THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civ. App. No. 48 of 2011
H.C.A. No. 3400 of 1999
CV. 2009-03844

BETWEEN

NATIONAL STADIUM (GRENADA) CORPORATION

APPELLANT/THIRD DEFENDANT

AND

NH INTERNATIONAL (CARIBBEAN) LIMITED

FIRST RESPONDENT/PLAINTIFF

CLICO INVESTMENT BANK LIMITED

SECOND RESPONDENT/FIRST DEFENDANT

ICS (GRENADA) LIMITED

THIRD RESPONDENT/SECOND DEFENDANT

Consolidated by Order of Rajkumar J. on January 28, 2011.

Civ. App. No. 48 of 2011
CV. 2006-01205

BETWEEN

NATIONAL STADIUM (GRENADA) CORPORATION

APPELLANT/SECOND DEFENDANT

AND

NH INTERNATIONAL (CARIBBEAN) LIMITED

FIRST RESPONDENT/CLAIMANT

CLICO INVESTMENT BANK LIMITED

SECOND RESPONDENT/CLAIMANT

PANEL:
P. Jamadar, J.A.
N. Bereaux, J.A.
C. Pemberton, J.A.

APPEARANCES:

For the Appellant:	**Mr. Hughes Q.C. leading Ms. A. Sooklal**
For the First Respondent:	**Mr. Fitzpatrick S.C. leading Ms. L. Lucky-Samaroo and Mr. S. Sharma instructed by Mr. A. Byrne**
For the Second Respondent:	**Mr. B. Reid**
For the Third Respondent:	**No Appearance**

DATE OF DELIVERY: November 28, 2018

I have read the judgment of Pemberton J.A. I agree with it and have nothing to add.

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/s/ P. Jamadar, J.A.

I have read the judgment of Pemberton J.A. I agree with it and have nothing to add.

_____
/s/ N. Bereaux, J.A.

JUDGMENT

INTRODUCTION

[1] This matter has had a long, winding and checkered history through the courts of both Grenada, Carriacou and Petit Martinique and Trinidad and Tobago. Two actions were consolidated for more efficient and effective passage through the courts. Essentially the Second Respondent, NH International (Caribbean) Limited, (**NH**) sought a stake in monies which were frozen at the Unit Trust Corporation of Trinidad and Tobago (UTC).

PROCEDURAL HISTORY

A. 1999 ACTION

[2] In 1999, NH filed proceedings seeking a declaration against Clico Investment Bank Limited (**CIB**), ICS (Grenada) Limited (**ICS**) and National Stadium (Grenada) Corporation (**NS**), that it was entitled, to, on the basis of an assignment in their favour, "*so much of the monies due from CIB under the Facility Agreement as would from time to time be owing to them under the construction agreement*". On May 25, 2005, NH managed to secure a freezing order from Tam J.[1]

B. 2006 ACTION

[3] In 2006, NH further engaged the court in another action against CIB and NS in which it sought declarations that the monies frozen in the former action were held by CIB "*on trust for the sole purpose"* of applying same to payment of suppliers and service

[1] This Order stated,

IT IS HEREBY ORDERED THAT *the U.S. Dollar equivalent of the sum of EC$7,430,724.70 which by clause 2 of the Order of this Court made herein on 23rd July 2004 was directed to be deposited by the First Defendant into an interest bearing account at the Unit Trust Corporation in the joint names of the instructing Attorneys at law on record for the parties be calculated using the direct conversion method of EC dollars to US Dollars and the rate of exchange of USS1.00 to EC$2.7130 prevailing at the Unit Trust Corporation on the date when the said account was opened.*

On May 25, 2005 this Order was varied to include that the rate of exchange to be used was US$1.00 to EC$2.7130. This resulted in additional US$93,174.54 being required to be paid into the Unit Trust Corporation account.

providers. NH, as such a supplier, was therefore entitled to enforce the trust for their own benefit. NS defended both claims on the ground that no trust had been created in favour of NH, or at all. In this action NS counterclaimed that the frozen funds properly and lawfully belonged to them as a result of the expiration of the Facility Agreement.

C. CONSOLIDATED MATTERS

[4] The matters were consolidated and on January 28, 2011. The trial judge determined the matters in NH's favour by way of several orders.

[5] In March 2011, NS appealed, seeking the reversal of those orders. On June 24, 2011 NH applied to the court seeking an order for dismissal of the appeal without a hearing on the merits, on the grounds that "*NS had not themselves demonstrated any entitlement to the frozen funds, nor had they appealed against the judge's findings against them on that issue*". This application found favour with the Court of Appeal. NS's appeal was dismissed without a hearing on the merits. NS then sought the assistance of the Privy Council. In short, the Privy Council decided that the Court of Appeal was not entitled to dismiss the appeal and the matter was remitted for full hearing on the merits.

[6] The issues for determination in this appeal are:

1. Whether the trial judge erred when he construed the "purpose" of the Facility Agreement?

a. *What is the "purpose" of the Facility Agreement?*
b. *Was that "purpose" fulfilled?*
c. *Who is the beneficiary entitled to the remaining funds which were generated under the Facility Agreement?*

2. Whether ICS acquired rights under the Facility Agreement, which were then assigned to NH?

[7] The appeal is allowed and the trial judge's findings and orders are reversed for the following reasons:

1. THE 1999 ACTION, THE ASSIGNMENT ACTION:

a. NS is not a trustee for ICS of any rights and obligations accruing to it under the Facility Agreement.

b. The funds in the frozen account arose under and by virtue of the Facility Agreement, which was entered into by NS and CIB.

c. Even though both ICS (the developer) and NH (builder) were both mentioned in the definition section of this Agreement, they played no role in the creation of rights or obligations or in the operation of the Agreement, which spelt out the rights and obligations of NS and CIB. It is therefore clear that ICS was not entitled to any funds under the Facility Agreement.

d. Nothing in the Facility Agreement could be read as giving any party a right or opportunity to assign.

e. Even if such a right or opportunity can found, they are defeated since the requirements of the Statute of Frauds, 1677 were not met.

f. Under the Development Agreement, NS, a separate entity from ICS, was obligated to receive advances made to it by CIB under the Facility Agreement and remit those advances to ICS, in order to finance the works under the Project.

g. The trial judge found as a fact, that there was no assignment of rights based on the Development Agreement and we affirm that finding.

h. Clause 17 of the Construction Agreement can only be interpreted as an assignment of ICS's rights to receive monies due to it. Any assignment of rights to receive monies contained in the Construction Contract cannot be read as conferring on NH a right to step into ICS's shoes, if the Facility Agreement contained no provision for assignment of NS's obligations and rights to ICS. ICS was not a party to that Facility Agreement.

i. NH could not lay claim to the monies, which had been the subject of the account which was frozen at UTC by Order of Tam J. on the basis

of the assignment clause contained in the Construction Agreement as those funds arose from the execution of the Facility Agreement which contained no assignment clause.

j. In the premises, NH did not prove its claim to monies which were frozen in the UTC account.

k. NS's appeal is allowed on the 1999 claim.

2. THE 2006 ACTION: THE TRUST CLAIM

[8] On the 2006 claim, the trial judge's decision is reversed for the following reasons:

a) The *"purpose"* of the Facility Agreement was not to construct the Project.

b) The *"purpose"* of the Facility Agreement was to enable ICS through the formation of NS, to meet its obligations to the Government of Grenada (**GOG**) in terms of financing the Project.

c) Once the *"purpose"* for the Facility Agreement had been fulfilled, the **QUISTCLOSE** principles did not arise.

d) Even if it is argued that the financing *"purpose"* had not been fulfilled, the **QUISTCLOSE** principles would have determined that the creditors/lenders/bondholders would have been the beneficiaries of a resulting trust and not NH, which did not fit into any of the above categories.

3. THE COUNTERCLAIM

[9] On the Counterclaim, NS claimed that NH had wrongfully obtained the freezing order and by so doing, unlawfully deprived NS from the use of the funds, which had been obtained by virtue of the operation of the Facility Agreement. During that time, NS was forced to seek alternative funding at considerable expense to itself for the completion of the Project. NS caused these monies to be paid to ICS by way of a loan. Therefore, ICS became indebted to NS. ICS became unable to satisfy this debt, had a judgment entered against it, and was forced into liquidation. This claim was resisted by NH in its Defence to Counterclaim. The trial judge held that there was no entitlement under the Facility Agreement for NS to receive funding to satisfy

the debt due and owing to them as creditors of ICS. Whilst that may be true, I do not think that this the thrust of NS's claim.

[10] NS's counterclaim lay on the interpretation of its rights under the Facility Agreement. By the time of the counterclaim, the Facility Agreement was spent, since bondholders were satisfied by the GOG. The sums remaining are payable to NS, the entity charged with the responsibility under the agreement for procuring the funds in the first place. I therefore do not agree with the trial judge's decision that on the counterclaim as was filed, NS was not entitled to the sums standing frozen at the UTC. I find that NH had wrongfully procured the freezing order as they had no right to those sums of money.

[11] By order of the High Court, dated November 1, 2017 NH was permitted to enforce the order of Rajkumar J. against UTC. The effect of this, was that the UTC was directed to pay out the monies which had been frozen, to NH. Those sums were paid to NH in obedience to the direction. Since I have found that NH had no entitlement to those monies, NH must now pay those monies, which had been released to it, to NS.

BACKGROUND

[12] The GOG, Carriacou and Petit Martinique, in order to encourage sporting activities, especially football, cricket and athletics for which the nation has become recognized globally, released a tender for erecting of a sporting facility. A company incorporated in Trinidad and Tobago, Imbert Construction Services Limited (**ICSL**), won the tender and proceeded to incorporate a company in Grenada called **ICS** to perform the works.

[13] In January 1997, the GOG signed a Memorandum of Understanding (**MOU**) with the Minister of Finance, ICSL and CIB. By the MOU, ICSL was engaged to implement and manage the stadium project through a special purpose company which was to be formed and owned by ICSL. They did that and **NS**, the Appellant in this action, was formed. By a supplemental MOU, ICSL was replaced by ICS, the

Respondent/Second Defendant in this action. A contract, which incorporated the MOU was then entered into amongst the GOG, NS, ICS and CIB where it was agreed that NS would implement and complete the Project using a build, own lease, transfer approach (BOLT)[2].

[14] It is internationally recognized that one vehicle for direct financing of large infrastructure projects such as this, lay in the corporate bond market.[3] In furtherance of its obligations under the finance component of the MOU, NS entered into an agreement with CIB. This was called the Facility Agreement. By this Agreement, CIB agreed to and did **secure investors** through a bond issue. The proceeds from that bond issue were intended to finance the construction of the national stadium and sporting complex. In keeping with the terms of the Facility Agreement, NS and CIB executed a Trust Deed by which CIB, as Trustee, held bonds issued in NS's name for the benefit of the bondholders. The effect of this was that these bonds secured NS's obligation to the bondholders. CIB issued certificates to the bondholders in the form as prescribed. NS further covenanted with CIB that the bonds would be interest-bearing and that the bondholders were to be repaid both principal and interest on the maturity of their securities. The parties agreed as well, that the net proceeds from the issue of the bonds, were to be used to finance the construction of the project. The GOG secured these bonds by executing a collateral Deed of Mortgage in favour of CIB over the property, Queens Park, and a collateral Deed of Charge over the Lease.[4] The design and construction phases were

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[2] See paragraph 7 of the 2006 Defence filed Mar. 1st 2010, which succinctly sets out the framework for construction. Of particular importance to these cases are:
1. NS's design, finance and construct obligation for the price of US $23 Million
2. CIB's obligation to facilitate the financing by inter alia, arranging a bond issue in the name of NS.
3. NS's responsibility for the repayment if the facility provided by CIB.

[3] Yener Altunbas et. al. Large Debt Financing. Syndicated Loans Versus Corporate Bonds. Working Paper. No. 1028. March 2009.

[4] **GRENADA NATIONAL STADIUM (DEVELOPMENT AND FINANCING) ACT, 1997. Act No. 8 of 1887.** Annex 2. Clause 7.01.
Sec. 2(1) states, *"for the purpose of the development and financing of the Grenada national stadium complex…approval is hereby given to the various agreements…to be executed by the parties, as contained in the Schedule B, Schedule C and Schedule D as appropriate."*
(2)…

evidenced by other agreements, the Development Agreement and the Construction Agreement.

[15] The entire project was given statutory force by virtue of the **GRENADA NATIONAL STADIUM (DEVELOPMENT AND FINANCING) ACT, 1997**[5]. Section 2(1) of the Act contained two of the three Agreements relevant to this action. They are (1) the Facility Agreement and (2) the Development Agreement,[6] which when executed, had the effect of law in Grenada. Those Agreements were,

WRITTEN AGREEMENTS

1. **15th May 1997**

   Facility Agreement executed between **CIB, the Trustee** and **N.S.**

   The *"purpose"* of this Agreement was to arrange a facility to be used to finance the project. By this facility, the sum of US$23 Million was procured by the issuance of bonds. The proceeds of the bonds were to be disbursed through advances made by CIB to/on behalf of NS to finance the project in the manner set out in the Agreement. As part of this Facility Agreement, NS and CIB executed a Trust Deed in which they agreed that interest-bearing bonds would be issued in NS's name, for the benefit of bondholders, repayable, to the bondholders or on the order of CIB when they became due. The bonds, which were issued under the Facility Agreement, were therefore constituted and secured by the provisions of that Deed.

2. **15th May 1997**

   Development Agreement

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(3) parties means the "national stadium project (Grenada) Limited, Clico Investment Bank, Minister of Finance as Corporation Sole and Minister of Finance representing the Government of Grenada".

[5] Id.

[6] Section 3 of the Act states, *"the Facility Agreement as contained in schedule b, the Development Agreement as contained in schedule C…shall when executed, have the force and effect of law in Grenada."*

That is the vehicle through which the proposal made by ICSL and accepted by the GOG was to be effected. Under this Agreement the parties **GOG, ICS, CIB** and **NS** undertook certain obligations in connection with the construction of the sporting facility. The monies were to be provided by CIB through interest-bearing bonds issued under the Facility Agreement. Further, NS as employer, agreed with ICS as the developer, for ICS to carry out the project for the sum of US$23 Million. CIB as financing agent, agreed that the monies secured under and pursuant to the Facility Agreement, were to be paid through NS to ICS for payments to, *"consultants, suppliers and other providers of goods and services in relation to the project"*[7]. The GOG agreed to lease the project from NS and these payments were to be the repayment of the US$23 Million with interest.

[16] Other Agreements relevant to the determination of this case and considered by the trial judge are:

a. 15th May 1997

The Agreement between **NS** and **ICS**

NH styled this Agreement as the Conduit Agreement. ICS agreed to carry out works and NS agreed to pay ICS the sum of US$23 Million for *"the design, planning, financing and management and construction of the Works"*[8]. Clause 7 of this Agreement contains a non-assignment clause save with consent of the other party.[9]

b. 6th June 1997

The **Construction Agreement** executed between **ICS** and **NH**, in which NH agreed to execute and complete the works and remedy any

[7] See The Development Agreement at Clause 6.5

[8] See The Agreement at Clause 2.

[9] Clause 7 of the Agreement states: "*Neither the Developer nor the Employer shall assign his interest in this Agreement or any part thereof without the written consent of the other provided that nothing herein shall prevent the Developer from sub-letting all or any part of the Works at its discretion."*

defects in conformity with the contract. The letter of acceptance which formed part of this Agreement stated the contract price was EC $43,502,812 Million. In addition, it contained a Clause 17, which provided that all monies due to NH under the agreement shall be assigned and paid directly to NH. There is no indication as to who was to do the assignment, but it can be inferred that the assignment was to move from ICS.

[17] Unhappy differences arose between ICS and NH and the contract between them terminated, without the project being completed. Thereafter, NH claimed that they were owed monies for works done. The acrimonious relationship was brought to a head in arbitration proceedings. Eventually, the arbitrators agreed that monies were indeed due and owing to NH, who managed to win an award of EC$7,626,796.67 with interest. In 1999, NH moved to freeze sums which originated under the Facility Agreement.

[18] After NH's termination, ICS remained responsible for finishing the Project. NS, to fulfil its obligations as providing the proceeds of the bonds to finance the Project, advanced funds to ICS, to the tune of EC$13.5Million. ICS did not liquidate that sum. NS sued and received a judgment in its favour in the Courts of Grenada.

[19] The project finished eventually on June 7, 2000. In August 2002, all monies advanced and secured under the bond facility were fully repaid through funds furnished by the GOG. The bondholders were fully repaid, both principal and interest. The sum of money which originated under the Facility Agreement, remained frozen as a result of the order of Tam J. CIB has categorically stated that they are not entitled to those frozen funds and they make no claim on them. NH, though not a party to the Facility Agreement, either as bondholder or otherwise, claims to have a stake in these monies. The basis, they allege, is a term in the Construction Contract which provided that all monies due to it under that Agreement were to be assigned by ICS and paid directly to them (the 1999 action), or on the basis of a trust created in their favour (the 2006 action). It is interesting to note that

no other Agreement was cited or referred to in the Construction Agreement. NH's claims are the subject matter of this consolidated litigation. It is to be noted, that ICS as well, was not a party to the Facility Agreement. The parties to the Facility Agreement, I reiterate, were NS, a wholly owned subsidiary of ICS, and CIB.

FIRST ACTION - THE ASSIGNMENT ACTION

STATEMENT OF CLAIM

[20] Having secured the arbitral award, sometime in November 1999, NH filed this action against CIB, ICS and NS in the courts of Trinidad and Tobago, in which they sought to recover the sums granted by the arbitration award as a debt due and owing to it based on Clause 17 of the letter of acceptance, which formed part of the Construction Contract. By that Clause, NH alleges that ICS had agreed to assign, in its favour, *"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 it under the Construction Agreement. In the alternative, NH's claim as against ICS and NS, lay on an assignment in its favour of *"so much of the monies due and to become [due] from NS to ICS"* under what he styled the **Conduit Agreement**, *"as would from time to time become payable to NH under the Construction Agreement"*.[10] By application of NH, Tam J. granted an *ex parte* injunction to NH restraining CIB from drawing down on the account until the determination of the matter. They managed to secure a freezing order of the monies. The sums were to be deposited in the UTC pending the hearing and determination of these proceedings. On October 6, 2009, a little over 10 years after the first filing, the Court of Appeal gave leave to NH to amend its pleadings,

DEFENCE

[21] CIB maintains that it had no interest in the frozen monies. ICS and NS however defended the claim. Much of the pleading was spent explaining the relationship between NS and ICS. They admit the Construction Contract between ICS and NH and say that NH in compliance with its obligations under the Construction Contract

[10] See the Amended Statement of Claim filed January 11, 2010 at paras. 2 and 3 of the Reliefs prayed.

commenced the Project and received payments directly from CIB as a matter of convenience only. That was not based on any contractual obligation or assignment or agreement to assign, which they pointedly denied.

[22] Since the filing of the Defence, ICS was wound up by Order of Baptiste J. (as he then was)[11]. On August 8, 2002, the investors of the facility to CIB, were repaid by the GOG and this brought an end to obligations under the Facility Agreement and under the Development Agreement as far as those obligations involved any action to be taken in pursuance of the Facility Agreement.

SECOND ACTION

STATEMENT OF CLAIM

[23] On May 12, 2006 NH filed an action against CIB and NS to recover the arbitral award and additional sums, representing interest. They claim that that sum was payable from the monies held by CIB as Trustee under the Facility Agreement, which had been part of the sums frozen, by interim order of Tam J. They sought declarations that those sums were held by CIB on trust, the primary purpose of which was to be *"used solely for the purpose of the project".* This meant that the sums from the Facility Agreement were to be applied to the payment of ICS and/or contractors, suppliers and other providers of goods and services in relation to the Project. It was agreed under the Construction Agreement that payments should be effected directly to NH from the funds advanced under the Facility Agreement. Since the bondholders had been fully satisfied, any remaining sums were held on trust by CIB. Further, since NH was a member of the class of service providers in relation to the Project, CIB held the funds on trust for it. Therefore, NH was entitled to maintain this action.

DEFENCE

[24] NS defended this claim and reiterated that NH was not entitled to any of the relief claimed in the Statement of Case or any other relief. They admitted most of the

[11] See Winding up Order made by Baptiste J (as he then was) in the High Court of Justice of the Supreme Court of Grenada and the West Indies Associated States dated December 22, 2005.

formal paragraphs of the Statement of Case. They further admitted that the project would have been implemented by using the BOLT approach, more particularly, that CIB would facilitate the financing of the project by arranging a bond issue. They admitted all of the agreements surrounding the various relationships,[12] but denied that NH through its agent held several meetings as alleged in the Statement of Case. They admit one or two meetings, which were arranged for the purpose of discussing *"the Claimant's request that payments becoming due to it for works to be completed on the project be paid by the First Defendant and not through"* either NS or ICS.[13] They deny any agreement with the Claimant for the assignment to the Claimant of any rights, which they had for monies payable to it, under the Facility Agreement. What they assert, is that there was an agreement in principle, *"subject to a formal contract being entered into"* that the advances due to be made to NS under the Facility Agreement, to satisfy payment as per that agreement would, *"as a matter of procedure and for the purpose of convenience"* only, would be paid by CIB directly to NH. Further, they assert that if there was any such assignment agreement, it would have been in breach of Clause 10 of the Development Agreement, since no consent to effect this arrangement had been procured as mandated in the Development Agreement.

[25] They further averred that ICS breached its contract in that it did not complete the scope of work as agreed. There was therefore, no monies due and owing to ICS to be paid to suppliers such as NH.[14] Further, under the Development Agreement, NH had no direct call on the Facility provided to NS by CIB in relation to the project. Those sums only became available to ICS if they fulfilled their obligations to NS under the main contract.

[26] NS asserted its entitlement to the frozen sums. The basis of this entitlement lay in NH's *"failure, refusal and/neglect to complete the works …"* resulting in ICS's failure to "*fulfill its obligations under the Main Contract and/or ICS's the consequential*

[12] See para. 8 of the Defence.
[13] Id. at para. 9.
[14] Id. at para. 12.

failure of ICS to fulfill its obligations under Clause 2 of the Development Agreement".[15] This failure had the effect of forcing NS, to complete the Project at considerable cost and expense to itself as it was complying with its *"continuing duty and obligation"* under the various Project agreements and contracts which they entered into and by which they were bound.

[27] NS stated that ICS became indebted to it to the tune of EC$13,449,469.00, which sums remain due and owing to them. On June 9, 2004 NS obtained a final judgment against ICS in the amount of $EC13,452,094.00 inclusive of costs and interest accruing at a daily rate of EC$4,422.61 from ju7dgment date until payment.[16] NS averred that ICS was wound up[17] and NH attempted to appeal that order, but was denied leave to appeal. It had since failed and/neglected to pursue the matter and is now precluded or estopped from so doing.

[28] As of March 1, 2010, ICS's debt to NS stood at EC$13,452,094.00 together with interest of EC$9,238,832.29. The total sum claimed is EC$22,690,926.29[18].

[29] NS asserts as well that the monies were held in trust by CIB until the occurrence of one or the other of two events, namely, the completion of the Project or the Bondholders' repayment. Both happened, the first on June 7, 2000 and the second as at August 8, 2002. They further deny the creation of any trust in favour of NH, since it does not accept that the primary *"purpose"* of the trust has failed. For NS

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[15] See para. 16 of the Defence which reads,

> *This Defendant further says that by reason of the Claimant's failure, refusal and/or neglect to complete the works under the Sub-Contract either as agreed or at all, the consequential failure of I.C.S. to fulfil its obligations under the Main Contract and/or the consequential failure of I.C.S. to fulfil its obligation under clause 2 of the Development Agreement, this Defendant being under a continuing duty and obligation under the Projects Agreements, Memorandum of Understanding and Supplemental Memorandum of Understanding pleaded herein, was forced to complete the Project at considerable cost and expense to itself and as a consequence whereof I.C.S. became indebted to this Defendant in the sum of EC$13,449,469.00, which sum remains due, owing and payable by I.C.S. to this Defendant.*

[16] See para. 17 of the Defence.

[17] *Infra.* See para. 22.

[18] See para. 18 of the Defence.

the primary *"purpose"* of the Facility Agreement was not the financing of the Project by payments to ICS, contractors and suppliers of goods and services, but rather was *"for the benefit and protection of the investors/Bondholders."*[19]

[30] NH being fully aware of all of these facts at all of the material times, was *"nevertheless guilty of prolonged, inordinate and inexcusable delay*" in approaching the court for relief. NH, NS says has *"acquiesced in the matters complained of"* leading NS to believe that NH would not bring or prosecute a claim on these bases such that it would not have been or would be prejudiced.[20] Therefore, NH is barred by laches from claiming any relief against NS.

THE COUNTERCLAIM

[31] In addition to the matters pleaded in the Defence, NS counterclaimed that NH had wrongly applied to apply to the Court for the funds to be frozen; that the funds properly and lawfully belonged to NS for its sole benefit and that NS was unlawfully and or improperly kept from the use of the funds as they were inaccessible to them for completing their obligations to the Project. NH's unlawful action they claim, caused NS to seek alternative funding to complete their obligations. This put NS to considerable expense and caused it to suffer loss and damage. NS therefore counterclaimed for a declaration that the sum of money in the account frozen at the UTC at the time of the action, belonged to it; that the UTC pay those sums together with interest accrued to Attorneys-at-law on record for NS forthwith; and the usual order for costs.

REPLY AND DEFENCE TO COUNTERCLAIM

[32] By the Reply and Defence to Counterclaim, NH reiterated that the monies received by CIB were impressed with a trust for the specific purpose of financing the Project by making payments to ICS and *inter alia,* service and goods providers of which NH was one. NH denied that there was no prohibition against assignment in the Development Agreement, which rendered the assignment agreement in the

[19] Id. at para. 29.
[20] Id. at para. 30.

Construction Contract void or invalid or that there was any law in Grenada, which rendered the said clause illegal. NH affirmed its view that the monies received by CIB under the Facility Agreement and which were held by it until the termination date of the Construction contract were held in trust to the extent of the sums declared due and owing to it under the Arbitration award. NH took issue with the allegation that it failed, refused and/or neglected to complete the works under the Project; stated that it is not "*guilty"* of delay in bringing the action or that it acquiesced in the matters complained about.

[33] In defence of the counterclaim, NH alleges that the counterclaim discloses no or no reasonable cause of action. NH was entitled to apply for and be granted the freezing order and that since an appeal against the said order was dismissed, NS is estopped from raising this claim. NH denies that NS has been unlawfully and/or improperly kept out of any monies due and owing to it, or that it has acted improperly. Further, NH denies that any action taken by it has caused NS to suffer any loss or damage or that it has caused NS to be put to any expense.

ISSUES, JUDGMENT AND ORDER OF RAJUKUMAR J.

ISSUES

[34] The trial judge identified three issues[21] to be addressed:

1. **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").**

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

3. **If so whether such a trust is enforceable by NH**

TRIAL JUDGE'S JUDGMENT

[35] The trial judge opined that the matter was to be resolved largely by examining the contract documents. Based on the trial judge's examination and interpretation of Clause 2.1, of the Facility Agreement, he found that a **QUISTCLOSE** type trust

[21] See Judgment of Rajkumar J. at para. 20. HCA 3400 of 1999, CV 2009-03844

existed in favour of NH. He interpreted the words *"purpose"* of the project, as the construction of the athletic stadium. Using that interpretation, the trial judge found, that the construction was effected by the execution of the Development Agreement, which stated at Clause 6.5, that the financing agent, CIB, had to use the sums of money arising under the Facility Agreement from the bondholders, to pay the *"developer, consultants, suppliers and other providers of goods and services in relation to the Project".* The trial judge stated that even though the stadium had been completed, obligations flowing from the completed stadium remained unfulfilled and those persons to whom sums were due and owing were beneficiaries of the monies, which were held by CIB. The trial judge also found that pursuant to Item 17 of the letter dated June 5, 1997 from ICS to NH, which stated *"all monies due to NHIC under the Agreement shall be assigned and paid directly to NHIC",* it was clear that ICS assigned any rights that it had to be paid, to NH. He stated, *"It should be noted that the sole source of funding for the Project, including that portion subcontracted to NH, was monies provided via CIB…The reference to assignment therefore could only be to monies originating from or via CIB under the Facility Agreement".*[22]

[36] The trial judge made the following findings:

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 [National Stadium], 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.*

[22] Id. at para. 128.

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.*[23]

ORDER

[37] The trial judge made certain Orders and Declarations, which I shall summarize where I can:

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.*

A similar declaration was made in relation to the deposited amount, the additional sum and the accumulated interest, as well as a declaration that CIB held the above stated sums in trust for NH.

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 thrust 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 all 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.*

[23] Id. at para. 222.

8. *It is ordered that the 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 30 1999 to the date of payment to the UTC account pursuant to order dated 23rd July 2004.*

Consequent to the order, interest was also payable on the sums held in trust for NH[24].

GROUNDS OF APPEAL

[38] NS has appealed on numerous grounds, which I will summarize as follows:

1. The trial judge erred in finding of a trust for the benefit of NH, as he misidentified the purpose of the trust; and there was insufficient evidence of a trust.
2. The trial judge erred in his analysis of the evidence, and in finding an assignment in favour of NH conflated the agreements.

Further, NS complains that the procedures adopted at the trial for receiving and/or testing of evidence were flawed as the trial judge failed to consider and/or failed to place sufficient weight on all relevant evidence; and failed to consider the incompatibility of the alternative bases on which the Judgment is founded, in particular, as it deals with the issue of the proper administration of the trust. NS took issue with the trial judge's conclusion that it possessed no entitlement to and/or beneficial interest in the EC Sum and/or the deposited amount and/or the additional sum and interest thereon.

ISSUES FOR COURT OF APPEAL

[39] The trial judge, in his judgment, opined that he regarded, *"the contemporaneous documentation and in particular, the project agreements, as being the primary*

[24] Id. at para. 223.

source (to determine this matter) to ascertain what agreements were made among the parties, their intentions, in so far as these might be relevant and the effect in law".[25] We agree with this approach and find that the appeal largely turns on the analysis of documentary evidence as contended by the trial judge.

1. Whether the trial judge erred when he misinterpreted the "purpose" of the Facility Agreement?

a. *What is the "purpose" of the Facility Agreement?*
b. *Was that "purpose" fulfilled?*
c. *Who is the beneficiary entitled to the remaining funds which were generated under the facility agreement?*

2. Whether ICS acquired rights under the Facility Agreement, which were then assigned to NH?

ISSUE 1

WHETHER THE TRIAL JUDGE ERRED WHEN HE MISINTERPRETED THE "PURPOSE" OF THE FACILITY AGREEMENT?

a. WHAT IS THE "PURPOSE" OF THE FACILITY AGREEMENT?

[40] It is not contested that the frozen sums represented monies which accrued by operation of the Facility Agreement, secured by the Trust Deed executed by CIB and NS.

TRIAL JUDGE'S JUDGMENT

In his Judgment, the trial judge went through all the Agreements in order to determine the "purpose" of the Facility Agreement. The trial judge determined that Facility Agreement was for *"the purpose of financing construction of the national stadium of Grenada…The EC funds which are being claimed by NH were part of the facility arranged for the purpose of paying contractors who performed that construction."*[26]

[25] Id. at para. 221.
[26] See Judgment at para. 81.

RESPONDENT'S SUBMISSIONS

[41] Mr. Fitzpatrick S.C. agreed with the trial judge's approach, arguments and his conclusions. Mr. Fitzpatrick's approach was to look at all the Agreements in order to determine the purpose of the Facility Agreement. With respect to the Development Agreement, Counsel submitted that, *"The Development Agreement recited that ICS intended to finance the carrying out of works by means of financing provided by CIB and that this financing would be provided on behalf of ICS through NS to suppliers or other providers of goods and services in relation to the project".* He further averted to Clause 5 and 6.5 of that Agreement. He asserted that NS misread Clause 6.5 and was of the misinformed view that it is NS, and not CIB, who has the obligation to pay or cause to be paid the sums referred to in Clause 6.5.[27] Further, Counsel submitted,

> *4. Financing was arranged by CIB and took the form of advances made by CIB from funds lent by a variety of investors. The terms of which these funds were lent were set out in the Facility Agreement made between CIB and NS. It was a term of the Facility Agreement that the funds advanced thereunder should be used solely for the purpose of the project…*
>
> *6. By a further agreement ("the Conduit Agreement") executed between NS and ICS, ICS undertook to carry out the project works for the said sum of 23M USD. It is therefore clear that the entire amount of the Facility arranged by CIB was for the benefit of ICS, consultants, suppliers and other providers of goods and services in relation to the project.*
>
> *7. On 6th June 1997, and subsequent to the execution [of] the Development Agreement, the Facility Agreement and the Conduit Agreement, ICS engaged NH (the Construction Agreement) to carry out certain works in relation to the project for the sum of approximately US16,100,000.00. NH was therefore to receive*

[27] Quote Clause 5 and 6.5 maybe

the benefit of the facility arranged by CIB to the extent of this sum.[28]

[42] Counsel relied on **QUISTCLOSE** to support his contentions that understanding the intention of the bondholders in lending the money, was critical to determining the existence of a trust.[29] This intention was for a "special purpose" of paying the ICS, the developer, and/or other suppliers of services for the construction of the works, through NS.[30] Counsel indicated that a broad interpretation of *"purpose"* under the Facility Agreement reveals that the beneficial interest resides with ICS under the Development Agreement, as they were involved in the construction. NS, being a party to the Facility Agreement acted as a conduit through which the *"purpose"* of the Facility Agreement could be achieved.

[43] Mr. Fitzpatrick highlighted that the *"purpose"* of the Facility Agreement was the construction of the stadium, which could not have been achieved unless suppliers of services were paid.[31] That "purpose" was not fulfilled and so any monies held by CIB after the bondholders had been satisfied, had to have been held in a **QUISTCLOSE** type trust, in favour of NH.

APPELLANT'S SUBMISSIONS

[44] Mr. Hughes was of the opinion that *"purpose"* within the Facility Agreement was to be interpreted narrowly.[32] Counsel submitted that the Facility Agreement had as its *"purpose",* the financing of the project. The *"purpose"* of the Facility Agreement had nothing to do with the construction of the stadium. Counsel directed the Court to the various background documents and scrutinized the Definitions section of the Facility Agreement. Mr. Hughes submitted that the "facility" as described by the Agreement is the sum of US$23 Million, which is to be used "*solely for the purpose of the project".*

[28] First Respondent's Speaking Note. Paras. 4, 6 & 7.
[29] Court Transcript. P. 18. May 18, 2018.
[30] Id. at 19.
[31] Id. at 24.
[32] Court Transcript. P. 16. May 16, 2018.

[45] Mr. Hughes submitted that the *"purpose"* of the Facility Agreement was completed when the bondholders were paid off, with interest, on their investment.[33] Counsel referred the Court to Clause 4.02 of the Trust Deed, which stated, *"the proceeds of all Original Bonds shall be receivable by the Project Company and shall be applied for the purposes set out in the Recital C of this Trust Deed".* Recital C states that the proceeds from the issue of Bonds are to be used to finance the construction of the stadium.[34] Mr. Hughes noted that the Trust was established for the benefit of the bondholders and they have benefited in accordance with the *"purpose"* of the Facility Agreement.[35]

LAW, ANALYSIS AND CONCLUSION

CASE LAW

BARCLAYS BANK LIMITED v. QUISTCLOSE INVESTMENT LIMITED[36]

[46] The main principle coming out of **QUISTCLOSE** is that if monies were advanced for a particular *"purpose"* and the *"purpose"* failed, the monies revert to the person or persons who advanced those monies. In **QUISTCLOSE**, Razor, had to pay monies to its shareholders. **QUISTCLOSE** gave Razor the monies to pay the shareholders. Before Razor could pay, they went into liquidation. Barclays Bank was one of the creditors in the liquidation. **QUISTCLOSE** claimed that they ought to rank, seeing as the monies which they advanced were not used for the purpose for which they were advanced. The court held that those monies, which were deposited into Barclays Bank by Razor, were held on resulting trust, for **QUISTCLOSE** since the "purpose" for which they lent the monies failed.

ANALYSIS

[47] Mr. Fitzpatrick argued that the trial judge's interpretation of the *"purpose"* in the Facility Agreement was correct. This was, that the *"purpose"* of that Agreement was

[33] Id. at 19-20.
[34] Appellant's Skeleton Arguments. Para. 18.
[35] *Op. cit.* at fn 15.
[36] [1970] AC 567.

for the **construction** of the facility.[37] Mr. Hughes disagreed and he argued that the *"purpose"* meant financing. It is imperative that the originating legislation be taken into account. The short title of Act makes provision for, *"the development and financing of the Grenada National Stadium Complex and for matters connected therewith"*[38]. A reading of the Act together with a reading of the Facility Agreement demonstrates that the establishment of the Facility Agreement was for the "purpose" of facilitating financing of the Project.

[48] The Facility Agreement made between NS and CIB contains the following Clauses:

- Clause 1.1.10 defines the facility as meaning, *"the facility of US Twenty-three Million Dollars as described in Clause 2.1";*
- Clause 1.1.23 defines project as meaning, *"the design and construction of sporting facilities and other related facilities for the playing and carrying on inter alia of football, cricket, athletic and other related activities on the Lands pursuant to the Contract";*
- Clause 3.1 states, *"the Facility shall be used solely for the purpose of the Project".*

THE FACILITY AGREEMENT

[49] It is interesting that the Deed mandates that the net proceeds from the bond issue are to be used to finance the construction of the sporting complex, Further, the Trust Deed recites CIB's agreement to act as Trustee of this Deed for the benefit of bondholders. By this Agreement, CIB as Trustee, agreed to arrange a bond issue, on behalf of the company, the proceeds of which were to be used for the project upon the terms and conditions outlined in the Agreement. One of the terms was that the Trustee also agreed to make advances *"to or on behalf of NS, up to an* ***aggregate maximum principal amount equal to the facility"***[39] which was US$23 Million. This Agreement provided that the facility, which comprised the proceeds of

[37] *Op. cit.* at fn. 11. P. 26.
[38] *Op. cit.* at fn. 1.
[39] Clause 2.1 of the Facility Agreement.

the bond issue, be used *"solely for the purpose of the project"*[40]. In fact, this Agreement outlined how these funds were to be dispersed, *"in order to ensure proper control of expenditure".* Clause 5.1 of the Agreement set out how these bonds were to be issued and also recites NS's Agreement *to "execute contemporaneously with this Agreement",* (i) a collateral Deed of Mortgage in favour of the Trustee over the land and (ii) a collateral charge over the parcel of land. Under Clause 5, NS agreed that at the date of each advance, they would issue temporary instruments in the form of interim bonds to the Trustee, in the amount equal to the advances made as of that date and interest accrued thereon. The Agreement also provided at Clause 10, for the payment of fees and charges associated with the facility.

THE DEVELOPMENT AGREEMENT

[50] In contrast, under Clause 5 of the Development Agreement made among GOG, ICS, CIB and NS, the developer, ICS was responsible for financing the *"Development of the Works through the Financing Agent in the manner set out in the Facility Agreement".* Clause 6.5 states that CIB shall, *"under and pursuant to the Facility Agreement pay or cause to be paid through the Project Company (NS) all monies due under or pursuant to the Contract Documents to the Developer (ICS), consultants, suppliers and other providers of goods and services in relation to the Project (NH)."*

[51] An Agreement creates rights and obligations with respect to its parties and those specifically named in it. In this case, we must recognize that the Facility Agreement is the financing vehicle for the project. That is, it is financing the *"purpose"* for which the project was conceptualized, formed and executed as evidenced in the Development Agreement. There is a reference in the Development Agreement to the Facility Agreement that is all. This reference cannot create rights and obligations in entities not party to the principal agreement. The two Agreements,

[40] Clause 3.

the Facility Agreement and the Development Agreement are exclusive of each other and cannot create rights and obligations, unless otherwise clearly stated.

CONCLUSION

[52] I think that the purpose of the Facility Agreement must be construed and determined within context. To that end, it is imperative that there be a clear understanding of how financing of government infrastructure projects is effected. Contracts relating to design, contracts relating to construction and contracts relating to financing are three separate elements and will only be linked using the clearest language. Let us examine those Agreements. The term "financing" means *"how governments or private companies that own infrastructure find the money to meet the upfront costs of building it."*[41] Two avenues for financing are available to governments: (i) public financing or (ii) private financing.[42] Whilst public financing occurs primarily through taxation and public borrowing, private financing is usually done through project financing.[43] Project financing *"involves government borrowing money from private investors to pay for specific projects"*[44] and a project company or special purpose vehicle (SPV) is set up to deliver a specific infrastructure.[45]

[53] In this case, NS, the project company, was required to deliver the Project to the GOG. NS was therefore responsible for finding and securing the financing for the project. NS was therefore the "finder". NS secured the financing of the project through CIB, which was responsible for securing the investors. CIB secured financing through private investors, by issuing commodity bonds. The investors were therefore to assume the risk of financing the project. This is all in keeping with the Facility Agreement, between NS and CIB and the supplemental MOU, referred to above. The GOG mortgaged the property upon which the athletic stadium was to be constructed to CIB. By not acquiring the freehold, the trust could not be held

[41] Institute for Government. "Financing Infrastructure". https://www.instituteforgovernment.org.uk/explainers/financing-infrastructure Jun. 10, 2018.
[42] Id.
[43] Id.
[44] Id.
[45] Id.

over for a third party. Specifically, ICS has no claim on the funds as they were not involved in the transaction at any point.

[54] The trial judge was plainly wrong on his construction of the Agreements and his conclusion that *"purpose"* in the Facility Agreement was to be widely interpreted to mean "construction of the Project". The *"purpose"* of the Facility Agreement was in fact to accommodate the access to financing in relation to the Project.

b. WAS THAT "PURPOSE" FULFILLED?

RESPONDENT'S SUBMISSION

[55] Counsel for the Appellant based a lot of his arguments on the authorities of **BARCLAYS BANK AND QUISTCLOSE INVESTMENTS** and **TWINSECTRA.** He looked at three points, the purpose of the trust, the fact that the money lent was not at the free disposal of the borrower and that the borrower was under a fiduciary duty to apply it for the purpose for which it was lent. According to Counsel's interpretation of the Facility Agreement, the "purpose" of the Facility Agreement was to construct the facility and persons engaged in the construction of the facility, were to be reimbursed through the proceeds of the Facility Agreement. A failure to reimburse, made any provider of goods and services, a creditor. Counsel submitted that the failure to pay the creditors, resulted in the non fulfilment of the "purpose" of the trust. As a result, the principles in **QUISTCLOSE, TWINSECTRA** and **GENERAL COMMUNICATIONS** were all applicable, whereby CIB, as borrower, held the sums in trust for NH as creditor/lender. Since the borrower, who he regarded as NS and/or CIB, were not free to dispose of the monies as they saw fit, and the monies were held to the account of CIB. Counsel asked the question, if the beneficial interest in a **QUISTCLOSE** trust arrangement does not lie in the borrower, where does it rest? Counsel correctly asserts that the beneficial interest in the monies lent, remains in the lender unless and until it is applied for the purpose for which it was lent. Counsel also laid reliance on the **GENERAL COMMUNICATIONS** case to buttress his arguments that since the "purpose" under the Facility Agreement was not met, that is, the monies raised were not applied to the payment of creditors like his client, the monies remaining under the Agreement, were held on trust.

APPELLANT'S SUBMISSIONS

[56] Based on Mr. Hughes' narrow interpretation of purpose, Mr. Hughes felt that the "purpose" was to facilitate the financing of the Project. Counsel felt that the "purpose" under the Facility Agreement had been fulfilled. He disagreed that the cases cited by Counsel for the Respondent and relied upon by the trial judge were applicable to this case. I do not need to say anymore.

ANALYSIS

[57] The "purpose" of the Facility Agreement was to finance the project. That "purpose", was completed by the realization of the bondholder's security, and in this case with interest.[46] The obligation created was to the bondholders. It was not an ongoing obligation. Therefore, any monies that the Trustee is holding, has to be within the context of the Facility Agreement. Since the main "purpose" of the Facility Agreement had been carried out, that is, the *raison d'ere* for the Facility Agreement no longer existed, there can be no issue of a trust being created. Further, it simply cannot be stated that liabilities which occur under the Development Agreement can be recovered under the Facility Agreement. It cannot be stated without more. There must be some language in the documents or circumstances existing at that time, for the inference to be drawn that this was the parties' intention.

[58] I find that, the matter at bar is not analogous to either **QUISTCLOSE** or **TWINSECTRA**. In those cases the "purpose" of the trust was not fulfilled, thus the trust failed. In the current case, the bondholders were repaid, thus the "purpose" of the trust was fulfilled and completed. As such, those authorities does not assist NH's argument. The trial judge's application of this case is plainly wrong.

c. WHO IS THE BENEFICIARY ENTITLED TO THE REMAINING FUNDS WHICH WERE GENERATED UNDER THE FACILITY AGREEMENT?

[46] As noted above in paragraph 15, construction was completed on 7th June 2000 and the bond issue was realized on the 8th August, 2002.

[59] Having determined that the "purpose" of the Facility Agreement was to facilitate the financing of the project, and having also determined that that "purpose" was fulfilled, it must now be ascertained who is entitled to benefit from the remaining funds generated under the Facility Agreement.

RESPONDENT'S SUBMISSIONS

[60] Mr. Fitzpatrick relied on Clause 9.2 of the Facility Agreement, which made provisions for the recovery of any unadvanced amount of the facility.[47] Counsel indicated that NS cannot claim the funds, as they never possessed a beneficial interest or right in the money.[48] Mr. Fitzpatrick submitted that based on Clause 6.5 of the Development Agreement, the beneficial interest lies with *"ICS and/or the suppliers because the Facility Agreement is made pursuant to the Development Agreement. It is not made in isolation. The Development Agreement says, 'the financing agent shall' so and so 'pay all monies through NS'."*[49]

APPELLANT'S SUBMISSIONS

[61] Mr. Hughes submitted that since the bondholders had been paid, any remaining sums were to the account of NS. CIB, making no claim to the monies, held those funds as if the only other repository was NS. It was certainly not NH by virtue of any trust, NH could not be seen as a beneficiary and was not a party under the Facility Agreement. The Facility Agreement does not confer any rights or give rise to any entitlement to be paid on behalf of ICS. Mr. Hughes indicated that the only trust relationship generated by the Facility Agreement, was for the benefit of the bondholders, due to the nature of the transaction. Mr. Hughes indicated that the Facility Agreement did not specify or earmark any particular supplier or contractor.[50] The Facility Agreement is void of any trust language or concept, which would identify NH as a beneficiary.[51] This information would have been easily included at the time, had it that been the intention that the monies would be held in trust for NH Mr.

[47] First Named Respondent's Skeleton Arguments. Para. 33.
[48] *Op. cit.* at fn. 11. p. 20.
[49] Id. at 22.
[50] Id. Pp. 14-15.
[51] Id. at 15.

Hughes submitted that based on the true construction of the documents there was insufficient intention to create a trust and the *"purpose"* of the trust was for the benefit of the project.[52] Mr. Hughes relying on **TWINSECTRA**[53], submitted that there was the absence of a specific arrangement, with specific language to show that NH was an intended beneficiary of the trust.[54]

LAW, ANALYSIS AND CONCLUSION

CASE LAW

TWINSECTRA LTD. v. YARDLEY AND ORS.[55]

[62] A solicitor was found to have held monies in trust for the "purposes" of a land acquisition. The monies were passed to the client who proceeded to use the monies for various other purposes. The solicitor who secured the money via a personal undertaking with the lender went into bankruptcy and the lender sued the solicitor who held the funds in trust. The trial judge found that the first solicitor had not created a trust. This was reversed by the Court of Appeal. The Court of Appeal held that: (i) the language was *"sufficiently certain for the creation of a trust"*; (ii) the intention of the lender was irrelevant and (iii) use of the money for anything other than its "purpose", constituted a breach of trust.

GENERAL COMMUNICATIONS LTD. V. DEVELOPMENT FINANCE CORPORATION OF NEW ZEALAND LTD.[56]

[63] In this matter, the Development Finance Corporation of New Zealand ("D.F.C.") advanced monies to Video Workshop through their Solicitors, for the purchase of new equipment. The monies which were held by the Solicitors were intended for the primary "purpose" of paying the suppliers of the equipment and could not be applied to any other purposes. Video Workshop went into liquidation soon thereafter. General Communications Limited, one of the suppliers, claimed that the Solicitors held the monies in trust for the suppliers. Thompkins J. found that the

[52] Id. Pp. 39-40.
[53] **TWINSECTRA LTD. v. YARDLEY AND ORS**. [2002] 2 AC 164.
[54] *Op.cit.* at fn. 14. Pp. 39-40.
[55] *Op. cit.* at fn. 24.
[56] [1990] 3 NZLR 406.

arrangement was for the benefit of the suppliers as a primary trust was created in their favour. On appeal, the decision was upheld through the examination of the intention of the instrument, whether the intention may be express or inferred and the irrevocability of the instrument.

ANALYSIS

[64] Mr. Fitzpatrick attempted to link the terms of the Facility Agreement to the terms of the Development Agreement. In order to say that a third party can benefit, there must be some connectivity between the Agreements and this must be expressly stated. Under the Facility Agreement, the plain meaning of these words cannot be taken a step further to mean that the intention of the funding was for CIB to hold these funds in a trust to pay NH and other subcontractors. Nowhere is it stated that a third party can benefit under the Facility Agreement. The bondholders were paid. That is the end of the Facility Agreement. In fact, there is no privity of contract existing other than between CIB and the bondholders.

[65] Mr. Fitzpatrick treats the sums remaining as unadvanced amounts, which he says refers to amounts not advanced by lenders. The plain language of the Trust Deed reflects that the bondholders were always intended to be the primary beneficiaries under the trust. Clause 1.1.29 of the Facility Agreement defines the Trust Deed as *"the deed substantially in the form set out in Annex 2 with only such variations thereof as the Trustee may approve"*. Throughout the Facility Agreement, references are made to the Trustee, as understood to be the Trustee under the Trust Deed. It stands to reason that the Trustee referred to under Clause 9.2 is CIB. It cannot be successfully argued by NH that Clause 9.2 was contemplated as a provision of recovery of funds for any party other than the bondholders, as the "purpose" of the Facility Agreement would be stymied.

[66] The trial judge erred in his reliance on the case of **TWINSECTRA,** because this case is distinguishable from the matter at bar. In **TWINSECTRA**, the funds at issue was used for something other than the intended "purpose", resulting in a breach of trust. This was not the occurrence in this matter. There was no breach of trust as the

bondholders were the proper beneficiaries of the trust. There is no issue of breach of trust.

CONCLUSION

[67] The trial judge fell into error, when he regarded the lender as CIB. The Facility Agreement had been underpinned, not by CIB's monies but by monies invested by the bondholders. This is the reason why, understandably and correctly, CIB made no claim to the monies, and are awaiting directions on how to deal with it. The bondholders were the lenders. This conclusion is not consistent with the finding of a trust using the **QUISTCLOSE** principles, as this case is distinguishable on several grounds, the main ground being, that the *"purpose"* of the trust in **QUISTCLOSE** had not been fulfilled. Once the purpose for which the Facility Agreement had been effected, that is NS's raising of the finance and the bondholders making a return on investment, that Agreement and any obligation under it, came to an end. On this basis as well, NS may lay claim to the monies as a surplus resulting from the execution of their obligation to obtain financing under the Facility Agreement, to the exclusion of any other party.

[68] There was no provisions made for any beneficiaries other than the bondholders. NH never claimed to be a bondholder to whom payment was due and owing and cannot now stand in the shoes of a bondholder under Clause 9.2, whilst claiming to be a beneficiary of a **QUISTCLOSE** type trust under the Facility Agreement. It would therefore be that NS, the other entity named in the Facility Agreement and the entity charged with administering the obligations to finance the project, will be entitled to any remaining fund since they were incorporated by ICS, as the arm and responsible authority for providing financing of the project. In other words, the financing obligation entered into by ICS created NS. NS was tasked with the responsibility of the generation of the facility. Therefore, upon completion of the *"purpose",* the only viable beneficiary of funds, which were intended for the facility, is NS. There are no other possible beneficiaries to the funds generated under the Facility Agreement. CIB makes no claim to the funds and I reiterate that the only other party to the Facility Agreement was NS. NH is not contemplated as a beneficiary to these

funds. If NH was to benefit from the funds generated under the Facility Agreement, that needed to have been stated clearly in the Facility Agreement.

[69] The cases of **TWINSECTRA** and **QUISTCLOSE** do not assist NH. I have already indicated that there was no failure of the *"purpose"* of the Facility Agreement, as such, the issue of intention is irrelevant to the matter at bar. The trial judge erred when he determined that the beneficiary of the funds was NH and other suppliers.

ISSUE 2

WHETHER ICS ACQUIRED RIGHTS UNDER THE FACILITY AGREEMENT, WHICH WERE THEN ASSIGNED TO NH?

RESPONDENT'S SUBMISSIONS

[70] Mr. Fitzpatrick was of the view that NH received an enforceable assignment of rights from ICS, that is that Clause 17 of their Agreement, which spoke to assignment, was effective to transfer or to assign ICS's rights to NH, however they arose. Counsel submitted that NS was a trustee for ICS, of CIB's promise to make advances under the Facility Agreement. The construction of the Agreements demonstrate that NS was never an intended beneficiary under the Trust. In fact, ICS was entitled to the entire sum of the US$23 Million dollars under the Facility Agreement by virtue of a trust by NS on behalf of ICS. Consequently, NH is entitled under Clause 2.1 of the Facility Agreement, to call for monies owed to them under that Agreement.[57] Counsel further relied on principle in *"Chitty on Contracts"*, which spoke to the intention to create a trust. Mr. Fitzpatrick noted that it was clearly intended for ICS to benefit under the Facility Agreement.[58] This intention was present in Clauses 5 and 6.5 of the Development Agreement which Counsel submitted showed that the trust was intended to benefit a third party.[59] Mr. Fitzpatrick also submitted that two additional requirements of creating a trust are that: (i) the intention must be irrevocable; and (ii) the promise was made pursuant to a contractual obligation.[60] Counsel submitted that these requirements have been

[57] *Op. cit.* at fn. 11. Pp. 42-43.
[58] Id. at 45-46.
[59] Id. at 46.
[60] Id.

satisfied. The existence of a trust for ICS's benefit created the nexus for ICS to assign these benefits to NH[61].

APPELLANT'S SUBMISSIONS

[71] Mr. Hughes submitted that the purported attempt to assign rights under a trust would have been subject to the Statute of Frauds and would have had to be in writing.[62] Counsel submitted that with regard to Clauses 2.1 and 6.5 one must look at construction.[63] Mr. Hughes referred to Clause 1.1.10 of the Facility Agreement noting that the definition of "contract documents" does not include any contract to which NH was a party. If it were the intention for NH to benefit, the language in the contract documents would have reflected this intention. Mr. Hughes noted that Clause 3.1 of the Facility Agreement ought to be read as having two purposes.[64] The first, as a financial instrument and second as saying that the financing can only be used for the sole purpose of the project. Counsel submitted that the use of the word "solely" in Clause 3.1 of the Facility Agreement, is not enough to have created beneficial and proprietary interests in NH[65]. Further, NH's case contained internal tension because any submission that a trust was created in favour of all suppliers conflicts with the alternative submission that ICS assigned its rights to NH[66]. Counsel highlighted that in the middle of a project, there cannot be one beneficial interest in both the bondholders and the suppliers at the same time.[67] The bondholders were paid and CIB makes no claims to the funds. NS still has substantial obligations to fulfil and ought to have first call on the funds.[68]

ANALYSIS

[72] The trial judge found that ICS as well as NH were *"the beneficiaries of CIB's promise to pay under the Facility Agreement, sums due for the project".* Further, the trial

[61] Respondent's Skeleton Arguments paras. 40 -42.
[62] Id. at 50.
[63] Id. at 56.
[64] Id. at 59
[65] Id. at 57.
[66] Id. at 57-58.
[67] Id. at 58.
[68] Id. at 59.

judge found both a matter of fact and as a matter of law 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."*[69] This assignment was enforceable by NH.

[73] I must preface this discussion with the fact that I have already determined that ICS was not the beneficiary of any trust created under the Facility Agreement. I have found already that the remaining sums were generated under the Facility Agreement. The rights to the monies under the Facility Agreement did not reside in ICS, but with NS. Since there is no allegation of fraud or any reason to lift the corporate veil. We have to treat all the companies as separate entities. ICS received no rights under the Facility Agreement and therefore could not assign any. NH is not relying on the Construction Agreement as the basis of its claim. By that Agreement, ICS could have only purported to assign rights which they lawfully had or acquired during the course of the project.

[74] An examination of the correspondence between Attorneys at Law for NH and CIB further confirms that the funds under the Facility Agreement were not a debt which was owed to either NS or ICS and therefore any right to those funds is incapable of being assigned.

[75] Mr. Fitzpatrick relied on Clauses 5 and 6.5 of the Development Agreement and linked this to Clause 2.1 of the Facility Agreement. This however does not meet with success. As I discussed earlier, these Clauses are to be read in the context of providing financing for the project.

[76] Further, CIB's correspondence further asserts that, *"the only manner in which the disbursements under the facility could have been transferred to your client was by a novation, since the disbursements to be made under the facility are not a debt owed to the Project Co. or ICSL and by law are not specifically enforceable and thus*

[69] See paras 141-166 of Rakumar J.'s judgment.

incapable of assignment".[70] I agree with this position. It is clear that the Facility Agreement made no provision for assignment to third parties. The effect of sums remaining, that is, any sums held by CIB after the bondholders are paid is on the account of the party requesting the issue, NS. The Facility Agreement is the instrument, which created the surplus. NH was not a party to that Agreement and therefore is not entitled to benefit, whether directly or by way of assignment. ICS, as a separate entity, was not a party to that Agreement and therefore, is not entitled to the remaining sums. Further, there was no right of assignment to NH from ICS, thereby creating in them any entitlement to those funds.

CONCLUSION

[77] No trust was created for the benefit of ICS which would have granted rights to them capable of being assigned to NH. The answer to the question is that ICS acquired no rights under the Facility Agreement, which were assigned or capable of being assigned to NH. The trail judge therefore plainly wrong when he determined that an assignment was established both as a matter of fact and as a matter of law, and that such assignment was enforceable by NH.

STATUTE OF FRAUDS

[78] NS contented that any assignment which was to be made of the monies payable under the Facility Agreement would not be in compliance with the requirements of the **STATUTE OF FRAUDS ACT**[71], and must be invalid. The trial judge rejected this argument and found that the assignment granted by ICS to NS was contained in and evidenced by letters of June 4 and June 5 and the Construction Contract. As a result, there was no question of violation of the Statute of Frauds. We find that if any assignment had to made under the Facility Agreement, that assignment had to be in writing. Since there was no evidence of any funds capable of being assigned under this facility, the issue simply did not arise and the trial judge was plainly wrong in his determination of this issue.

[70] Letter of Nobriga, Inniss & Co. dated Sept. 30, 1999.
[71] **STATUTE OF FRAUDS ACT, 1677 (UK).**

LACHES

[79] I agree with the trial judge's analysis on the issue of laches. Laches was discussed in relation to the 2006 action. After a thorough review of the evidence and law, the trial judge found that that was 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"*[72]*.* Given that context, I too find that there was no delay in starting the 2006 action and even if there was, it was excusable.

COUNTERCLAIM

[80] The trial judge opined at paragraph 178 of his judgment, "*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 lo9an made by it to ICS and repayable by that company. It cannot therefore obtain any payment in respect of the Deposited Amount."* I do not agree with the trial judge's premise that NS's counterclaim was based on a debt due from ICS secured by the default judgment. NS merely said that in the normal course of things, the remaining funds would have been paid over to them, but for the freezing order, which they asked the court to declare as being improperly obtained. That is their claim. The consequences of that, were, their having to obtain monies from outside of the Facility Agreement in order to make good their obligation under the Development Agreement to provide finance.

[81] I do not read the counterclaim as saying that the frozen monies as at the time of filing the appeal represented a loan to them by ICS, which stood recoverable under the default judgment. The trial judge erred in this respect. I cannot agree that NS has established no basis for the transfer of the frozen monies to them. NS's claim does not lay in trust and therefore, they need not make any claims in its pleadings in that regard. In the premises, I think that NS has met with success on its counterclaim.

[72] See para. 217 of Rajkumar J.'s judgment.

CONCLUSION

[82] Since the purpose of the Facility Agreement had been fulfilled and the bondholders had been paid, it is clear that the only entity that could have laid claim to the monies held at the UTC is NS. In the premises, NS has met with success on this appeal and the orders and directions of the trial judge are reversed. By order of the High Court, dated November 1, 2017 NH was permitted to enforce the order of Rajkumar J. against UTC. The order directed the UTC to pay out the monies, which had been frozen, to NH. The monies will now be repaid to NS by NH in furtherance of their counterclaim in the 2006 action.

ORDER

1. The Appellant's appeal is allowed.
2. The decision of the trial judge dated January 28, 2011 is set aside.
3. That NH do give an account of monies received in pursuance of the order of November 1, 2017 including all sums, accounts, records and documentation provided by CIB to NH, pursuant to the order of Rajukumar J.
4. That NH do pay to NS, all monies paid out to them by the UTC, representing the principal EC sum and interest accrued thereon to the date of payment in compliance with the order of November 1, 2017.
5. That NH do pay to NS the Additional sum of US$93,174.54.
6. That NH do pay to NS interest on the said principal EC sum and the Additional sum of US$93,174.54 from November 2, 2017 or such date of paying out, to the date of payment.
7. That these sums are to be paid by NH to NS, within 42 days of the date of this Order.
8. NH to pay NS's costs in the Court below, to be calculated on the prescribed costs scale.

9. NH do pay NS's costs of this appeal, to be assessed at 2/3 of the costs as prescribed in the High Court, certified fit for Queen's Counsel and one Junior Counsel.

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/s/ C. Pemberton, J.A.