[2015] UKPC 37
Privy Council Appeal No 0031 of 2014 and 0032 of 2014

JUDGMENT

NH International (Caribbean) Limited (Appellant) *v* National Insurance Property Development Company Limited (Respondent) (Trinidad and Tobago)

NH International (Caribbean) Limited (Appellant) *v* National Insurance Property Development Company Limited (Respondent) (No 2) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Neuberger
Lord Mance
Lord Clarke
Lord Sumption
Lord Reed

JUDGMENT GIVEN ON

6 August 2015

Heard on 30 June 2015

Appellant	*Respondent*
Alvin Fitzpatrick SC Jason Mootoo (Instructed by Ward Hadaway)	Alan Newman QC Iain Daniels (Instructed by Sheridans)

LORD NEUBERGER:

Introductory

1. These two appeals arise out of two interim, or partial, awards made by an arbitrator, Dr Robert Gaitskell QC ("the Arbitrator"), who was appointed to determine disputes which had arisen out of an agreement ("the Agreement") dated 6 March 2003, under which National Insurance Property Development Company Ltd ("NIPDEC") engaged NH International (Caribbean) Ltd ("NHIC") to construct the new Scarborough Hospital in Tobago.

2. Following disagreements between the parties, NHIC suspended work on the project in September 2005, and, in November 2006, it purported to exercise its right to determine the Agreement. The parties then referred a number of differences to arbitration pursuant to the terms of the Agreement. The Arbitrator was duly appointed to determine these issues, and in due course, he issued a total of five awards. Two of the issues determined by the Arbitrator were then challenged. The first was his decision, which was contained in his second award, that NHIC was entitled to terminate the Agreement. The second determination which was challenged arose under his third award, and it related to certain financial claims which he had to resolve.

3. The issues raised by the two appeals are connected, but, in terms of the legal and practical issues which they raise, they are each self-contained. The Board will address the two issues in turn, after setting out the relevant terms of the Agreement.

The relevant provisions of the Agreement

4. The Agreement was expressed to be subject to the FIDIC General Conditions of Contract for Construction, First Edition 1999 ("the Conditions"). The first appeal turns on clauses 2.4, 14 and 16 of the Conditions. The second appeal turns on clauses 2.5, 16 and 19 of the Conditions.

5. Clause 2.4 provided that the Employer, ie NIPDEC, "shall submit within 28 days after receiving any request from the Contractor [ie NHIC], reasonable evidence that financial arrangements have been made and are being maintained which will enable the Employer to pay the Contract Price … in accordance with clause 14". Clause 14 set out the contract price and procedure for payment, including provisions for interim certificates and a final certificate, referred to as "Payment Certificates".

6. Clause 16.1 entitled the Contractor, after giving 21 days prior notice to the Employer, to "suspend work (or reduce the rate of work) unless and until [it] has received the … reasonable evidence". Clause 16.2 entitled the Contractor to terminate the Agreement if, within 42 days of giving notice under clause 16.1, it had not received the reasonable evidence required by clause 2.4.

7. Clause 16.3 provided that on termination under clause 16.2, the Contractor should cease all work and leave the site. Clause 16.4 stated that, after termination under clause 16.2, the Employer should, "(a) return the Performance Security to the Contractor", "(b) pay the Contractor in accordance with sub-clause 19.6" and "(c) pay to the Contractor the amount of any loss of profit or other loss or damage sustained …".

8. Clause 19.6 required the Engineer appointed under the Agreement to "determine the value of the work done and issue a Payment Certificate". The clause went on to provide that the certificate should include "(a) the amounts payable for any work carried out for which a price is stated in the Contract", (b) the costs of certain plant and materials, and (c) any other costs which have been reasonably incurred. Clause 15.3 provided that, "as soon as practicable" after service of a notice of termination, the Engineer should proceed to determine the value of the works.

9. Clause 2.5 first provided that, if the Employer "considers itself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract", it should, subject to certain specified exceptions (such as cost of electricity, water or gas or for "other services requested by the Contractor") "give notice and particulars to the Contractor". The clause secondly went on to provide that "[t]he notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim". Thirdly, clause 2.5 stated that "[t]he particulars shall specify the Clause or other basis of the claim, and shall include substantiation of the amount … to which the Employer considers [it]self to be entitled", that the amount should be assessed by the Engineer, and that it "may be included as a deduction in the Contract Price and Payment Certificates". Fourthly, clause 2.5 ended by stating that the amount so determined "may be included as a deduction in the Contract Price and Payment Certificates" but that the Employer should only be entitled "to set off against or make any deduction from an amount certified in a Payment Certificate, or to otherwise claim against the Contractor, in accordance with this sub-clause".

The relevant facts

10. The primary facts relating to this issue are not in dispute. On 3 September 2004, NHIC issued a request to NIPDEC under clause 2.4. NIPDEC responded on 29 December 2004, enclosing a letter from the Project Administration Unit of the Ministry

of Health ("the Ministry"), which advised that the Cabinet had approved additional funding for the project in the sum of $59.1m.

11. On 28 April 2005, NHIC sent a further request under clause 2.4, which was answered on 5 July 2005 by the Permanent Secretary at the Ministry, Reynold Cooper. Having referred to the fact that the estimated final cost was $286,992,070, Mr Cooper stated that the Ministry "advise without prejudice that funds are available in [this] sum to meet the estimated final cost to completion".

12. NHIC then wrote on 8 July 2005, expressing concern about the expression "without prejudice" and asking whether there had been Cabinet approval to payment of sums due under the Agreement. No response was received to this request. NHIC then suspended work under the Agreement on 23 September 2005 (having already reduced its rate of work on 23 June 2005).

13. On 19 October 2006, over a year later, NHIC received a letter from the new Permanent Secretary, Sandra Jones, dated 6 October 2006. After referring to the previous correspondence, Ms Jones stated that the Government "confirm[ed]" that (i) completion of the project "is of the highest priority", (ii) the current estimate for the work was $224,129,801.99, (iii) "these funds are available from the consolidated fund for disbursement to NIPDEC for onward payment to NHIC or for direct payment to NHIC", (iv) "moneys certified or found due to NHIC … will be paid by the Government", and (v) "the Government stands fully behind the project … and will meet the contractual financial requirements for completion of the project".

14. On 27 October 2006, NHIC wrote to NIPDEC requesting confirmation that Cabinet had approved the funds. No such confirmation was forthcoming and on 3 November 2006, NHIC issued a notice of termination pursuant to clause 16.2. Around this time, the Cabinet accepted a recommendation from Ms Jones that the funds referred to in the letter of 6 October 2006 be provided for completion of the project, and this decision was formally recorded in a note prepared by the Cabinet Secretary on 16 November 2006.

15. NIPDEC did not accept that the Agreement had been validly terminated, and contended that NHIC had had no right to terminate. However, the parties very sensibly proceeded (in NIPDEC's case, without prejudice to its contention) on the basis that the Agreement had been terminated. Accordingly the Engineer then proceeded to assess the value of the work that had been done up to the date of termination.

16. A number of issues arose between the parties, and their disputes were referred, in accordance with the terms of the Agreement, to the Arbitrator, who issued a total of five partial awards.

17. The ultimate question for the Arbitrator in the second award was whether NHIC had been entitled to determine the Agreement under clause 16.2, as it had purported to do on 3 November 2006. It is common ground between the parties that the answer to that question turns on whether, in the light of the letters summarised above, NIPDEC had given "reasonable evidence that financial arrangements have been made and are being maintained which will enable [NIPDEC] to pay the Contract Price … in accordance with clause 14" within clause 2.4.

18. After hearing and reading evidence and argument on this issue, the Arbitrator decided in his second award, dated 16 April 2007, that the letters of 29 December 2004, 5 July 2005 and 6 October 2006, whether taken together or separately, did not amount to such "reasonable evidence" that "financial arrangements" had been "made and maintained". Accordingly, he concluded that NHIC had been entitled to terminate the Agreement as it had purported to do on 3 November 2006. That decision was upheld by Rajnauth-Lee J, but set aside by the Court of Appeal. The first of the instant two appeals is NHIC's appeal against that decision of the Court of Appeal.

19. While his second award was being appealed, the Arbitrator went on to entertain submissions as to the amounts due to NHIC, as there were claims and counter-claims. This led to his third award, which contained a number of detailed findings and calculations. NHIC appealed against a number of the conclusions reached in the third award, and sought an order remitting the matter to the Arbitrator. Jones J dismissed the appeal, but the Court of Appeal allowed NHIC's appeal on two points although declining to remit the third award in light of its decision on the second award. However, they upheld Jones J's rejection of NHIC's case on set-off, and it is that issue which founds the basis of the second of NHIC's instant two appeals.

The first issue: was NHIC entitled to determine the Agreement?

20. As explained above, the effect of the second award was that the Agreement had been validly terminated by NHIC on 3 November 2006. The Arbitrator gave two reasons for this conclusion in his second award. The first reason was that the contents of the letters relied on by NIPDEC, whether taken together or individually, did not constitute "reasonable evidence that financial arrangements [had] been made and maintained [to] enable [NIPDEC] to pay" the sums referred to in the letters. The second reason was that, even if those letters did constitute such "reasonable evidence", they related to a sum which was too low. The Board will concentrate on the first of those reasons, which has been rightly treated throughout these proceedings as the Arbitrator's primary reason for reaching his conclusion that NHIC was entitled to terminate the Agreement under clause 16.2.

21. In his second award, the Arbitrator referred to the evidence given by Ms Jones, who explained that she had sought the approval of Cabinet after receiving NHIC's letter of 27 October 2006, as "demonstrat[ing]" that Cabinet approval was necessary for the payment of funds, a conclusion which he said was also supported by the evidence of Minister Emil. The Arbitrator also stated that the effect of the evidence he had heard was that "[t]he normal procedure of seeking Cabinet approval prior to expenditure was rarely if ever departed from", a view which he considered was supported by the evidence of Ms Jones, who did not know of any occasion when such a departure had occurred. The Arbitrator further mentioned that in relation to previous construction contracts, the evidence showed that Cabinet approval was needed before money could be paid.

22. The Arbitrator then turned to the wording of clause 2.4, and concluded that it required more than showing that "the employer is able to pay", let alone that it was enthusiastic about the project. He said that what was required was evidence of "positive steps" on the part of the employer which showed that "financial arrangements" had been made to pay sums due under the Agreement.

23. The Arbitrator next addressed the question whether NHIC had been entitled to suspend work under clause 16.1 as it did on 23 September 2005. He held that NHIC was so entitled, in the light of the words "without prejudice", and the absence of any confirmation of Cabinet approval, in the letter of 5 July 2005, and in the absence of any response to NHIC's letter of 8 July 2005.

24. The Arbitrator then turned to the question whether NHIC had been entitled to terminate the Agreement pursuant to clause 16.2 as it purported to do on 3 November 2006. For very similar reasons, he held that NHIC was so entitled. The crucial letter from Ms Jones dated 6 October 2006 did not mention that Cabinet approval was being sought, let alone that it had been obtained: it merely gave assurances of the Government's commitment to the project. Although the Arbitrator accepted that the evidence before him showed that, as at 3 October 2006, ministerial and prime ministerial consents to the payment of any money due under the Agreement would be approved by Cabinet, he noted that this had not been communicated to NHIC. The Arbitrator accordingly held that NHIC was entitled to terminate the Agreement as it purported to do.

25. On 14 November 2008, Rajnauth-Lee J dismissed NIPDEC's challenge to the Arbitrator's conclusion that the Agreement had been validly terminated, but, the Court of Appeal (Mendonça, Jamadar and Bereaux JJA) allowed NIPDEC's appeal from her decision. It is from that decision which NHIC now appeals to Her Majesty.

26. In very summary terms, the Court of Appeal's reasoning as to why the Arbitrator went wrong was that he was mistaken in thinking that evidence of Cabinet approval was needed to satisfy clause 2.4, in the light of the assurances given by the Permanent Secretaries, Mr Cooper and Ms Jones, in their respective letters of 5 July 2005 and 6 October 2006. In those circumstances the Court of Appeal held that the Arbitrator was effectively demanding the "highest standard", rather than "reasonable evidence", of assurance.

27. In the Board's view, the decision of the Court of Appeal cannot, with respect, stand. There was no suggestion that the Arbitrator had misconstrued the relevant provisions of the Agreement, clauses 2.4, 14, 16.1 and 16.2; the challenge was simply to his assessment that the letters sent on behalf of NIPDEC were insufficient to satisfy the requirements of clause 2.4, and in particular to his conclusion that, at least in the circumstances of this case, NIPDEC had to produce evidence that Cabinet approval for payment of the sum due under the Agreement had been, or was in practice bound to be, obtained.

28. The Arbitrator's conclusion in this connection was one of fact rather than of law. It can be said to be a finding of secondary fact or even the making of a judgment rather than a strict fact-finding exercise, but it is not a resolution of a dispute as to the law. In those circumstances, save (arguably) to the extent that it might be contended that there was simply no evidence on which he could make the finding (or reach the judgment) that he did, or that no reasonable arbitrator could have made that finding (or reached that judgment), it was simply not open to a court to interfere with, or set aside, his conclusions on such an issue.

29. Where parties choose to resolve their disputes through the medium of arbitration, it has long been well established that the courts should respect their choice and properly recognise that the arbitrator's findings of fact, assessments of evidence and formations of judgment should be respected, unless they can be shown to be unsupportable. In particular, the mere fact that a judge takes a different view, even one that is strongly held, from the arbitrator on such an issue is simply no basis for setting aside or varying the award. Of course, different considerations apply when it comes to issues of law, where courts are often more ready, in some jurisdictions much more ready, to step in.

30. In the present case, the Board has no hesitation in concluding that the Arbitrator's careful analysis of the relevant clauses demonstrates that he made no error of law, that his summary of the factual evidence he heard shows that there was plainly enough evidence to justify the conclusion that he reached, and that the reasoning by which he arrived at that conclusion was coherent and clear. In those circumstances, as Rajnauth-Lee J rightly concluded, there was simply no basis for interfering with his conclusion that NHIC had validly determined the Agreement pursuant to clause 16.2.

31. In his judgment in the Court of Appeal, with which Mendonça and Jamadar JJA agreed, Bereaux JA relied on the fact that whether the evidence provided under clause 2.4 was "reasonable" was a matter of law. That is only true in the sense that there would be an error of law if the Arbitrator had reached a conclusion on this issue which was unsupportable in the light of the evidence, or if, which may well be the same thing, it was irrational. But, as already explained, such a contention cannot be maintained in this case: there plainly was evidence which justified the Arbitrator's conclusion. In effect, the Court of Appeal took the view that he had applied too high a standard when deciding what constituted "reasonable evidence", but that approach involved an impermissible substitution of the court's judgment for that of the Arbitrator, in circumstances where the parties had mutually agreed to have the issue determined by an arbitrator.

32. To condescend a little further into detail, in para 87 of his judgment, Bereaux JA said that it "must be a relevant consideration that the employer is wealthy and financially able to pay the contract price". That may very well be true, but it does not, as Bereaux JA suggested, give rise to a justifiable criticism of the Arbitrator's views that "the mere fact that an Employer is wealthy is inadequate for the purposes of sub-clause 2.4" and that "the mere fact that an Employer has good reasons for wanting a project completed does not itself mean that he has made and maintained the necessary financial arrangements". The Arbitrator was not saying that the employer's wealth was not relevant evidence: he was saying that it was insufficient to satisfy the requirements of clause 2.4.

33. Similarly, the suggestion in para 91 of Bereaux JA's judgment that, while "Cabinet approval would easily have satisfied the requirement of … clause 2.4, … the absence of Cabinet approval would not necessarily have breached it", involved substituting the court's judgment for that of the Arbitrator on a matter which was pre-eminently for the Arbitrator to determine. Further, while Bereaux JA's subsequent assessment in paras 92-96 that the Permanent Secretaries' assurances in the letters of 5 July 2005 and 6 October 2006 constituted "reasonable evidence" may well have been a perfectly fair and defensible view, it was not for him to form his own independent view on that point: it was for the Arbitrator. A final illustration of how the Court of Appeal allowed itself to take over the fact-finding role of the Arbitrator may be seen in para 99, where it was said that the Arbitrator "gave too little weight" to certain evidence of Minister Emil. It is not for the court to decide what weight should be given to certain evidence.

34. It is only fair to add that the judgment of Bereaux JA was careful and coherent, and that it is understandable that he took a different view from the Arbitrator. It is also right to say that the Court of Appeal was quite right to reject the second reason which the Arbitrator gave for finding that clause 2.4 had not been satisfied by NIPDEC, namely that, even if the letters of 5 July 2005 and/or 6 October 2006 would otherwise have satisfied clause 2.4, they did not do so, because they related to an insufficient sum (as mentioned in para 20 above). The Board considers that Bereaux JA was quite right

in paras 101-104 of his judgment to conclude that the Arbitrator had gone wrong in law on that point. However, the Arbitrator's error in that regard does not infect his first (and main) reason for holding that NHIC was entitled to terminate the Agreement, which was, as just explained, a conclusion with which a court should not interfere.

35. Accordingly, the Board considers that the appeal of NHIC on the first appeal is well founded, and therefore confirms that, as a result of the Arbitrator's second award, the Agreement was validly terminated by NHIC on 3 November 2006 pursuant to clause 16.2.

The second issue: NIPDEC's set-offs and cross-claims

36. As explained above, the Arbitrator's third award addressed the financial consequences of his finding that the Agreement had been validly determined by NHIC in accordance with clause 16.2. In the third award, having found what sums were owing to NHIC from NIPDEC, the Arbitrator went on to consider "NIPDEC's counterclaims", in respect of which he rejected NHIC's contention that clause 2.5 barred all or some of the counterclaims, because "clear words are required to exclude common law rights of set-off and/or abatement of legitimate cross-claims" and (by implication) the words of clause 2.5 were not clear enough. That decision was upheld by Jones J and by the Court of Appeal, in a judgment given by Mendonça JA with which Jamadar and Bereaux JJA agreed.

37. In his clearly reasoned judgment, Mendonça JA stated that, while the closing part of clause 2.5 "prohibits the employer from setting off any sum against any amount certified in a Payment Certificate", it "does not prevent the employer from exercising his right of set-off in any other way", and in particular "against amounts that are not certified".

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

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

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

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

42. In the light of the unchallenged part of the Court of Appeal's decision, it is common ground that the third award must be remitted to the Arbitrator. In the light of the Board's decision as to the effect of clause 2.5, it will have to be remitted on the basis that he will have to reconsider the sums which he allowed NIPDEC to raise by way of set-off or cross claims. Any of those sums which (i) were not the subject of appropriate notification complying with the first two parts of clause 2.5 and (ii) cannot be characterised as abatement claims as opposed to set-offs or cross-claims, must be disallowed. It is for the Arbitrator to decide which sums are to be allowed in the light of this conclusion, and to decide how he should proceed to determine that issue.

Conclusions

43. For the reasons given above, the Board concludes that both appeals of NHIC should be allowed and the third award remitted to the Arbitrator for his reconsideration

in accordance with the unchallenged directions of the Court of Appeal on the two points allowed in NHIC's appeal against the third award and the directions of the Board as set out in para 42 above. In the case of the second appeal, it should be added that NHIC had raised other points which it has abandoned, perhaps partly in the light of its success on the first appeal.

44. The Board invites submissions as to the costs of these two appeals within 14 days of the handing down of this judgment. If no submissions are received in that period, the Board will order that NIPDEC pay the costs of NHIC of both appeals on a standard basis.