TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim Number CV2008-04881

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 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 Arbitrator under the ICC Rules of Arbitration 1998

BETWEEN

NATIONAL INSURANCE PROPERTY DEVELOPMENT COMPANY LIMTED
CLAIMANT [DEFENDANT IN ARBITRATION]
AND

NH INTERNATIONAL (CARIBBEAN) LIMITED
DEFENDANT [CLAIMANT IN ARBITRATION]

AND

In the matter of the Arbitration Act Chapter 5:01

AND

In the matter of the decision of Dr. Robert Gaitskell Q.C. the Sole Arbitrator under the ICC Rules of Arbitration 1998

Claim Number CV2008-04998

BETWEEN

NH INTERNATION (CARIBBEAN) LIMITED
CLAIMANT [CLAIMANT IN ARBITRATION]

AND

NATIONAL INSURANCE PROPERTY DEVELOPMENT COMPANY LIMTED
DEFENDANT RESPONDENT IN ARBITRATION]

BEFORE THE HONOURABLE MADAM JUSTICE JUDITH JONES

Appearances:
Ms. K. Gough instructed by Mr. S. Harrison and Ms. D. Wellington for the National Insurance Development Company Limited

Mr. A. Fitzpatrick S.C., Ms. L. Lucky-Samaroo and Mr. J. Mootoo instructed by Mr. A. Byrne for NH(International Caribbean)Ltd.

JUDGMENT

1. There are two actions before the Court, one by National Insurance Property Development Company Limited filed on the 15th December 2008 and the other by NH International (Caribbean) Limited filed on the 22nd December 2008. By both actions the applicants seek to challenge a partial award ("the third partial award") made by an arbitrator on the 7th November 2008 and published to the parties on the 17th November 2008.

General Background

2. The third partial award is one of two substantive awards made in an ongoing arbitration under the auspices of the International Chamber of Commerce International Court of Arbitration ("the ICC"). The arbitration arises out of a contract, dated the 6th March 2003, entered into by the parties with respect to the construction of a hospital in Scarborough, Tobago. By the contract the contractor, NH International (Caribbean) Ltd. ("NHIC") was engaged by the employer, National Insurance Property Development Company Limited ("NIPDEC") to execute the works specified for the sum of $135,912,182.52 Trinidad and Tobago currency ("TT"). The conditions applicable to the contract are contained in a form recommended by the FIDIC Conditions of Contract for construction, for building and engineering works designed by the Employer, First Edition 1999 ("FIDIC CoC").

3. Work under the contract began in March 2003 and was due to be completed in March 2005. During the course of the work there were both variations to the work to be performed as well as delays. Disputes arose as to the remuneration to be paid to NHIC by NIPDEC in this regard. These disputes were not resolved and in August 2004 a notice of arbitration was served by NHIC on NIPDEC. Work however continued on the contract. In June 2005 NHIC reduced its rate of work on the project and in September 2005 suspended work. In November 2006 NHIC terminated the contract. As a result of the termination the work on the contract remained incomplete.

4. Meanwhile pursuant to the notice of arbitration a sole arbitrator, Dr. Robert Gaitskell QC ("the Arbitrator") was appointed by the ICC on the 30th September 2005 and the parties notified of the appointment on the 3rd October 2005. The terms of reference for the arbitration were signed on the 1st December 2005 and amended on the 15th January 2007. By the terms of reference and in accordance with clause 20.6 of the contract and the applicable rules of the ICC International Court of Arbitration the decision of the Arbitrator was to be final and binding on the parties.

5. The first substantive hearing resulted in the publishing of the second partial award by the Arbitrator. By that award the Arbitrator determined that pursuant to the conditions of contract NHIC was entitled to reduce the rate of work, suspend the work and thereafter to terminate the contract. Two issues originally set for determination at that hearing, the contractual requirements for notification of claims by the Employer and by the Contractor and compliance by the NHIC with clause 8.3 of the Contract, were deferred to the second substantive hearing.

6. The two deferred issues apart, the third partial award was primarily concerned with the financial consequences resulting from the Arbitrator's determinations in the second partial award. In arriving at his decision the Arbitrator was assisted by an independent quantity surveyor ("the IQS") jointly appointed by the parties with duties as set out in his terms of reference agreed to by both parties. By his terms of reference the report of the IQS was "not final and binding on the parties but shall be evidence of the

matters contained therein before the Arbitrator". Two reports were produced by the IQS, the main report of June 2007 and an addendum of July 2007.

7. At the commencement of the hearing the sums in dispute amounted some $223,000,000 TT of which $183,798,017.14 was claimed by NHIC and $40,697,466 TT was claimed by NIPDEC. The Arbitrator awarded NHIC the sum of $133,241,191.92 on its claims and NIPDEC $6,761,564.33 on its counterclaims.

8. In addition to making a final award the Arbitrator, as he was entitled to do, stated three questions of law for the opinion of the Court giving what he considered to be the correct decision in each of the three questions. In this regard, with the approval of the parties, he provided that the award, inclusive of what he considered to be the correct answers to the three questions, should become effective unless within six weeks or such other time as prescribed under the laws of Trinidad and Tobago either party set down the questions for argument as a special case.

9. By their claim dated the 15th December 2008 NIPDEC set down these three questions for the consideration of this Court as a special case, thereby effectively challenging the primary findings of the Arbitrator on those questions of law. In addition NIPDEC, by the said claim, seeks an order for the remission and/or setting aside of the award on the grounds that the Arbitrator erred on the face of the record and/or technically misconducted the proceedings by his failure to state a case on certain other questions as requested by them.

10. NHIC, by its action commenced on the 22nd December 2008, itself alleges that there were errors of law on the face of the award in that:

(i) The Arbitrator failed to properly construct clauses 2.5 and 16(4)(c) of the FIDIC CoC;

(ii) The Arbitrator, despite the concession of NIPDEC that NHIC had incurred disruption costs in the sum of $4, 335, 534.60 [and its defences on liability], had wrongly come to the conclusion that it was open to him to award NHIC a lesser sum;

(iii) The Arbitrator had wrongly allowed evidence inadmissible by virtue of being hearsay to be admitted into evidence.

11. While there were submissions on both sides that each was out of time with respect to their application it is clear that neither party relied heavily or indeed at all on this submission. In any event it was conceded by both sides that the Court had the jurisdiction to extend the time for the making of the applications.

12. In this regard and with respect to NIPDEC's application for a case stated it must be noted that the **Civil Proceedings Rules 1998 as amended** ("the CPR") require an application to the Court by way of case stated to be served within 14 days of the date upon which notice of the refusal to state a case was given to the applicant: **Part 61.4**. Insofar as the application by NIPDEC was by way of case stated therefore the application was out of time.

13. In all the circumstances of the case and particularly in the light of the agreement of the parties made in the arbitration that the award stand unless either party apply to the Court to set down the questions for argument within six weeks and given the fact that the application was in fact made within the six weeks period I extend the time for the making of the application.

Jurisdiction of the Court

14. The submission to arbitration entered into by the parties provides that the decision of the Arbitrator be final and binding on the parties. In these circumstances "the approach of the court has generally been to support the validity of the award and to make every reasonable intendment and presumption in its favour" per Parker LJ in **Meyer v Leanse [1958] 2 QB 371.**

15. The avenues for challenge to Arbitrator's award are therefore few and limited. The rationale being that:

> "The parties having agreed to arbitration and the arbitrator's decision being final and they cannot ordinarily complain if the award is made in consequence of an error of fact or an error of law or both. But in the course of its supervisory jurisdiction the Courts have developed limited powers of interference now partly enshrined in ss 22 and 23 of the Arbitration Act, 1950, enabling them to set aside an award or remit it for

reconsideration." per Judge Fay QC in **Stockport MBC v O'Reilly [1978]1 Lloyd's Rep. 595 at page 597.**

16. The jurisdiction of the Court is invoked pursuant to the **Arbitration Act Chap. 5:01** ("the Act"). By **section 32** of the Act an arbitrator may refer questions of law arising in the course of the reference to the Court in the form of a special case for the decision of the Court.

17. In similar vein to **sections 22** and **23** of the **Arbitration Act 1950**, UK the power of our Court to interfere in the arbitration reference can be found in **sections 18** and **19** of the Act.

18. **Section18(1)**states:

"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."

19. While the statute does not limit the Court's power to remit matters for the reconsideration of the Arbitrator, traditionally the power of the Court to remit a matter to the Arbitrator for reconsideration has been limited to four grounds. Where:

(i) The award was bad on its face;

(ii) There was misconduct on the part of the arbitrator;

(iii) The arbitrator has admitted a mistake;

(iv) Fresh evidence has been discovered.

20. These traditional grounds were, in the case of **King v Thomas McKenna Ltd [1991] 2W.L.R. 1234**, extended to include instances where due to some mishap or misunderstanding some aspect of the dispute had not been adjudicated in the manner which the parties were entitled to expect and it was inequitable to allow the award to take effect without further consideration by the arbitrator.

21. In the case of **Hodgkinson v Fernie (1857) 3 CBNS 189**, Cockburn CJ was of the opinion that the power to remit was not intended "to alter the general law as to the principles upon which the courts had been in the habit of acting in determining whether they would or would not set aside awards; but merely to give the court power to remit the matter to the arbitrator for re-consideration in all cases, though the submission should not contain that extremely useful course giving them that power, where it turned out that there was a fatal defect in the award, but of such a nature as not to render it expedient to set aside the award and thus render nugatory all the expense that had been incurred under that reference.": at page 201.

22. In addition to its powers to remit matters for the reconsideration of the arbitrator, by **section 19** of the Act the Court has the power to set aside the award where an arbitrator has misconducted himself or the proceedings or an arbitration or award has been improperly procured: **section 19(2)**.

The special case for the decision of the Court

23. During the course of the hearing NIPDEC requested that the Arbitrator state some 22 questions in the form of a special case for the decision of the Court. Of those 22 questions the Arbitrator was of the opinion that three were appropriate for reference to the Court. Of the remaining 19 questions 7 of them were resolved in favour of NIPDEC. NIPDEC submits that the failure of the Arbitrator to refer the other 12 questions constitute technical misconduct on the part of the Arbitrator.

24. Before considering the questions referred to the Court by the Arbitrator and the questions not so referred perhaps it is opportune at this point to set the stage with respect to the exercise of the Court's discretion in the matters at hand by adopting the words of Lord Denning M.R. in **GKN Centrax Gears Ltd. v Matbro Ltd.[1976] 2 Lloyd's Rep. 555 at page 575**:

> "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 principles which we endeavoured to state in the Halfdan case [1973] 1 Lloyds Rep. 296. 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. The point of law should be of such importance that the resolution of it is necessary for the proper determination of the case as distinct from a side issue of little importance.".

The questions of law referred to the Court by the Arbitrator.

25. The Arbitrator referred three questions of law in the form of a special case for the Court's determination:

1. Whether on a true construction of clause 20.1 of the FIDIC CoC: "contemporary records" means in clause 20.1, records produced at the time of the event giving rise to the claim, whether by or for the Contractor or Employer?
2. Whether on a true construction of clause 20.1 of the FIDIC CoC: where there are no contemporary records, the claim fails?
3. Whether on their true construction, the IQS' terms of reference override the express provision of the FIDIC CoC in particular clause 20.1 thereof, and permit NHIC to advance its claims without contemporary records or the particulars as required by clause 20.1.?

26. In stating these three questions the Arbitrator, with the approval of the parties, adopted the procedure of giving both primary and secondary answers to the questions posed. The object being that in the event that the opinion of the court was contrary to his

primary, and preferred, view the contrary view being already contained in the award there will be no need to refer the award back to him for reconsideration.

The Arbitrator's primary views

27. With respect to question 1 the Arbitrator was of the view that the term "contemporary records" as used in clause 20.1 referred to all documents produced at or about the time of the event or events giving rise to a particular claim, whether such documents are generated by or for the Contractor or the Employer. In his view the word "records" was to be given a wide meaning embracing both documents and electronic records and including material produced at the relevant time notwithstanding that the purpose of the production was not primarily the recording of event.

28. With respect to question 2 the Arbitrator was of the opinion that on a true construction of clause 20.1 a claim should not fail merely because there are no contemporary records. In his view the 28 day notice requirement to bring the claim was a condition precedent to recovery. He was of the further opinion that the other requirements under the clause were not conditions precedent to recovery and therefore a failure to satisfy those requirements did not inevitably mean that the claim should fail.

29. With respect to question 3 the issue was whether the terms of the IQS' report permitted NHIC to advance claims without contemporary records thereby overriding clause 20.1. The Arbitrator was of the opinion that rather than override the requirements

of clause 20.1 the terms of reference of the IQS supplemented clause 20.1. He was of the view that the IQS' terms of reference merely set out a procedure, expressly agreed by the parties, which permitted the IQS to make an appropriate assessment in accordance with his terms of reference bearing in mind that clause 20.1 specifically contemplates that the claim be maintainable in the event of non compliance with a non condition precedent by providing that in those circumstances the 'additional payment shall take into account the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim.'

The construction of clause 20.1

30. All three questions posed by the Arbitrator require first a determination of the proper construction to be placed on clause 20.1 of the FIDIC CoC insofar as it deals with the responsibilities of the Contractor with respect to claims for extensions of time and/or additional payments.

31. Clause 20.1 states:

> "If the Contractor considers himself to be entitled to an extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or the circumstance giving rise to the claim. The notice shall be given as soon as practicable,

and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.

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

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

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

Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such

other period as may be proposed by the Contractor and approved by the Engineer, the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect:

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

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

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

Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contract, the Engineer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time.

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

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

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

32. Before dealing with the interpretation to be placed upon the clause it will be useful here to refer in some detail to the case of Attorney-General for the **Falklands Islands v Gordon Forbes Construction (Falklands) Limited (No.2) [2003] BLR 280**, a case relied on heavily by NIPDEC.

33. In the Falklands case, in somewhat similar circumstances, the Court was asked to determine a question of law which involved the construction of Sub-Clause 53.4 of the FIDIC Conditions and in particular whether 'Contemporary records' in clause 53 means records produced or prepared at the time of the event giving rise to the claim, whether by or for the Contractor or the Employer." In that case the particular clause was adopted from the **FIDIC Conditions of Contract for Works of Civil Engineering Construction, 4th Edition**.

34. Insofar as it is relevant clause 53 reads:

> "53.1 Notwithstanding any other provision of the Contract, if the Contractor intends to claim any additional payment pursuant to any clause of these Conditions or otherwise he shall give notice of his intention to the Engineer, with a copy to the Employer, within 28 days after the event giving rise to the claim has first arisen
>
> 53.2 Upon the happening of the event referred to in Sub-clause 53.1, the Contractor shall keep such contemporary records as may reasonably be necessary to support any claim he may subsequently wish to make. Without necessarily admitting the Employers liability the Engineer shall, on receipt of a notice under sub-clause 53.1, inspect such contemporary records and may instruct the Contractor to keep any further contemporary records as are reasonable and may be material to the claim of which notice

has been given. The Contractor shall permit the Engineer to inspect all records kept pursuant to this Sub-Clause and shall supply him with copies thereof as and when the Engineer instructs.

53.3 Within 28 days, or such other reasonable time as may be agreed by the Engineer, of giving notice under Sub-Clause 53.1, the Contractor shall send to the Engineer an account giving detailed particulars of the amount claimed and the grounds upon which the claim is based…….

53.4 If the contractor fails to comply with any of the provisions of this clause in respect of any claim which he seeks to make, his entitlement to payment is in respect thereof shall not exceed such amount as the Engineer or any arbitrator or arbitrators appointed pursuant to sub-clause 67.3 assessing the claim considers to be verified by contemporary records (whether or not such records were brought to the Engineer's notice as required under sub-clause 53.2 and 53.3)"

35. As can be seen the clause, though similar, is not on all fours with our clause 20.1. In particular the consequences for a breach of the contractor's responsibilities under the clause are very dissimilar. In clause 53, the contractor's entitlement to payment is specifically contingent upon the claim being verified by contemporary records. This accords with the construction of clause 20.1 contended by NIPDEC.

36. Clause 20.1 contains many unnumbered paragraphs. For clarity and ease of reference I propose to number the paragraphs of the clause (i) to (ix) consecutively.

37. As we have seen the clause sets out the procedure by which claims for extension of time and additional payments by the contractor will be entertained. Paragraphs (i),(iii),(iv) and (v) deal with the responsibilities of the contractor with respect to the claim. Paragraphs (vi),(vii) and (viii) deal with the responsibility of the engineer in the event that such a claim is made. Paragraphs (ii) and (ix) deal with the consequences of a breach of the clause.

38. Paragraph (i) identifies the reach and scope of the clause. In addition it identifies the time within which the claim must be made and the contents of the notice making the claim. In order to make a claim for an extension of time for completion and/or additional payments the contractor is required to give to the engineer a notice describing the event or circumstance giving rise to the claim not later than 28 days of (a) the contractor's knowledge of the event or circumstance or (b) of the date when the contractor ought to have had such knowledge. For our purposes we shall refer to this as "the 28 days notice".

39. Paragraph (ii) identifies the penalty for failure to comply with the 28 days notice. Should the 28 days notice not be given then the time for completion is not extended; the contractor is not entitled to additional payment; and the employer is discharged from all liability in connection with such a claim. Where however the 28 day notice is given paragraphs (iii) to (ix) apply. Failure to give the required 28 day notice therefore renders

the claim not maintainable. In other words the 28 day notice is a prerequisite for the making a claim for an extension of time to complete and for additional payments.

40. Paragraph (iii) deals with the need for the Contractor to comply with other clauses in the contract.

41. Paragraph (iv) and the words "contemporary records" used there form the basis of the referral to the Court. With respect to the responsibilities of the Contractor, the paragraph mandates the Contractor to (a) keep such contemporary records as may be necessary to substantiate any claim, either on site or at any other location acceptable to the Engineer; (b) allow the inspection of the records by the Engineer and (c) provide copies of the said records to the Engineer if required. The paragraph also allows the Engineer, after receipt of the 28 day notice, to monitor the record keeping of the Contractor and, if necessary, instruct the Contractor to keep further contemporary records.

42. The reason for the paragraph is clear. Such a claim would be in respect of works or liabilities outside of the existing scope of works and contract price agreed between the parties. As a result if additional payment is being sought there would need to be some basis for the assessment of these additional payments. This paragraph therefore seeks to ensure that the Engineer has the ability to make a proper investigation of the claim by placing the responsibility for such record keeping on the Contractor as the person making

the claim. The requirement here therefore does not address the making of the claim but rather the substantiation of the claim.

43. The question that arises here is: what are the records that the Contractor is required to keep by this clause? It is clear what is required here is the maintaining of records or evidence necessary for substantiating the Contractor's claim for an extension of time for completion and/or additional payment.

44. 'Record' is defined in the **Concise Oxford English Dictionary** as "a piece of evidence about the past especially a written or other permanent account". In the context of the clause it is clear that 'records' here refers to 'written or other permanent accounts'. The word 'records' in the phrase therefore must be taken to refer to evidence, that is, documents: written, printed or electronic, evidencing matters that have occurred in the past.

45. The word 'contemporary' on the other hand deals with time. In the **Concise Oxford English Dictionary** 'contemporary' is defined as: "living, occurring or originating at the same time". In the context of a claim for an extension of time for completion and additional payments it must, in my view, therefore refer to the time when the record was created, obtained or produced. It must therefore be documents originating, obtained or produced at the same time as the matters which they evidence. The records to be kept therefore must be contemporary, that is created, obtained or produced, at the same time with the facts or events upon which the claim is based. In other words the

records must have been made or obtained or produced contemporaneously with or at or around the same time as the relevant event. In this regard I agree with Sanders Acting Judge in the Falklands case when, in this context, he equates "contemporary" with "contemporaneous".

46. In my view therefore the paragraph mandates the Contractor, with respect to the facts or events relied on in support of the claim, to keep documents or records evidencing these facts or events relied on made, obtained or produced at or around the same time as the facts or events relied upon.

47. Paragraph (v) deals with the submission of a detailed claim by the Contractor. The paragraph requires that this be done within 42 days of the date when the Contractor knew or ought to have known of the event or circumstance giving rise to the claim, that is within 14 days of the 28 days notice, or within such extension of time proposed by the Contractor and approved by the Engineer, The detailed claim shall include full supporting particulars of the basis of the claim and the extension of time and/or additional payment required. Where the event or circumstance has a continuing effect provision is also made for interim reports to be provided at monthly intervals and the provision of a final claim.

48. This paragraph therefore mandates the Contractor to quantify the claim and provide supporting particulars within a specified or extended time frame. In this regard therefore it differs from the 28 day notice in that the time period may be varied by agreement. It must be noted here that this paragraph makes no reference to contemporary

records. The paragraph merely provides that the detailed claim shall include 'full supporting particulars'. It would seem to me therefore that while the clause requires the Contractor to keep contemporary records to the satisfaction of the Engineer and have same available to the Engineer. It is not a requirement that the full supporting particulars comprise or be substantiated by contemporary records.

49. Paragraph (vi) deals with the responsibilities of the Employer with respect to the claim and in particular with the Engineer's approval or disapproval of the claim.

50. Paragraph (vii) deals with the conditions for payment. It requires that each payment certificate only include such amounts for any claim as have been reasonably substantiated as due under the contract. In other words the Employer is only to authorise payment with respect to claims which have been reasonably substantiated as due. In this regard therefore this paragraph is primarily addressed to the Employer as the person responsible for the payment certificate.

51. The paragraph further provides that "Unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the Contractor shall only be entitled to such part of the claim as he has been able to substantiate." Again it seems to me that this sentence as with the rest of the paragraph focuses on the Employer as the maker of the payment certificate. What this sentence does is two things firstly it confirms that before payment to the Contractor there must be substantiation, and secondly it allows for payment of a part of a claim in the absence of substantiation of the whole of the claim.

Again the paragraph does not however specify how the claim is to be substantiated. In particular no reference is made to the need to substantiate by way of contemporary records.

52. By paragraph (ix) should the Contractor fail "to comply with the requirement of this or another Clause which may apply to a claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Clause." It is clear therefore that all breaches of the clause are not to be treated in the same manner. A failure to comply with the 28 days notice results in the contractor not being able to make the claim. A failure to comply with the other requirements, that is, (a) the keeping of contemporary records; (b) allowing inspection of those records by the Engineer and (c) providing a detailed claim at least 14 days after the initial notice is only to be taken into consideration insofar as it may have prejudiced a proper investigation of the claim. In other words such breaches would only be relevant at the stage of an assessment of the claim.

53. In this regard it must be noted that our clause 20.1 is materially different from the clause 53 examined in the Falklands' case. The Falklands' clause specifically states that upon a failure to comply with any of the provisions of the clause the contractor's entitlement to payment "shall not exceed such amount as the Engineer or any arbitrator or arbitrators …….assessing the claim considers to be verified by contemporary records". In that case therefore the Judge could, and did in my view, legitimately come to the

conclusion that on a proper interpretation of clause 53 it was clear that "contemporary recording is the basic requirement for the assessment of a claim". Our clause 20.1, on the other hand, makes no such specification. The only requirement with respect to contemporary records is that the Contractor keep and make such records available to the Engineer. In this regard therefore there is no reference to the assessment or substantiation of the claim.

54. Insofar as it is relevant to the questions to be answered, with respect to extensions of time for completion and/or additional payments clause 20.1 therefore requires the Contractor: (a) within 28 days of the event to give to the Engineer a notice describing the event or circumstance giving rise to the claim; (b) thereafter within 14 days, or such extended time as agreed between the parties, give to the Engineer a fully detailed claim which shall include full supporting particulars of the basis of the claim and of the extension of time and additional payment claimed and (c) to keep such contemporary records as may be necessary to substantiate the claim to the satisfaction of the Engineer and at a place approved by the Engineer.

55. A failure by the Contractor to give the 28 day notice renders the claim not maintainable. Upon a failure by the Contractor to comply with (b) and (c) above then the extent to which that failure has prevented or prejudiced a proper investigation of the claim is relevant and shall be taken into account in the assessment of the extension of time and/or additional payment to which the Contractor is entitled.

56. Payment on the claim shall not to be made unless the particulars supplied are sufficient to substantiate the whole claim or part of the claim. Where the particulars substantiate only a part of the claim then payment shall only be with respect to that part substantiated. These particulars need not comprise 'contemporary records' but must be sufficient to substantiate the claim or that part of the claim for which payment is made.

57. In these circumstances it is appropriate to now consider the three questions posed by the Arbitrator.

Question 1

Whether on a true construction of clause 20.1 of the FIDIC COC: "contemporary records" means in clause 20.1, records produced at the time of the event giving rise to the claim, whether by or for the Contractor or the Employer?"

58. In my view it is clear that the clause refers to records or documents made, obtained or produced at the relevant time, that is the time of the events giving rise to the claim. The clause does not deal with the production of the documents but only addresses the responsibility for keeping such records. In the circumstances in my opinion the term contemporary records as used in the clause does not preclude documents produced at the time of the event giving rise to the claim by either the Contractor or the Employer. The clause merely deals with the responsibility of the Contractor to maintain these records whatever their origin. In other words by the clause the Contractor is required to keep such records regardless of who produced them or on whose behalf such records were produced. Neither in my opinion are documents which were produced for some other

purpose excluded from being contemporary records under the clause once that document satisfies the time and content requirement.

59. I find that on a true interpretation of clause 20.1 of the FIDIC CoC 'contemporary records' means records created, obtained or produced at the time of the event giving rise to the claim, whether by or for the Contractor or the Employer. In this regard I am in agreement with the primary view of the Arbitrator.

60. Of passing interest is the fact that this question is in exact terms as one of the questions posed for the determination of the Court in the Falklands case. In that case the answer given by the Court was that "'Contemporary records' in Clause 53 of the FIDIC Conditions 4th Edition, means original and primary documents, or copies thereof , produced or prepared at or about the time giving rise to the claim, whether by or for the Contractor or Employer."

Question 2

Whether on a true construction of clause 20.1 of the FIDIC COC where there are no contemporary records the claim fails?

61. As we have seen with respect to 'contemporary records' clause 20.1, unlike clause 53.4 in the Falklands case, does not specifically require a verification of the claim by contemporary records. With respect to contemporary records all clause 20.1 requires is that the contractor keep and have available for inspection by the Engineer these records.

The clause, in my opinion, is clear, a failure by a contractor to keep such records does not prevent recovery on the claim but is to be taken into account in its assessment insofar as it may have prejudiced or prevented a proper investigation of the claim.

62. I find that on a true construction of clause 20.1 where there are no contemporary records the claim does not fail. In this regard therefore I am in agreement with the primary view given by the Arbitrator.

Question 3

Whether on a true construction, the IQS' Terms of reference override the express provisions of the FIDIC COC, in particular clause 20.1 thereof and permit NHIC to advance its claims without contemporary records or the particulars as required by clause 20.1.?

63. The terms of reference of the IQS were agreed between the parties. By these terms of reference the IQS was required to view the site and produce a detailed evaluation of items in dispute. In this regard he was required to inspect the site for the purpose of viewing and recording the extent of the works executed and the quantity of materials supplied and to record any other information in order to arrive at a fair and proper evaluation.

64. The question posed seems to be predicated upon the assumption that clause 20.1 does not permit a contractor to advance its claim without contemporary records required

by clause 20.1. Given my interpretation of clause 20.1 this is an incorrect premise. With respect to the particulars required by clause 20.1 as we have seen a failure to comply with the requirement that the contractor provide full particulars within a certain time frame does not preclude the making of the claim. By clause 20.1 the only thing that precludes the making of the claim is the failure to give the 28 day notice.

65. With respect to particularisation what the clause does is to provide, not that the claim not be advanced, but that payment shall not be made unless the particulars supplied are sufficient to substantiate that part of the claim for which payment is to be made. In this regard therefore I agree with the Arbitrator that the IQS' terms of reference supplements rather that overrides the express provisions of the contract. It goes to that part of the clause that requires particularisation and substantiation before payment. The fact that the clause says that the contractor shall only be entitled to payment for that part of the claim as he has been able to substantiate does not in my opinion require that the substantiation must only be from information produced by the Contractor himself but rather deals with the burden of proof. In other words the sentence merely recognises that the onus is on the Contractor to provide the substantiation whatever the source.

The additional questions posed by NIPDEC

66. That an arbitrator may be guilty of technical misconduct in circumstances where a request has been made for a case to be stated but despite the request the arbitrator proceeds to make an award without allowing that party the opportunity to apply to the

court for an order directing that a case be stated is not in dispute. The action of the arbitrator may constitute a misconduct if, in the court's view, the application for a statement of case was one which ought to have been granted: **Halsbury's Laws of England fourth edition Volume 2 page 314 paragraph 600**.

67. That said a party is not entitled as of right to have a case stated on all questions posed to the Arbitrator in this regard. Section 32 of the Act provides for a case to be stated with respect to questions of law only. Questions of fact therefore do not form a part of this procedure.

68. Neither is it that because a line of enquiry follows from a proposition of law that it is necessarily a question of law.

> "When arbitrators reach a conclusion on the evidence before them, in the light of an undisputable principle of law, they are engaged in making findings of fact, not of mixed fact and law. A question of fact cannot be dressed up as a question of law, appropriate for an appeal to the High Court, merely by showing that the investigation took a proposition of law as its starting point." : per Mustill J in **Overseas Buyers Ltd. v Granadex S.A. [1980] 2 Lloyd's Rep. 608 at page 613**.

The application of legal principles to the particular facts of a case, therefore, remains an issue of fact for the determination of the arbitrator.

69. Further the point of law posed by the question must be real, substantial and material to the issues to be determined.

> "The Court is not at the beck and call of the arbitrator to answer whatever questions the arbitrator may want to put to it, and it is not here to indulge in legal exercises. It is here only to answer questions which it is satisfied do arise in the course of the reference and are material to be determined.": per Devlin J in **Windsor RDC v Otterway & Try Ltd [1954] 3 All ER 721 @723 E.**

70. Even then "The point of law must be such that the resolution of it is important to the proper determination of the case as distinct from a side issue of little importance.": **GKN Centrax Gears Ltd.[1976] 2 Lloyd's Rep.555** per Denning LJ at page 575.

71. A Court therefore will not direct an arbitrator to state a special case unless the question is one of law which is material to the issues between the parties and which having regard to all the circumstances of the case should be determined by the Court.

72. The questions posed by NIPDEC arose in relation to NHIC's amended claim for overheads and profit based on the Eichleay formula; the admissibility of certain evidence led on behalf of NIPDEC and NHIC's claims for extension of time and disruptions.

73. NIPDEC concedes that the first two bases of its request fall away by reason of favourable conclusions by the Arbitrator in the award. Accordingly insofar as the

questions posed deal with NHIC's claim to recover overheads and profit on the basis of the Eichleay formula and its application to strike out parts of the report of the expert engineer these questions are no longer relevant.

74. Of relevance, it submits, is the Arbitrator's refusal to state a case on the issues of (i) extension of time and disruption; (ii) assessments made by the IQS, question 4 posed by it; and (iii) whether as a matter of law the requirements of clause 20.1 of the FIDIC CoC preclude NHIC from submitting its claims as a global formulation and thus preclude the Arbitrator from applying the principles found in the case of **John Doyle Construction Ltd v Laing Maintenance (Scotland) Limited [2002] BLR 393**, question 8 posed by it.

75. Of the questions posed by NIPDEC for a case to be stated as we have seen the Arbitrator in fact stated three. For ease of reference I have maintained the numbering and format used by NIPDEC in the original 22 questions posed when dealing with the remaining 12 questions.

76. As a result the questions upon which NIPDEC bases its allegation of misconduct are:

> Whether on a true construction of sub- clause 20.1 of the FIDIC COC:
>
> 2. "Contemporary records" does not mean witness statements produced after the event giving rise to the claim?

3. “Contemporary records” does not mean hypothetical calculations prepared by witnesses or in-house “experts” employed by NHIC for the purpose of the Arbitration?

4. The requirement for “contemporary records” does not mean and cannot be substituted, by assessments made by IQS without the benefit of any “Contemporary records”?

6. Where there are contemporary records to support part of a claim though not in its entirety, the claim may succeed on that part but not the balance unless inferences which can properly be drawn from the extant contemporary records show the otherwise unsupported part of the claim is made out

7. In drawing such inferences the tribunal may not rely on witness statements, or hypothetical calculations and/or IQS assessments to supplement or be a substitute for what contemporary records do not show, but it may rely on witness evidence or the IQS report to identify and clarify any points in contemporary records which are either ambiguous or unclear.

8. The requirement in clause 20.1 of the FIDIC COC for the Contractor to “send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed---”, precludes NHIC from presenting any such claim in a global formulation?

11. Whether clause 20.1 of the FIDIC COC bears any other meaning and if so what meaning?

The NHIC claims

12. To the extent that the manner of particularisation of NHIC's claims at law differs from that required by clause 20.1 of the FIDIC COC, what degree of particularization is required?

13. Whether and to the extent on their true construction NHIC's claims for an extension of time; prolongation costs in the form of additional preliminaries a [split into three periods] disruption costs and claims for loss of overheads and profit have been presented as global claims?

14. Whether on their true construction, the said NHIC claims have been presented in some other form and if so, what form?

The appointment of the IQS and his terms of reference

18. Whether NIPDEC in agreeing the IQS Terms of Reference in the arbitration waived or abandoned its contractual and/or legal entitlement to have NHIC's claims presented and particularised in the manner required by law?

19. Whether the IQS terms of reference bear some other and if so what meaning?

77. Questions 2 to 11 specifically deal with the construction of clause 20.1. In dealing with these questions it is important to bear in mind that the answers to the three questions stated by the Arbitrator ("the Arbitrator's questions"), questions originally numbered 1, 5 and 17, required a determination of the true construction of clause 20.1 and in particular (i) the meaning to be placed on the words "contemporary records"; (ii) the effect of their being no contemporary records on a claim for extension of time and/or additional payments pursuant to the section and (iii) the relationship between clause 20.1 and the IQS' terms of reference.

78. The issue for my determination here is whether the application for a statement of case with respect to these questions ought to have been granted by the Arbitrator. In this regard therefore it is necessary to bear in mind the answers given to the questions of law which were referred to the Court by the Arbitrator.

79. **Question 2**: 'Contemporary records' does not mean witness statements: A determination as to the meaning of contemporary records was dealt with in the first question posed by the Arbitrator. The question really seeks the identification of the type of document which would constitute a contemporary record. The question, in my view, is in fact seeking the application of legal principles to the facts of the case and is a question of fact for the Arbitrator. This question is therefore inappropriate.

80. **Question 3** : 'Contemporary records' does not mean hypothetical calculations prepared by witnesses or in-house 'experts' employed by NHIC for the purpose of the

Arbitration: As with question 2, and despite being put in the negative, this question seeks the identification of the type of document which would constitute a contemporary record. This is a question of fact for the Arbitrator. In any event a determination as to the meaning of contemporary records was dealt with in answer to the Arbitrator's first question.

81. **Question 4**: The requirement for contemporary records does not mean and cannot be substituted, by assessments made by the IQS without the benefit of any "Contemporary records". Insofar as this question contains an element of law the answer is contained in the determination of the meaning of contemporary records. Insofar as it seeks the identification of the type of document comprising a contemporary record it is a question of fact. In any event given the construction to be placed on clause 20.1 and in particular the answer to the Arbitrator's second question this question just does not arise in the course of the submission.

82. **Question 6**: Where there are contemporary records to support part of a claim though not in its entirety, the claim may succeed on that part but not the balance unless inferences which can properly be drawn from the extant contemporary records show that the otherwise unsupported part of the claim is made out: In similar vein given the answers to the Arbitrators first and second questions and the construction placed on clause 20.1 this question does not arise and is irrelevant. In any event, in my view, the inferences to be drawn on the evidence are solely within the province of the Arbitrator.

83. **Question 7**: In drawing such inferences the tribunal may not rely on witness statements, of hypothetical calculations and/or IQS assessments to supplement or to be a substitute for what contemporary records do not show, but it may rely on witness evidence or the IQS report to identify and clarify any points in contemporary records which are either ambiguous or unclear: Again given the answers to the Arbitrator's questions 1 and 2 this question does not arise. In any event this is a matter of the assessment of evidence and solely in the province of the Arbitrator.

84. **Question 8**: The requirement in clause 20.1 of the FIDIC COC for the Contractor to "send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed …." precludes NHIC from presenting any such claim in a global formulation: As we have in the observations to questions 1 and 5 and construction to be placed on clause 20.1 the clause does not preclude the presentation of a claim by the contractor on a global formulation. What is precluded by the words "Unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the Contractor shall only be entitled to payment for such part of the claim as he has been able to substantiate" is payment on the whole of a claim made in a global formulation without substantiation. Given the answers to questions 1 and 5 this question does not arise.

85. **Question 11**: Whether clause 20.1 of the FIDIC COC bears any other and if so what meaning. The construction to be placed on the clause was dealt with by the Arbitrator in the answer to questions 1 and 5. In any event as posed this is an

inappropriate question in that it ventures into the realm of hypothetical. It suggests that there is an onus or seeks to place on the Arbitrator the responsibility of the adducing all possible meanings to be placed on the clause. In the course of the submission NIPDEC presented what it considered was the true construction to be placed on the clause. In similar vein NHIC presented its construction. The Arbitrator in answering the other questions was required to come to his conclusion as to the true construction to be placed on the clause. The question as posed seems to require the Arbitrator to suggest other interpretations to be placed on the clause. This is in my view improper as well it is immaterial to the issues to be decided.

86. **Question 12**: To the extent that the manner of particularisation of NHIC's claims at law differs from that required by clause 20.1 of the FIDIC COC what degree of particularisation is required?: Again not only is this not a question of law but rather a question of evidence and within the sole province of the Arbitrator. Further in similar vein as question 11, it seeks the advice of the Arbitrator. In my view it is not permissible to require the Arbitrator to advise the parties on what they are required to prove or the manner of proof.

87. **Question 13:** Whether and to what extent, on their true construction NHIS' claims for an extension of time; prolongation costs in the form of additional preliminaries [split into three periods] disruption costs and claims for loss of overheads and profit have been presented as "global" claims: Again despite the introduction of the words "on their true construction" this question remains nothing more than a question on the assessment

of the evidence, that is on how NHIC has presented its claims, and is a matter for the Arbitrator. In any event the question is not material to the issues to be determined by the Arbitrator.

88. **Question 14**: Whether, on their true construction, the said NHIC claims have been presented in some other form and if so, what form: Again despite the use of the words 'on their true construction' this question, as question 13 remains a question of evidence dressed up as a question of law. In addition as with questions 11 and 12 the advice of the Arbitrator is sought. It is for NIPDEC to make submissions if it is of the opinion that the claims have been presented in an impermissible form and for the Arbitrator to rule on those submissions. In any event this question is not material to the issues to be determined.

89. **Question 18:** Whether NIPDEC, in agreeing the IQS terms of reference in the arbitration waived or abandoned its contractual and/or legal entitlement to have NHIC's claims presented and particularised in the manner required by clause 20.1 of the FIDIC COC and/or particularised in the manner required by law. As we have seen the IQS' terms of reference are not in conflict with clause 20.1. In any event the question whether certain acts amount to a waiver is a question of fact and solely in the province of the Arbitrator.

90. In the circumstances I agree with the Arbitrator that the only questions appropriate for referral to the Court on a case stated are the three questions which were in

fact referred to the Court by the Arbitrator. The submissions made by NIPDEC with respect to the misconduct of the Arbitrator in failing to state a case on the additional 12 questions posed by it therefore fails.

Error on the face of the award

91. The classic statement as to what constitutes the award in the case of **Hodgkinson v Fernie 3 CB (NS)189** it was stated that the question of law must arise "on the face of the award, or upon some paper accompanying and forming part of the award.": per Williams J at page 202.

92. "An error on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating his reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is and then going on to the contract on which the parties' rights depend to see if that contention is sound.": per Lord Dunedin in **Champsey Bhara and Company v Jivraj Balloo Spinning and Weaving Company Limited [1923] AC 480 at pages 487 to 488**.

93. A clear distinction must therefore be made between the operative part of the award and mere narrative. Mere reference to the evidence of a particular witness or a document used in the course of the Arbitration therefore does not automatically entitle me to examine the whole of the evidence of that witness or the complete document. The evidence or the document must be specifically incorporated into the award itself, not merely by way of narration as for example submissions of the parties.

94. In an award such as this where by sheer necessity arising from the range of issues of both law and evidence and submissions by the parties the award comprises some 308 pages and in which the Arbitrator seeks to deal with every conceivable point made by the parties the practical difficulties in ascertaining what comprises basis of the award are clear. The first and major difficulty posed is ascertaining what if any documents have been incorporated into the award.

95. Assistance in this regard, and, a not so gentle, reminder of the place of the Court in arbitration references, is rendered by the statement of Lord Denning in the case of **D.S. Blaiber &Co. Ltd. v Leopold Newbourne (London) Ltd. [1953] 2 Lloyd Rep. 427** when on an application such as this he says:

> "I have a strong suspicion that the arbitrators went wrong in law but we are not able to say so without looking at the contract. The difficulty is that we are not at liberty to see this contract. It is not expressly incorporated into the award nor can I see that it is impliedly incorporated. The question

> whether a contract, or a clause in a contract, is incorporated into an award is a very difficult one. As I read the cases, if the arbitrator says: "on the wording of this clause I hold" so- and- so, then that clause is impliedly incorporated into the award because he invites the reading of it; but if an arbitrator simply says: "I hold that there was a breach of contract," then there is no incorporation."

96. At the end of the day I have come to the conclusion that my investigations are to be limited to the four corners of the award. In particular I find that for the purposes of these application the award does not include the evidence of any of the witnesses to the arbitration, including the IQS, except insofar as that evidence is specifically contained in the award. The invitation made by NIPDEC therefore that I consider parts of the evidence of witnesses not contained in the award itself is declined.

97. Both parties allege errors of law arising out of the Arbitrator's treatment of the evidence. In dealing with those submissions it is necessary for me to keep in mind the fact that unless I am satisfied that the Arbitrator's findings of fact are unsupported by any evidence or "there is such an irreconcilable conflict between the arbitrator's conclusion and the facts found on the award as to show that he must have misdirected himself when arriving at the conclusion" or "where there is sufficient conflict between various findings of fact to make it uncertain what the arbitrator meant.": per Mustil J in **Overseas Buyers Ltd v Granadex SA.** I am bound by the Arbitrator's findings of fact and his treatment of the evidence. Further it is not sufficient for me to suspect that the Arbitrator may have

gone wrong the conclusion must be evident on the face of the award. Insofar as either of the parties allege error of fact arising out of the Arbitrator's treatment of the evidence therefore the burden upon them is a heavy one**.**

NIPDEC's CLAIMS

98. NIPDEC submits that the Arbitrator erred in law in that:

(i) He opined that it was possible [or permissible as a matter of law] to make a proper evidence based assessment of NHIC's claims for additional preliminaries and/or that the material submitted to the IQS provided for the basis for such a proper evidence-based assessment.

(ii) He wrongly took account of and/or placed reliance on the interim assessments of the engineer during the contract period expressly made pending the provision of proper substantiation of NHIC's claims by NHIC for an extension of time.

(iii) He held or accepted that a reconstructed critical path analysis prepared by the IQS' assistant was an appropriate method of assessing NHIC's entitlement to an extension of time in the absence of contemporary records to substantiate the claim.

(iv) He failed to place any, or any sufficient weight on the IQS' report in Appendix B which stated that in its tender and subsequent

programme submissions NHIC programmes were of little or no assistance and flawed as set out therein.

(v) He failed to place any or any sufficient weight on the express statement of the IQS that in respect of its claims for extension of time NHIC failed to substantiate its claims.

(vi) He erred in finding that "the IQS' assessment cannot fairly be characterised as "a hypothetical assessment"….Instead the extension granted is based on solid contemporaneous evidence, analysed in detail".

(vii) He erred in the construction of Clause 20.1

99. The errors referred to at (i) to (vi) above are in relation to the Arbitrator's treatment of the evidence. Insofar as (vii) refers to the construction of clause 20.1 the construction to be placed on the clause 20.1 has already been dealt with. A review of the construction to be placed on the clause as it may pertain to the other errors of law contended by NIPDEC is however useful.

100. Given the construction I have placed on clause 20.1 the Arbitrator was not prevented from using records or evidence other than contemporary records within the meaning of the clause in assessing NHIC's claim for extension of time and additional payments.

101. In this regard it is also important to note that even insofar as clause 20.1 provides that "Unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the Contractor shall only be entitled to payment for such part as he has been able to substantiate." The clause does not require that the substantiation shall be by way of contemporary records. It merely provides that there can be no payment, whether of the part or of the whole of the claim, without substantiation and that it is NHIC's responsibility to ensure such substantiation. The mode or method of substantiation is left open.

102. Further it is clear that while the clause refers to proof of the whole of the claim it contemplates that there may be circumstances where despite the fact that there is not substantiation or proof of the whole of the claim payment may be made on parts of that claim once those parts are substantiated.

103. By the appointment of the IQS on the terms of reference as agreed the parties are in fact saying that insofar as there are claims which are in dispute and are to be assessed by the Arbitrator the report of the IQS shall be evidence with respect to those matters but shall not be final or binding on the parties. The parties, and for our purposes NIPDEC, were therefore at liberty to dispute any conclusions arrived at by the IQS. Similarly, as with the other evidence before him, it was open to the Arbitrator to accept or reject the conclusions of the IQS. In the same way it was open to the Arbitrator to accept and or reject such parts of the IQS' evidence as he felt appropriate.

104. That said let us examine the challenge by NIPDEC to the Arbitrator's treatment of the evidence. It is fair to state that the grounds appear to be more in the manner of grounds of appeal on the Arbitrator's treatment of the evidence rather than errors of law.

105. **The Arbitrator erred in law in opining that it was possible or permissible as a matter of law to make a proper evidence based assessment of NHIC's claims for additional preliminaries and/or that the material supplied to the IQS provided the basis for such a proper evidence-based assessment.** In this regard NIPDEC refers us to paragraphs 30.4 and 30.5 of the award. At paragraph 30 the Arbitrator deals with NHIC's claim for additional preliminaries within the original contract period. This is a claim for additional payments within the meaning of clause 20.1 The Arbitrator found that NHIC was entitled to the sum of $4,295,766.14 for these additional preliminaries.

106. At paragraph 30.4 the Arbitrator refers to the statement of the IQS that he has not been provided with NHIC's costs in sufficient detail to do a precise calculation of these costs with respect to additional staff and other costs which the IQS thought NHIC to be entitled. He goes on to consider the evidence of the IQS as to the manner in which the IQS carried out his own assessment and arrived at a value of the claim at $4,295,766.14. This is in fact the sum awarded by the Arbitrator.

107. In paragraph 30.5 of the award the Arbitrator states: "Applying the law as set out in paragraphs 23 and 24 above, it is my view that in the present case, in all the circumstances, it is possible to make a proper evidence based assessment in respect of

NH's claim for additional preliminaries for the original contract period, in the way the IQS has done." It must be noted here that the Arbitrator's conclusions in law have not been challenged. All that has been challenged here is the Arbitrator's application of the law to the evidence before him. In other words what is challenged is the Arbitrator's acceptance that on the evidence as presented by the IQS in his report the IQS was able to make a proper evidence based assessment of the claim. This, as we have seen, is a matter of the acceptance of evidence and solely within the province of the Arbitrator and not reviewable by me.

108. The Arbitrator thereafter concludes that by way of support for his conclusion "the IQS's assessment based as it is on upon a rational methodology, and supported by NIPDEC's own Engineer's assessment, cannot be characterised as merely a "best guess" assessment."

109. In my opinion the Arbitrator, as he was entitled to do, came to the conclusion that the methodology used by the IQS allowed the IQS to make a proper evidence based assessment and arrive at a value of $4,295,766.14. He therefore, as he was entitled to do, accepted the evidence of the IQS in this regard and the value placed on the work by the IQS. The fact that the Arbitrator goes on the say that in his opinion the evidence of the IQS in this regard is supported by other evidence does not take away from the fact that it is the Arbitrator acceptance of the evidence of the IQS in this regard that is key. In the opinion of the Arbitrator on the basis of the IQS' report, agreed by the parties to be treated as evidence, he was satisfied that there was sufficient substantiation to support an

award of $4,295.766.14. In the circumstances I do not accept the submissions of NIPDEC that this constitutes an error of law on the part of the Arbitrator.

110. **The Arbitrator wrongly took account of and placed reliance on the interim assessments of the Engineer made during the contract period expressly made pending the provision of proper substantiation.** Not much assistance is given by NIPDEC in its submissions with respect to this challenge. The thrust of this ground seems to be that the certificates were interim and expressly made pending the provision of proper substantiation. These facts are not revealed in the award. In the circumstances this is not an error of law revealed on the face of award.

111. **The Arbitrator held that a reconstructed critical path analysis prepared by the IQS' assistant was an appropriate method of assessing NHIC's entitlement to an extension of time in the absence of contemporary records to substantiate the claims as required by the contract.** Again no assistance is given by NIPDEC in it's submissions with respect to this ground. Insofar as this seeks to challenge the Arbitrator's acceptance of the evidence contained in the IQS' report is not permissible. Insofar as it seeks to advance the position that what was required for substantiation prior to payment were contemporary records it is an incorrect assumption.

112. **The Arbitrator failed to place any or sufficient weight on certain statements made by the IQS in his report in Appendix B with respect to NHIC's programmes.** In my opinion Appendix B has not been incorporated into the award. In this respect

therefore this ground of challenge fails. In any event it is clear from the submission that this is a matter of the acceptance of evidence and the weight to be placed on evidence, a matter solely for the Arbitrator.

113. **The Arbitrator failed to place any sufficient weight on the express statement of the IQS that in respect of its claims for extension NIPDEC failed to substantiate its claims.** Again this seeks to deal with the weight placed on evidence before him by the Arbitrator and is a matter for the Arbitrator alone. The Arbitrator was of the opinion that on the evidence before him there was sufficient substantiation to satisfy the payment to NHIC.

114. **The Arbitrator erred when he found at paragraph 63.9.4 that "the IQS's extension of time cannot fairly be characterised as a hypothetical assessment instead the extension granted is based on solid contemporaneous evidence, analysed in detail"** The reference here is to paragraph 63.9 of the award. By way of background, paragraph 63 of the award deals specifically with NIPDEC's requests for a special case to be stated by the Arbitrator. At hand was NIPDEC's request that the Arbitrator state a case if he found that NHIC, although in breach of the requirements of clause 20.1, was entitled to payments on the basis of assessments or the best guess as to the value of its claims as undertaken by the IQS. The Arbitrator here considers the submission of NIPDEC in which it asks whether in the absence of substantiation it is permissible to make a hypothetical assessment of either the time by which the Contract Period should be extended and/or the contract sum increased to compensate NHIC for any alleged delay

and disruption to the works. It is in this that paragraph 63.9 specifically deals with NHIC's claim for time extensions.

115. In paragraph 63.9 by way of narrative the Arbitrator refers to Appendix B of the IQS' report and states:

> "Contemporaneously, during the course of the project, NIPDEC's own Engineer, Mr. Zak, granted 327 days extension. The IQS in appendix B has granted only 294 days for events up to 23 June 2005. Thus the IQS has granted less than NIPDEC"s own representative granted……."
>
> The IQS' June 2007 report at paragraph 2.7.8 and following states the IQS has made a detailed analysis of critical duty"…"based on NHIC's own progress reports and updated programmes'…

116. He then goes on to state in the context of the question posed:

> "Accordingly in my view the IQS' extension of time cannot fairly be characterised as "hypothetical assessment" …..Instead, the extension granted is based on solid contemporaneous evidence, analysed in detail. Therefore the arbitrator in confirming the extension calculated by the IQS is not finding that NH is entitled to extensions on a "best guess" ….Hence there is no need for a case to be stated in this regard."

117. The first point to be made is that this was a statement made by the Arbitrator with specific reference to the application made by NIPDEC for a case stated. In that

regard it was irrelevant to the award made. In any event the finding of the Arbitrator that the conclusion arrived at by the IQS with respect to the extension of time was based on solid contemporaneous evidence analysed in detail was a finding with respect to the quality of the evidence of the IQS, one which the Arbitrator was entitled to make and not open to question. It does not in my view present any inconsistency or lack of clarity which will permit a challenge.

118. In all the circumstances NIPDEC's challenges to the award on the basis of error of law on the face of the award also fails.

NHIC'S CLAIMS

119. NHIC submits that the Arbitrator erred in law in:

(i) the construction placed on clauses 2.5 and 16.4 (c) of the FIDIC COC

(ii) wrongly ignoring a concession made by NIPDEC and thereby awarding NHIC a lessor sum than conceded and

(iii) wrongly admitting inadmissible hearsay evidence.

120. With respect to the construction of the clauses the first question to be determined with respect to each of the clauses is whether there was such a reference to the Arbitrator on the construction of the clauses that his decision must be taken as final and not open to question by me.

121. "No doubt an award may be set aside for an error of law appearing on the face of it; and no doubt a question of construction is (generally speaking) a question of law. But 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 itself have come to a different conclusion. If it appears that the arbitrator has proceeded illegally- for instance he has decided on evidence which in law was not admissible or on principles of construction which the law does not countenance, then there is an error in law which may be a ground for setting aside the award; but the mere dissent of the Court from the arbitrator's conclusion on construction is not enough for that purpose.": per Viscount Cave in **Government of Kelatin v Duff Development Company [1923] A.C. 395 at page 409**.

122. In **F.R. Absalom Ltd. v Great Western London Garden Village Society [1933] AC 592** the question arose as to whether the question of law decided by the Arbitrator was specifically referred to him for his decision or was only one which necessarily arose in applying the ascertained facts to the terms of the contract. The former would preclude the Court's interference the latter would permit it.

(a) Clause 2.5

123. NHIC seeks an order that the award be remitted for the reconsideration of the Arbitrator of NIPDEC's counterclaims in the arbitration in accordance with the directions of the Court on the proper construction of clause 2.5 of FIDIC CoC.

124. Insofar as clause 2.5 is referred to in the award it is referred to in two circumstances: by way of a recital of the submissions made by NHIC and NIPDEC with respect to NIPDEC's counterclaims and at paragraph 53.4.3 of the award.

125. From the submissions made by the parties and recited by the Arbitrator in the award it is clear that NHIC was submitting that NIPDEC had not complied with the provisions of clause 2.5 with respect to the making of its claims. NIPDEC on the other hand was saying that the clause could not operate so as to bar or ignore all general principles of contract construction. According to NIPDEC the obligation under clause 19.6 for the Engineer to determine the value of the work done and issue a payment certificate involved bringing into account its cross- claims regardless of clause 2.5, for the purpose of final reckoning.

126. At paragraph 53.4.3 the Arbitrator states:

> "I agree ….that clear words are required to exclude common law rights of set-off and/or abatement of legitimate cross-claims, and in my view such

set off/abatement should be taken into account in the final reckoning following the termination. The terms of clause 2.5 do not prevent this. Also see Clause 11.10 as regards each party remaining liable for the fulfilment of any obligation remaining unperformed"

127. This is in fact the finding of the Arbitrator challenged by NHIC and according to NHIC entitles me to embark upon a proper construction of the clause. It is clear that what the Arbitrator is in fact saying here is that clause 2.5 as drafted cannot be interpreted as excluding a party's common law right to a setoff or abatement. The question here is whether this finding by the Arbitrator permits me to put my own construction on clause 2.5.

128. In my opinion it does not. One of the specific issues referred to the Arbitrator for his determination was the contractual requirements for notification of claims by the Employer and by the Contractor. Clause 2.5 specifically deals with the requirements for the notification of a claim by the Employer. In this regard therefore in my opinion this clause, along with other clauses dealing with the requirements for notification of claims, was specifically referred to the Arbitrator for his determination as to what it required. In other words by the reference the Arbitrator was required to examine the clauses dealing with notification of claims, for example clause 2.5 and as we have seen clause 20.1, and make a decision on what was required to be done by the relevant party in this regard. In my opinion the words 'contractual requirements for notification of claims' mean nothing

more than the Arbitrator was required to examine the contract and determine what the clauses in the contract which deal with the notification of claims say.

129. By way of an aside, in my view, the only reason that this court was able to place its own construction on clause 20.1 was because the door was opened by the Arbitrator himself by the questions of law stated for the decision of the Court.

130. In determining that the terms of clause 2.5, or the requirement under the contract for the notification of a claim by the Employer, did not exclude the common law rights of set off or abatement it seems to me that the Arbitrator must have been of the opinion that even if NIPDEC did not comply with the conditions set out in clause 2.5 for the notification of its claims by way of set-off or abatement on a proper construction the terms of the clause do not contain sufficiently clear words to prevent NIPDEC from pursuing a claim for set-off and/or abatement. In other words the Arbitrator was of the opinion that given the terms of the contract with respect to the notification of claims by the employer it was open to him to consider the employer's common law right to a set off and/or abatement notwithstanding the fact that the notification of the claim may not have been in accordance with the provisions of the clause 2.5.

131. The fact that I may have come to a different conclusion on the contractual requirements for notification of a claim by the employer as contained in the clause does not in my view allow me to interfere in the conclusion arrived at by the Arbitrator. The parties have themselves determined that the decision of the Arbitrator on the contractual

requirements for notification of claims by the contractor or the employer be final. In my view the contractual requirements was a question of law specifically referred to the Arbitrator. There is nothing on the face of the award to show that the Arbitrator proceeded illegally in coming to this conclusion. In my opinion in these circumstances it is not open to me to direct the Arbitrator on the construction to be placed on clause 2.5. NHIC's submissions on this issue therefore fails.

(b) Clause 16.4(c)

132. Clause 16 deals with payment on termination. This was not a clause the construction of which was specifically referred to the Arbitrator but arose in the context of the financial consequences resulting from the Arbitrator's determinations in the second partial award.

133. The clause provides as follows:

> "After a notice of termination under clause 16.2 [Termination by Contractor] has taken effect, the Employer shall promptly:
>
> (a) return the Performance Security to the Contractor,
>
> (b) pay the Contractor in accordance with Clause 19.6 [Optional Termination Payment and Release] and
>
> (c) pay to the Contractor the amount of any loss of profit or other loss or damage sustained by the Contractor as a result of this termination".

134. Clause 16.4 (c) of the FIDIC CoC arose in the context of a dispute between the parties as to what percentage should be applied to any award with respect to outstanding work to represent loss of profit or other loss or damage. This was in respect to work which formed a part of the contract but which, because if its termination, was never done. NHIC was contending that it was entitled to a percentage of the award representing both overheads and loss of profit. No issue arose with respect to the entitlement to overheads with respect to variations that arose during the works. The sole issue was whether NHIC was entitled to claim overheads under this clause with respect to work not performed.

135. Clause 16 deals specifically with payments arising from a termination of the contract. The contention before that Arbitrator was that NHIC was "entitled to (as part of its loss of profit") a general uplift for overheads.": paragraph 39.14 of the award. The submission of NHIC at Arbitration therefore was that the words 'loss of profit' meant combined profit and overhead. In this regard the Arbitrator refers to NHIC 's contention that the Hudson 11th Edition paragraphs 8.178 and 8.179 supported its position that loss of profit means the combined profit and overhead. In this regard the Arbitrator was of the opinion that if the clause had intended that the contractor be entitled to both profit and overheads. "It would have said so in terms particularly because where a contract is terminated the overheads associated with the future work are not incurred. Further, for the purpose of clause 16.4(c) such non incurred head office overheads would not appear to satisfy the term "other loss or damage sustained (underlining added). It is noteworthy

that the draftsman of the FIDIC conditions is aware of the terms "overhead" and "profit" since he has used both of these, distinctively, in for example, Clause 13.5(b)(ii):

"A sum for overhead charges and profit"

By contrast in Clause 16.4(c) the draftsman has simply referred to "any loss of profit or other loss or damage". This phraseology is inconsistent with the word "profit" in Clause 16.4 (c) meaning both profit and overheads". In my view, the above indicated that the draftsman did not intend that overheads should be recovered under 16.4(c).": paragraph 39.14.

136. In this regard NHIC refers to **Hudson's Building and Engineering Contracts 11th Edition** at paragraphs 8-177 to 8-179 where the author deals generally with the relationship between profit and fixed overheads. At the end of the day however it is the construction of the particular clause in the contract that is relevant. It would seem to me that the clause seeks to deal with actual loss sustained. In this regard I agree with the Arbitrator when he says at paragraph 39.10 this involves NH proving that it has "sustained" the sum for which it contends." While overheads are recoverable during the continuance of the contract once the contract has been terminated that portion of the contractor's office and other supervisory expenses which are apportioned to the contract are no longer needed for the maintenance of the contract and are therefore available for use on other work. It would seem to me that it is in these circumstances that the clause seeks to deal with losses which are "sustained" by the contractor. It cannot be said that in the context of the termination of the works that overhead costs attributable to the contract are a loss actually sustained by the contractor.

137. In addition I accept the reasoning used by the Arbitrator when he refers to the use of the phrase "a sum for overhead charges and profit" used elsewhere in the contract. This seems to me to confirm that there is maintained in the contract a distinction between overhead charges and profit.

138. In any event the question here is not whether I disagree with the conclusion arrived at by the Arbitrator but rather whether this was a conclusion that he could not on the law have come to. I find that, on the law, it was open to the Arbitrator to arrive at this conclusion. In the circumstances I am of the opinion that the Arbitrator made no error of law in this regard.

(c) The Arbitrator wrongly ignored a concession made by NIPDEC and awarded NHIC a lesser sum for disruptions notwithstanding that NIPDEC had conceded that a greater sum was due.

139. NHIC submits that, despite the fact that this was an issue of fact, there was such an irreconcilable conflict between the Arbitrator's conclusion and the facts found in the award that it is clear that the Arbitrator must have misdirected himself at arriving at his conclusion. The fact that a court may interfere with an Arbitrator's award on this ground is not in dispute. The question is whether there was in fact such an irreconcilable conflict so as to warrant my interference.

140. This issue arises from the Arbitrator's award on NHIC's claim for disruption. The Arbitrator's finding was as follows:

> "In view of NH's failings as regards providing information, as referred to above, and since the IQS, in carrying out his estimate, has only been able to use a percentage figure (unlike his more detailed estimate in respect of preliminaries-above) it is my view that NH is only entitled to the assessment which the Engineer himself granted when ….he certified TT$1 million in respect of this item. The Engineer Mr. Zak, was present at all material times and so was in a position to make a reasonable assessment from his own knowledge."

141. The issue raised here is whether given: (i) the Arbitrator's acknowledgment that NIPDEC accepts (subject to its defences) that NHIC incurred disruption costs of TT $4,335,534.60; and (ii) his finding that with respect to this claim that NIPDEC's general defence based upon global claims failed the Arbitrator could have properly come to this conclusion.

142. With respect to the Arbitrator's acknowledgement that NIPDEC accepted that subject to its defences NH incurred disruption costs. It is clear from the award that what the Arbitrator was referring to was the statement contained in the IQS' report that NIPDEC accepts, subject to liability (including its 'global claim' defence) and simply as a matter of quantum, the figure assessed by the IQS (TT$4,335,534.60). The concession

therefore by NIPDEC was merely on a 'figures as figures basis", a term used elsewhere by the Arbitrator to describe the status of the concession, and subject to the Arbitrator's findings as to liability and its [NIPDEC's] general defences.

143. In this regard the Arbitrator states:

> " Although NIPDEC contends that the claim should fail in principle, I note ….that the approach of the English courts is that if there is sufficient evidence "to make a rational apportionment of part of the global loss to the causative events for which the defendant has been held responsible" then this is the course to be adopted." paragraph 36.5(iii).

144. What the Arbitrator rejected therefore was contention that the claim should fail in its entirety because it was presented as a global claim. In this regard while accepting that the claim was presented as a global claim he was of the view that despite this he was entitled to make a rational apportionment of the claim. It is those circumstances that he accepts the sum awarded by NIPDEC's Engineer "in the light of his contemporaneous knowledge of the site events."

145. In this regard there seems to me to be no irreconcilable conflict with the conclusions of the Arbitrator and his findings. In other words the Arbitrator accepted that the claim was presented by way of a global formulation; rejected the submission of NIPDEC that in those circumstances the claim should be dismissed outright and made what he considered to be a rational apportionment of the claim based on the sum awarded

by NIPDEC's Engineer. The fact that NIPDEC had conceded on a figures as figures basis that the claim as presented, on the global formulation, amounted to a greater sum was irrelevant to the rational apportionment that the Arbitrator was of the opinion he was entitled to make.

(d) The Arbitrator wrongly admitted hearsay evidence

146. In the course of the hearing NHIC applied to strike out passages of an expert's report which referred to and commented on tests conducted by an assistant in the absence of that expert. The basis of the objection was that the statements consisted of inadmissible hearsay. The Arbitrator accepted the submissions of NIPDEC in this regard and came to the conclusion that passages were admissible and ought not to be stuck out.

147. The basis of the submission accepted by the Arbitrator was that Part 33.10 (1) (c) and (d) of the Civil Proceedings Rules 1998 as amended ("the CPR") stated that an expert's report must say who conducted any test or experiment which the expert has used for the report and give details of the qualification of the person who carried out any such test or experiment. The process therefore of the expert instructing his assistant to undertake testing on his behalf was a proper procedure thereby rendering the evidence given in this regard admissible.

148. NHIC on the other hand submits that since the conjoint effect of sections 35(1) and 35(3) of the Evidence Act is that hearsay evidence will be admissible in arbitration

proceedings in accordance with rules of court made for that purpose of admitting hearsay evidence and since Part 33 of the CPR are not made for the purpose of admitting hearsay evidence it therefore does not apply to arbitrations and cannot be read as allowing such evidence to be admitted through the "back door."

149. Unfortunately neither party referred the Arbitrator to Part 30 of the CPR which does deal with the admissibility of hearsay evidence. It is not disputed that this evidence is evidence made admissible, subject to the rules of Court made for this purpose, by the **Evidence Act Chap 7:02**. **Part 30** provides for the admission of hearsay evidence. In particular it allows hearsay evidence to be adduced upon the service of a notice in that regard. In certain cases the notice triggers the right of the opposing party to serve a counter notice requiring the production of the witness. It is not disputed that no hearsay notice was given in this regard by NIPDEC. By **Part 30.8** however the Court may permit a party to adduce hearsay evidence even though the party seeking to adduce the evidence has failed to serve a hearsay notice. As a matter of law therefore the discretion to allow the statements into evidence was a matter for the Arbitrator even in the absence of a hearsay notice. The submissions of NHIC in this regard therefore fails.

150. At the end of the day therefore all the challenges to the award made by the Arbitrator have failed. With respect to the case stated I confirm the Arbitrator's primary views made in the award. Both claims insofar as they seek to challenge the award are hereby dismissed.

151. Under normal circumstances an order that each party bear its own costs would be appropriate. In this particular situation however the fact that in addition to its submissions on misconduct and error of law on the face of the award NIPDEC also raised the special case for the consideration of the Court in circumstances where, given my determination on those questions, it was unnecessary. I am of the view therefore that the costs of that part of their application ought to be borne by NIPDEC. In accordance with the cost budget of $750,000.00 set in these actions and bearing in mind the extent of the arguments in this regard I order that NIPDEC pay NHIC's costs in the sum of $250,000.00.

Dated this 21st day of October, 2009

…….
Judith A. D. Jones
Judge