THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO. CV 2007- 02224

In the Matter of the Arbitration Act Chapter 5:01, Sections 18, 19 and 32

And

In the Matter of an Application Under Parts 60 and 61 of the Civil Proceedings Rules 1998 (as amended)

And

In the Matter of the Decision of Dr. Robert Gaitskell QC, the Sole Arbitrator of an Arbitration Under the ICC Rules of Arbitration 1998

Between

NATIONAL INSURANCE PROPERTY DEVELOPMENT COMPANY LIMITED
Claimant [Respondent in the Arbitration]

And

NH INTERNATIONAL (CARIBBEAN) LIMITED
Defendant [Claimant in the Arbitration]

Before The Honourable Madam Justice Rajnauth-Lee

Appearances:

Mr. John Tackaberry Q.C. leading Ms. Karen Gough instructed by Mr. Samuel Harrison for the Claimant.

Mr. Alvin Fitzpatrick S.C. leading Miss Lesley-Ann Lucky-Samaroo and Mr. Jason Mootoo instructed by Mr. Adrian Byrne for the Defendant.

Dated: the 14th November, 2008.

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JUDGMEMT

INTRODUCTION

Relief Sought

1. By its Fixed Date Claim filed on the 28th June, 2007, the National Insurance Property Development Company Limited, the Claimant, ("NIPDEC") claimed against NH International (Caribbean) Limited, the Defendant, ("NHIC") the following relief:

    (1) an extension of time for filing its application;

    (2) an order that the Arbitrator should state a case as to the proper construction of clause 2.4 of the FIDIC Conditions of Contract and/or

    (3) the setting aside of the award in which the Arbitrator construed clause 2.4; and/or

    (4) the remission of the award to the Arbitrator together with the opinion of the Court on the proper construction of clause 2.4.

Grounds of the Application

2. The grounds of the application are summarized as follows:

(i) NIIIPDEC, in invoking the jurisdiction of the Arbitrator to state a special case for the court, unintentionally went beyond the statutory limit required to make any application on other grounds.

(ii) The Arbitrator erred on the face of the award and his decision on the construction of clause 2.4 was both wrong in law and against the weight of the relevant evidence presented.

(iii) The Arbitrator was wrong to refuse to state a case for the opinion of the Court.

(iv) NIPDEC had always intended to reserve its position so as to be able to challenge an adverse decision on the proper construction of clause 2.4. There was a procedural mishap in that NIPDEC was not advised that it would be necessary to ask the Arbitrator to state a special case for the opinion of the court, before the publication of his award. Accordingly, NIPDEC's failure to seek a case stated has caused a substantial injustice.

The Affidavits

3. The Claim Form was supported by the affidavit of Wendy Ali sworn to and filed on the 28th June, 2007 ("the first affidavit of Mrs. Wendy Ali"). NHIC filed an affidavit of Peter Morris on the 13th November, 2007 in opposition to NIPDEC's claim. Mrs. Ali filed two further affidavits:

- The second affidavit of Mrs. Wendy Ali sworn to and filed on the 14th December, 2007; and

- The supplemental affidavit to the second affidavit of Mrs. Wendy Ali sworn to and filed on the 17th December, 2007.

THE CONTRACT AND THE ARBITRATION

4. On 6th March, 2003, NIPDEC, as Employer, contracted with NHIC, as Contractor, for the construction of the new Scarborough Hospital in Tobago ("the Contract").

5. The conditions of contract used by the parties were those contained in the well known standard form of building contract for construction works known as the FIDIC General Conditions of Contract for Construction, First Edition, 1999 ("FIDIC COC").

6. The works commenced on or about the 17th March, 2003, and were earmarked for completion within 730 calendar days, that is, by the 17th March, 2005. By the 17th March, 2005, however, the works were substantially incomplete and disputes or differences arose thereafter between the parties.

7. By a Request for Arbitration dated the 24th August, 2004 addressed to the ICC International Court of Arbitration ("the ICC"), NHIC referred various disputes to arbitration pursuant to the parties' agreement as set out in clause 20.6 of the FIDIC COC. Subsequently the parties agreed Terms of Reference ("TOR") to the Arbitration which were signed on the 1st December, 2005 and which terms were amended on the 15th January, 2007.

8. By letter dated the 3rd October, 2005, the ICC appointed Dr. Robert Gaitskell Q.C. of Keating Chambers, 15 Essex Street, London to be the sole Arbitrator in the case. The Arbitrator has published two Partial Awards, the first on the 7th February, 2007 and the second dated the 16th April, 2007 published on the 20th April, 2007. NIPDEC's claim relates to matters arising in connection with the Arbitrator's Second Partial Award ("the SPA"). The SPA is exhibited as W.A.1 to the first affidavit of Mrs. Wendy Ali.

9. The SPA dealt with certain liability issues, the formulation of which were settled by the parties on the 5th December, 2006 and amended immediately prior to the hearing which commenced on the 15th January, 2007 in Port of Spain. The hearing took place between the 15th - 23rd January, 2007. The issues arising for decision in the SPA were annexed as Appendix B to the Amended TOR, which will be considered in detail later in this judgment.

CLAUSE 2.4 OF FIDIC COC:

10. Clause 2.4 of the FIDIC COC provides as follows:

> *"The Employer shall submit, within 28 days after receiving any request from the Contractor, reasonable evidence that financial arrangements have been made and are being maintained which will enable the Employer to pay the Contract price (as estimated at that time) in accordance with Clause 14 [Contract Price and Payment]. If the Employer intends to make any material change to his financial arrangements, the Employer shall give notice to the Contractor with detailed particulars."*

11. Clause 16 of the FIDIC COC entitled NHIC to suspend work (or reduce the rate of work) under the Contract and to terminate the Contract if NHIC did not receive the reasonable evidence required by clause 2.4 within a specified period of time subject to certain notice requirements being met [paragraph 18.3 of the SPA refers].

12. On 28th April, 2005, NHIC invoked clause 2.4 and requested evidence. Having claimed that it had not received the requested evidence, on the 31st May, 2005 it issued a 21 day notice under clause 16.1 threatening to suspend/reduce work. NHIC claimed that it was therefore entitled to reduce its rate of work from the 23rd June, 2005, and did so.

13. On the 23rd September, 2005, NHIC suspended work under the Contract on the ground that NIPDEC remained in non-compliance with the requirements of clause 2.4 and for the same reason gave notice of termination of the Contract pursuant to clause 16.2 on the 3rd November, 2006.

14. NIPDEC disputed that it was in breach of the requirements of clause 2.4 contending that its letters and memoranda provided to NHIC dated the 28th December, 2004, the 29th December, 2004, the 5th July, 2005, the 6th July, 2005, the 6th October, 2006 and the 20th October, 2006 ("the financial arrangements correspondence") satisfied the evidential threshold required by the clause.

15. By the SPA, the Arbitrator upheld NHIC's contentions that the financial arrangements correspondence did not constitute reasonable evidence that financial arrangements had been made and were being maintained which would enable NIPDEC to pay the Contract Price as estimated at the relevant time and that NIPDEC was accordingly in breach of clause 2.4.

16. The Arbitrator went on to hold that NHIC was entitled to reduce its rate of work, suspend work and terminate the Contract as and when it did.

NIPDEC'S REQUEST FOR THE ARBITRATOR TO STATE A SPECIAL CASE

17. Almost one month after the publication of the SPA, NIPDEC by letter dated the 18th May, 2007 invited the Arbitrator to state a special case pursuant to section 32 of the Arbitration Act Chapter 5:01, concerning the construction of clause 2.4. NIPDEC's request concerned five questions, the terms of which are set out hereunder:

(1) Whether on a proper construction of clause 2.4 of the FIDIC Conditions of Contract for Construction for Building and Engineering Works designed by the Employer, First Edition 1999 in the context of a public project financed by the Government and the Inter-American Development Bank the Employer, National Insurance Property Development Company Limited, is required to provide evidence to the Contractor of Cabinet Approval having been obtained and/or that same would be inevitably forthcoming.

(2) What is the extent of the authority of the Permanent Secretary as the chief accounting officer in a Ministry of Government authorised to disburse public money to provide reasonable evidence of the making and maintaining of financial arrangements to enable payment to be made by the Employer under the said clause 2.4 properly construed.

(3) Whether the said clause 2.4 is to be construed as requiring evidence that payment can be made by the Employer.

(4) Whether on the true construction of the said clause 2.4 of the FIDIC Conditions of Contract the letter dated 5 July 2005 from the Permanent Secretary Ministry of Health to the Contractor and/or the letter dated 6 October 2006 from the Permanent Secretary, Ministry

of Health to the Contractor constituted reasonable evidence within the meaning of the clause.

(5) Whether on a proper construction of clause 2.4 the Contractor's suspension and/or termination of its contract with the Employer was lawful and/or valid.

18. NHIC responded to NIPDEC's request by way of submissions to the Arbitrator dated the 23rd May, 2007 and NIPDEC replied by e-mail dated the 29th May, 2007.

19. By an e-mail from the Arbitrator to the parties dated the 31st May, 2007, the Arbitrator rejected NIPDEC's request for a case stated. The relevant portions of the Arbitrator's email are set out hereunder:

(i) "My Second Partial Award (SPA) is dated 16 April, 2007 and was issued by the ICC shortly thereafter. The Request is dated 18 May, 2007. The SPA deals with certain questions formulated by the parties. At no time prior to receipt of the Request was it ever suggested that there be any case stated.

(ii) I note NHIC's submissions (page 2) that s. 32(1)(a) provides for what is commonly known as a 'consultative case', where, prior to an award being made, the arbitrator seeks the Court's guidance as to certain legal questions, without himself coming to any decision on those questions. I accept that submission. Plainly, since the present Request was made some time after the SPA was produced, s. 32 (1)(a) is inapplicable.

(iii) … it is clear that s. 32(1) and (2) do not permit a case to be stated in the present circumstances, where a binding decision has already been produced on the issues in question.

(iv) Further, in the present case the ICC rules apply. The ICC letter, dated 17.4.07, issuing the SPA referred to ICC Rule 28(6), stating the SPA was binding and the parties had undertaken to carry out the award without delay and had waived any form of recourse. The SPA was scrutinized by the ICC International Court of Arbitration (Rule 27) prior to being issued. This all reinforces the point above that, as regards issues dealt with in the SPA, I am functus officio (although, of course, I remain able to deal with issues not dealt with in the SPA). (The fact that decided issues may subsequently be applied in later partial awards does not alter this position. The issues remain decided.)

(v) Conclusion

In my view NHIC is correct in its contentions that s. 32 does not cater for requests for a case to be stated in circumstances where the request is first raised after the arbitrator has already made decisions disposing of the material issues. In such circumstances the arbitrator is functus officio in respect of those issues, and does not have the jurisdiction in respect of those issues to state a case for the court. Accordingly, I must decline the request to state a case in respect of issues already dealt with in the SPA".

ISSUES:

20. In these circumstances, NIPDEC has commenced this claim. The following issues fall to be determined by the Court:

(i) Whether NIPDEC should be granted an extension of time for the making of this application.

(ii) Whether the Court ought to direct the Arbitrator to state a special case in the circumstances of this case.

(iii) Whether there occurred a procedural mishap which warrants the Court remitting the Award to the Arbitrator.

(iv) Whether there was an error on the face of the award, and if so, whether the Court should in its discretion set aside or remit the award in which the Arbitrator construed clause 2.4.

21. The Court will look first at the issues at (ii), (iii) and (iv) and will then consider whether in all the circumstances it ought to grant an extension of time.

SHOULD THE COURT DIRECT A CASE STATED

A. The Court's Jurisdiction

22. Section 32 subsections (1) and (2) of the Arbitration Act, Chapter 5:01 ("the Act") provide as follows:

"(1) An arbitrator or umpire may and shall if so directed by the Court state:

(a) any question of law arising in the course of the reference, or

(b) an award or any part of an award

in the form of a special case for the decision of Court.

(2) A special case with respect to an interim award or with respect to a question of law arising in the course of a reference may be stated, or may be directed by the Court to be stated, notwithstanding that proceedings under the reference are still pending."

23. NIPDEC contends that the wording of section 32 permits the stating of a case *after* the publication of an award but concedes that it is in the discretion of the Arbitrator to refuse to do so. NIPDEC further contends that in refusing the application because he considered that he was *functus officio,* the Arbitrator was clearly in error. NIPDEC accepts that the Arbitrator was not entitled to alter his award of his own volition and by his own act, but submits that nothing prevented him from stating a case for the court to decide the important issues of law arising out of his Award.

24. Accordingly, NIPDEC argues, the Arbitrator, having failed to state a case for the opinion of the Court, either as a matter of technical misconduct or by reason of the powers of the court, should be directed so to do.

25. On the other hand, NHIC contends that NIPDEC's request for the Arbitrator to state a case constitutes a request for a consultative case which as a matter of law can only be entertained if it is made before the making of an award. In such a case, the Arbitrator asks for the guidance of the court without coming to a decision himself. NHIC submits that the very language of section 32 of the Act necessarily contemplates that any request for a special case to be stated must be made prior and

not subsequent to the making of an award or any part of an award. It is further argued on behalf of NHIC that an arbitrator who has delivered one or more awards making definite findings of fact and law is *functus officio* in respect of matters submitted to him in which he has awarded.

26. NHIC has placed reliance on the cases of **Fidelitas Shipping Co. Ltd v V/O Exportchleb** [1965] 1 Lloyd's Rep. 223. and **London Dock Company v Shadwell** (1862) 7 L.T 381.

27. In the case of **Fidelitas Shipping**, Lord Denning M.R., in considering the arbitrator's power to state a case and the significance of a consultative case, stated at page 228 (second column):

> "Since the introduction of such an interim award, a consultative case should be confined to those cases where the arbitrator or umpire asks for the guidance of the Court without coming to a decision himself. The typical case is where, during the course of the reference, a question of law arises, and he wants to know the opinion of the court before he comes to his decision. Such was the case *In re Knight and the Tabernacle Permanent Building Society,* [1892] 2 Q.B. 613, where the arbitrator wanted to know whether the Society had power to make alterations in their rules so as to bind Knight. To such a case the words of Lord Justice Bowen still apply:
>
> > ….The section contemplates a proceeding by the arbitrator for the purpose of guiding himself as to the course he should pursue in the reference. He does not divest himself of his complete authority over the subject-matter of the arbitration. He still remains the final judge of law and fact…
> > See [1892] 2 Q.B., at p. 619".

28. Diplock LJ in the same case made the following important points (at page 231, second column):

> "Once his final award is made, whether or not stated in the form of a special case, the arbitrator himself becomes *functus officio* as respects all the issues between the parties unless his jurisdiction is revived by the Court's exercise of its power to remit the award to him for his reconsideration. But this is merely the way in which the principle *nemo debet bis vexari pro una et eadem causa* affects the arbitrator's functions. He has decided the questions of fact as to which he is the exclusive tribunal; he has determined their legal consequences subject only to correction by the High Court on the stated questions of law. The parties cannot re-open the same matters again before him."

29. In the case of **London Dock Company v Shadwell**, after the making of the award by the umpire, the company was dissatisfied with the award and wrote to the umpire requesting him to state the legal principle upon which he had acted in making his award, in order that they might take legal advice upon the case with a view to questioning its validity in court. In the discourse between Cockburn C.J. and Counsel for the company, Cockburn C.J. remarked:

> "What is the use of inserting a clause of this nature providing for the statement of a special case and then treating it as nugatory? I doubt the propriety of asking an umpire for his reasons for the purpose of taking the opinion of the court. Besides, you are too late. Why come to this court and involve the parties in expense in order to do that which you had power to do under the submission". (page 382 second column)

And further (at the same page):

> "You allow the opportunity to go by and take your chance, and then come here, putting all the parties to great expense. It can't be permitted."

30. NIPDEC argues that **Shadwell** is concerned with a power to request that the arbitrator state a case contained in the parties' submission to arbitration and not with a statutory provision. In any event, NIPDEC contends, the decision appears not to go to jurisdiction but to involve an exercise of the court's discretion.

31. While the Court agrees that the clause in **Shadwell** (for stating a special case) was contained in the parties' submission and not in a statutory provision, the Court is of the view that having regard to the language of section 32 of the Act and to the learning in **Fidelitas Shipping,** the same principle applies in **Shadwell** as to this case. The request to state a special case on the construction of clause 2.4 of FIDIC COC is too late. The Arbitrator is *functus officio* in relation to the SPA and cannot thereafter state a case for the court in respect of issues submitted to him by the parties and on which he has made definite findings of fact and law. The SPA cannot be re-opened before him, unless the Court exercises its power to remit it to him for his reconsideration.

32. The Arbitrator can be requested to state as a special case for the decision of the Court, a question of law arising in the course of the reference, an award or part of an award, or, an interim award pursuant to section 32 of the Act. The language of the section clearly contemplates that this request must be made *prior* to the issue of the Arbitraror's award.

B. **Is the case stated procedure appropriate**

33. It has also been argued on behalf of NHIC that the questions formulated by NIPDEC and contained in its letter of request dated the 18th May, 2007 are inappropriate for the case stated procedure. The Court proposes to consider NHIC"s submissions as regards Questions (1) – (5) already set out at paragraph 17 of this judgment.

34. Question (1):

NHIC submits that this question cannot be meaningfully argued in the absence of the relevant factual matrix. It is contended on behalf of NHIC that it is for the party who frames the question to make plain to the Arbitrator the points on which it requires facts to be found to argue the questions of law **[Halsbury Laws of England 4th edn Vol. 2 para 601**]. NHIC submits that NIPDEC has failed to do this.

35. Question (2):

NHIC submits that this is a pure question of fact, asked in a vacuum and not suited for the case stated procedure. In addition NIPDEC argues, questions of fact are within the exclusive domain of the Arbitrator.

36. Question (3):

NHIC contends that this is not a well-defined question and does not take the construction of clause 2.4 any further.

37. Question (4):

NHIC argues that this is a question of fact, not suited for the case stated procedure and in any case within the exclusive domain of the Arbitrator.

38: Question (5):

NHIC submits that the question is not well defined; that it is not a defined question of law; that it is being asked in the absence of a factual matrix and that it involves the specific issue which was referred to the Arbitrator.

39. The Court has looked at the case of **GKN Centrax Gears Ltd v Matbro Ltd** [1976] 2 Lloyd's Rep 555, and the well-known proposition of Lord Denning M.R. at page 575 second column:

> "When an award is stated in the form of a special case, it is not to be treated as if it was in the nature of an appeal from a Judge alone. The arbitrator is the final judge of fact, of admissibility of evidence and discovery and such like. Too often advocates have asked for special cases. Too often arbitrators have acceded to the request. I hope that arbitrators will only state cases when they come in the principles which we endeavoured to state in the Halfdan case, [1973] 2 Lloyds's Rep. 296; [1973] 1 Q.B. 62. The point of law should be clear cut and capable of being accurately stated as a point of law. It is wrong to dress up a matter of fact as if it were a point of law."

40. The Court has also considered the learning in the text **Commercial Arbitration by Mustill and Boyd** (1982) at page 333:

> "The problem about a consultative case is that the Court cannot and will not decide a question of law without an underlying basis of fact. Since a consultative case involves no finding of fact which is binding on the parties

or, for that matter, the arbitrator, the Court must either be asked to assume facts or simply be informed of the factual issues without any indication of the likely outcome."

41. The Court accepts NHIC's submissions that questions 2 and 4 are questions of fact which fall for the sole determination of the Arbitrator. The Court also agrees with NHIC that Questions 1, 3, 5 are not suited for the case stated procedure. The Arbitrator should normally be asked in the request for the case stated to find certain facts on which questions of laws can be argued. In the absence of a factual matrix, the Court agrees that these questions are being asked in a vacuum. Moreover, these principles reinforce the Court's view that it is not proper for an Arbitrator to be asked to state a special case *after* the issue of his award.

C. The Exercise of the Court's Discretion:

42. NHIC has also submitted that in the exercise of the Court's discretion as to whether it should direct a special case, the Court should take into account the following matters:

(A) that the parties specifically designated the Arbitrator the final judge of law and fact. The Court ought not to direct the Arbitrator to state a case on the very questions which the parties specifically posed to him; and

(B) the conduct of NIPDEC in making a deliberate, tactical decision not to ask the Arbitrator to state a case prior to the issue of his Award.

(A) The Issues in the Arbitration

43. NIHC has submitted that an examination of the Amended TOR (W.A. 3 to the first affidavit of Mrs. Wendy Ali) discloses that the broad issues agreed by the

parties in their Agreement of the 5th December, 2006 to be dealt with at the First Substantive Hearing included the issue of the validity of NHIC's suspension [Broad Issue (1)] [Appendix B to Amended TOR].

44. At paragraph 7.2.1. of the SPA [W.A.1 to the first affidavit of Mrs. Wendy Ali] the Arbitrator remarked that he would resolve all relevant issues of fact and law that properly fall to be dealt with in the Arbitration including but not limited to such issues raised by the parties and referred to in the Amended TOR, as well as any additional issues of fact or law which he considers necessary in order to render his Award. Further, the parties agreed in the Amended TOR that the Arbitrator should have jurisdiction to determine all matters raised on the pleadings.

45. The decision of the Arbitrator shall be final and binding on the parties in accordance with clause 20.6 of FIDIC COC [paragraph 7.2.2 of the SPA].

46. With respect to the first broad issue – the validity of NHIC's suspension – the parties posed specific questions for the determination of the Arbitrator [Appendix B (supra)]. The questions revolved around clauses 2.4, 15.2 and 16.1 and called for inter alia construction of clause 2.4 and findings as to whether NIPDEC had satisfied the evidential threshold required by clause 2.4 and consequentially, whether NHIC was entitled to reduce the rate of work, suspend the works or terminate the Contract.

47. It is not necessary to examine these questions in detail at this stage. Suffice it to say that the Arbitrator was asked to construe clause 2.4 and to determine by and large the very questions which were subsequently formulated by NIPDEC in its letter of request to the Arbitrator dated the 18th May, 2007.

(B) NIPDEC's Conduct

48. An examination of NIPDEC's conduct centres on paragraph 9 of the first affidavit of Mrs. Wendy Ali:

> "In the interim, and on advice, NIPDEC sought to engage the Arbitrator by requesting him to state a case for the opinion of the court under section 32 of the Arbitration Act Chapter 5:01. It was always NIPDEC's intention that the proper construction of Clause 2.4 of the FIDIC COC should be referred to the Court in the event that the Arbitrator ruled that "reasonable evidence" of financial arrangement in the context of a government or government authority was construed by the Arbitrator to go beyond the information available in the public domain. NIPDEC was not advised and did not understand that section 32 of the Arbitration Act required, in all cases, for a party to request the Arbitrator to state a special case before writing an interim or partial award in the arbitration." [emphasis mine]

49. It was submitted on behalf of NHIC that NIPDEC had taken a deliberate, tactical decision to sit by and wait for the Arbitrator to rule on the questions posed to him, and if the Arbitrator ruled against them, to refer the Arbitrator's construction of clause 2.4 to the Court. It was therefore argued that such conduct did not warrant the intervention of the Court. NHIC also argued that NIPDEC, by Mrs. Ali's last statement, appeared to accept that their request for a case stated was too late.

50. NIPDEC on the other hand contended inter alia that the parties were working under tremendous pressure to present an important case in circumstances where the Arbitrator maintained that he was proceeding with the Arbitration. Mr. Tackaberry argued that in the circumstances where NIPDEC sought no advice and

did not understand that section 32 of the Act required in all cases for a party to request the Arbitrator to state a special case before writing his award, this was a procedural mishap which led to injustice and the Court ought to intervene.

51. Since the issue of NIPDEC's conduct as it relates to the exercise of the Court's discretion overlaps the issue of procedural mishap as it relates to the power to remit, the Court will deal with these issues together.

SHOULD THE COURT REMIT THE AWARD TO THE ARBITRATOR ON THE BASIS OF PROCEDURAL MISHAP

52. The power to remit is a statutory power contained in section 18 of the Act, which provides:

> "18. (1) In all cases of reference to arbitration the Court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.
>
> (2) Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order."

53. In the well-constructed judgment of Jamadar J. in the unreported case of **ICS (Grenada) Limited and NH International (Caribbean) Limited** (HCA No. Cv. 1541 of 2002) the learned Judge noted that although on its face the discretion appeared unlimited, it had been circumscribed though process of judicial interpretation. There are four grounds upon which a matter can be remitted to an arbitrator for reconsideration. These are where:

(i) the award was bad on the face of it;
(ii) there was misconduct on the part of the arbitrator;
(iii) there had been an admitted mistake by the arbitrator; or

(iv) fresh evidence had been discovered after the making of the award.

54. Subsequently, these categories were extended to include situations where had been "a misunderstanding leading to injustice" or some "procedural mishap which led to injustice". Attorneys for NIPDEC agreed with the statement of Jamadar J. at page 6 of **ICS (Grenada) Limited** that unlike the jurisdiction to set aside, the court has no inherent jurisdiction to remit an award.

55. In addition to the submissions advanced on behalf of NIPDEC and set out at paragraph 50 of this judgment, NIPDEC has argued that the true *test* as to whether the Court should remit an award to the Arbitrator is, in circumstances in which it is fully accepted that the Court is always reluctant to intervene where an arbitrator has made his award, whether injustice is sufficiently serious or real or substantial. Put another way, if the Court does not intervene, can the Court in all fairness and justice, confirm the award and enforce it.

56. NIPDEC has also argued that the proper distinction is not between finality and legality but that the award of the Arbitrator is final unless there is a serious injustice as a result. NIPDEC places reliance on the case of **Indian Oil Corporation v Coastal (Bermuda) Ltd** [1990] 2 Lloyd's Rep. 407.

57. NHIC on the other hand submits that the Court will not exercise its jurisdiction to remit in favour of a party who, for reasons attributable to it or its legal advisers, fails to request that an arbitrator state a case for the opinion of the court before his award is published. According to NHIC's Written Submissions, whether the Court declines because the party's failure to act timeously cannot constitute a procedural mishap of the type required by the Court for the exercise of its jurisdiction or because such failure amounts to conduct disentitling that party from claiming unfairness does not matter. NHIC relies on the case of **GKN Centrax Gears Ltd** (supra).

58. Both parties have addressed at length on the case of **King v Thomas McKenna Ltd** [1991] 2 W.L.R. 1234. The facts of this case are simple. There was a building dispute referred to arbitration in which the contractors claimed £25,000. The building owners counterclaimed for £5,000. and made a sealed offer in that sum. In argument before the arbitrator on the question of costs, Counsel for the building owners decided not to reveal the existence of the sealed offer, but mistakenly failed to indicate either to the arbitrator or to the contractors that she wished the issue of costs to be deferred until liability and quantum had been determined. The arbitrator awarded the contractors £4,743. in full settlement of all claims and not knowing of the sealed offer, he also awarded them costs of the arbitration. On the application of the building owners for the award to be remitted on the ground of procedural mishap, the Judge granted the application. He found that Counsel had made deliberate, tactical decisions not to inform the arbitrator of the sealed offer and to ask for the issue of costs to be "held over" but that she had mistakenly believed that her submissions had achieved that purpose.

59. The Court of Appeal had been asked by the parties to hear the appeals of **King v Mckenna** and **Indian Oil** (supra) together. The combined judgment was in an advanced state of preparation when they learnt that **Indian Oil** had been settled. The Court found it inappropriate to express conclusions on the rights of the parties to the **Indian Oil** appeal, but in fairness to the arbitrators in that case, they made it clear that they would not have upheld the finding of any element of "mishandling or technical misconduct" on their part.

60. In the judgment of Lord Donaldson, he examined whether the court's jurisdiction under section 22 of the Arbitration Act, 1950 [equivalent to section 18 of the Act] was unlimited. Lord Donaldson concluded that the jurisdiction was indeed wholly unlimited. How that jurisdiction should be exercised however was a different matter, he pointed out.

61. One of the many cases considered by Lord Donaldson was the case of **Mutual Shipping Corporation v Bayshore Shipping Co. Ltd. (The Montan)** [1985] 1 W.L.R. 625 in which the arbitrator made, and readily admitted, that he had made an inadvertent error in awarding damages to the owners when he meant to award them to the charterers. The case fell within the third of the four traditional categories.

62. At page 632 of **The Montan,** Lord Donaldson had said:

> "Section 22 empowers the court to remit an award to an arbitrator for reconsideration. It provides the ultimate safety net whereby injustice can be prevented, but it is subject to the consideration that it cannot be used merely to enable the arbitrator to correct errors of judgment, whether on fact or law, or to have second thoughts, even if they would be better thoughts. In the instant case, the arbitrator has accidently made a major error, which, if uncorrected, would lead to the charterers paying the owners, when it is the owners who should be paying the charterers. No court could lend the power of the state to the enforcement of such an award and no court should stand by when it has power to correct such an accidental error and I stress the word 'accidental.'"

63. Lord Donaldson commented on his judgment in **The Montan** at page 1241 of **King v Mckenna**. According to him, the philosophy underlying this statement of law was that the great distinguishing feature between litigation and arbitration was that parties voluntarily submitted to the latter system of disputes resolution, save when it was imposed by statute, and as part of that choice could stipulate who should be the judges and the procedures to be adopted. As a consequence, it was not unreasonable, although the matter could be more politely expressed, to require them to accept those judges and those procedures "warts and all."

64. At page 1243 of his judgment, Lord Donaldson drew important conclusions as to the remission jurisdiction. According to him, the remission jurisdiction extended beyond the four traditional grounds to any cases where, notwithstanding that the arbitrators have acted with complete propriety, due to mishap or misunderstanding, some aspects of the dispute which have been the subject of the reference have not been considered and adjudicated upon as fully or in a manner which the parties were entitled to expect and it would be inequitable to allow any award to take effect without some further consideration by the arbitrator. The court's jurisdiction was subject to one vital qualification, that it was designed to remedy deviations from the route which the reference should have taken towards its destination (the award) and not to remedy a situation in which, despite having followed an unimpeachable route, the arbitrators have made errors of fact or law and as a result have reached a destination which the court would not have reached. Lord Donaldson further commented that parties to arbitration, like parties to litigation, were entitled to expect that the arbitration would be conducted without mishap or misunderstanding and that, subject to the wide discretion enjoyed by the arbitrator, the procedure adopted would be fair and appropriate. What they were not entitled to expect of an arbitrator any more than of a judge was that he would necessarily and in all circumstances arrive at the right answer as a matter of fact or law.

65. A short but extremely well-reasoned judgment was given by Ralph Gibson L.J. who agreed with Lord Donaldson that the appeal should be dismissed. He reasoned that due to no fault of the arbitrator or the other party, the building owners on the facts of the case on the issue of costs had not received *a fair trial.* Counsel for the contractors had agreed that there was no conceivable explanation for a failure to ask that the issue of costs be stood over other than an obvious blunder by Counsel, and not the making of a considered decision not to secure an opportunity for consideration by the arbitrator of the sealed offer. Ralph Gibson L. J. regarded that as important because according to him, the jurisdiction to remit should not be available to enable a party to an arbitration to *repent* of a considered decision by

himself or his legal representatives with reference to such a matter in order for him to pursue a different course on remission to the arbitrator.

66. In the case of **Indian Oil** (supra) through the obvious blunder or mistake of IOC's legal representative, IOC's defence on one of the issues in the arbitration was not correctly formulated. Evans J. granted the application of IOC to remit the award to the arbitrators. According to Evans J. the power to remit can and should be exercised when there is otherwise the likelihood of *substantial miscarriage of justice*, either because the arbitration has been mishandled (that is misconduct), or where there has been some other procedural mishap, even one due to the fault of the party seeking remission or his representative.

67. In my judgment, it is not necessary to determine whether NIPDEC had made a deliberate, tactical decision which did not warrant the intervention of the court. In exercising my discretion whether to remit, two (2) important questions are to be answered:

(i) Has NIPDEC received a fair trial although the Arbitrator was never requested to state a case for the opinion of the court?

(ii) Has there been some substantial miscarriage of justice or put another way was there some serious or real or substantial injustice to NIIPDEC as a result?

68. In answering these questions, I adopt the language of Lord Donaldson. In my opinion, during the course of the Arbitration, there have been no *deviations from the route which the reference should have taken toward its destination.* I have seen nothing in the evidence or in the submissions of the parties to suggest that NIPDEC has not received a fair trial before the Arbitrator. The Arbitrator has properly and fairly dealt with the issues raised by the parties and the questions posed to him in the Amended TOR. Nothing arose in the course of the reference

which resulted either in a unfair trial or in any substantial miscarriage of justice to NIPDEC. There was no serious or real or substantial injustice to NIPDEC as a result of its not requesting the Arbitrator to state a special case during the course of the reference.

69. At paragraph 59 of its original Written Submissions filed on the 21st January, 2008, NIPDEC submitted that the procedural mishap in this case was its provision to NHIC in the first place of an internal memorandum referring to Cabinet approval and dated the 28th December, 2004. According to NIPDEC, this gave rise to the assumption or claim by NHIC that it was entitled to documents emanating from the Cabinet as "reasonable evidence" of NIPDEC's ability to pay.

70. The Court is at a loss to understand how this amounts to a procedural mishap leading to substantial injustice. I agree with NHIC's submission that the procedural mishap must have arisen in the course of the reference.

71. Accordingly, the Court refuses to remit the award for the reconsideration of the Arbitrator on the ground of procedural mishap. As to the exercise of the Court's discretion considered earlier in this judgment [paragraphs 42-51], there being no unfairness or miscarriage of justice to NIPDEC, the Court will not direct the Arbitrator to state a special case. Again, I do not think it necessary to make a determination as to NIPDEC's conduct.

SHOULD THE COURT REMIT OR SET ASIDE FOR ERROR ON THE FACE OF THE AWARD

72. In addition to the power to remit an award which was bad on its face, [one of the four traditional categories set out earlier], the courts in Trinidad and Tobago have the power to set aside an award under its inherent jurisdiction where there is an error of law on the face of the award. The court also has a statutory jurisdiction to set aside an award where an arbitrator has misconducted himself or the

proceedings or where the award has been improperly procured [section 19(2) of the Act].

73. NIPDEC has contended that there was an error of law on the face of the award, and the award should either be remitted or set aside. They argued inter alia that the Arbitrator had set the bar too high by deciding that clause 2.4 of FIDIC COC required Cabinet approval and that it had to be for the contract sum.

74. NHIC on the other hand argued that the Arbitrator never found that Cabinet approval was required. NHIC contended inter alia that where a specific question of law or principle of construction is referred to the Arbitrator for his determination, the courts will not interfere even if they appear on the face of the award and are clearly wrong. In any case, it was argued on behalf of NHIC, the Arbitrator's findings of fact were reasonable, his construction of clause 2.4 did not proceed on any wrong principles, and his findings of law without error. In the circumstances, NHIC contended that the award ought not to be set aside or remitted.

75. NIIPDEC has countered that there was an important distinction to be drawn between the type of case where there is a specific reference to the arbitrator of a point of law simpliciter and the instant case where there is a general reference to the arbitrator and a point of law arises in the course of the reference. Accordingly, it was submitted on behalf of NIPDEC, in the latter case, the Arbitrator's determination of the point of law can be remitted or set aside. In order to determine whether the SPA should be remitted or set aside, I propose to consider facts and matters which occurred prior to and during the course of the reference.

76. The parties to the Arbitration had agreed by a jointly signed Letter of Agreement dated the 5th December, 2006 that certain liability issues should be dealt with at the First Substantive Hearing commencing on the 15th January, 2007.

77. Pursuant to that Letter of Agreement the parties referred to the Arbitrator certain broad issues and specific formulated questions produced by each party and set out in Appendix B to the Amended Terms of Reference [W.A 3 of the first affidavit of Mrs. Wendy Ali; paragraph 7.2.4. of the SPA].

78. NHIC's specifically formulated questions were:

> Was NHIC entitled to terminate the Contract pursuant to Sub-Clause 16.2 by Notice dated 3rd November 2006" (paragraph 25.6.1 of the SPA).
>
> Was NHIC entitled to reduce the rate of work under Sub-Clause 16.1 on 23rd June 2005 by reason of NIPDEC's failure to provide reasonable evidence as required by Sub-Clause 2.4 that financial arrangements had been made and were being maintained so as to enable NIPDEC to pay the Contract Price as estimated at the time (paragraph 25.3.1 (a) of the SPA).
>
> Was NHIC entitled to suspend the Works under Sub-Clause 16.1 from 23rd September 2005 until termination by reason of NIPDEC's failure to provide reasonable evidence as requested by Sub-Clause 2.4 that financial arrangements had been made and were being maintained so as to enable NIPDEC to pay the Contract Price as estimated at the time (paragraph 25.3 1(b) of the SPA).

79. Among NIPDEC's specifically formulated questions were the following:

> Given the true meaning and effect of Sub-Clause 2.4 and in the events which have transpired, was NHIC entitled to request from NIPDEC reasonable evidence that financial arrangements had been made and were being maintained and which enabled the Employer to

pay the Contract Price as contemplated by Sub-Clause 2.4 of FIDIC ('the request').

Assuming, without admitting, that NHIC was entitled to make the request pursuant to Sub-Clause 2.4, did the facts and circumstances including, inter alia, the NIPDEC's letters and memoranda dated 28th December 2004, 29th December 2004, 5th July 2005, 6th July, 2005, 6th October 2006 and 20th October, 2006 ('the financial arrangements correspondence') satisfy the evidential threshold required by Sub-Clause 2.4.

Given the intended effect of the Sub-Clause 2.4 as explained by the FIDIC Guide 1999 and in the light of the true meaning and effect of Sub-Clause 2.4 and receipt by NHIC of the financial arrangements correspondence was NHIC obligated to resume work in accordance with Sub-Clause 16.1.

Whether, in the light of the true meaning and effect of Sub-Clause 2.4 and/or in the light of the financial arrangements correspondence, did the conduct of NHIC in reducing the rate of work suspending the work and subsequently terminating the Contract amount to a breach of the Contract and, in particular, Sub-Clause 16.1.

80. Where parties refer a specific question of fact or law to an arbitrator, even though he makes an erroneous decision, there exist no grounds for setting aside the award. Otherwise it would be futile even to submit a question of law to the arbitrator: **Re King and Duveen** [1913] 2 K.B. 32. The question of law must be a specific one, however, and not merely a question of the most general character: [**Parsons v Brixham Fishing Smack Insurance Co. Ltd** (1918) 118 LT 600].

81. Further, where a question of construction is specifically referred to arbitration, the decision of the arbitrator on that point cannot be set aside because the court would have come to a different conclusion, unless it appears on the face of the award that the arbitrator has proceeded illegally, for example, that he has decided on evidence that is inadmissible or on principles of construction which the law does not countenance [**Kelantan Government v Duff Development Co** [1923] A.C. 395 [H.L.]. According to Viscount Cave L.C, where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the court only because the court would have come to a different conclusion. [page 409].

82. In **Kelantan**, the arbitration clause in the deed of cancellation applied in terms to every dispute, difference or question which might arise between the parties touching the construction, meaning or effect of the deed. The appointment of the arbitrator showed that differences had arisen as to construction, and the arbitrator was appointed to determine those differences. In the pleadings delivered in pursuance of the arbitrator's direction, the questions of construction were again clearly raised. Further, the appellants in their case delivered for the purpose of the appeal stated that among the points to determined by the arbitrator were:

> (1) What, upon the true construction of the Deed of Cancellation, was the nature and extent of the obligation of the Government in regard to …
>
> (2) Whether, upon the true construction of the Deed of Cancellation, the Government … and if so, in what terms and what was the nature and extent of the obligation of the Government …

83. Viscount Cave L.C. concluded that the reference in **Kelantan** was a reference as to construction [page 409]. The decision of the Court of Appeal which had affirmed the decision of Russell J. was upheld and affirmed.

84. Ten years later, in the case of **F.R. Absalom Ltd v Great Western (London) Garden Village Society** [1933] A.C. 592 (H.L), Lord Russell of Killowen (as he then was) delivered an insightful judgment on the same point.

According to Lord Russell:

> "My Lords, it is, I think, essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision. I am not sure that the Court of Appeal has done so. The authorities make a clear distinction between these two cases, and, as they appear to me, they decide that in the former case the Court can interfere if and when any error of law appears on the face of the award, but that in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one."

85. Lord Russell went on to find that in **Absalom** no specific question of construction or law was submitted to the arbitrator. It was in the delivery of the statement of claim, as regards the issue whether the arbitrator should revise the last certificate that the question of law arose, not specifically submitted, but material in the decision of the matters which had been submitted.

86. In my opinion, the instant case resembles **Kelantan** and not **Absalom.** Specific questions of law and the construction of clause 2.4 of FIDIC COC were indeed referred to the decision of the Arbitrator pursuant to the Amended Terms of Reference [Appendix B]. Accordingly, the award of the Arbitrator ought not to be set aside or remitted unless I find on the face of the award that the Arbitrator has proceeded illegally or on principles of construction which I do not countenance.

87. At this stage, it is appropriate that I make two short observations. Firstly, NIPDEC by paragraphs 17-19 of its Original Written Submissions filed on the 21st January, 2008, appeared to agree that specific questions had been submitted by NIIPDEC to the Arbitrator for determination in the SPA.

88. Secondly, NIPDEC has by its Supplementary Submissions filed on the 30th June, 2008 exhibited pages 108 – 135 of the transcript of the evidence before the Arbitrator and sought to argue not only that the Arbitrator took into account irrelevant evidence but that he appeared to have failed to take into account the oral evidence of Mr. Winston Riley, one of NHIC's own witnesses. [Annex 2]. The Court agrees with NHIC that since the transcript does not form part of the award and is not directly incorporated in the award, it cannot be said that the error was on the face of the award, even if error is shown by the transcript.

89. As already pointed out in this judgment, the arbitrator is the final judge of fact. Lord Denning has warned Advocates that it is wrong to dress up a matter of fact as if it were a point of law. [**GKN Centrax Gears Ltd** (supra)]

90. NHIC has argued that the question posed to the Arbitrator as to what constituted reasonable evidence under clause 2.4 that financial arrangements had been made and were being maintained, had to be determined in all the circumstances of the case, in the light of the relevant evidence, and was a question of fact in the sole purview of the Arbitrator. In my opinion, NHIC's submission must be upheld. The Court will not interfere even though I might hold a different view.

91. I also agree with NHIC that even where there is a question of mixed law and fact, once the arbitrator has correctly stated the proposition of law, even if he arrived at a wrong conclusion of fact, this would not be a ground to interfere. [Mustill J. in **Oversea Buyers v Granadex S.A**. [1980] 2 Lloyd's Rep. 608].

Accordingly, the question posed by NIPDEC as to whether the facts and circumstances including inter alia the financial arrangement correspondence satisfied the evidential threshold required by clause 2.4, assuming but not admitting that NHIC was entitled to make a clause 2.4 request, was indeed a question of mixed law and fact, and unless the Arbitrator has proceeded on a wrong principle of law, the Court ought not to interfere with his findings of fact.

92. The Arbitrator has pointed out in the SPA (paragraph 18.5) that clause 2.4 did not simply require evidence that the Employer was able to pay, but that financial arrangements had been made and were being maintained which would enable the Employer to pay. In his view, proper weight had to be given to all the words which were included in clause 2.4.

93. The Arbitrator has found that the mere fact that an Employer was wealthy was inadequate for the purposes of clause 2.4. Accordingly, mere evidence that the Government of Trinidad and Tobago ("GORTT") had very substantial funds did not by itself satisfy clause 2.4. [paragraph 18.6 of the SPA].

94 The Arbitrator also found that emerging from the evidence before him as regards the significance of Cabinet approval was that (quite properly and for very good public policy reasons), GORTT cannot pay large sums of public money in respect of costs overruns on construction contracts unless Cabinet approval was given in advance, or perhaps, retrospectively. The issue of Cabinet approval therefore could not be ignored. It was at some point an essential element of any arrangement to pay. According to the Arbitrator the question remained: Had the Employer put in place (made/maintained) financial arrangements which would enable him to pay? This required positive steps by the Employer [paragraphs 18.6 and 18.7 of the SPA].

95. The Arbitrator considered the letter from the Permanent Secretary, Ministry of Health dated 5th July, 2005 and supplied to NHIC on the 6th July, 2005. By this letter, the Ministry of Health had advised that "without prejudice', funds were available in the sum of $286,992,070. to meet the estimated final cost of completion for the Scarborough Hospital. [paragraph 18.12].

96. By letter dated the 8th July, 2005, Mr. Elias (NHIC's witness) rejected the 5th July, 2005 letter, sought clarification as to the term "without prejudice" and requested confirmation that there was Cabinet approval for the payment in the light of an earlier response from NIPDEC dated 29th December, 2004, that Cabinet approval had been confirmed. There was no response to the 8th July letter.

97. The Arbitrator found that in the absence of a response the 5th July, 2005 letter remained equivocal [paragraph 18.18]. Further, Mr. Elias' evidence was that three weeks after the letter, on the issue of Certificate 27, the Employer was apparently unable to pay it and had to ask the Tobago House of Assembly to use money from a different vote to pay the certificate. The Arbitrator noted that that evidence was not challenged by NIPDEC. [paragraphs 18.18 and 18.19].

98. In the circumstances, the Arbitrator's view was that as at 5th and 6th July 2005, it was probable that no financial arrangements had in fact been made to enable GORTT to pay NHIC for the sums, beyond the IADB loan, that were being incurred. Accordingly, the letters of the 5th and 6th July, 2005 did not provide as required by clause 2.4 reasonable evidence that financial arrangements had been made and were being maintained which would enable the Employer to pay the estimated Contract Price [paragraph 18.20].

99. As to the September and October, 2006 letters, referred to in paragraphs 18.25 and onwards of the SPA, it is not necessary to go through the evidence in detail. NHIC was contending that the Contract Price was $474,201,877.60 (VAT inclusive) while the letter of Ms. Sandra Jones, Permanent Secretary, Ministry of

Health, dated 6th October 2006, referred to a Contract Price of $224,129,801.99 (VAT inclusive).

100. The Arbitrator found that it was NIPDEC's own case that at the time the request was made the relevant estimated final cost to completion was $286,992,070. [paragraph 18.27.9]

101. In addition, the 6th October, 2006 letter was only hand-delivered to NHIC on the 19th October, 2006. On 27th October, 2006, NHIC requested confirmation of Cabinet approval. According to the evidence of Ms. Jones since two weeks before, she had taken action to go to Cabinet for approval and in fact by 30th October, 2006, she had actually prepared a Cabinet Note. She did not tell NHIC about her steps to get Cabinet approval.

102. Further, earlier NIPDEC had written to the Minister of Health, by letter dated 29th September, 2006, indicating the advice of Queen's Counsel that a renewed letter should be issued by the Ministry of Health to NHIC stating that financial arrangements had been made and continued to be maintained, which would have enabled the Employer to pay the Contract Price. That letter contained in the margin, in manuscript, the signatures of the Attorney General (who commented that he agreed with the "recommendation outlined herein" and Minister of State in the Ministry of Finance, Mr. Conrad Enil. The Arbitrator found that that letter had been so signed on the 3rd October, 2006 in circumstances where the Minister of Health had held discussions with the Prime Minister, Minister Enil and the Attorney General. It was the Arbitrator's view that since three leading members of Cabinet were committed to that course of action, it was inevitable that Cabinet approval would be given in due course, as indeed it was. However, the Arbitrator

found that that information (approval by the three key Cabinet Ministers) was not given to NHIC.

103. Accordingly, the Arbitrator found that until the Employer passed on the information about the approval of the three key Cabinet Ministers to the course of action in the letter of the 6th October, 2006 (or gave some equivalent appropriate assurance that Cabinet approval would be inevitably forth coming), it had not submitted "reasonable evidence" as required by clause 2.4.

104. I have examined the Arbitrator's findings. I agree with NHIC that they are without exception having regard to the evidence before the Arbitrator and all the circumstances of the case. I also agree that the Arbitrator never found that Cabinet approval was necessary to satisfy clause 2.4. I accept as correct that there is nothing in the findings of the Arbitrator which infringes the Freedom of Information Act Chap. 22:02.

105. It has not been demonstrated that the Arbitrator proceeded on any wrong principle of law or construction. In the circumstances, the Court will not interfere with his award. Accordingly, there has been no demonstrated error on the face of the award and NIPDEC's claim on that issue fails.

106. In all the circumstances, where I am opinion that there is no merit to NIPDEC's claim for any of the reliefs sought, the Court refuses NIPDEC's application for an extension of time for filing its Claim. In any case, no good ground has been shown that would justify an extension of time.

CONCLUSION/COSTS:

107. The Claimant's Fixed Date Claim filed on the 28th June, 2007, is hereby dismissed. On the 31st January, 2008, the Court set a costs budget in the sum of $1.2 million (Trinidad and Tobago Dollars). Having regard to the complexity of the issues for determination before the Court and the extensive evidence and submissions filed by the parties, the Court will not vary the costs budget. Accordingly, the Claimant shall pay to the Defendant costs of the claim in the sum of $1.2 million.

MAUREEN RAJNAUTH-LEE
JUDGE