THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO. SLUHCV 1999/52

BETWEEN:

WINDWARD CONSTRUCTION COMPANY LIMITED

Claimant

and

WATER AND SEWERAGE COMPANY INCORPORATED

Defendant

Appearances:

Shan Greer for Claimant
Kimberley Roheman for Defendant

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2005: March 7, 8, 10

April 8, 13

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Introduction

1. SHANKS, J: In 1991 the Defendant's predecessor, WASA, invited tenders for the construction of a sewerage scheme for the Gros Islet-Rodney Bay area. The scheme comprised three elements. Lot 1 involved the provision of sewerage pipes to a main pumping station near the Gros Islet highway and pipes from there to a treatment plant

at Beausejour and the construction of a 1.6 km road from the pumping station to the treatment plant along with electricity, water and telephone services for the treatment plant. Lot 2 involved the construction of the pumping station itself. Lot 3 involved the construction of the treatment plant comprising a series of ponds for the treatment of the sewerage and an operations building. A joint venture consisting of the Claimant and a French company called SOGEA (which specialized in electro-mechanical works, eg pumps) tendered for the whole job but was unsuccessful.

2. Following negotiations the Claimant alone entered into a contract with WASA on 9 March 1992 to carry out the works on lots 2 and 3 with SOGEA as its sub-contractor in relation to the electro-mechanical works. The contract incorporated the FIDIC General Conditions. The Engineer appointed by WASA was M Grandjean of BCEOM, the French consultants who had designed the scheme. The price of the works to be done by the Claimant was $1,955,402 for lot 2 and $5,586,637 for lot 3, though a substantial part of these sums was to be paid direct to SOGEA in French francs. Liquidated damages were specified as $1,000 per day for each of lots 2 and 3. WASA decided to carry out the lot 1 works in-house and later sub-contracted the construction of the road from the pumping station to the treatment plant to a company called B & D Construction.

3. The order to commence was given on 13 April 1992. Under the Claimant's contract the work on lots 2 and 3 should therefore have been finished by 15 July 1993. In fact it was not completed until 25 November 1994, 71 weeks later. Included in the final payment certificate dated 30 September 1996 is a substantial claim for liquidated damages by WASA which resulted in the Claimant receiving no release of retention

moneys against that certificate. The Claimant says that these liquidated damages should not have been awarded by the Engineer. It also says that the Engineer should have allowed a claim made on 16 March 1996 for some $5.5 million as losses it incurred by reason of the 71 week delay, which it says was caused entirely by breaches of contract by WASA. WASA says that the liquidated damages were rightly imposed, denies that it is responsible for the delay and says that the losses claimed are extravagant and unproven. It was accepted by the parties that it is open to me under cl 67 of the FIDIC conditions to "open up, revise and review" any decision or certificate of the Engineer.

The evidence

4. As with many construction disputes there are numerous interlocking issues in the case and a mass of documents (in particular the contractual documents, the site meeting notes, party and party correspondence and the certificates and other documents issued by the Engineer). Fortunately the areas of primary factual dispute are limited and the witnesses who gave evidence (namely John Allamby, a director of the Claimant, Joseph Fevrier, the Claimant's Project Manager, John Holland, a contracts manager for CO Williams who hired plant to the Claimant, and Errol Frederick, WASA's sewerage operations manager) were all doing their best to assist the court to resolve an unfortunate commercial dispute. As well as hearing their evidence I was taken on a very helpful site visit by the parties and their attorneys (and, I should say, I was provided with very thorough and helpful written submissions before trial by both attorneys as well as oral submissions at the close of the trial).

5. Mr Harry Phelps of Trinidad was appointed as a single expert at the request of the parties in November 2003 and the parties accepted at the time that they would be bound by any answers given by him to their questions. In my judgment against that background the court must accept Mr Phelps's conclusions in so far they give discernible answers to the questions put by the parties and they do not contain manifest errors of fact or proceed on a false basis of law. Ms Roheman for the Defendant accepted that proposition but she said that his reports contained various anomalies which meant that his conclusions could not be relied on: I will deal with the conclusions in Mr Phelps's reports in the course of considering the various possible causes of delay in detail.

Delay

6. Before turning to deal with the causes of the delay, it is fair to say that the concept of delay in a case such as this is a highly elusive one given the myriad of causes and effects that can operate over a particular period of time. And, as the editors of one of the leading text books say, "the determination of the correct period of delay attributable to an employer's breach is one of the most complicated and difficult issues of fact in building litigation" (see: *Hudson's Building and Engineering Contracts* 10th Ed 1970 p603).

7. It is also true that the parties and Mr Phelps do not always seem to distinguish clearly between the question of how long an extension of time the Claimant ought to have been given for completion of the works by the Engineer and the quite separate question whether a particular period of delay was attributable to a breach of contract on the part of WASA which would entitle the Claimant to damages.

8. I will consider the possible causes of delay under the following heads:

(1) WASA's failure to give possession of lot 3;

(2) The failure to provide proper drawings;

(3) The problems with the access road;

(4) Ingress of water at lot 2 caused by leaking from sewer pipeline;

(5) Miscellaneous other causes of delay.

Failure to give possession of lot 3

9. Work on site began on 11 May 1992. On 19 May 1992 instructions were issued to the Claimant not to enter lands owned by Andes Louis: this was as a result of a dispute with him over land acquisition. The Andes Louis lands comprised about 34 out of the 55 acres which make up the lot 3 site and 17 of them were required for the construction of the ponds forming the work the Claimant was contracted to do on that site. Only on 26 August 1992 was the Claimant authorised to enter the Andres Louis lands again.

10. It was not disputed that the failure to give the Claimant possession of the Andes Louis lands for that period involved a breach of cl 42 of the FIDIC general conditions: indeed the Engineer granted an extension of time of two weeks and awarded compensation of $49,000 in respect of the failure to give possession (see letter of 20 December 1993 and Payment Certificate no 7). Mr Phelps states at page 4 of his first report that a two week extension to compensate for the three month delay was inadequate and that compensation of $49,000 was inadequate having regard to the discrepancy between three months and two weeks.

11. Ms Roheman cross-examined Mr Fevrier and Mr Allamby to the effect that the lack of possession of the Andes Louis lands for the period 19 May to 26 August had not or need not have caused three months' delay to the overall works. Whilst I could see that there may have been something in the some of the points she was making it seems to me that Mr Phelps's answers are sufficiently clear to indicate that his view is that a three month delay had been caused and that the parties and the court are therefore bound by that conclusion. Nor do I think that Mr Phelps's stated inability to comment on the calculations made by the Engineer as a result of insufficient information undermines his other conclusions on this part of the case: he is quite clear that $49,000 based on a two week delay allowance is inadequate.

12. I therefore conclude that there was a delay of three months in relation to lot 3 caused by WASA's breach of cl 42 for which the Claimant ought to have been granted a three month extension under cl 44 and for which the Engineer ought to have certified a sum greater than $49,000 as compensation. I shall assess that compensation as part of the overall damages for delay.

Failure to provide proper drawings

13. The contract drawings issued to the Claimant by the Engineer contained errors in the ground levels shown. Responsibility for this was accepted by the Engineer at a meeting on 3 September 1992. It led to a substantial redesign of the embankments to the stabilization ponds, which itself led to changes in the requirements of the electro-mechanical works to be supplied by SOGEA. Sometime around early November the Claimant reluctantly agreed to take responsibility for producing the new drawings

required by this redesign although the Engineer and not the Claimant had primary responsibility for producing drawings. Unfortunately there were delays in the production of the drawings by the Claimant.

14. Mr Phelps is clear in his reports that the Claimant ought to have received an extension of time and compensation under cl 6 of the FIDIC general conditions for the Engineer's failure to provide accurate drawings and that the claimed sum of $108,000 for the Claimant's own costs of producing the new drawings was justified and reasonable in amount. Unfortunately, however, his report is not at all clear as to the amount of time that ought to have been given by way of extension and/or which is attributable to a breach for which WASA must bear responsibility (see pp 1-4 of the first report and p 1 of second report).

15. Ms Greer indicated in her closing submissions that the Claimant was claiming compensation for just one month's delay in relation to the drawings. I think on any reading of the Phelps reports that is justified and I therefore conclude that the Claimant must be compensated for a further one month's delay for this matter which will relate to both lots 2 and 3.

16. As to the claim for $108,000, Ms Roheman contended that there was no evidence that the Claimant had actually produced the drawings. I think it was pretty clear from the documents that they had done so and in any event it was implicit in Mr Phelps's findings that they had done so. She also contended that the Claimant could not claim the $108,000 because they had voluntarily agreed with the Engineer that they would produce the drawings. In the circumstances that applied at the time I think it must

have been implicit in their agreement to take on the Engineer's work that they expected to be paid for it and/or they were spending money to mitigate their losses flowing from the errors in the initial drawings, which money on general principles would be recoverable as damages. I am satisfied that the sum of $108,000 is recoverable by the Claimant as part of its compensation under cl 6(4).

Access road

17. It is self-evident that there was a relationship between the works on lots 2 and 3 and those on lot 1, if only because all three sets of works would have to be complete before the sewerage system could function. Mr Allamby told me (and I accept) that it was always understood during negotiations that access to lot 3 would be available through lot 1 and there is no doubt that it was made clear in the technical specifications which formed part of the Claimant's contract documents that co-ordination of the work on lots 2 and 3 with that on lot 1 would be the responsibility of the Engineer. Further, according to the Engineer's letter of 6 November 1992 it was originally planned that the road in lot 1 would be completed at an early stage by July 1992.

18. At the outset there was a track through lot 1 which gave some access to lot 3. The Claimant made some improvements to this track during the initial phase of work sufficient to allow it to carry the service and fuel vehicles which would be necessary to keep the heavy equipment on lot 3 functioning, at least in good weather. Having decided to do the lot 1 works themselves WASA invited tenders for the construction of the access road which formed part of those works on 4 May 1992. The invitation, which was sent to the Claimant, stated that reasonable access would have to be allowed to the contractor on lot 3 during the construction of the access road. The

successful tenderer was B & D Construction who undertook (extremely optimistically as it turned out) to start work in early June and to complete the road to sub-base level within 100 days.

19. Unfortunately progress on the new access road was extremely slow. On 21 July 1992 the Claimant complained about the condition of the existing track and stated that they needed an alternative access route (see Engineer's letter of 6 November 1992). On 25 August 1992 Mr Fevrier wrote to the Engineer again complaining about the condition of the existing track and stating that the Claimant had mobilized without a proper access road in place on the understanding that a proper motorable road would be constructed within three months. At a meeting on 3 September 1992 the Engineer acknowledged that the delay in relation to the construction of the road was causing a constraint for works on lot 3 because the actual access was in bad condition and an alternative access from the Cas-en-Bas road was not motorable after heavy rain.

20. By a letter of 23 September 1992 the Claimant offered to construct a temporary road via the Cas-en-Bas road while the main access road was being completed, quoting a price of $96,000 to construct it and $10,000 per month to maintain it and estimating that it would take two weeks to complete. The Engineer's answer dated 30 September 1992 was to the effect that WASA would not pay for this since under cl 81 of the contract it was the responsibility of the Claimant to provide and maintain access to lot 3. This position was maintained by the Engineer and the Claimant for its part did not improve the existing route via the Cas-en-Bas road in the way offered but continued to use it in its "rough cut" form right until the end of the contract so that it could not be used when it rained heavily and delays to the works on lot 3 continued.

21. There was a dispute between the parties as to whether the Claimant's inability to access lot 3 through lot 1 during this period resulted from the weather and the fact that the new motorable road had not been constructed within the originally envisaged time scale or whether it resulted from the fact that B& D Construction in the course of their works actually obstructed the existing track. In evidence Mr Fevrier said that in the course of putting in culverts B & D Construction opened up deep trenches which were simply left open for long periods making the existing track impassable. This was hotly denied by Mr Frederick. There was no mention of culverts in the Claimant's witness statements and the only reference to them in the papers is in the notes of a meeting of 23 September 1993 (i.e. nearly 18 months into the work) which is to the effect that because of works on the culverts in the lower section of the road diversions had been made to the existing track which were not good enough to allow the Claimant's water tankers to pass and that the Engineer would ask B & D Construction to improve the diversions. This note does not seem to me to be consistent with the Claimant's case put by Mr Fevrier in relation to the culverts. On the other hand logic would suggest that the construction of a road on roughly the same alignment as the existing track would tend to obstruct it unless special arrangements were made and that is consistent with the case put by Mr Allamby in his letter of 12 January 1993 and with the answers given by Mr Phelps on this part of the case (see pp 4/5 of his first report).

22. In the circumstances my finding is that the construction of the road by B & D Construction did in itself obstruct the Claimant's access through lot 1 to some degree and that it caused some delay to the Claimant and that the slow progress of the road works extended that delay. I shall consider below the vexed question whether WASA

were in breach of contract by reason of this obstruction. Before I turn to that I note two points in relation to the delay actually caused by the obstruction. First, no satisfactory evidence has been given as to the precise period of the delay caused; Mr Phelps simply states (paragraph 4 on p5 of his first report) that the delays were "severe". Second, there is a strong argument that the Claimant in failing to go ahead and carry out the works to the Cas-en-Bas access route which it was proposing failed to mitigate any loss which it was suffering in this respect.

23. Cl 81(1) in the particular conditions states that the Claimant is to provide and maintain such access roads as may be necessary throughout the contract. Cl 81(4) states that any temporary or permanent roads which exist in connection with the works may be used by the Claimant but subject to any conditions imposed by the Engineer and that any permission by the Engineer would not relieve the Claimant of any obligations under the contract. Cl 81(5) requires the Claimant to satisfy himself in relation to means of access before tendering and states that it shall be deemed to have obtained all necessary information. On the face of it, therefore, access is the Claimant's problem under the contract and there is no basis for a claim based on WASA's failure to maintain unimpeded access by a particular route.

24. Ms Greer with characteristic ingenuity had a number of possible answers to this difficulty. Her first was to say that lot 1 was part of the site of the Claimant's works and that WASA were in breach of cl 42 in failing to give possession of that portion of the site in order to enable the Claimant to proceed with the works. In this connection she referred to sections 102 and 104(d) of the Common Specifications which were part of the contract documents. I do not think the references to the access road or track in

those paragraphs was intended to make lot 1 part of the Claimant's site and this would not be consistent with the general scheme of the contract or the definition of "site" in cl 1 of the FIDIC General Conditions.

25. Second, she maintained that it was an implied term of the contract that the lot 1 work would be completed before the start (or the completion) of the lot 2 and 3 work or that WASA or its contractors would carry out their obligations "under the contract in timely fashion". Quite apart from her obvious difficulty in formulating such an implied term and that WASA and its contractors did not have any obligations to carry out works under the contract with the Claimant (let alone in a timely fashion), it is clear that none of the versions suggested can be said to be necessary to give business efficacy to the contract between the Claimant and WASA. It would have been possible in theory as I understand it for the Claimant substantially to complete the works on lot 3 without the works on lot 1 being completed or even started.

26. Third, she relied on an implied term that WASA would not destroy the Claimant's works or hinder the Claimant in carrying out its work. Terms are often implied to the effect that neither party to a contract will prevent the other performing it (see Halsbury's Laws Direct *Contract* para 786) and, in the building context, that if part of the works are excluded from the contract, neither the employer nor his direct contractors in carrying out the excluded works will hinder the contractor in the performance of his contract (see Halsbury's Laws Direct *Building Contracts* para 103). But there is no scope for implying terms where the matter in question is covered by the express terms of a contract. In this case it seems to me that cl 81 deals with the issue of access to lot 3 and who is responsible for securing it and who will bear the risk if a particular access

route is obstructed so that it is not appropriate to imply terms dealing with the obstruction or destruction of the Claimant's access through lot 1 save for one to the effect that WASA would not *deliberately* obstruct or destroy an access. There is no suggestion that WASA acted deliberately in this case.

27. In the circumstances notwithstanding Ms Greer's ingenuity it does not seem to me that WASA were in breach of any express or implied contractual terms by reason of the obstruction of the access through lot 1 and I need not therefore consider further the question of what compensatable delay resulted from that obstruction. That is not to say, however, that the Engineer would not have been able to extend time under cl 44 to take account of delays caused by extended obstructions to the access through lot 1.

Ingress of water at lot 2

28. Mr. Fevrier's statement at paragraph 26-28 complains about the ingress of water to lot 2 from WASA's sewer pipeline between July 1993 and January 1994 which was the case of numerous written complaints (see LT 32, 34, 40, 41 and 62), and which Mr. Fevrier says caused delays in the construction of the pumping station because the Claimant could not continue with its concrete works at the base of the pump well. The Engineer granted a three week extension in respect of this ingress of water in December 1993 (see LT39). It is plain that Mr. Phelps regards this problem as being the responsibility of WASA and that in his view it caused two months delay to the lot 2 works (see first report pp6-7, second report page 2, third report p1 paragraph 1 (b).

29. Although the point was not canvassed expressly at trial it sees to me that WASA must

have been in breach of the implied term not to hinder the Claimant in the performance of his contract (which I have already referred to in a different context) in allowing this ingress of water to continue (see: paragraph 26 above and see also Ms. Greer's skeleton argument at pages 7 and 9). The Claimant is therefore entitled to damages for its losses flowing from two months' delay in respect of lot 2.

Miscellaneous causes of delay

30. There is a complaint in Mr. Allamby's statement at paragraphs 44–48 that the Claimant received late instructions which led to delay and to the failure to construct a drain to alleviate flooding on lot 3 which in turn led to damage by siltation when Tropical Storm Debbie hit. This complaint is reflected in paragraph 12 (d) of the statement of claim. However, as far as I can see, there is no evidence from Mr Phelps or otherwise as to the delay, if any, caused by these matters and they are not referred to anywhere in the submissions put forward by Ms. Greer. It is fair to say that Mr. Phelps at page 7 of his initial report confirms the evidence about siltation.

31. There is a further complaint at paragraph 49 of Mr. Allamby's witness statement to the effect that in constructing lot 1 works WASA dug up some of the Claimant's works, destroyed a sewer laid by the Claimant between the operations building and the main inlet structure and installed pipes wrongly so that they leaked and destroyed the Claimant's work. These matters are pleaded at paragraph 12(f) of the statement of claim but no evidence was given as to any loss, damage or delay following from them.

32. At paragraph 11.6 of the Defence it is alleged that the delays in relation to lot 3 were caused by the Claimant's own fault resulting from initial delay in mobilizing, poor

organization and staffing, delays in mobilization after approval, lack of submission of programmes and delays in providing working drawings. I have dealt with delays in providing drawings in the context of the allegation about a failure to provide drawings on the part of the Engineer. As to the other points in paragraph 11.6 of the Defence, I do not believe that I need to resolve them because they do not form the basis of any counterclaim by the Defendant and I will award damages to the Claimant only on the basis of periods of delay caused by WASA's breaches.

Extension of time

33. Under cl 44 of the FIDIC general conditions the Engineer must allow extensions of time if (a) there is additional work or (b) any cause of delay referred to in the conditions or (c) exceptional adverse weather or (d) other special circumstances not caused by the Claimant's default, any of which fairly entitle the Claimant to an extension. By his letter of 20 December 1993 the Engineer granted an extension of time for lots 2 and 3 up to 28 February 1994.

34. The Claimant apparently requested a further extension to 31 July 1994 in a letter dated 16 March 1994 (not before the court). By a letter of 29 March 1994 the Engineer appears to have passed on responsibility for making a decision on the matter to WASA. By its letter of 18 April 1994 WASA purported to extend time to 31 July 1994. In a letter dated 22 June 1994 to the Engineer (not copied to the Claimant) WASA suggest that this extension only related to SOGEA's electro-magnetic works and not the balance of the Claimant's works. By a letter of 12 October 1994 WASA told the Claimant that if work was not completed by 21 October 1994 they would rely on cl 46

and 47 (liquidated damages). In the event work was substantially completed on 25 November 1994.

35. Payment certificate no 24 issued on 24 December 1994 charged liquidated damages of $49,000 arrived at by applying $1,000 a day for the period 22 October to 25 November in relation to lot 3 and 22 October to 4 November (I have no idea why only 4 November and not 25 November) for lot 2. This was consistent with the position apparently being taken by WASA in its letter of 12 October 1994. However, on 11 May 1996 in response to the Claimant's initial claim the Engineer purported to charge $445,762 in liquidated damages in respect of both lots claiming a sum in respect of civil works for the period 1 March to 25 November 1994 and in respect of electro-mechanical works for the period 1 August to 25 November 1994. This figure duly appeared in the final payment certificate no 27 issued on 30 September 1996.

36. It is clear from Mr Phelps's report that his view is that the extension of time which ought to have been given was 60 weeks, i.e. to about 10 September, or 11 weeks before substantial completion on 25 November 1994 (see p 2 of second report and p 1 of his third report). In my judgment this view must be accepted by the parties and the court and I accordingly find that the contract ought, if cl 44 had been properly applied, to have been extended by 60 weeks.

37. If I am wrong in that conclusion it seems to me that it is not open to WASA to contend that the contract as a whole has not been extended to 31 July 1994 given their letter of 18 April 1994 (even if they did usurp the Engineer's role) and the fact that the Claimant kept working thereafter. It is also clear that the Engineer had no authority under the

contract to divide up the completion and charge partial liquidated damages and his letter of 11 May 1996 can therefore only be read as extending time for the whole contract to 31 July 1994.

38. Ms Greer contended that the letter of 12 October 1994 also gave rise to an estoppel which prevented WASA denying that time had been extended to 21 October 1994. She said the Claimant relied on this letter in that it failed to make a timeous request under cl 44 for an extension. Mr Allamby gave some evidence which just about supported this alleged reliance but I reject the estoppel argument based on the letter of 12 October 1994 both because none of the facts are pleaded and (much more importantly in my view) because I do not read the letter of 12 October as an unequivocal representation that no liquidated damages would be charged in respect of any period before 21 October 1994 or that time was extended to that date.

39. In the circumstances I find that completion of the whole contract should have been extended by 60 weeks. It follows from this that liquidated damages ought to have been charged at the rate of $2,000 per day for a period of 11 weeks (ie 71-60), ie $2,000 x 77 = $154,000. The final payment certificate will need to be adjusted accordingly by substituting this figure for $445,762 in line 3.1.

Quantum of damages for delay

40. I turn to the claim by the Claimant for damages for delay caused by WASA's breaches. I have found that the total delay caused by WASA's breaches was four months in relation to lot 3 and three months in relation to lot 2 (see paras 12, 15, and 29 above). This is equivalent to 17.14 weeks and 12.86 weeks respectively. I must now assess

damages on the basis of the available evidence as to the loss which the Claimant suffered as a consequence of that delay.

41. The loss claimed in the statement of claim set out at para 14 is based directly on the claim put forward by Mr Allamby to the Engineer on 14 March 1996. That claim was based on the full delay of 71 weeks and claimed:

(1) a sum of $4,043,155 representing 71 times the weekly costs of performing the contract (comprising staff costs, plant and equipment, lighting and power, site hutting, telephone, stationery, small tools, insurance and bond, and public and bank holiday costs) (see pp 11-18 of the claim document);

(2) a sum of $896,808 for head office overheads and profit lost as a consequence of a 71 week delay arrived at by applying a head office/profit percentage of 15% to a formula which is set out at p 599 of *Hudson* (see pp 19/20 of the claim document);

(3) a sum of $540,504 for loss of productivity, uneconomic working and disruption (see pp 21-24 of the claim document).

42. The claim as put forward in March 1996 was obviously good enough for its purpose of seeking to persuade the Engineer to make a generous award under cl 67. It is unfortunate however that since then very little further work has been done on the claim or evidence produced to support it, for a court can only act on the basis of proper evidence when assessing damages, a point graphically illustrated by a case produced by Ms Roheman called *Sunley v Cunard White Star* [1940] 2 AllER 97. It is fair to point out that Mr Phelps at p10 of his first report, in answer to the question what

compensation for delay should have been granted to the Claimant, sets out the general basis of the March 1996 claim and then simply states that "adjustment of the …claim must be in respect of the extension of completion time. The Claimant's figure of 71 weeks is too high". This might be taken as implying that he accepts the claim as quantified subject to the length of time for which it is to apply. However, even if this is what he intended to say, I do not think I can proceed in that way since it is patently the case that he has not checked the sums claimed in any but the most superficial way and he has not attempted to assess damages in accordance with proper legal principles.

Staff costs

43. In the claim put forward in March 1996, a claim was made for $1,003,940 which was arrived at by multiplying various weekly salaries (or parts of weekly salaries) by 71. The only evidence relevant to this head of loss is in paragraphs 5 and 6 of Mr. Allamby's statement. This records a list of people who worked on the project for various periods but it does not say anything about their salaries and it does not correspond with the relevant section in the March 1996 claim document. Ms. Greer referred me to a document in the Contract Documents bundle headed "Supplementary Works Lot 2 and Lot 3", which lists daily rates for various personnel. She explained that these rates were those agreed in the event of extra work being required under the contract although I was not able to see how the document fitted in the remainder of the contract documentation.

44. The evidence in relation to this claim is clearly unsatisfactory though I accept that the Claimant must have suffered some loss by reason of employing personnel on the

project during the periods of delay. Making the best I can of the material I have as described above, all I can say is that the services of the Project Manager (Mr Fevrier) and the Director Surveyor (Robert Emard), which are claimed at $2,600 and $2,000 per week respectively in the March 1996 claim, should be compensated for the 17.14 week period of delay in respect of lot 3 and that the sums claimed seem reasonable. . This gives a sum of $4,600 x 17.14 = $78,844. Otherwise, I have not been able to link up the March 1996 claim, the daily rates shown in the Supplementary Works document and Mr Allamby's statement

Plant and equipment

45. Both Mr Allamby and Mr Holland gave evidence that the Claimant hired various items of heavy equipment from C O Williams in order to perform the contract (see the list at para 3 of Mr Holland's witness statement) and Mr Holland gave evidence as to the hourly rates and explained to me that C O Williams charged for the hire on the basis of an 8 hour day or 40 hour week. The implication of Mr Holland's statement at para 4 was that this equipment was on hire for the entire extended contract period although he does not say so expressly. Ms Roheman rightly pointed out that the contract with C O Williams dated 8 July 1992 did not reflect the terms of the agreement as explained by Mr Holland and did not have the all important schedule attached to it; she also pointed out that no invoices or receipts or other documentary records of any payment had been produced by any witness and elicited from Mr Holland in cross-examination that his figures must have come second hand from C O Williams's accounts department. Mr Holland explained that the contract dated 8 July 1992 was just a standard form; he was unable to explain the absence of the schedule; he explained the difficulties of keeping documents for long periods of time (as did Mr Allamby).

46. All this is clearly very unsatisfactory but I am not prepared to reject Mr Holland's evidence out of hand and I am therefore inclined to award damages on the basis of his explanation of the arrangement with the Claimant for the period of 17.14 weeks delay in respect of lot 3. I note that he accepts at para 5 of his statement that the equipment was on standby for a period and that standby rates of 50% were charged during this period and I must assume that during the period of delay for which I am allowing recovery it was being charged at standby rates. My calculation of the damages for plant hire wasted is therefore: 2,565 (hourly rate for all plant hired) x 50% x 40 x 17.14= $879,282.

Other items of expenditure

47. There is no evidence to support the sums claimed in the March 1996 document for lighting and power, site hutting, telephone, stationery, small tools and public and bank holidays except that in the course of cross examination Mr. Allamby was able to confirm that on site generators at lot 3 had cost at least $100 per day to run. Nor has any document been produced to support any of the figures mentioned. I do not understand the claim in respect of "public and bank holidays". Is those circumstances I regret that I must reject any claim based on those costs, save for a figure of $500 per week for the generator, i.e. $500x 17.14 = $8,570,

48. In the course of his evidence Mr. Allamby was able to produce an insurance certificate showing that an additional premium of $7,533 was paid in respect of the period 11 May 1994 to 31 August 1994 for the project. Since this information was produced in response to a question asked in cross- examination and the amount is very

substantially less than that claimed under this head in the March 1996 claim I will award $7,533 for extra insurance costs.

Head Office Overheads

49. The March 1996 claim is for $896,808 and is based on a formula to be found in *Hudson* at p.599 to which is applied a head office/profit percentage of 15%. The only support for this figure in evidence came in the course of Mr. Allamby's cross examination when he said that if one looks at the contract and the salaries 15% is actually a low figure. I am afraid that in the absence of any proper analysis or evidential support for the 15% figure I am not prepared to accept it on the basis of this assertion. I note that the editors *Hudson* state that evidence given in litigation on many occasions (in the UK and as at 1970) suggests that the relevant percentage in a major contract subject to competitive tender is normally between 3% and 7%. They also state that care should be taken in relation to the profit element of the formula in that evidence is required that profit was actually capable of being earned which itself involves proof that the contractor did not underestimate costs and that other equally profitable work would have been available if necessary. No such evidence was tendered in this case.

50. In those circumstances I clearly cannot make an award based on the formula applying a percentage of 15%. Nevertheless it must be the case that the Claimant would have suffered a loss of contribution to head office overheads, and I am prepared to apply the formula with a percentage for head office overheads of 5%. This gives the following results:

Lot 3: 5% x 5,253,935 (contract sum for lot 3 as certified)/136 (total contract period including delay 13.4.92-25.11.94) x 17.14 = 33,107;

Lot 2: 5% x 843,241/136 x 12.86 = 3,986

Loss of productivity etc

51. This claim as set out in the March 1996 document appears to be a claim for the difference between actual labour costs and the estimated labour value in the final account (see p 24 of the March 1996 claim). As such it was totally unsupported by any evidence and it does not appear to be related in any logical way to losses caused by delay for which the Defendant is contractually liable for. I therefore reject this claim.

Total damages

52. I therefore assess the damages for delay as follows:

Staff costs	…78,844
Plant and equipment	879,282
Generators	…8,570
Insurance	…7,533
Head office overheads lot 3	…33,107
Head office overheads lot 2	…3,986
Total	…1,011,322

Miscellaneous other matters

Cl 44

53. Cl. 67 of the FIDIC General conditions in effect provides a 90 day time limit on claims following an adverse decision by the Engineer. This provision has not been pleaded by the Defendants and no reliance was or could therefore be placed on it at trial. However, the Defendant did seek to rely on cl. 44 as an answer to the claims because

it was said the Claimant failed to supply full and detailed particulars to the Engineer in good time. This point is misconceived in my view. All cl. 44 says is that in deciding whether to grant an extension of time (not whether to accede to a monetary claim) the Engineer need not (but may) take account of additional work or other special circumstances if the contractor does not submit particulars of the extension of time he considers himself entitled to within 28 days of the circumstances arising or as soon thereafter or is practicable. It therefore has nothing to do with monetary claims and need not be relied on by the Engineer in any event.

Retention money

54. At p3 of her supplemental skeleton arguments of 28 February 2005 Ms. Greer states that there is an error in the Engineer's final payment certificate No.27, in that it states that $256,016 of retention money has been released against previous certificates (see line 5.2) when the figure should be $227,332. This point does not appear to have been raised expressly before 28 February 2005 and it is not clear whether it is even arguably part of the amount claimed in the statement of claim. Further, although Ms Greer asserted that the figure of $256,016 was wrong (and she was not contradicted) there was no evidence to that effect. I therefore reject the point.

Interest

55. Interest is claimed under Article 1009A of the Civil Code from 30 September 1996 at 14%. However the contract between the parties makes express provision for interest in cl.60(3) of the Particular Conditions. Cl.60(3) says that interest is charged at 5% on late payment against certificates and on a failure to pay retention money in accordance with cl.60(2). Cl.60(2) says retention money should be paid within 28 days

of the expiry of the maintenance period (i.e. 25 November 1995). A large part of the claim for damages for delay ought to have been certified by the Engineer under cl. 40(1) and the whole ought in any event to have been the subject of a decision by the Engineer made within 90 days of the submission of the claim in March 1996 (see cl.67). In those circumstance I cannot see any scope for awarding interest at a higher rate or for different periods to those contemplated by the contract which is designed to govern the relationship betweens the parties. I also observe that no evidence in support of the figure of 14% was given.

Cost of preparing claim

56. The Claimant seeks $50,000 for preparing the claim which was submitted to the Engineer in March 1996. I cannot see any basis for such costs to be recoverable save in so far as they may form part of the costs of the litigation. In any event there was again no evidence given in support of them.

Conclusions

The certificate

57. The figures in the final payment certificates were accepted by the Claimant save for the liquidated damages and the figures for retention released at line 5.2. I have rejected the retention money claim but, on liquidated damages, the figure of $154,000 is to be substituted for $445,762 in line 3.1. The effect of this substitution will be to increase the amount of the certificate by $291,762, which gives a figure for the certificate of $280,396 (i.e. $291,762 - $11,366). This sum should have been paid by 22 December 1995 (maintenance period plus 28 days) which is the date from which interest will run. Interest will be $129,683 ($280,296 x 5% x 9.25 years).

The damages

58. I have assessed damages for delay in the sum of $1,011,322. To this needs to be added the sum of $108,000 for the production of drawing by the Claimant and from it $49,000 needs to be deducted which has already been allowed as part of the work certified by way of damages for the failure to give possession of lot 3 on time. The total damages are therefore $,070,322. Interest will run on this figure from 14 June 1996 (the date 90 days after the submission of the claim, when it should have been allowed in part by Engineer). The interest will therefore be $1,070,322 x 5% x 8.75 = $468,265.

Judgment

59. There will be judgment for the Claimant for the sum of $1,948,666 (280,396 + 129,683 + 1,070,322 + 468,265). The Defendant must also pay the Claimant's costs on the prescribed basis in respect of such judgment. I invite Counsel to agree the figure when drawing up a judgment.

MURRAY SHANKS
High Court Judge (Ag)