Michaelmas Term
[2022] UKPC 39
Privy Council Appeal No 0031 of 2020

JUDGMENT

A & A Mechanical Contractors and Company Ltd (Appellant) *v* Petroleum Company of Trinidad and Tobago (Respondent) (Trinidad and Tobago)

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

before

Lord Lloyd-Jones
Lord Briggs
Lord Leggatt
Lord Burrows
Lord Stephens

JUDGMENT GIVEN ON
3 November 2022

Heard on 7 April 2022

Appellant
Daniel Feetham KC
Anand Ramlogan SC
Rowan Pennington-Benton
(Instructed by Jared Jagroo of Freedom Law Chambers (Trinidad))

Respondent
Anneliese Day KC
Prakash Deonarine
Odette Clarke
(Instructed by Signature Litigation LLP)

LORD STEPHENS (with whom Lord Lloyd-Jones, Lord Briggs, Lord Leggatt and Lord Burrows agree):

1. Introduction

1. In these proceedings A & A Mechanical Contractors and Company Ltd ("the appellant") claims the value of variations carried out under a construction contract entered into with the Petroleum Company of Trinidad and Tobago ("the respondent"). At first instance the appellant relied on the respondent's letter dated 23 June 2008 ("the June 2008 letter") as agreeing the value of certain variations amounting to TT$7,291,961.81. In addition, it claimed the value of certain other alleged variations not addressed in that letter. The June 2008 letter was not marked "without prejudice". At trial the respondent objected to the June 2008 letter being admitted in evidence on the basis that it was part of without prejudice negotiations between the parties. In his judgment dated 28 April 2014 Boodoosingh J ("the judge") held that the June 2008 letter was not written on a without prejudice basis and therefore could be admitted as evidence. Based on the June 2008 letter, the judge made an award in favour of the appellant in the sum of TT$7,291,961.81. The judge also awarded a further TT$2,680,300.93 in relation to variations numbered 27A, 27B1, 27B2, 28 and 29 which were not addressed in the June 2008 letter. Accordingly, the total award in favour of the appellant was TT$9,972,262.74.

2. On 12 December 2019, the Court of Appeal (Mendonça and Smith JJA, with Jones JA dissenting on this issue) held that the June 2008 letter was a "without prejudice" communication and was as a result inadmissible. Consequently, the Court of Appeal set aside the award of TT$7,291,961.81 and remitted the question of the variations addressed in the June 2008 letter for retrial. The Court of Appeal unanimously set aside the further award of TT$2,680,300.93 in respect of variations 27A, 27B1, 27B2, 28 and 29 on the basis that the judge was wrong to conclude that there was no evidence given by the respondent concerning those variations. The appellant's claims in relation to those variations were also remitted for retrial.

3. The appellant now appeals to the Board. On this appeal the appellant accepts that the total amount of the valuations which were agreed in the June 2008 letter was TT$5,180,175.31 rather than TT$7,291,961.81. Furthermore, the appellant accepts that by its pleadings it had excluded variation numbered 10c so as to further reduce its claim based on the June 2008 letter by TT$290,000.00 to TT$4,890,175.31.

4. The issues on this appeal are:

(a) Whether the Court of Appeal was correct to find that the June 2008 letter was without prejudice and inadmissible ("the first issue");

(b) Whether the Court of Appeal was correct to interfere with the judge's approach with respect to variations 27A, 27B1, 27B2, 28 and 29 ("the second issue"); and

(c) Whether the judge erred in failing to make an award with respect to interest ("the third issue").

2. Factual background

5. The appellant is a limited liability company which performs engineering and construction works primarily in the oil and gas industry. Mr Azard Ali is the managing director of the appellant. Mr Selwyn James was the appellant's project engineer and Mr Leon David and Mr Ali were the appellant's project managers in relation to the works which are the subject matter of these proceedings.

6. The respondent, otherwise known as Petrotrin, was at all material times a state-owned oil company in Trinidad and Tobago. Its principal activities were the exploration, development and production of hydrocarbons in addition to the manufacturing and marketing of petroleum products. Mr Ainsley Newton was the respondent's project manager and Mr Paul Fortune was the respondent's construction supervisor in relation to the works which are the subject matter of these proceedings.

7. By its Invitation to Bid ("the ITB") dated 28 October 2003 the respondent invited various contractors, including the appellant, to bid to perform stipulated steelworks relating to the strengthening of the respondent's platform and block station number 4 in the respondent's main Soldado oilfield.

8. On 17 December 2003 the appellant submitted its tender to carry out the work as stipulated in the ITB ("the work") for the price of TT$26,800,000 (exclusive of VAT).

9. The appellant emerged as the successful bidder and on 23 September 2004, a contract was entered into between the appellant and the respondent. The parties agree that the contract is contained in several documents, namely the ITB dated 28 October 2003, the respondent's General Conditions of Contract, the appellant's

tender dated 17 December 2003, the respondent's letter of intent dated 23 July 2004, addenda numbers 1 and 2 dated 20 and 28 November 2003 and the respondent's purchase order dated 23 September 2004.

10. Under the contract the appellant agreed to carry out the work for the "Contract price" of TT$26,800,000 (exclusive of VAT) or such other sum as should become payable under the contract.

11. By clause 2 of Part V to section 3 of the ITB, the respondent had the power to instruct the appellant to carry out variations to the work. Clauses 4 and 5 of Part V to section 3 of the ITB provides:

> "4. If, in the opinion of the [appellant], such a variation shall impact on the cost of the Contract, the Project Schedule or the parties' obligations under this Contract, then the [appellant] shall notify the [respondent] in writing and submit to the [respondent] for approval the costs, a statement as to the variation/s and the impact of such a variation/s on the Project Schedule and/or obligations. *The amount to be added or deducted from the Contract Price shall be determined in accordance with the rates specified in the Schedule of Prices, if applicable. Where rates are not contained in the said schedules or are not applicable, then the amount shall be such sum as is in all the circumstances reasonable.* Due account shall be taken of any partial execution of works which is rendered useless by any such variation.
>
> 5. In any case where the [appellant] is instructed to proceed with a variation prior to the determination of the value thereof, the [appellant] shall keep contemporary records of the Cost of making the variation and of time expended thereon. Such records shall be open to inspection by the Engineer at all reasonable times" (emphasis added).

In arriving at a valuation in respect of a variation the emphasised part of clause 4 provides for adherence to the quoted rates in the Schedule of Prices unless not contained in the said schedule or unless the rates are "not applicable."

12. Clause 7 of section 5.1 of the ITB makes further provision for the adjustment of the contract price, either by way of addition or deduction, to reflect the value of "such extras, alterations, additions or omissions" directed by the respondent during the progress of the work. It is appropriate to set out clause 7 in full. It provides:

> ""**Clause 7 Alterations and Variations (Section Five General Terms and Conditions of Contract)**
>
> [The respondent] may at any time during the progress of the Work make alterations in or additions to or omissions from the Work or any alterations in the kind or quality of the materials to be used therein and if [the respondent] shall give notice thereof in writing to the [appellant] and the [appellant] shall alter, add to or omit as the case may require and the value of such extras, alterations, additions or omissions shall in all cases be agreed between [the respondent] and the [appellant] the amount thereof shall be added to or deducted from the Contract price as appropriate. No variation shall be made to the Work stipulated without prior written approval of [the respondent's] authorized representative. Failure to observe this condition may at the sole discretion of [the respondent] result in non-payment for the unauthorized Work."

13. It is convenient at this stage to set out several points which can be made about the express wording of clause 7:

(a) In addition to the power contained in clause 2 (see para 11 above) it enables the respondent at any time during the progress of the work to "make alterations in or additions to or omissions from the [w]ork" and to make "alterations in the kind or quality of the materials to be used" in the work.

(b) It envisages the respondent giving notice in writing to the appellant in respect of variations to the work and that if the appellant carries out the variation without the respondent's authorised representative giving prior written approval, then this may result at the respondent's sole discretion in non-payment for the unauthorised work.

(c) It provides that if the appellant shall alter, add to or omit from the work in accordance with the respondent's direction then "the value of such extras, alterations, additions or omissions shall in all cases be agreed between [the respondent] and the [appellant]."

(d) It directs that the agreed amount of the value of such extras, alterations, additions or omissions shall be added to or deducted from the contract price as appropriate.

(e) The obligation to agree arises in respect of each extra, alteration, addition or omission so that, for instance, if agreement is reached in respect of the value of a particular extra, then that amount shall be added to the contract price even if the parties have failed to reach agreement in respect of the value of other extras. The aspiration is for the parties to agree the value of all extras, alterations, additions or omissions but it is not necessary for them to reach an all-embracing agreement before the agreed value of particular variations are added to or deducted from the contract price. In this way, the aim of clause 7 is to achieve a global agreement or alternatively to narrow the issues in dispute.

(f) The obligation to agree is a continuing obligation which arises in relation to each variation as soon as the alteration or addition is carried out or the omission is made.

14. There are further relevant points to make in relation to clause 7 read with clause 4 as set out in para 11 above.

15. First, the presumed intention of the parties is that their contractual obligation to agree the value of such extras, alterations, additions or omissions is an obligation to agree "a reasonable value" for all the appellant's costs direct and indirect flowing from the variation. A reasonable value is to be determined in accordance with the rates contained in the schedule of prices if that rate is applicable. If a rate is not contained in the schedule or if it is not applicable, then the amount shall be such sum as in all the circumstances is reasonable.

16. Second, there is an implied obligation on both parties to negotiate in good faith seeking agreement in respect of the reasonable value of extras, alterations, additions or omissions.

17. Third, where, as here, the respondent has failed to give notice in writing of the variation to the appellant and has waived the obligation resting on the appellant to obtain the respondent's authorised representatives written approval of a variation prior to carrying out the variation, then to comply with the obligation to agree the value of the variation there is an obligation on both parties to agree whether there has been a variation. In those circumstances the obligation is to agree both the variation and the value.

18. Fourth, if there is a failure to agree, then the court can determine whether there has been a variation and if so, its reasonable value, which amount the court can either add to or deduct from the contract price.

19. Fifth, the ability of the court to determine whether there has been a variation and the reasonable value of the variation is not to overshadow the anterior stage which is the implied contractual obligation on the parties in good faith to enter into a process seeking to achieve agreement.

20. Sixth, it is an essential prerequisite to a claim for the value of a variation for the party bringing the claim to demonstrate that absent the necessary written notice or approval it has sought to agree that there was a variation and that it has sought to agree the value of the extras, alterations, additions or omissions that are the subject matter of the claim.

21. On 4 April 2006 (by which date the appellant had completed the work) a certificate of compliance was issued on behalf of the respondent in accordance with the contract. The appellant was paid the sum of TT$26,800,000 plus VAT. However, it is accepted by the respondent that during the progress of the work it had directed the appellant to carry out and the appellant had carried out some additional and modified work as variations. However, in relation to some of the appellant's claimed extras, alterations or additions, the respondent contends that these were included in the work and therefore do not amount to variations. On the other hand, it is accepted by the respondent that in relation to extras, alterations and additions that did amount to variations that the appellant is entitled to have such work valued and the value added to the contract price there being no pleaded set off or counterclaim.

22. The evidence of Mr Newton was that attempts to agree what matters were variations and if so the amounts to be attributed to them commenced in October 2005 between Mr James on behalf of the appellant and Mr Fortune on behalf of the respondent. Mr Fortune in his witness statement describes how he and Mr James walked through the "entire job site and measured all the works which were done by [the appellant] which [the appellant] was claiming to be variation works." Mr Fortune

states that both he and Mr James came up with the same measurements and thereafter calculated the value of the measurements using the rate sheet. Mr Fortune continued by stating that he then prepared a document ("PF1") which contained the calculations, and that Mr James had no difficulty with the figures he had put in this document. However, Mr Fortune stated that Mr Ali did not agree with the measurements or with the calculations so that he then conducted a remeasurement exercise but on this occasion with Mr Ali. Mr Fortune then said that:

> "However, when we sat down to work out the figures by reference to the structural manual and rate sheet I specifically remember Mr. Ali stating that weights stated in the structural manual were wrong."

Despite the lack of agreement with Mr Ali as to the value of the variations, Mr Fortune then prepared another document ("PF2") valuing the measured variations based on the "agreed measurements, agreed rates and the weight as per the structural manual which Mr James and [he] had agreed." PF2 contained a total figure greater than PF1 "because certain adjustments were made to try to settle and 'close off' this matter and compromise with Mr Ali".

23. Mr Newton in his witness statement recounts how after the measurements were taken in October 2005 and after repeated requests by the respondent, the appellant by letter to the respondent dated 29 January 2007 claimed the amount of TT$14,911,233.04 as being its final variation and lost time claims.

24. After receipt of the letter dated 29 January 2007, the respondent requested input from its own internal audit department but on 5 March 2008, they were advised that the internal audit department could not become involved in operational issues. Mr Newton states that he then met with representatives of the appellant, including Mr Ali, on 10 March 2008 and 23 May 2008. These meetings, he said, were an attempt to try and settle the matter "notwithstanding our previous agreement", by which he was referring to the negotiations in 2005 involving Mr James and the failed attempt to reach agreement with Mr Ali.

25. In his witness statement Mr Ali states that at the meeting on 23 May 2008 it was agreed that various items of additional works were variations and that agreed valuations were attributed to each of them. Mr Newton in his witness statement also gives evidence as to what occurred at those two meetings, and he states that "after the two meetings there was agreement on 26 of the 30 claims." Mr Newton accepted in his evidence at trial that on 23 May 2008 he had the respondent's authority to enter into an agreement with the appellant. Accordingly, the evidence of

the appellant and of the respondent coincides that an agreement was reached at the meeting of 23 May 2008 between Mr Ali as the managing director of the appellant and Mr Newton as the authorised representative of the respondent.

26. After the meeting on 23 May 2008 the respondent sent the June 2008 letter to the appellant which is a record of what occurred at that meeting. It is necessary to give some detail in relation to that letter. It states that it is further "to our meeting of 2008 May 23 re the finalization of your claims associated with Tender No. 03/10141402 - the Strengthening of Platform & Block Station 4 in the Soldado Main Field".

27. The letter recorded the matters which had been agreed between the appellant and the respondent at the meeting on 23 May 2008. In Attachment I the respondent set out “all that has been agreed to thus far” and listed, in relation to each of the variations set out in the attachment, the amount claimed and the amount agreed together with the variation claim numbers and a description of the nature of the variation concerned. It records that the total value of variations which have been “agreed to thus far” was TT$5,180,175.31. The amounts which were agreed related to variations numbered 2, 3, 5, 6, 7, 8, 9, 10a, 10b, 10c, 11, 12, 13, 14, 15, 16, 18, 19, 22, 23, 24, and 26.

28. The letter goes on to set out in Table I the items in relation to which the appellant wanted clarification from the respondent together with the “amount[s] proposed” by the respondent in relation to those items. Included in Table I are variations numbered 17, 20, 21, and 25. Variation 17 is described as “Structural change out of steel” and a detailed calculation is given by the respondent in Attachment II in respect of that variation leading to a proposed figure of TT$1,925,616.10. Variation 21 is described as “Installation of larger sized trusses” and a detailed calculation is given by the respondent in Attachment III in respect of that variation leading to a proposed figure of TT$186,170.40.

29. The June 2008 letter sets out in Table II the respondent’s proposed counterclaim in the total amount of TT$2,123,847.00. The proposed counterclaim had nil entered against both claim 1 “Liquidated damages” and claim 2 “Penalty for removing of barge.” The sums counterclaimed related to claims numbered 3, 4 and 5 which were headed respectively “Services not provided as per contract”, “Cost of Servicers [sic] provided by Trinmar Operations” and “Costs incurred for additional supervision because of late completion.” A detailed calculation is given in Attachment IV in respect of each of those proposed counterclaims. In the event the respondent has not sought in these proceedings to set off any amount nor has it brought any counterclaim.

30. The letter ends by inviting the appellant to another meeting on 27 June 2008 to discuss "the attached" and “bring this issue to closure.”

31. The next material part of the factual background is the appellant’s letter of 19 November 2008. The background to that letter is that the appellant’s claimed variation 17 had not been agreed in the June 2008 letter. Rather, it was one of the variations in Table I in respect of which the appellant had sought clarification from the respondent. The respondent provided a detailed calculation in Attachment II in respect of that variation leading to a proposed figure of TT$1,925,616.10. However, by letter dated 19 November 2008 the appellant revised its claim for variation 17 and submitted a total claim for all the variations including variation 17 of TT$14,580,169.06. In submitting that revised claim, the appellant confirmed that variations 2, 3, 5, 10a, 10b, 11, 14, 15, 16, 18, 19, 22, 24 and 26 had been previously agreed.

32. The respondent replied by letter headed “without prejudice” dated 30 April 2009. For the reasons set out in para 66-74 below the Board considers that this letter is admissible in evidence even though headed “without prejudice.” By that letter the respondent retracted all previous offers and concessions made by it during previous negotiations. The respondent then proceeded to make an itemised assessment as to whether the appellant’s claimed additional work were variations and the value which the respondent attributed to each additional piece of work which it accepted were variations. The total value attributed to the accepted variations was TT$6,859,372.80. However, the respondent intimated a counterclaim for TT$9,853,847.00 which now included liquidated damages and a penalty for removing the barge. Accordingly, the respondent asserted that the appellant owed it the amount of TT$2,994,474.20. As the Board has stated the respondent has not sought in these proceedings to set off any amount nor has it brought any counterclaim. On this basis the admission of liability amounting to TT$6,859,372.80 is no longer subject to any qualification.

33. On 29 January 2010 the appellant’s attorney sent a letter before action to the respondent claiming TT$14,580,169.06. The respondent replied by letter dated 5 March 2010 stating that the appellant’s valid claims amounted to TT$6,859,372.80 but that the respondent was entitled to set off the sum of TT$5,166,783.00 (rather than the earlier figure of TT$9,853,847.00). The respondent claimed that the amount of TT$5,166,783.00 represented damages for the delay by the appellant in completing the contract works and the breach of clause 1 of the special conditions of contract. Again, the respondent has not sought in these proceedings to set off any amount nor has it brought any counterclaim. On this basis the admission of liability amounting to TT$6,859,372.80 is no longer subject to any qualification.

34. In these proceedings and in its "Re-amended Statement of Case" the appellant pleaded at para 20A that "the [appellant] and the [respondent] agreed on 23 May 2008 that" in effect variations numbered 2, 3, 5, 6, 7, 8, 9, 10a, 10b, 11, 12, 13, 14, 15, 16, 18, 19, 22, 23, 24, and 26 (but not 10c) "were and should be treated as variations" and that the value of those variations amounted in aggregate to TT$4,890,175.31.

35. In its amended defence the respondent pleaded amongst other matters that there was an earlier agreement entered into between the parties in October 2005 by their respective authorised representatives. However, in response to the allegation that there was an agreement entered into between the parties at the meeting on 23 May 2008 as evidenced in the June 2008 letter, the respondent did not plead that the appellant had repudiated that agreement so that it could no longer rely on it.

36. At trial Mr Ali gave evidence and was cross examined by Mr Deonarine on behalf of the respondent. On 22 October 2013 during cross examination Mr Deonarine relied on the June 2008 letter and the letter dated 19 November 2008. He invited Mr Ali to "look at" the June 2008 letter, which was in the agreed court bundle of documents, to establish that Mr Ali had agreed to "structural change out of steel" in the amount of TT$1,925,616.10. This was an attempt by Mr Deonarine to discredit Mr Ali's later increased claim for the "structural change out of steel" on the basis that a lower figure had been agreed at the meeting on 23 May 2008. It was also an attempt to discredit Mr Ali's evidence on the basis that the Code of Standard Practice for Steel Buildings and Bridges, Al SE 303-05, 18 March 2005 edition, published by the American Institute of Steel Construction ("the American code") upon which the appellant subsequently relied to increase its claim was available to Mr Ali at the time of the meeting. In fact, Mr Deonarine was mistaken as to the effect of the June 2008 letter. It had not recorded an agreement in relation to the amount for "structural change out of steel" but rather an amount which was proposed by the respondent in respect of that item. However, the point remains that Mr Deonarine put the June 2008 letter before the court and sought to use it to discredit Mr Ali not only on the mistaken basis that a lesser figure had been agreed in relation to this item, but also on the basis that he had not relied on the American code at an appropriate time during the course of attempting to agree a valuation of a claimed variation.

37. Furthermore, during his cross examination of Mr Ali, Mr Deonarine also showed him the appellant's letter dated 19 November 2008 which was also in the agreed court bundle of documents. That was the letter which makes a claim valuing the variations to the work at TT$14,580,169.06 based on the American code's definition of structural steel. Based on the letter dated 19 November 2008 it was suggested to Mr Ali that the appellant's claim had "jumped to 14 million because of [his] definition of structural steel" and that he had come up with "this creative

definition from the American book as structural steel." In short by using the letter in cross examination an attempt was being made to damage Mr Ali's credibility it being suggested that the appellant had used a bogus claim to increase the value of the claim to TT$14,580,169.06.

38. Subsequently on 24 October 2013, despite having himself put the June 2008 letter before the court and made use of it in his cross examination of Mr Ali, Mr Deonarine objected to its use during the cross examination of Mr Newton by Mr Fitzpatrick on behalf of the appellant, on the basis that the letter was part of without prejudice correspondence.

3. The judgments of the High Court and of the Court of Appeal

(a) The judgment of Boodoosingh J in the High Court

39. The judge rejected, at para 5, the respondent's defence that all the appellant's claims were statute barred. He found, at para 9, that the respondent had waived the right to rely on the lack of prior written approval from the respondent's authorised representative in respect of any of the variations. At paras 13-15 he dismissed the appellant's claim (variation 1) for the cost of increased wages payable to its employees in performing the works. At para 26, the judge also dismissed the appellant's lost time claim (variation 19) of TT$1,626,706.15 on the basis that this variation had been agreed in the June 2008 letter at TT$1,257,788.75. It is not necessary for the Board to consider any of these issues as they have either been accepted by the parties or they are not the subject of this appeal to the Board.

40. In relation to the variations set out in the June 2008 letter, the judge rejected the proposition that the letter was part of without prejudice negotiations. He referred, at para 6, to post completion meetings held on 10 March 2008 and 23 May 2008 which led the respondent to send the June 2008 letter. He stated, at para 8, that:

> "In my view, therefore, the meetings which led to the [respondent's] letter of 23 June 2008 and the letter are important for setting out what was agreed between the parties as additions or variations. It was a necessary process to finalise the payments due. The purpose of the meetings was exactly for the purpose of agreeing what was to be paid. No without prejudice designation could therefore be attached to the 23 June 2008 letter. These were not

> negotiations being undertaken for the settlement of a disputed claim but rather an integral step in the process of finalising the payments. Without these meetings and process final payments could not be met."

He continued, at para 11, to hold that:

> "[The respondent's] liability cannot be less than the sums of the Agreed and Admitted Values as set out in the 23 June 2008 letter. … The sum here is TT$7,291,961.81."

The judge considered that there was no need to resolve disputed facts in relation to the variations set out in the June 2008 letter, but rather he stated, at para 12, that the June 2008 letter "is the most appropriate and practical mechanism by which to fix liability for the matters dealt with in that letter." So, the June 2008 letter was the sole basis upon which the judge awarded TT$7,291,961.81.

41. In relation to variations 27A, 27B1, 27B2, 28 and 29 the judge stated, at para 16, that "these were dealt with at paragraphs 134 to 147 of the witness statement of Mr Ali" and that "there was no evidence concerning these matters by the [respondent]." The judge considered the evidence of the respondent's construction supervisor, Mr Fortune in relation to the issue as to whether Mr Ali had "walked through" the works with him resolving that issue in the respondent's favour. The judge also considered the evidence of respondent's project manager, Mr Newton. However, the judge accepted the evidence of Mr Ali remaining of the view that "there was no evidence concerning these matters by the defendant." On that basis he awarded TT$2,680,300.93, which was the amount claimed by the appellant in relation to these variations.

42. The judge made a total award in favour of the appellant in the sum of TT$9,972,262.74, comprising TT$7,291,961.81 based on the June 2008 letter and TT$2,680,300.93 in relation to variations 27A, 27B1, 27B2, 28 and 29. The judge was asked to award interest on those amounts pursuant to section 25 of the Supreme Court of Judicature Act. However, in his judgment he did not address interest on the award so by default no order as to interest was made.

(b) The judgments of the Court of Appeal

43. The lead judgment was delivered by Smith JA. Mendonça JA delivered a concurring judgment. Jones JA delivered a dissenting judgment in relation to the issue as to whether the June 2008 letter was inadmissible as part of without prejudice negotiations between the parties.

44. In relation to the privilege attaching to without prejudice negotiations, Smith and Mendonça JJA extracted several propositions from authorities such as *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280, *Ofulue v Bossert* [2009] UKHL 16; [2009] AC 990; *Bradford & Bingley Plc v Rashid* [2006] UKHL 37; [2006] 1 WLR 2066; *Unilever plc v The Procter & Gamble Co* [2000] 1 WLR 2436.

45. First, Smith JA cited the statement of Lord Griffiths in *Rush & Tompkins* at page 1301 C that "as a general rule the 'without prejudice' rule renders inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made in a genuine attempt to reach a settlement."

46. Second, relying on *Rush & Tompkins* at page 1299 it was said that the rule was "founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish."

47. Third, relying on *Ofulue* and *Unilever plc* it was said that the rule also rests on "the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence."

48. Fourth, relying on *Bradford & Bingley Plc,* at para 64, it was said that as "the exchanges in question were not marked without prejudice … there can be no question of any implied agreement here."

49. Fifth, relying on *Rush & Tompkins* at pages 1299 G to 1300 A and on *Bradford & Bingley Plc*, at paras 62 and 64, it was said that "the application of the rule is not dependent upon the use of the phrase 'without prejudice'." The absence of that phrase is not determinative. "Rather the critical question here is whether 'it is clear from the surrounding circumstances that the parties were seeking to compromise the action' [or] whether, as Sir Robert Megarry V-C put it in *Chocoladefabriken Lindt & Sprungli AG v Nestlé Co Ltd* [1978] RPC 287,288, 'there is an attempt to compromise actual or impending litigation'."

50. Sixth, relying on *Rush & Tompkins* at page 1300 C it was said that an exception to the general rule is that "… the 'without prejudice' material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement."

51. In addition, relying on *Unilever Plc* at pages 2448 to 2449 Mendonça JA stated, at para 37, that:

> "… where there is no concluded agreement, it is not permissible to dissect out identifiable admissions or admitted facts from the without prejudice negotiations."

Relying on *Rush & Tompkins* at pages 1299 H to 1300 A and *Bradford & Bingley Plc*, at para 91, Smith JA stated that "the use of documents as partial admissions has been disapproved of and runs contrary to the underlying policy of the without prejudice privilege." (para 72)

52. Jones JA in her judgment relying on the judgment of Lord Neuberger in *Best Buy Co Inc. v Worldwide Sales Corpn España SL* [2011] EWCA Civ 618; [2011] Bus LR 1166, at para 18, identified that the answer to the critical question as to whether there is an attempt to compromise actual or pending litigation was "to be answered by reference to what a reasonable person, in the position of the recipient of the letter, with its knowledge of all the relevant circumstances as at the date the letter was written, would have understood the writer of the passage to have intended, when read in the context of the letter as a whole." Furthermore, Jones JA considered "that in determining the status of the document it was not appropriate to take into account subsequent correspondence unless perhaps that subsequent document was in reply to the first. Under normal circumstances therefore the letter must be looked at independently of later correspondence." Finally, Jones JA agreed with the passage now found at paragraph 24-24 in *Phipson on Evidence*, 20th edition, that even though correspondence is initiated with a view to settlement, one of the surrounding circumstances is whether the "parties positively want any subsequent court to see the correspondence and always had in mind that it should be open correspondence." (paras 117-119)

53. Mendonça JA, at para 22, referred to the judge's factual finding that the purpose of the meetings on 10 March 2008 and 23 May 2008 was part of a necessary process to finalise the payments due, and as such "[these] were not negotiations being undertaken for the settlement of a disputed claim but were integral steps in the process of finalising payments". Mendonça JA stated that this was the factual basis upon which the judge had held that the meetings which led to the June 2008 letter were not part of without prejudice negotiations. However, Mendonça JA concluded, at para 25, that in arriving at this finding the judge had gone plainly

wrong by failing to take into account material evidence. Mendonça JA identified, at paras 26 – 28, the evidence which the judge had ignored, which related to an earlier purported agreement valuing the variations in the amount of TT$2,327,380.63 from which earlier agreement Mr Ali had purportedly resiled in "January 2007" by submitting a claim valuing the variations in the amount of TT$14,911,233.04. Mendonça JA also referred, at para 31, to that part of the June 2008 letter in which the respondent intimated a counterclaim in the amount of TT$2,123,847.00 before concluding, at para 32, that:

> "It seems clear therefore that differences had arisen between the parties in relation to the variations claimed by the [appellant] and counterclaims of [the respondent]. There were meetings between the parties genuinely aimed at a settlement or compromise of their differences.… In those circumstances the June letter, in my judgment, is a without prejudice communication and accordingly is privileged and inadmissible. The Trial Judge therefore should not have relied on it to arrive at his award in respect of all the other variations."

54. Mendonça JA also rejected the judge's conclusion that the purpose of the meetings was an integral step in the process of finalising payments under clause 7 as he considered that there were matters discussed at the meetings and contained in the June 2008 letter that "went beyond the pale of simply agreeing values." (para 34)

55. Mendonça JA concluded, at paras 39 and 43, that there had been no final agreement between the parties and that it was not permissible to dissect out the identifiable admissions. On this basis there was no exception to the inadmissibility of evidence as part of without prejudice negotiations.

56. Smith JA referred to correspondence post dating the June 2008 letter and at para 68 stated that:

> "The correspondence shows that the parties were genuinely negotiating with a view to reaching a settlement. There was no concluded compromise nor was there an agreed settlement. The letter of 23 June 2008 was a part of these negotiations and thus the without prejudice privilege would make the contents of that letter such as admissions and partial admissions, inadmissible in subsequent litigation between the parties …."

57. Smith JA also rejected the appellant's submission that the letter of 23 June 2008 was proof of a contractual agreement pursuant to clause 7 so that it could be admitted in evidence. He rejected this submission for three reasons.

58. First, he stated, at para 71, that:

> "even if parties are contractually bound to agree, it does not put the process of agreement outside of the without prejudice rule of evidence. In fact, the without prejudice rule of evidence and its deep-rooted validation in public policy protects the process of negotiation even if the words without prejudice are not used" (emphasis added by Smith JA).

59. Second, he stated, at para 72, that:

> "… at best, [the respondent] is trying to use the letter as a partial admission. An attempt to excise an independent partial admission from the letter runs contrary to the reading of the letter as a whole. The letter proffered partial admissions, denials, counter-proposals and set-offs/deductions as part of a total package to invite [the appellant] to 'a meeting on 27 June 2008 to discuss the attached (letter) and bring this issue to closure.' Further, the use of documents as partial admissions has been disapproved of and runs contrary to the underlying policy of the without prejudice privilege" (emphasis added by Smith JA).

60. Third, he stated, at para 73, that:

> "Clause 7 merely provided for agreement to be reached between the parties only on the value of extras, alterations, additions or omissions. At the time of the letter of 23 June 2008 and the meetings between the parties there were substantial disputes as to whether some of the matters in the Respondent's claims were even variations, extras or additions for which they could be paid and/or were matters that were already catered for in the contract price. These were not issues concerning the value of the extras,

> alterations, additions or omissions which the parties should agree under clause 7 but were issues that were outside the ambit of the mechanism for agreeing values as provided for in clause 7." (emphasis added by Smith JA)

This led Smith JA to conclude that "at the time of the letter of 23 June 2008 and the meetings between the [a]ppellant and the [r]espondent, the parties were not truly engaged in meetings pursuant to clause 7 alone" so that the judge erred in holding that the meetings which led to the June 2008 letter were pursuant to the contractual process.

61. Smith JA, at para 79, agreed with Mendonça JA that it would be inappropriate to dissect out the admissions contained in the June 2008 letter and, at paras 87 to 90, rejected the proposition that the respondent had waived the without prejudice privilege by (i) the respondent's defence; (ii) the respondent's cross examination on the June 2008 letter; and (iii) disclosure of the letters in the respondent's list of documents.

62. In accordance with the judgments of the majority, the Court of Appeal ordered that judge's award of damages was set aside and the matter was remitted to the High Court for rehearing. The Court of Appeal also ordered that the rehearing is "to proceed without reference to the `without prejudice' letters (including the letter of 23 June 2008 from the [respondent]) and meetings which represented the negotiations between the parties toward a settlement of the [appellant's] claim)." As the judge's award of damages was being set aside and as the matter was being remitted for rehearing it was not necessary for the Court of Appeal to determine the appellant's cross appeal in relation to the judge's omission to consider an award of interest, though Jones JA stated, at para 150, that she accepted that interest will usually be awarded on the sums payable.

63. Jones JA identified, at paras 102 and 104, two core questions in relation to the June 2008 letter. First, whether it was part of a privileged communication or whether it was "simply generated as part of the process under the contract for arriving at a value for the works." Second, if the June 2008 letter is admissible then what is its effect.

64. In relation to the first question Jones JA held, at para 102, that the June 2008 letter was simply generated as part of the process under the contract for arriving at a value for the works so that it was admissible in evidence. Jones JA considered that the "relevant circumstances here include the contractual provisions and the nature of the meetings from which the June letter emanated." The relevant contractual

provision was clause 7. Jones JA considered, at para 124, that in "accordance with clause 7 of the contract the meetings were a necessary step in the process to determine what, if any, additional sums were due to [the appellant] for the works." She stated, at para 128, that:

> "… this is a situation where, in accordance with their contractual arrangements, the parties must have contemplated that correspondence confirming agreements arrived at in meetings held in furtherance of the finalization of the value of additional works should be open correspondence. To now assert otherwise and to rely on the 'without prejudice' rule would be to abuse the protection afforded by the rule."

Consequently, she concluded, at para 129, that "the June letter was admissible and the Judge was entitled to consider the contents of the June letter in coming to his determination as to the sums of money due to the [appellant]."

65. In relation to the second question, Jones JA concluded that the judge had made two errors. The June 2008 letter identified agreed values for variations in Attachment I as being TT$5,180,175.31 not TT$7,291,961.81. Also, the judge had not considered whether the agreed amount of TT$5,180,175.31 should be added to the contract price. Before it could be added there had to be consideration of claims by the respondent against the appellant. Accordingly, Jones JA would have set aside the judge's award of TT$7,291,961.81 and remitted the matter to the High Court for "a determination in accordance with Clause 7 of the contract on what compensation, if any, is the [appellant] entitled to receive for those items the value of which had been agreed between the parties and identified in Attachment I to the letter of June 23 2008."

4. The first issue: whether the Court of Appeal was correct to find that the June 2008 letter was without prejudice and inadmissible.

66. In agreement with the judge and Jones JA the Board concludes that the June 2008 letter was admissible because the agreements reached at the meeting on 23 May 2008, as recorded in the June 2008 letter, were part of the process under clause 7 of the contract for arriving at a value for the work which process was intended to be open. The Board arrives at this conclusion for several reasons.

67. First, the Board accepts that the judge did not refer to or grapple with the evidence as to the negotiations which took place in October 2005. However, consideration of the evidence in relation to those negotiations reveals that no agreement was reached at that stage. It was not established that Mr James had any authority to enter into an agreement on behalf of the appellant and it is common case that Mr Ali expressly disagreed with the respondent's measurements and calculations (see paras 22-24 above). The conclusion that there was no concluded agreement is reinforced by the fact that in 2008 Mr Newton was prepared to continue to negotiate with the appellant which would have been surprising if there was an earlier concluded agreement in October 2005.

68. Second, the contractual obligation under clause 7 was not simply to agree values. Where, as here, the respondent waived the obligation resting on the appellant to obtain the prior written approval of the respondent's authorised representatives for a variation of the work, then to comply with the obligation to agree the value of the variation there is an anterior obligation on both parties to agree whether there has been a variation. The Board disagrees that the content of the June 2008 letter went beyond the scope of clause 7 because Attachment I "went beyond the pale of simply agreeing values" (see para 54 above) and disagrees that "Clause 7 merely provided for agreement to be reached between the parties only on the value of extras, alterations, additions or omissions" (see para 60 above). In this case the contractual obligation on the parties is to agree both the variation and the value (see para 17 above).

69. Third, clause 7 imposes an obligation on the parties to be involved in a process in which they state and revise their respective positions in relation to whether the work has been varied and if so the value of the variation. The process is with a view to seeking agreement in accordance with their contractual obligation under clause 7. It is to be seen as an ongoing process which is distinct from negotiations between parties who in contemplation of litigation seek to settle their differences. There is no policy reason why the contractual process should be conducted on a without prejudice basis. Rather, if subsequently a court must determine whether there has been a variation and the value to be attributed to it the court will be assisted by knowing the earlier positions adopted by the parties. For instance, from the positions adopted by the parties a court might be assisted in identifying inflated or unmeritorious claims. This is not to say that there cannot be two parallel processes: one the open contractual process and the other separate "without prejudice" negotiations conducted in correspondence in which a party makes an offer to compromise the position adopted in the open correspondence.

70. Fourth, in these circumstances a reasonable person would understand the parties' joint intention to be that the process of reaching agreement should be an

open process. The parties did not intend any of the correspondence forming part of that process to be without prejudice including the respondent's letter dated 30 April 2009 albeit headed "without prejudice" as objectively that letter was part of the process under clause 7. The consequence is that any correspondence objectively forming part of that process is admissible in evidence.

71. If, contrary to the Board's conclusion the June 2008 letter was part of without prejudice negotiations, then in accordance with the contractual obligation to individually agree each variation (see para 13(e) above), the letter records concluded agreements that certain individual items were variations and as to the value of those individual items. Accordingly, the letter falls within the well-established exception that without prejudice correspondence can be admitted to determine whether an agreement has been concluded, see *Phipson on Evidence*, 20th edition at para 24-26. The Board disagrees with Mendonça JA at para 55 above and Smith JA at para 59 above that the appellant's use of the June 2008 letter impermissibly dissected out admissions. No question of dissecting out admissions arises because the June 2008 letter is not being relied on as an admission of liability. Rather it is being relied on as recording an agreement as to the existence and value of certain variations in circumstances where there is a contractual obligation to agree individual variations and where such agreements are enforceable even if there is no all-embracing agreement, see para 13(e) above.

72. If, contrary to the Board's conclusion the June 2008 letter was part of without prejudice negotiations, then the Board considers that there has been a waiver of the without prejudice qualification. One of the matters relied on by the appellant to establish a waiver of privilege is that the respondent in its defence, at paragraph 7, pleaded that:

> "… during the period January 2007 to April 2009 the parties were engaged in efforts to amicably resolve this dispute via a series of meetings and correspondence. The [respondent] would rely on the said correspondence for the period January 2007 to April 2009 for its full term[s] true meaning and effect."

By this pleading the respondent expressly takes the voluntary decision to put all this correspondence before the court and expressly intends to rely on it for its full terms, true meaning, and effect. The Board considers that this pleading amounts to an unequivocal waiver of any without prejudice qualification attached to all the correspondence including the June 2008 letter and the letter of 30 April 2009.

73. Another matter relied on by the appellant to establish a waiver of privilege is that the respondent by its own counsel waived privilege by positively relying on the June 2008 letter during the cross examination of Mr Ali, see para 36 above. The appellant submits that this was another voluntary decision made by the respondent to treat the June 2008 letter as admissible and that there would be an obvious inconsistency if thereafter the respondent was able to maintain any privilege attaching to the letter. Again, the Board considers that the use of the letter during cross examination amounts to an unequivocal waiver of any without prejudice qualification.

74. The Board concludes that the June 2008 letter was admissible in evidence and could be relied on by the judge. The appellant claims that variations about which there is no dispute were identified in Attachment I of the June 2008 letter and that the June 2008 letter recorded the agreed value of those variations as being TT$5,180,175.31. The Board agrees that the letter read with Attachment I records an agreement reached between the parties on 23 May 2008 in accordance with clause 7 of the contract. Further, that there was no issue at trial as to whether an agreement was made on 23 May 2008, see para 25 above. Also, the respondent did not plead that the appellant had repudiated the agreement so that it could no longer rely on it. Consequently, there was uncontroverted evidence of a concluded agreement in relation to variations numbered 2, 3, 5, 6, 7, 8, 9, 10, 10b, 10c, 11, 12, 13, 14, 15, 16, 18, 19, 22, 23, 24, and 26 and of an agreement as to the value of those variations as being TT$5,180,175.31. The judge was entitled to rely on that evidence to make an award in favour of the appellant.

75. However, the Board considers that the judge was in error to rely on the June 2008 letter to make an award of TT$7,291,961.81 because the agreed value of the variations listed in Attachment I was TT$5,180,175.31. The additional amount of TT$2,111,786.50 set out in Table I was the total of respondent's proposed amounts in relation to variations numbered 17, 20, 21 and 25. There was no agreement in relation to those variations. An award should not have been made on the basis that the amount of TT$2,111,786.50 had been agreed. There has been no determination as to whether the appellant is entitled to an award in respect of those claimed variations, not on the basis that they were agreed but on the basis that they were variations. Accordingly, the appellant's claims in respect of variations numbered 17, 20, 21 and 25 should be remitted to the High Court for rehearing.

76. In relation to the agreed amount of TT$5,180,175.31 set out in the June 2008 letter the Board in agreement with Jones JA considers that the next question is whether that amount should be added to the contract price. However, the Board does not consider that it is necessary or appropriate to remit this question to the

High Court in circumstances, where, as here, there is no set off or counterclaim. In short there is no reason why an amount should not be added to the contract price.

77. It was submitted on behalf of the appellant that the appropriate amount to be added to the contract price was TT$5,180,175.31. However, this ignores the appellant's pleaded case that the amount agreed was TT$4,890,175.31, see para 34 above.

78. In relation to the first issue the Board concludes that the June 2008 letter was admissible in evidence and that the sum of TT$4,890,175.31 should be added to the contract price. Accordingly, the Board will make an award in favour of the appellant in that amount. The Board remits to the High Court for rehearing the appellant's claims in respect of variations numbered 17, 20, 21 and 25.

5. The second issue: whether the Court of Appeal was correct to interfere with the judge's approach with respect to variations 27A, 27B1, 27b2, 28 and 29.

79. The Court of Appeal held that the judge had fallen into error and wrongly awarded TT$2,680,300.93 in relation to variations numbered 27A, 27B1, 27b2, 28 and 29 on the erroneous basis that there was no respondent's evidence in respect of these variations. The appellant submits that the judge did refer to and did take into account the evidence of Mr Newton. The respondent submits that the judge not only failed to take into account Mr Newton's evidence but that his evidence ought to have led to this head of claim being rejected. In advancing that submission the respondent referred to for instance Mr Newton's evidence contained in para 32 of his witness statement that in his final review of the appellant's claims the respondent maintained the position that the items were already contained in and formed part of the scope of work and as such were not variations. In relation to that example the judge did not explain why he considered that the alleged additional works were indeed variations. Rather, the judge wrongly stated that there was no evidence concerning these variations given by the respondent.

80. The Board, in agreement with the unanimous judgments in the Court of Appeal, considers that the award made in relation to these variations was on the erroneous basis that there was no respondent's evidence and that these variations should be remitted to the High Court for rehearing. In such circumstances where a rehearing is ordered it would not be appropriate for the Board to analyse all the evidence in relation to these variations as questions as to the strength or the effect of the evidence must now be decided at a rehearing.

6. The third issue: whether the judge erred in failing to make an award with respect to interest.

81. The judge erred in failing to consider his discretion under section 25 of the Supreme Court of Judicature Act to award interest on the amounts awarded to the appellant. Consequently, the question as to whether interest should be awarded on the amount of TT$4,890,175.31 should be remitted to the High Court. Furthermore, if the High Court makes any award in favour of the appellant in relation to variations numbered 27A, 27B1, 27b2, 28 and 29 then in respect of that award the High Court should also consider its discretion to award interest.

7. Conclusion

82. The Board allows the appeal in relation to the first issue setting aside the order of the Court of Appeal in relation to variations 2, 3, 5, 6, 7, 8, 9, 10, 10b, 11, 12, 13, 14, 15, 16, 18, 19, 22, 23, 24, and 26 and makes an award in favour of the appellant in respect of those variations in the amount of TT$4,890,175.31.

83. The Board remits to the High Court for rehearing the appellant's claims in respect of variations numbered 17, 20, 21 and 25.

84. The Board dismisses the appeal in relation to the second issue and remits to the High Court for rehearing the appellant's claims in respect of variations numbered 27A, 27B1, 27b2, 28 and 29.

85. In respect of all the claimed variations remitted for rehearing evidence as to what occurred at the meetings forming part of the clause 7 process is admissible in evidence as is the correspondence forming part of that process.

86. The Board allows the appeal in relation to the third issue and remits to the High Court the question as to whether in the exercise of discretion interest should be awarded on the amount of TT$4,890,175.31 or on any further amount that might be awarded to the appellant in relation to variations numbered 17, 20, 21, 25, 27A, 27B1, 27b2, 28 and 29.