Hilary Term
[2015] UKPC 6
Privy Council Appeal No 0103 of 2012

JUDGMENT

National Stadium Project (Grenada) Corporation (Appellant) *v* NH International (Caribbean) Limited (Respondent) (Trinidad and Tobago)

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

before

Lord Neuberger
Lord Mance
Lord Clarke
Lord Carnwath
Lord Toulson

JUDGMENT GIVEN ON

16 February 2015

Heard on 21 January 2015

Appellant	*Respondent*
Simon Hughes QC	Alvin Fitzpatrick SC
Stuart R Young	Lesley-Ann Lucky-Samaroo
	Shiv Sharma
(Instructed by Blake Morgan LLP)	(Instructed by Ward Hadaway)

LORD CARNWATH:

1. This is an appeal from a judgment of the Court of Appeal in Trinidad and Tobago (Archie CJ, Yorke Soo Hon and Stollmeyer JJA), dismissing the appellant's appeal without a hearing on the merits. The issue is whether the court was entitled to do so. If not, the matter will have to be remitted to that court for full hearing.

The facts

2. The dispute arose out of contractual arrangements made in connection with a project of the Government of Grenada for the construction of a national stadium and sporting complex. In January 1997 the government entered into a Memorandum of Understanding with Imbert Construction Services Limited ("ICSL") and CLICO Investment Bank Limited ("CIB"). ICSL would be engaged to implement and manage the project through a special purpose development company to be formed and owned by ICSL. The appellant company ("NS") was set up by ICSL for this purpose. By later agreements ICSL was replaced by ICS (Grenada) Limited ("ICS"). The arrangements were made under statutory authority: the Grenada National Stadium (Development and Finance) Act 1997 (Act No 8 of 1997).

3. Two agreements are particularly material to the present dispute, both concluded on 15 May 1997:

   i) By a *facility agreement* made between NS and CIB as "the trustee", CIB agreed to arrange a bond issue on behalf of NS, the proceeds of which were to be used to construct the sporting complex. CIB was to make advances to or on behalf of NS up to a maximum of US$23m, to be used solely for the purpose of the sporting complex. NS and CIB were to execute a trust deed, under which CIB was to hold the bonds (issued in the name of NS) for the benefit of the bondholders, as secured obligations of NS to the bondholders, for which CIB was to issue certificates to the bondholders in a prescribed form. Under the trust deed NS covenanted with CIB to pay interest on the bonds, and to repay the principal amount of the bonds, to or to the order of CIB as and when the same became due.

   ii) By a *development agreement* between the Minister of Finance, ICS, CIB and NS, ICS agreed to finance the project through CIB in the manner set

out in the facility agreement; NS (as employer) was to enter into a contract with ICS (as developer) under which ICS was to carry out the development for US$23m; and CIB undertook to pay or cause to be paid through NS all monies due to ICS, consultants, suppliers, and other providers of goods and services. The government agreed to lease the sporting complex from NS for 15 years at a rent calculated on the basis of an amortised schedule for the repayment of US$23m with interest.

4. On the same day NS and ICS duly entered into a contract under which ICS agreed to carry out and complete the construction of the project and NS undertook to pay the sum of US$23m in accordance with its terms. The respondents ("NH") were not themselves parties to any of these agreements, but they entered into a construction agreement with ICS to carry out a major part of the development for an amount equivalent to about US$16m.

5. NH continued to be involved in the development until October 1999, when ICS gave them notice of intention to terminate the construction agreement. They responded by commencing an action in the High Court (the "1999 Action") against CIB, ICS and NS, claiming, inter alia, a declaration that there was a binding assignment in their favour of so much of the monies due from CIB under the Facility Agreement as would from time to time be due and owing to them under the construction agreement. On 5 November 1999 they sought and obtained from Tam J an ex parte injunction, restraining CIB from paying under the facility agreement monies which would reduce the balance below EC$7,430,724.70 (the "frozen fund") pending the trial of the action. NH also commenced arbitral proceedings against ICS which resulted in March 2002 in an award in their favour of EC$7,626,797.67 with interest.

6. Following termination of the construction agreement ICS became responsible for completing the project. NS had to advance funds to enable it to do so. As a result, ICS became indebted to NS in the sum of approximately EC$13.5m, for which sum (with interest) NS has obtained judgment against ICS. (There appears to be a surprising discrepancy in the evidence as to whether this sum included, or was in addition to, the amount of the frozen fund. Happily, in the Board's view it is not necessary to resolve it at this stage.)

7. The project was eventually completed on 7 June 2000. In August 2002 all monies advanced by lenders secured by bonds under the facility agreement were fully repaid, with funds provided by the government. In April 2005, following an order of the court, the frozen fund, converted into US dollars (US$2,682,719.24) was deposited by CIB into an interest-bearing account in the joint names of the attorneys on the record for the parties in the 1999 action.

8. In May 2006 NH commenced the 2006 action against CIB and NS claiming inter alia, declarations that the frozen fund was held by CIB on trust for the sole purpose of applying the same in payment of suppliers and other providers of goods and services for the project, which trust NH as such a supplier were entitled to enforce for their own benefit. NS resisted the claim, and counterclaimed for a declaration that the fund belonged to them.

9. The consolidated actions were heard by Rajkumar J, who on 28 January 2011 held in favour of NH. He granted a declaration that the frozen fund was held by CIB on trust for the NH and ordered payment of that sum with interest, which he later assessed. That money has been paid into the joint account by CIB. Neither ICS nor CIB, though nominal parties to the proceedings, had taken any active part before the judge, and neither has appealed. In later correspondence CIB has made clear that it asserts no separate interest in the monies held in the joint account. (We were told by Mr Fitzpatrick SC that in January 2009 CIB was brought under control of the Central Bank of Trinidad and Tobago in the exercise of the Central Bank's emergency powers, and that since October 2011 CIB has been in liquidation).

10. By notice of appeal dated 11 March 2011 NS appealed to the Court of Appeal, seeking orders that the orders of Rajkumar J be reversed and that judgment be entered for NS on their counterclaim. On 24 June 2011 NH applied to the court for an order that the appeal be dismissed without a hearing on the merits, on the grounds that NS had not themselves demonstrated any entitlement to the frozen fund, nor appealed against the judge's findings against them on that issue. On 25 June 2012 the Court of Appeal upheld the application and dismissed the appeal. NS appeals to the Privy Council with leave granted by the Board on 25 August 2013.

The proceedings below

11. In order to understand the issues in the appeal, it is necessary to look in more detail at the relevant parts of NH's pleaded case and NS's response. NH's case in summary (see para 28 of the claim) was that the advances received from investors under the facility agreement, of which the frozen fund (referred to as the "EC fund") formed part, were held in trust by CIB; that the primary purpose of the trust was to finance the project by payment to ICS and other suppliers; that it had been agreed that money due to NH under the construction agreement should be paid directly to them from those advances; that the investors as lenders had been fully repaid; and accordingly the frozen fund was held on trust for NH.

12. In NS's defence, the main substantive allegation came in para 16, which, having referred to the termination of NH's construction agreement by ICS and ICS's failure to fulfil its own duties, continued:

> "… this Defendant being under a continuing duty and obligation under the Project Agreements, Memorandum of Understanding and Supplemental Memorandum of Understanding pleaded herein, was forced to complete the Project at considerable cost and expense to itself and as a consequence whereof ICS became indebted to this Defendant in the sum of EC$13,449,469.00, which sum remains due, owing and payable by ICS to this Defendant."

In response to para 28 of the claim, the defence (para 29) asserted that the frozen fund was "part of such monies received by (CIB) from the investors/bondholders"; but denied that the primary purpose of the trust was to finance the project by payments to ICS and others; rather it was "for the benefit and protection of the investors/bondholders". Further the trust was –

> "… until the happening of one or the other of 2 events, namely, completion of the Project or until the Bondholders (investors) had been repaid, whichever occurs first in time. This defendant avers that the Project was completed in or around June 7, 2000 and the Bondholders were fully repaid as at August 8, 2002."

It was accordingly denied that the NH was entitled to any of the relief claimed.

13. The counterclaim repeated the allegations in the defence. It asserted that the freezing injunction had been obtained by NH "wrongfully and without any entitlement", that NS in consequence had been "forced to obtain alternative funding at considerable expense" for the completion of the project; leading to the judgment debt for ICS; and that –

> "In the premises, this defendant has been unlawfully and/ or improperly kept out of its monies properly and lawfully belonging to it and for its sole benefit and has suffered considerable loss and damage and has been put to considerable expense by the claimant's improper actions." (para 39)

It counterclaimed for a declaration that the frozen fund and interest on it "belonged and belong at all material times" to NS, and for orders for payment accordingly.

14. At the end of a long and detailed judgment, the judge concluded (para 222), in agreement with NH, that the advances under the facility agreement were subject to a trust for the benefit of suppliers and providers to the project, enforceable by them; and that there also existed an assignment by ICS to NH of "its legal chose in action to recover any payments due to it from NS". The correctness of those conclusions will be in issue in the appeal if it is allowed to proceed, but is not now before us for consideration.

15. The judge dealt separately with NS's counterclaim towards the end of the judgment (paras 173-182). However, to put that in context it is necessary to refer a little more fully to his earlier treatment of what he called "the *Quistclose* argument", which he summarised (para 58):

> "It was contended that the funds obtained from investors payable by CIB to NS under the Facility Agreement were impressed with a trust in favour of suppliers and providers to the Project, including NH, enforceable therefore by NH as a beneficiary of that trust."

He went on to deal at some length with the requirements for a so-called "*Quistclose*" trust (following *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567), the effect being (as he put it) that –

> "….arrangements for the payment of a person's creditors by a third person can give rise to a relationship of a fiduciary character or trust, in favour, as a primary trust, of the creditors, and secondarily, if the primary trust fails, of the third person….
>
> In the instant case the primary purpose has not yet been fulfilled because the EC sum was frozen, but it can yet be carried out. The lender has been repaid so its remedies in debt are no longer relevant. There is no debt outstanding to it." (paras 63-65)

It appears that he regarded the "lender" for these purposes as CIB (not the bondholders, or NS), which would therefore be the beneficiary of a resulting trust under the *Quistclose* principle (see eg para 81: "the loan from CIB cannot be said to have failed"; also para 91ff). He rejected, as "based on a conceptual misunderstanding", NS's contention, as he understood it, that completion of the project, and repayment of the bondholders would "bring any *Quistclose* type trust to an end" and leave in its place "the relationship of borrower and lender between the Bondholders and NS":

> "It is the express trust per the Trust Deed which came to an end, prior to the filing of the 2006 Claim, on the repayment of the Bondholders.
>
> The suggestion (based on this conceptual misunderstanding) that the EC Sum is somehow then held for the benefit of NS, to the exclusion of all others including NH is therefore unsound and is rejected.
>
> It is based on a misapprehension or mischaracterisation of the role of NS under the Project Agreements, a role which left no room for it to benefit from the sums advanced or to be advanced through it to suppliers or providers to the Project. The possibility that it could itself be a supplier under the Project was not within the original contemplation of the Project agreements." (para 97-99)

16. Having dealt with the other aspects of NH's case, he addressed separately "National Stadium's Claim to the Deposited Amount" (para 173-182). He noted that NS were not themselves suppliers of goods or services to the project, the responsibility for completion being that of ICS. NS's claim was based on its default judgment against ICS, for the sum of about EC$13m, allegedly advanced to ICS to facilitate continuation and completion of the project. He continued:

> "178. Even if such a loan had been proved it would amount to no more than a debt to NS due from ICS. National Stadium recovered judgment in Grenada against ICS -National Stadium has made no claim against CIB in these proceedings. It cannot now claim to be entitled to recover from CIB as trustee of the Facility a sum which it said was a loan made by it to ICS and repayable by that company. It cannot therefore obtain any payment in respect of the Deposited Amount.
>
> 179. There is no entitlement under the Facility Agreement for NS to receive funding for remedial or other works out of the Facility. In any event there is no documentary or other evidence to substantiate the allegation of any loan from National Stadium to ICS.
>
> 180. The Project Agreements make clear the capacity in which NS receives the Facility - (for onward transmission to suppliers and providers only).

> 181. Lord Millett explained clearly in *Twinsectra* ‘The borrower's interest pending the application of the money for the stated purpose ... is minimal. He cannot apply it except for the stated purpose.’
>
> National Stadium makes no claim in its pleadings to be entitled to the beneficial interest therein pursuant to any trust.
>
> 182. Further it has not sought any reliefs against CIB. Therefore NS has established no basis for the transfer to it of the EC sum. Any transfer of the beneficial interest in the loan proceeds from the lenders to National Stadium (as National Stadium contends) is therefore inconceivable particularly where the stated purpose can still be achieved.”

17. NS’s notice of appeal listed the findings of fact and law which were challenged. Generally it challenged the judge’s findings in relation to the *Quistclose* trust and the assignment in favour of NH. It specifically challenged (para 13) the judge’s finding that NS’s case was based on a “conceptual misunderstanding” as to the effect of repayment of the bondholders (paras 96-99, see above). It did not in terms challenge the judge’s separate findings on NS’s counterclaim, including para 178.

The notice to dismiss

18. This failure was picked up by NH’s notice to dismiss the appeal (24 June 2011). NS, it was said, had failed to assert any facts which gave it any interest in the frozen fund. Its only claim was to the sum owed to it by ICS. A successful appeal against the order in favour of NH would do nothing to improve that position:

> “L. NS counterclaims in the High Court proceedings for a declaration that the Fund belongs to it and alleges at para 39 of the 2006 Defence that it has been kept out of monies belonging to it but asserts no facts on its pleadings which give rise to a beneficial interest in the Fund. NS's only claim is to the sum of EC$13,449,469.00 owed to it by ICS.
>
> M. CIB has not appealed the Trial Judge's order that the Fund, which was vested in it and is currently deposited at the Unit Trust Corporation, be paid out to NH. Since NS's pleadings show no entitlement or interest in this Fund, the only effect of a successful appeal will be to reverse the order for costs made below.”

19. The appeal came before the Court of Appeal on 25 June 2012. The transcript shows that the argument lasted for the whole morning. Mr Fitzpatrick SC accepted that the court should approach the case on the basis that the challenge to the judge's findings on NH's claim could be made good, but he submitted that could not justify the appeal proceeding to full hearing unless NS could show that in that event it had a good claim of its own to the frozen fund. Otherwise the only practical result of the appeal would be in relation to costs.

20. It is clear from the interventions of the court that the judges were troubled by the nature of NS's interest and anxious to give Mr Hughes QC the opportunity to clarify the point. Early in his submissions, Mr Hughes QC was asked by the Chief Justice "on what basis does your client claim an interest here". He responded that there had been very little argument on that issue before the judge:

> "The reality is, in my submission, that both parties have proceeded on a strong basis that essentially it's trust or assignment or, indeed, the money reverts to NS…. that in my submission very much reflects the pleadings and the opening and closing arguments." (pp 21-22)

21. Later the Chief Justice came back to the issue of how NS could assert a "better claim" than that of NH:

> "Because you are in exactly the same position, you had a contractual arrangement with ICS, you sued them on the loan, and now you are seeking to establish an interest in the fund…" (p 26)

22. The eventual response, after some discussion, seems to have been that NS's right depended on the satisfaction of two conditions, the first being that the money must be used for the project, the second that CIB have been repaid. The Chief Justice asked whether "under any of the terms of conditionalities", NS would be entitled to retain the money, to which Mr Hughes QC responded:

> "Absolutely, My Lord, because the two conditions have been met. CIB has been repaid, the project has been completed. Both those purposes have been fulfilled. If there is a residual sum which is left over, only the possible candidate for its retention is the recipient of the money in the first place."

and later to similar effect:

> "My Lord, we would say both of those an over-arching event have occurred, namely, full repayment of CIB. The project is complete. And in those circumstances on the very narrow question of where title in any residual fund rests, we must say title must rest in my client as the recipient of the facility sum…" (pp 28-29)

23. Mr Hughes QC also raised the "anterior question" as to where before the freezing injunction "does this money vest?", in response to which he submitted:

> "… before the involvement of the Honourable Justice Tam, the money vested in my clients, legally, but because there was a facility agreement, the money was given over and the terms of that facility agreement were (A), complied with and (B), performed and fulfilled. And there is, in my submissions, in those circumstances, no other candidate. There are plainly other candidates for beneficial entitlement to the money, if we begin speaking about trust and assignment."

24. In response to the Chief Justice's queries he accepted that there "might be two analyses":

> "One is that money… money was absolutely transferred to my client to be applied on certain terms…., the alternative is that money was not transferred absolutely to my clients, but rather it was paid over to my clients who had to hold it beneficially on certain terms, and the title, legal title never truly passed." (p 31)

With regard to the failure of the notice of appeal to challenge the findings in para 178 of the judgment, Mr Hughes QC submitted that those findings had played no part in the judge's conclusions, and were in any event findings of law rather than fact; but that if necessary he should be permitted to amend the notice (pp 34-36). Finally, he submitted that the jurisdiction to strike out appeals should be reserved for "the clearest possible cases". He distinguished *Credit Foncier* as a "very simple case", where the party before the court had no interest at all in the subject matter of the claim. The appeal should be allowed to proceed, subject if necessary to permission to amend to challenge para 178 of the judgment (p 49). In reply Mr Fitzpatrick SC noted the request for leave to amend but submitted that this would not cure the deficiencies in the notice (p 52).

25. At the end of the argument, after a short break, the Chief Justice gave an oral judgment dismissing the appeal. He started by rejecting the argument that the judge had not based his findings on the question of NS's entitlement; rather he

had treated that as "a precedent" to his conclusions on the main issues. Having noted that several of the judge's "key findings" had not been challenged, he continued:

> "Now, the basis of the counterclaim on the pleaded case and, indeed, on the evidence is that NS was owed a debt by ICS because NS had to advance monies to ICS for the completion of the project. We are unable to discern by what principle, without more, this could be construed as vesting some direct interest, whether under the facility agreement, or otherwise as some sort of residual interest in the proceeds of the trust in NS. An invitation to amend the pleadings at this stage and to advance the case on an additional basis, in our view, goes both against the evidence as it stands, and against our understanding of principles governing amendment, at this late stage of the proceedings. Insofar, therefore, as the relief sought today by the appellant relates to any declaration of trust or entitlement in their favour, we don't think that it would be available, whatever the merits of the appeal may be on the question of whether NH is entitled. Mr Fitzpatrick SC, in his application, was clear that he was proceeding on the basis that the judge … may have been wrong for the purposes of argument. But that, nonetheless, the principles in *Credit Foncier* would apply. Insofar as NS is concerned, we agree and we think, therefore, that we ought not to entertain this appeal and it is accordingly dismissed."

He concluded with some general observations on "the justice of the case", noting that ten years after the arbitral award in their favour, NH were "still to recover the fruits of the award", out of monies which were originally designated for payment to suppliers to the project of which NH was one.

26. The court refused leave to appeal, but gave an interim stay pending application to the Board.

The arguments before the Board

27. Mr Hughes QC's primary submission is that the Court of Appeal ignored the well-established principles applying to applications to strike out a notice of appeal. This should be reserved for "clear and obvious cases", not requiring "extensive inquiry into the facts" *Burgess v Stafford Hotel Ltd* [1990] 1 WLR 1215, 1222C-D per Glidewell LJ), and where the points raised are in effect "vexatious and an abuse of the process of appealing" (*Law Land plc v Gerald Simpson Sinclair* 1992 WL 895644, (unreported) 24 April 1991, p 4, per Purchas

LJ). They were wrong to rely simply on *Credit Foncier of Mauritius Ltd v Paturau & Co* (1876) 35 LT 869, rather than the more flexible approach adopted by the Board in *Elders Pastoral Ltd v Bank of New Zealand* [1990] 1 WLR 1090.

28. In any event a proper analysis of the contractual documents, which the court failed to undertake, would have shown that legal title in the frozen fund vested in NS, at the latest, from 2002 when CIB, the financier, was fully repaid. An appendix to the appellant's statement of case contains a detailed analysis of the contractual documentation, to support the submission that "legal title" in the frozen funds had vested in NS from 2002, and indeed that NH's case before the judge had implicitly proceeded on that basis. (It is said at the end of the appendix that "the foregoing analysis" was relied on by the appellant before the Court of Appeal. However, there appears to be nothing in the documentation before the Board to indicate that anything in this form was put before that court in writing.) I will need to come back below to some of the detail of the analysis.

29. Mr Fitzpatrick SC, for NH, does not challenge the authorities on which Mr Hughes QC relies for the correct approach to such an application. He accepts that the appeal may have been competent, but, as *Elders Pastoral* makes clear, the court retains a discretion and will normally refuse to entertain an appeal if the only effect of success would be to reverse an order for costs. He submits that the court was correct to dismiss the notice of appeal for the reasons it gave. NS's claim to an entitlement to the frozen fund was put solely on the basis that it was owed a debt by ICS to whom it had advanced monies to complete the project, and that it had obtained a judgment for the amount so due. Such a judgment could give no arguable right to the frozen fund as such.

30. Furthermore, although NS issued bonds for monies advanced by CIB, it was clear from both the Development Agreement and the Facility Agreement, that it did so on the terms that all advances were to be paid to or for the benefit of ICS and for the purposes of the project. It followed that, if the frozen fund did not belong to NH, it belonged to ICS which had completed the project using funds borrowed from NS. The fact that the bonds were repaid in full by the government in August 2002 could not have the effect of vesting in NS monies to which it was never beneficially entitled.

Discussion

31. The starting point, in the Board's view, is to identify and apply the correct principles applying to an application to strike out a notice of appeal without a full hearing. As is accepted, this power is reserved for clear cases where the appeal is in effect unarguable. The decision in *Credit Foncier* needs to be read

in the light of the review of the explanation given by Lord Templeman, giving the advice of the Board, in *Elders Pastoral*:

> "… there was a dispute over the ownership of some machinery, claimed by the suppliers and claimed also by the owners and subsequent purchasers of the land upon which the machinery had been installed. A decision was given in favour of the suppliers. The owners and purchasers did not appeal and did not wish to appeal. *Credit Foncier* were mortgagees of the land, had appeared in the action and had been subsequently paid in full. *Credit Foncier* nevertheless sought to appeal and to establish that the machinery belonged to the owners of the land and not to the suppliers …."
>
> In that case it was perverse of the *Credit Foncier* to continue a quarrel between the suppliers and the purchasers which neither wished to pursue, a quarrel in which the *Credit Foncier* had no need to intervene in the first place and in which, as it turned out, their intervention was unnecessary." (p 1093 B-G)

32. This position can be contrasted with *Elders Pastoral* itself. Summary judgment was given against the company in favour of the bank and upheld in the Court of Appeal, which granted leave to appeal to the Board. Before the appeal was heard, the bank repaid the principal and offered interest, but not costs. The Board held that the appeal remained competent, even though the only remaining issue was in relation to costs, and it should be considered on its merits.

33. Having referred to *Credit Foncier* and later authorities, Lord Templeman concluded that, even if the only effect of a successful appeal would be to reverse an order for costs made in the courts below, "there remains a lis or issue between the parties …". An appellant was not entitled "as of right" to appeal in such a case, and, although he might seek special leave, he would only obtain it "very exceptional circumstances". However:

> "Where supervening events render an appeal unnecessary save with regard to costs there must however be cases in which it would be most unfair for the Board to decline to entertain the appeal. It would normally not be right to hold that a respondent could abort a subsisting appeal merely by paying the appellant the sum in dispute, with nothing for costs already incurred." (p 1095 F-H)

The instant appeal was such a case, because the appeal to the Board had been made as of right and led to substantial expenditure before the making "at the last

moment" of the full offer by the bank, and furthermore the dispute raised important questions of principle which, given the Board's advance reading, would not greatly extend the hearing.

34. While there has been no dispute about the relevance of these authorities, some caution is necessary in their application in the present context. Both were concerned with principles applicable to appeals to the Board, rather than, as in this case, to first appeals to the local court of appeal. Such a court should be particularly careful not to shut out an apparently serious appeal unless it can be satisfied, without unduly detailed inquiry, that it is not realistically arguable. Furthermore, even if it is clear (as it was in those cases) that the dispute has become one wholly or mainly about costs, it remains a competent appeal and the court must exercise a discretion how to deal with it. The court may decide having regard to the overall justice of the case, including the amount of costs properly incurred, that it is right to allow it to proceed. On the other hand, if the court cannot be satisfied without detailed inquiry into law or fact that only costs are in issue, that is likely to be a good reason for not attempting to reach a decision without full argument. Further, it will rarely be appropriate to strike out the appeal where the deficiency can be corrected by amendment, at least if the amendment raises no new issues of fact and if any prejudice to the other parties can be met by an appropriate order for costs.

35. NH's notice to dismiss, served in June 2011, identified an apparent gap in NS's case on the appeal, in that they had failed to show what interest they claimed in the frozen fund, or to challenge the judge's finding that they had none. The point was put very clearly in the notice. It seems surprising that, in the year that elapsed before the Court of Appeal hearing, nothing seems to have been done to amend the notice of appeal or otherwise to articulate the precise basis on which the case was to be put. It seems not to have been until the actual hearing, in response to questions by the Chief Justice, that any real attempt was made to address the point. Even then, although the possibility of an amendment was touched on by Mr Hughes QC in his submissions, none seems to have been formulated, nor applied for. It is unfortunate that the Board is reduced to searching through the transcript to ascertain how precisely the criticism was answered.

36. As already noted, the Board has the benefit of a more detailed analysis of the facility agreement and its alleged consequences. At the heart of the analysis is the proposition that under that agreement the finances for the project were raised and disbursed "for and on behalf of" NS, advances by CIB for the project (including those to NH) were made on NS's behalf, and it was NS which issued the interim and permanent bonds, and was primarily liable for repayment to bondholders The issue of the Completion Certificate in June 2000, it is said, "set in train a series of events":

> "In accordance with Clause 5.2 of the Agreement, the interim Bonds issued by (NS) to investors in the Project were converted by (NS) to permanent 15-year Bonds and the Government of Grenada also became contractually obligated to start repaying the full amount of the Facility plus interest, through (NS) to CIB, in semi-annual instalments.
>
> In addition, having issued the Completion Certificate, the Government acquired the right to make an early repayment of the entire Facility, together with all applicable interest and charges. The Government exercised this right in August 2002.
>
> Thus, as soon as (NS) issued the permanent debt instruments (ie the floating rate Bonds) to CIB and the investors in the Project for the entire principal sum of US$23m plus interest, which it did shortly after the Completion Certificate was issued in June 2000, then by virtue of these permanent debt instruments, (NS) acquired the ownership of all of the undisbursed funds, including the US$2.75m that had been frozen by the injunction obtained by the Respondent in November 1999.
>
> However, on any view, by the time the entire Facility was repaid in August 2002, CIB no longer had any interest of any kind in the frozen money, since it was repaid the full principal sum of the Facility (US$23m) plus all applicable interest, including the US$2.75m that it had not disbursed to NS."

Mr Hughes QC indicated in his oral submissions to the Board that he would if necessary amend the notice of appeal to include the substance of this analysis.

37. In the circumstances as they appeared to the Court of Appeal, and in the absence of a formulated notice of appeal, it is perhaps understandable that the Chief Justice dealt with that possibility somewhat cursorily in his judgment. However, the issue remained one of discretion for the court, to decide whether the apparent deficiency in the pleaded case was sufficiently fundamental, having regard to the nature of the case overall, to justify the extreme course of striking out the appeal altogether at this stage.

38. Furthermore, while the argument as developed in the appendix appears complex, the essential points had emerged reasonably clearly from the exchanges in oral argument (as summarised as above). They were that, on the true construction of the documents and the undisputed history, NS's claim was not (as the judge had

thought) simply as an unsecured judgment creditor of ICS, but rather as the entity originally responsible both for raising money from and for repaying investors, and for using such funds to finance the project, and therefore that, once the project was completed and the bondholders repaid, it was to NS (not ICS or CIB) that any residual monies should revert. In the view of the Board it is arguable, to put it no higher, that under the trust deed the bonds were held by CIB solely for the benefit of the bondholders, and that on the discharge in full of NS's obligations to the bondholders, there was a resulting trust in favour of NS (as the creator of the trust and issuer of the bonds) in respect of any proceeds of the bonds remaining in the possession of CIB.

39. The reasons given by the Chief Justice for not considering an amendment were that it went "against the evidence as it stands", and also against the principles governing amendment "at this late stage". In the Board's view those reasons were not well-founded. There was no indication in Mr Hughes QC's submissions that he was seeking, or needed, to go beyond the existing evidence. His arguments, whether or not previously presented in this form, turned on the construction of the contractual documents, in the context of the established facts. If correct (on which the Board expresses no view) they provided arguable grounds at least for reversing the judge's conclusion that NS had no basis for claiming an interest in the frozen fund. Nor was there any reason for thinking that NH were prejudiced (other than in respect of costs) by the delay in formulating this aspect of the case. Furthermore, it appears that the court regarded itself as bound by "the principles in *Credit Foncier*" without any apparent recognition of the exercise of discretion required by later authorities.

40. That conclusion is sufficient, in the Board's view, to justify reversing the order of the Court of Appeal. However, while not necessary to the decision, there are in the Board's view other considerations leading to the same conclusion, which seem to have attracted little attention hitherto. They relate to the circumstances surrounding the frozen fund itself. NH commenced the proceedings asserting an interest in this money, to which it made NS a party, and on the basis of which Tam J made the freezing order. In its counterclaim, NS alleged that the diversion of this money led it to incur additional expense in order to complete the project. Assuming the interim injunction granted by Tam J was accompanied by the normal undertaking in damages, it is hard to see why NS did not have an interest in showing that NH's original assertion of title was misplaced, if only for the purpose of pursuing a claim for damages under the undertaking. If so, that would be sufficient to show that its interest in the appeal, even without amendment, was not limited to costs.

41. Furthermore, when the money was later transferred to a joint interest bearing account, it was put into the names of the attorneys for the parties to the litigation. This, it could be said, not only recognised that each of them had a potential

interest in the fund, but also by implication that, on the information then available, no other party claimed any competing interest. Thus, for example, there was no indication that the Government of Grenada was asserting any interest on the basis of the payments made by it in 2002. If the four attorneys on instruction had been able to agree on the form of a consent order for sharing the fund between those parties, it is difficult to see what basis the court would have had to refuse it. If that is correct, it shows that each party had an interest not merely in establishing his own interest, but also in challenging the assertion of any greater interest by one of the other parties. By the time of the Court of Appeal hearing the only parties still asserting an interest were NH and NS. Neither claim was straightforward. The justice of the case called for a full hearing of the contest between them on its merits, without shortcuts.

42. For the reasons given, the Board directs that the appeal be allowed and the order dismissing the notice of appeal be set aside. The order will be subject to NS amending the notice of appeal to indicate the basis on which it challenges para 178 of the judgment.

43. Submissions in respect of costs, if not agreed, should be made within 21 days. On the material presently available (in particular, the matters noted in para 35 of this judgment), it appears that the appeal to the Board was in part made necessary by the appellant's failure to formulate its case with adequate clarity at an earlier stage. Subject to consideration of any contrary submissions, the Board is minded to direct that costs of the application to the Court of Appeal and of the appeal to the Board should be costs in the substantive appeal.