Michaelmas Term
[2024] UKPC 33
Privy Council Appeal No 0031 of 2023

JUDGMENT

Estate Management and Business Development Company Ltd (Appellant) *v* Junior Sammy Contractors Ltd (Respondent) (Trinidad and Tobago)

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

before

Lord Reed
Lord Hodge
Lord Leggatt
Lord Stephens
Lady Rose

JUDGMENT GIVEN ON
29 October 2024

Heard on 30 April 2024

Appellant
Jonathan Acton Davis KC
Colin Kangaloo SC
Jennifer Jones KC
(Instructed by Sheridans (London))

Respondent
David Thomas KC
Ramesh L Maharaj SC
Robert Strang
(Instructed by BDB Pitmans LLP (London))

LORD STEPHENS:

1. Introduction

1. Estate Management and Business Development Company Ltd ("the Employer") entered into a contract dated 4 February 2015 with Junior Sammy Contractors Ltd ("the Contractor") under which the Contractor agreed to carry out residential infrastructure works ("the Works") for the Employer for the contract sum of TT$231,235,125.36 at a site known as the Caroni Savannah Residential Development Phase B ("the Site"). The contract sum was based on the estimated quantities set out in the Bill of Quantities prepared on behalf of the Employer. It was subject to adjustment on, for instance, any difference between the estimated quantities and final measurement of the "as built" quantities.

2. The Contractor carried out the Works between 4 February and 17 August 2015.

3. Between March and October 2015 13 interim payment certificates ("IPCs") were issued to the Contractor by the engineer appointed by the Employer, Vikab Engineering Consultants Ltd ("Vikab"). Each IPC certified the amount which Vikab fairly determined as due and owing to the Contractor at the end of each tranche of the Works. The Employer paid IPCs 1-6 in full. The Employer paid part only of IPC 7 leaving TT$10,502,422.46 outstanding. The Employer failed to pay IPCs 8-13. The total amount certified as due to the Contractor on IPCs 7-13 which remains unpaid is TT$77,658,948.91. In addition, the Contractor states that the Employer has failed to release the outstanding retention sum of TT$5,145,270.28.

4. On 20 December 2018, the Contractor commenced these proceedings in the High Court to recover TT$82,804,219.19 from the Employer, comprising TT$77,658,948.91 certified by Vikab as due under IPCs 7-13 and TT$5,145,270.28 in relation to the failure to release the outstanding retention. The Contractor also claimed interest on the total unpaid sum claimed.

5. The Employer in its defence served on 18 March 2019 seeks to defend the proceedings on two grounds. First, that the Contractor had absolutely assigned to Ansa Merchant Bank Ltd ("the Merchant Bank") any rights that it may have had against the Employer in respect of TT$77,658,948.91 said to be due and owing on foot of IPCs 7-13. Accordingly, by virtue of that absolute assignment the Contractor no longer has the right to sue the Employer in respect of that sum and the correct claimant is the Merchant Bank. Second, the Employer states that in respect of the full claim for TT$82,804,219.19 it *may* be able to rely on defences of abatement and/or fraud.

6. It is appropriate at this stage to say a little bit more about the grounds of defence relied on by the Employer.

7. In relation to the first ground, the central issue is whether the assignment to the Merchant Bank was an absolute assignment or whether it was by way of charge only. If it was an equitable assignment, being by way of charge only, then, for the purposes of this appeal, the Employer concedes that the Contractor is entitled to sue on the debt of TT$77,658,948.91 without the Merchant Bank being joined as a party.

8. In relation to the potential defence of abatement, the Employer contends that the Contractor *may* not have done all the Works certified by Vikab and, if the Contractor did not do all the Works, then the Employer states that it should only pay for the lesser amount of Works which have in fact been carried out by the Contractor and not the amounts which have been over-certified by Vikab. The essential ingredients of the right to abate have been set out in *Mondel v Steel* (1841) 8 M&W 858, in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol)Ltd* [1974] AC 689, 717 and in *Mellowes Archital Ltd v Bell Products Ltd* (1997) 58 Con LR 22, 30. For the purposes of this appeal there is no dispute that to plead a right to abate, the Employer had to plead and particularise (a) that the Contractor had not performed certain obligations under the contract and was thereby in breach; and (b) by reason of that breach the work done was worth less than the amount claimed by the Contractor.

9. In relation to the potential defence of fraud, the Employer, in effect, asserts that it has "*reason to believe"* that, when applying for the IPCs, the Contractor made statements to Vikab applying for certification in respect of works which it must have known it had not carried out or alternatively acted recklessly as to the accuracy of the works stated to have been carried out. The word fraud does not appear in the defence, but the Employer relies on the definition of fraud given by Lord Herschell in *Derry v Peek* (1889) 14 App Cas 337, 374. Lord Herschell stated that "fraud is proved when it is shewn that a false representation has been made (1) knowingly, or … (3) recklessly, careless whether it be true or false." Accordingly, an unequivocal allegation that the Contractor in making claims to Vikab for the thirteen IPCs must have known that the claims were false or at the very least must have been recklessly careless as to the truth or falsity of those claims, would amount to an allegation of fraud. However, the pleaded basis for this assertion is that the Employer has "reason to believe" that the works were over-certified and/or incorrectly certified and therefore that the Contractor *may* not be entitled to payment to the extent claimed. This is not a sufficient basis on which to allege fraud. Thus, counsel on behalf of the Employer correctly conceded during the hearing before the Board that the defence should not be read as pleading a positive case of fraud.

10. The Employer contends at paras 22.10 to 22.14 of its defence that it cannot determine whether the Contractor is entitled to payment without an examination of the Contractor's statements to Vikab in support of its applications for all 13 IPCs together

with the supporting documents accompanying those statements ("the Statements and Supporting Documentation"). The Employer explains that the Contractor has been requested to, but has failed to, provide the Statements and Supporting Documentation to the Employer. At para 22.11 of the Employer's defence, it is stated that in the absence of disclosure of the Statements and Supporting Documentation by the Contractor and its subsequent analysis by the Employer, it is not possible for the Employer to identify whether all or some only of the Works certified by the engineer have been carried out and if some only what would be an accurate valuation for those Works. The Employer's defence accepts that absent disclosure and analysis of the Statements and Supporting Documentation the defences of abatement and/or fraud are "necessarily preliminary." However, the Employer anticipates, at para 7 of its defence, that once it has obtained and analysed the Statements and Supporting Documentation "it is probable that [it] will seek to amend its Defence to set out a full Defence … ."

11. The Board notes that if the Employer cannot obtain the Statements and Supporting Documentation either voluntarily or under an order of the court, then there will be insufficient evidence on which to apply to amend the defence. The position will remain that the defences of abatement and fraud will not have been pleaded so that those grounds for the defence of the proceedings will not be available to the Employer. The Contractor has not voluntarily made the Statements and Supporting Documentation available to the Employer. Accordingly, if the Employer cannot obtain a court order requiring those documents to be disclosed then the Contractor will be entitled to summary judgment in the amount of either TT$82,804,219.19 or TT$5,145,270.28 depending on whether the Contractor has the right to sue the Employer for the sum of TT$77,658,948.91.

12. After the defence was served on 18 March 2019 and by a notice of application dated 25 March 2019 the Contractor applied for summary judgment.

13. By a notice of application dated 26 March 2019 the Employer applied for an order requiring the contractor to make specific disclosure of the Statements and Supporting Documentation. In support of that application the Employer relied on what it termed its "*real reason to believe* that the ... Works have been over-certified and/or incorrectly certified." The Employer gave four such reasons which the Board sets out later in this judgment.

14. Both applications were heard by Dean-Armorer J ("the judge") in the High Court who dismissed the Employer's application for specific disclosure and granted the Contractor's application for summary judgment. The judge ordered the Employer to pay the Contractor (a) TT$82,804,219.19; (b) TT$41,903,377.58 being the amount of interest on the sum due as at the date of the judge's order; (c) statutory interest at the rate of 5% per annum from the date of the judgment until payment; and (d) costs. The judge gave oral reasons on 13 January 2020 and handed down a written judgment on 11 March 2020.

15. The Employer appealed the judge's order. The Court of Appeal (Archie CJ and Pemberton and Boodoosingh JJA) dismissed the appeal in a judgment delivered on 20 July 2022 and ordered the Employer to pay the Contractor's costs of the appeal at two thirds of the assessed costs of the summary judgment application in the High Court.

16. The Employer's appeal to the Board challenges: (a) the grant of summary judgment for TT$77,658,948.91 on the basis that the Contractor has no standing to bring proceedings and that the correct claimant is the Merchant Bank; (b) the refusal to order specific disclosure of the Statements and Supporting Documentation; and (c) if an order for specific disclosure ought to have been made, the grant of summary judgment in any amount as being premature pending an analysis of the Statements and Supporting Documentation.

2. Factual background

(a) A description of the Employer and a brief description of the Works

17. The Employer is a wholly-owned state company incorporated in Trinidad and Tobago involved in managing and developing state lands including the Site.

18. The Employer wished to carry out the Works at the Site to facilitate a subsequent residential development on approximately 60.75 hectares (150 acres). In summary the Works included: (a) grading of the Site; (b) construction of road and subbase, basecourse and asphalt materials; (c) construction of roadside [kerbs] and drains; (d) construction of reinforced concrete box drains, cross-drains and catchpits; (e) construction of water reticulation system including hydrants, valves etc; (f) construction of primary and secondary wastewater underground structures; and (g) traffic management.

(b) The H Lewis contract

19. On 25 May 2010 the Employer entered into a written contract with H Lewis Construction Ltd ("H Lewis") for the construction of the Works as described in a Bill of Quantities prepared by BBFL Civil Ltd ("BBFL") ("the H Lewis Works"). BBFL acted as the engineer under the H Lewis contract. The H Lewis contract incorporated (among other documents) the priced BBFL Bill of Quantities.

20. On 20 April 2010 and prior to entering into the written contract H Lewis had commenced work on the Site. On 22 October 2010 work was suspended. The certificates which had by then been issued by BBFL provide evidence that, between April and October 2010, H Lewis had carried out some earthworks (including Site clearance,

backfill and the construction of some embankments), and installed drains, sewers and water services, but had not begun work on the roads.

21. After 22 October 2010 the H Lewis Works were afflicted by long delays, for which H Lewis blamed inconsistencies in the drawings provided by the Employer and missing drawings. According to H Lewis, the Site had to be re-surveyed, because the original survey was wrong. It appears that the only work done on the Site after the suspension of the H Lewis Works was survey work done by H Lewis at the request of the engineer, BBFL.

22. In January 2014 H Lewis made a claim for an extension of time.

23. On 2 April 2014 the H Lewis contract was terminated by the Employer because, on the Employer's case, H Lewis was in delay in carrying out the H Lewis Works and it had failed to comply with notices from BBFL.

24. The Employer took possession of the Site upon termination of the H Lewis contract.

(c) The new Bill of Quantities

25. A new Bill of Quantities dated 17 December 2014 was prepared on behalf of the Employer ("the new Bill of Quantities"). It set out the Works which the expert engineers or quantity surveyors who prepared it on behalf of the Employer considered were required to be undertaken by a new contractor given the works which had already been undertaken by H Lewis some four years previously.

26. The new Bill of Quantities contained significant differences compared to the BBFL Bill of Quantities used in the H Lewis contract. To take one example, the cost of the earthworks in the BBFL Bill of Quantities was expected to be TT$28,406,950 and in the new Bill of Quantities it was expected to be TT$94,170,550. Accordingly, in relation to the earthworks needed those experts preparing the new Bill of Quantities on behalf of the Employer had significantly re-assessed the work which required to be undertaken. This means that the Works in the Contractor's contract were substantially different from the H Lewis Works.

27. The new Bill of Quantities also reflected the fact that the works which had been done by H Lewis some four years previously would need to be undertaken again. In the H Lewis contract under the heading of "Site clearance", H Lewis had been required to clear an area of 60.75 hectares and grub up to a depth of 500mm. The certificates issued

to H Lewis recorded that it had cleared an area of 58.15 hectares. However, those preparing the new Bill of Quantities on behalf of the Employer again required clearance of the full area of 60.75 hectares. It is not necessary for the Contractor to establish why the Site clearance work needed to be undertaken again. The simple fact of the matter was that the Contractor was required to do it again. Furthermore, there is no evidence either from those who prepared the new Bill of Quantities or from some other quantity surveyor as to how the new Bill of Quantities could be so substantially wrong. However, if it is necessary to search for a potential explanation as to why the Site had to be cleared again, it may be found in the fact that the H Lewis Site preparation and earthworks had been exposed to tropical weather for more than four years so that any work previously undertaken had long since deteriorated with the Site becoming overgrown.

(d) The contract between the Employer and the Contractor

28. In January 2015 the Works as defined in, amongst other documents, the new Bill of Quantities were put out to tender by the Employer. The Contractor submitted a tender for TT$231,235,125.36 inclusive of VAT and by letter dated 2 February 2015 was awarded the contract for the Works. In February 2015 the contract was formalised in a written agreement incorporating the Fédération Internationale des Ingénieurs-Conseils ("FIDIC") Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, 1999 Edition, as amended by Conditions of Particular Application.

29. The brief description of the Works in the Contractor's contract was the same as in the H Lewis contract. However, the Works in both contracts were not identical as they incorporated different Bills of Quantities.

30. Vikab carries on practice as Civil & Structural Engineers, Architects, Quantity Surveyors, Project Managers and Mechanical and Electrical Engineers. On 23 January 2015 Vikab was appointed by the Employer as the engineer under the contract. In accordance with clause 3.1(a) of the contract Vikab was deemed to act for the Employer in relation to carrying out duties or exercising authority specified or implied in the contract, including the issuance of IPCs pursuant to clause 14.6.

31. In September 2016 Vikab's decision-making position as engineer under the contract was brought to an end by the Employer and the Employer purported to take over all decisions. The Employer has given no reason for taking this action in relation to Vikab.

(e) The contractual terms in relation to the issue and payment of IPCs

32. The procedure for the issue and payment of IPCs is set out under part 14 of the FIDIC General Conditions.

33. When applying for an IPC, the Contractor is required by clause 14.3 to submit to the engineer a statement in a form approved by the engineer showing in detail the amounts to which it considers itself to be entitled, together with supporting documents. As indicated, the Board refers to the statement and documents submitted in relation to all thirteen IPCs as "the Statements and Supporting Documentation."

34. The contractual obligation is to provide the Statements and Supporting Documentation to Vikab as the engineer. There is no contractual obligation on the Contractor to provide them to the Employer, though the Employer can obtain copies of them from Vikab. It is apparent from the affidavit of the Employer's attorney, Danielle R Nieves, that the Employer may have had copies of the Statements and Supporting Documentation at some earlier stage. She states, at para 4 of her affidavit, that:

> "[she has been] advised by Mrs Maurica Ramnarine Singh-Zoro and [she believes] that the [Employer] has carried out searches of its files and records, and does not have copies of the [Statements and Supporting Documentation] in its possession, either because same were not contemporaneously copied and/or sent to the [Employer] or because copies and/or complete copies of same (sic) cannot be located within the [Employers] records."

The Board observes that if the Employer had the Statements and Supporting Documentation at the time when the Contractor was applying for the IPCs then they could have been analysed by the Employer's own personnel at that time.

35. Clause 14.6 provides that the engineer, within 28 days after receiving the Statement and Supporting Documents under clause 14.3, shall issue an IPC which shall state the amount which the engineer fairly determines to be due. To determine the amount due fairly, it is implicit that Vikab must have received the Statement and Supporting Documentation and, where the Contractor claims payment for work that needs to be measured, that Vikab has carried out such measurement of the work as was required fairly to determine the amount due for that work.

36. Each of the sums certified in an IPC as due became payable by the Employer within 77 days of the receipt by the engineer of the Contractor's Statement and Supporting Documentation: clause 14.7(b) of the General Conditions as amended by the Conditions of Particular Application.

(f) The IPCs, the failure to pay and the Employer's explanation for its failure to pay

37. A total of 13 IPCs were issued by Vikab to the Contractor between March 2015 and October 2015. Each of the IPCs was signed by Hardutt R Punwasee, the Managing Director of Vikab. In each he stated the "Gross value of the Works executed to date" together with the amount which Vikab fairly determined to be due from the Employer to the Contractor.

38. On receipt of each of the 13 IPCs the Contractor issued an invoice to the Employer in the amount certified as due from the Employer to the Contractor.

39. The Employer did not make, and has not made, payments totalling TT$77,658,948.91 under the invoices.

40. On 28 November 2015 Mr Shameer Ronnie Mohammed was appointed as the Chairman of the Board of Directors of the Employer. He states that on 17 February 2016 he met Mr Gregory Hill of the Merchant Bank and Mr Ramdath Ramsubir of the Contractor and that at the meeting Mr Ramsubir wanted to ascertain the reason for the delay in payment by the Employer to the Contractor. Mr Mohammed states that he replied that "all Projects at [the Employer] are being audited, and [the Contractor] was to contact [the Employer's] management on these matters." However, it was not until a letter dated 10 November 2016 that the Employer provided the first written explanation as to the reason for its failure to make the payments due on IPCs 7-13. The Employer stated:

> "that any amounts that may be owing … will be settled only upon receipt by [it] of results from an audit conducted by an independent third party Quantity Surveyor as per a directive received from our Line Ministry."

The letter did not state the date of or the reasons for the directive from the Ministry, nor whether the independent audit was solely in relation to the Contractor's contract, nor did it identify the Quantity Surveyor who was to carry out the audit.

41. Some six months later and by letter dated 9 May 2017 the Employer provided some further information to the Contractor. The Employer stated:

> "… we were directed by our Line Ministry to conduct an independent audit of all our contracts prior to making payments on same. The audit into the Caroni Savannah Road Residential Site Development Contract is being conducted by an

> independent quantity surveyor, Skinner & Joseph QS Practice with on site in situ testing and measurements being undertaken by geotechnical experts, Earth Investigation Systems Ltd. [The Employer] has submitted to its Line Ministry preliminary results of the audit and [the Employer] is awaiting a response on same from its Line Ministry prior to providing further feedback to you.
>
> Please note in an effort to finalise the audit report, we have been liaising with the Consultant under the contract, [Vikab], in connection with questions from Skinner & Joseph QS Practice. Our apologies for the length of time this process is taking. As soon as a final determination is made we undertake to inform and update you on same."

Several points can be made in relation to this letter as follows: (a) the directive from the Line Ministry was not particular to the Contractor or to the Contractor's contract; (b) no explanation was given as to why the Line Ministry had issued the directive; (c) no information was given as to whether the directive was oral or in writing; (d) the independent quantity surveyors were identified as Skinner & Joseph QS Practice; (e) on site testing and measurements were being undertaken by the geotechnical experts, Earth Investigation Systems Ltd; (f) no information was provided as to how Skinner & Joseph QS Practice was carrying out the audit in relation to the Contractor's contract, for instance as to whether it was a high level paper review or whether they had interviewed any of the Employer's or Vikab's or the Contractor's personnel who had been on the Site or whether they had interviewed the persons involved in the preparation of the new Bill of Quantities; (g) no information was provided as to the nature of or the results of the on site testing and measurements undertaken by Earth Investigation Systems Ltd; (h) preliminary results of the audit were said to be available from Skinner & Joseph QS Practice but those preliminary results were not disclosed; (i) there was no suggestion that the preliminary results indicated that there was reason to believe that the Contractor had not done all the works certified by Vikab or may have committed fraud; (j) the Employer was liaising with Vikab in connection with questions from Skinner & Joseph QS Practice in an effort to finalise the audit report; (k) the nature of the questions was not specified; (l) the answers to the questions were the only matters identified as necessary in the "effort to finalise the audit"; (m) the Employer did not seek disclosure of the Statements and Supporting Documentation from the Contractor for the purposes of the audit and there was no suggestion that the Contractor should provide any information to the auditors; (n) no information was given to the Contractor as to any evolving case potentially being made against it; and (o) no opportunity was afforded to the Contractor to respond to any matter which may have been of concern to the auditors.

42. Despite the assurance in the letter dated 9 May 2017 that "[a]s soon as a final determination is made we undertake to inform and update you on same" the Employer

did not provide any further update to the Contractor in relation to the outcome of the audit. The Contractor's letters dated 18 August 2017 and 25 October 2018 seeking further information met with no response from the Employer.

43. Ultimately, on 20 December 2018, some three years after the last IPC had been issued by Vikab, some two years after the Contractor had been informed in writing that an independent audit was to be carried out, and approximately one and a half years after the Employer and its Line Ministry had the preliminary results of the audit, the Contractor commenced these proceedings.

44. It was only in response to the proceedings by letters dated 12 and 18 February 2019 that the Employer requested the Contractor to disclose and subsequently applied for an order requiring the Contractor to disclose the Statements and Supporting Documentation. Furthermore, it was only in response to the proceedings and in its defence that the Employer alleged that it *may* be entitled to defend the proceedings on the basis of abatement and/or fraud.

(g) Vikab's and the Employer's personnel on the Site

45. The Employer asserts that the Contractor may have acted fraudulently in applying for IPCs in respect of works which it must have known it had not carried out or alternatively acted recklessly, careless as to the truth or falsity of its statements as to the works which had been carried out. If such a fraud was committed, then it must have been committed without any of Vikab's personnel on the Site noticing that the Works which the Contractor claimed had been carried out had not in fact been carried out. Vikab's personnel on the Site included Mr Rajesh Rambarath, Project Manager, Mr Kerwin Beharry, Project Engineer and Mr R Kidney, Clerk of Works. It must also have been committed without any of the Employer's personnel on the Site noticing. The Employer's personnel on the Site included Mr Kahlil Baksh, Project Manager, Mr Nazim Ramkisoon, Project Engineer, and Mr Kurt Harripersad, Safety Officer.

(h) The Employer is making no allegation that Vikab may have been involved in a fraud

46. Alternatively, if Vikab's personnel on Site did notice that the Works claimed had not been carried out then a question would arise as to whether Vikab, in collusion with the Contractor, falsely certified payments. However, the Board was informed by the Employer's counsel that there was no reason to believe that Vikab may have committed fraud by falsely certifying payments, knowing that the Works claimed to have been carried out by the Contractor had not been carried out.

(i) Defects and release of the retention

47. Clause 10.1 of the General Conditions provides that a Taking-Over Certificate can only be issued by Vikab "when the Works have been completed in accordance with the Contract … except for any minor outstanding work and defects which will not substantially affect the use of the Works … for their intended purpose."

48. By a Taking-Over Certificate dated 17 August 2015, Vikab certified that the Contractor had completed the Works to its satisfaction with the exception of an attached list of minor defects. The defects period under the Taking-Over Certificate ended on 18 August 2016. On 19 August 2016 Vikab wrote to the Contractor enclosing a revised defects list, showing that the outstanding matters identified a year earlier had been completed, but identifying three new minor matters. It is the undisputed evidence of the Contractor that at a subsequent joint Site inspection the Employer agreed that all outstanding items had been satisfactorily completed.

49. There is no suggestion in these proceedings that the defects have not been remedied or that the Contractor did not complete the Works. The proceedings have been conducted on the basis that the outstanding retention of TT$5,145,270.28 ought to be released so that the Contractor is entitled to summary judgment unless the Employer is able to plead a defence of abatement or fraud.

(j) Cash flow pressures on the Contractor, a letter from the Employer to First Citizens Bank and the agreement between the Contractor and the Merchant Bank

50. Because of the Employer's failure to pay all the amounts certified in IPCs 7-13 the Contractor faced cash flow and financial pressure. It sought finance from several institutions. In relation to the Contractor's application for a loan from the First Citizens Bank, the Contractor asked the Employer to write to that bank to confirm the financial status of the project at the Site. By letter dated 9 October 2015 Gary Parmassar, the Chief Executive Officer of the Employer, confirmed the financial status of the project at the Site to the Manager of the First Citizens Bank. The Employer's letter stated that in relation to the Caroni Savannah Road Phase B Project site the "Balance outstanding from [the Employer] to [the Contractor] on Works certified" was "TT$77,658,948.91." The Contractor relies on the letter as being an admission by the Employer that there was an outstanding balance due from the Employer to the Contractor. The Employer states that the letter does no more than set out the amount certified by Vikab so that it deals with valuation rather than entitlement to payment. The judge held, at para 52 of her written judgment, that this letter was "a clear admission". The Court of Appeal observed, at para 115 of its judgment, that "[t]here was no qualification in the letter that the sums were subject to verification or that such verification was being pursued" so that it was open to the judge to conclude that this was an acceptance by the Employer of the debt due. However, the Court of Appeal considered that it was unnecessary for the judge to determine the issue as based on the Employer's pleaded case there was no defence with a realistic prospect of success.

51. There is no evidence that the Contractor obtained financial assistance from the First Citizens Bank. However, the Contractor did obtain financial assistance from the Merchant Bank. On 16 February 2016 the Contractor entered into a written agreement with the Merchant Bank entitled "Factoring Agreement" and signed Schedule B to the agreement entitled "Assignment of Receivables". By letter dated 16 February 2016 the Contractor gave notice to the Employer that it had assigned the debt to the Merchant Bank ("Notice of Assignment"). The Notice of Assignment was in the form set out in Schedule A of the Factoring Agreement. It is necessary for the Board to consider in some detail all three documents when addressing the Employer's submission that the Contractor no longer has the right to sue the Employer for the sum of TT$77,658,948.91.

3. Whether the Contractor has the right to sue the Employer for the sum of TT$77,658,948.91

(a) Introduction

52. The central issue is whether by the Factoring Agreement, the Assignment of Receivables and the Notice of Assignment, each dated 16 February 2016, the Contractor absolutely assigned the debt of TT$77,658,948.91 to the Merchant Bank including the right to sue or whether the debt of TT$77,658,948.91 was assigned by the Contractor to the Merchant Bank by way of charge only. As indicated, if it was by way of charge only to secure the repayment of a loan from the Merchant Bank to the Contractor then the Contractor has the right to sue the Employer. However, if the assignment was absolute, then the Contractor has no right to sue.

(b) Section 23(7) of the Supreme Court of Judicature Act

53. The distinction between an absolute assignment and an assignment by way of charge only is to be found in section 23(7) of the Supreme Court of Judicature Act (c 4.01) which provides:

> "*Any absolute assignment*, by writing under the hand of the assignor (*not purporting to be by way of charge only*), of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim the debt or thing in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to the debt or thing in action ..." (Emphasis added).

(c) Legal principles

54. The effect of an absolute assignment is clear. As Lord Esher MR stated in *Read v Brown* (1888) 22 QBD 128, 132:

> "The debt is transferred to the assignee and becomes as though it had been his from the beginning; it is no longer to be the debt of the assignor at all, who cannot sue for it, the right to sue being taken from him; the assignee becomes the assignee of a legal debt and is not merely an assignee in equity, and the debt being his, he can sue for it, and sue in his own name."

Accordingly, in the case of an absolute statutory assignment under section 23(7) of the Supreme Court of Judicature Act the debtor ceases to be under any liability to the assignor and is liable only to the assignee. The assignment passes to the assignee, not only the legal remedies for the debt, but the legal right to the debt itself.

55. The anterior question is how to distinguish an absolute assignment from an assignment by way of charge only. Whether a particular instrument creates an "absolute" assignment or an assignment "by way of charge only" is a question of construction of the relevant instrument taken as a whole: see *Bexhill UK Ltd v Razzaq* [2012] EWCA Civ 1376 ("*Bexhill*") at para 45 and *Orion Finance Ltd v Crown Financial Management Ltd (No 1)* [1996] 2 BCLC 78, 84 and 85. Guidance as to the approach to construction was given by Mathew LJ in *Hughes v Pump House Hotel Co Ltd (No 1)* [1902] 2 KB 190, 193-194. He said:

> "In every case of this kind, *all the terms of the instrument must be considered*; and, *whatever may be the phraseology adopted in some particular part of it*, if, on consideration of the whole instrument, it is clear that the intention was to give a charge only, then the action must be in the name of the assignor; while, on the other hand, if it is clear from the instrument as a whole that the intention was to pass *all the rights of the assignor in the debt or chose in action to the assignee*, then the case will come within section 25 [of the Judicature Act 1873] and the action must be brought in the name of the assignee." (Emphasis added).

Accordingly, the phraseology adopted in an instrument that the assignment is "absolute" is not by itself determinative. Rather, the question to be addressed is whether "the intention was to pass all the rights of the assignor in the debt or chose in action to the

assignee." In the same case Mathew LJ found, at p 194, that the assignment in question was absolute because:

> "It seems to me clear from its terms that the intention was to pass to the assignees *complete control of all moneys payable* under the building contract, and to put them *for all purposes* in the position of the assignor with regard to those moneys." (Emphasis added).

He continued by stating:

> "…this instrument may be properly described as an absolute assignment, because it is one under which *all the rights of the assignor* in respect of the moneys payable under the building contract were intended to pass to the assignees, and not one which purports to be by way of charge only." (Emphasis added)

56. Included in the rights of the assignor in respect of a debt is the right to sue to recover the debt. An issue arises as to what impact the failure to assign the right to sue has on the question whether the assignment was absolute. Does a failure to assign the right to sue on its own entail that the assignment is not absolute? Alternatively, does a failure to assign the right to sue merely provide a strong or key indicator that the assignment is not absolute? The Contractor relies on *Ardila Investments NV v ENRC NV* [2015] EWHC 1667 (Comm); [2015] 2 BCLC 560 ("*Ardila*") at para 23, and *Mercantile Bank of London v Evans* [1899] 2 QB 613 ("*Mercantile*") at p 616 in support of the proposition that an assignment that reserves to the assignor the right to sue in respect of the subject matter of the assignment cannot be an absolute assignment. However, the Board considers that neither authority goes so far as to support that proposition.

57. In *Ardila* it was a feature of the Deed of Assignment between Ardila and a bank that it did not take effect to assign Ardila's right to sue. The relevant application before Simon J was an application to strike out Ardila's claim on the basis that the assignment was an absolute assignment, so it no longer had the right to sue. The application to strike out failed as there were several provisions in the Deed of Assignment which indicated an intention that the assignment was to take effect by way of charge only. The failure to assign the right to sue was one of those provisions. It was not necessary for Simon J to hold, and he did not hold, that a failure to assign the right to sue on its own meant that the assignment was not absolute.

58. In *Mercantile* the plaintiff bank brought proceedings against the defendant to recover £100 due by the defendant to one C G Vansittart under an agreement dated 1 June 1897. The agreement was to establish a fund to meet the promotion expenses of the

formation of a company for the purposes of carrying on a business and the defendant was contractually obliged to contribute £100 to the fund. C G Vansittart procured from the plaintiff bank a credit of £200, as security for which, on 3 June 1897, he executed the following assignment:

> "In consideration of your placing to my credit to-day the sum of £200, I hereby assign to you the whole of my rights and interest under the agreement dated 1st June, 1897 … as security for the repayment on demand of the said sum of £200 … and I hereby appoint you my nominees in pursuance of the provisions of the said agreement, with power to exercise all my rights thereunder, either in my name or your own; and I hereby appoint you my irrevocable attorneys in that behalf."

A L Smith LJ, who stated at p 617 that the Lord Chancellor (Earl of Halsbury LC) agreed in the result, said, at p 616, that "[t]his seems to me to shew that the right of suing on the contract remained in the assignor." However, A L Smith LJ did not simply rely on that matter to hold that the assignment was not absolute. Rather, in addition, he questioned whether if C G Vansittart had repaid the sum of £200 to the bank, it would have had any further right or interest in the contract. In answer to that question, he held that the bank "would have no further rights at all, for it was only for securing to them the repayment of the £200 that the rights and interest of Vansittart under the agreement of 1 June 1897, were assigned to the plaintiffs..." For that reason, also, the assignment was not absolute.

59. The impact of an assignment of the right to sue on the question whether the assignment is absolute was also considered by the Court of Appeal in *Bexhill*. In that case, on the true construction of the particular instruments, the right to sue was assigned, with the court determining that this factor pointed, in the event decisively, towards the assignment being an absolute assignment: see para 55. The Court of Appeal did not have to consider the converse question whether, if the right to sue was not assigned, that would mean that the assignment of the benefit of the contract was not absolute.

60. A further recent relevant authority, not relied on by the Contractor, is *USAF Nominee No 18 Ltd v Watkin Jones & Son Ltd* [2023] EWHC 1880 (TCC), where Waksman J addressed the question as to who were the necessary parties to proceedings if the assignment was absolute or if it was equitable: see paras 158, 167 and 171. Waksman J did not consider whether a failure to assign the right to sue on its own entails that the assignment is not absolute.

61. In this appeal, there are several provisions which indicate an intention that the assignment was to take effect by way of charge only. Accordingly, it is not necessary for the Board to determine whether a failure to assign the right to sue on its own entails that

the assignment is not absolute. The Board expresses no concluded opinion upon this question save to say that the failure to assign the right to sue to the assignee is at least a very strong indicator that the assignment is not absolute. When the question does arise for decision, much may be said in favour of the view that it does entail that the assignment was by way of charge only.

62. Since the appellant relied on the decision of the Court of Appeal in *Bexhill* it is convenient at this point to say something more about that decision. In doing so it is not necessary to set out the complicated commercial background in that case save to say that the outcome turned on the true construction of several documents including the RSA-Bexhill facility agreement, the Barclays-Bexhill facility agreement, the Barclays Bank debenture, and the RSA Premium Credit Ltd debenture. The defence was that Bexhill had no right to sue Mr Razzaq (an owner and director of RSA Premium Credit Ltd) for possession of certain commercial property because any rights that Bexhill may have had to do so had been assigned to Barclays Bank plc. The Court of Appeal held, at para 45, that "[w]hether a particular instrument creates an 'absolute' assignment or an assignment 'by way of charge only' is a question of construction of the relevant instrument taken as a whole." Thereafter, the Court of Appeal examined closely the crucial Barclays Bank debenture and, at para 68, allowed Mr Razzaq's appeal.

(d) The true construction of the Factoring Agreement, the Assignment of Receivables and the Notice of Assignment

63. The relevant instruments in this case which require to be construed as a whole are the Factoring Agreement, the Assignment of Receivables and the Notice of Assignment (collectively "the documents"). The true construction of the documents is not straightforward as they lack coherence and are not well drafted. There are several indicators that the assignment was intended to take effect as an absolute assignment but there are also several indicators that the assignment was by way of charge only. Ultimately, the essential question is whether the Merchant Bank lent TT$40,000,000.00 to the Contractor secured by way of a charge on the debt of TT$77,658,948.91 or whether the Merchant Bank paid the contractor TT$40,000,000.00 and acquired the debt of TT$77,658,948.91 owed by the Employer to the Contractor. If the former, then the assignment was by way of charge only. If the latter, then it was an absolute assignment.

64. The Notice of Assignment refers to the assignment being absolute. It was written in terms specified in Schedule A to the Factoring Agreement and therefore may be said to reflect the intentions of the Merchant Bank and the Contractor. It states, with emphasis added:

> "We, [the Contractor] … hereby give you notice that we have sold and *assigned absolutely* with full title guarantee to [the

> Merchant Bank] … ("the Assignee") *all our rights, titles, benefits and interests whatsoever present and future whether proprietary, contractual or otherwise* under or arising out of the debt or sum of $77,658,948.91 Dollars ("the Assigned Debt") due and owing by [the Employer] to [the Contractor] under or in respect of the [contract dated 4 February 2015 between the Employer and the Contractor] which said debt or sum is constituted and/or evidenced by the following invoices."

Not only is the debt of TT$77,658,948.91 identified in the Notice of Assignment but also the invoices which followed were all the outstanding invoices issued by the Contractor to the Employer in respect of IPCs 7-13. Accordingly, the debt of TT$77,658,948.91 due to the Contractor from the Employer under IPCs 7-13 is clearly the debt of which notice is given that it has been "assigned absolutely." The phraseology of an absolute assignment is supportive, but not determinative, of an intention to pass all the rights of the assignor in the debt to the assignee.

65. Another, textual indicator of an absolute assignment in the Notice of Assignment is that notice is given that all the Contractor's "rights … present and future whether proprietary, contractual or otherwise under or arising out of the debt … of $77,658,948.91" have been assigned absolutely. One of the Contractor's rights is the right to sue the Employer to recover the debt. Accordingly, the Notice of Assignment suggests that the Contractor's right to sue the Employer has also been assigned absolutely to the Merchant Bank. This would be yet further support for the proposition that the parties intended the assignment to pass all the rights of the assignor in the debt to the assignee. However, the anterior question is whether on the true construction of the Notice of Assignment read with clause 4.1.5 of the Factoring Agreement there was in fact an assignment of the Contractor's right to sue the Employer. Clause 4.1.5 of the Factoring Agreement reserves to the Contractor the right to sue the Employer. The Board will return to clause 4.1.5 below.

66. The phraseology of an absolute assignment is also to be found in the Assignment of Receivables. The Receivables which are assigned are termed the EMBD Receivables. They are defined in the Factoring Agreement by reference to the contract between the Contractor and the Employer which is termed "the EMBD contract." The Assignment of Receivables states:

> "ASSIGNMENT OF RECEIVABLES
>
> THIS ASSIGNMENT is made this 16th day of February, 2016 by and between [the Contractor] ... and [the Merchant Bank] ...

> WHEREAS the parties hereto have entered into a certain factoring agreement dated the day of February, (hereinafter referred to as 'the Factoring Agreement') whereby the Seller has agreed to assign and sell to the Purchaser and the Purchaser has agreed to purchase the EMBD Receivables (as defined in the Factoring Agreement) described in the Schedule hereto:
>
> NOW THIS ASSIGNMENT WITNESSES that in pursuance and in consideration of and subject to the terms and conditions of the Factoring Agreement the Seller as beneficial owner hereby assigns absolutely and sells to the Purchaser and the Purchaser hereby agrees to purchase free from Encumbrances all the Seller's right, title and interest in and the full benefit of the EMBD Receivables described in the Schedule hereto."

The Schedule to the Assignment of Receivables sets out all the outstanding invoices which were issued by the Contractor to the Employer in respect of IPCs 7-13. Accordingly, the sums due to the Contractor from the Employer under IPCs 7-13 clearly fall within the definition of "Receivables" within the Assignment of Receivables.

67. Several points can be taken from the Assignment of Receivables.

68. First, the phraseology of an absolute assignment of the debt owed by the Employer to the Contractor in respect of IPCs 7-13 is further support for, but not determinative of, the proposition that the parties intended the assignment to pass all the rights of the assignor in the debt to the assignee.

69. Secondly, the EMBD Receivables are defined in clause 1 of the Factoring Agreement as meaning and including "all present … book debts, … contract rights, … arising from or out of the provision of the Services to [the Employer] under or in respect of the EMBD Contract, all proceeds thereof." Under the definition which applies, unless the context otherwise requires, the EMBD Receivables include not only the book debts, that is the debts owed by the Employer to the Contractor, but also include "contract rights ... arising from or out of the provision of the Services to the [Employer] under … the EMBD contract." One of the contract rights of the Contractor is the right to sue the Employer. On that definition, unless the context otherwise requires, an assignment of the debt under IPCs 7-13 would include an assignment of the right to sue the Employer. This is yet further support for the proposition that the parties intended the assignment to pass all the rights of the assignor in the debt to the assignee. However, as the Board has indicated the documents are not well drafted. It is clear that the definition of EMBD Receivables cannot include the Contractor's right to sue the Employer given the terms of

clause 4.1.5 of the Factoring Agreement which reserves that right to the Contractor. The Board will return to clause 4.1.5 below.

70. Thirdly, the phrase that the Merchant Bank "agrees to purchase free from Encumbrances all the Seller's right, title and interest in and the full benefit of EMBD Receivables" is further support for, but not determinative of, the proposition that the parties intended the assignment to pass all the rights of the assignor in the debt to the assignee.

71. Fourthly, the Assignment of Receivables and the Factoring Agreement term the Contractor as "the seller" and the Merchant Bank as "the purchaser." The use of the terms "the seller" and "the purchaser" suggests that the debt owed by the Employer to the Contractor has been sold to the Merchant Bank rather than being charged to secure the repayment of a debt. Those terms are further support for, but not determinative of, the proposition that the parties intended the assignment to pass all the rights of the assignor in the debt to the assignee.

72. However, the Assignment of Receivables expressly states that the assignment is "subject to the terms and conditions of the Factoring Agreement". Accordingly, the question arises as to whether the Factoring Agreement qualifies the phrase "assigns absolutely", the phrase "agrees to purchase free from Encumbrances all the Seller's right, title and interest in and the full benefit of EMBD Receivables", the terms "the seller" and "the purchaser" and the concept of a sale of the entire debt to the Merchant Bank. It is therefore important to consider in some detail the Factoring Agreement.

73. A factoring agreement ordinarily is an agreement where a business sells outstanding invoices to a third party in exchange for cash. Accordingly, the title of the agreement as being a factoring agreement is further support for, but not determinative of, the proposition that the parties intended the assignment to pass all the rights of the assignor in the debt to the assignee.

74. The recital to the Factoring Agreement emphasises the point in favour of the assignment being an absolute assignment that the Contractor is termed "the Seller" and the Merchant Bank is termed "the Purchaser" and that the receivables are being sold by the Contractor to the Merchant Bank. It is recited that:

> "A. The Seller has certain receivables due to it from [the Employer] pursuant to certain services ('Services') provided by the Seller to [the Employer] under the EMBD Contract (as defined below).

> B. The Seller is desirous of selling the receivables in pursuance of the EMBD Contract and the Purchaser has agreed to purchase the receivables upon the terms and conditions hereinafter contained."

75. Clause 5.1 provides that: "The purchase price ('Purchase Price') of the EMBD Receivable(s) sold and assigned to the Purchaser hereunder shall be 52% of the Face Amount of the relevant Invoice(s)." On one view this clause is further support for the proposition that the Merchant Bank was purchasing all of the debt upon payment of 52% of the total amount of TT$77,658,948.91. However, clause 5.1 does not define the relevant invoices and it is inconsistent with clause 2.1 under which the Contractor agrees to assign the EMBD Receivables up to the Facility Amount of TT$40,000,000.00.

76. Thus far there is a powerful case, on the true construction of the documents, that the Contractor and the Merchant Bank intended to pass all the rights of the Contractor in the debt to the Merchant Bank. However, a detailed analysis of the documents reveals that in reality the transaction was a loan with an equitable assignment of the debt in order to secure repayment of the loan. There are several reasons for that conclusion.

77. First, the Factoring Agreement uses the terminology of a "facility" which is consistent with a loan from the Merchant Bank to the Contractor rather than a sale by the Contractor to the Merchant Bank of the debt owed by the Employer.

78. Secondly, clause 1 of the Factoring Agreement under the heading of "Definitions and Interpretation" defines the "Facility Amount" as meaning "the total Face Amount of the EMBD Receivables sold and assigned to the Purchaser pursuant to this Agreement up to the maximum amount of TT$40,000,000.00." Therefore, (a) the maximum facility to be made available by the Merchant Bank to the Contractor was TT$40,000,000.00; (b) the amount of EMBD Receivables "sold and assigned" to the Merchant Bank did not exceed TT$40,000,000.00; and (c) the EMBD Receivables in excess of TT$40,000,000.00 were not "sold and assigned" to the Merchant Bank. Accordingly, even if the Contractor was able to recover the full amount of the debt from the Employer, then the Merchant Bank would only be entitled to the amount of TT$40,000,000.00.

79. Thirdly, this construction of clause 1 that not all the EMBD Receivables were being sold and assigned to the Merchant Bank is reinforced by the terms of clause 2.1 under which the assignment or sale of receivables is limited. Clause 2.1 provides:

> "The Seller as beneficial owner with full title guarantee hereby agrees to assign and sell to the Purchaser and the Purchaser hereby agrees to purchase all the Seller's right, title and interest

> in and the full benefit of the EMBD Receivables free from Encumbrances up to the Facility Amount …."

Accordingly, the entire debt of TT$77,658,948.91 was not being assigned but rather only a part of the debt up to the Facility Amount of TT$40,000,000.00. A partial assignment up to TT$40,000,000.00 is consistent with a charge on the debt in circumstances where the Contractor and/or the Merchant Bank do not know which invoices are going to be paid by the Employer.

80. Fourthly, clauses 2.3 and 5.3 of the Factoring Agreement make provision for the payment by the Contractor to the Merchant Bank of a Facility Fee at 4.0 per cent per annum and clause 5.4 provides for the payment by the Contractor of an Additional Facility Fee defined in clause 1 as "of 0.5% per annum above the Facility Fee." The payment of a facility fee and of an additional facility fee is consistent with a loan from the Merchant Bank to the Contractor. It is inconsistent with the sale by the Contractor of the debt of TT$77,658,948.91 for TT$40,000,000.00.

81. Fifthly, in circumstances where the Employer disputes its liability to pay any EMBD Receivable or any part thereof clause 7.1 makes provision for the payment by the Contractor to the Merchant Bank of "the whole amount of the relevant EMBD Receivable without any deduction whatsoever and notwithstanding that only part of the relevant EMBD Receivable may be so involved." This provision is inconsistent with the EMBD Receivables having been sold and absolutely assigned to the Merchant Bank in consideration of the payment by the Merchant Bank of a percentage of the face value of the invoices. If they had been sold and absolutely assigned then, ordinarily, the risk of non-payment of the EMBD Receivable would fall on the Merchant Bank. Rather, this provision is consistent with the EMBD Receivables being a security for a loan from the Merchant Bank to the Contractor as it amounts to a requirement to replace part of the security by a payment by the Contractor to the Merchant Bank of the amount of the disputed EMBD Receivable.

82. Sixthly, the Contractor relies on clause 4.1 read with clause 4.1.5 of the Factoring Agreement to demonstrate that it was not the intention of the Contractor and the Merchant Bank to pass all the rights of the assignor in the debt to the assignee because the right to sue the Employer has been reserved to the Contractor. Clauses 4.1 and 4.1.5 provide as follows:

> "4.1 The Seller will be responsible for the following matters and things during the Term and the Extended Term:
>
> …

> 4.1.5 Promptly at its own expense to take all such actions as are required under the EMBD Contract to settle, compromise, adjust or otherwise enforce or dispose of by litigation or otherwise, any such dispute, controversy or claim as referred to in Clause 4.1.4 and to keep the Purchaser informed of the actions taken by Seller for settlement, compromise, adjustment, enforcement or other disposal of same Provided However that Seller shall obtain Purchaser's prior written approval of any terms whereby Seller is required to grant any allowance or credit to EMBD or to adjust the amount of an Invoice with respect to any EMBD Receivables that are the subject of such dispute, controversy or claim or payment of any such EMBD Receivables will be delayed."

83. Counsel on behalf of the Employer contended that clauses 4.1 and 4.1.5 merely imposed a contractual obligation on the Contractor to enforce by litigation any dispute relating to any of the EMBD Receivables. The Board rejects that submission for several reasons.

84. First, clause 4.1.5 does not provide a mechanism whereby the Merchant Bank can require the Contractor to commence proceedings by for instance sending a notice to the Contractor requiring it to do so. Rather, the decision as to whether to commence proceedings is entirely at the discretion of the Contractor. The Contractor does not have to obtain the Merchant Bank's permission to commence proceedings.

85. Secondly, the Contractor was not required to seek the Merchant Bank's permission to sue. It would be surprising if on the true construction of clause 4.1.5 the Merchant Bank permitted the Contractor to use the Merchant Bank's name in proceedings without its consent thereby exposing it to an order for costs if the proceedings were unsuccessful.

86. Thirdly, the Board raised the question with the Employer's counsel whether, if there is an obligation on the Contractor to bring proceedings against the Employer under clause 4.1.5, the Contractor should bring those proceedings in its own name or in the name of the Merchant Bank. In response counsel contended that *as the assignment was absolute*, then by virtue of section 23(7) of the Supreme Court of Judicature Act the proceedings could only be brought in the name of the Merchant Bank. However, that answer assumes that the assignment is absolute and ignores the prior question whether it is absolute. Clauses 4.1 and 4.1.5 are important clauses in answering that prior question as they reserve an important right to the Contractor of bringing proceedings against the Employer. This is a powerful indicator that the Contractor and the Merchant Bank did not intend to pass all the rights of the assignor in the debt to the assignee so that the assignment was not an absolute assignment.

87. Fourthly, the construction that the Merchant Bank and the Contractor intended that the Contractor should retain the right to sue the Employer is consistent with the interest that the Contractor has in retaining that right. Clause 2.5 provides that "if any EMBD Receivable or any part thereof remains outstanding past the Buffer Period or the Extended Period as the case may be, the [Merchant Bank] shall be entitled by notice to the [Contractor] … to reassign to the [Contractor] the outstanding EMBD Receivable(s) and the [Contractor] shall immediately refund to the [Merchant Bank] the full consideration paid by the [Merchant Bank] in respect of the EMBD Receivable(s) less any amount received by the [Merchant Bank] from [the Employer] on account of the particular EMBD Receivable(s)." Accordingly, the Contractor has a vital interest in retaining the ability to sue the Employer. If the Contractor cannot do so, then it is at risk of the Merchant Bank serving notice under clause 2.5 with the consequence of having to repay all outstanding sums to the Merchant Bank.

88. It was also contended by counsel for the Employer that by virtue of the proviso to clause 4.1.5 the obligation on the Contractor to litigate in relation to any of the EMBD Receivables was under the control of the Merchant Bank, as the Contractor requires the Merchant Bank's prior written approval of any terms whereby, for instance, the Contractor is required to grant any allowance to the Employer. However, the proviso in clause 4.1.5 is consistent with the Merchant Bank having an interest in preserving its charge over the EMBD Receivables. It does not significantly detract from the position that the remedy of getting in the debt was reserved to the Contractor, which is a powerful indicator that the Contractor and the Merchant Bank did not intend to pass all the rights of the assignor in the debt to the assignee, so that the assignment was not an absolute assignment.

(e) The Board's conclusion as to whether the Contractor has the right to sue the Employer for the sum of TT$77,658,948.91

89. For these reasons the Board decides that the Contractor did not absolutely assign its rights and interests in the debt of TT$77,658,948.91 to the Merchant Bank. Rather, the overall effect of the documents was to assign the EMBD Receivables by way of security for a loan from the Merchant Bank to the Contractor. Accordingly, the assignment constituted an equitable and not a legal or statutory assignment and the Contractor is entitled to sue the Employer. The Employer's appeal in relation to the standing of the Contractor to sue is therefore dismissed.

4. Application for specific disclosure of the Statements and the Supporting Documentation

(a) Legal principles

90. The Employer has applied pursuant to rule 28.5(1) of the Consolidated Civil Proceedings Rules 2016 ("the CPR") for an order for specific disclosure of the Statements and Supporting Documentation. Rule 28.5(5) provides that:

> "An order for specific disclosure may only require disclosure of documents which are directly relevant to one or more matters in issue in the proceedings."

Accordingly, it is a prerequisite to an order being made that the documents are directly relevant to one or more matters in issue in the proceedings. Directly relevant is defined in rule 28.1(4) as follows:

> "For the purposes of this Part a document is 'directly relevant' if—
>
> (a) the party with control of the document intends to rely on it;
>
> (b) it tends to adversely affect that party's case; or
>
> (c) it tends to support another party's case,
>
> but the rule of law known as 'the rule in *Peruvian Guano*' does not apply."

Rule 28.6(1) is also relevant. It provides that:

> "When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs."

Accordingly, even if the documents are directly relevant to one or more matters in issue in the proceedings the court still must consider whether specific disclosure is necessary.

91. At para 117 of its judgment the Court of Appeal relied on an extract from *Matthews and Malek on Disclosure* 5th Edition (now para 20-42 of the 6th Edition), for the proposition that disclosure may not be used to attempt to establish a defence. The Board agrees that to establish direct relevance to an issue in the proceedings the applicant for an order for specific disclosure must raise an issue which is more than fanciful or speculative or the applicant will not have established that disclosure is relevant to any issue in the action and furthermore an order would not be necessary to dispose fairly of the issue. If the issue is merely fanciful or speculative then an application for an order of specific disclosure would amount to a fishing expedition. Accordingly, in this appeal to obtain an order for specific disclosure the Employer must demonstrate that the potential defences of abatement or fraud are not merely fanciful or speculative.

(b) The Board's conclusion in relation to the application for specific disclosure

92. The Statements and Supporting Documentation are directly relevant to the potential defences of abatement and fraud. However, the Board concludes that the Employer has failed to demonstrate that the potential defences of abatement or fraud are more than fanciful or speculative. Accordingly, no order should be made for specific disclosure. As explained in more detail below, the Board arrives at that conclusion based on (a) the inadequate quality of evidence relied on by the Employer to give substance to the potential defences; and (b) an analysis of the four reasons advanced by the Employer in support of the potential defences.

(c) The quality of the Employer's evidence to give substance to the potential defences

93. It is a feature of the Employer's application for specific disclosure of documents that the affidavit in support of the application was sworn by Danielle R Nieves, an Attorney-at-law. In her affidavit Ms Nieves merely sets out para 22 of the Employer's defence and then asserts that the documents are "relevant to the issues as pleaded." However, she does not provide any evidence in support of the issues as pleaded. The evidential position in relation to the defences of abatement and fraud can be summarised as follows:

(a) there is no affidavit from anyone involved in the audit of the contract or from any expert witness;

(b) there is no evidence from any of the Employer's or Vikab's personnel with direct knowledge of events on Site as to the quantities of the Works actually carried out by the Contractor;

(c) there is no explanation as to how the overstated claims were made by the Contractor without being obvious to the Employer's and Vikab's personnel on Site or how a fraud was committed without any collusion on the part of Vikab: see paras 45 and 46 above;

(d) no explanation has been given as to why the Line Ministry issued the directive to conduct an independent audit of all contracts;

(e) the preliminary results of the audit carried out by Skinner & Joseph QS Practice, which were available in May 2017, have not been disclosed seven years later in 2024. The Board considers that the inescapable inference from the failure to exhibit the preliminary report from Skinner & Joseph QS Practice is that their audit provides no evidence to support the Employer's suspicions of over-certification;

(f) no information has been provided by the Employer as to the nature of the on site testing and measurements undertaken by Earth Investigation Systems Ltd. No preliminary or final report from Earth Investigation Systems Ltd was exhibited to the application. Again, the Board considers that the inescapable inference from the failure to exhibit any report from Earth Investigation Systems Ltd is that their investigations provided no evidence to support the Employer's suspicions of over-certification;

(g) in answer to questions from the Board it was apparent that the Employer was not relying on any report from the Skinner & Joseph QS Practice or from Earth Investigation Systems Ltd in support of the assertion that it has "real reason to believe that the ... Works have been over-certified and/or incorrectly certified." Rather, the Employer has engaged John Palmer of Capita and Charles Gurnham FRICS of GB Squared as its expert advisors. However, there was no affidavit from either of them. Furthermore, Ms Nieves' affidavit in support of the application for specific disclosure did not state that she had relied on any information provided by either of those individuals;

(h) there was no evidence as to whether enquiries had been made by Skinner & Joseph QS Practice, or by Earth Investigation Systems Ltd or by the Employer or by the Employer's legal advisors of personnel who had been involved in supervising the Works to determine what they said in relation to the suggestion that some of the Works had not been carried out;

(i) there was no explanation as to why the new Bill of Quantities was inaccurate; and

(j) there was no evidence as to what questions had been directed to Vikab and what Vikab's response was to those questions.

94. The quality of the Employer's evidence is wholly insufficient to demonstrate that the potential defences of fraud or abatement are not merely fanciful or speculative.

(d) The four reasons relied on by the Employer in support of the assertion that it has "real reason to believe that the ... Works have been over-certified and/or incorrectly certified"

95. The Employer puts forward four reasons in support of its assertion that it has "real reason to believe that the ... Works have been over-certified and/or incorrectly certified." None of the reasons was supported by an expert witness. The Board concludes that there is no substance in any of them.

(i) Road embankments

96. The first reason advanced by the Employer was that the quantities certified in respect of road embankments appeared to be too great.

97. In support of this reason the Employer relies on the fact that in 2010 H Lewis had completed 21,127 cu m of road embankment work on the Site. The Employer suggests that because this work had been carried out by H Lewis in 2010 the Contractor's claim for 74,000 cu m of road embankments works in 2015 was too great. However, the new Bill of Quantities drawn up in December 2014, some four years after H Lewis had stopped work, provided for a road embankment total of 70,800 cu m. The Employer has given no reason why the assessment in the new Bill of Quantities as to the required quantity of road embankment works should be doubted. Furthermore, a final measured total of 74,000 cu m of road embankments against an expected need for 70,800 cu m in the new Bill of Quantities does not provide any basis for a defence of abatement or fraud.

98. In support of this reason the Employer also relies on a calculation that the maximum total volume of embankment fill which could have been carried out by the Contractor was 9,261 cu m. The calculation is based on tender drawings from which were taken design levels and average embankment heights. The calculation is not supported by any expert analysis and is necessarily based on a number of unknown and unstated assumptions about the methods of construction, the nature of the Site and the materials used. It is contradicted by the Employer's new Bill of Quantities which calculated that a volume of 70,800 cu m was needed.

99. There is no substance to this reason for suspecting that the Works were over-certified.

(ii) Earthworks

100. The second reason advanced by the Employer was that the quantities certified in respect of earthworks appeared to be too great.

101. In support of this reason the Employer asserts that prior to the contract with the Contractor, BBFL certified H Lewis as having undertaken clearing and grubbing works to a depth of 200 mm and having undertaken 127,079 cu m of sandfill works. The allegation appears to be that as H Lewis was certified as having prepared the Site by backfilling with sand (presumably after already doing such clearing and grubbing works as were necessary), there should have been no need for the Contractor to clear the Site and remove the work put in by H Lewis. However, the fact that H Lewis had previously done some Site clearing and preparation work more than four years previously is neither here nor there. It is evident from the new Bill of Quantities that the Employer decided in December 2014 that such works were necessary, with knowledge of the work that had been done by H Lewis and after a re-assessment of the Site and the work required.

102. In support of this reason the Employer also asserts that "such of the [Contractor's] contemporary records … as are in the [Employer's] possession are materially inconsistent" with the large numbers of personnel and/or large quantities of equipment which would have been required to be on Site. The records are said to include the minutes of Site meetings. However, the minutes of Site meetings show that they do not purport to provide a record of what was on Site at the time, but merely record, in short form, the matters discussed by those present at the meeting.

103. There is no substance to this reason for suspecting that the Works were over-certified.

(iii) Off Site disposal

104. The third reason advanced by the Employer was that the quantities certified in respect of off-Site disposal appeared to be too great. The Employer pleads that the Contractor was certified as having removed 15,515 cu m of material from the Site, and asserts that this is a cause for suspicion, because the volume of total excavation required under the specific items of excavation in the Bill of Quantities was only 2,140 cu m. However, the Employer acknowledges that this does not account for the removal of materials excavated under the general heading of Site clearing, grubbing, demolition and excavation over 60.75 hectares but puts the Contractor to proof that this was necessary "given that the entire site was cleared by H Lewis". However, H Lewis had not in fact cleared the whole Site. Furthermore, the amount of off-Site disposal depends on the amount of Site clearing required. The fact that in 2010 H Lewis had carried out some Site clearance is neither here nor there as in December 2014 in the new Bill of Quantities the Employer had determined that the whole 60.75 hectares of the Site had to be re-cleared.

105. There is no substance to this reason for suspecting that the Works were over-certified.

(iv) Quantities applied for and certified in identical amounts to the estimated quantities in the Bill of Quantities

106. The fourth reason advanced by the Employer was that a high percentage of all the amounts certified by Vikab were identical to the estimated quantities in the new Bill of Quantities. The Employer pleads that 89 out of 101 items in the new Bill of Quantities were certified in the same amount as in that Bill and goes on to plead examples. The reasons for inferring fraud are not expressly stated, but the implication is that an accurate measurement of each actual quantity would be unlikely to coincide so often with the quantities predicted. Again, the Board concludes that there is no substance to this reason for suspecting that the Works were over-certified.

107. First, the Employer has not identified all 89 out of 101 items which are said to coincide with the new Bill of Quantities, but a perusal of the new Bill of Quantities reveals that one would not be surprised to find a great many of the items to be measured in the same amount as expected. That is because: (a) many items are described as a specific number – e.g. manholes, ponds, trees to be removed; (b) many items are described by lengths which must have been calculated from drawings, such as specified lengths of pipe, drain, fence – it would not be surprising to find that these calculations were accurate; and (c) many items in section E are specified amounts of concrete, steel and waterproofing material required for the construction of specific structures, which are likely to have been calculated from drawings so that it would not be surprising to find these calculations were accurate.

108. None of the Employer's four reasons for suspicion individually or collectively have sufficient substance to establish that the potential defences of abatement and/or fraud amount to more than mere speculation.

(e) Conclusion in relation to the application for specific disclosure

109. The Employer has failed to demonstrate that the potential defences of abatement or fraud are more than fanciful or speculative. The application for specific disclosure is a fishing expedition which amounts to no more than a hope that something might turn up. The lower courts correctly refused to make an order for specific disclosure and the appeal to the Board seeking an order for specific disclosure is dismissed.

5. Conclusion

110. The Contractor is entitled to sue the Employer for TT$77,658,948.91 being the amount outstanding under IPCs 7-13: see para 89 above. As the Employer is not entitled to an order for specific disclosure of the Statements and Supporting Documentation there is insufficient evidence on which to apply to amend the defence to plead abatement or fraud: see paras 11 and 109 above. The position remains that that those defences have not been pleaded in relation to either the claim for TT$77,658,948.91 due under IPCs 7-13 or the claim for TT$5,145,270.28 in respect of the release of the retention. Accordingly, the lower courts correctly entered summary judgment in favour of the Contractor in the amount of TT$82,804,219.19. The appeal is dismissed. The order of the judge is affirmed.