THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2009-03844
No. 3400 of 1999

Between

N.H. INTERNATIONAL (CARIBBEAN) LIMITED

Plaintiff

AND

CLICO INVESTMENT BANK LIMITED

I.C.S. (GRENADA) LIMITED

NATIONAL STADIUM PROJECT (GRENADA) CORPORATION

Defendants

Claim No. CV2006-01205

Between

N.H. INTERNATIONAL (CARIBBEAN) LIMITED

Claimant

And

CLICO INVESTMENT BANK LIMITED

NATIONAL STADIUM PROJECT (GRENADA) CORPORATION

Defendants

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES:
Mr. Alvin Fitzpatrick S.C, Ms. Lesley-Ann Lucky Samaroo, Mr. Shiv Sharma instructed by Mr. Adrian Byrne for the claimant.
Mr. Seenath Jairam S.C., Mr. Dharmendra Punwasee instructed by Ms. Marcelle Ferdinand for the defendant, National Stadium Project Corporation.

BACKGROUND

1. In 1996, the Government of Grenada (the government) decided to construct a sporting complex (the Project).

2. In 1996 Mr. Colm Imbert formed a company (**ICSL**) in Trinidad and made a proposal to the Government of Grenada for ICSL to implement and develop this project including arranging the finance for its construction. The financing was to be from investors arranged by and through Clico Investment Bank (**CIB**).

3. The company **ICS** Grenada [**ICS** or **ICS Grenada**] was later formed for the purpose of the construction aspect of this project and the company **National Stadium** [NS] was formed to be the **Project Company**.

4. Mr. Imbert was one of the principals of ICSL, ICS Grenada, and National Stadium. Mr. **Elias'** company **N.H. INTERNATIONAL (CARIBBEAN) LIMITED** [**NH**] was awarded a subcontract by ICS Grenada for construction work to be performed, initially of 70 % of the value of the initial project cost.

Assignment

5. NH alleges that before it embarked on its construction activities for the project it sought assurances from Mr. Imbert, (who was one of the principals of ICSL, ICS Grenada, and the project company- National Stadium) – that NH would be paid directly from the funds arranged via CIB from investors– and that the sum, equivalent to its payment for work to be done under its subcontract, would be assigned to it by ICS. This would obviate the need for its having to wait to be paid through ICS after ICS first received payment from the project company - NS.

6. It alleged that CIB was a party to this arrangement which was arrived at in a meeting at which Mr. Imbert and CIB's representative, Mr. Archer were present and that this assignment arrangement was confirmed/evidenced by two letters in which it sought and received confirmation that this arrangement was in place.

Trust

7. It further contends that a trust was constituted in favour of NH of the sum due to it under its construction contract for work done and approved, out of the sum that CIB had arranged to finance the project. As the purpose of the financing was specifically the construction activities of NH - and other contractors for the Project, this gave rise to a special purpose Quistclose type trust, enforceable by NH as a beneficiary thereunder against the holder of the fund held by CIB.

Claims Arising Under the Construction Agreement

8. ICS purported to terminate the contract with NH when on **29th October 1999** ICS wrote to NH purporting to give 14 days notice of its intention to terminate the Construction Agreement.

The Frozen Sum

9. NH then sought and obtained an interim injunction restraining CIB from paying, out of monies to thereafter become due and payable under the Facility Agreement, any monies which would reduce the balance available for disbursement thereunder below the sum of EC$7,430,724.70 ("the said EC Sum").

10. On November 5, 1999 NH obtained an *ex parte* injunction before the Honourable Justice Tam which injunction was continued on the *inter partes* hearing on November 30, 1999 in the following varied form:

> "That CIB whether by its… be restrained and an injunction is hereby granted restraining CIB from doing any of the following acts, that is to say, from **paying** to ICS or NS **out** of monies to hereafter become due and payable by CIB under the Facility Agreement … <u>any monies which would reduce the balance of advances available thereunder below the</u> <u>sum of EC $7,430,724.70</u> until the hearing and determination of this action or under further order." **[Tab 10 Agreed Bundle]**.

11. NH's order in effect froze the sum held by CIB which had not yet been advanced to NH in respect of NH's contract with ICS [the frozen sum or the EC sum]

12. The EC Sum therefore represented advances under the Facility Agreement not disbursed by CIB as a result of the interim injunction

Repayment of the Facility

13. An indenture dated 24th September 2001("the Indenture") made between National Stadium and CIB recited the former's indebtedness under the Facility Agreement at US$29,935,525.03 including the original indebtedness of US$23,000,000.00 the amount originally payable under the Facility Agreement being US$23,000,000.00. and a further loan in the sum of US$1,231,067.60 (see *Indenture dated the 24th September 2001 exhibited as "EPE56" to the witness statement of Mr. Elias found at pages 806-811 of the Trial Bundle*)

14. On 8th August 2002 the Government of Grenada repaid the Facility to CIB including the original financing and the additional loan.

The Arbitration Award

15. NH commenced arbitration proceedings against ICS and on **18th March 2002** obtained an award in its favour for the net figure of EC$8,412,636.83 together with interest.

16. NH seeks to recover some part of the award against the frozen sum.

Claim against CIB

17. The claim against CIB arises in respect of:

i) The funds frozen by injunction, and

ii) Interest which allegedly should have accrued thereon, as well as

iii) An alleged short payment arising on the non direct conversion of the EC fund held by CIB to US dollars when it was so ordered by the High Court.

Terms

18. **EC Sum –** The sum of EC $7430724.70

Deposited Amount – the sum actually deposited by CIB pursuant to the order of the Honourable Justice Tam dated July 23 rd 2004 into a joint interest bearing account in the name of attorneys at law for the parties.

19. **Additional sum-** the amount by which the sum actually paid by CIB fell short of the EC sum converted directly into US dollars.

THE ISSUES

20. At issue therefore are:

a) Whether an assignment from ICS exists in favour of NH in respect of the Monies payable by CIB for NH's work on the Project ("the frozen sum').

b) Whether a trust exists in respect of the frozen sums for the benefit of contractors on the project.

c) If so whether such a trust is enforceable by NH.

THE CLAIM

21. The claimant NH's claim arises out of 2 actions which were consolidated and in which it seeks the following relief (inter alia):

22. (i) By a Writ of Summons filed on November 5, 1999 (now CV No. 2009 – 03844), amended on January 6, 2000 the Plaintiff, NH International (Caribbean) Limited (hereinafter called "The Plaintiff" or "NH") brought an action against CLICO Investment Bank Limited (hereinafter called "CIB") I.C.S. (Grenada) Limited (hereinafter called "ICS") and National Stadium Project (Grenada) Corporation (hereinafter called "NS"), and claimed:

(ii) A declaration that NS is a trustee for ICS of the rights and obligations accruing to it under the Facility Agreement between CIB and NS.

(iii)A declaration that there is a binding assignment in favour of NH of so much of the monies due and to become due from CIB under the Facility Agreement as would from time to time be due and payable to NH under the construction agreement dated June 6, 1997.

(iv)As against ICS and NS a declaration that there is a binding assignment in favour of NH of so much of the monies due and to become due from NS to ICS under the agreement annexed to the Development Agreement as would from time to time be due and payable to NH under the Construction agreement.

23.

(i) further and/or alternatively a declaration that the sum of $7,430,724.70 (the EC Sum) was held on trust for NH;

(ii) a declaration that the sum of US 2,682,719.24 (the **Deposited Amount**, together with all interest accumulated thereon and the **Additional sum** of US 93,174.54 are held on trust for NH;

(iii) alternatively, a declaration that the Deposited Amount and the Additional Sum are held on trust for the sole purpose of applying the same in payment of suppliers and other providers of goods and services in relation to the Project;

(iv) a declaration that NH as a supplier of goods and services in relation to the Project is entitled to enforce the said trust for its benefit;

(v) an order that the **Deposited Amount** and the **Additional sum**, be paid out to NH;

(vi) Interest;

CHRONOLOGY

24.

(i) March 19 1996 – Incorporation of ICSL in Trinidad.

(ii) 1996-The Proposal.

(iii) 24th December, 1996 – letter of award.

(iv) January, 1997- Memorandum of Understanding [EPE2].

(v) April 11, 1997 -The incorporation of National Stadium NS.

(vi) April 11, 1997 -The formation of ICS in Grenada.

(vii)April, 1997-The Supplemental Memorandum of Understanding.

(viii) May 1, 1997- Submission of Tender by NH.

(ix) May 9, 1997 -Enactment of Act No. 8 of 1997 by the Parliament of Grenada.

(x) May 15 1997 - The Conduit Agreement

(xi) May 15 1997 - The Facility Agreement

(xii) May 15 1997 - The Development Agreement

(xiii) June 6 1997 - The Construction agreement

(xiv) November 1999 - Termination of construction contract

(xv) March 18 2002 - Arbitration award.

THE PROJECT DOCUMENTATION

25. On March 19 1996 Mr. Colm Imbert formed the company Imbert Construction Services Limited ICSL, a Trinidad company.

26. On November 1 1996 he made a **proposal** to the Government of Grenada for ICSL to implement and develop a sporting complex including arranging the finance for the construction, through financing arranged by Clico Investment Bank (CIB).

The award

27. This proposal led to the Government entering into an **agreement**, awarding a contract to ICSL for the construction of the complex **by letter of 24th December, 1996.**

The Memorandum of Understanding

28. That agreement was subsequently confirmed by the Government in a Memorandum of Understanding, which was made between the Government, ICSL and CIB in January, 1997. Those parties agreed that ICSL would be engaged by the GOG "to implement and manage the Project and to develop the physical works (associated with the National Stadium of Grenada) based on designs approved by the GOG through a special purpose development company (therein called "the Project Corporation") to be formed and owned by ICSL and attend to the legal and administrative and financial issues necessary to ensure the efficient implementation of the Project.

29. The **Memorandum of Understanding** reflects that **ICSL was awarded the contract** to design, finance, construct, lease and lease back the project and that the Project Corporation, the special purpose company to be **formed** and **owned** by ICS, would engage CIB to use its best efforts to arrange finance.

30**.** **The project company** (NS) contemplated by the Memorandum of Understanding with the Government, (owned by ICSL**) was the vehicle through which ICS and the subcontractors would be paid** such sums as were due and owing. **The Project Corporation was to make all necessary payments to ICSL and the subcontractors and to CIB for the implementation of the project.** [Clause 3 (iii)]

The Supplemental Memorandum of Understanding

31. By a Supplemental MOU made in April, 1997 [**EPE4**] made between the GOG, the Minister of Finance as Corporation Sole ("MOF"), ICSL, CIB, ICS Grenada and NS it was agreed that **the rights and obligations of ICSL under the MOU would be taken over or assumed by ICS** Grenada and that since the execution of the original MOU, the Project Corporation contemplated by Item 1 of the original MOU therein had since been formed and **the Project Corporation is the special purpose development corporation [namely, NS**] contemplated therein and that the MOF adopts the MOU in so far as necessary or desirable under the laws of Grenada.

The formation of ICS in Grenada

32. **In March, 1997, Mr. Imbert gave instructions for the formation of ICS Grenada Limited (**ICS) which was incorporated on April 11, 1997.

The incorporation of NS

33. **In March of 1997 Mr. Imbert also gave instructions for the incorporation of** National Stadium Project (Grenada) Corporation ("National Stadium" **or "NS**"), the special purpose development company formed and owned by ICS. *See his witness statement, at paragraph 9.*

34. The Certificate of Incorporation for NS was filed on April 11, 1997 [**EPE 56**].

35. The incorporator of NS and ICS was Mr. Neville Leroy Neckles and the directors of NS and ICS were Mr. Colm Imbert (from 1997 to March 1st 2002) and the said Mr. Neville Leroy

Neckles. (EPE **56)** Although NS was not owned **by** ICS, both ICS and NS had a common incorporator Mr. Neckles and two common directors, Mr. Imbert and Mr. Neckles, who conducted the affairs of NS and ICS "collectively" **[EPE 55]**.

Submission of Tender by NH

36. On May 1, 1997 NH submitted a written Tender [**EPE 5**] to ICS Grenada for the execution of works in connection with the Project in the sum of EC $43,502,812.00.

Enactment of Act No. 8 of 1997 by the Parliament of Grenada

37. On May 9, 1997 the Parliament of Grenada passed the *Grenada National Stadium (Development and Finance) Act, 1997 (Act No. 8 of 1997)* which received the assent of the Deputy Governor General on May 12, 1997. This Act enacted into the laws of Grenada the **Facility Agreement** (Schedule B), the **Development Agreement** (Schedule C) and the Reconveyance Agreement (Schedule D). **[Tab 84 of NS' Supplemental Bundle].** All the Project Agreements were to be governed by the laws of Grenada but no issue is raised as to any divergence in their interpretation under the laws of Grenada and the laws of Trinidad and Tobago.

38. Three agreements were executed on the 15th May, 1997- namely

1. **The Development Agreement**,
2. The **Facility Agreement** and
3. The **contract between NS and ICS**, to carry out the works for the sum of U.S. $23 million dollars.

The Development Agreement

39. **On 15th May 1997 four parties**, that is:

(i) the Government of **Grenada, ICS Grenada, Clico Investment Bank Limited** ("CIB") and **National Stadium** executed the **Development Agreement** ("the Development Agreement") under which, inter alia, ICS agreed to undertake the development of the Project in accordance with a contract to be entered into with National Stadium (being the contract immediately hereinafter referred to);

(ii) National Stadium and ICS executed an agreement under which ICS agreed to carry out the Project works for the sum of US$23,000,000.00.

40. **The Development Agreement** recites all the agreements between the parties, (the Facility Agreement, the MOU, and the supplemental MOU) sets out **the role of the project company, [NS]** sets out **the role of the developer** [**ICS Grenada**] and sets out **the role of CIB as financing agent.**

It recited that the Government of Grenada had agreed to award ICS a contract to carry out the Project works and that ICS intended to finance such works by means of finance provided by CIB. **The Development Agreement** also recited the execution of the **Facility Agreement**.

The first recital sets out ICSL's proposal.

The second recital recites the agreement to award the contract to ICS Grenada by letter of the 24th December. 1996.

The third recital sets out that the developer, (ICS), intends to finance the works by means of finance provided by the financing agent, that is CIB.

The fourth recital sets out that: "*Whereas the project company and the Financing agent have entered into an agreement, hereinafter called the* ***Facility Agreement****, for the making of* ***advances*** *by* ***the financing agent*** *on behalf of the Developer* ***through the Project Company to the developer*** *or a consultant or supplier* ***or other provider of goods and services in respect of the project."(It is agreed as follows …***

41. In the definition section at 1.1.23, **Project Company** is defined as meaning the company called **National Stadium Project (Grenada) Corporation** which was **specifically formed by** or on behalf of the **developer**, (**ICS)**, for the purpose of carrying out the project and includes its successors in title.

Clause 5 of the Development Agreement provided that ICS would finance the Project through CIB as set out in the Facility Agreement.

42. "Contract Documents" in Clause 1.1.10 of the Development Agreement means: (a) the Proposal; (b) the Award; (c) the MOU [and Supplemental MOU]; and (d) the [Development] Agreement

43. Clause 6.5 contained an undertaking by CIB that under the Facility Agreement it would pay or cause to be paid through National Stadium all monies due under the contract documents to

ICS, *consultants, suppliers and other providers of goods and services in relation to the Project* as follows:-

6. "In consideration of the agreement of the Developer set out in Clause 2 the Project Company [NS] shall:

……

and the Financing Agent [CIB] shall…

6.5 under and pursuant to the Facility Agreement pay or cause to be paid through the Project Company all monies due under or pursuant to the Contract Documents *to the Developer, consultants, suppliers and other providers of goods and services in relation to the Project."* ***[D 84 at pgs 177-178] [Emphasis added]***

44. It may be noted that the money due under the contract documents includes monies due under the Development Agreement, which includes payments in respect of the "Project" (which as defined includes design and construction of sporting facilities) to suppliers and providers of goods and services. This must include sub contractors like NH who was awarded a subcontract initially contemplated to be 70% of the cost of the entire project.

*"10 **Assignment***

*Neither party shall be entitled to assign all or part of **its rights** or obligations **hereunder without the prior written consent of the other par**ty such consent not to be withheld unreasonably or*

without giving reason therefor provided that nothing herein shall prevent the Developer from sub-letting all or any part of its rights or obligations under the Contract."

The Facility Agreement

45. On 15th May 1997 National Stadium and CIB entered into the **Facility Agreement**. The Facility Agreement recited CIB's agreement to arrange a bond issue on behalf of National Stadium, the proceeds of which were to be used to construct a sporting complex in Grenada. CIB was to make advances to or on behalf of National Stadium up to a maximum amount of US$23,000,000.00 [the Facility] such advances to be used solely for the purpose of the Project (emphasis added) *See Clauses 2.1 and 3.1 of the Facility Agreement*).

46. **Financing** for the Project arranged by CIB took the form of advances made by CIB from funds lent by a variety of investors and secured by bonds issued by National Stadium.

47. The Facility Agreement provided for ***borrowing by NS*** in a sum not to exceed US$29 million, (*as stated in Recital A of the Trust Deed in Annex 2 on **pg 120** of the Act **[D 84])* "***by the issue and sale of Floating Rate Bonds***."

48. The first recital of this agreement sets out the **purpose** for which the Facility had been arranged as follows "*Whereas the trustee has agreed to arrange a bond issue on behalf of the company, **the proceeds of which are to be used to construct a sporting complex at Queens Park."***

49. The definition of builder is as follows:

*"**The builder means, NH International Limited and Emile Elias and Company Limited".***

This confirms that discussions had been taking place with NH prior to execution of the Facility Agreement, that is, prior to 15th May 1997.

50. *Clause 1.1.5* defines **contract** as "**The fixed price contract for the construction of the project to be entered into between the company NS and the (developer), ICS** Grenada".

51. At 4.2B, it was a condition precedent of the agreement that the Company, NS, and the developer, ICS, shall have entered into the Contract for the construction of the Project.

52. And at 4.2 C, that: "The builder shall have established an irrevocable performance bond with a Surety acceptable to Trustee ... for a sum of not less than three million one hundred thousand dollars."

It was contended that this demonstrates that before in fact NH had entered into a contract, that the question of a performance bond and the extent of the performance bond over and above an industry norm of ten per cent had been discussed.

53. Recital D of the Trust Deed on pg 120 states that the Trustee (CIB) had agreed to act as trustee for the benefit of the Bondholders on and **subject to the terms and conditions set out in the Trust Deed.**

It was submitted that the Trust Deed created an express trust in favour of the Bondholders. No doubt it did with respect to their rights and the enforcement thereof under the Trust Deed. However the bondholders have been repaid. Their express rights of enforcement created under the trust deed are therefore spent. Further this does not mean that this precludes any other trust, not inconsistent therewith, arising by operation of law.

The Agreement between NS and ICS

54. Simultaneously with the execution of the Facility Agreement, National Stadium engaged ICS Grenada to carry out and complete the works for the sum of US$23,000,000.00.

55. National Stadium was to receive 23 million dollars US, under the Facility Agreement and agreed to pay 23 million dollars US to the developer ICS Grenada. No profit was to be retained by National Stadium.

The Construction Agreement

56. Prior to the execution of these documents Mr. Imbert the principal behind ICS and a director of National Stadium, met with representatives of NH International (Caribbean) Limited ("NH"), to negotiate inter alia a sub-contracting of 70% by value of the Project works by ICS to NH.

57. Subsequent to these meetings agreement was reached between the parties and on 6th June 1997 ICS entered into a contract ("**the Construction Agreement**") with NH for the execution by the latter of works in relation to the Project for the sum of EC$43,502,812.00 or approximately

US$16,100,000.00("the Contract Sum").

THE QUISTCLOSE ARGUMENT

58. It was contended that the funds obtained from investors payable by CIB to NS under the Facility Agreement were impressed with a trust in favour of suppliers and providers to the Project, including NH, enforceable therefore by NH as a beneficiary of that trust.

Whether a Trust was created

59.

(i) The monies advanced by investors to CIB for disbursement under the Facility Agreement were advanced for the construction of the Project.

(ii) Those monies were intended by the investors, CIB and National Stadium to be used by CIB to ensure payment to the suppliers of goods and services for the Project at the appropriate time.

(iii) Those monies were for no other purpose.

The primary purpose of the monies to be advanced by CIB to NS was therefore payment of these suppliers (including NH) and those monies were the subject of a trust for that purpose. Furthermore CIB itself received and held the monies advanced by investors on trust to so apply it**.**

The Law

60. The law has developed in a series of cases in which the creation and enforcement of trusts by creditors and lenders, in relation to third parties, has been considered.

Barclays Bank Ltd v Quistclose Investments Limited [1970] A.C. 567. The facts hereunder are taken from the headnote at p. 567 D – F.

R. Ltd., who were in serious financial difficulties, having an overdraft with their bank, the appellants, of some £484,000 against a permitted limit of £250,000, commenced negotiations with X, a financier, with a view to obtaining a loan of £1,000,000, and it was suggested that such a loan might be made on condition that R. Ltd. found a sum of £209,719 8s. 6d. which was needed to meet an ordinary share dividend which R- Ltd. had declared on July 2, 1964. R. Ltd. succeeded in obtaining a loan of that sum from the respondents. The loan was made ***on the agreed condition*** *that it would be used to pay the dividend. The respondents' cheque was* ***paid into a separate account*** *opened specially for the purpose with the* ***appellants****, who* ***knew*** *that the money was borrowed and who* ***agreed*** *with R. Ltd. that the* ***account would only be used for the purpose of paying the dividend****. Before the dividend had been paid, however, R. Ltd. went into voluntary liquidation.*

The respondents brought an action against R. Ltd. and the appellants claiming that the money had been held by R. Ltd. on trust to pay the dividend; that, that ***trust having failed****, it was held on a resulting trust for the respondents, and that the appellants had had notice of the trusts and were, accordingly, constructive trustees of the money for the respondents.*

61. Per Lord Wilberforce at page 580 A-C:

*"There is equally, in my opinion, no doubt that the loan was made **only** so as to enable Rolls Razor Ltd. to pay the dividend and for no other purpose. This follows quite clearly from the terms of the letter of Rolls Razor Ltd. to the bank of July 15, 1964, which letter, before transmission to the bank, was sent to the respondents under open cover in order that the cheque might be (as it was) enclosed in it. The mutual intention of the respondents and of Rolls Razor Ltd., and the essence of the bargain, was that the sum advanced should not become part of the assets of Rolls Razor Ltd., but should be used **exclusively** for payment of a particular class of its creditors, namely, those entitled to the dividend. **A necessary consequence from this, by process simply of interpretation, must be that if, for any reason, the dividend could not be paid, the money was to be returned to the respondents: the word "only" or "exclusively" can have no other meaning or effect.**"* [**Emphasis added**.]

*"That arrangements of this character for the payment of a person's creditors by a third person, give rise to a relationship of a fiduciary character or trust, **in favour, as a primary trust, of the creditors**, and **secondarily, if the primary trust fails, of the third person**, has been recognised in a series of cases over some 150 years".*

62. And later at page 581D to 582A:

…."The transaction, it was said, between the respondents and Rolls Razor Ltd., was one of loan, giving rise to a legal action of debt. This necessarily excluded the implication of any trust, enforceable in equity, in the respondents' favour: a transaction may attract one action or the other, it could not admit of both.

My Lords, I must say that I find this argument unattractive. Let us see what it involves. It means

that the law does not permit an arrangement to be made by which one person agrees to advance money to another, on terms that the money is to be used exclusively to pay debts of the latter, and ***if, and so far as not so used****, rather than becoming a general asset of the latter available to his creditors at large, is to be returned to the lender. The lender is obliged, in such a case, because he is a lender, to accept, whatever the mutual wishes of lender and borrower may be, that the money he was* ***willing to make available for one purpose only shall be freely available for others of the borrower's creditors for whom he has not the slightest desire to provide****.*

I should be surprised if an argument of this kind—so conceptualist in character—had ever been accepted. In truth it has plainly been rejected by the eminent judges who from 1819 onwards have permitted arrangements of this type to be enforced, and have approved them as being for the benefit of creditors and all concerned. ***There is surely no difficulty in recognising the co-existence in one transaction of legal and equitable rights and remedies****: when the money is advanced, the lender acquires an equitable right to see that it is applied for the primary designated purpose (see In re Rogers, 8 Morr. 243 where both Lindley LJ. and Kay L.J. recognised this):* ***when the purpose has been carried out (i.e., the debt paid) the lender has his remedy against the borrower in debt: if the primary purpose cannot be carried out, the question arises if a secondary purpose (i.e., repayment to the lender) has been agreed, expressly or by implication: if it has, the remedies of equity may be invoked to give effect to it, if it has not (and the money is intended to fall within the general fund of the debtor's assets) then there is the appropriate remedy for recovery of a loan****."* [**Emphasis added.**]

63. Lord Wilberforce considered and declined to depart from several cases in which it was held that **arrangements for the payment of a person's creditors by a third person can give rise to a relationship of a fiduciary character or trust, in favour, as a primary trust, of the**

creditors, and **secondarily, if the primary trust fails, of the third person.**

64. He also found that **since legal and equitable rights and remedies can co-exist in one transaction,** the fact that the transaction of loan gave rise to a legal action of debt did not of itself exclude the implication of a trust enforceable in equity. A **trust (**which equity could give effect to), **for the benefit of the Lenders** could arise if the secondary purpose (for their repayment) **had been agreed expressly or by implication if the primary purpose to pay the dividend failed** (which it had). When the primary purpose had been carried out the lender had his remedy against the borrower in debt.

65. In the instant case the primary purpose has not yet been fulfilled because the EC sum was frozen, but it can yet be carried out. The lender has been repaid so its remedies in debt are no longer relevant. There is no debt outstanding to it.

Carreras Rothmans Ltd. v Freeman Matthews Treasure Ltd (in liq.) and Another [1985] 1 All E.R. 155.

66. In **Carreras**, monies were paid by the Plaintiff into a special bank account at the Defendant's bank for the sole purpose of assisting the Defendant to settle its debts to agency and media creditors. The facts hereunder are taken from the headnote of the report.

67. *The plaintiff manufactured cigarettes and brands of tobacco which it advertised extensively in newspapers, periodicals and by means of posters. For many years, the defendant, a company*

carrying on the business of an advertising agency, had undertaken services for the plaintiff. In 1979 the defendant undertook all the plaintiffs' placement work, namely, producing from the artwork all that was needed for the advertisements to be printed and buying space in publications and on bill boards. In doing that work the defendant negotiated favourable discounts for advertising space and incurred debts as a principal to third parties for the space bought and for certain technical services. The plaintiff paid the defendant an annual fee in monthly installment for the placement work and each month the plaintiff would pay the defendant a sum equivalent to the amount of the invoices received by the defendant from third parties for liabilities incurred the previous month. The plaintiff paid the money in time for the defendant to pay the third parties when the debts became due for payment, which was usually at the end of the month. The defendant was in financial difficulties and, at the suggestion of the plaintiff, it agreed in July 1983 that a special account should be opened into which the plaintiff P would pay a sum equivalent to the moneys due to third parties. Under that July agreement the plaintiff paid into the special account a sum of money to meet the invoices for June liabilities payable by the defendant at the end of July. The defendant drew the cheques necessary to pay the third parties on that account but on 3 August the defendant went into a creditors' voluntary liquidation and its liquidator arranged for the special account to be frozen before the cheques were cleared. –The plaintiff was taken by surprise by the winding up of the defendant. .....it paid the third parties for debts incurred by the defendant in June and July and took assignments of those debts. .... The plaintiff brought an action against the defendant and its liquidator for a declaration that the moneys in the special account were held on trust for the sole purpose of paying the third party creditors and for an order for those moneys to be repaid to the plaintiff.

Held, (1) that under the terms of the July agreement the moneys paid by the plaintiff into the special account to meet the June debts owed by the defendant to third parties were never held by the defendant beneficially; that since the moneys had been placed in a special account for a specific purpose, equity required that the moneys were used only for that purpose; that, accordingly, the July agreement did create a trust and the plaintiff had a right to enforce the payment over of moneys in the special account to the third parties and the third parties had an interest in the orderly administration of those trust funds F (post, pp. 220F-H, 221B-C, 222B-C, 224C-D).

Quistclose Investments Ltd. v. Rolls Razor Ltd. [1970] A.C. 567, H.L.(E.) applied.

68. At page 211 the arrangement is described as follows:-

The scheme to protect the third parties was incorporated in the plaintiff's "contract letter," which read:

> *". . .As regards payments made to you for purely onwards transmission (in effect) to the media and production agencies by way of reimbursement for past services, we require the following arrangements to be approved and implemented by you before we\ are prepared to make further payments."*

"In essence, we require such payments to be paid to a special account to be opened by you at your bank for the purposes only of meeting the accounts of media and production agencies incurred on your behalf for Carreras Rothmans. The bare bones of the arrangement are as follows: 1. Your agreement to setting up a special account at your bank under the title of 'FMT/Carreras Rothmans Client Account.' 2. All moneys received by you from us for such account will be clearly marked 'FMT/Carreras Rothmans Client Account Only' and payable ***only***

*into such account. 3. The moneys in the account will be used **only** for the purposes of meeting the accounts of the media and production fees of third parties directly attributable to Carreras Rothmans involvement with the agency. 4. The account will be used **only** for the purposes in (3) above and no other moneys will be paid in or out of such account. 5. In the event of any balance occurring in the account after the payment as in (3) then such sum will be repaid to us (obviously this should never occur in the usual course of things). 6. We are supplied with fortnightly statements in respect of the account through your good selves as supplied by the bank. 7. We receive written confirmation from the bank that they are aware of the conditions and purpose of this account prior to our cheque (shortly due to be paid) being sent to you and that such an account has been opened. 8. In consideration for your meeting the above arrangements, we pay a one-off fee of £150 plus VAT against receipt of the appropriate invoice."*

"Upon receiving your written confirmation of the above, we foresee no delay in making future payments to you in respect of placements charges etc."

"A special account was opened and the contract letter was signed by the defendant and handed back to the plaintiff on 26 July. Under that agreement (the "July agreement") a cheque was paid into the special account for the amount of the invoices relating to debts incurred in June from third party creditors. The defendant paid the third parties promptly and cheques were sent off on or by 29 July."

69. *(At page 220 of the judgment of Peter Gibson J- emphasis added)*

"(1) Trust

Mr. Millett and Mr. Higham for the plaintiff contended that the language of the contract letter was apt to create a trust and that such trust was fully constituted as to the moneys in the special account when the defendant agreed to the terms of the contract letter and received the moneys from the plaintiff. They relied on the line of cases of which Quistclose Investments Ltd. v. Rolls Razor Ltd. [1970] A.C. 567 is the highest authority. Mr. Potts denied that any enforceable trust was created. He submitted that the language of the contract letter was apt to create obligations of a contractual nature only in relation to the moneys to be paid into the special account, that the Quistclose line of cases was distinguishable, that if there were a trust it was an illusory trust and that in any event the court should not order specific performance of the July agreement to perform any trust that was created.

The July agreement was plainly intended to vary the contractual position of the parties as to how, as the contract letter put it, payments made by the plaintiff to the defendant ***for purely onwards transmission, in effect, to the third party creditors, would be dealt with****. If one looks objectively at the genesis of the variation, the plaintiff was concerned about the adverse effect on it if the defendant, which the plaintiff knew to have financial problems, ceased trading and the third party creditors of the defendant were not paid at a time when the defendant had been put in funds by the plaintiff. The objective was accurately described by Mr. Higgs in his informal letter of 19 July as to protect the interests of the plaintiff and the third parties. For this purpose a special account was to be set up with a special designation.* ***The moneys payable by the plaintiff were to be paid not to the defendant beneficially but directly into that account so that the defendant was never free to deal as it pleased with the***

moneys so paid. *The moneys were to be used only for the specific purpose of paying the third parties and as the cheque letter indicated, the amount paid matched the specific invoices presented by the defendant to the plaintiff.* ***The account was intended to be little more than a conduit pipe, but the intention was plain that whilst in the conduit pipe the moneys should be protected***. *There was even a provision covering the possibility (though what actual situation it was intended to meet it is hard to conceive) that there might be a balance left after payment and in that event the balance was to be paid to the plaintiff and not kept by the defendant.* ***It was thus clearly intended that the moneys once paid would never become the property of the defendant.*** *That was the last thing the plaintiff wanted in view of its concern about the defendant's financial position. As a further precaution* ***the bank was to be put on notice of the conditions and purpose of the account. I infer that this was to prevent the bank attempting to exercise any rights of set off against the moneys in the account.***

70. In my judgment even in the absence of authority ***it is manifest that the defendant was intended to act in relation to those moneys in a fiduciary capacity only.***

There is of course ample authority that moneys paid by A to B for a specific purpose which has been made known to B are clothed with a trust. *In the Quistclose* ***case [1970] A.C. 567, 580*** *Lord Wilberforce referred to the recognition, in a series of cases over some 150 years, that arrangements for the payment of a person's creditors by a third person gives rise to*

> *"a relationship of a fiduciary character or trust, in favour, as a primary trust, of the creditors, and secondarily, if the primary trust fails, of the third person ..."*

Lord Wilberforce in describing the facts of the Quistclose case said a little earlier on p. 580 ***that the mutual intention of the provider of the moneys and of the recipient of the moneys***

and the essence of the bargain was that the moneys should not become part of the assets of the recipient but should be used exclusively for payment of a particular class of its creditors. *That description seems to me to be apt in relation to the facts of the present case too.*

Mr. Potts sought to distinguish the Quistclose case……..

In the Quistclose case Lord Wilberforce, in rejecting an argument that the lender only had contractual rights in a transaction of loan, said, at p. 581:

> *"There is surely no difficulty in recognising the co-existence in one transaction of legal and equitable rights and remedies: when the money is advanced, the lender acquires an equitable right to see that it is applied for the primary designated purpose."*

Mr. Potts submitted that there was no recognition in the Quistclose case that anyone else had an enforceable right and that in particular a person in the position of the plaintiff discharging a debt had no right to enforce any trust.

71. It is of course true that there are factual differences between the Quistclose case and the present case. The transaction there was one of loan with no contractual obligation on the part of the lender to make payment prior to the agreement for the loan. In the present case there is no loan but there is an antecedent debt owed by the plaintiff. I doubt if it is helpful to analyse the Quistclose type of case in terms of the constituent parts of a conventional settlement, though it may of course be crucial to ascertain in whose favour the secondary trust operates (as " in the Quistclose case itself) and who has an enforceable right. ***In my judgment the principle in all these cases is that equity fastens on the conscience of the person who***

receives from another property transferred for a specific purpose only and not therefore for the recipient's own purposes, so that such person will not be permitted to treat the property as his own or to use it for other than the stated purpose. *Most of the cases in this line are cases where there has been an agreement for consideration so that in one sense each party has contributed to providing the property.* ***But if the common intention is that property is transferred for a specific purpose and not so as to become the property of the transferee, the transferee cannot keep the property if for any reason that purpose cannot be fulfilled****. I am left in no doubt that the provider of the moneys in the present case was the plaintiff. ……..*

the fact remains that the plaintiff made its payment on the terms of that letter and the defendant received the moneys only for the stipulated purpose. That purpose was expressed to relate only to the moneys in the account. In my judgment therefore the plaintiff can be equated with the lender in Quistclose as having an enforceable right to compel the carrying out of the primary trust.

72. Mr. Potts also submitted that the third party creditors had no enforceable rights and that where the beneficiaries under the primary trust have no enforceable rights, no trust is created. Mr. Millett and Mr. Higham also submitted that the third party creditors had no enforceable rights, though that submission was made primarily with an eye to an argument relevant to the section 95 point that the beneficial interest in the moneys paid into the special account always remained in the plaintiffs. ***In none of the many reported cases in the Quistclose line of cases, so far as I am aware, has any consideration been given to the question whether the person intended to benefit from the carrying out of the specific purpose which created the trust had enforceable rights. Thus the existence of enforceable***

rights in such persons has not been treated as crucial to the existence of a trust. Further in the one case in which so far as I am aware the question who, in addition to the provider of the property, had enforceable rights was determined by the court, it was held that the persons intended to benefit from the carrying out of the primary trust did have enforceable rights. *That case is the decision of Sir Robert Megarry V.-C. in In re Northern Developments (Holdings) Ltd. (unreported), 6 October 1978-…*

The interest of the banks was held to be under the secondary trust ***if the primary trust failed****. In the light of that authority I cannot accept the joint submission that the third party creditors for the payment of whose debts the plaintiff had paid the moneys into the special account had no enforceable rights. In any event* ***I do not comprehend how a trust, which on no footing could the plaintiff revoke unilaterally, and which was expressed as a trust to pay third parties and was still capable of performance, could nevertheless leave the beneficial interest in the plaintiff which had parted with the moneys.*** *….*

73. ***In the present case the plaintiff seeks an order not for specific performance but for the carrying out of the primary trust in respect of moneys which not only are not the property of the defendant but never have been****. At the commencement of the liquidation its previous asset, the book debt, had been discharged. I see no reason why the court should not so order.*

74. ***In my judgment therefore a trust was created by the July agreement, the trust was completely constituted by the payment of moneys into the special account and the plaintiff as the provider of the moneys has an equitable right to an order for the carrying out by the defendant of the trust."***

75. In **Twinsectra v Yardley [2002] 2 A.C. 164** House of Lords the issue of the Quistclose trust was analysed by *Lord Millet*. It is worth setting out in full the analysis therein. He noted *Lord Wilberforce's* statement in *Quistclose*:

The starting point is provided by two passages in Lord Wilberforce's speech in the Quistclose cast [1970] AC 567. He stated, at 580:

"That arrangements of this character ***for the payment of a person's creditors*** *by a third person, give rise to a relationship of a fiduciary character or trust, in favour, as* ***a primary trust, of the creditors****, and secondarily,* ***if the primary trust fails, of the third person****, has been recognised in a series of cases over some 150 years."*

76. At p 581, he stated*:*

"when the money is advanced, the lender acquires an equitable right to see that it is applied for the primary designated purpose (see In re Rogers (1891) 8 Morr 243 where both Lindley LJ and Kay LJ recognised this). . ."

These passages suggest that there are two successive trusts, a ***primary trust*** *for payment to identifiable beneficiaries, such as creditors or shareholders, and* ***a secondary trust in favour of the lender arising on the failure of the primary trust****. But there are formidable difficulties in this analysis,* ***which has little academic support****. What if the primary trust is not for identifiable persons, but as in the present case to carry out an abstract purpose? Where in such a case is the beneficial interest* ***pending the application of the***

money for the stated purpose *or the* ***failure of the purpose****?* ***There are four possibilities****: (i)* ***in the lender****; (ii)* ***in the borrower****; (iii)* ***in the contemplated beneficiary****; or (iv)* ***in suspense****.*

(i) The lender. In "The Quistclose Trust: Who Can Enforce It?" (1985) 101 LQR, 269, I argued that the beneficial interest remained throughout in the lender. This analysis has received considerable though not universal academic support: see for example Priestley LJ "The Romalpa Clause and the Quistclose Trust" in Equity and Commercial Relationships, edited by P D Finn (1987), pp 217, 237; and Professor Michael Bridge "The Quistclose Trust in a World of Secured Transactions" (1992) 12 OJLS 333, 352; and others. ***It was adopted by the New Zealand Court of Appeal in General Communications Ltd v Development Finance Corpn of New Zealand Ltd [1990] 3 NZLR 406*** *and referred to with apparent approval by Gummow J in In re Australian Elizabethan Theatre Trust (1991) 102 ALR 681. Gummow J saw nothing special in the Quistclose trust, regarding it as essentially a security device to protect the lender against other creditors of the borrower pending the application of the money for the stated purpose.*

On this analysis, the Quistclose trust is a simple commercial arrangement akin (as Professor Bridge observes) to a retention of title clause (though with a different object) which enables the borrower to have recourse to the lender's money for a particular purpose ***without entrenching on the lender's property rights more than necessary to enable the purpose to be achieved. The money remains the property of the lender unless and until it is applied in accordance with his directions, and insofar as it is not***

so applied it must be returned to him. I am disposed, perhaps pre-disposed, to think that this is the only analysis which is consistent both with orthodox trust law and with commercial reality*. Before reaching a concluded view that it should be adopted, however, I must consider the alternatives.*

(iii) The borrower.

It is plain that the beneficial interest is not vested unconditionally in the borrower so as to leave the money at his free disposal. ***That would defeat the whole purpose of the arrangements, which is to prevent the money from passing to the borrower's trustee in bankruptcy in the event of his insolvency****. It would also be inconsistent with all the decided cases where the contest was between the lender and the* ***borrower's trustee in bankruptcy,*** *as well as with the Quistclose case itself: see in particular Toovey v Milne (1819) 2 B &C Aid 683; In re Rogers, Ex p Holland & Hannen (1891) 8 Morr 243 (supra).*

The borrower's interest pending the application of the money for the stated purpose or its return to the lender is minimal. He must keep the money separate; he cannot apply it except for the stated purpose; unless the terms of the loan otherwise provide he must return it to the lender if demanded; he cannot refuse to return it if the stated purpose cannot be achieved; and if he becomes bankrupt it does not vest in his trustee in bankruptcy. If there is any content to beneficial ownership at all, the lender is the beneficial owner and the borrower is not.

In the present case the Court of Appeal adopted a variant, locating the beneficial interest

in the borrower but subject to restrictions. I shall have to return to this analysis later.

(iii) In the contemplated beneficiary. In the Quistclose case itself [1970] AC 567, ***as in all the reported cases which preceded it, either the primary purpose had been carried out and the contest was between the borrower's trustee in bankruptcy or liquidator and the person or persons to whom the borrower had paid the money;*** *or it was treated as having failed, and the contest was between the borrower's trustee-in-bankruptcy and the lender. It was not necessary to explore the position while the primary purpose* ***was still capable of being carried out*** *and Lord Wilberforce's observations must be read in that light.*

The question whether the primary trust is accurately described as a trust for the creditors first arose in re Northern Developments (Holdings) Ltd (unreported) 6 October 1978, where the contest was between the lender and the creditors. The borrower, which was not in liquidation and made no claim to the money, was the parent company of a group one of whose subsidiaries was in financial difficulty. There was a danger that if it were wound up or ceased trading it would bring down the whole group. A consortium of the group's banks agreed to put up a fund of more than £500,000 in an attempt to rescue the subsidiary. They ***paid the money into a special account*** *in the name of the parent company for the* ***express purpose of "providing money for the subsidiary's unsecured creditors over the ensuing weeks" and for no other purpose.*** *The banks' object was to enable the subsidiary to continue trading, though on a reduced scale; it failed when the subsidiary was put into receivership at a time when some £350,000 remained*

unexpended. Relying on Lord Wilberforce's observations in the passages cited above, Sir Robert Megarry V-C ***held that the primary trust was a purpose trust enforceable (inter alios) by the subsidiaries' creditors as the persons for whose benefit the trust was created.***

There are several difficulties with this analysis. In the first place, Lord Wilberforce's reference to In re Rogers 8 Morr. 243 makes it plain that the equitable right he had in mind was not a mandatory order to compel performance, but a negative injunction to restrain improper application of the money; for neither Lindley LJ nor Kay LJ recognised more than this. In the second place, the object of the arrangements was to enable the subsidiary to continue trading, and this would necessarily involve it in incurring further liabilities to trade creditors. Accordingly the application of the fund was not confined to existing creditors at the date when the fund was established. The company secretary was given to understand that the purpose of the arrangements was to keep the subsidiary trading, and that the fund was "as good as share capital". Thus the purpose of the arrangements was not, as in other cases, to enable the debtor to avoid bankruptcy by paying off ***existing creditors****, but to enable the* ***debtor*** *to continue trading by providing it with working capital with which to incur fresh liabilities. There is a powerful argument for saying that the result of the arrangements was to vest a beneficial interest in the subsidiary from the start,* ***if so, then this was not a Quistclose trust at all.***

In the third place, it seems unlikely that the banks' object was to benefit the creditors (who included the Inland Revenue) except indirectly. The banks had their own commercial interests to protect by enabling the subsidiary to trade out of its difficulties*.*

If so, then the primary trust cannot be supported as a valid non-charitable purpose trust: see In re Grant's Will Trusts, Harris v Anderson [1980] 1 WLR 360 and cf In re Denley's Trust Deed [1969] 1 Ch 373.

The most serious objection to this approach is exemplified by the facts of the present case. In several of the cases the primary trust was for an abstract purpose with no one but the lender to enforce performance or restrain misapplication of the money. In Edwards v Glyn (18 59) 2 E & E the money was advanced to a bank to enable the bank to meet a run. In re EVTR, Gilbert v Barber [1987] BCLC 646 it was advanced "for the sole purpose of buying new equipment". In General Communications Ltd v Development Finance Corpn of New Zealand Ltd [1990] 3 NZLR 406 the money was paid to the borrower's solicitors for the express purpose of purchasing new equipment. The present case is another example. It is simply not possible to hold money on trust to acquire unspecified property from an unspecified vendor at an unspecified time. There is no reason to make an arbitrary distinction between money paid for an abstract purpose and money paid for a purpose which can be said to benefit an ascertained class of beneficiaries, and the cases rightly draw no such distinction. Any analysis of the Quistclose trust must be able to accommodate gifts and loans for an abstract purpose.

I note that in the instant case the providers and suppliers to the Project are identifiable, as is the nature of their supply (goods and services for the Project) NH is even expressly named as the Builder in the Facility Agreement.

77. *"(iv) In suspense. As Peter Gibson J pointed out in Carreras Rothmans Ltd v Freeman Matthews Treasure Ltd [1985] Ch 207, 223 the effect of adopting Sir Robert Megarry V-C's analysis is to leave the beneficial interest in suspense until the stated purpose is carried out or fails. The difficulty with this (apart from its unorthodoxy) is that it fails to have regard to the role which the resulting trust plays in equity's scheme of things, or to explain why the money is not simply held on a resulting trust for the lender.*

Lord Browne-Wilkinson gave an authoritative explanation of the resulting trust in ***Westdeutsche Landesbank Girpcentrale v Islington Borough Council*** *[1996] AC 669, 708c and its basis has been further illuminated by Dr Robert Chambers in his book Resulting Trusts published in 1997. Lord Browne-Wilkinson explained that a resulting trust arises in two sets of circumstances. He described the second as follows: "Where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest." The Quistclose case [1970] AC 567 was among the cases he cited as examples. He rejected the argument that there was a resulting trust in the case before him because, unlike the situation in the present case, there was no transfer of money on express trusts. But he also rejected the argument on a wider and, in my respectful opinion, surer ground that the money was paid and received with the intention that it should become the absolute property of the recipient."*

(In the instant case the Project agreements do not contemplate that the Facility or

any part thereof should become the absolute property of NS).

78. *"The central thesis of Dr Chambers's book is that a resulting trust arises whenever there is a transfer of property in circumstances in which the transferor (or more accurately the person at whose expense the property was provided) did not intend to benefit the recipient. It responds to the absence of an intention on the part of the transferor to pass the entire beneficial interest, not to a positive intention to retain it. Insofar as the transfer does not exhaust the entire beneficial interest, the resulting trust is a default trust which fills the gap and leaves no room for any part to be in suspense. An analysis of the Quistclose trust as a resulting trust for the transferor* ***with a mandate to the transferee to apply the money for the stated purpose*** *sits comfortably with Dr Chambers' thesis, and it might be thought surprising that he does not adopt it.*

(v) The Court of Appeal's analysis. The Court of Appeal were content to treat the beneficial interest as in suspense, or (following Dr Chambers's analysis) to hold that it was in the borrower, the lender having merely a contractual right enforceable by injunction to prevent misapplication. Potter LJ put it in these terms [1999] Lloyd's Rep Bank 438, 456, para 75:

"The purpose imposed at the time of the advance creates an enforceable restriction on the borrower's use of the money. Although the lender's right to enforce the restriction is treated as arising on the basis of a 'trust', the use of that word does

not enlarge the lender's interest in the fund. The borrower is entitled to the beneficial use of the money, subject to the lender's right to prevent its misuse; the lender's limited interest in the fund is sufficient to prevent its use for other than the special purpose for which it was advanced."

79. *This analysis, with respect, is difficult to reconcile with the court's actual decision in so far as it granted Twinsectra a proprietary remedy against Mr Yardley's companies as recipients of the misapplied funds. Unless the money belonged to Twinsectra immediately before its misapplication, there is no basis on which a proprietary remedy against third party recipients can be justified.*

Thus all the alternative solutions have their difficulties. But there are two problems which they fail to solve, but which are easily solved ***if the beneficial interest remains throughout in the lender.*** *One arises from the fact, well established by the authorities, that the primary trust is enforceable by the lender. But on what basis can he enforce it? He cannot do so as the beneficiary under the secondary trust, for if the primary purpose is fulfilled there is no secondary trust: the precondition of his claim is destructive of his standing to make it. He cannot do so as settlor, for a settlor who retains no beneficial interest cannot enforce the trust which he has created.*

Dr Chambers insists that the lender has merely a right to prevent the misapplication of the money, and attributes this to his contractual right to specific performance of a condition of the contract of loan. As I have already pointed out, this provides no solution

where the arrangement is non-contractual. But Lord Wilberforce clearly based the borrower's obligation on an equitable or fiduciary basis and not a contractual one. He was concerned to justify the co-existence of equity's exclusive jurisdiction with the common law action for debt. Basing equity's intervention on its auxiliary jurisdiction to restrain a breach of contract would not have enabled the lender to succeed against the bank, which was a third party to the contract. There is only one explanation of the lender's fiduciary right to enforce the primary trust which can be reconciled with basic principle: he can do so because he is the beneficiary.

The other problem is concerned ***with the basis on which the primary trust is said to have failed in several of the cases****, particularly Toovey v Milne 2 B & A 683 and the Quistclose case itself [1970] AC 567. Given that the money did not belong to the borrower in either case, the borrower's insolvency should not have prevented the money from being paid in the manner contemplated. A man cannot pay some only of his creditors once he has been adjudicated bankrupt, but a third party can. A company cannot pay a dividend once it has gone into liquidation, but there is nothing to stop a third party from paying the disappointed shareholders. The reason why the purpose failed in each case must be because the lender's object in making the money available was to save the borrower from bankruptcy in the one case and collapse in the other. But this in itself is not enough.* ***A trust does not fail merely because the settlor's purpose in creating it has been frustrated: the trust must become illegal or impossible to perform. The settlor's motives must not be confused with the purpose of the trust; the frustration of the former does not by itself cause the failure of the latter. But if the borrower is***

treated as holding the money on a resulting trust for the lender <u>but with power (or in some cases a duty) to carry out the lender's revocable mandate,</u> and the lender's object in giving the mandate is frustrated, he is entitled to revoke the mandate and demand the return of money which never ceased to be his beneficially."

Whether the Purpose of the Trust has Failed

80. The analysis supra deals with the issue of whether the purpose of the trust can be said to have failed and makes a distinction between frustration of the settlor's intended purpose and the failure of that purpose by its impossibility or illegality.

81. I consider that in this case the purpose of the loan from CIB cannot be said to have failed – it was for the purpose of financing construction of the national stadium of Grenada. That construction took place. The EC funds were part of the Facility arranged for the purpose of paying contractors who performed that construction. The purpose was fulfilled. It was never rendered either impossible or illegal and the purpose of the trust can therefore still be carried out.

82. But the money in the instant situation was not applied because it was frozen, pending the determination at arbitration of the amounts owing, if any, under the construction contract.

83. That has now been determined. There is an arbitration award which sets out that sum. The delay in its determination and the fact that the money was held in abeyance by court order pending that determination cannot mean that the purpose of any primary trust has failed.

If there was ever such a primary trust (in this case for the payment of creditors) then

despite such delay that primary trust must continue to exist. This is consistent with the analysis of Lord Millett at paragraph 98 of his judgement when he considers the circumstances in which a trust can be considered to have failed.

84. He continued:-

"The case is, of course, even closer to the present than the traditional cases in which a Quistclose trust has been held to have been created. I do not think that subtle distinctions should be made between "true" Quistclose trusts and trusts which are merely analogous to them. It depends on how widely or narrowly you choose to define the Quistclose trust. ***There is clearly a wide range of situations in which the parties enter into a commercial arrangement which permits one party to have a limited use of the other's money for a stated purpose, is not free to apply it for any other purpose, and must return it if for any reason the purpose cannot be carried out****. The arrangement between the purchaser's solicitor and the purchaser's mortgagee is an example of just such an arrangement. All such arrangements should if possible be susceptible to the same analysis.*

As Sherlock Holmes reminded Dr Watson, when you have eliminated the impossible, whatever remains, however improbable, must be the truth. I would reject all the alternative analyses, which I find unconvincing for the reasons I have endeavoured to explain, and hold the Quistclose trust to be an entirely orthodox example of the kind of default trust known as a resulting trust. The lender pays the money to the borrower by way of loan, but he does not part with the entire beneficial interest in the money, and in so far as he does not it is held on a resulting trust for the lender from the outset. Contrary

*to the opinion of the Court of Appeal**, it is the borrower who has a very limited use of the money, being obliged to apply it for the stated purpose or return it. He has no beneficial interest in the money, which remains throughout in the lender subject only to the borrower's power or duty to apply the money in accordance with the lender's instructions. When the purpose fails, the money is returnable to the lender, not under some new trust in his favour which only comes into being on the failure of the purpose, but because the resulting trust in his favour is no longer subject to any power on the part of the borrower to make use of the money. Whether the borrower is obliged to apply the money for the stated purpose or merely at liberty to do so, and whether the lender can countermand the borrower's mandate while it is still capable of being carried out, must depend on the circumstances of the particular case.*

Certainty

After this over-long exposition, it is possible to dispose of the remaining objections to the creation of a Quistclose trust very shortly. ***A trust must have certainty of objects. But the only trust is the resulting trust for the lender. The borrower is authorised (or directed) to apply the money for a stated purpose, but this is a mere power and does not constitute a purpose trust. Provided the power is stated with sufficient clarity for the court to be able to determine whether it is still capable of being carried out or whether the money has been misapplied, it is sufficiently certain to be enforced****. If it is uncertain, however, then the borrower has no authority to make any use of the money at all and must return it to the lender under the resulting trust. Uncertainty works in favour of the lender, not the borrower; it cannot help a person in the position of Mr Leach.*

When the trust in favour of the lender arises

Like all resulting trusts, the trust in favour of the lender arises when the lender parts with the money on terms which do not exhaust the beneficial interest. It is not a contingent reversionary or future interest. It does not suddenly come into being like an 8th century use only when the stated purpose fails. It is a default trust which fills the gap when some part of the beneficial interest is undisposed of and prevents it from being "in suspense"".

Enforceability

85. I consider that Lord Millett's analysis is sufficiently comprehensive to encompass a wide range of situations and permutations including the instant one. In fact it demonstrates that it doesn't really matter,

1. Whether there is a single resulting trust in favour of the lender, if it is enforceable by the lender or enforceable **by the beneficiary (as contemplated in Carreras)** in respect of the power/purpose of the trust or,

2. Whether there is a primary **and** secondary trust as contemplated by Lord Wilberforce - as in that case the secondary trust in favour of the lender comes into being when the primary trust fails -. In this case the primary trust has not failed. It is therefore either enforceable **as to the terms of that primary trust** by the lender **or** by the beneficiary.

86. It does not matter which party can enforce the trust if what each party is able to enforce is the same thing - the application of the funds for the specified purpose of the trust – the trust not having failed.

87. I consider that the Quistclose trust is a special form of resulting trust. The identified purpose of the advancement of the funds cannot be ignored .If the purpose of the trust fails then the beneficial interest can revert to the lender (though in this specific case the provider of the funds has been repaid). But if that purpose does not fail, as is the case here, it can be enforced – both by the lender – as to the original terms and purpose of the trust – and by the beneficiary.

88. Lord Millet's concerns as to whether Northern Development dealt in reality with a Quistclose trust at all are shared,- though the reasoning as to the direct enforcement of such trust by beneficiaries , accepted as it was in the Carreras case, remains sound in principle.

89. I consider that direct enforcement of a Quistclose type special purpose resulting trust by a beneficiary is logically permissible under Lord Millet's analysis in Twinsectra, as well as by the reasoning in Carreras.

90. Lord Millett makes clear in Twinsectra (page 193 C – "***Whether the borrower is obliged to apply the money for the stated purpose or merely at liberty to do so, and whether the lender can countermand the borrower's mandate while it is still capable of being carried out, must depend on the circumstances of the particular case."***

91. In this case the lender is not the party seeking to enforce the trust. In default of its seeking to do so the issue is whether the beneficiary can do so. The claimant was the main subcontractor contemplated at the time – It is even referred to as the Builder in the statutorily enacted Facility Agreement.

92. In this case

1. The lender **cannot countermand** the borrower's mandate as there is no basis on which it can do so now and it has not sought to do so.
2. The borrower **cannot be merely at liberty to apply the monies**, with an option to retain it for itself.
3. The borrower's mandate is still capable of being carried out.
4. It follows that the borrower is **obliged** to apply the Facility monies for the stated purpose mandated under the contract documents – that is to pay contractors and subcontractors.

93. Any Quistclose trust in favour of CIB is **subject to the application of those monies subject to the trust,** for the primary purpose of that trust if it is capable of being carried out. I find that purpose, payment to providers of goods and services to the Project, is still capable of being carried out.

94. If there is a trust enforceable by the lender but on such terms

1. That the borrower cannot be merely at liberty to apply the monies save as contemplated under the contract documents (as the instant case),

2. That the lender **cannot countermand** the borrower's mandate (as the instant case),

3. That the borrower is obliged to apply the monies for the stated purpose – that is to pay contractors and subcontractors,

then there is no impediment to enforcing the trust by directly enforcing the mandate, at the instigation of a beneficiary such as NH (whether created by power, trust or duty) by ordering payment from CIB directly to the claimant NH.

95. It was contended that prior to the commencement of the 2006 Claim,

(a) The purpose was given effect; the Project was **completed**.

(b) The evidence is that the Bondholders were repaid prior to the commencement of the 2006 Claim.

96. It was contended that this would bring any *Quistclose* type trust to an end and in its place the relationship of borrower and lender would have then existed between the Bondholders and NS but this is based on a conceptual misunderstanding.

97. It is the express trust *per* the Trust Deed which came to an end, prior to the filing of the 2006 Claim, on the repayment of the Bondholders.

98. The suggestion (based on this conceptual misunderstanding) that the EC Sum is somehow then held for the benefit of NS, to the exclusion of all others including NH is therefore unsound and is rejected.

99. It is based on a misapprehension or mischaracterisation of the role of NS under the Project Agreements, a role which left no room for it to benefit from the sums advanced or to be advanced through it to suppliers or providers to the Project. The possibility that it could itself be a supplier under the Project was not within the original contemplation of the Project agreements.

General Communications Ltd v Development Finance Corporation of New Zealand Ltd (1990) 3 NZLR 406.

100. Development Finance Company of New Zealand Ltd. ("DFC") agreed to advance to Video Workshop certain monies specifically for the purchase of new equipment. General Communications Ltd. was one of the **suppliers** of this equipment over which DFC was to take security. General Communications confirmed with DFC that DFC was providing finance and that Video Workshop's solicitors were responsible for disbursing it. They informed DFC of their payment terms. In due course DFC paid the total advance to **the solicitors who undertook to DFC to pay it directly to Video Workshop's suppliers**. After General Communications supplied the equipment, but before payment was due, Video Workshop fell into financial difficulties and receivers were appointed. General Communications sued DFC and the solicitors claiming that the money had been held by the solicitors on trust for General Communications.

101. The issue was therefore whether the creditor General Communications was entitled to recover even against the provider of the funds the sum intended for it.

102. At first instance, Tompkins J concluded at page 419 lines 9 to 18 of his judgment,

"The arrangement was for the benefit of the suppliers of the scheduled plant in that it enabled them to supply the plant with the certain knowledge that they would be paid either on delivery or on such later date as may have been agreed with Video Workshop is thus the primary trust was in favour of the suppliers. I am satisfied , for the reasons expressed by Megarry V-C in Northern Developments and Peter Gibson J. in Carreras ***that provided the primary trust did not fail, it was enforceable by the suppliers."***

103. On DFC's appealed the decision of the Court of Appeal [the Court] reviewed the analysis of the **Quistclose**, **Northern Development** and **Carreras cases** undertaken by Lord Millett (then P.J. Millett Q.C.) in **(1983) 101 LQR 269.** The Court agreed with Tompkins J that the terms upon which the solicitors received and held the money imposed on them a trust to apply it primarily in payment of the suppliers and secondarily in payment to DFC. It was not a mere power to make those payments but a duty (see page 438 line 45 to page 433 line 1of the Judgment).

104. The more difficult question for the Court was whether the beneficial interest in the money held by the solicitors passed to suppliers, enabling them to enforce the trust, **even against the lender: [p 434 lines 7-10].** In posing the question, the Court adopted the opinion of Mr. Millett in his article and the guidelines there formulated.

105. The Court considered the issue of whether any beneficial interest in these monies had passed to General Communications as supplier, supply having been made, by applying the following guidelines:

(i) the beneficial interest in a fund will pass if such was the intention;

(ii) the intention may be express, as where the arrangement is made for the stated purpose of benefitting the creditors, or it may be inferred, for example from the nature of the arrangement;

(iii) if the arrangement is such that its purpose would be defeated if the settlor were able to revoke it at will, then it will be inferred that he intended to forego the beneficial interest that would have left that right with him. **The transaction will create an irrevocable trust in favour of the suppliers** if **the lender's/settler's intention was to benefit the supplier**, enforceable **by the supplier**.(see page 432 line 5 to page 433 line 2 and page 434 lines 8 – 25 of the judgment).

106. The Court concluded that Tompkins J. was correct in his opinion that the arrangement between DFC, Video Workshop and the solicitors was such that **no power of revocation was retained** by DFC and that consequently a beneficial interest in the monies held by the solicitors had been conferred on General Communications.

107. This conclusion was based on two distinct grounds.

Communication

108. Firstly, communication, as DFC as lenders had informed General Communications that payment would be received through the solicitors [435 lines 18 to 30]. **It had therefore made it clear to General Communications that it would not have to rely on the purchaser of the equipment, Video Workshop, for payment** (Line 21). By this advice, to General Video DFC

created an equity against itself that prevented it from varying the terms on which it paid the fund to the solicitors resulting in with the solicitors no longer being able to pay the money to General Video. **This in itself was sufficient to enable General Communications to enforce the trust** to the extent of the debt due to it for equipment supplied.

IRREVOCABILITY

109. Secondly irrevocability, as the Court accepted that it might well be said that DFC, **being contractually unable to recall the fund itself**, save in the event of non payment to a supplier and failure of the primary trust, and being **unable to allow payment to other than suppliers**, the trust it created was for those reasons alone irrevocable. It considered, that in the circumstances of the case it must certainly be inferred that that was its intention (p 435 - line 39). The purpose for which the solicitors, asked for the money and the restrictive terms on which they held it, meant that the arrangement had benefit to the suppliers as a necessary, although not sole, consequence.

110. It was only by paying the suppliers that DFC's purpose in providing the finance would be fully achieved. Having put the fund beyond its power of recall, DFC must have intended the trust, binding as it was on the solicitors, to be irrevocable, and hence to confer a beneficial interest on each supplier as he fulfilled his contract (see page 435 lines 1 to 50 of the judgment).

The Alternative Approach

111. I have found that the enforceability of the trust by suppliers such as NH is consistent with Twinsectra. I note further however that Lord Millett at some stage expressed discomfort with the analysis in Cameras. His view on an alternative analysis was expressed in an article.

"The Quistclose Trust: Who can enforce it?" ***(The Law Quarterly Review April 1985 Vol. 101 – TAB B)*** which was referred to in both Twinsectra and the General Communications case. He found that this depended upon the intention ascertained from the language used, the conduct of the parties and all the circumstances.

These guidelines of Lord Millett were adopted by **the Court of Appeal in the General Communications** case.

Guideline No. 1 states:

> "If A's intention was to benefit C, or his object would be frustrated if he were to retain a power of revocation, the transaction will create an irrevocable trust in favour of C, enforceable by C but not by A. The beneficial interest in the trust property will be in C."

112. It was submitted that, for the reasons stated therein, the lenders to the Facility fund, because their object would be frustrated if they were to retain a power of revocation, intended to create an irrevocable trust and hence to confer a beneficial interest on each supplier of goods and services to the Project as it fulfilled its contract.

1. In the instant situation CIB cannot possibly have intended to retain any interest in the Facility or the EC sum. This is simply incompatible with the Project agreements. Its role was to advance monies supplied by investors to ICS and suppliers and providers to the project, not to retain any part of the Facility for itself.

2. NH further argued that CIB was therefore constituted as trustee of the loan proceeds for such suppliers to the extent of their interest therein with an irrevocable mandate to pay all sums due and owing for goods and services supplied.

113. The reasons relied upon by NH are set out below for convenience.

(i) The purpose of the loan advanced by investors for disbursement under the Facility Agreement was to finance the construction of a National Stadium for the Government of Grenada by ensuring payment of all suppliers of goods and services in relation thereto;

(ii) The loan was structured by way of a bond issue with investors purchasing bonds;

(iii) The lenders retained an interest in the application of the loan proceeds with payment of the bonds being secured, inter alia, through an assignment in favour of CIB of lease rentals due to National Stadium under a lease of the Project land and a mortgage of the lands in favour of CIB. These lease rentals, the value of the mortgaged lands and National Stadium's capacity to settle its obligations under the bonds were all likely to be critically threatened by a failure to complete the Project;

(iv) CIB was therefore under an obligation to ensure that the loan was used for the stated

purpose;

(v) The stated purpose would clearly be frustrated if the lenders were to be permitted to change their minds, revoke the directions they had given as to the use to which the loan was to be put and either substitute new directions, advise CIB or National Stadium to retain the money beneficially or require repayment to themselves. If the lenders' mandate was revoked or amended the construction of the Project would be placed in jeopardy, the security for the bonds adversely affected, and the legislation enacted in Grenada with respect to the Project effectively defeated.

(vi) It was only by paying suppliers that the lenders' purpose in providing the finance would be fully achieved and it was for this very purpose that CIB controlled the disbursement of the loan *(see page 435 of the judgment of the Court of Appeal in the General Communications case lines 38 to 46)*

(vii) The lenders' must have known at the time of making the loan that CIB intended, if it had not already done so, to contractually commit itself to, inter alia, the Government of Grenada and National Stadium to use the proceeds in payment of suppliers of goods and services to the Project and for no other purpose. It would be entirely inconsistent with this commitment if the lenders proposed to retain a beneficial interest in the loan with a power to change their minds as to the use to which the funds might be put;

(viii) Finally, lenders who purchased bonds could not have intended to retain a right to revoke

their mandate with respect to the money used in such purchase and to either require the money to be used for a purpose other than in connection with the Project or to be repaid immediately. The inference must be that such bondholders intended to, and did, create an irrevocable trust and hence conferred a beneficial interest in the money on suppliers of goods and services to the Project contingent upon the supply being made.

114. It is clear from the structure of the Project Agreements and the analysis in the General Communications case set out supra that this analysis is correct, and it is accepted in its entirety.

COMMUNICATION

115. Secondly, even if it is assumed that the money advanced by the lenders in the present case was held on trust for them. I find that NH was told (because it had concerns and it inquired) of the arrangements for and the purpose of the fund, prior to entering into the Construction Agreement, and it was assured that it would not have to rely on ICS or National Stadium to pass on the money advanced *(see page 435 lines 11 to 30 of the judgment of the Court of Appeal in the General Communications case).* That case adopted the guidelines in the article "the Quistclose Trust: Who can enforce it?" by Lord Millett (at pg 433 lines 9-20),

"Where A's (lender's) object was to save b from bankruptcy by enabling him to pay his creditors the prima facie inference is (the beneficial interest will remain in A."

However this inference is displaced by communication as follows:-

"(iii) communication to C of the [financing] arrangements prior to A's revocation will effect an assignment of A's equitable interest to C, and convert A's revocable mandate into an irrevocable trust for C".

REPAYMENT

116. Further there has been repayment in full to the lenders of the loan advanced. Even if the lenders retained a beneficial interest in the money loaned pending its application for the purposes of the Project the lenders' right to revoke their mandate and change their directions with respect to the stated purpose necessarily determined once repayment had been made, the lenders' mandate even if originally revocable, (which I do not accept) became irrevocable, and CIB was thereby, obligated to pay any undistributed loan proceeds in fulfillment of the stated purpose. (even if it were not so obligated before repayment).

117. I have found that there existed a trust in favour of NH and other suppliers and providers to the Project. I have found that it does not matter whether there was one resulting trust (as in Twinsectra) or two, a primary and a secondary trust (as in Quistclose) as either the primary trust (which is still in existence) or the single resulting trust, is in the circumstances of this case enforceable by the beneficiary NH.

118. Even if a single resulting trust arose in favour of the Lender it was enforceable by NH as it was the intention of the parties that the trust in favour of suppliers and providers to the Project would be irrevocable once such supply and provision had been made and communication of the direct financing arrangements had been made to NH. (see below*)*

119. I have found, as the Claimant contends,

a) That the monies received from investors by the First Defendant [CIB] were to be held by the latter on trust;

b) The said EC sum formed part of such monies received by the First Defendant;

c) That the primary purpose of the trust was to finance the Project by payment to I.C.S., consultants, suppliers and other providers of goods and services in relation to the Project;

d) That the Claimant was made aware of the purpose of the trust from discussions with Mr. Colm Imbert acting on behalf of I.C.S. and the Second Defendant [NS].

e) That the First and Second Defendants and I.C.S. agreed that monies due to the Claimant under the Construction Agreement should be paid directly to NH by the First Defendant from advances payable under the Facility Agreement;

f) That there is owing to the Claimant under the Construction Agreement monies in excess of the said EC sum in respect of the supply of goods and services in relation the Project;

g) That the primary purpose of the trust has therefore not failed;

h) That the investors as lenders have been fully repaid.

i) That the said EC sum, the Deposited Amount and the Additional Sum were and are held on trust for the Claimant and the Claimant is entitled to the benefit of the trust and to enforce same.

120. The finding on the existence and enforceability of the trust by NH is sufficient to dispose of the matter. However the alternative issue of an assignment by ICS to NH of its rights to payment by NS was also raised in the alternative. Although it is not strictly necessary to deal with this, the argument is considered below.

THE ASSIGNMENT ARGUMENT

MATTERS RELEVANT TO WHETHER AN ASSIGNMENT OCCURRED - FACTUAL ISSUES.

The Defence of NS in the 1999 Action

121.

Paragraph 7 is as follows:

"The second [ICS] and third named [NS] defendants say that in or around December 1996 the plaintiff [NH] agreed in principle, and subject to a formal contract being entered into, to be the ***main sub-contractor*** *on the project responsible for the construction of certain works on the project.* ***Further the second and third named defendants say that during the period March to June 1997 negotiations were held between representatives of the plaintiff and the second named defendant*** *with respect to the terms and conditions of the proposed sub contract (hereinafter called "the proposed sub contract") under which the plaintiff would construct*

certain of the works included in the project. The second and third named defendants deny that it was ever agreed between the plaintiff and the second named defendant or at all that the plaintiff would execute all of the construction works under the project."

122.

Paragraph 9

"The second [ICS] and third named [NS] defendants say that in or around May or June 1997 ***the plaintiff and the defendants agreed in principle,*** *and subject to a formal contract being entered into,* ***that those advances due to be made to the third named defendant under the Facility Agreement*** *referred to at paragraph 11 herein* ***to satisfy payments certified by the Engineer appointed to the project and due to the plaintiff under the proposed sub contract would as a matter of procedure and for the purposes of convenience alone be paid by the first named defendant directly to the plaintiff.*** *The second and third named defendants deny that it was agreed by the plaintiff and the defendants or at all that the* ***second named defendant or third named defendant would assign to the plaintiff any rights which they held or any monies to them under the said Facility Agreement."*** **[Emphasis added].**

The Defence of NS in the 2006 Claim

123.

Paragraph 10

[ii] In response to sub paragraph (b) this Defendant says that the First Defendant did not participate in the meetings which resulted in the award of the sub-contract dated June 6, 1997 ("the Sub-Contract") to the Claimant for the execution of certain, but not all, of the construction

works in relation to the Project. Initially the Claimant was contracted by I.C.S. to carry out approximately 70% of the construction works in relation to the Project (having a value of approximately US$16,000,000.00) but subsequently the Project Engineer reduced the scope of construction works by approximately US$3,000,000.00 thereby reducing the total scope of construction works to be carried out by the Claimant in relation to the Project to approximately 57% (having a value of approximately US$13,000,000.00). This Defendant says that there were several other sub-contractors providing goods and services in relation to the Project.

[iii] This Defendant says that it was a term of the Sub Contract that the Engineer appointed thereunder might reduce the quantity of works to be executed by the Claimant under the Sub Contract. Further, this Defendant says that certain of the said works were in fact properly deleted from the original scope of works provided for under the Sub Contract. At the trial of this action this Defendant will rely upon the terms of the Sub Contract for its full terms true meaning and effect.

[iv] This Defendant denies that it was agreed between the Claimant and this Defendant or between the Claimant, the Defendants herein and I.C.S., either as alleged in sub paragraph (c) or at all that I.C.S. would assign to the Claimant any rights which it held or any monies payable to it under the said Facility Agreement because the same is untrue for the following reasons:

[a] This Defendant says that in or around May or June 1997 the Claimant, the Defendants and I.C.S. agreed in principle, and subject to a formal contract being entered into, that those advances due to be made to this Defendant under the Facility Agreement to satisfy payments certified by the Engineer appointed to the Project and due to the Claimant under the proposed

Sub Contract would as a matter of procedure and for the purposes of convenience alone be paid by the First Defendant directly to the Claimant; *and*

[b] this Defendant says further that if there was the alleged or any agreement to assign monies or so much of the monies payable under the Facility Agreement as would from time to time be due to the Claimant under the Sub-Contract, which is denied, the same was -

[i] prohibited by clause 10 of the Development Agreement without the prior written consent of the parties (no consent having been given by the parties to the Development Agreement);

[ii] in breach of the laws of Grenada; and

[iii] in contravention of the Statute of Frauds 1677, the monies in the fund under the Facility Agreement being impressed with a trust for a specific purpose."

124.

Paragraph 12

"Save that this Defendant says that … (e) under and by virtue of the Development Agreement neither the Claimant nor any supplier of goods and services had a direct call on the said Facility provided to this Defendant by the First Defendant in relation to this Project".

125.

Paragraph 29 of the defence

"This Defendant says that in relation to paragraph 28 of the Statement of Case… Save as aforesaid this Defendant says that:

[a] In relation to paragraph 28(a) of the Statement of Case that the monies received from investors by the First Defendant ***on trust was until*** *the happening of one or the other of 2 events, namely,* ***completion of the Project or until the Bondholders (investors) had been repaid,*** *whichever occurs first in time. This Defendant avers that the Project was completed in or around June 7, 2000* ***and the Bondholders were fully repaid as at August 8, 2002****.*

[f] Subject to the Claimant proving the enforceability of the arbitration award, ***paragraph 28[f] of the Statement of Case is admitted to the extent that monies are owed to the Claimant by I.C.S.***

[g] In relation to paragraph 28(g) of the Statement of Case this Defendant denies the implied inference ***that the primary purpose of the trust was to finance the Project by making payments to I.C.S., consultants and other providers of goods and services*** *in relation to the Project and repeats paragraphs 12 and 29[c] in answer thereto.*

[h] In answer to paragraph 28(h) of the Statement of Case this Defendant ***admits that the investors/Bondholders have been*** *repaid as hereinbefore pleaded.*

126.

(a) On 4th June 1997 (the day before the Construction Agreement was entered into) NH wrote to ICS Grenada and inter alia under the rubric "*ASSIGNMENT OF LOAN PROCEEDS*" requested confirmation from Mr. Imbert of the agreement that monies due to NH under the Contract would be assigned and paid directly by CIB to NH;

(b) On the following day ICS via Mr. Imbert replied confirming at item 17 of its letter dated 5th June 1997 that "*all monies due to NH under the Agreement shall be assigned and paid directly to NH*".

127. This letter is incorporated into the contract between the parties at clause 2*: "The following documents shall be deemed to form... part of this agreement.*

(a) the letter of acceptance".

128. It should be noted that the sole source of funding for the Project, including that portion subcontracted to NH, was monies provided via CIB. But for an assignment, such monies would be paid to NS under the Facility Agreement, for payment to ICS under the agreement between NS and ICS, and thence to the subcontractors of ICS including NH. The reference to assignment therefore could only be to monies originating from or via CIB under the Facility Agreement.

The Alleged Meetings

129. Emile Elias ("Mr. Elias") Executive Chairman of NH International (Caribbean) Limited contends that during meetings which preceded NH's tender it was agreed with Mr. Imbert of ICS and Mr. Archer of CIB *inter alia* that:

(i) in order to secure payment of all monies that might become due to NH under the proposed Construction Agreement ICS would assign to NH so much of the monies payable to it under the Facility Agreement as would from time to time be due to NH under the Construction Agreement; and

(ii) out of the financing arranged by CIB and received by it for disbursement under the Facility Agreement, CIB would set aside for payment to NH under the Facility Agreement an amount equal to the Contract Sum. (Paragraphs 9 (iii), 9 (iv) of his witness statement)

130. Mr. Imbert disputes such agreement. His witness statement is as follows –

Paragraph 22. *Notwithstanding our agreement in principle, neither Mr. Elias nor NH were (sic) involved in any negotiations or discussions between the Government of Grenada. Imbert Construction Services Limited, CIB, NSPGC and ICS in relation to the Project. Neither NH nor Mr. Elias or anyone else at NH was party to any of the Project Agreements and they were not involved in their conceptualization, preparation, negotiation or execution. Furthermore, I did not supply Mr. Elias or NH with any information, documentation or copies of the Project Agreements until after June 6 1997.*

Paragraph 23. *I did not, in a comprehensive or in-depth manner, discuss the details, form, structure, wording and intent of any of the Project Agreements with Mr. Elias or any other representative of NH.* ***Any discussion on the Project Agreements that I had with Mr. Elias was peripheral and superficial in nature****. In fact, the wording and/or intent of the Project Agreements were no concern of Mr. Elias, since NH had no obligations to NSPGC, CIB or the government of Grenada for the completion of the Project and NH was merely intended to be a subcontractor to ICS for part of the works on the Project, under a commercial contract with ICS.*

Paragraph 24.

During the period March to June 1997 I was involved, on behalf of ICS, in negotiations with Mr. Elias and other representatives of NH with a view to arriving at an agreement on the terms of a subcontract to be awarded to NH for the execution of some of the works to be done on the Project. No representative of the Government of Grenada, CIB or NSPGC was involved in any of these negotiations.

Paragraph 25.

During the negotiations it became clear that money that would become due to NH under the proposed subcontract would not be paid directly to it. This was because under the Project Agreements money due for work completed or materials supplied on the Project would have to be paid by CIB directly to NSPGC or alternatively on NSPGC's direction to ICS. As a result, at NH's invitation ***I, on behalf of ICS, met with representatives of NH and Mr. Lennox Archer, a representative of CIB,*** *on one (1) or perhaps two (2) occasions. I have not otherwise attended a meeting where Mr. Archer, Mr. John Connon and/or Mr. Elias or any other representative of NH were present at the same time.*

Paragraph 26.

The purpose of that meeting was simply to consider a request from NH ***that it be paid directly*** *for work done on the Project,* ***rather than having to wait for NSPGC or ICS*** *to be* ***paid under*** *the Project Agreements* ***before NH was paid****. Mr. Elias was concerned that because NH was not a party to the Project Agreements, and as a result, it had no privity of contract, there might be a delay in payments to ICS to NH. He wanted to* ***save time in the payment process*** *under the*

Construction Agreement between ICS and NH, if possible. After some discussion ***I agreed that****, for convenience and subject to NH and ICS entering into a formal agreement,* ***NH could receive payments directly from CIB****, but only under very strict* ***conditions****, i.e. by way of a payment order. I told Mr. Elias that NH would only be paid money directly by CIB if (i) such payments were* ***certified by the engineer*** *appointed by ICS under the Construction Agreement, as being due to NH in accordance with that Agreement, and (ii) the* ***Quantity Surveyor*** *engaged by CIB to assess work done on the Project* ***had no objection*** *to such payments, (iii)* ***written instructions were sent to CIB by NSPGC****, or by* ***ICS with the approval of NSPGC****, to effect such payments.* ***All these conditions were necessary*** *for such payments to be made directly to NH. This in fact was the payment procedure adopted by NH and ICS in respect of work done and materials supplied to by NH to the Project.*

Paragraph 27.

I have never attended a meeting with Mr. Archer and Mr.Elias where it was agreed that ICS would enter into an agreement for the carrying out of the construction works on the Project. All discussions and agreement between ICS and NH in relation to the award of a subcontract were conducted or arrived at in the absence of Mr. Archer or any other representative of ICB.

Paragraph 28.

Similarly I have never attended a meeting with Mr. Archer and. Elias where it was agreed that CIB would arrange finance for the construction of the Project. All discussions and negotiations in relation to the funding of the project were conducted between the Government of Grenada, NSPGC, ICS, CIB and Imbert Construction Services Limited. NH was not a party to those

discussions and negotiations. So far as the Project was concerned NH had no relationship with the Government of Grenada, CIB and NSPGC. Its sole interest was limited to the proposed subcontract between NH and ICS for the construction of part of the works on the Project.

Paragraph 29.

I have never attended a meeting with Mr. Archer and Mr. Elias at which Mr. Archer agreed on behalf of CIB that CIB would preserve the integrity of the Facility for the financing of the Project to the extent of the contract price under the proposed subcontract. Had I been in such a meeting I would have objected as neither NH nor ICS was entitled to any money under the Facility Agreement. In addition, neither NH nor ICS would be entitled to payment of any money until work was completed or material supplied on the Project and the Quantity surveyor appointed by CIB had certified the payment.

131. Obviously NH needed to be paid for work properly certified under its construction contract. Consistent with that practical reality neither ICS nor NS could have had any objection to that - It is difficult to understand what the objection by Mr. Imbert could have been. In fact the evidence is more consistent with the position of direct assignment to NH NOT being objected to.

Neither I nor Mr. Archer agreed in any meeting with Mr. Elias or any other representative of NH that NH would procure a performance bond in favour of ICS in the sum of EC$10 million as a condition of CIB arranging financing for the Project. Instead, in or around March 1997, I ***casually mentioned*** *to Mr. Elias that* ***a Performance Bond*** *of the order of* ***EC$10 million*** *had been requested by CIB for the Project.*

132. The very fact that a meeting was held with Mr. Archer -CIB's representative, supports this version - Why would there need to be a meeting with CIB if not to get its input and agreement to direct payment to NH- Mr. Imbert says it was direct payment under specific conditions -

i. Certification by Engineer,

ii. Certification by QS on behalf of CIB, and

iii. Written instructions by NS or ICS with approval of NS to CIB.

133. What **Mr. Imbert makes clear** is that, after the execution of the Facility Agreement but prior to the signing of the Construction Agreement, Mr. Archer of CIB, Mr. Imbert and NH met and **consensus was reached between ICS, CIB and NH for direct payment by CIB out of the funds it was to receive under the Facility Agreement to NH for work done on the Project.** Lennox Archer, CIB's representative at these meetings, failed to attend and testify at the trial. Mr. Archer, as financier, could only have been present at those meetings, between a developer and a subcontractor to discuss payment. His presence at a meeting such as described by Mr. Imbert would have been redundant. Certification by the Engineer and CIB's Quantity Surveyor did not require the further sign off by Mr. Archer. Even the 3rd condition above did not require a meeting with Mr. Archer if all Mr. Imbert was prepared to do was to agree to direct payment to NH upon written instructions by NS, or ICS with the approval of NS. (This is also suggestive of Mr. Imbert also representing NS). Any such written instructions would have spoken for themselves. Possibly Mr. Archer's presence may have been required to confirm that CIB would honour such written instructions. On balance however, given in addition the evidence in the arbitration proceedings, I do not accept this version.

134. There is absolutely no reason why Mr. Elias should not have learnt of the effect of the Agreements through Mr. Imbert.

135. Mr. Imbert confirmed in subsequent arbitration proceedings between NH and ICS arising in connection with the Construction Agreement, that he and CIB had agreed to set aside the Contract Sum from funds provided by investors under the Facility Agreement and not to draw down thereon except for the purpose of paying to NH monies due to it for work and services provided to the Project (see *Arbitration transcript "EPE 32" attached to* Elias' Witness Statement exhibit EPE 32 at pages 95-98.

The bottom of page 95:

"When we negotiated the contract with NH, it was for a total of 16.1 million U.S. dollars, so that there was a difference of approximately 7 million U.S. dollars ..."(Quoting)"...Once the engineer certifies I sent the certificate to the band (bank). Mr Leonard comes in, he does his assessment, he says okay. No objection. Money is paid directly to NH.

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"What I agreed with CIB is that 16.1 million we put it aside i.e. NH's original contract sum. We put it in a special account or a special place in the bank and that is what will be used to make disbursements to the contractor. I ICS, would not touch that. Out of that 16 million we wouldn't request any disbursements we wouldn't try to access those funds and, up to the point of termination that 16.1 million was preserved. It was there. NH had received approximately

12 million out of the 16 and the 4 million was left. I had made no effort to access the four million dollars left of the 16 million."

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"Within the 23 million allocated for that was 16 million for NH's original contract…"

"…any construction work that we did we didn't apply for it out of the 16 million just to avoid any argument that look, I have made a legitimate deletion to NH's scope of works…I could legitimately say that NH's contract is now reduced by a million dollars and I could go into the 16 million, take out a million and say.. I took it out of remaining seven million dollars just because I just did not want this type of argument."

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So that when these allegations arose about me drawing down excessively on the funds, I just couldn't understand what this was about because the fund was preserved; the money was there and I had not drawn down on it.

And at pages 171-174

At page 171 of the transcript:-

Q: "When you say it was set aside, what do you mean it was set aside?"

A: "We agreed with the bank what we would do is you have 23 million for the entire project…we had a main sub contractor NH with whom we had signed a contract for 16 million so what we said we take 16 out of the 23 and put that in a separate – I won't say a

separate account but a separate place in the bank, and that 16 million would be used to disburse money to NH. … ICS could not draw down those funds…ICS agreed that it would not seek to draw down out of the 16 million allocated for the original contract.

Q: Agreed with the bank.

A: With the bank. Yes.

Q: In writing

A: Yes, I believe so.

Q: Where is it in writing?

A: I'll have to get that, I can't say, Sir

(Pages 338-341 and page 414 of the Trial Bundle in "Witness Statements Volume 1" and pages 415-422 of the Trial Bundle in "Witness Statements Volume 2").

136. By paragraph 26 of the Witness Statement of Mr. Colm Imbert, Mr. Imbert confirmed that he and CIB had made it clear to NH that it would not have to rely on ICS or National Stadium to pass on monies advanced by CIB (The effect of this is reflected in the **General Communications case** at page 435 lines 18-21 of the judgment (see also paragraph 108 supra).

137. It was also submitted that the subsequent actions of ICS, National Stadium and CIB are confirmatory of such an assignment with

(a) ICS and CIB agreeing to set aside the Contract Sum from funds provided by investors under the Facility Agreement for payment to NH when appropriate(*see pages 338 to 341 and page 414*

of the Trial Bundle in Witness Statements Volume 1 and pages 415 to 422 of the Trial Bundle in Witness Statements Volume 2); and

(b) CIB making direct payments to NH of monies due to it under the Construction Agreement.

138. I find that, on a balance of probabilities, ICS agreed to assign, and did assign, to NH so much of the monies payable to it under the Facility Agreement as would from time to time be due to NH under the Construction Agreement.

139. The contemporaneous documentary evidence supports the request and the grant of such an assignment. I do not accept that NH would agree to enter into the Construction Agreement with ICS (Grenada) a newly formed special purpose company with no assets. The value of work it was to perform initially was in excess of US$ 16m or approximately $100 million TT dollars. It is almost inconceivable that in those circumstances that NH would commit to mobilise in a foreign jurisdiction without having obtained the benefit of an assignment of the type contended for.

140. The fact that the original contract sum could be varied upward or downward by deletions can not affect this conclusion. It is clear from the letter of June 5 1997 that ICS had agreed to assign to NH from its sole source of funds, being the Facility Agreement, all sums due from ICS to NH under the Construction Agreement. Implicit in that agreement however was that NH would not be paid for work that was not done. The agreement was for a provision to be made for the value of work that was contemplated at the time the contractual requirements for certifying the value of the work actually done remained unaffected.

ASSIGNMENT – FACTUAL ISSUES

Project Documents

141. NH contends that ICS agreed to assign, and did assign, to NH so much of the monies payable to it [ICS] under the Facility Agreement, as would from time to time be due to NH from ICS under the Construction Agreement.

142. CIB did promise/agreed under the Facility Agreement to make advances available to NS for the purposes of the Project. At issue is

a. Whether ICS assigned its own rights, to first receive payment from NS under the Facility Agreement, to NH.

b. Whether ICS **and NH** are beneficiaries of CIB'S promise to make payments **through** NS to ICS and providers/ subcontractors such as NH.

143. Recital 4 of the Development Agreement makes it clear that the Facility Agreement was an agreement for the making of advances by CIB through the Project Company [NS] to

a. the Developer [ICS] or

b. providers of goods and services for the project.

144. ICS as well as NH are therefore the beneficiaries of CIB's promise to pay under the Facility Agreement sums due for the Project.

145. It was submitted that the arrangement, whereby ICS, NS and CIB allegedly agreed that advances to be made by CIB under the Facility Agreement would be paid directly to the NH

insofar as monies were due and owing to NH under the proposed construction agreement, is a clear departure from the obligations and duties of NS and CIB under the Facility Agreement, Development Agreement and the Trust Deed.

146. NH is one such supplier, under the Construction Agreement entered into with ICS. The arrangement alleged by NH was that money be first due and payable to it under the Construction Agreement. I find that such direct payment is not inconsistent with the Project agreements. In fact that option is clearly provided thereunder, provided that the monies to NH as supplier or other provider of goods and services in relation to the Project, had become due. Any allegation that CIB would be in breach of any duties as alleged is rejected.

ASSIGNMENT – LAW

147. The assignment of rights to claim indefinite sums of money can constitute the assignment of a legal chose in action which can be recovered or enforced by an action at law**. [Paragraph 19-008** ***Chitty on Contracts 30th Edition Volume 1 page 1286]***

Paragraph 18-078 [ibid]

Trusts of promises. *Equity developed an exception to the doctrine of privity by making use of the concept of a trust of a chose in action. It accordingly held that where A made a promise to B for the benefit of C, the promise could be enforced by C against A if B had constituted himself trustee of A's promise for C. This exception to the doctrine of privity was approved by the House of Lords in Walford's case where C (a broker) negotiated a charter party in which the shipowner*

(A) promised the charterer (B) to pay a commission to C. It was held that B was trustee of A's promise for C, who could accordingly enforce the promise against A.

148. National Stadium executed the Facility Agreement pursuant to the memorandum of understanding of January 1997 as amended, to raise financing for the Project in order to meet the payments to ICS and subcontractors such as NH (see clauses 2 and 3 (iii) of the Memorandum of Understanding of January 1997 The intention to benefit ICS and subcontractors was manifested from the inception of the Project and is consistent with an intention to create a trust in their favour.

149. This is also consistent with the MOU paragraph 1 of the terms agreed. ICS was clearly engaged to implement and manage the Project through the Project Corporation to be formed and owned by it. The MOU itself from inception contemplated that NS would be a vehicle or appendage of ICS and the history of its formation and composition of its directorship and principals merely reinforce this.

150. Accordingly the evidence is clear that CIB's promise to pay NS was akin to a promise to pay ICS. In any event it is clear on the documents [MOU and Facility Agreement] that the Facility by CIB was intended for a payment to, albeit through NS, to ICS and to subcontractors such as NH, and a trust was created of that promise to pay by CIB, which was enforceable by ICS and NH.

151. Further the promise by CIB to NS, inherent in the Facility Agreement, as explained in the

MOU and the Development Agreement, that funds would be advanced to pay ICS and subcontractors like NH, was enforceable by both ICS and NH, against CIB, as beneficiaries of that promise. NS would be the trustee of such promise.

Paragraph 19-021 page 1336

"Means of assignment. An assignor can assign a contractual right in equity in one of two main ways. ***He can inform the assignee*** *that he transfers the chose to him; or he can instruct the debtor to discharge the obligation by payment to, or performance for, the assignee. Thus an agreement by merchants with a bank that payment for goods sold by the merchants should be remitted direct by the purchasers to the bank has been held to constitute a valid equitable assignment of the amounts to the bank."*

152. An equitable assignment of a **legal** chose in action need not be in writing or in any particular form.

Formalities for equitable assignments. *An equitable assignment of a legal chose in action need not be in writing, nor in any particular form.* **19-025 [Ibid]**

153.Apart from being enforced directly by NH therefore, such an agreement can be specifically enforced by NH as assignee (on the basis of the assignment to it by ICS of ICS' right to receive payment from NS), once consideration is present and, in the case of an agreement to assign made by a third party in whose favour a trust of a promise is found (such as ICS), once the third party (such as ICS) and the trustee (NS) are made parties to the action.

154. National Stadium, CIB and ICS are parties to the instant action. The assignment to NH by ICS of the benefit of the promise by CIB is therefore also enforceable by NH on these bases.

Paragraph 19-027

Consideration needed for agreements to assign. *The extent to which consideration is required for an equitable assignment is one of some difficulty. It should first be observed that the question can only arise as between an assignor (or his successors in title) and assignee.* ***So far as the debtor is concerned, the presence or absence of consideration appears to be immaterial****. He cannot refuse to pay the assignee merely on the ground that there was no consideration for the assignment, and, conversely, if he does pay the assignee after due notice has been given to him, it seems clear that the assignor cannot make him pay again.* ***As between the assignor and the assignee the position broadly appears to be that consideration is required for an agreement to assign a chose in action, but is not required for an actual assignment of a chose in action.*** *Since a future chose in action is incapable of assignment in the strict sense, it follows* ***that a purported assignment of a future chose can only operate as an agreement to assign, and as such requires consideration.*** *There is no doubt however that dicta can be produced which suggest that consideration is always required.*

Paragraph 19-032 page 1341

Agreement to assign expectancy supported by consideration. *Although a mere expectancy is thus incapable of actual assignment,* ***an agreement for valuable consideration to assign*** *such an expectancy operates in equity to transfer the right to chose in action as soon as it comes into existence provided only that it is sufficiently identifiable under the agreement. No further action*

on the part of the assignor is necessary to convert an agreement to assign into an actual assignment. The effect of this equitable principle is that the assignee's interest is more than a mere matter of contract, even before the chose in action comes into existence.

(See **Chitty on Contracts 30th Ed. Vol.1 paragraphs 19-001- 19-041**)

The law relating to equitable assignment

155. In the Privy Council in the case of ***Palmer v Carey*** [1926] A.C. 703 Lord Wrenbury at pp 706- 707 stated:

"The law as to equitable assignment, as stated by Lord Truro in Rodick v. Gandell, is this: "The extent of the principle to be deduced is that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund, in other words, will operate as an equitable assignment of the debts or fund to which the order refers."

"An agreement for valuable consideration that a fund shall be applied in a particular way may found an injunction to restrain its application in another way. But if there be nothing more, such a stipulation will not amount to an equitable assignment. It is necessary to find, further, that an obligation has been imposed in favour of the creditor to pay the debt out of the fund. This is but an instance of a familiar doctrine of equity that a contract for valuable consideration to transfer or charge a subject matter passes a

beneficial interest by way of property in that subject matter if the contract is one of which a Court of equity will decree specific performance."

Consideration

156. NH provided a performance bond and entered into the Construction Agreement.

157. This performance bond, allegedly in excess of the industry norm, provided consideration for ICS's agreement to assign. In fact, I note this performance bond was a condition precedent to the first drawdown under the Facility Agreement. (*See condition 4 (2) of the Facility Agreement)* and I find that it constituted consideration for the assignment.

158. The *Statute of Frauds, 1677*, s. 4 provides that *"no action shall be brought to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.*

159. It was contended that no action can be brought or maintained by NH against CIB since there is no agreement, memorandum or note thereof in writing signed by it.

160. I find that the project agreements, including the Facility Agreement and the Development Agreement executed by CIB, together with the Construction Agreement

and the letters of June 4th and 5th executed by ICS constitute a comprehensive and sufficient memorandum of that agreement to assign.

161. CIB agreed under the Facility Agreement to make advances to **or on behalf** of NS [clause 2.1] and further executed the Development Agreement confirming that it would make advances on behalf of ICS, to ICS **or** a supplier or provider of goods and services in respect of the project.

162. It knew NS was a mere conduit under the project agreements and that NH was the Builder referred to therein.

163. Its obligation and promise was to use the Facility to pay to suppliers. Nothing is more consistent with those agreements than that ICS agreed to assign to NH its own rights to receive payment from NS and/or CIB in respect of the project and that CIB agreed to such assignment because the option of such an assignment was inherent in the project documents **executed** by CIB and confirmed in the meetings referred to by Mr. Elias and Mr. Imbert. The conditions described by Mr. Imbert as preconditions to direct payment are logical procedural mechanisms and checks to monitor the implementation of an assignment. They are not inconsistent with it. The evidence of Mr. Imbert in the arbitration proceedings and CIB's actions in effecting direct payment to NH leave little room for doubt that the assignment alleged was in fact agreed and was being implemented.

164. It was further contended **that** the pleaded terms in paragraph 7 of NH's Statement of Case in the 1999 Action **are** not supported by Mr. Imbert's letter dated June 5, 1997 **[EPE 7]**. However the written confirmation of an oral agreement to assign does not contradict the said paragraph 7. In fact it is **evidence** confirmatory of it.

165. Even if money payable under a contract not yet executed does not become an existing chose in action until it is earned, it may be treated as expectancy. (In fact however, ICS had executed its contract with NS by the date of the construction contract.) An agreement for valuable consideration (in this case the enhanced Performance bond, recognised under the Facility Agreement as a condition to loan drawdown by NS –Clause 4.2 – Facility Agreement) to assign such an expectancy operates in equity to transfer the right to the chose in action as soon as it comes into existence *(see Chitty's ibid at paragraph 19-032).* It came into existence at the date monies first became payable to ICS (and NH) under the Facility Agreement.

Finding

166. I find therefore that the assignment alleged has been established both as a matter of fact and as a matter of law, and that such assignment is enforceable.

NATIONAL STADIUM'S DEFENCES

National Stadium's Defence

167. National Stadium admits that the monies payable under the Facility Agreement were impressed with a trust for a specific purpose (*see paragraph 10 (iv) (b) of the Defence in the*

second action) but alleges that it came to an end upon repayment of the bondholders. (*Paragraphs 28*, 29a ibid)

(National Stadium) raises the following arguments in the second, or trust action, namely.

(i) that clause 10 of the Development Agreement prohibits the assignment of monies payable under the Facility Agreement without the prior written consent of the parties to the former;

(ii) that any such assignment would be in breach of the laws of Grenada; and

(iii) that any such assignment would be in contravention of the United Kingdom Statute of Frauds 1677, the monies payable under the Facility Agreement being impressed with a trust for a specific purpose *(see paragraph 10(iv)(b) of the Defence in the second action).*

Although no issue has been joined in the first action with respect to the matters set out in the preceding paragraph these arguments are considered in the context of the consolidation of the two actions.

Non assignment Clause

168. Clause 10 of the Development Agreement provides as follows:

"Neither party shall be entitled to assign all or any part of its rights or obligations hereunder without the prior written consent of the other party such consent not to be withheld unreasonably or without giving reason there for..." (Emphasis added)

Clause 10 of the Development Agreement prohibits the assignment of rights and obligations arising under that agreement. The Facility Agreement contains no such prohibition. It is pursuant to the Facility Agreement that monies are payable from the Facility to ICS, and suppliers and providers such as NH [Clause 6.5 of the Development Agreement].

169. I accept the evidence that CIB consented to the assignment claimed by NH in the meeting attended by Mr. Archer and by its actions in making direct payment to NH.

Requirement to be in writing

170. National Stadium suggests that the monies payable under the Facility Agreement being impressed with a trust for a specific purpose, any assignment not compliant with the requirements of the United Kingdom Statute of Frauds Act 1677 ("the Act") must be invalid.

171. Section 9 of the Act reads as follows:

"9. And……..all grants and assignments of any trust or confidence shall likewise be in writing signed by the parties granting or assigning the same……or else shall likewise be utterly void and of no effect."

172. The assignment granted by ICS to NS was contained in and evidenced by the letters of June 4th and 5th and the Construction Contract.

NATIONAL STADIUM'S CLAIM TO THE DEPOSITED AMOUNT

173. National Stadium was not a supplier of goods or services to the Project. The responsibility to develop and complete the Project was that of ICS [See the Development Agreement, clause 4]. In so far as NS had any functions to perform under the financing arrangement it was not entitled to payment there for.

174. National Stadium's claim to the Deposited Amount is, on its pleadings, based on a default judgment picked up by it against ICS in Grenada. (*See paragraph 38 of National Stadium's counterclaim in the second action*).

175. The particulars of this default judgment may be found in the Statement of Claim filed by National Stadium in Claim No. GDAHCV2004/0261 exhibited as part of EPE50 to the witness statement of Mr. Elias (*see page 675 of the Trial Bundle in "Witness Statements Volume 2*). Paragraph 10 of the Statement of Claim identifies the constituent parts of the judgment debt of EC$13,449,469.00 relied upon by National Stadium.

a. EC$8,038,966.60 allegedly due in respect of remedial works;
b. EC$4,610,502.40 interest accruing on the said sum; and
c. EC$800,000.00 legal costs incurred.

The basis of ICS's debt to National Stadium

176. At paragraph 11 of Mrs. Imbert's witness statement found at page 867 of the Trial Bundle states that National Stadium advanced approximately EC$13,000,000.00 to ICS to facilitate the continuation and completion of the Project.

177. Mr. Imbert similarly gave evidence that the deficit in the Project costs was financed through contributions from money earned by Imbert Construction Group Limited, savings and loans (*see paragraph 55 of Mr. Imbert's witness statement found at page 863 of the Trial Bundle in Witness Statements Volume 2).*

178. Even if such a loan had been proved it would amount to no more than a debt to NS due from ICS. National Stadium recovered judgment in Grenada against ICS –National Stadium has made no claim against CIB in these proceedings. It cannot now claim to be entitled to recover from CIB as trustee of the Facility a sum which it said was a loan made by it to ICS and repayable by that company. It cannot therefore obtain any payment in respect of the Deposited Amount

179. There is no entitlement under the Facility Agreement for NS to receive funding for remedial or other works out of the Facility. In any event there is **no documentary** or other evidence to substantiate the allegation of any loan from National Stadium to ICS.

180. The Project Agreements make clear the capacity in which NS receives the Facility - (for onward transmission to suppliers and providers only).

181. Lord Millett explained clearly in Twinsectra "*The borrower's interest pending the application of the money for the stated purpose…is minimal.* ***He cannot apply it except for the stated purpose.****"*

National Stadium makes no claim in its pleadings to be entitled to the beneficial interest therein pursuant to any trust.

182. Further it has not sought any reliefs against CIB. Therefore NS has established no basis for the transfer to it of the EC sum. Any transfer of the beneficial interest in the loan proceeds from the lenders to National Stadium (as National Stadium contends) is therefore inconceivable **particularly where the stated purpose can still be achieved**.

The portion of the EC sum payable under the Facility Agreement

183. NH claims that it is owed a sum under its agreement with ICS in excess of the EC Sum in respect of the supply of goods and services in relation to the Project, derived from the award of the Arbitrator (see **"EPE35"**) in arbitration proceedings **between NH and ICS**. This is admitted by NS on the pleadings. The Arbitrator awarded NH the following sums against ICS:

[i] **$1,389,048.76 for variations**;

[ii] $**240,000** for breach of the acceleration agreement;

[iii] $**305,671.17 for measured works;**

[iv] $**1,678,440.80 being** the amount of **retention** held by ICS at the date of termination;

[v] $**3,645,000.00 loss of use of equipment;**

[vi] $368,636.94 loss of profit; and

[vii] **$**800,000.00 in legal costs.

184. The figures highlighted in bold are indisputably sums awarded under the contract, and strong arguments in relation to the entire award can be raised. I reject the contention that only the portion of the Award in respect of measured work is relevant

185. Alternatively it was contended that the findings of the Arbitrator, save possibly for his award in respect of measured works, are irrelevant for the purposes of these proceedings and only the figure assessed by CIB's Quantity Surveyor could be considered outstanding or payable under the Facility Agreement. This contention ignores the overriding role of the Arbitrator to determine the full amount due to such suppliers in case of dispute and the primacy of his findings and Award.

186. Further National Stadium has admitted in its pleadings that there was owing to NH under the Construction Agreement as at 18th March 2002 in respect of goods and services provided in relation to the Project the net figure of EC$8,412,636.83 *(see paragraphs 17 and 28(f) of the Statement of Case and paragraphs 21 and 29(f) of the Defence of National Stadium in the second action).*

187. In the alternative the arbitrator has found that NH is entitled to payment of the above sums which sums are (save for the sums for loss of profits and legal costs), due and owing to NH

for goods and services supplied to the Project and attract interest thereon pursuant to the award at the rate of 12% per annum from the 29th December 1999.

188. It was contended that as at the 18th March 2002, ICS owed to NH for such supply the sum of EC$7,597,479.67, being the sum of the figures referred to above less the damages awarded to ICS in the sum of EC$1,258,420.19 together with interest on the difference at the rate of 12% per annum from the 29th December 1999 to the date of the award.

189. I accept that both the award and the alternative calculation above are sums in excess of the said EC Sum and find that the entire EC sum with interest if any accrued thereon would be subject to the trust.

THE CLAIM AGAINST CIB

190. In the present case it is not disputed that

(i) on 30th November 1999 the Honourable Mr. Justice Tam froze the said EC sum of EC$7,430,724.70 advanced by investors to CIB under the Facility Agreement [see *paragraph 15 of the Statement of Case in the second action* and *paragraph 19 of the Defence of National Stadium in the second action*.

(ii) there was owing to NH under the Construction Agreement as at 18th March 2002 in respect of goods and services provided in relation to the Project the net figure of EC$8,412,636.83 (see *paragraphs 17 and 28(f) of the Statement of Case and paragraphs 21 and 29(f) of the Defence of National Stadium in the second action.*

191. On 23rd July 2004 NH obtained an order ("the July Order") that the said EC Sum together with any interest accumulated thereon be deposited by CIB into an interest bearing account at the Unit Trust Corporation. Paragraph 2 of the July Order provided that in the event the Unit Trust Corporation did not accept deposits in EC dollars the US dollar equivalent of the said EC Sum calculated at the rate of exchange prevailing at the time of deposit should be deposited instead.

192. On 26th April 2005 CIB deposited with the Unit Trust Corporation into account number 0447657-005 ("the Account") in the names of Attorneys at Law for NH, CIB and ICS the sum of US$2,682,719.24 ("the Deposited Amount") comprising US$2,645,758.00 (being the said EC Sum first notionally converted into TT currency at the rate of TT$2,2428 to EC$1.00 and then converted into US dollars at the rate of TT$6.2990 to US$1.00) and the sum of US$36,961.24 representing interest thereon from 10th August 2004 to 25th April 2005.

193. On 25th May 2005 ("the 2005 Order") NH obtained a further order to the effect that the US dollar equivalent of the said EC Sum which by paragraph 2 of the July Order was to be deposited by CIB into an account at the Unit Trust Corporation, be calculated using the direct conversion method of EC dollars to U.S. dollars at the rate of exchange of US$1.00 to EC$2.7130. As a result of the 2005 Order CIB was required to deposit with the Unit Trust Corporation the further sum of US$93,174.54 ("the Additional Sum") representing the difference between the United States dollar equivalent of the said EC Sum of EC$7,430,724.70 converted at the exchange rate of US$1.00 to EC$2.7130 and the Deposited Amount (see *paragraph 23 and 24 of the Statement of Case and paragraph 25 of the Defence in the second action*).

194. CIB has paid no part of the Additional Sum as ordered by the Honourable Justice Tam into the Unit Trust Corporation.

The money now due to NH under this award, with interest, is as at July 29th 2010, EC $21,130,691.67. [See paragraph 46 witness statement of Mr. Emile Elias].

195. The plaintiff's claim is against CIB:

(a) For the payment of that sum US$93,174.54. Its claim is those moneys formed part of the trust funds held by CIB; and also

(b) For interest, which ought to have been accrued on the EC sum for the years it was held by CIB which would also form part of the trust fund.

THE QUESTION OF INTEREST

196. The Courts of Appeal in the **General Communications case** also considered the question as to whether or not interest should be payable. It concluded that the Court's equitable jurisdiction to award interest is exercised on the principle that a trustee – and it mattered not that the trustee was constructive rather than express – may not profit from his trust. This jurisdiction was to be exercised on the basis that the trustee was liable for the interest he has received or that which it is so clearly to be supposed he did receive that he may not deny its receipt.

The interest awarded was not to represent a punishment for breach of fiduciary duty but rather an accounting for profits made (see the judgment of the Court of Appeal at paragraph 436 lines 20 to 38 – TAB 3.

197. This interest is itself to be considered trust monies as it represents profits on trust funds which the trustee is so clearly to be supposed to have received that he may not deny its receipt.

(In the present case where CIB has declined to participate in the trial and Mr. Lennox Archer has not attended to give evidence thereat).

198. In the **General Communications case** there was evidence, unlike, in the instant case, of use of the trust funds by the bank. The Court of Appeal held that the test for an award of compound interest is whether the trustee, making the best use one would expect him to make of the money, may properly be presumed to have earned compound interest himself (see page 436 lines 35 to 37 of the Judgment – TAB-3).

199. The said EC Sum was frozen by the order of the Honourable Mr. Justice Tam. It is not disputed that:

(i) no interest was earned by CIB on the said EC Sum for the benefit of the beneficiaries of that fund between 30th November 1999 and the date of deposit into the Account on 26th April 2005 of the sum of US$2,645,758 (being the said EC Sum first notionally converted into TT currency at the rate of TT$2.2428 to EC$1.00 and then converted into US dollars at the rate of TT$6.2990 to US$1.00) except for call rate interest (at less than 2% per annum) between 10th August 2004 to 25th April 2005 amounting to US$36,961.24 (see paragraph 51 of the Witness Statement of Emile Elias found at page 23 of the Trial Bundle in "Witness Statement, Volume 1"); and

(ii) CIB failed to pay into the Account in disobedience of the 2005 Order any part of the Additional Sum.

200. NH contends that **it is to be presumed** that CIB

(i) Used the said EC Sum in its business between 30th November 1999 and 26th April 2005; and

(ii) Did likewise with the Additional Sum between 26th April 2005 and the date hereof and earned compound interest thereon for its own benefit.

201. NH relies in this regard on the following factors.

(i) CIB was at the relevant time a financial institution carrying on business in Trinidad and Tobago and duly licensed under the Financial Institutions Act 1993 (see paragraph 2 of the Statement of Claim in the second action and paragraph 3 of CIB's Defence).

(ii) CIB, while retaining control of the said EC Sum and admitting that the same formed part of a fund impressed with a trust for a specific purpose, namely financing the Project by paying, inter alia, suppliers and providers of goods and services (of which NH was one), **denied that it held the said EC Sum as trustee** (see paragraphs 7 and 13 of the CIB's Defence in the first action and paragraph 19 of its Defence in the second action).

(iii) CIB has **failed to account** for any interest on the said EC Sum except for call rate interest between 10th August 2005 and 25th April 2005; NH must give credit for the call rate interest of

US$36,961.24 paid by CIB.

(iv) CIB **has not denied, nor offered any explanation with respect to, NH's allegation that CIB was utilizing the said EC Sum for its own purposes and not accumulating same** (see paragraphs 19 to 22 of Mr. Elias affidavit found at page 488 of the Trial Bundle in "Witness Statements Volume 2" and paragraph 10 to 12 of Mr. Archer's affidavit found at page 544 of the Trial Bundle in "Documents Volume 2).

(v) CIB has not participated in these proceedings and Mr. Archer has failed to appear at the trial.

(vi) **CIB failed to comply with the 2005 Order** but has retained control of the Additional Sum.

202. NH claims interest against CIB at the judgment rate of 12% per annum, compounded annually, on,

(a) the said EC Sum from 18th March 2002 (the date of the Arbitral Award in NH's favour) until 26th April 2005; and

(b) the Additional Sum from 25th May 2005 (being the date of the 2005 Order) until payment.

203. The Honourable Justice Tam in the first action stated:

"As a trustee, it is CIB's duty to invest the funds until the rightful owners be ascertained. Interest accruing from investment of the funds will then accrue on the principal and will itself

form part of the trust. By not investing the funds, or by applying any interest accruing thereon to a use other than the specific purpose for which the funds were raised, CIB would be acting contrary to the trust. In addition, the evidence before me strongly suggests that CIB has been intermingling the funds with its own monies (see paragraph 3 of Lenox Archer's supplemental affidavit) and this too is a breach of trust. It appears therefore that there are 2 clear breaches of trust on the part of CIB- (1) the non-investment of the EC$7,430,724.70 and (2) the intermingling of this sum with its own monies. These 2 factors in my view amount to evidence of misconduct on the part of the trustee as to warrant the court's intervention to protect the funds."

204. CIB was a trustee of the Facility for the bondholders. Furthermore, I have found that the Facility was impressed with a trust for a special purpose enforceable by suppliers and providers to the project such as NH. It is clear that CIB could not possibly claim to be entitled to any portion of the Facility. The EC sum frozen by the order of the Honourable Justice Tam was a part/portion of the Facility. The initial order of the Honourable Justice Tam was in the following terms:

*"**IT IS HEREBY ORDERED** that the injunction herein granted on the 5th November 1999 be and is hereby continued in the following varied form:*

That the First named Defendant whether by its directors, officers, employees, servants and/or agents, subsidiary or associated companies or otherwise howsoever be restrained and an injunction is hereby granted restraining the first named Defendant from doing any of the following acts, that is to say, from paying to the Second or Third named Defendants out of the

monies to hereafter become due and payable by the First named Defendant under the Facility Agreement entered into between the First and Third named Defendants with respect to the financing of the design and construction of sporting and related facilities at the National Stadium, St. Georges, Grenada any monies which would reduce the balance of advances available therunder below the sum of SEVEN MILLION, FOUR HUNDRED AND THIRTY THOUSAND, SEVEN HUNDRED AND TWENTY-FOUR DOLLARS AND SEVENTY CENTS (EASTERN CARIBBEAN CURRENCY) (E.C. $7,430,724.70) until the hearing and determination of this action or until further order."

205. The 2004 order of the Honourable Justice Tam required/directed payment by CIB of the EC sum **together with accrued interest thereon** into the Unit Trust Account. The initial order did not provide expressly for the deposit of the EC sum into an interest bearing account, though the 2004 order assumed that interest had accrued on the EC sum.

206. The fact is however that the EC sum was trust property. Further any interest accrued thereon would equally be trust property. The Facility was **repaid** to CIB by the government of Grenada. That indicates that the sum of $23 million US must have been **paid** initially. The EC sum, being part of the Facility, must equally have been paid to CIB, and therefore constituted a fund in the hands of CIB.

207. CIB was a financial institution in the business of arranging financing, and lending. An inference can be drawn that funds in the possession of CIB, unless segregated, would be available for its use. The onus was therefore on CIB to establish that it did segregate those funds

and did not use the frozen EC sum for its own business or purposes, and that it did not make a profit or benefit from interest on that sum. This it has failed to do despite being represented on a watching brief at trial. It was under a duty to account for the frozen sum, as a trustee of the frozen sum and any interest thereon, especially in the light of Justice Tam's observations above.

208. It was suggested that it could be presumed in the circumstances that CIB in fact did accrue interest on the frozen sum and various suggestions as to the appropriate rate of interest repayable by CIB were made at this stage.

209. However as CIB is a party and possesses or should possess the specific information as to its dealings and profits if any from the frozen sum it should still be possible for that information to be provided. It is unfortunate that no attempt was made to provide this information previously, especially since it would have been obvious to CIB and its advisors that, whichever party succeeded in this litigation to establishing its right to the frozen sum, such party would also have established its right to interest accrued, or interest which should have accrued thereon. The outcome of this litigation was irrelevant to the necessity for CIB as trustee of the EC sum to account for such interest.

210. The quantum of that interest must be assessed. Accordingly,

a. CIB is directed to provide, file and serve on all parties within 7 days from today's date complete accounts, records and documentation in its possession in relation to the frozen EC sum from the date of Justice Tam's initial order of November 30th 1999 to the date of payment to the UTC account pursuant to order dated 23rd July 2004.

b. Evidence of interest rates considered relevant for this purpose may also be filed and served by any party within 14 days, and

c. Replies if to be filed and served any within 7 days thereafter. Leave is accordingly granted to all parties to this action for the filing of such material if considered necessary.

211. In relation to the additional sum of US $93,174.54 short paid under the order dated 23rd July 2004 there has been no explanation or defence to the claim for its payment. CIB's attorneys confirmed the accuracy of the figure claimed and this sum must therefore be paid by CIB together with interest accruing thereon from May 26, 2005. Interest on this sum will run at the rate of 12% per annum – the statutory rate of interest on judgment debts, as that sum was immediately payable upon the order dated May 25, 2005 being made.

LACHES

212. It is alleged that as NH brought the 1999 Action since 1999 and took several interlocutory and other steps in the arbitration but waited until May 2006 to bring the 2006 claim, its claim to relief thereon must be barred by laches.

Law

213. In Lindsay **Petroleum Co. v Hurd** (1874) LR 5 PC 221 at 239-240 Sir Barnes Peacock stated:

"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his

conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy ."

214. In ***Erlanger v New Sombrero Phosphate*** *Co* (1877-78) L.R. 3 App Cas. 1218, 1279 – 1280 Lord Blackburn after quoting the above passage, stated:

"I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change, which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry." [Emphasis added]

215. The modern approach was recognised by the Court of Appeal in **Re Loftus** [2007] 1 WLR 591 at 605 paragraph 42; [2006] EWCA Civ. 1124 in which Chadwick LJ gave the leading judgment. Chadwick LJ quoted with approval from the judgment of Aldous LJ in *Frawley v. Neill (1999) The Times*, April 5, 1999 the passage set out hereunder. The Court of Appeal stated that the modern approach to the defence of laches is to:

"require a broad approach, directed to ascertaining whether it would in all the circumstances be unconscionable for a party to be permitted to assert his beneficial right. No doubt the circumstances which gave rise to a particular result in the decided cases are relevant to the question whether or not it would be conscionable or unconscionable for the relief to be asserted, but ***each case has to be decided on its facts applying the broad approach****." [Emphasis added;]*

216. The relevant circumstances in the present case are not disputed.

(a) The Conditions of Contract which governed the Construction Agreement between NH and ICS required that disputes arising thereunder be referred to arbitration.

(b) Arbitration proceedings were commenced by NH against ICS on February 18th 2000 *(see paragraph 13 of the arbitration award exhibited as EPE 35 to the witness statement of Emile Elias and found at page 522 of the Trial Bundle in "Witness Statements Volume 2")* and an award was issued on 18th March 2002.

(c) This award was challenged by ICS on 6th May 2002 in an application to have the same set aside and/or remitted for misconduct and/or excess of jurisdiction and/or errors on its face.

(d) The application was dismissed by the High Court on 17th February 2004 and a

subsequent appeal to the Court of Appeal was dismissed on the 31st December 2004. *(See paragraphs 37, 41 and 45 to 47 of the Witness Statement of Emile Elias in "Witness Statement Volume 1" of the Trial Bundle).*

(e) An order rendering the award enforceable as an order of the High Court was granted on 27th June 2004 subject to an undertaking not to enforce same until the final determination of the aforesaid appeal .*See page 586 of "Documents Volume 2" of the Trial Bundle").*

(a) The EC Sum was secured by the order of the Honourable Mr. Justice Tam made on 30th November 1999 in the first action,

(b) The final enforceability of the arbitration award was fundamental to the second action, **to establish the debt owed to NH as a supplier to the Project,**

(c) The second action could not have been properly commenced until after December 31 2004.

217. There was therefore a strong argument that no determination could be made as to whether the said EC sum was held on trust for NH until an arbitrator had finally decided the issue **and** his award had been made enforceable as an order of the court.

(a) I find there was no delay in starting the second action or if there was any delay, it was not inexcusable.

(b) This is not a case where the conduct of NH can reasonably have been regarded by National Stadium as a waiver of NH's right to equitable relief or as causing injustice to it.

(c) There is no suggestion that National Stadium has acted in reliance upon any purported acquiescence or waiver by NH.

(d) No prejudice to NS has been alleged or proved on the evidence.

FACTORS AFFECTING CREDIBILITY

Whether Conflicts on Pleadings Affect Credibility

218. It was contended that paragraph 7 of the Statement of Claim in the 1999 Action and paragraph 7 of the Statement of Case in the 2006 Claim) contain material differences in that:-

[a] in the former it is pleaded that meetings took place between the period March to June 1997 while in the latter the period pleaded is March to May 1997;

[b] in the former it is alleged that Mr. Emile Elias represented NH at the meetings while in the latter the plea is that Messrs. Emile Elias, Geoff Gray and John Connon represented NH;

[c] in the former the plea is that Mr. Colm Imbert was present at the meetings on behalf of ICS while in the latter the plea is that Mr. Imbert represented both ICS and NS at the meetings;

[d] in the former it is pleaded that CIB WOULD ARRANGE to finance the construction of the Project through a Facility Agreement in favour of ICS while in the latter it is pleaded that CIB HAD ARRANGED "financing for the Project through investors which financing would be provided under Facility and Development Agreements substantially in terms of those subsequently executed and referred to in paragraph 9 and 10 hereof"

219. In the Privy Council case of **Attorney General and Anor v Kalicklal Bhooplal Samlal** (1987) 36 WIR 382, 387 it was stated:

"But a judge must check his impression on the subject of demeanour by a critical examination of the whole of the evidence (see ***Yuill v Yuill*** [1945] P. 15 at page 20)**… It is essential when weighing the credibility of a witness to put correctly into the scales the important contemporaneous documents … and the inherent improbability..." [**Emphasis added.**]**

220. I do not accept that any differences, such as they may be, are material, reflect on credibility, or even that some of the alleged differences are even differences. A reading of the paragraphs side by side makes this clear.

221. Further, I regard the contemporaneous documentation and in particular the Project agreements as being the primary source on which I can rely after the lapse of several years, to ascertain what agreements were made among all the parties, their intentions, in so far as these might be relevant, and the effect in law of these, in the instant peculiar concatenation of circumstances.

CONCLUSION/DISPOSITION

222. I have found inter alia the following:

1. That there existed a trust of the Facility for the benefit of suppliers and providers to the Project enforceable by such suppliers /providers, including subcontractors such as NH,

2. That there also existed an assignment by ICS to NH of its legal chose in action to recover any payments due to it from NS, and /or that there was an agreement to so assign.

3. That there has been consideration for that assignment which complies with all necessary legal formalities.

4. That the sum due to NH ascertained by the arbitration award exceeded the EC sum.

5. That CIB is required to account for interest on the EC sum.

6. That CIB is required to comply with the order of the High court that it pay the Additional sum, and that it pay interest thereon from the date of its non compliance.

ORDERS

223.

1. A declaration is granted that the sum of EC $7,430,724.70 ("the said EC sum") was held by the First Defendant [CIB] on trust for the sole purpose of applying the same in payment of suppliers and other providers of goods and services in relation to the Project.

2. A declaration is granted that

   (i) the Deposited Amount and

   (ii) the Additional Sum and

   (iii) Interest accumulated thereon,

   are held on trust (for the sole purpose of applying the same in payment of suppliers and other providers of goods and services in relation to the Project).

3. A declaration is granted that the sum of EC $7,430,724.70 ("the said EC sum") was held on trust for NH by the First Defendant [CIB].

4. A declaration is granted that the sum of US$2,682,719.24 ("the Deposit Amount") paid by the First Defendant [CIB] into Account No. 0447657-005 at the Trinidad and Tobago Unit Trust Corporation (UTC) [the Account] pursuant to the order of Mr. Justice Tam dated 23rd July 2004 (made in the High Court Action 3400 of 1999) together with any interest accumulated thereon, is held on trust for NH.

5. A declaration is granted that the sum of US $93,174.54 ("The Additional sum) is held by CIB on trust for NH.

6. It is ordered that the Deposited Amount and all interest accumulated thereon be paid out to NH and that there be payment out to NH of the monies held in the Account.

7. It is ordered that CIB do pay to NH the Additional Sum of US$93,174.54 owed by CIB as a result of the 2005 Order together with interest thereon from May 26 2005 at the rate of 12% per annum.

8. It is ordered that interest on the said EC sum from November 30 1999 to April 26 2005 be assessed.

9. It is ordered that CIB do,
   a. provide, file and serve on all parties within 7 days from today's date complete accounts, records and documentation in its possession in relation to the frozen EC sum from the date of Justice Tam's initial order dated November 30th 1999 to the date of payment to the UTC account pursuant to order dated 23rd July 2004.
   b. Leave is granted to all parties to this action for
      (i) the filing ,within 14 days from today, of such material, if considered necessary in relation to evidence of relevant interest rates and
      (ii) Replies if any within 7 days thereafter.

10. It is ordered that the costs of these actions be paid by the Defendants to the Claimant/Plaintiff on the basis prescribed by the Civil Proceedings Rules as follows -

(i) In the case of CIB costs are to be paid on the value of the total of the (a) Additional Sum, (b) Interest thereon, and (c) the interest, when assessed, on the said EC sum from November 30 1999 to April 26 2005.

(ii) In the case of NS, costs are to be paid on the basis prescribed for the value of the Deposited Amount (not including the interest which has been accumulating thereon since its deposit into the Unit Trust Account).

Liberty to apply

The Court is indebted to counsel for all parties which participated at trial, and their teams, for the diligence of their research and the thoroughness and detail of their written submissions.

Dated this 28th day of January 2011

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Peter Rajkumar

Judge