulos has said wasn't compliant with the specification, so you got two numbers and you've derived a percentage compaction from very dubious numbers that I think has to be taken into account.
>
> The other, there is another factor when you come to compaction, is that the specification says that you can use the material and compact it within a moisture content range of plus (+) or minus (-) two percent (2%) of optimum. It gets a bit complicated but all it comes down to is that unless you have the moisture content of the material precisely at the optimum, you would never achieve the maximum dry density. The specification allows that to vary, so you start to get into an art form -- this is not scientific, you know not scientific detail -- you getting into an art form that use the material you got, you lay it down and you compact it.
>
> Now, mostly site operators, supervisors know that the material is sound by the way it gone down, the way you watch the rollers at the end as they were placing it. They've also got the specification allows for proof rolling of the film and the Engineer will just watch it to see if it's wallowing up and down or shaking down whatever. So you got this observational approach and you look at it and you decide it passes or not three percent (3%) of maximum dry density, particularly from dubious data is incidental. Think you have to look at it from a practical point of view.

367. Finally, the witness made the point that it would be unreliable to use findings of tests taken years after completion particularly in the case where there has not been adequate maintenance

[98] Transcript day 7 page 69

of the roadways. He accepted that the duty lay with EMBD to maintain the works after completion. This was his evidence[99]:

> Q If you look at your 4.6.5, you say, "After completion of the Contracts EMBD would take full responsibility for the development sites and the upkeep of the roads and infrastructure, all the services and general maintenance of the land." Now, what -- what would that consist of "the general maintenance of the land"?
>
> A The -- what I saw when I was there, you had much vegetation invading the road surfaces, we had manhole covers stolen and there are quite substantial small trees growing through them. You've got silt in the sewers and you got channels that are choked. For the proper upkeep all that detritus needs to be removed regularly and that's the maintenance that's essential to keep the road in its pristine condition. If that's not done, the roads will deteriorate and when I saw it, the fly-tipping is another problem in that it interferes with the road drainage. So the whole schemes has fallen into disrepair by lack of maintenance.

368. Further he was clear in his view that the passage of time together with non-maintenance particularly in areas that are likely to be affected by water can be subject to regression thereby affecting not only the surface but the thickness of the base and sub base. His evidence was as follows[100]:

> Q Trees growing through the manholes et cetera, et cetera. How could the lack of maintenance -- and I think this is a point that you make -- result in or affect the different layers that would have put down? Assume, for example, that Namalco had complied with all of the specifications to the letter, would it be possible that if the place is not maintained that you could come back later on and do your proper test and find that the layers are at different thickness, widths and so on.
>
> A (indiscernible 2:16:30) changing thickness but the integrity of them will have been reduced by this movement in the subgrade.

[99] Transcript day 7 page 79
[100] Transcript Day 7 pages 79 to 81.

Q Yes.

A That is generated by changes in water levels. So you then end up -- the drainage systems are choked, so you've got no control of water. The water is building up into the road bases which they are not designed for. Your idea is the road is kept -- water levels are kept below the road and you have this dry layer; so you're protecting the road surface. You also don't want to have water building up in the road base because you're into another element there, in that it's a sort of equivalent to water hammering pipes that when you used the road, the load can (indiscernible 2:17:27) and the load is taken by the water which then can try to burst outwards. So if you got water in the road base caused by build-up from lack of maintenance as you drive over it, the integrity of the road base is gonna become reduced or impacted on which could lead to break up of the road surface as well. So it's a continual degradation. It's natural if anything outside and it would tend to deteriorate, if you maintain it you preserve its life.

Q Would it be possible that the -- you might have built the sublayer at the correct required specification but because of lack of maintenance and when you come to measure it at a later stage, at a later date that it is less than the specification that you built it to.

A Yes, it's called regression and it's also referred to in TRL paper but much earlier reference -- it's called "regression" that gradually deteriorates and it's caused by root penetration, ground movement; so the road is deteriorating.

Q And would it also effect -- affect the level of compaction of the road material?

A Yes, as -- if you have movement. If you put it down solid, you know, you compact it in, when you start having movement below it, you gonna get movement of the road itself which results in the cracking that has been observed there.

Q Now, you said that you had -- when you went to the sites, you had observed vegetation growing in the road itself.

A Yes.

Q Which means that, of course, the vegetation would have come up and pierced the surface?

A Or through cracks and then –

Q Or through cracks, yeah.

A -- grown down.

Q And, of course, that would be a way for the water to get directly into the road.

A Yes.

Q At paragraph 4.6.11, you say, "It's apparent on my photographs and plates, Picton 2, 5, 6; Petit Morne 3 and 4; Roopsingh 2, 6, 9 and 10 that there are no wide shoulders to support the edges of the road pavements as recommended in Overseas Road Note 31. Longitudinal cracking in the road pavement might be anticipated." Now, was this what you observed here as a result of the design itself?

A Yeah, the recommendation is you put shoulders on the side of the road, so you're supporting the road.

Q Yes.

A It's like buttressing, you supporting the road surface with the weight of traffic on the road, without that the road is likely to spread laterally and that's what the recommendation is, is to put shoulders on to support the road surface of a gradual change from the road surface elevation to the subgrade; so to avoid the cracking.

Q And would that have contributed as well to the results that have been generated in the test that had been conducted in 2018?

A Yeah, the natural regression of the road –

Q Yeah.

A -- means that the road is losing its integrity and years after it's been built that those tests are only showing what it is several years after the event, not necessarily what was -- probably not what was there during construction.

369. There was other evidence by this witness of EISL not having conformed to the testing standards such as excavating to a depth of one hundred millimetres (100mm) when in fact there was excavation to a depth of one hundred and forty-five millimetres (145mm) in some cases. This court does not propose to traverse every item of non-compliance in testing methods set out by the witness although it has read and considered all of the evidence.

370. In that regard, the issue of the accuracy of the EISL tests were also the subject of cross-examination of Barmpopoulos, Civil Engineer called on behalf of EMBD (whose role is set out in the next section). The witness admitted that EISL did not conform to the specified test method when cross-examined by APCL. He was cross-examined on the test following test pits.

371. In relation to Test Pit No. CH-0565, under the column headed "sieve size", the EISL test indicated that there were particles of three inches (3") which took up ten percent (10%) of the sample, the depth of the said test hole was (one hundred and thirteen millimetres (113mm)) 66, and volume of the said test hole was one thousand, seven hundred and seven cubic centimetres (1707cm^3). However, the sub-base layer thickness average was (two hundred and eighty-eight millimetres (288mm)) 67 which indicated that the test hole one hundred and thirteen metres (113mm) was less than the depth of the sub-base layer (two hundred and eighty-eight millimetres (288 mm)) 68. Given that the test hole had particles of a maximum of three inches (3"), which took up ten percent (10%) of the sample, the volume of one thousand, seven hundred and seven cubic centimetres (1707cm^3) dug up was less than the minimum volume of two thousand, eight hundred and thirty cubic centimetres (2830cm^3) as required by ASTM D-1556 . Barmpopoulos admitted that in relation to this test pit, (as set out in his report) that EISL did not follow the D1556

which required the digging of the test hole to a minimum two thousand, eight hundred and thirty cubic centimetres (2830cm³) but instead dug a hole of one thousand, seven hundred and seven cubic centimetres (1707cm³). His evidence was that the hole was, therefore, thirty percent (30%) smaller than what should have been dug. He also admitted that the significance is that the in-situ density results may have been understated so that true result may have been higher.

372. Again in relation to Test Pit CH06 27, Barmpopoulos accepted that that test pit was almost fifty percent (50%) smaller than the recommended size. Further, the depth was also less than the test specification. He admitted that once again the significance of not complying with the testing standard is that there may be an erroneous result namely the in-situ dry density reading less than it should read. He admitted that a similar exercise could be conducted for all of the pits the inference being that the same problem applied across the board.

373. It was clear from this evidence that the tests were not compliant and so the results were bound to be inaccurate. Further, EISL‟s Director and Senior Geotechnical/Civil Engineer, Mr. Charles Allen, during his cross-examination admitted that the necessary volume of material required for the sand replacement tests was not actually used for the tests done.

374. There are several other areas of criticism of the testing methods used by EISL which are set out in the submissions of both Namalco and APCL. It is not necessary for the court to traverse all of them having regard to the court's other ruling on Fugro and the report of Barmpopoulos. It is the evidence of the witnesses these inaccuracies applied generally to all of the Projects.

375. In the court's view, this evidence casts grave doubts on the accuracy of the EISL report as being reflective of the quality of the work done by Namalco, both as a matter of quality and the passage of time without maintenance of the sites. The court, therefore, accepts the argument of APCL that the tests are unreliable inter alia for the following reasons:

a. Incorrect volumes were used in the sand cone replacement tests.

b. Overestimated Maximum Dry Density figures were, therefore, recorded and used.

c. An insufficient number of test pits were utilised dug.

376. Additionally, the court finds that an attempt to correct inaccurate results by the application of a formula is equally unreliable. The cumulative effect of the evidence tells the court that it is more likely than not that the results were in fact inaccurate and the court so finds.

377. This finding also affects the reliability of the report of Barmpopoulos in so far as his report is predicated on those results and by extension the evidence of Pattinson in this regard. The court is not satisfied, therefore, that the assessment of Pattinson is well grounded for that reason but takes no issue with her method of calculation as Namalco asks it to do. EMBD is required to prove its Counterclaim and the burden has remained on it so to do throughout.

Report of Ioannis Barmpopoulos

378. This witness, a Civil Engineer called on behalf of EMBD issued a report dated September 11, 2019 in which he set out his opinion on the adequacy of pavement construction which includes the asphalt surface course on an unbound granular base on an unbound granular subbase constructed on a subgrade of natural ground or fill. His report was based on tests carried out by QES and Associates Limited, a firm of quantity surveyors to audit the works carried out by Namalco and to carry out visual surveys, EISL, a firm specialising in ground investigation and material testing and Fugro GeoServices Ltd, a site investigation contractor and specialist in ground penetrating radar (GPR). These tests were done in 2016 and 2018.

379. It is Namalco's argument that the witness was engaged by letter issued January 27, 2017 and was issued formal Terms of Reference in August 2019 in draft and then in final form in September 2019. Part 33 CPR requires an expert to certify that he understands his responsibility under Part 33. Further, the expert is bound to append all of his instructions to his report. Under cross-examination the witness admitted that he had in fact been acting under earlier instructions given to his colleague, Mr. Kishan De Silva of the firm WJM but that those instructions were never appended to his report. It was his evidence that he had been involved as an expert advisor to EMBD for the purpose of advising it on its pleadings prior to his appointment as an expert witness. He provided no reason for not having disclosed this fact to the court in his report. It is his evidence that he understood that the disclosure was important as it would have assisted the court in relation to the issue of he being an independent expert witness.

380. He further admitted in cross-examination that he had in fact been advising EMBD on the drafting of their pleading before he had been instructed as an expert. It was also his admission

that in 2017, he travelled to Trinidad and met with the main witness of EMBD, Mr. Baksh to discuss the background of the case with him and that he had discussions with him about the Project. He also admitted that he failed to disclose this fact to Namalco and that he failed to disclose the communication that he had with Baksh.

THE FUGRO REPORT

381. Fugro GeoServices Limited (Fugro) was engaged in 2018 by EMBD to carry out exploratory works and/or surveys to investigate the construction of the Pavements. Barmpopoulos also relied heavily on this report in relation to ground penetrating radar (GPR) surveying, a scanning technique for mapping as-built thicknesses in pavements and structures. In his report, Barmpopolous sets out that all references by him to investigations means the work of both EISL and FUGRO. The name of the FUGRO report is "Trinidad Developments Ground Penetrating Radar Investigations for EMBD".

382. Namalco submitted that the court ought not to give weight to the Fugro Report for the following reasons:

a. It has not been proven.

b. It is not in evidence.

c. It is an expert report for which leave of the court was not obtained.

383. In brief, the arguments are as follows. On the point of proof, Namalco filed a Notice to Prove on September 23, 2019 pursuant to Part 28.18 CPR. That Notice included the Fugro Report. Some two (2) weeks into the trial on November 14, 2019, EMBD filed affidavits of S. Brooks and J. Barrell in an effort to prove the report as the report had not been compiled by Barmpopolous who testified that he was not able to assist the court with the provenance of the document. He also testified that he was not employed or authorised by Fugro to give evidence of the matters therein nor could he identify the makers' signatures on the document. In open court this court commented about the absence of proof of the report and the fact that despite the Notice to Prove having been filed months before, EMBD chose only to attempt to prove the document as it were by ambush midway during the trial. As a consequence EMBD was not allowed to lead the evidence of the witnesses at that stage.

384. Namalco, therefore, submitted that the report has not been established as a report for the purpose of the trial.

385. In their reply submissions, EMBD argues on this point that it wrote to Namalco on November 18, 2019, addressing the documents that had not been agreed one of which was the Fugro Report and serving the affidavits set out above at the same time. In that item of correspondence EMBD wrote as follows:

> *"We trust that Claimant's Counsel will not require to cross-examine the remaining deponents on the contents of their affidavits, as they do not otherwise give substantive evidence in the proceedings. Please confirm by return. However, in the event that Claimant's Counsel does wish to do so, please let us know as soon as possible so that arrangements can be put in place (including as necessary video-conferencing facilities for those that are overseas)."*

386. EMBD says that Namalco simply ignored this letter and no requests were made to examine the deponents. It adds that the fact that the court did not permit the evidence of the witnesses Brooks and Barrell to be used at trial does not derogate from the fact that the affidavits provide sworn testimony in proof of the Fugro Report in response to Namalco's Notice to Prove.

Fugro has not been proven

387. Part 28.18 CPR reads:

> *(1) A party shall be deemed to admit the authenticity of any document disclosed to him under this Part unless that party serves notice that the document must be proved at trial.*
>
> *(2) A notice to prove a document must be served not less than 42 days before the trial.*

Part 32.19 of the CPR of the UK provides:

> *32.19*

(1) A party shall be deemed to admit the authenticity of a document disclosed to him under Part 31 (disclosure and inspection of documents) unless he serves notice that he wishes the document to be proved at trial.

(2) A notice to prove a document must be served –

(a) by the latest date for serving witness statements; or

(c) *within 7 days of disclosure of the document, whichever is later*.

388. The distinction between the two rules is simply that the local rules give a time frame for compliance for filing the Notice that is reckoned with regard to a set number of days. The rationale of both remain the same nonetheless which is, that the party who relies on the document must call its witness to prove the document at trial. In other words, the opposing party must be given adequate and sufficient notice after the Notice has been provided of the evidence of the witness that the party relying on the document proposes to call at trial so that that party will not:

1. Be taken by surprise thereby reverting to the old days of trial by ambush.

2. Is prepared well in advance to cross- examine the witness on the authenticity of the document to be proven.

389. The requirement for adequate notice becomes even more pronounced where the subject matter of the document to be proven relates to an area of expertise or specialisation. In such a case, cross-examination without the required notice may unjustly deprive the opposing party of the opportunity to obtain instructions on the evidence to be led in proof and to call their own evidence so as to disprove the document. The rule is clear that what is required when Notice to Prove is given is for the relevant witness to be called at trial to prove the document.

390. In that regard, the history of the proceedings in this case is important. This claim would have traversed the gamut of case management and Namalco would have filed its Notice to Prove well within time. Some two (2) months thereafter while in the midst of a trial that lasted one month, for the first time, EMBD was writing to Namalco to enquire as to whether Namalco wished to cross-examine the witnesses. In the court's view, this was an attempt to cure a fatal flaw that

appears to have only been recognised midway during the trial. This no doubt would have been unfair to Namalco at that stage of the proceedings and the request from EMBD to Namalco as to whether it wished to cross-examine the witness was a hollow one. The failure of Namalco to respond to such a request was, therefore, non-offensive in the circumstances. The obligation lay with EMBD to serve a witness statement or affidavit (although the order of this court was made for witness statements) well in advance of the start of trial so as to give Namalco an opportunity to take instructions thereon and prepare to cross-examine. EMBD chose to do that during the cut and throw of trial which was not only procedurally improper in the court's view but was also manifestly unfair to Namalco.

391. For the court to simply look and assess the affidavits with a view to saying that the document has been proven as suggested by EMBD in its submissions would be equally improper and unfair. The opportunity to take proper instructions thereon with a view to cross-examination was of particular importance in this case as the accuracy of method of testing used by FUGRO was hotly disputed and remains a main issue of contention in this case.

392. The court finds, therefore, that the Fugro Report has not been proven by EMBD.

Fugro is not evidence

393. It follows as a matter of law that there having been no agreement as to the Report and EMBD having failed to prove it, it is not in evidence. The attempt by EMBD to have the testing data admitted into evidence, in the middle of trial, by filing a supplementary witness statement and a hearsay notice must also be deprecated. Contrary to what has been submitted in answer to this issue by EMBD the fact that it filed a supplementary witness statement and hearsay notice on the day the Notice to Prove was filed cannot assist the Report. Firstly, procedurally, a hearsay notice does not override the duty to prove the document as that is the very purpose of the Notice to Prove. Secondly, a supplementary witness statement to prove a document should of course be followed by the witness giving evidence of the authenticity of the document. In that regard, the court is unable to locate any supplemental witness statement that attempts to prove the Fugro Report filed the said day (hence the apparent need for the affidavits). Further, whether EMBD called the witness who gave the alleged supplementary witness statement is a matter which lies within the purview of EMBD who bears the burden of proving the document.

Fugro is expert evidence that required leave

394. Part 33 CPR provides:

> ***General duty of the court and of the Parties***
>
> ***33.4*** *Expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly.*
>
> ***Court's power to restrict expert evidence***
>
> ***33.5*** *(1) No party may call an expert witness or put in an expert's report without the court's permission.*
>
> *(2) The general rule is that the court's permission should be given at a case management conference.*

395. EMBD submitted that the Fugro Report is fact based data that requires specialist knowledge and training as opposed to the expression of an opinion. That the authors of the Fugro Report expressed no opinion on any of the matters in dispute in the case. That Barmpopolous was the expert who interpreted and applied the data.

396. Part 33.4 above helpfully provides guidance as whether expert evidence should be admitted by the court. It also, however, does not provides on the face of it a basis for the court to determine whether evidence is expert evidence in the first place. Evidence of opinion is generally inadmissible in court as a witness may only attest to facts which are within his personal knowledge and is not permitted to draw inferences from those facts. For completeness, in determining whether the court should grant permission for expert evidence to be used, the test was clarified by Their Lordships of the Court of Appeal in ***Christianne Kelsick v Dr. Ajit Kuruvilla and others*** Civ App P277 of 2012. Justice of Appeal Jamadar set out as follows:

> *8. In determining whether permission should be granted to use expert evidence and what expert evidence is reasonably required to resolve the issues that arise for determination, a court ought to weigh in the balance the likelihood of the following (assuming admissibility):*
>
> *(i) how cogent7 the proposed expert evidence will be; and*

(ii) how useful or helpful it will be to resolving the issues that arise for determination.
In determining whether this evidence is reasonably required to resolve the proceedings justly, the following factors that allow one to assess proportionality should also be weighed in the balance:

(iii) the cost, time and resources involved in obtaining that evidence, proportionate to the quantum involved, the importance of the case, the complexity of the issues, the financial position of each party involved in the litigation, and the court resources likely to be allocated to the matter (in the context of the court's other obligations);

Depending on the particular circumstances of each case additional factors may also be relevant, as such:

(iv) fairness;

(v) prejudice;

(vi) bona fides; and

(vii) the due administration of justice.

9. Under cogency, the objectivity, impartiality and independence of the proposed expert, together with the qualifications and experience of the proposed expert, in relation to both the specific subject under consideration and the particular issues to be resolved, are material considerations. At this stage of the proceedings a trial judge is simply required to assess how cogent the expert evidence is likely to be. That is, how convincing and compelling it is likely to be based on the stated considerations. Under usefulness or helpfulness, the technical nature of the evidence to be reconciled and the focus of the issues to be determined, as well as the familiarity of the expert with the areas under scrutiny, are material considerations, especially when that expertise is relevant for necessary fact and/or inferential findings. As with cogency, at this stage of the proceedings the trial judge is only required to assess the likelihood of usefulness or helpfulness.

10. These two factors (of cogency and usefulness/helpfulness) contain some commonalities and there will often be overlap in what one considers under these two heads. Proportionality involves a comparative assessment of the multiple considerations stated in the Overriding Objective (Part 1.1, CPR, 1998). These considerations are not exhaustive and only serve to assist the court in determining what is required to deal with a case justly.

11. In summary, for expert evidence to be appropriate in light of the CPR, 1998, and for permission to be granted to use it, that evidence ought to be relevant to matters in dispute, reasonably required to resolve the proceedings and the proposed expert must be impartial and independent and have expertise and experience which is relevant to the issues to be decided. In addition, the use of expert evidence must also be proportionate in light of the factors set out in Part 1.1, CPR, 1998. Economic considerations, fairness, prejudice, bona fides and the due administration of justice are always matters that may have to be considered depending on the circumstances of each case.

397. In ***Sun Cheong Construction Company Ltd v The Incorporated Owners of King Fu, Ho Fu, Ki Fu & Ka Fu Buildings*** [2019] HKCA 167 [TAB 55]329, the Court of Appeal in Hong Kong considered the issue of an expert report within an expert report. In that case, it was held that insofar as the expert witness could demonstrate his personal involvement in the previous investigations, inspections and preparation of the reports relied upon no separate leave to adduce the evidence was required. In respect of certain other tests carried out, it was sufficient that there was evidence from a witness who had personal involvement in the process and could speak to the methodology deployed. However, in the case of any other evidence contained in appended reports which was not within his expertise, it was accepted that separate leave was required to adduce the evidence.

398. In the court's view, to determine whether the Report qualifies as expert evidence a court would have to examine several factors including:

1. Whether the matters set out therein purport to be matters of fact or opinion;

2. Whether the opinions in the report are relevant to the issue to be decided.

3. Whether Barmpopolous' personal involvement in the investigations, inspections and preparation of Fugro Reports is such that he can speak to the methodology deployed without separate evidence from a witness who had personal involvement in the process.

399. A perusal of the Fugro Report shows that it was signed by both J. Barrell and S. Brook, two Project Managers, the former on July 23, 2018 and the latter on January 4, 2019. There is an executive summary that speaks of the tests being non-destructive investigations using GPR for thirty-five (35) land kilometres (km) of pavement on the four (4) sites. Fifty-seven (57) trial pit investigations were taken in total across the sites. Results were tabulated at one metre (1m) intervals. Those results were then set out as a matter of fact for each site. Under Terms of Reference the author states the following[101]:

> *This investigation involved the use of non-destructive methods and therefore, the majority of the findings presented here are the result of the measurement and interpretation of electrical and electromagnetic signals. This report represents the best professional opinion of the authors. Every effort has been made to ensure that the results are accurate and reliable, including reference to material calibration data from this and other sites. However, as with other indirect methods there is a possibility of localised inconsistencies and inaccuracies within the results.*

400. The Report then sets out background information, data acquisition, the survey methodology and data tables. Finally, the "findings' are set out. Under the general rubric the author provides his opinion that as with any non-destructive test, the effectiveness was influenced by the characteristics of the ground, the target and the site conditions. He further stated:

> *We believe this variation is related in the pavement condition and the construction material present as opposed to the equipment or processing methods used.*

401. Having regard to the general tenor of what is set out above, it is abundantly clear to the court that the Report purports to be not only statements of fact but also statements of opinion by experts who are skilled in the field of this method of testing. Opinion on the quality of

[101] Para 1.3.2 of the report

construction material used which is an issue in this case. It is equally clear that the authors were acutely aware that they were providing not only facts on a test but also opinions as stated by them above. So that the court finds that all of the criteria set out above are present, the last being the admission of Barmpopolous that he had no personal involvement in the investigations, inspections and preparation of the report as set out in the evidence above.

402. There is no gainsaying that this specialist report amounts to expert evidence and an application for permission to adduce it as same ought to have been made.

403. For all of the reasons set out above, therefore, the Fugro Report is not evidence in this case and carries no weight whatsoever. It also follows that the evidence of Barmpopolous carries no weight in so far as he seeks to rely on that Report and the court so finds.

Jonathan Palmer

404. Mr. Palmer is a Chartered Engineer with experience in Geotechnical aspects of civil and structural engineering. He prepared a report dated September 9, 2019 on behalf of EMBD. He was first approached by way of email dated March 20, 2019 in which as enquiry was made as to his availability to review the briefing notes issued by WJM, to provide comments and to potentially take on a larger role including that of being an expert witness. Formal terms of reference were subsequently issued in September 2019, days before the date of his report. Under cross-examination, Palmer stated that he had read and understood that it was a discharge of his duty as an independent witness of the court to enclose and attach his instructions to his report in compliance with Part 33. However, none of his instructions were so appended and no explanation has been provided for such failure.

405. The evidence under cross-examination also revealed that he had in fact started his main report in or around April or May 2019 without terms of reference. It was his evidence that he was in fact acting on oral instructions provided to him in April 2019 by the legal team of EMBD. Those oral instructions were not provided to the Claimant. Palmer also confirmed that he had been engaged by EMBD to advise in another claim involving a party to these proceedings, BBFL, which concerned earlier contracts on some of the Project Sites in this claim, a fact which had not been previously disclosed to Namalco or the court. He admitted that he would have responded to the email of March 2019 but the court notes that no such response have been disclosed or appended to the expert report. The witness also explained under cross-examination that he had visited the

Cedar Hill Sites in June 2018 (a fact stated in the report for the purpose of the present claim) but that the visit was made in relation to some other matter involving another contract unrelated to this one. That one was a claim by an entity named LCB for works done at Cedar Hill. In that matter, he had been tasked by EMBD to provide the specifications for an investigation of the site to be conducted by EISL and to supervise the investigation. He had also been retained to provide his expert advice of earthworks in BBFL's claim against EMBD in respect of two other Projects.

406. Namalco submitted that the evidence and matters set out above, clearly demonstrate that both Barmpopoulos and Palmer were fully aware of their duties and responsibilities under CPR 33 but nevertheless, for no reason, knowingly failed to append to their reports or disclose to the court all instructions. Indeed, Palmer confirmed that he has previous experience as an expert court witness. For this reason alone, the court is entitled to and should reject their reports. See dictum of Dean-Armourer J (as she then was) at paragraph 14 of CV2006-03842 Martin Phillip Revenales v Eric Charles [TAB 48]313 where the Learned Judge said:

> *"Moreover, failure to provide information required by Part 33.10 of the Civil Proceedings Rules is fatal and would result in the court's rejection of the expert report."*

407. The failure of both experts to make full and frank disclosure brings a large measure of discomfort to the court. The importance of the distinction between an expert who is an expert advisor and one who is an expert witness is set out by Namalco in its submissions and so is the basis for the court's concern. The court is of the view that the submissions ought to be set out herein in full form as follows:

a. An expert adviser is an expert who is usually appointed at an early stage, sometimes prior to proceedings being filed, in circumstances where a party requires specialist or technical advice, particularly in relation to the merits of its case. An expert witness is an independent witness; one who is retained for the purpose of giving evidence at trial for the assistance of the court. It is important to note that the two types of expert are not subject to the same principles. For example, an expert witness is immune from suit, whereas an expert adviser is not. Additionally, instructions to an expert adviser are privileged, whereas instructions to an expert witness are not. Most important, however, is the fact that an expert witness has an overriding duty to the court, whereas an expert adviser simply has a duty to his Client. Many expert advisers turned witnesses, therefore, find themselves faced with the

practical difficulty of immediately ceasing to advise the Clients while continuing a professional relationship with the Client's legal team and maintaining its overriding duty to the court.

b. For those reasons, while it is not uncommon for an expert adviser to be retained by a Client as an expert witness in the interest of saving time and costs, in certain circumstances, however, it may not be appropriate for an expert adviser to act as an expert witness in a case. For instance, in **Anglo Group Plc v Winther Brown & Co 72 Con LR 118,** 315, the judge did not consider an expert adviser's previous advice used for the purpose of negotiations to be independent expert evidence.

c. Similarly, expert advice for the purpose of defending litigation may not be independent if the possibility of a potential conflict of interest is not previously determined and dismissed. For this reason, it is essential that there be full disclosure to the court of an experts' previous relationship with a Party before his appointment as an expert.

408. Namalco sought to demonstrate the manner in which the court ought to approach the evidence by recourse to UK recommendations of the Civil Justice Council (2014) in relation to expert advisers. The guidelines establish that before experts are instructed or the court's permission to appoint named experts is sought, it should be established whether the experts have no potential conflict of interest. In that regard, it also recommends that where an expert adviser is approached to act as an expert witness he ought to consider carefully whether he can accept such a role.

409. Having regard to the evidence set out extensively in the cross-examination of both Dr. Love and Dr. Jones, this court harbours serious doubts about the accuracy of the test results by EISL and the interpretation of those results by both Barmpopoulos and Palmer.

410. The court, therefore, agrees with the submissions of Namalco that there is no evidence that the instructions or advice connected with the "privileged" WJM briefing notes were dispensed with once Barmpopoulos' role changed to expert witness and/or when he finalised his expert report pursuant to the instructions received in his capacity as a witness. It accepts the following:

a. Barmpopoulos confirmed that he had prepared his report, *inter alia*, pursuant to the earliest instructions to WJM, which said instructions were instructions from Client to adviser.

b. Subsequently, WJM's "privileged" briefing notes were provided to Palmer in or around March 2019, after the Order for Experts was made and at a time when he was instructed to prepare an Expert Report pursuant thereto.

c. EMBD's reliance on the "*privileged"* nature of these instructions to an adviser highlights one of the key difficulties that can arise when advisers move to the role of witness without those instructing or themselves recognising the shift in their duty.

d. The primary duty of an expert witness is to provide independent assistance to the court and the parties by way of objective unbiased opinion. It is in the discharge of this duty that the requirements of full and frank disclosure of instructions arise.

e. A party is not entitled to make a distinction between the expert adviser's instructions or advice and those of the expert witness to avoid its disclosure obligations, unless of course, the two are truly entirely distinct.

f. That is not what is contemplated by Part 33 and the two are not entirely distinct matters in this case and are in fact so intertwined that they are likely to be inseparable unless the expert is vigilant.

g. EMBD's evidence in that the WJM briefing notes were used by these experts in the preparation of their final Expert Reports.

411. The court, therefore, draws the inference that a potential and realistic conflict of interest existed from the failure to disclose these instructions. It follows that the claim of privilege by EMBD over the advice and/or instructions given to the experts at an earlier stage which by its own admission, formed part of the experts' instructions to prepare their expert reports cannot stand and the court so finds.

412. Additionally, in its submissions Namalco submitted[102]:

> In addition to the experts' advisory roles in relation to this claim, the court is also asked to consider that these experts were retained by EMBD in connection with other matters (in some cases which were closely related to this claim) which call their independence into question. Barmpopoulos, for example, was responsible for determining the specifications for investigations conducted by EISL in 2018, the results of which form part of the expert report of Allen. Interestingly, at Clause 4(ii) of the Contract for the said investigations between EMBD and EISL dated January 19, 2018, EMBD named Barmpopoulos its "designated representative" in respect of the Services. It is unclear which instructions Barmpopoulos would have been acting pursuant to under this Contract, as these were never disclosed to Namalco. However, it is noteworthy that this Contract was entered into after Barmpopoulos had already been instructed to begin preparing his expert report. Namalco says that it is reasonable to infer that pursuant to his duties under that Contract, Barmpopoulos would have been acting in the interest of EMBD as his Client- a clear conflict of interest.

413. The court wholly agrees with this submission and is taken aback by the fact that Barmpopoulos accepted another contract in which he was named designated representative after he had been instructed to begin the preparation of his expert report in this matter. This raises nothing short of a definite conflict of interest in so far as his independence as an expert of the court is concerned. The result is that EMBD has not assuaged the effects of such conflict of interest whether real or apparent. No weight will, therefore, be accorded to the evidence of Mr. Barmpopoulos.

414. Additionally, the evidence of Barmpopoulos is based largely on the contents of the Fugro Report and the results of the EISL tests. The court has ruled in relation to Fugro that it cannot be relied on and so his evidence being based on that report cannot stand. Further, the court has also ruled that the results of the EISL report appears to it to be wholly unreliable having regard to the evidence that was elicited in cross-examination. It means that the entire evidence of Barmpopoulos is rendered unreliable as a consequence and no weight has been given to his evidence also on this basis.

[102] Para 393 of Namalco's submissions of August 14, 2020.

415. In relation to the witness Palmer, there is evidence that he had previously advised EMBD in relation to two separate cases involving Projects Sites in this very claim and had conducted site visits, communicated with EMBD's attorneys, prepared reports for EMBD and by inference would have worked closely with EMBD. There appears, therefore, to be a close working relationship between Palmer and EMBD. In the court's view that is a matter that although not determinative of the admissibility of his evidence, ought to have been disclosed before trial to all of the parties so that they may have interrogated the relationship between Palmer and EMBD. The failure so to do goes to the weight of his evidence.

416. However, Palmer's Report is of course predicated on the EISL tests. The court prefers the evidence of Dr. Love and Dr. Jones in relation to the unreliability of the EISL tests set out in the evidence above for the reasons set out therein and it so finds. Based on their evidence, the court finds that it is more likely than not that the EISL test results were not accurate and so did not provide a reliable picture of whether any defects existing not only in relation to RR but also in relation to the other projects were caused by Namalco's defective works. The burden lay with EMBD to so satisfy the court and in the court's view it has fallen short of the discharge of that burden.

417. It follows, therefore, that very little will be given to the evidence of Palmer, it being based on the EISL test results and the evidence of Dr. Love and Dr. Jones carrying with it much weight in the court's view. This applies to all of the Projects.

418. In the result, while EMBD was permitted to rely on abatement as a defence it has failed to prove the defects as pleaded. Namalco is also, therefore, entitled to a return of the retention sum.

NAMALCO'S EXPERT ON VALUE/RATES

Phillip Duggan

419. It should be noted that no objection was taken to any of the experts called in this case. Duggan, a Quantity Surveyor by profession, filed two reports, one of September 11, 2019 (the first report) and one of October 11, 2019 (the supplementary report). At the time of receiving instructions for the preparation of the first report he was acting as Regional Managing Director of Driver Group in the UK. At the time of preparation he was the Regional Head of the company's

Expert Witness company names Diales in the Middle East. The first report gives his assessment based on measurements provided by his qualified assistants and his view in respect of the valuation of the works completed as certified by the respective Engineers, they have made site visits and taken measurements. He referred to part of this process as a verification exercise in his cross-examination. In this regard, his focus in that report was on the disputes raised by EMBD. He acknowledged that in most cases the disputes involved matters of law so that they were outside his remit. He therefore, gave no view on those. He therefore, only provided his view in relation to disputes that involved the principles and methods of evaluation and sums that would be ordinarily due. At the time of preparation of the first report, he had not yet received the report of Sarah Pattinson. The first report is in the court's view somewhat unhelpful for present purposes.

420. In his supplementary report, he set out what he termed a consideration of market rates as against the rates set out in the Supplementary Agreements. He also stated therein that he was unable to set out a definitive summary of the sums that he considers EMBD would be entitled to deduct from what has been certified. In his opinion, PURE rates used as a measure both by Hood and Pattinson are not market rates to be used for projects such as RR and PM because of the very large scale of the projects. He disagreed with some of the general assumptions made by both Hood and Pattinson, in particular that large scale projects would have lower rates due to economies of scale. He also states that he does not believe economies of scale ought to apply to earthworks operations and that this seems to be supported by the FIDIC Contracts Guide. It is his report that earthworks operations themselves are particularly difficult to generalise and compare from location to location as they are unique to the particular site. The sites under consideration were old sugar plantations with a considerable amount of hostile vegetation with undulating terrain and other factors that would affect construction operations in terms of overhead power lines and underground main sewers. He highlighted several of the variable factors which, according to him, makes it not reasonable to make general assumptions about earthworks.

421. He disagreed with the process used by Pattinson to arrive at what she referred to as reasonable market rates applicable as at April 2012. This process involved establishing an average rate for each Bill Item from the original tenders after first removing the highest and lowest rate and uplifting the said average rates by seven percent (7%) per year to arrive at derived market rates. It is his evidence that analysing rates individually across all tenders ignores where each individual tenderer may have priced risk items and/or overhead and profit and the use of general inflation data instead of taking cognisance of the actual market rate conditions for construction is

unreliable. In his view, whatever constitutes market rates in any agreement will be dictated by what the receiver of the service is prepared to pay for something and the price at which the seller is prepared to sell.

422. In essence, he says, therefore, that Namalco was not obliged to resume works on RR so that they did not have to take on board a substantial scope of increase at Original Contract rates on PM. In other words, the rates on PM were separate and apart from those that had originally been agreed to on RR. There was ideally no relation between the RR rates and the PM rates. Namalco, therefore, was entitled to enter into a Supplementary Agreement that were based upon the price they were prepared to sell their services for. Essentially therefore, Namalco determines the rates.

423. The Expert Witness, therefore, stated in his report that he is not in a position to assist the court in determining what would constitute market rates in 2012 for RR and PM as this would be speculation given the lack of relevant published data that exists.

424. The Witness commented on the approach of Pattinson towards valuation of the defective works. He surmises that her evidence is speculative as she has developed pricing for the purported defects which were raised by EMBD's technical experts but he has not seen any statement in which the experts have agreed to the extent of the works required to make the roads acceptable or what works flow from design defects (which do not fall within the responsibility of Namalco) as opposed to defects in workmanship. He agreed with her approach in re assessing road layer thickness but was of the view that the finding of quantities to be abated was subjective given the relatively small sample data that exists compared to the overall areas in question. He further stated that he has not had time to compare his original quantity assessments to that of Ms. Pattinson. Neither has he had a chance to consider the quantities derived.

425. In relation to earthworks quantities, he undertook analysis of the quantity date contained in the Palmer Report and compared them to the checks he set out in his original report. Despite so doing, he nonetheless concluded that the measurement of earthworks could not be done independently and accurate retrospectively due to their inherent nature.

426. He was cross-examined by EMBD. In relation to the claim for provisional sums, he was referred to Clause 13.5 of the Contract which sets out that each provisional sum shall only be used

in accordance with the Engineer's instructions and the Contract price adjusted accordingly. He admitted having seen no such instructions from the Engineer. He also testified that in his experience it was not uncommon for a provisional sum to be certified although no evidence of same was provided to the Engineer. However, he accepted that Clause 13.5 required that the thing to be done is done first and then the actual cost proven and charged for. He also admitted, therefore, that the arrangement in that regard in relation to RR appeared in part to be contrary to the Contract. He also admitted that if there was no provision in the Supplemental Agreement that the new rates shall apply to the old rates under the Original Agreement that the new rates are not chargeable for work done under the old agreement.

427. In relation to Overheads and Equipment, he was referred to a certification by Atlantic of 3M in IPC5 for recovery of overheads due to extension of time on the Cedar Hill Contract. He admitted that Namalco would only be entitled to any recovery to the extent that it could demonstrate its entitlement to extension of time on the Cedar Hill Contract and admitted that he has seen no analysis in that regard by Namalco or Atlantic. He was also cross-examined on the issue of sandfill but having regard to the ruling of the Court on the Supplementary Agreements, the evidence is not relevant.

428. Of particular relevance was the cross-examination on the issue of market rates in 2012. In his view Mr. Soogrim of Namalco was better placed to deal with rates as he was involved with tendering at the time. He agreed that Pattinson also stated in her report that there is no specific construction inflation index but that there are details of the labour market and wage increases together with an index for building and material prices. By inference he admitted that it may not be fair to say that Pattinson, therefore, only relied upon the general inflation statistics. His response was "She has obviously done her best, yes, but I still think it's generic. It's a general labour index."

EMBD'S EXPERTS

Sarah Pattinson

429. Pattinson who specialises in the field on Quantity Surveying issued her report on September 13, 2019 in which the subject matter was set out as: The costs of unproductive resources arising from disruption to the works. She is a partner of GBsqd LLP, a partnership that provides quantity surveying services to employers, contractors and consultants in the

construction and engineering industries. She is a Chartered Quantity Surveyor and member of the Royal Institution of Chartered Surveyors with twenty (20) years practical experience in the field. She holds a BSc in Quantity Surveying and a Post Graduate Diploma in Law. She was instructed to provide an expert opinion on the value of the works undertaken that are alleged to be defective and/or not in accordance with the Contract, the estimated cost to remedy the defects based on remedial schemes proposed by Mr. Barmpopoulos, provide an audit and valuations of the works claimed for and to give an opinion as to the level of market rates at 2012 for RR and PM and provide a valuation of the works completed on this basis.

430. Pattinson set out the value of works at RR when the Original Contract works were used based on her assessment of the work to be valued. It is her evidence that in respect of **RR**, should the Supplementary Agreement be set aside, the gross value of work certified based on the Original Contract rates is four hundred and sixty-one million, four hundred and ninety-six thousand, eight hundred and ninety-seven dollars and thirty-five cents ($461,496,897.35); whereas her assessment of the value using the said original rates is that of eighty-four million, four hundred and seventy-six thousand, nine hundred and sixty-eight dollars and fifty-two cents ($84,476,968.52); bringing the over certified amount to three hundred and seventy-seven million, nineteen thousand, nine hundred and twenty-eight dollars and eighty-three cents ($377,019,928.83).

431. In respect of **PM** the gross value of work certified based on the Original Contract rates is that of six hundred and nine million, three hundred and forty thousand, three hundred and eight dollars ($609,340,308.00); whereas her assessment of the value using the original rates is that of eighty two million, five hundred and ninety-six thousand, one hundred and two dollars and seventy-eight cents ($82,596,102.78), resulting in an over certification of five hundred and twenty-six million, seven hundred and forty-four thousand, two hundred and five dollars and twenty-two cents ($526,744,205.22).

432. In relation to payment, it is her evidence that based on the assessment of the real value made by her in respect of RR, Namalco has been overpaid by eighty-seven million, seven hundred and sixty-three thousand, nine hundred and fifty-nine dollars and ninety-two cents ($87,763,959.92). In respect of PM, that figure is one hundred and seventy-two million, five hundred and seventy-seven thousand, eleven dollars and five cents ($172,577,011.05).

433. In cases where she was unable to provide an assessment of the value of the work or the claim in accordance with the rules of valuation set out in the applicable contract conditions, she attempted to provide the court with a reasonable assessment of the value based on the paucity of the information available.

Mark Hood

434. Hood was called on the issue of rates. He is a Fellow of the Royal Institution of Chartered Surveyors, a member of the Chartered Institute of Arbitrators and other Institutes. His specialities include Quantity Surveying, Contract Claims, Dispute Resolution and testifying as an expert witness on Construction Contracts.

435. He testified as to a measure of rates called PURE rates as published by the Ministry of Public Works and the extent to which such rates are used in Trinidad. In his report he sets out that he has never used PURE rates in practice so his report is of his understanding of PURE rates. He was also appointed to liaise with the witness Pattinson in relation to the use of those rates. PURE rates were established in 2004. In his report he set out the basis of the rates and categorisation of types of work for which the rates would be appropriate, for example, clearing and grubbing depending on the geography of the site. Further, it was his evidence that in 2015 market prices and PURE rates were similar. PURE rates seemed to have been more lucrative than market rates up to 2014, but thereafter the contrary became the norm.

436. His view was that PURE rates have increased very little over the period 2010 to 2016 despite inflations and market price increases so that in his opinion the PURE rates are not a very good indicator of market prices for similar road upgrade works in 2011 and 2012. This position would have corrected itself in 2015. In large measure, the witness Pattinson would have considered this report in composing her report. There was no cross-examination of this witness so that his evidence stands. The Claim is based, however, on market rates as agreed between the Parties. This evidence becomes helpful in the context of the findings of the court in relation to the non-applicability of the SA and so must be considered in the round with the evidence of Pattinson.

Discussion and findings

437. It should be noted that the court's ruling is to set aside the Roopsingh Road and Petit Morne Supplementary Agreements. It follows that the value of the works ought not to be based on prices awarded in the Supplementary Agreements. The court has a duty to do the best it can in the

circumstances so as to bring an end to the dispute of the Parties and avoid further protracted litigation. The evidence of Pattinson is helpful in this regard, in the court's view, and is the best evidence that it can rely on in the unique circumstances of this case. The burden lies with EMBD to prove the diminution in value but that value cannot be based on the sums set out in the IPCs that were issued under the terms of the Supplementary Agreements. There is, therefore, an issue as to what value ought to be used as the starting point for works done to which the Supplementary Agreements do not apply.

438. In the court's view, the only viable option having regard to the state of the evidence is that the sums certified at the original rates ought to apply so that the court can do the best that it can to resolve the issue between the Parties. This is so due also to the finding of the court that the evidence of Barmpopolous and Palmer carry no weight. The assessment by Pattinson of the value of the work done is based on the evidence of the latter experts so in that regard her evidence in so far as the value of work done is concerned must also be given no weight.

439. The evidence of Duggan, in that regard, is with respect grossly unhelpful in any event as he purports to make no such valuation. While the court appreciates the logic of his argument on the tremendous difficulty of assessing the value of earthworks, and the fact that such an exercise may result in an imprecise outcome, the fact remains that for the purpose of this decision there has to be an ascribed value.

PROJECTS

ROOPSINGH ROAD VALUE

440. EMBD having failed to prove the defects in relation to abatement, put another way, EMBD having failed to prove it's abatement defence (in respect of defective works only) the court shall use the evidence of Pattinson in relation to the value of the work as certified based on the original rates as the starting point. In relation to Roopsingh Road, Pattinson testified that the value when the original rates are applied should the Supplementary Agreement rates be set aside is the sum of four hundred and sixty-one million, four hundred and ninety-six thousand, eight hundred and ninety-seven dollars and thirty-five cents ($461,496,897.35)[103]. In her reply report, while she corrected the figures to reflect payments made, in essence, her evidence remained the same. Namalco, however, set out what they consider to be their entitlement should the abatement

[103] See TB2 139189 and TB2 139190.

defence fail. It is difficult to ascertain by which method it was decided that those sums apply. The court in doing the best it can will, therefore, examine each item with a view to deciding whether it should be allowed.

Clearing and grubbing or Stripping

441. According to EMBD, the Engineer should expend Provisional sums on express instruction and there is no such instruction from BBFL. Because of this lack of information, there cannot be a positive valuation for the Provisional sums.

442. Further, the certification of the Provisional sums based on monthly rates were contrary. The correct approach was certification only to the extent that the Project reasonably incurred costs due to events, which have critically delayed completion, and only because of events for which EMBD is liable to compensate Namalco.

443. Namalco submitted that the Engineer's certification under Provisional sums should remain undisturbed. Having regard to the evidence of Dr. Rajpatty for APCL and that of Sookram, it is evident that the Engineer simply did not require those documents to substantiate the claims for Provisional sums because they were to be treated as lump sums.

444. The court is of the view that the Provisional sums are allowable having been certified. The Engineer must have been satisfied that the costs were reasonably incurred whether a monthly rate or otherwise was used. Therefore, a sum under this head is allowed.

Preliminary Items for Office and Security

445. EMBD says that Namalco is not entitled to preliminary items for offices and security, as EMBD did not grant it an extension of time on the Roopsingh Road Project. In any event, Namalco had to prove any period of critical delay.

446. Namalco on the other hand submits that the certification by BBFL and then APCL is evidence in itself that the Engineer considered Namalco to be entitled to those items for the duration claimed. It is not disputed that the works went beyond the Original Contract duration or that these services were in fact provided by Namalco and in the circumstances APCL's certifications in respect of these items should be allowed.

Overheads

447. Namalco has claimed two sums by way of overheads. The sum of three million, ninety thousand, three hundred and one dollar and twenty-four cents ($3,090,301.24) between October 22, 2010 and April 14, 2011 is a claim for suspension of works. Pattinson concluded that the costs incurred by Namalco was not payable.

448. EMBD relied on the Roopsingh Road Supplementary Agreement that provides that Namalco's loss of profit claim (of which the overheads claim is a part) is nullified. Having regard to the ruling of the court on the validity of the agreements, this submission cannot stand so that the sum of three million, ninety thousand, three hundred and one dollar and twenty-four cents ($3,090,301.24) is allowed.

449. The sum of twenty-seven million, five hundred and twenty-nine thousand, three hundred and forty-four dollars ($27,529,344.00) between July 24, 2013 to June 14, 2015 is the other claim for overhead costs. According to Pattinson, Namalco has not provided evidence of critical delay nor was there any evidence of any extension of time awarded on the RR as the reference to an extension appears to be in relation to PM. The court is also not satisfied that Namalco has shown that the overhead resources that were lost on the suspension could not have been used commercially elsewhere. Pattinson, therefore, provided an alternative valuation by considering the Original Contract price and Namalco's accounts. In her expert opinion the loss would be nine thousand, seven hundred and sixty-nine dollars and one cent ($9,769.01) per day amounting in total to the sum of six million, seven hundred and fifty thousand, three hundred and eighty-five dollars and ninety-one cents ($6,750,385.91) for six hundred and ninety-one (691) days. The court accepts this evidence and will allow the said sum.

Equipment

450. Namalco makes three (3) equipment claims for the following periods:

i. A claim between October 22, 2010 – March 31st, 2012 for eleven million, one hundred and twelve thousand and five hundred dollars ($11,112,500.);

ii. An equipment amortisation claim for the same period at two million, six hundred thousand, eighty-six dollars and six cents ($2,600,086.06); and

iii. A claim between July 24, 2013 – June 14, 2015 at fifty-two million, one hundred and thirteen thousand, one hundred and twelve dollars and fifty cents ($52,113,112.50).

451. According to EMBD, Namalco submitted its claim with the Engineer, Planviron and resubmitted it under BBFL. The BBFL's claim went beyond the contracted price. EMBD maintained its position that Namalco is not entitled to payment pursuant to Clause 12.4 as well as the Original Tender. Further, Namalco is entitled to both the capital and interest repayments under a loan amortisation, over a three (3) year period, at an annual interest rate of eighteen percent (18%).

452. In relation to the period of 2013 to 2015, APCL certified over fifty million dollars ($50M) in suspension-related equipment costs. Again, Namalco did not provide documents that there was stoppage of works and a reduction in the rate of works during the suspension periods.

453. EMBD relied on APCL to assess the works. Pattinson raised five (5) components APCL should have considered:

i. Determining the number of days of critical delay to the Project in fact caused by suspension and/or a reduced rate of working;

ii. The actual equipment on site for the duration of the Project;

iii. The hours of utilisation of the equipment and the reasons for that utilisation;

iv. The identification of idle plant and equipment; and

v. The rates to be applied to idle/standing-by time.

454. Namalco submitted that the sum of eleven million, one hundred and twelve thousand and five hundred dollars ($11,112,500.00) represents the value of Namalco's certified claims over two separate periods, the first up to the date stated in Planviron's assessment and the second from that date to the date of resumption of works. This was supported by Duggan who concluded that the said sum was calculated for two separate periods, therefore, EMBD's criticism of Namalco as being opportunistic is wholly unfounded.

455. Pattinson expressed her doubts as to the veracity of BBFL's statement as follows: "8.8.2 BBFL has stated that the equipment that is part of the equipment claim is not the same as the equipment in the amortisation claim. I am unable to verify this and BBFL has not set out how it did so itself. On the face of the document there is a potential duplication of the sums claimed and certified."

456. The Contractor may choose to claim for idle equipment during suspension on the basis of its loss at a daily rate for equipment fully owned or on the basis of its loan repayment for equipment purchased for the project. In the circumstances, Namalco submitted that the allegation that there has been duplication is both misguided and unfounded.

457. It is unclear how Pattinson estimated the cost of owning the equipment or indeed why she reduced her assessment of twenty-one million dollars ($21M) to "the order of twelve million, six hundred and forty-two thousand, seven hundred and ninety-seven dollars and thirty-three cents ($12,642,797.33)".

458. In essence, the analysis of Pattinson reduced the value of works and APCL's certification. The court is of the view that two claims appear to be for the same period and is duplicitous. As a consequence, the court will allow the first claim for the period October 22, 2010 to March 31, 2012, but not for the Claim for the sum of two million, six hundred thousand, eighty-six dollars and six cents ($2,600,086.06). The sum of fifty-two million, one hundred and thirteen thousand, one hundred and twelve dollars and fifty cents ($52,113,112.50) on the second claim is allowed. In so finding, the court also noted and accepted the submissions of APCL as follows.

459. It was the case for APCL that Namalco performed its functions at a reduced rate due to EMBD's non-payment but still completed the project. In addition, APCL assessed the claim in consideration of the documentary evidence provided by Namalco. The methodology adopted by APCL was as follows:

i. According the Sub-Clause 16.1 of FIDIC, claims of this nature may include profit;

ii. fifteen percent (15%) was for profit but excluded overhead;

iii. A further ten percent (10%) was removed for opportunity costs losses less operational costs, such as fuel and maintenance, therefore, resulting in twenty-five percent (25%) overall reduction.

460. The allegations of breach of contract and negligence were denied in the Ancillary Claim on the basis that whilst other Engineers may approach the calculation of this item in a different way thus arriving at a different sum, the methodology applied by APCL was sound and consistent with its contractual obligations and the approach to be adopted by a responsible and professional Engineer and as such APCL was not acting recklessly, without knowledge of the true position. APCL adopted a commercial approach to a situation which it considered, as previously indicated, was unprecedented, where a Contractor spent a substantial time in performing its functions at a reduced rate due to EMBD"s non-payment but still completed the project. APCL assessed the claim in consideration of the documentary evidence which was provided by Namalco and therefore, it is not true that there was no analysis or investigations. In his evidence in chief, Dr. Rajpatty explained the approach taken by APCL in the assessment of this item (which is not here repeated but see paragraphs 254 to 261 of the witness statement of Steve Rajpatty). That evidence however, has failed to satisfy the court that the amortisation aspect of the claim for the same period was not duplicitous.

Clearing and grubbing

461. EMBD says that Namalco claimed approximately fourteen million, four hundred and seventy-nine thousand, nine hundred and nineteen dollars ($14,479,919.00) for clearing and grubbing works on the Roopsingh Road Project. However, the grubbing claimed could not possibly have been undertaken unless the full volume of claimed sandfill was used. It is their case that seven hundred and seventy-four thousand square metres (774,000m²) of the site had been cleared and grubbed to a depth of one hundred and fifty millimetres (150mm). It was the evidence of the expert Palmer that if the works had been in fact undertaken, the average sandfill thickness across the site would be one point five metres (1.5m). The trial pit investigations demonstrate that sandfill was only present under fifty-five percent (55%) of the site and not to the average thickness of one point five metres (1.5m). This evidence has been ruled as carrying no weight so the sum is allowed.

462. The court must be cognisant of the elapsed time between the completion date and the re testing by EMBD. Further, it was the evidence that having regard to the nature of the land, any

restarting of the Project must have necessarily involved clearing and stripping once again and the court accepts that these were factors to be considered. In the view of the court, the observation that only fifty-five percent (55%) of the area contained sandfill did not render it improbable that the entire area had to be cleared and grubbed. The court therefore, finds that this was more likely than not the case.

Imported sandfill

463. Namalco was certified a payment of a total of one hundred and sixty-five million, nine hundred and twenty-three thousand, eight hundred and twenty-two dollars ($165,923,822) worth of sandfill works over an area of seven hundred and sixty-two thousand, one hundred and one square metres (762,101m²). EMBD submitted that the quantities claimed by Namalco and thus certified were inaccurate. The court, however, does not accept the evidence of Pattinson, in that regard, as there is other probative evidence that fifty-five percent (55%) of the area was sandfilled. In keeping with the rational set out above. The court, therefore, allows the said sum.

Individual claims for excavation and imported sandfill

464. Namalco was certified a total of two hundred and three million, one hundred and twenty-two thousand, six hundred and fifty-six dollars and forty cents ($203,122,656.40) for individual claims for excavation and imported sandfill. EMBD submitted that the said works were over-certified by, as Pattinson's primary assessment on this matter reduced the amount certified in respect of all work under this item by eighty-three percent (83%). Namalco submitted that in so doing she relied solely on the expressions of opinions in Palmer's Report. As such, it must be disregarded entirely and the Engineer's certification should not be disturbed.

465. The court noted once again that the unchallenged evidence of Sookram is that Roopsingh Road's Site was situated in a low-lying area and was prone to becoming water-logged with the ground throughout saturated and, as such, required substantial filling. It is his evidence that it also contained bagasse.

466. Further, the court also accepted the evidence by Dr. Barrie Jones, Consulting Civil Engineer of August 2019 in which he sets out that the works appeared to be commissioned with some degree of urgency and proceeded without a detailed ground investigation. So that issues spoken of by Sookram would have most likely arisen.

467. Additionally, the court noted that the evidence on quantity of fill in the Palmer Report was struck out so that it would be improper to consider the reduction based on that report. Therefore in the court's view, the sum is allowable.

Recovery of profit – omission of detention ponds

468. The Original Contract did not provide for such a claim. There is also a lack of evidence that works took place between March 2015 and October 2015.

469. However, Namalco submits that its claim is based on the fundamental principle of contract law that a loss directly caused by contractual breach is recoverable. Namalco says that the certification by the Engineer of the sum of **six hundred and sixty-one thousand, three hundred and fifty-seven dollars and ninety-three cents ($661,357.93)** was fully justified and same should not be disturbed. Furthermore, Pattinson assesses loss of profit of nine point three five percent (9.35%) at five hundred and nine thousand, six hundred and eighty-five dollars and thirty-eight cents ($509,685.38). The court finds, however, that having regard to the finding on the validity of the Supplementary Agreement and to the fact that the Original Agreement did not provide for such a claim, such claim will not be allowed. The sum will therefore, not be allowed. These issues are discussed in more detail in the decision on the Ancillary Claim.

Fill and re-grading

470. Namalco was certified a total of nine million, eight hundred and fifty-eight thousand, seven hundred dollars and twenty-four cents ($9,858,700.24) for re-grading works to the Site. EMBD's case is that these works were, in fact, wholly unnecessary. Pattinson has considered all the claim documents submitted by Namalco. In her view, there was no evidence for the carrying out of any works between March 2015 and October 2015. As such, the most to which Namalco is entitled in the opinion of Pattinson is twenty-six thousand, five hundred and ninety-four dollars and thirty-two cents ($26,594.32). The court finds that Pattinson's evidence is the best evidence on the issue in the circumstances and the sum of **nine million, eight hundred and thirty-two thousand, one hundred and five dollars and ninety-two cents ($9,832,105.92)** will not be allowed.

Variations

471. EMBD did not accept that any claim for variations were within Namalco's scope of works and same did not form part of the final statement in IPC30. BBFL claimed not to be a party to the detail of the "Agreed Variations" in IPC 30 issued in respect of work during the time that Planviron

was Engineer. Pattinson has suggested that should the variations be found to have been invalid, then a deduction will need to be made to any sums found due to Namalco. Pattinson gave the following evidence in relation to the variations:

472. Planviron issued IPC3 to EMBD on December 14, 2010 and therein advised that the payment certificate included the following variations:

a. Access road to stockpile rehabilitation and maintenance.

b. Bridge on Access Road failed structurally, alternative access road constructed – five hundred and fifty-four thousand, four hundred dollars ($554,400.00).

c. Demobilisation and equipment following instruction – eighty-seven thousand, five hundred dollars ($87,500.00).

473. VO#1: Access Road Repairs. The court finds that this claim should not be allowed as a variation as access to Site and maintenance thereof was the responsibility of the Contractor so that Planviron ought not to have issued a variation for repair work to the access road. The evidence of Pattinson is that she could locate no correspondence relating to the instruction by Planviron to Namalco to proceed with the variation works in any event. So that she is unable to verify the reason for the works. EMBD argues that Instructions to Tenders explicitly set out that Site access was a matter that Namalco is deemed to have investigated and for which it took a risk. The court agrees with the submission of EMBD and the sum of **two hundred and eighty-six thousand, five hundred dollars ($286,500.00)** will not be allowed.

474. VO#2: Access Road to Stockpile. This was a claim for **two hundred and eighty-three thousand, five hundred dollars ($283,500.00)** for remediation of the access road to the stockpile. On the same basis as above the Claim will not be allowed.

475. VO#3: New Access Road. The evidence is that the access road bridge was on the verge of collapse and could no longer be used for access. As a consequence, a new access road from Brickfield Road had to be constructed. This was an event that would have occurred after contract and there is no evidence that this was a foreseeable event. The sum is therefore, to be allowed.

476. VO#4: Demobilisation Costs. The instruction to demobilise resulted in Namalco having to remove twenty-five (25) pieces of equipment off site. In the court's view, while it does not qualify as a variation, it does qualify as cost reasonably incurred. The rate applied was three thousand, five hundred dollars ($3,500.00) per item. The evidence of Pattinson is that the maximum value for demobilisation should be related to the sum included in the BOQ Preliminaries section until such time as Namalco furnished the Engineer with the appropriate supporting information. The Technical Specification states that upon completion five percent (5%) of the Lump Sum in the BOQ sum of three hundred thousand dollars ($300,000.00) is to be paid on demobilisation. Therefore, according to Pattinson the maximum sum certified should have been fifteen thousand dollars ($15,000.00). The court accepts that this rationale applied to completion but finds that demobilisation has come about as a consequence of suspension and not completion as completion would have occurred upon termination which in this case was elected by Namalco after a period of suspension. The sum will therefore, be allowed.

477. The court having found as it has done above on the issues and evidence in the claim the sum owing to Namalco will be calculated as follows (exclusive of interest) using as the starting point the sum calculated by Pattinson based upon the original rates as a guide:

Value allowed: four hundred and forty-seven million, eight hundred and thirty-three thousand, three hundred and forty-seven dollars and twenty-nine cents ($447,833,347.29);

VAT at fifteen percent (15%): sixty-seven million, one hundred and seventy-five thousand, two dollars and nine cents ($67,175,002.09);

Retention sum: five million, eight hundred and thirty-one thousand, two hundred and forty dollars and ninety-six cents ($5,831,240.96);

Sub Total = five hundred and twenty million, eight hundred and thirty-nine thousand, five hundred and ninety dollars and thirty-four cents ($520,839,590.34);

Less sums paid: one hundred and twenty-six million, three hundred and seventy-one thousand, four hundred and nineteen dollars and fifty-seven cents ($126,371,419.57);

Grand Total**: three hundred and ninety-four million, four hundred and sixty-eight thousand, one hundred and seventy dollars and seventy-seven cents ($394,468,170.77).**

PETIT MORNE VALUE

478. When it comes to PM however, the position appears to be somewhat different. In that regard, the court accepts the evidence of Duggan that it cannot and ought not to be assumed that the rates agreed to in the Original Award for RR can be applied to the Contract for PM as PM was never the subject of a previous tender award. What then should a court do in the circumstances where the agreement is set aside? This is the difficulty that the court finds itself in the SA having been set aside. The best that it can do in this case is to remit assessment to a Master, damages to be calculated on a quantum meruit basis. In so doing, however, the court also orders that the sums assessed by the DAB in relation to Earthworks and Variations must stand as part of that assessment in keeping with the ruling of the court earlier on in relation to the legal effect of the DAB.

CEDAR HILL VALUE

479. The starting point will be the sum certified. The court shall consider the heads of dispute to determine whether diminution in value by way of abatement should be made from the certified sums.

Insurance and performance security

480. According to EMBD, the terms of the Invitation to Tender specified a list of Approved Insurers[104] and stated the following:

"Guarantees and bonds will be accepted from the above approved insurers listing and all Commercial Banks licensed to conduct business in Trinidad and Tobago.

Please note that all bonds must be registered with the Board of Inland Revenue in order to be considered a legal document. *Performance bonds will not be accepted from Insurance Brokers."*[105]

104 See TB2 059374 2C

105 See TB2 059373-4 2C

481. On April 17 2015, Namalco submitted a Performance Security dated March 12, 2015 from World Bankers Re Limited[106], which also underwrote its project insurances. In his evidence, Baksh explained that at the time of submission, World Bankers Re Limited was not a bank authorised to do business in Trinidad and Tobago and was therefore, not an approved Insurer. As such, EMBD submitted that since World Bankers Re Limited was not at the time an approved Insurer, Namalco is not entitled to payment for the project insurances and performance security.

482. Namalco submitted that World Bankers Re Limited was approved by the Central Bank of Trinidad and Tobago on June 11, 2015. In its view, this approval would have corrected whatever non-compliance might have been present at the time of the issue of the policy. It also relies on a statement made by the witness for EMBD, Pattinson in her report in which she accepted that this sum was correctly certified by the Engineer who treated it as a Provisional sum. Pattinson helpfully set out that this sum ought not to have been included as a value in the tender invitation as quite simply it was a Provisional sum, namely a sum included in the BOQ for works that are uncertain, not fully defined or may never happen. To the extent, therefore, that Provisional sums are to be tendered (according to Pattinson and accepted by the court), is illogical, contrary to normal practice and creates ambiguity.

483. In the court's view, the policy of insurance is a contract between the Insurer and the Insured. The effect of the non-approval of the Insurer means that during the period prior to approval, the performance of the obligation by the Insurer was unenforceable in Trinidad and Tobago. Effectually therefore, the Insurer is not obligated to indemnify the Insured should such obligation have arisen. In this case there appears to be no evidence as to the precise date that the Central Bank of Trinidad and Tobago approved the Insurer. The evidence is that EMBD placed the Insurer on its approved list on June 18, 2015. One act of course follows the other. It follows that the effect is that there was no effective insurance coverage until approval was given in June 2015, whereupon the Insurer appeared on the list of Insurers approved by EMBD on June 18, 2015. But the claim for the sum was approved by the Engineer and submitted prior approval by the Central Bank. It means that should there have arisen a claim under the policy before June 2015, that claim would have been unenforceable as a matter of law in Trinidad and Tobago.

106 Performance Security TT-PB-1090/15 March 12, 2015 Worldwide Bankers Re Limited.

484. The court accepts however, that the duty to insure was a continuing one which duty was fulfilled when the Insurer was eventually approved. Further, there appears to have been no insurance claims made prior to approval. In those circumstances and having regard to the evidence of Pattinson, the court finds that the claim made by Namalco for the sum and so certified will be allowed.

Other Provisional sums

485. EMBD submitted that three items, C.04, D.16, and G.10 were over-certified by APCL, in that APCL added an additional twenty-five percent (25%) to the underlying Provisional sum, as distinct from the day work rate of fifteen percent (15%). Pattinson concluded that there was no justification for any additional percentage beyond fifteen percent (15%)[107], such that Namalco is entitled to one million, forty-seven thousand, two hundred and seventy-two dollars ($1,047,272.00) for those items. The sum certified was two million, nine hundred and forty-eight thousand, nine hundred and one dollars and fifty cents ($2,948,901.50). Namalco accepted EMBD's values as the correct values and, therefore, the total payable in respect of Items C.04, D.16, and G.10 is **one million, forty-seven thousand, two hundred and seventy-two dollars ($1,047,272.00)**.

486. Further, according to EMBD, in breach of Clause 13.5 of the Cedar Hill Contract, which required an express written instruction authorising the expenditure of a Provisional sum, Provisional sums for items 4, 5, 9, and 16 were certified for payment by APCL in the absence of any such instruction. As such, EMBD submitted that Namalco is not entitled to payment for the aforementioned.

487. In relation to items 4, 5, 9 and 16, Namalco submitted that Pattinson's assessment is flawed and should be rejected. It argues that by letter of instructions dated May 6, 2015 the Engineer APCL instructed Namalco to proceed with item 16 before quotations were received with the rider that any provisional sum that exceeds the amount allocated in the BOQ requires approval from the Client/Engineer. It follows that APCL was instructing Namalco to proceed with the provisional sum items up to the value set out for provisional sums in the BOQ. This appears to be the position as corroborated by minutes of a meeting in which the same instruction appears to have been decided upon.

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107 See Pattinson I/Annex A/6.6.26- TB2 140296 (2/H)

488. **Item 4** is referred to in the BOQ as "Protection of Services". This item carried a designation of Provisional sum. However, under the description reference is made to the "tendered lump sum" but in the court's view, the item is clearly set out as a Provisional sum by way of the designation made in the column next to the description. **Item 5** was "Provisional sum for relocation and/or permanent Protection of Services as directed by the Engineer". The specification makes it clear that this is a Provisional sum. **Item 9** reads "Office Facility for the Engineer, Provide, Furnish and Equip for the Engineer". The designation for this is "lump sum" and not Provisional sum. It follows that this was a sum that was a tendered sum. **Item 16** is for "accommodation of traffic, maintenance of existing accesses and construction of new accesses". The designation is Provisional sum. To the extent that Pattinson sets out all of the above the court accepts her view as being correct.

489. In her expert report, Pattinson spoke of a Kick Off meeting on April 17, 2015 as reflected in minutes at item 60 that, "Atlantic indicated that Provisional Sums and Contingencies are to be expended only upon approval from the Engineer and Client". By letter of even date Namalco requested that Atlantic instruct it in relation to specific works to be covered by a number of Provisional sums. By letter of April 24, 2015, Atlantic responded "…and due to the critical three (3) month project completion time frame, please proceed with the following items, ensuing it is within the limit of the allocated Provisional sums. Also please be advised that you are required to submit quotations for each item as soon as possible." The list of items approved matched exactly those requested by Namalco and includes items 9 and 16. Pattinson also set out that she understood the reference to the word "quotation" to mean a quotation provided to Namalco by a third (3rd) Party and not by the Contractor. The inference being that Namalco was claiming for works in respect of which it provided no quotations from third (3rd) Parties but solely from itself.

490. The court interprets the letters to have meant that Namalco was instructed to carry out the works at items 9 and 16 specifically as provisional works on the condition that the cost did not exceed the Sums set for it in the BOQ. In the event that the cost to be incurred was to exceed the Sum set in the BOQ, specific approval for same was to be had from the Engineer. To be approved, quotations would have to be submitted to the Engineer for approval. This interpretation is different to that given by Pattinson who has accounted for the differing view by recourse to an entry in the minutes of the Kick Off meeting that set out that all works under a provisional sum were subject to approval. The court is of the view, that this appeared not to be an absolute statement but was one qualified by the subsequent instructions by the Engineer and the cap on

Provisional sums. Pattinson also discussed the fact that there appeared to be no documentation to support the values certified. However, it appears to the court that the Engineer has the discretion to certify the Claim in the absence of the production of documents as discussed much earlier in this decision.

491. Based on Pattinson's analysis of the supporting documents submitted by Namalco, EMBD's alternative case is that Namalco is limited to a nominal twenty-five percent (25%) of claimed expenditure, being six hundred and twenty-five thousand dollars ($625,000.00).[108]The court does not accept that Namalco is not entitled to the certified sum as the effect of the approval would have been evidence of pre-work authorisation.

492. In relation to item 9, Pattinson found that if Namalco provided most but not all of the equipment listed, the Provisional Sum was a reasonable pre-estimate. She, therefore, assessed the sum at one hundred and twenty-six thousand dollars ($126,000.00). The court, however, sees no valid reason not to allow the full sum of one hundred and forty thousand dollars ($140,000.00) and it so finds.

493. In relation to items 4, 5 and 16, Pattinson assessed a nominal amount because of lack of information. In the court's view, this is an insufficient reason to lower the claim having regard to its findings on the provision of supporting documents. The sum as certified will, therefore, be allowed.

Overheads resulting from the suspension of works

494. APCL certified the sum of three million, six hundred and fifty-nine dollars and twenty cents ($3,000,659.20) in IPC5 as arising out of an alleged delay of fifty-five (55) days to the works to the Cedar Hill Project. Pattinson assessed this claim in detail.[109]

495. According to EMBD, Namalco did not submit evidence to APCL of any reduced working and APCL made no effort either to make enquiries of its own or to adequately assess Namalco's claim when submitted. As such, EMBD submitted that the proper value of the Claim is therefore $NIL.[110]

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108 See :Pattinson I/Annex A/5.7.2 - TB2 140291 (2/H)

109 See Pattinson I/Annex A/7.6.1 – 7.7.7 - TB2 140310-13 (2/H)

110 See Pattinson I/Annex A/7.6.7 - TB2 140310 (2/H) & Pattinson I/Annex A/7.7.7 -TB2 140313 (2/H)

496. EMBD submitted that although Pattinson was handicapped by the inadequacy of Namalco's supporting documents, she attempted to provide alternative valuations to the extent that the court is against EMBD.[111]

497. Namalco countered that there is absolutely no evidence of the allegation that APCL had no adequate evidence of any reduced work or that APCL made no enquiries of its own (not Namalco's exact words). One only has to phrase the submission in that form to see the fallacy of the submission. EMBD was simply making the point that APCL had no evidence before it of reduced work and so Namalco's answer is misconceived. Namalco also submitted that APCL was an Engineer on site with offices on site the inference being that it would have been aware of the suspension and the works. Further, that it is precisely because it was aware, that it reduced the number of days claimed by Namalco from ninety-five days (95) days to fifty-five (55) days and made its certification on the basis of a percentage contribution of the Cedar Hill Project to Namalco's total overhead expenses which it was entitled to do. This argument of course is an attractive one which is more plausible that the former argument. The court, therefore, finds it more likely than not that APCL would have been fully aware of the suspension and it so finds. It follows that APCL was possessed of sufficient information to make the certification. The sum is therefore, allowed.

Equipment

498. EMBD submitted that exactly the same analysis is applicable to the equipment claim as is applicable to the overheads claim. According to EMBD, the proper value for the equipment claim is $NIL[112].

499. Although similarly constrained by the inadequate data with respect to the equipment claim, Pattinson attempted to provide alternative valuations to the extent that the court is against EMBD.[113]

500. Namalco argued that despite the claim by Pattinson that she could find no contemporary records in relation to the claim, APCL stated that the assessment was based on the idle equipment schedule including costs submitted. Pattinson also testified that there was no evidence provided

111 See Pattinson I/Annex A/7.6.11 – 7.6.18 - TB2 140311-12 (2/H)
112 See Pattinson I/Annex A/8.6.5 - TB2 140322 (2/H)
113 See Pattinson I/Annex A/8.6.6 – 8.6.17 - TB2 140322-24 (2/H)

to demonstrate that resources could have been used on other projects during the suspension. The point was made by Namalco, however, that such evidence is essentially irrelevant as when a suspension is ordered, the Contractor does not generally know the length of the suspension so that it would be unreasonable to move the equipment to other projects. The latter makes for good sense in the court's view and Namalco could, therefore, not be faulted for failure to relocate in circumstances where the suspension may have been lifted by EMBD at a date of their choosing which was unknown to Namalco. The court, therefore, finds that the claim of five million, one hundred and fifty-four thousand, eight hundred and seventy-five dollars ($5,154,875.00) should stand.

Landslip

501. According to EMBD, there was a similarly sterile debate with respect to the cause of the landslip under the Cedar Hill Construction Contract as there was under the Picton Construction Contract. EMBD submitted that this was a matter in respect of which Namalco expressly undertook the risk under Clause 4.1 of the Cedar Hill Construction Contract. The aggregate value of the earthworks claimed for the landslip repair is five million, one hundred and seventy-six thousand, eight hundred and seventy-nine dollars and fifty cents ($5,176,879.50).

502. This issue of the risk being that wholly of Namalco was dealt with before and the court did not agree with such a submission. The issue raised by Pattinson is also one of the rate claimed per cubic metre (/m³), namely, six hundred dollars ($600.00) by a quantity of seven thousand, eight hundred cubic metres (7,800m³). This fill was for treatment of soft areas. Under FIDIC 12.3(a) the Engineer must fix a new rate for a work item where the change in quantities directly changes the cost per unit quantity by more than one percent (1%), which of course was the case here. This is not in dispute that the soil on all of the Projects being former Caroni cane planting lands consisted of soft soil and bagasse. Palmer at paragraph 122 of his Reply Report confirmed that it was likely that the instability of the slope at Cedar Hill was due to poor construction by the previous Contractor and the court accepts that evidence.[114]

503. APCL would have known this and would have been aware that a previous Contractor had attempted to resolve the issue by filling the same area. The short point, therefore, is that armed with knowledge of the condition of the soil the Engineer would have, by certifying the rate at six

[114] See Trial Bundle Evidence 2: 2H Expert Report and Responses (version 29.11.19): Paragraph 122 [TB2 142045 (2/H)].

hundred dollars per cubic metre ($600.00/m³), satisfied the requirement set at Clause 12.3(a) and the court so finds.

504. Finally under this head, it was also an issue as to whether the replaced material was the same material originally set down by a previous Contractor. This in the court's view, is not a plausible assertion in determining whether the rate was reasonable one for the obvious reason that the material excavated was unsuitable in the first place. The sum is therefore, allowed.

Clearing and grubbing: IPC1

505. Namalco claimed one million, three hundred and eighty-nine thousand dollars ($1,389,000.00) for clearing and grubbing work to a depth of five hundred millimetres (500mm) (despite the fact that the Bill of Quantities for the Cedar Hill Project required only three hundred millimetres (300mm)) and, moreover, claimed to have carried out this work prior to the instruction to commence being issued by APCL.

506. Pattinson reviewed the available correspondence and concluded that she would not have expected works to have been carried out in the absence of any formal instruction to commence work. Moreover, the works were carried out without supervision by either EMBD or APCL.

507. Further, Pattinson was unable to find any evidence that the work was in fact carried out as claimed[115]. Accordingly, EMBD submitted that the proper value of this claim is $NIL.

508. To the extent that the court is against EMBD on this point, Pattinson carried out alternative assessments.[116]

509. The sum of one million, three hundred and eighty-nine thousand dollars ($1,389,000.00) was certified for this item. The sum was calculated using the area grubbed of thirteen point eight nine hectares (13.89ha) at the contract rate of one hundred thousand dollars per hectare ($100,000.00/ha). At paragraph 10.5.21 of her report, Pattinson questioned the acreage and stated, "*There is nothing to demonstrate how this was calculated and there is no readable co-ordinate to allow computation*".[117] Namalco submitted that EMBD by its pleadings however,

[115] See Pattinson I/Annex A/10.6.1 – 10.6.5-TB2 140339-40 (2/H)

[116] See Pattinson I/Annex A/10.6.6 – 10.6.8 - TB2 140340 (2/H) & Pattinson I/Annex A/Appendices A.7.1 – A.7.2 - TB2 140440-45 (2/H)

[117] See Trial Bundle Evidence 2: 2H Expert Report and Responses (version 29.11.19): Paragraph 10.5.21[TB2 140337 (2/H)].

accepted that the Cedar Hill Site was fourteen point five four hectares (14.54ha).[118] In that regard, the court finds that the pleading of EMBD does in fact admit the acreage.

510. According to Namalco, it was common ground that it entered into the works to conclude a previously terminated Contract. Pattinson accepted that from the "*few photographs of the Site that I have seen that vegetation can grow back quickly after having been removed, if not maintained; nevertheless, I understand that some of the roads had been completed to sand capping layer by the previous Contractor and it might be that those areas did not require clearing and grubbing works*."[119] Namalco submitted that the aforementioned statement confirmed that Pattinson was in no position to determine, several years after the event, the extent of site clearing and grubbing certified by the Engineer with no complaint by EMBD or its representatives on site. The court accepts this argument as it appears from the evidence an immensely difficult if not impossible exercise having regard to the specific nature of the work involved and the passage of time which would have brought with it growth.

511. The court also finds that on the other hand, the need to grub and clear the area appears to be corroborated by Sookram's evidence, in which he testified that "*Given that the site had been left abandoned for some time…..I say the site….was overgrown and to be cleared throughout for the work to resume*."[120] The court accepts that there is no evidence to the contrary. The court, therefore, finds that it is more likely than not that the entire area would have required grubbing inclusive of green spaces so that this item will be allowed.

Embankment from borrow

512. Palmer extensively investigated the available information with respect to Namalco's claim for seven million, eight hundred and seventy-five thousand, five hundred and fifty-two dollars ($7,875,552.00). His view was that those works should have never been certified for payment on the basis that Namalco's own surveys showed that those works could not have been undertaken. Accordingly, EMBD's case is that Namalco is entitled to $NIL for those works.[121]

[118] See paragraph 88V.3 of the Defence [Trial Bundle 1 01885].
[119] See Trial Bundle Evidence 2: 2H Expert Report and Responses (version 29.11.19): Paragraph 10.5.23 [TB2 140338 (2/H)].
[120] See Trial Bundle 2. Evidence 2A NCSL. WS (1) Lenny Sookram: Paragraph 36 [TB3 000015].
[121] See TB2 138350 – 53 (2/H)

513. Pattinson primarily assessed the value of "*embankment from borrow materials*" at $NIL.[122] She did so solely on the basis that Palmer concluded that this work should not have been certified for payment, as it was not a valid variation, an opinion outside his expertise.

514. Further, Pattinson expressed that those works were not a variation.[123] According to Namalco, it was not in dispute that those works were being carried out. Namalco submitted that if the works were not a variation, it was still entitled to be paid for that work on a measured basis.

515. According to Namalco, Pattinsons' assessment of the volume of material was the same as that certified (forty-one thousand, eighteen point eight zero cubic metres (41,018.80m³)).[124] However, in terms of the applicable rate, while Pattinson accepted that the Engineer was reviewing the rate, which Namalco submitted in order to conduct negotiations, she stated that she has seen no evidence of such negotiation.[125] Namalco submitted that because Pattinson saw no evidence of negotiation, did mean that there was not any.

516. Sookram in his witness statement referred to the rate of one hundred and ninety-two dollars per cubic metre ($192.00/m³) as an "agreed rate".[126] Namalco submitted that it was more probable that the rate was agreed following discussions. As such, Namalco submitted that it is entitled to its full claim of seven million, eight hundred and seventy-five thousand, five hundred and fifty-two dollars ($7,875,552.00) as a variation. Alternatively, in the event that the court holds that the work was not a variation, Namalco is entitled to the sum of six million, five hundred and sixty-three thousand and eight dollars ($6,563,008.00) being the value of the work assessed at Pattinson's rate of one hundred and sixty dollars per cubic metre ($160.00/m³).

517. The court has had a very detailed read of Pattinson's Report in relation to this claim. For her several reasons set out therein, which is not herein repeated for the sake of brevity, the court accepts her expert opinion that the work would not have been a variation within the meaning ascribed by the Contract. The court does not, however, find it more likely than not that the work was not done, as the cumulative effect of the evidence of APCL and Sookram is that the work was done. The court also accepts the evidence of Pattinson that it appears that the borrowed fill

[122] See Trial Bundle Evidence 2: 2H Expert Report and Responses (version 29.11.19): Paragraph10.5.6 [TB2 140349 (2/H)].
[123] See Trial Bundle Evidence 2: 2H Expert Report and Responses (version 29.11.19): Paragraph 11.5.2 [TB2 140348 (2/H)].
[124] See Trial Bundle Evidence 2: 2H Expert Report and Responses (version 29.11.19): Paragraph 11.5.6 [TB2 140349 (2/H)].
[125] See Trial Bundle 2. Evidence: 2H Expert Reports and Responses (version 29.11.19): Paragraph 11.4.30 [140349 (2/H)].
[126] See Trial Bundle 2. Evidence 2A NCSL. WS (1) Lenny Sookram: Paragraph 67: [TB3 000025].

emanated from within the combined Cedar Hill Site. The court, therefore, applies the rate assessed by Pattinson and will allow the sum of six million, five hundred and sixty-three thousand and eight dollars ($6,563,008.00).

The Systemically Defective Nature of Namalco's Works – Defective Work - Bill Section C

518. EMBD submitted that as a result of the analysis carried out by Ioannis Barmpopoulos ("Barmpopoulos")[127], there were only a limited number of issues on Namalco's defective works which remained in dispute. EMBD further submitted that, as its evidence with respect to the inadequate thickness of the pavement layers was not challenged by any of Namalco's experts, it must be taken as accepted.

519. Having regard to the court's findings on Palmer, Barmpopoulos, EISL testing and the Fugro Report above, however, these issues do not arise for determination. The sums payable for Cedar Hill will therefore, be as follows:

Value of work: twenty million, two hundred and ninety-nine thousand, three hundred and thirty-one dollars and thirty-eight cents ($20,299,331.38);

VAT at fifteen percent (15%): three million, forty-four thousand, eight hundred and ninety-nine dollars and seventy cents ($3,044,899.70);

Retention sum: seven hundred and five thousand, eight hundred and thirty-six dollars and ninety-four cents ($705,836.94);

Sub Total = twenty-four million, fifty thousand, sixty-eight dollars and two cents ($24,050,068.02);

Less sums paid: two million, four hundred and fifty-five thousand, eighty-four dollars and ninety-nine cents ($2,455,084.99);

GRAND TOTAL: twenty-one million, five hundred and ninety-four thousand, nine hundred and eighty-three dollars and three cents (**$21,594,983.03).**

[127] EMBD's expert witness

INTEREST

520. FIDIC Condition 14.8 in each contract sets out:

"If the Contractor does not receive payment in accordance with Sub-Clause 14.7 [Payment], the Contractor shall be entitled to receive financing charges compounded monthly on the amount unpaid during the period of delay."

a. Compound interest as agreed under 14.7 refers to interest that is to run on the payment of IPCs. In relation to RR and PM, the finding of the court is that there was no Supplementary Agreements on account of avoidance for conspiracy. It follows that the sums as certified on the IPCs were not payable and, therefore, the agreed rate of compound interest cannot apply to these projects. Simple interest will have to apply to RR.

b. In relation to Picton, unless the DAB specifically provides for such a continuing interest rate, simple interest is to apply from the expiration of twenty-eight (28) days after the date of the DAB, no Notice of Dissatisfaction having been filed.

c. In relation to PM, a DAB decision forms part of the entitlement of Namalco having regard to the ruling of this court on the effect of the DAB. It follows that simple interest will have to run on the damages to be assessed on quantum meruit which shall include the payment of the sums due for earthworks as certified by the DAB. But in the event that the DAB decision provides for such interest is to be applied in the manner set out in the DAB decision limited to the sum so certified by the DAB and simple interest is to be applied on the balance of the award.

d. In relation to Cedar Hill, the compound interest set out at Clause 14.7 FIDIC must apply.

e. In assessing the applicable rate of simple interest, the court should have regard to the general scheme of interest as set out in contracts of the like kind between the Parties at that time. The best guidance comes from the Cedar Hill Contract that provides for a compound interest rate of zero point five percent (0.5%) compounded monthly after ninety-one (91) days of the application for payment. Compound interest is generally a high rate of interest so that the simple interest awardable must be that which reflects the

general nature of such interest. The court is, therefore, of the view that the simple interest rate where applicable should be two point five percent (2.5%) per annum.

SECTION TWO

THE ANCILLARY CLAIM

521. By Amended Ancillary Claim filed October 4, 2018 EMBD instituted claims against four (4) Ancillary Defendants (the Engineers of the Projects) seeking indemnity/contribution should EMBD be adjudged liable to Namalco. However, EMBD's claim against the First Ancillary Defendant has been stayed to be heard with the Caroni Road proceedings.

522. EMBD contracted APCL to perform certain services for Petit Morne and Roopsingh Road Projects. APCL was also the Engineer throughout the Cedar Hill Project. LYP was the Engineer on the Picton Project. In assessing the damages in relation to Petit Morne, a Master of the High Court ought properly to have regard to the court's findings on the issue of over-certifications if any, or wrongful certifications made on items that ought not to be allowed in respect of that Project set out below under the head of Petit Morne.

523. Throughout this case, the tenor of the case for EMBD appears to be one in which they say that at the material time, EMBD appeared to be part of a process in which the very officers of the Company appeared to have been committing acts that were against the best interest of the Company. The indirect assertion (although, sometimes not so subtle) is that there were others who would have participated in this process to the economic detriment of EMBD.

524. As with all cases though, the difficulty lies with the proof of such assertions whether by direct evidence or inference as such behaviour is often committed in the dark as it were and great efforts are taken to ensure that they are never uncovered. This court is not unaware of that underlying tension in the facts of this case. In the view of the court, courts must equally be sensitive to guard against the drawing of inferences or making linkages where the evidence does not lend itself to same. In that regard, this court has ruled in the main claim that there appeared to be a conspiracy between the parties to agree to much higher rates in relation to both RR and PM. It is not inconceivable that the conspiracy would not have stopped there having regard to

what appeared on the face of it to have been the conduct of the individual responsible for making decisions at EMBD at the time. But it must also be remembered that EMBD was under the control of a Board of Directors at that time which presumptively would have acted in the best interest of the Company. This court has therefore, been very careful not to conflate the issue of the conspiracy with the issue of breach of contractual duty or common law duty in this Ancillary Claim.

Disposition:

525. The court makes the following order on the Ancillary Claim of the Ancillary Claimant and Counterclaim of the Second Ancillary Defendant.

On the **Ancillary Claim against the Second Ancillary Defendant**:

526. It is declared that the Second Ancillary Defendant breached its duty to the Ancillary Claimant to exercise the reasonable skill and care required of a reasonably competent Project Engineer in relation to certifications of the following works on the Roopsingh Road Project:

a. Recovery of profit for the omission of detention ponds.

b. Variations to include access road repairs and access road to stockpile.

527. It is declared that the Second Ancillary Defendant breached its contractual duty to the Ancillary Claimant to certify fairly between the Client and Third Party as an independent professional pursuant to Sub-Clause 3.3.2 (c) of the General Conditions of Contract entered into between the Ancillary Defendant and the Second Ancillary Claimant in certifying sums for recovery of profit for the omission of detention ponds and variations to include access road repairs and an access road to a stockpile in relation to the Roopsingh Road Project.

528. It is declared that the Second Ancillary Defendant breached its duty to the Ancillary Claimant to exercise the reasonable skill and care required of a reasonably competent Project Engineer and its contractual duty to the Ancillary Claimant to certify fairly between the Client and Third Party as an independent professional pursuant to Sub-Clause 3.3.2 (c)of the General Conditions of Contract entered into between the Ancillary Defendant and the Second Ancillary Claimant in relation to certifications of sums for wrongful variations to excavation widths on the Petit Morne Project.

529. It is declared that the Second Ancillary Defendant breached its duty to exercise the reasonable skill and care required of a reasonably competent Project Engineer and its contractual duty to the Ancillary Claimant to certify fairly between the Client and Third Party as an independent professional pursuant to Sub-Clause 3.3.2 (c)of the General Conditions of Contract entered into between the Ancillary Defendant and the Second Ancillary Claimant in certifying sums for recovery of profit for the omission of detention ponds and variations to include access road repairs and an access road to a stockpile on the Petit Morne Project.

530. The Ancillary Claimant having suffered no loss as a consequence of the breaches of duty of the Second Ancillary Defendant the claim for indemnity is dismissed.

531. The Ancillary Claim is dismissed against the Second Ancillary Defendant in relation to the Cedar Hill Project.

On the **Counterclaim of the Second Ancillary Defendant against the Ancillary Claimant**:

532. The Ancillary Claimant shall pay to the Second Ancillary Defendant, damages for breach of contract in respect of sums outstanding on the Exchange III Project in the sum of one million, six hundred and twenty thousand, six hundred dollars ($1,620,600.00) together with interest at the rate of two point five percent (2.5%) from the date of filing of the Claim to the date of judgment.

533. The Ancillary Claimant shall pay to the Second Ancillary Defendant damages for breach of contract for services rendered and unpaid in relation to the Roopsingh Road, Petit Morne and Cedar Hill Projects together with contractual interest thereon save and except for the sums claimed in invoice numbers 817, 818, 819, 837 and 846 set out in Table 194(1) of the Counterclaim and the sum claimed by way of invoice for services for certification of the Claims that this court has ruled in the Ancillary Claim were certified in breach of the duty of the Second Ancillary Claimant above such damages to be quantified by a Master on a date to be fixed by the Court Office.

On the **Ancillary Claim against the Third Ancillary Defendant**:

534. The Third Ancillary Defendant having not participated in the trial, the Ancillary Claim against the Third Ancillary Defendant is stayed to permit the Ancillary Claimant to file submissions in relation to the specific orders that should be made against the Third Ancillary Defendant having regard to the findings made by this court in its Judgment by May 23rd, 2022 whereupon the stay shall be lifted and the said Ancillary Claim against the Third Ancillary Defendant shall be determined by the court by way of the grant of orders as it sees fit.

On the **Ancillary Claim against the Fourth Ancillary Defendant**:

535. The Ancillary Claim against the Fourth Ancillary Defendant is dismissed.

COSTS

536. The costs of the Claim, Counterclaim, Ancillary Claims, and Counterclaim on the Ancillary Claim are reserved to be determined after submissions made thereon by all parties by May 23, 2022.

PICTON PROJECT

537. Having regard to the court's decision on the DAB this Ancillary Claim can be dealt with firstly, as a matter of convenience. By agreement dated June 9, 2008, LYP agreed to provide design services to EMBD for the site infrastructure works at the Picton Project. The Contract price for the design services was nine hundred and sixty-five thousand, six hundred and forty-five dollars ($965,645.00) (VAT exclusive).

538. According to EMBD, LYP acted in breach of the contract and/or negligently, and/or in breach of its duty, and/or without reasonable skill, care and diligence. As such, EMBD claims against LYP an indemnity in the sum of forty-four thousand, six hundred and seventy-four thousand and fifty-nine dollars ($44,674,059.00) being the whole of the Claimant's claim with respect to the Picton Project.

539. As such, EMBD claimed against the Fourth Ancillary Defendant for the following:

i. An indemnity/contribution from the Third Ancillary Defendant in the sum of forty-four thousand, six hundred and seventy-four thousand and fifty-nine dollars ($44,674,059.00) being the whole of the Claimant's claim with respect to the Picton

Project, alternatively such other sum as provides a complete indemnity to the Defendant/Ancillary Claimant in respect of any sum which EMBD is ordered to pay to Namalco greater than $NIL on the Picton Project, alternatively in such other amount which the Honourable Court sees fit;

ii. *An indemnity and/or pro-rated contribution against any costs order and all other costs incurred by the Defendant/Ancillary Claimant in defending this action and the costs of this Ancillary Claim as it relates to the Picton Project and/or as it relates to the Fourth Ancillary Defendant;*

iii. *A declaration that its interim payment certificates do not provide good or any evidence of the value of works carried out, and that the value of those works must be proven from first principles.*

540. The effect of the court's ruling, not the validity of the DAB on this Ancillary Claim is that the court ought not to and cannot go behind the matters treated with by the DAB whose decision is binding on the Parties. It follows that EMBD cannot challenge that decision on the basis set out in the Ancillary Claim. The Ancillary Claim against LYP for negligence and/or breach of contractual duty and other matters pursuant to the Ancillary Claim in respect of Picton will therefore, be dismissed.

CEDAR HILL PROJECT

541. By its Amended Ancillary Claim filed on October 4, 2018 EMBD claimed the following against APCL:

iv. *An indemnity/contribution from the Second Ancillary Defendant in the sum of one billion, one hundred and forty-seven million, six hundred and fifty-four thousand, two hundred and fifty-seven dollars and fifty-four cents ($1,147,654,257.54), being the whole of the Claimant's claim with respect to the Roopsingh Road, Petit Morne, and Cedar Hill Projects, alternatively, such other sum as provides a complete indemnity to the Defendant/Ancillary Claimant in respect of any sum which EMBD is ordered to pay to Namalco greater than (a) forty-nine million, two hundred and twenty-one thousand, six hundred and fifty-nine dollars and thirty-seven cents ($49,221,659.37) on the Roopsingh Road Project; (b) $NIL on the Petit Morne*

Project; and (c) $NIL on the Cedar Hill Project, alternatively, in such other amount which the Honourable Court sees fit;

v. *An indemnity and/or pro-rated contribution against any costs order and all other costs incurred by the Defendant/Ancillary Claimant in defending this action and the costs of this Ancillary Claim as it relates to the Cedar Hill, Roopsingh Road and Petit Morne Projects and/or as it relates to the Second Ancillary Defendant;*

vi. *A declaration that its interim payment certificates do not provide good or any evidence of the value of works carried out, and that the value of those works must be proven from first principles*.

542. According to EMBD, Namalco's works are systematically defective and the extent of over-certification by the Engineers are enormous. Because of these defects, EMBD has incurred additional costs. EMBD has relied on the assessment of Ms. Pattinson for the following deductions:

> *On the Cedar Hill Project, EMBD would only have been liable to pay Namalco five million, two hundred and eighty-four thousand, sixty-three dollars and fifteen cents ($5,284,063.15), had Namalco carried out the works adequately and in the proper quantities. However, the total cost of the works to EMBD has been seven million, forty-two thousand, seven hundred and ninety-nine dollars ($7,042,799.00), made up of the four million, ten thousand, seven hundred and ninety-seven dollars ($4,010,797.00) of works which EMBD accepts are compliant, and the three million, thirty-two thousand and two dollars ($3,032,002.00) which EMBD will now have to spend in remedial works in order to rectify the defects. EMBD is, therefore, entitled to deduct the additional cost of one million, seven hundred and fifty-eight thousand, seven hundred and thirty-five dollars and eighty-five cents ($1,758,735.85) from Namalco's account (seven million, forty-two thousand, seven hundred and ninety-nine dollars minus five million, two hundred and eighty-four thousand, sixty-three dollars and fifteen cents ($7,042,799.00 – TT$5,284,063.15)).*

543. Therefore, the total amount to be deducted from the amounts otherwise due to Namalco is forty-seven million, six hundred and eighteen thousand, four hundred and forty-eight dollars and fifteen cents ($47,618,448.15), leaving a total sum which EMBD accepts is properly certified

of twenty-three million, eight hundred and twenty-three thousand, two hundred and seventy-eight dollars and seventeen cents ($23,823,278.17).

544. The court's ruling has been that Namalco is entitled to the sums certified less a sum as diminution in value. The court, therefore, must examine the items that have been reduced in value so as to determine whether they have been so valued as a consequence of the negligence in over-certification and/or invalid variations and the like. The court has also ruled in the main claim on the issue of defective works so that consistent with the findings, APCL bears no liability for defective works on the Ancillary Claim having regard to those findings on the evidence. In relation to the claims that have been allowed as set out in the main claim, the court will not repeat each and every such claim here but shall treat only with those which have resulted in a reduced sum being allowed.

545. APCL called three witnesses. The court finds it necessary to only treat with two of those in this decision although it has considered the evidence of all three. In that regard, the court agrees with the submission of EMBD that the third witness is unhelpful. That witness is Pollonais. APCL also filed a witness statement of one Mr. Rampersad but he was not called for cross-examination neither did APCL make an application to rely on his witness statement. His evidence was, therefore, not considered by the court.

546. **Amrit Ramharack** is a Civil Engineer in the employ of APCL who was at first the Site Engineer at Cedar Hill then the Project Engineer. He attended the progress meetings and prepared the minutes. He was responsible for construction supervision on site where he ensured that the works were carried out in accordance with specifications and drawings. He was also involved in the quality assessment and verification exercises which would have informed the certification of the IPC's by APCL's Chartered Surveyors, namely, doctor Steve Rajpatty and Mr. Peter Cateau. He was also part of the on-site technical team which was the main team to verify conformity with construction works with technical specifications and design drawings and he conducted site visits and physical inspection of works. The progress meetings took place fortnightly in which case either one Ms. Dookeram or this witness attended on site together with representatives of Namalco and EMBD to discuss the progress of works and any issues that had arisen. It is his evidence that at the end of every such meeting there was a joint walkthrough of the site so that the physical state of the works could be viewed. Those meetings were attended by either of

EMBD's representatives Mr. Baksh and/or Mr. Ramkissoon (Project Manager) on behalf of (EMBD).

547. This witness provided exacting details of the process entailed prior to certification of the sums in the IPCs. There is no reason for the court to traverse the entirety of his evidence at this stage suffice it to say that insofar as he treats with the items set out below is evidence, is set out under those heads.

548. **Steve Rajpatty** is the Managing Director of APCL. He testified as to his history in the industry, his qualifications and the history of the Cedar Hill Contract. It was his evidence that the APCL elevations reported to him for the purpose of the preparation of the IPCs. The IPCs in large measure involved much consultation with the Parties involved and were prepared following agreement by EMBD and Namalco during the joint site evaluations process at which re-measurement exercises for line items were conducted. Namalco would send an interim payment application to APCL and to Mr. Baksh of EMBD. There was then a joint site valuation meeting between the Namalco, EMBD, APCL and the Site Engineer at which the draft valuation interim payment application was discussed on an item by item basis both as to the degree to which that item had been completed to the extent claimed by the Claimant and as to the price claimed by the Claimant for the item as completed or partially completed. Where adjustments were required to the sums claimed these were discussed and agreed between the persons present. Also, at these meetings, the IPAs and the supporting documents were reviewed by all in attendance. Copies of quality assurance documents such as test results and certificates of materials were also viewed as these were part of the site records while actual and planned progress was discussed and recorded at the fortnightly site progress meetings.

549. The IPC was then prepared to reflect the sums agreed at the joint site valuation and sent to EMBD and copied to the Namalco together with an invitation to EMBD to contact the APCL if they required more information.

550. In cross-examination, Rajpatty set out the general operating process between the parties to the Contract as those that were not strictly in adherence to the contractual terms such as the compilation of monthly progress reports and others. He testified that in his many years in the industry the local practices have developed in such a way that there is consultation between the Parties and information provided which may not always be contained in documentary form but

which is ordinarily sufficient to satisfy the Engineer of the accuracy of the Claim. The following exchanges in cross-examination appear to the court to be reflective of accepted practices that deviate from the strict letter of the FIDIC requirements but which appear to be practices on his evidence that were commonly employed in the local construction sector at that time:

Q Did you carry out a critical delay and path analysis?

A It was not required. We did not see a need for that because we were given -- and let me make it clear again, Sir. We were given IPCs for review that were previously certified by the previous Engineer.

Q How can you assess today without carrying out a critical delay analysis?

A Because if every time a situation occurs on a site and you speak with the -- you have dialogue with the Contractor, between the FIDIC Engineer and the Contractor, I mean, I'm almost certain and I think this is what happens to projects in nature that we supervise, we would normally ask them to revise their schedule, we would look at meetings and see where their progress is, you know, where we are today, where we're going to be tomorrow and those are things that you discuss during the normal course of a, you know, a Contract as a Manager. You would need to have dialogue with the Contractor on a daily basis.

And more importantly, there were continuously an Engineer or a personnel of the Employer, together with the Consultant from the documents we would have seen, present to see exactly what was transpiring on a daily basis.

Q That's your Engineer on the Project perhaps, but if you're carrying out a review after the event, surely you would have had to have a critical path analysis.

A And Sir, I will say to you this, some Engineers will use that critical path approach. Our methodology may not have been in sync with the particular standards that you might be speaking about. However, be that as it may, I would think that Mr. Cateau, I believe that he did use enough of his technical knowledge and years of experience working for the World Bank and other major institutions to make that determination.

And later on:

Q Now -- so there, the point is taken that there's no substantiation, and there's no evidence of stoppage and no reduction in the rate of work, therefore, no stoppage. But your firm's conclusion despite that was that seventy-five percent (75%) of costs were allowed?

A Yes.

Q What's the justification for that conclusion?

A Well, when you look at overheads, Sir, in the normal scheme of the day as far as a construction company is concerned, that's what they live by. So they would take their relevant projects and they would apportion it accordingly on any given project. Some projects may overlap with others and some may not.

Having said that, Namalco presented their financial statements. More importantly, they actually made it clear from charts and other documents that they had apportioned a percentage, I'm not sure if it was forty percent (40%) of the total overhead costs.

And in making that determination again, Mr. Cateau had a methodology that he used and that's what we came -- and of course, he would have made considerations to other things where he excluded that twenty-five percent (25%) from the cost.

Additionally, having said that, when you think about overhead in normal scheme of things and you talk about the office, the interest payments, you know, payments and equipment, and you talk about marketing, administration costs, he would have again looked at the numbers that were presented by the Contractor and try to make some sort of, I would say comparison for want of a better word, Sir.

Q Your firm's role is to look out for the Employer, and your firm here assumed that there was no stoppage, and if there was no stoppage, Namalco is not entitled to any overheads during a claim to any stoppage, were they?

A No. If there was no stoppage, and if they were asked to remove their equipment, there would have been documents to suggest that they were asked to demobilise from the site. We have not seen anything, Sir.

Whatever we had and whatever we were presented with, under the circumstances, perhaps EMBD may have been going through their stuff as well and we were given the right to speak with Namalco. We continuously asked for information and if certain things would have surfaced -- and more importantly, having said that, it was for the review of Mr. Gary Parmassar.

So I believe that we acted very responsibly, in the sense that you were to review the documents. And more importantly, Sir, if you think about it, why then did BBFL -- I mean EMBD went ahead and issue the performance certificate to Namalco which indicates that they were happy with the performance of the Contract.

So I was -- we were in a position where we had to make a determination, and yes, we had to be fair, and it is difficult sometimes. I mean you see things being presented to you in the normal course of the day and you have to make a judgement call. Sometimes, we do, we are human beings, and if a bad judgement call may have been made, I felt that it was not the final payment certificate. According to FIDIC 14.6, you can make adjustments to those numbers.

Of course, it was continuous. The negotiation process was something that would have continued from that point in time.

551. The court is of the view that in large measure Rajpatty appears to be accepting that in some cases, there may not be supporting documents but the Engineer is always in touch with the Contractor and the Employer so that even where documents are absent, sums are arrived at by negotiation and agreement. It appears to be his evidence by inference that this is also a generally accepted practice in Trinidad and Tobago so that at the times APCL would have engaged in this practice, it would have been exercising reasonable care and skill in certifying the said works given the circumstances. The difficultly, therefore, becomes the tension between the perceived local practices and the strictures embodied in the FIDIC form of contracts.

Contractual obligations/breaches under common law duty

552. The court is of the view that over-certification or lack of supervision on their own do not lead necessarily to negligence in tort unless it can be demonstrated that the conduct of the Engineer fell below the standard of reasonable care and skill to be expected of a reasonably competent Project Engineer when certifying works. In this regard, it is up to EMBD to demonstrate that APCL breached its duty of care in tort or its contractual duties. Further, consistent with the finding in the main claim defective works is not an issue. The issue in the Ancillary Claim relates to over-certification and/or wrongful certification.

553. The duties of APCL under all of the Contracts, which amended the general form of contract, are set out in Clause 3.3 which provides as follows:

"DUTY OF CARE AND EXERCISE OF AUTHORITY

3.3.1 In accordance with the recognised professional standards of reputable professional firms undertaking services of the same or substantially similar to those to be undertaken by the Consultant hereunder in relation to projects of the scale and character of this Project".

Sub-paragraphs "b" and "c" of Sub-Clause 3.3.2 of the General Conditions are modified as follows:

(b) Certify, decide or exercise discretion, fairly between the Client and third party not as an Arbitrator but as an independent professional who acts by his skill and judgment.

(c) vary the obligations of any third party, subject to obtaining the prior approval of the Client to any variation which can have an important effect on costs or quality or time (except in any emergency when the Consultant shall inform the Client as soon as practicable)."

554. Under the un-amended Clause 3.5 FIDIC, when making a determination the Engineer should consult with each of the parties and if agreement cannot be reached, make a fair determination in accordance with the Contract. However, the Engineer is deemed to act for the

Employer, in this case EMBD. Indeed the main witness for APCL accepted that the role of the Engineer was to protect the interests of the Employer.

555. Further, Clause 6.1.3 sets out the compensation payable and the manner in which damages, if any, becomes payable under the respective Contracts:

"6.1.3 If it is considered that either party is liable to the other, compensation shall be payable only in the following terms:

(a) such compensation shall be limited to the amount of reasonably foreseeable loss and damage suffered as a result of such breach, but not otherwise;

(b) in any event the amount of such compensation shall be limited to the amount specified in Clause 6.3.1;

(c) if either Party is considered to be jointly liable with a third party to the other, the proportion of compensation payable by that Party shall be limited to that proportion of liability which is attributable to his breach."

556. In that regard, EMBD has argued that Sub-Clause 6.3.1 of the Contracts do not appear to quantify the limit for liability, therefore, there is no limit on liability. The court does not accept this to be a correct proposition as in such a case, any such loss should be assessed on the basis of that which was reasonably foreseeable and the result of the breach as is the case generally.

557. The scope of APCL‟s role as Project Engineer was extensive for the Cedar Hill Project, as this involved APCL undertaking a quality assessment function with respect to the construction works at Cedar Hill and also entailed a review of Namalco's claims, the issuing of certificates for payment and the preparation of the final statement of accounts.

558. The standard of care applicable to a professional is usually determined by the standard of the ordinary skilled man exercising and professing to have that particular skill. The learned authors of Halsbury's expressed the following regarding the duties of care and skill between an Engineer and his Client:[128]

[128] Halsbury's Laws of England, (Vol. 6 (2018)), para. 458

The relationship between the Architect or Engineer and his Client is primarily contractual. Thus, the duties to be performed by the Architect or Engineer will principally depend upon the express or implied terms of the Contract in question. However, it is clear that professionals generally owe a parallel duty and undertake a concurrent liability in tort. Moreover, certain duties are customarily performed by competent experienced Architects and Engineers.

The test of whether the Architect or Engineer is in breach of his duty is whether he did or did not exercise the skill and care to be expected of an ordinary Architect or Engineer exercising and professing to have that skill. Although in general the duty of an Architect or Engineer is only to exercise reasonable skill and care, a higher duty may exceptionally be imposed, for example, if the circumstances show that it was the common intention of the parties that the Architect or Engineer design a building which would be fit for its purpose. It is evidence of ignorance and lack of skill that the Architect or Engineer has acted contrary to the established practices that are universally recognised by members of the profession. It is not sufficient to establish a breach of duty to show that another Architect or Engineer of greater experience and ability might have used a greater degree of skill or care.

When an Architect or Engineer is employed upon works which involve the use of some new invention of which he has no knowledge and with which he has not professed any acquaintance, his failure may not make him liable for want of skill. Where the directions of the Employer are capable of more than one meaning and the Architect or Engineer honestly and carefully, but erroneously, adopts the one which his Employer did not intend, he will not be liable.

When an Architect or Engineer is engaged to provide services during the construction period a continuing duty to review the original design may arise. Such a duty will not arise unless there is good reason to carry out a review and whether there is good reason is to be determined objectively and by reference to the standard set by what a reasonably competent Architect would do in the circumstances. An Architect will also have a duty to consider and find out key constraints of a project such as its budget and must also inform the Client if they know the Client is under a misconception about how the budget could be achieved.

559. The learned authors of Halsbury's stated the following regarding the duties of an Architect/Engineer and their role as to supervision and administration:[129]

Although an Architect or Engineer is not expected to be constantly on the site and to supervise every detail, it is not sufficient for him to pay occasional visits and to get any defects which he may happen to notice set right; his duty is to give such an amount of supervision as will enable him to give an honest certificate whether or not the work has been done in accordance with the Contract. Moreover, although his supervision may be partially, as to matters of detail, entrusted to subordinates such as Clerks of Works or Inspectors, the Architect or Engineer cannot exonerate himself by saying that the negligence was theirs.

Depending upon the express terms of the relevant engagements, the duties of an Architect or Engineer may include a duty to advise or warn the Employer of deficiencies in his own performance or that of other members of the professional team.

The failure of the Architect or Engineer to discover at the time that the work done or materials supplied are not up to the standard of the Contract may involve the Employer in loss, where the Employer's rights against the Contractor are limited to having such defects made good as were ascertainable at some particular time or where a final certificate has been issued and has become conclusive or where the Contractor is insolvent. The loss to the Employer, due to the Architect's or Engineer's negligence in such a case, may be the difference between the amount for which the Builder or Contractor is actually liable and the whole cost of the repairs, or the whole expense of rectifying the defects.

An Architect or Engineer is obliged in administering a contract to deploy sufficient knowledge of those principles of law relevant to his professional practice in order reasonably to protect his client from damage and loss. Thus an Architect has been held liable in damages for failing to give notice under a building contract in relation to a contractor who did not proceed regularly and diligently.

[129] Halsbury's Laws of England, (Vol. 6 (2018)), para. 467

Monthly progress reports

560. EMBD aver that APCL was negligent and/or in breach of its responsibilities under the APCL Cedar Hill Contract by issuing IPCs without receiving monthly progress reports from the Namalco, as is required by FIDIC Sub-Clauses 14.3 and 1.21.

561. The obligations of APCL were clear:

- *receiving, certifying and approving valuations from the Contractor and issuing certificates for payment; and*

- *reviewing and making determinations on any contractual issues which arise during the course of the works.*

562. APCL issued five (5) certificates, four (4) IPCs and a Take Over certificate. On December 21, 2015, the final IPC #5 was issued. In essence, EMBD submitted that APCL improperly certified IPCs one to five.

563. APCL submitted that as the Project Engineer, it was in receipt of information by which Namalco's claim could be verified and has accepted that this was not done via monthly reports. It is the evidence that such information came from minutes from progress meetings, site visits, quality assurance reports and the supporting documents contained in the Interim Payment Applications made by Namalco to APCL. There is no evidence from EMBD to the contrary of that given by Namalco's witnesses Sookram and Ramharack as to the walkthroughs and progress meetings so that the court accepts this evidence. Further, those walkthroughs and meetings were admitted by the witness Baksh for EMBD. The effect is that APCL would have certified sums having been satisfied that it possessed the required information so to do notwithstanding the absence of monthly progress reports in writing and the court so finds. In the view of the court, the purpose of the monthly progress meetings would have been equally achieved by the fortnightly in person on site meetings.

564. Additionally, APCL raised the issue of waiver by EMBD to its entitlement to receive monthly progress reports. The court agrees with this argument on the basis set out in the submissions of APCL namely:

a. There appeared to be a practice by EMBD not to require the provision of formal monthly progress reports as a basis for paying on the IPCs in the Cedar Hill Project as was done in the RR and PM Projects in which payments were made on IPCs certified by previous Engineers prior to the assumption of the role of Project Engineer by APCL.

b. Supporting documentation and material in support of the payment applications were considered by both EMBD and Namalco representatives after the joint site valuation meeting at which the application was discussed but prior to the issuance of an IPC and no request for monthly progress reports were made.

c. The IPCs and were not subject to any challenge or complaint by EMBD at any material time following issuance, up to and until the commencement of these proceedings, on the ground that monthly progress reports were not provided.

565. The court accepts that on the evidence it appears that EMBD also at the time operated without regard to the terms of its own Contract in that it never sought to enforce the requirement for the monthly progress reports. This is the difficulty that the EMBD as presently constituted finds itself in. In that regard, the court accepts that the approach of the EMBD today may have been quite different. But the court must examine the circumstances as they obtained at the material time. Those appear to be that EMBD of that time was content not to receive monthly reports and further, did not require them in keeping with its legal rights under the Contract. It is clear to the court, therefore, that the EMBD waived the requirement and the court so finds.

566. Support for this line of thinking can be found in the following. Lord Cairns in ***Hughes v Metropolitan Rly Co*** (1877) 2 App Cas 439 at 448, set out that if one party to a contract leads the other:

> "to suppose that the strict rights arising under the Contract will not be enforced, or be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the Parties".

567. Denning L.J. in ***Charles Rickards v Oppenheim*** [1950] 1 K.B. 616 at 626 stated:

"In order to constitute a waiver there must be conduct which leads the other Party reasonably to believe that the strict legal rights will not be insisted upon. The whole essence of waiver is that there must be conduct which evinces an intention to affect the legal relations of the Parties. If that cannot properly be inferred, there is no waiver."

568. In the present case, it is clear that the sums certified on the IPCs were being paid without the provision of monthly reports and in the circumstances where there were alternative progress meetings being held on site. The obligation of EMBD to pay the sums on the IPC was a legal one founded in contract. To the court, therefore, it was clear that EMBD by continuing to pay the sums was evidencing an intention to affect the legal relations between the Parties. The court therefore, finds that EMBD would have waived its entitlement to monthly reports.

569. The court has also considered the submission of EMBD in relation to the issue of the effect of the cross-examination of Mr. Baksh as it related to the on-site meetings. The evidence was as follows[130]:

Q Mr. Rajpatty says and Mr. Sookram said in the course of his evidence, that "The IPC in large measure involve much consultation with the Parties involved and were prepared following the agreement by EMBD and Namalco during the joint site valuation process at which the measurement exercises or line items of the four IPAs relevant to the four IPCs were conducted." Do you see Mr. Rajpatty says that?

A Yes. I'm seeing what he is saying, yes.

Q You do not agree with that?

A No.

Q But you were not on site all the time.

A No.

[130] Transcript day 3 from page 73 line 32.

Q Now he says that, “The process, Namalco would send in the interim payment application to APCL and to Mr. Balroop and to you, so that each interim application payment was sent to the Engineer and the EMBD.”

A As I said before, I can’t confirm if all came to EMBD yeah, but...

Q But as far as you are concerned, several of them (Inaudible 02:12:49 P.M.)

A No. Yeah, some may -- yes, some may have come.

Q And they were only four -- are really four IPCs.

A Five.

Q Oh there were five. Oh, there are five. One of them dealt with the (Indiscernible 02:12:57 P.M.)

A That was the fifth -- okay.

Q Yes. IPC 4 dealt solely with the (Indiscernible 02:13:02 P.M.)

A Okay.

Q He says then that, “There was a joint site valuation meeting on site between Namalco, represented by Mr. Wesley Darsan and Mr. Ramdarrie -- I hope my pronunciation is correct -- and EMBD represented either by yourself, Mr. Nizam Mohammed or Mr. Hafeez Mohammed...

THE COURT: Nizam Ramkissoon.

MR. FITZPATRICK SC: Nizam Ramkissoon. I beg your pardon, My Lord.

BY MR. FITZPATRICK SC:

Q ...and Mr. Hafeez Mohammed and APCL represented by certain parties.” You see that?

A Yes. I'm seeing it.

Q "At which the draft valuation interim application payments were discussed on an item by item basis, both as to the Claimant -- as to the degree to which the item had been completed and to the extent claimed by the Claimant and as to the price claimed by the Claimant for the item as completed or partially completely." Do you see that?

A Yes. I'm seeing it.

Q Are you saying that that is incorrect?

A I'm saying that I never attended such meeting. It's not the practice of EMBD to go item by item to evaluate an IPA. It is the role of the Engineer and as I say, EMBD would not have all the information to properly agree to any figures on --in -- on an IPA because most of the works are underground, covered up and EMBD at a meeting would not be able to sit down and say yes these works were...

Q At each stage of the works that were carried out...

A Yes.

Q You would have various stages and what Mr. Rajpatty is saying is that each stage...

A Uh huh.

Q ...prior to interim certificate, payment certificate, certificate being issued, that the Interim Payment Application will be discussed by all Parties following a walkthrough and an examination of the work which had been done so far. Are you saying that is incorrect?

A That is not -- I am saying I was not present and is not the practice of the EMBD to do those walkthroughs or to go through item by item. In a general sense if there is an issue about one item we -- it could be discussed but not item by item on an IPA.

Q You do accept -- You do accept that at the fortnightly progress meetings...

A Yes.

Q ...following those meetings there was a joint walkthrough by the Parties.

A It would -- there were -- there would have been walkthroughs, yes. Either before or after the meetings.

Q Every fortnight.

A I can't say for every fortnight. I didn't attend all meetings so.

Q All right. For those that you attended, there was a walkthrough.

A In -- yes. Just a walkthrough not to measure quantities, but a walkthrough.

Q And the walkthrough, that's to walk about the site and have a chat.

A Normally it's a large site. These are large sites. They will show the work that is ongoing not a detail measurement.

Q You must show that the work was ongoing...

A Yes.

Q ...what work was completed and -- so that EMBD would be in a position to judge whether the Payments Applications were justified.

A In a general sense, yes.

Q He also goes on to say Mr. Rajpatty that, "At these meetings Namalco's IPA and supporting documents were reviewed by all in attendance." So, that would include those in which you attended and you don't know about the others and you say that is not true.

A No.

Q So you've never reviewed.

A An IPA, no.

Q You never reviewed the supporting documents for the IPA?

A Together in a meeting, no.

Q Oh. You were -- you were there independently?

A No -- when the certificate is issued and it comes to us, to -- we -- if they ask about it and attach -– we do review it sometimes, we go through it to look at the works that were -- that they are -- to see if it matches back up.

Q And of course if you're dissatisfied having reviewed it, you would raise it with the Engineer and the Contractor.

A If there is an issue we would raise it, yes.

Q And there were no issues in which you raised dissatisfaction?

A No. No. No.

Q Mr. Rajpatty says that, "These documents were comprised of records of the Contractor's personal and equipment -- personnel -- I beg your pardon and equipment. List of notices, safety statistics, actual and planned progress." He says, "At these -- at these meetings these things were reviewed."

A What is -- the min -- each meetings had minutes and what was minuted was what items were discussed. A lot of these items by items were not minuted because they weren't discussed at the meeting.

Q And he says, “Copies of quality assurance documents such as test results, that is to say compaction and gradation and certificates of material sub-base and base, were also viewed as these were part of the site records while actual and planned progress was discussed and recorded at the fortnightly site meetings.”

A The planned and progress at the last line, yes, were discussed, actual and planned progress, but the other details were not -- if you look at the minutes those things weren’t minuted as being discussed.

Q And nowhere in the course of the receipt of the IPAs and the issue of the IPCs was any objection raised by either yourself or anybody on behalf of EMBD.

A No. I have no record of it.

Q At the first site meeting, among other things that was discussed, was the landslips. You say that at paragraph 72-73 of your statement.

MR. FITZPATRICK SC: I beg your pardon, My Lord, it’s in Mr. Rajpatty’s statement.

BY MR. FITZPATRICK SC:

Q Mr. Rajpatty says, “At the first site meeting, among other things that were discussed were the landslip problem. You were aware that there was a landslip?

A I know it -- I can’t say if it was the first meeting but that landslip issue was discussed at meetings. If it is minuted then it was discussed at the first meeting.

Q Mr. Rajpatty says that at paragraph 112 of his statement that, “Certain of the Provisional Sums were treated as lump sums because -- at the EMBD’s request because they were concerned that those figures would exceed the Provisional sums.” You know about that?

A I’m not aware of that, no.

Q You’re not aware.

570. The court is unable to accept the argument of EMBD on the effect of the cross-examination. It understands Baksh to have been admitting that he was present at some of the on-site meetings (albeit not all) and that there were walkthroughs and discussions about the works. He also admitted that in a general sense EMBD would have ascertained whether the work was in fact being done and would be able to either object and/or proceed to pay. His evidence is also that EMBD would not go through the IPA item by item as that was the duty of the Engineer. What is somewhat concerning is the fact that Baksh admits that EMBD never had concerns and never raised concerns with the Engineer or Namalco at those meetings. In the court's view, it is again clear from the above that EMDB adopted the approach of paying without as much as asking for a monthly report in circumstances where Baksh himself was of the view that the walkthrough may have not been enough. The Engineer was therefore, led to believe that the reports were not required.

571. In any event, having regard to the court's ruling on the issue of whether the provision of supporting documents was a condition precedent to the payment of an IPC set out in the main Claim, the issue of the failure, if any, of APCL to be in possession of supporting documents prior to certification does not arise on the Ancillary Claim. This is especially so in light of the evidence above as to the walkthroughs and progress meetings.

Provisional sums

572. EMBD submitted that three items, C.04, D.16, and G.10 were over-certified by APCL, in that APCL added an additional twenty-five percent (25%) to the underlying provisional sum, as distinct from the day work rate of fifteen percent (15%). Pattinson concluded that there was no justification for any additional percentage beyond fifteen percent (15%)[131], such that Namalco is entitled to one million, forty-seven thousand, two hundred and seventy-two dollars ($1,047,272.00) for those items. The sum certified was two million, nine hundred and forty-eight thousand, nine hundred and one dollars and fifty cents ($2,948,901.50). Namalco accepted EMBD's values as the correct values and, therefore, the total payable in respect of Items C.04, D.16 and G.10 is **one million, forty-seven thousand, two hundred and seventy-two dollars ($1,047,272.00)**. The court allowed such sum, the result being that APCL would have over-certified by the sum of one million, nine hundred and one thousand, six hundred and twenty-nine dollars and fifty cents ($1,901,629.50). This over-certification did not, however, result in a loss for

131 See Pattinson I/Annex A/6.6.26- TB2 140296 (2/H)

EMBD as the sum was not paid. Effectively, therefore, there is no loss under this head against which APCL would be required to indemnify Namalco and the court so finds.

573. However, APCL conceded that it incorrectly over-certified those items (see paragraphs 277 and 278 of the submission of APCL). The answer to the issue was given as follows:

> "APCL has conceded that it incorrectly over-certified these items and that the uplift only ought to have been by a rate of fifteen percent (15%). However, as Dr. Rajpatty notes, any over-certification could have been rectified in the generation of the Final Account Statement:
>
> "129. As regards the items set out in paragraph 146, APCL admits the over-certification listed for the following cost items: (i) Pavement Repair; (ii) Pond Repair; and (iii) Wastewater. This resulted from applying in each case an addition of twenty-five percent (25%) when the addition ought to have been fifteen percent (15%). There was accordingly an over-certification in each case in the sums set out in paragraph 146. However, this over-certification in any instance can be rectified in the generation of the Final Account Statement when APCL has been granted the opportunity to do so."

574. In the court's view this type of error falls within the ambit of those which are possible in the cut and thrust of day to day project management and does not appear to carry with it fault of the type required for liability either as a matter of contractual breach of duty of care or tortious negligence.

Embankment from borrow

575. The court ruled on this issue in the main Claim and accepted the expert opinion of Pattinson that the work would not have been a variation within the meaning ascribed by the Contract. The court also found that the work was in fact done having regard to the cumulative effect of the evidence of APCL and Sookram. The court also accepted the evidence of Pattinson that it appears that the borrowed fill emanated from within the combined Cedar Hill Site. It follows that the certified sum of seven million, eight hundred and seventy-five thousand, five hundred and fifty-two dollars ($7,875,552.00) was a sum that was certified by APCL without regard to all of the supporting facts. The valued sum by Pattinson was that of six million, five hundred and sixty-three

thousand and eight dollars ($6,563,008.00), a wrongful certification of one million, three hundred and twelve dollars, five hundred and forty-four dollars ($1,312,544.00).

576. APCL accepted that the quantity it certified was erroneously listed as part of variation works. Mr. Ramharack explained that it was only the volume of the item which was increased over and above the stipulated amount in the Bill of Quantities and that, therefore, it should have been categorised as re-measured works. APCL also accepted that the rates used for material obtained from within the Cedar Hill Site could not be reasonably used for material which was excavated and transported from outside of the Cedar Hill Site hence, the increased rate. APCL, however, submitted that it was not negligent in that regard as the instructions to do the work had been given by Mr. Baksh.

577. There are two matters here. The first is that of whether the works amounted to a variation. The court held that it did not. The court also accepts that the work ought to have been certified as a re-measure. The issue is therefore, whether instructions had been given for such works which works had been clearly performed.

578. It is the evidence of Ramharack that Namalco had originally applied for the amount of eight million, four hundred and seventy-one thousand, eight hundred and sixty-four dollars ($8,471,864) at the rate of one hundred and ninety-two dollars per cubic metre ($192.00/$m^{3)}$), however, by IPC number 2 APCL certified the cost of the item as a variation but reduced the quantity of earth at the same rate. According to him the same data used for mapping the Cedar Hill Site for the clearing and grubbing exercise was also used to ascertain areas in which backfill was used by reference to the quantities claimed by Namalco. The original grown level surveys were used to determine the fill quantities required to meet the design levels. Spot checks were also made to ensure the consistency of Namalco's cutting and filling service under quantified claim. It is based on this process that the APCL reduced the sum applied for by Namalco. He testified that it was clear but the change in the quantities within the Bill arose due to the inconsistency between the on-site conditions and designs prepared by the previous design and project management consultants in 2014. It was apparent, therefore, that they will perhaps have some miscalculations of the cut and fill quantities on BBFL's end while preparing the Bill of Quantities in 2014 or perhaps that the original services performed by BBFL and used to generate the cut and fill quantities contained errors.

579. In essence, therefore, it is the evidence of the witness that the categorisation as a variation was an error as it should have been certified as a re-measurement. In that regard, the measurement made and backfill used on-site amounted to much more than that set out in the BOQ. On the evidence therefore, it appeared that APCL and Namalco were faced with a situation in which BBFL would have grossly underestimated the quantum of landfill required. As a consequence APCL would have been required to be satisfied that the increased landfill was necessary and authorised by EMBD. The evidence of Ramharack is that at three separate progress meetings on April 15, 2015, May 28, 2015 and June 11, 2015 EMBD representatives were present when the earth works were discussed and carried out. This has not been disputed by EMBD. The evidence of Rajpatty under cross-examination in this regard is as follows:

Q But your firm did not find an authorised variation for this item of work did it, Dr. Rajpatty?

A Sir, we took that from Mr. Baksh being the Project Manager and a senior employee of the Chantry when he directed Namalco and APCL that they could use the material that was the shortfall of the Bills of Quantity from that particular site. That's -- and I'm sure my Engineers that are going to come after me will explain to you, Sir.

580. The court accepts this evidence and, therefore, finds that the works were completed on the instructions and authorisation of EMBD and that the claim for the sum under the head of variation must have been an error on the part of APCL.

581. Rajpatty also had the following to say on the issue under cross-examination:

> *"This was a clear indication where what was -- we did not prepare the Contract documents and that job. Sorry to say that BBFL did that. Yes, we had a role that we had to look at what they had based on the designs and the specifications to execute our job. Obviously, there was some errors in the cut and fill. How cut and fill works, you know, you cut a particular area, two thousand metres (2000m) and you fill another area with the two thousand metres (2000m). What, and again I'm going from memory, my Engineers are going to be coming after me, what happened there is that what BBFL said in their quantities did not match up to what was actually good to be filled on the lots. And again, Mr. Baksh was at that meeting, Mr. Kahlil Baksh, and he authorised my Engineers and Namalco that there was a borrow pit that they could have used that from that.*

So again, it was a clear situation of interpretation and they knew; they were on-site. Two Engineers from the EMBD, both Mr. Baksh and Mr. Ramkissoon, and that is the only reason. I don't think my Engineers are so irresponsible to just give, and what should I say, an authorisation without having that explicitly stated to them by the Client. I hope I answered."

582. Such an error resulted in no consequential loss to EMBD as the sum could have formed the basis of a valid claim under the head of re-measurement and the court so finds. There appears, however, on the evidence to have been a failure by the Design Engineer BBFL to have properly estimated the quantity of fill needed under this head for which BBFL by virtue of its non-participation has not answered. The evidence, therefore, stands against them. It is of such a nature in the court's view that it demonstrates that the conduct of the Engineer fell below the standard of the reasonably competent Project Engineer in that BBFL ought to have carried out accurate measurements of the fill required having regard to the topographical features of the land together with the evidence of its previous use as cane lands.

583. The court having, however, considered the sum testified to by Pattinson as the sum to be paid, it follows that there is nothing to indemnify EMBD in respect of, on this issue. A suitable declaration should, however, be made against BBFL.

ROOPSINGH ROAD CONTRACT

584. APCL also replaced BBFL on the Roopsingh Road Project. The Project which had started since in April, 2012 and was substantially complete by the time APCL was engaged. EMBD had already paid Namalco sums outstanding pursuant to IPCs #1-15. APCL's appointment followed the termination of the Contract of BBFL as Engineer. BBFL itself was appointed following the termination of Planviron Limited as Engineer. APCL was contracted to provide "Contract Administration Services of the Infrastructure Works on the Residential Site". Such services were said to included "acting as the "Engineer" on the FIDIC 1999 Red Book contract and was to encompass the specific tasks of reviewing all outstanding claims by the Contractor, together with the completed works and any extension of time claims. The services to be provided also included reviewing all completed works, to issue the Taking Over certificate and Performance certificate when due. For the reasons set out in the submissions of APCL, the court accepts and finds that it would not have been the function of APCL to re-open each IPC to assess whether the completed

work had met the contractual or other fit for purpose standards. This is so as EMBD had not brought to their attention any problems with the IPCs and it was nigh impossible to assess the quality of the work done years after it was completed without having observed the work as it was ongoing to conduct real-time quality control tests.

585. The court having found that some items would have reduced the sum owing due to abatement, only those items shall be considered on the issue of the Ancillary Claim against APCL.

Provisional sums

586. Ms. Pattinson's view is that costs for time-related provisional sums beyond the original Contract Period should have been certified only to the extent that they have been reasonably incurred due to events which have critically delayed completion, and only as a result of events for which EMBD is liable to compensate Namalco.

587. In essence, APCL failed to apply the terms of the Contract as a reasonably competent certifier.

588. EMBD submitted it did not grant an extension of time to Namalco beyond the Original Contract duration. However, if an extension of time was awarded, Namalco has not proven nor provided evidence that it was entitled to an extension of time because of critical delay.

589. Again the court will be guided by its ruling on the RR Project in relation to these sums so as to determine whether APCL is liable for that diminution in value.

Equipment

590. This claim arises out of the same period of Government-instructed suspension. EMBD has adopted Ms. Pattinson's total and quantities in this regard. This court ruled in its decision on the main Claim as follows:

> "379. In essence, the analysis of Pattinson reduced the value of works and APCL's certification. The court is of the view that two claims appear to be for the same period and is duplicitous. As a consequence, the court will allow the first claim for the period October 22, 2010 to March 31, 2012, but not for the Claim for the sum of two million, six hundred thousand, eighty-six dollars and six cents ($2,600,086.06). The sum of fifty-two million, one

hundred and thirteen thousand, one hundred and twelve dollars and fifty cents ($52,113,112.50) on the second claim is allowed. In so finding, the court also noted and accepted the submissions of APCL as follows..."

It follows that the duplicitous sum appears to have been wrongly certified.

591. It is the case for APCL that Namalco performed its functions at a reduced rate due to EMBD's non-payment but still completed the Project. In addition, APCL assessed the claim in consideration of the documentary evidence provided by Namalco. The methodology adopted by APCL was as follows:

i) According the Sub-Clause 16.1 of FIDIC, claims of this nature may include profit;

ii) Fifteen percent (15%) was for profit but excluded overhead;

iii) A further ten percent (10%) was removed for opportunity costs losses less operational costs, such as fuel and maintenance therefore resulting in twenty-five percent (25%) overall reduction.

592. The allegations of breach of contract and negligence are denied on the basis that whilst other Engineers may approach the calculation of this item in a different way thus arriving at a different sum, the methodology applied by APCL was sound and consistent with its contractual obligations and the approach to be adopted by a responsible and professional Engineer and as such APCL was not acting recklessly, without knowledge of the true position. APCL adopted a commercial approach to a situation which it considered, as previously indicated, and was unprecedented, where a Contractor spent a substantial time in performing its functions at a reduced rate due to EMBD's non-payment but still completed the Project. APCL assessed the Claim in consideration of the documentary evidence which was provided by Namalco and, therefore, it is not true that there was no analysis or investigations. In his evidence in chief, Dr. Rajpatty explained the approach taken by APCL in the assessment of this item:

"254. Namalco's claim was for sixty-nine million, four hundred and eighty-four thousand, one hundred and fifty dollars ($69,484,150.00), the breakdown of which is included in document titled "Claim No. 2 – Standby Cost for Equipment due to the Suspension caused

by the Delayed Payments". That Summary Table lists the items of equipment and the days of idleness associated with same. A daily rate in reference to twenty-four (24) hours is listed for each item of equipment and a total value for each line item of equipment for the delay period is stated. Again, for this assessment we were only provided with documents by Namalco, in accordance with the instructions given by EMBD.

255. The daily rates were verified by APCL and compared with the daily rates for the items of equipment contained in the Bill of Quantities -Section H – Dayworks, contained in the tender documents, which is contained in Attachment 3.2 – Agreement Rates – Phase 2 (Agreed Rates 2012). When we compared the rates submitted under Namalco's claim with the rates contained in the Bill of Quantities we found that the rates used under Namalco's claim was further discounted. For example, for the item D4 Tractor, the Bill of Quantities rate is listed as three thousand, six hundred dollars ($3,600.00) per day based on the hourly rate (one hundred and fifty dollars by twenty-four dollars ($150.00 x $24.00) versus three thousand dollars ($3,000.00) as listed in Namalco's submission. Also, for the item Motor Grader, the Bill of Quantities rate is listed four thousand, eight hundred dollars per day ($4,800.00) based on the hourly rate, versus three thousand, five hundred dollars ($3,500.00) in Namalco's submission. This was also considered in granting a further discount of twenty-five percent (25%) as noted in further detail below.

256. It is appropriate at this juncture to address paragraph 204A (a) of the Amended Ancillary Claim, in which EMBD claims that the equipment hourly rates for the standby claims are higher than the Roopsingh Road Supplementary Agreement. I wish to note that APCL was only provided with the Bill of Quantities document referred to above in paragraph 91. I repeat my explanation also in paragraph 91 in response to this allegation. Further, when the cited items of equipment are compared, it is clear the rates we used were much lower than that contained in the Bill of Quantities. I am not clear as to the basis of EMBD's allegation that these items were over claimed in the amount of six million, five hundred and eleven thousand, nine hundred and seventy-five dollars ($6,511,975.00), as they do not provide the particulars for such a calculation.

257. In response to paragraph 204(b) and (c), I understand EMBD to be stating that we used full working day rates. We did in fact apply a twenty-four (24) hour daily rate and at a seven (7) day working week. This was in recognition of the fact that the equipment would

have been idle throughout the course of the day and is consistent with the rate stipulated in the Bill of Quantities. As noted above, however, we made provision for a discount of twenty-five percent (25%) which would have addressed the periods of idleness associated with these pieces of equipment during the prolongation period.

258. That total submitted by Namalco was itself subject to an addition of fifteen percent (15%) for profits and overheads. It should be noted that a fifteen percent (15%) profit deduction is very reasonable. The original total excluding the profits and overheads was seventy-five million, five hundred and twenty-six thousand, two hundred and fifty dollars ($75,526,250.00). When the addition of fifteen percent (15%) was included, this amounted to eighty-six million, eight hundred and fifty-five thousand, one hundred and eighty-seven dollars and fifty cents ($86,855,187.50). This figure was then subject to a twenty percent (20%) discount, which amounted to sixty-nine million, four hundred and eighty-four thousand, one hundred and fifty dollars ($69,484,150.00). That twenty percent (20%) discount, therefore, was reviewed by APCL and found to have removed the fifteen percent (15%) which represented the addition for profits and overheads, with a further five percent (5%) discount by Namalco.

259. As to the allegation with regards to equipment at paragraph 201 of the Amended Ancillary Claim, I wish to state initially that fifteen percent (15%) was profit and excluded overhead. FIDIC Red Book Sub-Clause 16.1 provides a claim of this nature may include profit. FIDIC Red Book Sub-Clause 16.1:

"… If the Contractor suffers delay and/or incurs as a result of suspending work (or reducing the rate of work) in accordance with this Sub-Clause, the Contractor shall give 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],

260. Payment of any such cost plus reasonable profit, which shall be included in the Contract Price. "Despite the fact that recognition for profit could have been included as part of the claim for additional cost of equipment during the six hundred and ninety (690) days period, the fifteen percent (15%) for profit and overhead initially included by Namalco

was actually removed by Namalco as described above. We applied a twenty-five percent (25%) discount rate to Namalco's claim. Ten percent (10%) of that twenty-five percent (25%) discount rate further removed opportunity cost losses less operation costs, which are matters such as maintenance and fuel. We then allowed for a fifteen percent (15%) for profits and overheads to be applied, despite that aspect of Namalco's claim being removed by Namalco itself. Thus, arriving at an overall reduction of twenty-five percent (25%) in total. Therefore, from the above, APCL's further discount, removed more profits from Namalco's claim, in the range of ten percent (10%).

The discounting of profits by a further fifteen percent (15%) by APCL was effected in recognition of any overstatement which we may have perceived to have been done by Namalco.

261. In terms of applying the range of discount APCL applied, this was consistent with the recognition by EMBD and BBFL in their acceptance of certain variation orders/quotations or proposals submitted by Namalco, which carried an average profit overhead rate of twenty-five percent (25%). There were no queries as far as APCL could have ascertained. Non-objection is considered a confirmation that there was an agreement to what was submitted."

593. From the above, it appeared to the court that Rajpatty failed to treat with and explain specifically the sum which Namalco claimed was a separate amortisation claim, not a depreciation claim. Instead it applied an entirely different methodology in certifying the claim. His evidence is that APCL simply did not adopt wholesale the claim made by Namalco but methodically analysed the claim in an attempt to assess it in a fair and reasonable manner.

594. This approach seemed to be of some issue in cross-examination by Attorney for EMBD who suggested to Rajpatty that it was his duty to do what was in the interest of his Employer and hence protect the Employer (EMBD). It appears that Rajpatty accepted this but attempted to demonstrate in his answers that APCL was the party who held the scale in the balance in an attempt to even the playing field between the two. In cross-examination he speaks of constant negotiations between Namalco and EMBD on a day to day basis which APCL and its employees had to resolve.

595. The issue for the court is whether the certification of the amortisation claim was done in keeping with the standard to be expected of a reasonably competent Project Engineer. The answer in this case is yes, in the view of the court. It is not sufficient to establish a breach of duty to show that another Project Engineer of greater experience and ability or even of similar experience and ability might have used a greater degree of skill or care. The court is satisfied that given the circumstances set out in the evidence above, APCL performed the verification exercise as best as it could and used a formula which is on the face of it reasonable and not outside of the general practices of Project Engineers.

596. Neither is it a breach of the contractual duty as the effect of the certification appears in this case not to have caused loss to EMBD who refused to pay the said sum which the court has now determined was not payable.

Recovery of profit – omission of detention ponds

597. EMBD argued that there is no provision in the Roopsingh Road Construction Contract for Namalco to claim its loss of profit on an omission. As such, Namalco's entitlement is nil. However, Namalco submitted that its claim is based on the fundamental principle of contract law that a loss directly caused by contractual breach is recoverable. Namalco says that the certification by the Engineer of the sum of **six hundred and sixty-one thousand, three hundred and fifty-seven dollars and ninety-three cents ($661,357.93)** was fully justified and same should not be disturbed. Furthermore, Pattinson assesses loss of profit of nine point three five percent (9.35%) at five hundred and nine thousand, six hundred and eighty-five dollars and thirty-eight cents ($509,685.38). The court found on the main Claim, however, that having regard to the finding on the validity of the Supplementary Agreement and to the fact that the Original Agreement did not provide for such a claim, such claim should not be allowed.

598. APCL specifically argued as follows:

i) Pursuant to FIDIC Red Book Clause 13.1 of, Right to Vary, the Contractor is entitled to payment for a variation which may include:

(d)omission of any work unless it is to be carried out by others."

ii) The Conditions of Particular Application with respect to this Contract and which is not included in the Cedar Hill and Petit Morne Contracts, includes the insertion of the following clause to the Right to Vary provided by Clause 13.1 as follows:

"No Variations shall be executed without the written approval of the Employer."

iii) The assessment carried out by APCL based on Namalco's entitlement to this item claimed in accordance with Sub-Clauses 12.4, 20.1 and 13.1 which was set out by the APCL's Defence and Dr. Rajpatty's evidence in chief and supported by a review of Namalco's financial statements, Attachment 4.3 – Statement of Accounts. The loss of profit was calculated by subtracting Cost of Sales from Gross Income (three hundred and two million, two hundred and fifty-one thousand, seven hundred and ninety-one dollars minus two hundred and seventy-five million, seven hundred and twelve thousand, four hundred and sixty-five dollars ($302,251,791.00 - $275,712,465.00)) which gave a net profit of twenty-seven million, three hundred and ninety-two thousand, seven hundred and thirty-nine dollars ($27,392,739.00). This amounted to twelve point three percent (12.3%) expressed as a percentage of the cost of sales, (net profit/net sales) (twenty-seven million, three hundred and ninety-two thousand, seven hundred and thirty-nine dollars of two hundred and twenty-five million, seven hundred and twelve thousand and four hundred and sixty-five dollars ($27,392,739.00/$225,712,465.00)). Namalco applied a profit percentage on their recoverable overheads, which were incurred as a result of loss of earnings on that item. Using the profit and loss calculation, APCL was of the opinion that twelve point one three percent (12.13%) was an appropriate profit percentage to be applied, resulting in the sum of six hundred and sixty-one thousand, three hundred and fifty-seven dollars and ninety-three cents ($661,357.93).

iv) By letter dated November 19, 2015, APCL expressly sought EMBD's comments with respect to the sums claimed by Namalco based on the insertion of the clause specifically requiring variations to be approved by the Employer in writing, however, EMBD never responded.

599. It is pellucid that no written approval was provided by EMBD. APCL says that notwithstanding, it certified the sums for the following reasons:

i) Based on Sub-Clauses 12.4, 20.1 and 13.1 APCL assessed this claim as a valid claim on the basis that Namalco was entitled to this item as the omission was deemed invalid owing to the omission being caused by lack of funds of EMBD and on the basis of the redesigns of the BBFL by their correspondence of November 12, 2015.

ii) The Claim was made under the Contract for loss of profits on the omission contained in the Bill of Quantities and as such had to be treated appropriately by recognising loss of profits on the omission contained in the BOQ as set out by Namalco's claim for this item; Item No. 37 - Claim No. 5 - Loss of OH&P for Omission of Concrete Lining to Ponds.

iii) The methodology for the quantification of this claim as set out above was explained by APCL's Defence and evidence of Dr. Rajpatty.

iv) Based on the insertion of the clause specifically requiring variations to be approved by the Employer in writing, APCL sought the comments of EMBD for this item, however, EMBD never responded. This item, therefore, remained pending EMBD's response and, therefore, despite being assessed by APCL cannot be deemed a final assessment unless approved or rejected by EMBD.

v) Despite her opinion that this claim should be assessed as $NIL, Pattinson further states alternatively that a reasonable level of profit was eight point five five percent (8.55%) or nine point three five percent (9.35%).

600. In relation to the explanation provided at i) above, the fact that the omission became part of the redesign by BBFL does not mean as a matter of course that the omission was deemed invalid as it remained an omission for which permission had to be obtained even under the circumstances where its inclusion became part of re-design unless that re-design was specifically approved by the Employer of which there is no evidence. In relation to ii) the method by which the loss is recognised must nonetheless be reconciled to permission being granted for the work to provide for the omission. So the fact that the Claim was made under loss of profits for the omission is on

its own not a reason that validated the Claim. Additionally, APCL relies on the fact that Pattinson valued the work. This fact is however, of no relevance whatsoever to the issue before the court.

601. Finally, APCL seems to have made an alternative argument that the response of EMBD is still outstanding, therefore, the assessment is not a final assessment. This position goes against the grain of both the Claim and the Ancillary Claim as it is abundantly clear that Namalco claimed the sum based on what it considered to be and which appeared in all of the circumstances to have been a certification to which it was entitled.

602. The court, therefore, does not accept any of the arguments set out above as being plausible answers to the issue. The expense is a risk that undertaken by Namalco and certified by APCL without any basis for so certifying under the Original Contract terms.

603. It follows that there was literally no validity of such a claim in the absence of the written permission of EMBD. Neither is there, unlike in other instances oral permission which may in some circumstances be acceptable despite the absence of written permission. Permission being the guiding factor and requirement for writing being a matter of form as opposed to substance.

604. In the court's view therefore, the certification fell below that standard of skill and care required of a reasonably competent Project Engineer and a declaration shall be made accordingly. It is to be noted once again that the sum was not paid so that there is no real loss to EMBD as a consequence of the act of APCL. There, therefore, appears to be no contractual breach.

Fill and re-grading

605. Namalco was certified a total of nine million, eight hundred and fifty-eight thousand, seven hundred dollars and twenty-four cents ($9,858,700.24) for re-grading works to the site. EMBD's case is that these works were unnecessary. Pattinson considered all the claim documents submitted by Namalco. In her view, there was no evidence for the carrying out of any such works between March 2015 and October 2015. As such, the most to which Namalco was entitled in the opinion of Pattinson was twenty-six thousand, five hundred and ninety-four dollars and thirty-two cents ($26,594.32). The court found that Pattinson's evidence is the best evidence on the issue in the circumstances and it follows that the argument is that entire sum was wrongly certified, however, it is to be noted that the court was of the view that Namalco was entitled to

twenty-six thousand, five hundred and ninety-four dollars and thirty-two cents ($26,594.32) in keeping with Pattinson's assessment.

606. APCL submitted that its scope of services did not involve a quantity control assessment function or undertaking any verification exercise. The works referred to were completed before APCL was retained by EMBD and these works were captured within the IPCs prepared and certified by BBFL and paid for by EMBD in IPCs #1-15. As forensic investigations was not part of its remit, APCL discharged its duties under the Contract by examining all supporting documents attached to each IPC in an effort to confirm that the previous Engineer considered all issues prior to certification. The evidence in chief, Dr. Rajpatty on this issue (as set out at the beginning of this decision) supported this contention.

607. The court accepts this reasoning in relation to this head, APCL having done all that it was contracted to do in the discharge of its duties. The fault it appears lies with BBFL and so a suitable order will be made in respect thereof in due course.

Variations

608. The court found the following in respect of variations:

> "VO#1: Access Road Repairs. The court finds that this claim should not be allowed as a variation as access to site and maintenance thereof was the responsibility of the Contractor so that Planviron ought not to have issued a variation for repair work to the access road. The evidence of Pattinson is that she could locate no correspondence relating to the instruction by Planviron to Namalco to proceed with the variation works in any event. So that she is unable to verify the reason for the works. EMBD argues that Instructions to Tenders explicitly set out that site access was a matter that Namalco is deemed to have investigated and for which it took a risk. The court agrees with the submission of EMBD and the sum of two hundred and eighty-six thousand, five hundred dollars ($286,500.00) will not be allowed.
>
> VO#2: Access Road to Stockpile. This was a claim for two hundred and eighty-three thousand, five hundred dollars ($283,500.00) for remediation of the access road to the stockpile. On the same basis as above the Claim will not be allowed."

609. These were therefore, found to be wrongful certifications. These matters are attributable to certifications of BBFL who at first took over as Project Engineer from Planviron and also to APCL who assumed the role thereafter. But the final burden lay with APCL who would have therefore, have had to verify and certify this claim but APCL does not appear to have specifically answered the main issue which is that of whether access to the site and stockpile and repairs to the road were matters for the Contractor. This of course does not fall into the category of quality control assessment but does fall squarely in the category of verification of the validity of the claim which was by admission included within the scope of duties of APCL. It follows that these certifications were made not in keeping with the standard to be expected of a reasonably competent Project Engineer in the absence of justification there for. Again no loss has been suffered by EMBD so that a suitable declaration will be made. There is also in the court's view, a breach of Sub-Clause 3.3.2 (c) in relation to the duty of APCL.

610. There also appeared to be a mathematical error made in the calculation of interest on this claim which was admitted by APCL. This is a minor matter in that no loss has been suffered as the Claim was never paid.

611. In relation to indemnity, there having been no consequential loss to EMBD, there is no loss to indemnify.

PETIT MORNE CONTRACT

<u>The Petit Morne Project calculations</u>

Claim	**Amount Certified by BBFL (TT$)**	**Amount Certified by APCL (TT$)**	**EMBD's Value AND Reference**	
Overheads		15,090,868.25	0	**[Pattinson I/Annex C/9.8.4]**
Equipment	5,451,875		0	**[Pattinson I/Annex C/5.5.3]**
		23,950,917.25	0	

Wrongful variation to excavation widths and depths for the roadways	218,068,955		0	**[Palmer I/91 – 97]**
Clearing and grubbing	16,473,000		505,600	**[Pattinson I/Annex C/8.7.3]**
Recovery of profit – omission of detention ponds		6,751,592.25	0	**[Pattinson I/Annex C/10.5.3]**
Assessment of Interest		134,312,262.32	-	**[Pattinson I/Main Report/17.4.5 – 17.4.6]**
TOTAL	234,541,955	180,105,640	505,600	

612. It must be noted that this Contract was for the provision of Contract Administration Services as this Project was already completed prior to APCL's involvement. The duty of APCL was, therefore, to review the outstanding claims by the Contractor and the completed works so as to prepare a final account. BBFL was the previous consultant. The Contract was entered into on September 4, 2015 and the site was substantially completed. Interestingly, EMBD wrote to APCL by letter on September 2, 2015 through its CEO saying that they were pleased to award a contract for Engineering Services. The court accepts, however, that APCL was hired for the purpose of review of outstanding claims and not as Project Engineer in the true sense of the term as the site had already been completed. However, the duties it was required to perform were those that are usually included in the duties to be performed by the Project Engineer in the usual course of events. Therefore, the standard of care and skill to be applied would be the same but only in relation to the matters they were tasked to review and only in so far as the already completed site permitted of such review by the nature of the work. This reasoning also applies to the RR Project set out above. The duty and standard of care remains the same.

Sub-standard and defective works

613. For the same reasons set out in the main Claim in relation to the quality of the evidence of EMBD on sub-standard and defective works, this head is in the court's view, one that should be allowed.

Overheads

614. EMBD argued that Namalco was not entitled to an extension of time for its claim on overhead costs. In addition, there is no evidence there was stoppage of works or reduced works and the claim should not have been certified. This matter arose as EMBD failed to pay Namalco certified sums and so Namalco invoked its right to suspend works. However, provided that EMBD was responsible for the delay, Namalco will only be entitled to seven thousand, four hundred and sixteen dollars and one cent ($7,416.01).

615. In the court's view, without repeating the extensive arguments and evidence of Rajpatty and Sookram all of which can be found in the submissions of APCL at paragraphs 505 to 512, the court finds after careful consideration that the delay was not caused by Namalco who would have

unavoidably incurred costs due to the prolongation period. In the view of the court, EMBD would have been responsible for such delay as it refused to pay.

616. However, it must be borne in mind that the ruling of the court is that the Supplementary Agreement under which rates were payable was invalid and is set aside. This of course is of retroactive effect and could not reasonably have been a basis at the time for non-payment. Indeed EMBD does not give this as the reason for non-payment. The simple fact remains that the stoppage or reduction would have been as a result of non-payment at any rate whatsoever.

617. The court, therefore, finds that a reasonably competent Project Engineer would have done as APCL did and made a value judgment based on assessment of the documents and evidence of works provided by Namalco. In that regard, Rajpatty set out the basis for the assessment of APCL as follows:

> "The reduction of the rate of work applied was inferred on the basis that the Initial Contract period was designated for five hundred and forty (540) days and extended to a further three hundred and ninety-four (394) days. This must be considered along with the fact that the IPCs covering these periods still showed works were being executed. Namalco's submission contained in Attachment 5.4 – Summary of Applications for Payment shows that IPCs #3 to #24 overlapped with the period of suspension. Since the three hundred and ninety-four (394) days extension represented seventy-two percent (72%) of the Contract period of five hundred and forty (540) days, we allowed seventy-five percent (75%) of the overhead costs for that period.
>
> The figure of seventy-five (75%) was allowed on the basis that this period represented the majority portion of the overall Petit Morne Contract.
>
> Some extent of works was being done during this period, when these IPCs are reviewed. Therefore, it was most reasonable for APCL to approach the assessment of the overheads claim on the basis of a reduced rate of works. Had there been total stoppage, a reduction of Namalco's claim would have been a greater percentage than that applied by APCL (i.e. twenty-five percent (25%)). The twenty-five percent (25%) discount was applied in recognition of the reduced rate of works for the suspension period. There was also the fact that there were no demobilisation instructions given by Namalco, which also informed our

view that works were being continued by Namalco albeit on a reduced rate. Finally, APCL's approach to assessment of the overheads claim, must be understood in the context of APCL reviewing documents relating to the claim at a point in time when the works were substantially completed.

As such, we made a value judgment based on assessment of the documents, evidence of works and documentation namely the items of work covered in the IPCs, as provided by the Namalco. We were also stymied in our assessment by the fact that we had to rely on documentation provided by Namalco, despite requesting relevant documentation from EMBD and their failure to provide same."

618. In the view of the court, the methodology used to calculate the sum to be certified was among the best that could have been devised in the circumstances of a delay that extended by some seventy-two percent (72%) of the original period of contract with evidence of ongoing work and no fault on the part of Namalco. The court, therefore, finds that APCL would have acted well within the standard to be expected of a reasonably competent Project Engineer and there is no breach of its contractual duty to the Employer.

Equipment

619. Again, EMBD submitted that no adequate evidence in relation to the effects of the delay was submitted, in other words, there was no evidence of stoppage or reduced work and the correct value is $NIL. This claim was originally made at a value of five million, four hundred and fifty-one thousand, eight hundred and seventy-five dollars ($5,451,875.00) to BBFL but was never certified. The court is of course unaware of the reason for non-certification by BBFL and does not have before it sufficient evidence to impute dishonesty on the part of Namalco who thereafter, claimed almost seven times the figure, being some thirty-three million, two hundred and sixty-five thousand, one hundred and sixty-two dollars and eighty-six cents ($33,265,162.86) reduced by APCL to twenty-three million, nine hundred and fifty thousand, nine hundred and seventeen dollars and fifty cents ($23,950,917.50.) It, therefore, becomes a matter of investigating the basis for the certification by APCL.

620. APCL submitted that Namalco had in fact submitted a schedule of idle equipment during the said period and the associated daily rates and costs of the equipment. That evidence was to be found in Namalco's claim and also the evidence of Sookram at paragraph 372 of his witness

statement in which he testified that the list was derived from the Engineer's records of the minutes of the monthly progress meetings for the equipment on site for each month and he used daily rates that would have applied had it not been for the delay.

621. APCL further reduced the amount in that fifteen percent (15%) for profit and overhead was removed and ten percent (10%) for opportunity costs losses less operational cost such as maintenance and fuel. The overall reduction was some seventy-five percent (75%) of the sum applied for. The extension of some three hundred and ninety-four (394) days was also factored in. What is interesting is that the evidence of Rajpatty is that he then compared the list of equipment on site during the original period of work to the list of equipment on site during the extension and same showed that Namalco had reduced it equipment on site. The comparative list set out at paragraph 322 of the witness statement of Rajpatty shows that some twenty-nine (29) pieces of equipment had been removed from site and there had been a reduction in persons from eighty to sixty (80-60).

622. The court noted that at the time APCL would have had no information to demonstrate to it that the cause of the suspension or reduction in the rate of work by Namalco was due to any cause besides non-payment by EMBD. The court is satisfied on the testimony before it that there must have been a reduction in work as there was no payment forthcoming from EMBD, that the evidence also shows a reduction in both manpower and equipment which, all things being equal supports such a claim. In the circumstances, the court finds that APCL is not liable for either breach of duty under contract or in tort.

<u>Wrongful variation to excavation widths</u>

623. The sum certified for these works were three point six (3.6) times the Contract Price, thus exceeding EMBD's financial limits. Further, EMBD gave no such authorisation. This issue was explored in the evidence referred to in the Claim. The evidence is that the variation to the excavation width was in keeping with a safe practice of excavation in a nutshell. The obvious difficulty is that it was a variation in respect of which no permission was given either in writing or orally by the Employer. This is why the sum was not allowed. APCL does not appear to have answered this issue. The court has revisited the evidence of APCL on several occasions but can find no answer to this claim. As was with the case of Roopsingh Road supra, in relation to the omission of detention ponds the court finds, by way of the same rationale that the certification fell below that standard required of a reasonably competent Project Engineer and a declaration

shall be made accordingly. It is to be noted once again that the sum was not paid so that there is no real loss to EMBD as a consequence of the act of APCL. This is also a breach of Sub-Clause 3.3.2 (c) of the Contract.

Recovery of profit – omission of detention ponds

624. The circumstances here were the same as those on the RR Project. By letter dated October 9, 2012 from Namalco to BBFL, a proposal for the concrete lining of the detention ponds was made. The proposal was approved by BBFL and instruction to proceed was given by letter dated December 21, 2012. While the works were being done, BBFL gave instructions for the works to cease by letter dated October 15, 2013. Namalco therefore, considered itself entitled to a claim for the loss of profits as a result of the omission of the concrete lining works. By letter dated November 11, 2015, APCL sought EMBD's comments on the proposed sums, including, Recovery of Profit - Omission of Detention Ponds, but received no response. For the same reason as above, the court finds that the act of certification fell below that standard required of a reasonably competent Project Engineer and a declaration shall be made accordingly. It is to be noted once again that the sum was not paid so that there is no loss to EMBD as a consequence of the act of APCL. This is also a contractual breach of Sub-Clause 3.3.2 (c) of the Contract.

Assessment of Interest

625. APCL inadvertently used compounded interest instead of simple interest to certify this claim which was an error according to EMBD as FIDIC Sub-Clause 14.8 was amended in the case of this Contract. This issue is a non-starter having regard the court's decision to set aside the Supplementary Agreements.

AASHTO 180/191

626. As originally set out, the Ancillary Claim included a claim against the APCL for certifying works based on AASHTO 191 as opposed to the AASHTO 180 standard. In the view of the court, this can no longer be maintained, the clear evidence from the experts being that both tests are in fact similar.

627. In that regard, there is a connected issue that has been the cause of some concern by the court. The evidence showed, as brought out frontally by Mr. Davis QC in cross-examination that the testing company hired by Namalco in fact operated out of the very office of Namalco and

carried a letterhead that bore the same phone number. This is a practice that must carry with it a level of suspicion. Of course there appears to be no clause in the Contract that sets out that the testing company should be an "independent" one and it may well be good for the business of the Contractor to have a commercial interest in the testing company so that perhaps it may benefit from preferential rates on its projects. However, on the other hand, the practice of having tests conducted by a company owned by the Contractor is essentially one of himself unto himself. Such a practice must necessarily derogate from the independence of the results of the test in the view of the public. It is a matter of public confidence in the expenditure of public funds. Contracts between private parties may not carry with it that level of circumspection but contracts that involve the use of tax payer funds should be scrupulously guarded to ensure that contractors do not double dip into the national purse through innovate schemes.

628. That being said, in this case, there is no evidence that Namalco owned the testing company or that it held a controlling interest. The evidence of the company operating out of the same offices of Namalco is discomforting at its highest but goes no further in the context of the evidence set out in this case.

THE COUNTERCLAIM OF APCL TO THE ANCILLARY CLAIM

629. APCL aver that it has not been paid for its services nor has EMBD explained the failure to do so. APCL, therefore, counterclaims for the following sums:

(i) Cedar Hill – one million, four hundred and forty-nine thousand dollars ($ 1,449,000.00)

(ii) Roopsingh Road – one million, eight hundred and ninety-seven thousand, five hundred dollars ($ 1,897,500.00)

(iii) Petit Morne – one million, eight hundred and ninety-seven thousand, five hundred dollars ($1,897,500.00)

(iv) Exchange III – one million, six hundred and twenty thousand, six hundred dollars ($1,620,600.00).

630. In relation to the Project called Exchange III, EMBD entered into a Written Contract dated April 15, 2015 with APCL for works on that Project, it also being a residential site at Exchange Estate Road Couva for the sum of five hundred and seventeen thousand, five hundred dollars ($517,500.00). The evidence is that the services were performed and invoices that were issued but remain unpaid are as follows:

a. Invoice number 793 for the sum of two hundred and fifty-one thousand, eight hundred and fifty dollars ($251,850.00).

b. Invoice number 829 for the sum of five hundred and seventeen thousand, five hundred dollars ($517,500.00).

c. Invoice numbers 830, 831, 832 and 845 in the sum of eighty-six thousand, two hundred and fifty dollars ($86,250.00) each.

d. Invoice numbers 855, 866, 881, 895, 904, 908 each in the sum of eighty-four thousand, three hundred and seventy-five dollars ($84,375.00).

631. The total outstanding for Exchange III is, therefore, one million, six hundred and twenty thousand, six hundred dollars ($1,620,600.00).

632. EMBD submitted that if APCL is entitled to outstanding fees, EMBD is entitled to set-off from any sums found to be due to APCL, the value of the indemnity or contribution it is entitled to seek from APCL as a result of the matters set out in EMBD's Ancillary Claim against APCL. In so doing the inference is that the fees are in fact outstanding. A suitable order will therefore, be made on the Counterclaim.

633. APCL also counterclaimed for fees invoiced and outstanding on RR, PM and Cedar Hill. In relation to those claims, APCL has abandoned its claim to invoice numbers 817, 818, 819, 837 and 846 as set out in Table 194(1) of the Counterclaim. The court will therefore, make an order for damages in that regard but APCL will not be able to recover for services rendered in relation to

the certifications that the court has ruled were invalid owing to breach of duty on the part of APCL.

Ricky N. Rahim

Judge.

Judicial Research Counsel:

Jael Reid.