Trinity Term
[2016] UKPC 21
Privy Council Appeal No 0051 of 2015

JUDGMENT

Mascareignes Sterling Co Ltd (Appellant) *v* Chang Cheng Esquares Co Ltd (Respondent) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Mance
Lord Clarke
Lord Sumption
Lord Carnwath
Lord Hodge

JUDGMENT GIVEN ON

19 July 2016

Heard on 11 May 2016

Appellant	*Respondent*
Nerys Jefford QC Maxime Sauzier SC (Instructed by Blake Morgan)	Eric Wilson Ribot SC Louis Eric Ribot (Instructed by Carrington and Associates)

LORD HODGE:

1. This is an appeal from the Supreme Court of Mauritius. It involves a challenge to an arbitration award in a building contract dispute. It raises a preliminary issue as to the scope of an appeal in this case from the arbitrator to the courts. The parties to the appeal also contest four substantive issues, namely (i) the nature of the building contract and whether the contractor, Chang Cheng Esquares Co Ltd ("CCE") is entitled to the sum specified in the final account statement, (ii) whether there was a violation of the principle of public order in the conduct of the arbitration, (iii) whether CCE was in breach of contract in relation to the mechanical and engineering works component of the building contract and (iv) whether CCE was in breach of contract under a collateral finance agreement.

Factual background

2. Mascareignes Sterling Co Ltd ("MSC") was the employer and CCE the contractor in a written building contract dated 3 December 1993 for the design and construction of Sterling House, a 13-storey office building in Port Louis, Mauritius. The contract was a standard form contract prepared by the Joint Tribunal Contract, of which, counsel informed the Board, developers and contractors in Mauritius have little experience. The contract in this case was the JCT Standard Form of Contract 1980 edition with Contractor's Designed Portion Supplement, as amended by the parties ("the Contract"). The contract sum was specified as Rs 100m (article 2). The architect was stated in article 3 to be R Koleejan of 5 Residences des Palmiers, Beau-Bassin, but the architect did not take part in the administration of the contract and MSC terminated his appointment. The quantity surveyor was stated in article 4 to be A Juddoo & Partners Ltd ("AJP"), and Mr Juddoo of AJP in practice administered the Contract in the absence of an architect. Although MSC engaged another architect, Mr Bhatia, to assist it in relation to technical matters, he was not formally appointed under the Contract and did not carry out the functions of the architect under it.

3. Work on the building commenced on 2 May 1994 and practical completion was achieved on 31 March 1996. During the course of the contract AJP produced interim valuations of the work which CCE had carried out and over time MSC paid the sums due under those valuations. At the completion of the contract works, AJP prepared a final account which it issued on 16 October 1996. That account stated that MSC owed Rs 17,582,027.83 to CCE. Shortly before AJP produced the final account, MSC by letter dated 7 October 1996 informed CCE that it had terminated AJP's services as quantity surveyor with effect from 4 October 1996. MSC did not give notice of the removal of the quantity surveyor and the arbitrator found that his removal was unlawful (para

9.4.2.3 of his award). CCE contested MSC's right to replace the quantity surveyor. MSC refused to pay the sum which AJP stated was due in the final valuation.

4. CCE therefore invoked the arbitration clause in the Contract to determine the dispute. In its statement of case in the arbitration CCE claimed the sum certified in the final account and certain other sums which are not material to this appeal. The arbitrator, Mr Abdurrafeek Hamuth, who was Master and Registrar of the Supreme Court of Mauritius, produced an award dated 22 July 2005 in which he awarded CCE Rs 22,784,189.80 together with interest. Included in that award were the Rs 17,582,027.82 which AJP had certified as due in the final account. The arbitrator also dismissed MSC's counterclaim.

5. MSC appealed to the Supreme Court on grounds both of fact and law. On 30 August 2012 the Supreme Court dismissed MSC's appeal. MSC now appeals to the Board, with the leave of the Supreme Court, against the arbitrator's award of the sum that AJP in its final account found MSC was owing to CCE and also against his failure to uphold MSC's counterclaims arising out of CCE's alleged breaches of contract.

The scope of the appeal

6. Article 1027-1 of the Civil Procedure Code provides:

> "La sentence arbitrale est susceptible d'appel à moins que les parties n'aient renoncé à l'appel dans la convention d'arbitrage. …"

Thus there is in Mauritius an unqualified right of appeal from an arbitrator unless the parties to the arbitration have restricted or excluded that right in their agreement to arbitrate.

7. In this case the Contract contained an arbitration clause. It provided in clause 41.6 (as amended by the parties) that

> "The parties hereby agree and consent pursuant to the Code of Civil Procedure related to Arbitration, Act No 1 - 1981 that either party may appeal to the Supreme Court on any question of law arising out of an award made in an arbitration under this Arbitration Agreement; …"

8. Once CCE had asserted its entitlement to arbitration under clause 41.6 of the Contract, the parties attempted to agree terms of reference. Having failed to agree the terms, the parties entered into a further arbitration agreement dated 15 March 2002, in which they set out the terms of reference which each of the parties wished the arbitrator to consider and instructed the arbitrator to consider "the disputes given in the terms of reference of each party". Clause 6 of the agreement provided: "The decision of the Arbitrator shall be binding on the parties but shall be subject to appeal".

9. The Board is satisfied that the arbitration agreement to which article 1027-1 of the Civil Procedure Code refers is the combination of the arbitration agreement in the Contract and the agreement setting out the terms of reference of each of the parties. The former confines the appeal from the arbitrator to questions of law and the latter does not contradict that restriction. The Board therefore concludes that the appeal to the Supreme Court should properly have been confined to an appeal on a question or questions of law and that the appeal to the Board is similarly restricted.

10. The question for the Board therefore is whether the arbitrator erred in law in reaching the determinations which MSC now challenges.

The nature of the building contract and the final account

11. Before the Supreme Court the parties focussed their attention on the question whether the Contract was properly construed as a lump sum contract or as a measure and value contract. The parties had advanced similar arguments before the arbitrator. He had determined (in para 5.29.1 of his award), first, that the Contract properly construed was a measure and value contract and, secondly and as a fall back, that, if the parties' contract was initially a lump sum contract, it was varied by the parties so that payment became due on the basis of measurement and valuation.

12. Before the Board, counsel for CCE conceded in his written case (para 10.1) that the Contract had been a lump sum contract but he submitted that the parties had altered it by their conduct into a measure and value contract. The Board is satisfied that the concession that the written contract was a lump sum contract was correctly made. Article 1156 of the Civil Code lays down the following rule on the interpretation of contracts:

> "On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes."

In this case the common intention of the parties was clearly manifested by the express terms of the Contract. Clause 2 of the Contract specified the contract sum as Rs 100m. Clause 14.2 provided that the contract sum could be adjusted or altered only in accordance with the express provisions of the conditions. Such provisions included clause 13, which provided for variations, which were instructed or sanctioned by the architect, their valuation and the alteration of the contract sum accordingly. Clause 30.6 provided for the final adjustment of the contract sum after practical completion and clause 30.8 provided for the architect to issue the final certificate which compared the sums paid under the interim certificates (in accordance with clause 30.1) with the contract sum adjusted as necessary in accordance with clause 30.6, and identified the difference as a balance due to or by the contractor or the employer. Further the parties deleted the fluctuations clause (clause 37) and in its place inserted:

> "This contract shall be a fixed price contract and no increase whatsoever will be allowed for material or labour … The Contractor must allow in his prices for any possible increases that may affect their tender during the execution of the Works."

In the Board's view there is nothing in the admissible factual matrix of the Contract which points against its clear terms that it was a lump sum contract.

13. It follows that the arbitrator erred in so far as he relied on the subsequent actions of the parties to construe the Contract as being a measure and value contract. But that is not the end of the matter because he also held, in the alternative, that the parties had agreed to depart from the original contract and that variation was evidenced by their behaviour in carrying out the contract (para 5.29.1).

14. The arbitrator recorded (para 5.13) that MSC was aware during the contract that AJP provided interim valuations based on measuring the work done and using the rates in the bills of quantities. He held (para 5.27) that those bills were "a fully priced bill of quantities", which showed the breakdown of the contract sum of Rs 100m and formed part of the contract. In section 9 of the award, in which he discussed AJP's final account, the arbitrator recorded his factual findings that, in the absence of an architect, AJP had issued interim valuations based on measure and value and that MSC was fully aware of that. He held (para 9.6.4):

> "MSC's conduct is an admission that clause 30 was not going to be given effect to. This practice was carried out throughout the whole of the construction period and the specification that the Architect shall issue interim valuation certificates and final account was thereby rendered inoperative due to the absence of the

> Architect throughout the contract and also by the conduct of the parties as mentioned above."

15. It is a matter of regret that the arbitrator did not make more detailed findings of fact about AJP's interim valuations based on measure and value and, as discussed below, on how Mr Juddoo prepared the final account. Where, as in this case, an arbitrator's decision may be appealed only on a point of law, it is important that the facts which underlie an arbitrator's award are clearly stated. This might have avoided the expense which the parties have incurred in disputing the nature of the contract.

16. It is clear from his discussion of drawings in part 8 of his award, that the arbitrator accepted CCE's evidence that MSC had radically redesigned the building from that which it proposed when the parties entered into the Contract. He recorded CCE's evidence that

> "the building has been completely changed from the initial project as per the contract, and this inside and outside, from the bottom to the top, the height, the look, the structure, the finish."

He stated: "details of these have satisfactorily been given elsewhere in the evidence" (para 8.2). It would have been much better if the arbitrator had recorded in more detail the main components of the changes in design which supported this summary. The Board can see indications of some of the elements which supported this conclusion elsewhere in the award. Thus in relation to delays relating to the contractor's design portion the arbitrator recorded (at para 7.11.6) that the cause of the delays included the absence of the architect, MSC's failure to issue drawings despite requests from CCE and delays in deciding whether to add additional floors.

17. In its written case, CCE gives examples, derived from the evidence before the arbitrator, of the changes which included the alteration of the height of each basement, a change to the grade of concrete, the increase in the number of lift shafts from two to three and changes in their size, thickness and height, changes to the floor area and height of the building, changes to the number and height of ducts, the addition of a mezzanine floor, and the removal of roofing, woodwork and metal work from the contract. The arbitrator had evidence in a statement of the quantity surveyor, Mr Juddoo, which explained the agreement of rates for work and the make-up of his final account, and a statement by Mr S Dahlia of Pro-Five Ltd, which among other things explained how detailed design drawings departed materially from the original concept drawings. The arbitrator also had before him a substantial document (X2E3) which compared the original contract documents with the later design drawings. The Board is therefore satisfied that the arbitrator had before him evidence which entitled him to conclude that

there were radical changes to the design of the building after the parties signed the Contract.

18. It is clear from Mr Juddoo's statement (a) that the parties had agreed priced bills of quantities, (b) that rates had been agreed for works not defined in the bills of quantities, (c) that when preparing interim valuations, his staff measured the works carried out by CCE, and (d) that when preparing the final account (shown as document X2D) he required to measure items of work because of the extent of the changes to the scope of the works. He also made it clear that in preparing the final account he sought to operate clause 30.6 of the Contract so far as was possible in circumstances in which both the building and the allocation of work had been radically changed since the contract was signed. He started with the fixed price of Rs 100m (which included preliminaries of Rs 11,789,832 which required no adjustment), deducted the prices attributed to all of the items which had undergone significant changes since the contract was signed, and in their place added back in figures to reflect the value of the work that CCE actually performed. It is not necessary to go through each item. Three examples suffice. First, in relation to the basement, concrete and blockwork, he explained what he had done in these terms:

> "following the signature of the contract, numerous changes to the works were instructed by Mr Ujoodha [of MSC] directly to the architect, engineer and contractor eg: The whole structure components including slab, beam, columns, shear wall, lift shaft and staircase; layout of each floor including blockwall layout, various tie beams and tie columns, etc were altered.
>
> In order to work out the true effect on the Contract Sum caused by those major changes and due to the fact that the whole scope of works was changed, the only fair and reasonable method was to measure all items of works that had been done by the contractor in basement, concrete and blockwork sections of the BoQ.
>
> I therefore, in the final account statement, omitted all amounts for basement, concrete and blockwork comprised in the contract sum and added actual amounts measured and certified by myself."

Secondly, he omitted roofing and woodwork altogether because they had been removed from the contract on MSC's instructions and reduced metalwork from Rs 4.25m to Rs 36,400 because MSC had removed all but the installation of louvres in the basement from the contract. Thirdly, because MSC had significantly changed the scope of finishes, he omitted the Rs 14.4m which was derived from the bills of quantities and replaced it with Rs 7.57m which was the measured amount of the work CCE actually

performed. The variations which MSC instructed in the course of the contract were also measured and added in to the final contract sum.

19. The result of this exercise was that the gross sum due to CCE fell from Rs 100m to Rs 85,175,001.81. After allowing for the contractual retention of 5%, an agreed deduction of professional fees and the amount previously paid under the interim valuations, the result was that Rs 17,582,027.83 was due to CCE.

20. What Mr Juddoo did in preparing the interim valuations resulted in part from the absence of an architect to operate the process of interim certification under the contract and in part from the changes that MSC was making at the time to both the design of the building and the allocation of work. What Mr Juddoo did in creating the final account statement was consistent with the building contract remaining a lump sum contract but being adapted, in accordance with clause 13.5 of the Contract, to the wholesale changes to the building works and the allocation of work.

21. In the Board's view there is more scope for flexibility in valuing additional or substituted work in a lump sum contract than the parties have submitted. Work which is not expressly or impliedly included in the work for which the contracted lump sum is payable is extra work. An early example of this in a much less formal building contract which commissioned work set out in a bill of quantities is *Kemp v Rose* (1858) 65 ER 910; 1 Giff 258, 268-269 per Vice Chancellor Sir John Stuart. In the present case the lump sum was made up of elements set out in the fully priced bills of quantities which the arbitrator held were part of the contract. There was thus a definition of the works which were the subject of the lump sum, from which the existence of additional or substituted work could be identified.

22. Under clause 13.5 of the JCT standard form contract which applies in this case (and also under clause 5.6 of the current 2011 ed) additional or substituted work carried out within a lump sum contract may be measured and valued by use of the rates and prices set out in the contract bills if three conditions are met. First, the work must be of a similar character to the work set out in the bills; secondly, the work must be executed in similar conditions to those of the work in the bills; and, thirdly, the work must not significantly change the quantity of the work set out in the bills. If either or both of the second and third conditions are not fulfilled, the valuation can be based on the rates and prices on the bills but a fair allowance must be made for differences in conditions or quantity. If the work is not of a similar character to the work set out in the bills (ie the first condition is not fulfilled) the valuer must use fair rates and prices. See *Keating on Construction Contracts* (9th ed (2012)), para 20.300ff (on clause 5.6 of the current JCT contract), in which the authors' commentary expands on the discussion of clause 13.5 in the edition current at the time of the Contract (5th ed (1991)) pp 522-523.

23. The use of measurement and value to ascertain the value of additional or substituted work is thus not inconsistent with a lump sum contract. In this case, Mr Juddoo treated the contract as a lump sum contract by preserving the preliminaries unchanged, but the sums attributed to each of the other components of the contract were significantly altered. Most of the significant works were measured and valued although some items (site works, professional fees and attendance and profit) were valued at figures which the parties had agreed as appropriate in view of the changes to the building and the allocation of work. While it is not correct to say, as the arbitrator did, that the contract was varied to become a measure and value contract, the bulk of the components of the contract were properly valued by measurement and value in Mr Juddoo's preparation of the final account statement as a consequence of the changes which MSC made to the building and the allocation of work since the signing of the written contract. Accordingly, in the Board's view, the arbitrator's mischaracterisation of the nature of the parties' contract had no bearing on his decision that CCE was entitled to receive the Rs 17,582,027.83 which Mr Juddoo stated in his final account statement.

24. The arbitrator accepted Mr Juddoo's approach to the valuation of CCE's work, which involved extensive use of measurement and value. The Board detects no error of law in the arbitrator's acceptance of that approach. The arbitrator did not accept as reliable the final account prepared by Mr Bowler, the surveyor led in evidence by MSC, for the reasons which he gave in section 9.8 of his award. His judgment on reliability includes questions of fact which the Board has no jurisdiction to review in this appeal.

25. This challenge therefore fails.

26. Having dealt with the principal issue on the appeal, the Board can address the other points shortly.

The allegation of a violation of the principle of public order

27. Before the Supreme Court MSC argued that the arbitrator had failed to keep a proper record of the arbitral proceedings and that this failure amounted to an infringement of article 1019 of the Code of Civil Procedure. The Supreme Court examined the facts behind the allegation in considerable detail and concluded (a) that only one document, the transcript of a sitting of the arbitration on 2 December 2003, was missing, (b) counsel for MSC had had a copy of that transcript when he made closing submissions to the arbitrator, and (c) the transcript had been lost after the arbitrator had sent the whole papers of the proceedings to the Supreme Court.

28. MSC submitted that the absence of a complete record of the arbitration proceedings is an infringement of article 1019 of the Code of Civil Procedure which provides:

> "Les actes de l'instruction et les procès-verbaux sont faits par tous les arbitres si le compromis ne les autorise à commetre l'un d'eux."

The lack of a complete record, MSC submitted, constitutes an infringement of public order under article 1027-3(6) of the Code of Civil Procedure, which should result in the award being declared null and void. Article 1027-3 provides:

> "Lorsque suivant les distinctions faites à l'article 1027-1, les parties ont renoncé à l'appel, ou qu'elles ne se sont pas expressément reservées cette faculté dans la convention d'arbitrage, un recours en annulation de l'acte qualifié sentence arbitrale peut néanmoins être formé malgré toute stipulation contraire.
>
> Il n'est ouvert que dans les cas suivants - …
>
> 6. si l'arbitre a violé une règle d'ordre public."

29. It is not clear to the Board that article 1019 has any bearing in this arbitration as it appears to be concerned with arbitrations in which there are two or more arbitrators. It is also not apparent that the loss of a document such as the minutes of a sitting of an arbitration could amount to a violation of a rule of public order under article 1027-3, unless there was a demonstrable adverse consequence to the administration of justice in the case. But there is no reason for the Board to express a view as, on the facts as established by the Supreme Court, the arbitrator was not to blame for the loss of the document.

30. MSC sought in this appeal to raise other alleged irregularities by the arbitrator which were not the subject of investigation before the Supreme Court. The Board will not consider them because it is too late to raise such matters at this stage of the appellate process. This challenge therefore fails.

The mechanical and engineering works

31. In the Contract CCE undertook to design and construct mechanical and electrical works, such as electrical installations, firefighting installations and lifts ("M & E

works"). CCE produced designs for the M & E works which were not in accordance with Mauritian standards. CCE therefore suggested that Mauritian consultants, Pro Five Ltd, be engaged to design the M & E works to the appropriate standards. MSC instructed Pro Five Ltd to produce the designs. MSC also engaged contractors to carry out the M & E works. MSC claimed that CCE had breached the contract by failing to design and construct the M & E works and claimed as damages, among other things, Pro Five Ltd's design fee and cost of instructing the contractors to carry out those works.

32. The arbitrator concluded in section 7.11 of his award that although CCE had been responsible for the M & E designs, the parties had agreed that Pro Five Ltd would carry out the designs. There was correspondence between AJP and CCE in October 1994 which suggested that CCE would finalise terms with Pro Five Ltd, but that appears not to have been done.

33. The arbitrator also held that MSC's engagement of other contractors to carry out the M & E works was voluntary and did not result from fault on CCE's part (paras 7.11.3 and 7.11.6).

34. There are two problems with MSC's claim for damages under this heading. First, the arbitrator concluded that the parties had agreed to exclude the M & E works from the contract. In the context of a contract in which radical changes were made to the building over time by agreement between the parties, there is nothing in the findings of fact to contradict the arbitrator's conclusion that the parties agreed both to allow Pro Five Ltd to design the M & E works and to exclude the carrying out of those works from the contract. The Board was not referred to any evidence which should have prevented the arbitrator from reaching that conclusion. The Board was referred to no evidence which supported the view that CCE had refused to carry out the M & E works. The arbitrator in section 7.7 of his award summarised evidence in the form of minutes of meetings and correspondence which entitled him to conclude that CCE did not refuse to carry out the M & E works. The arbitrator records evidence that CCE initially protested that other contractors had been engaged to carry out those works and later agreed, subject to the right to present a claim for loss of profits, in order to avoid further delay. Further support can be found in the statement of Mr Dhalia of Pro Five Ltd who said that AJP had acted wrongly because it had instructed contractors without obtaining CCE's consent to this major change to the contract (para 7.7.5). The arbitrator concluded (para 7.7.9) that MSC took the works from CCE and engaged contractors for its own financial benefit in the form of discounts, credit facilities, and substituting office space for payment. MSC agreed to pay CCE a sum as compensation for loss of profit for the many items removed from the contract.

35. Secondly, Mr Juddoo in his final account deleted the sums attributable to the M & E works, which had been included as provisional sums in the contract. In his witness statement he said:

> "Following instructions issued by Mr Ujoodha, only a few items in the provisional sum, such as laying of electrical conduits, builder's work etc, were carried out by CCE, while most of provisional sums works were deleted from the contract and contracted by Mr Ujoodha to various direct contractors. I therefore omitted the total amount of provisional sum comprised in the Contract Sum and added amount in the Final Account for works carried out by CCE and certified by myself."

MSC's claim, therefore, if it had established breach of contract, would prima facie have been the excess (if any) of (1) what it paid Pro Five Ltd and the contractors for the design and carrying out of the M & E works over (2) what was due to CCE under the contract for those activities. It did not pursue a claim on this basis and it is not evident that such an excess existed.

36. The arbitrator's finding which addressed the small element of MSC's claim which related to Pro Five Ltd's fees (para 7.11.1) was:

> "it can be said that even though CCE was responsible for the M & E designs, the parties to the contract agreed that Pro Five Ltd would carry out those designs given that those submitted by CCE did not meet Mauritian requirement. Hence, although it departed from the term of the contract, MSC can be said to have accepted it and cannot now claim that it had no choice but to do so."

The arbitrator did not expressly address who was to be responsible for Pro Five Ltd's fees in his discussion of liability for the M & E works. But he concluded in part 12 of his award that in June 1995 the parties had agreed that MSC could deduct professional fees, including those it paid to Pro Five Ltd, from retention money and that AJP had deducted the agreed amounts in the final account (paras 12.5.1 and 12.5.2). MSC therefore suffered no loss in relation to those fees.

37. The M & E claim therefore fails.

The finance agreement

38. On 1 April 1994 the parties signed an agreement which provided that, notwithstanding clause 30 of the Contract, MSC would pay for the works in accordance with a cash flow schedule which was attached to the agreement. It provided (a) that, if MSC achieved sales of property within the development in excess of the cash flow predictions, its payments would increase proportionately and (b) that, if sales were

depressed, the parties would work out a new schedule. It also provided that a loan of Rs 15m would be made available to CCE six months after the start of the works. The agreement stated its context: the date of CCE's possession of the site was to be 2 April 1994 and CCE was to complete the works within 18 months.

39. The arbitrator described pre-contractual correspondence which included proposals that CCE would provide loan finance for the works. That correspondence pre-dated CCE's incorporation. On the arbitrator's findings, the only finance agreement between the parties was the agreement of 1 April 1994. It did not involve CCE providing loan finance for the development but was designed to regulate the timing of MSC's payments to CCE.

40. MSC counterclaimed under this heading for damages of Rs 13,720,222, which it claimed were its costs of financing the project. The counterclaim proceeded on the basis that it had a contract under which CCE would fund the development: see MSC's Technical Report Vol II in support of its final account (Doc X2GC: section 4.1). But that was not what the arbitrator found, and it has not been demonstrated that his finding involved any error of law.

41. The finance agreement of 1 April 1994 was never implemented. CCE on several occasions requested MSC to cancel it. Further, as the arbitrator recorded (para 7.9.2), the date of possession was agreed at a meeting on 1 July 1994 to have been 2 May 1994 and, as stated in para 3 above, it took almost 23 months from then to complete the works. This delayed performance of the Contract created a mismatch between the cash flow schedule and the reality.

42. The arbitrator's findings in relation to the cancellation of the finance agreement of 1 April 1994 are inconclusive. He recorded (para 6.8.1) that MSC never acceded to CCE's request to cancel that agreement. But he also referred to a meeting on 29 June 1995 between MSC and CCE in which Mr Ujoodha of MSC stated that the financing agreement had served its purpose. He referred to minutes of the meeting. He stated in para 6.8.3:

> "CCE may have been in breach of the above agreement, however here again the breach was accepted by MSC and the contract was to that extent varied with the tacit agreement of both parties."

It is not necessary for the Board to resolve what the arbitrator meant by these findings in paras 6.8.1 to 6.8.3 of his award. The Board inclines to the view that the actions of the parties, which he then summarised, enabled him to infer that, while MSC had not formally agreed to the cancellation of the agreement of 1 April 1994, it had agreed to its supersession because the parties operated the Contract by means of interim

valuations without complaint. It is clear from the delayed progress of the building works that the cash flow schedule was superseded by events and that the parties never replaced it with an updated cash flow. In any event, MSC presented no claim based on the breach of this agreement.

43. The claim relating to the finance agreement therefore fails.

Conclusion

44. For these reasons the appeal will be dismissed. The Board's preliminary view is that the respondent should be awarded the costs of the appeal but that the parties have 21 days to lodge written submissions if a different order is sought.