Hilary Term
[2025] UKPC 9
Privy Council Appeal No 0066 of 2021

JUDGMENT

Water and Sewerage Authority of Trinidad and Tobago (Respondent) *v* Waterworks Ltd (Appellant) (Trinidad and Tobago)

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

before

Lord Lloyd-Jones
Lord Sales
Lord Leggatt
Lord Burrows
Lady Rose

JUDGMENT GIVEN ON
18 February 2025

Heard on 31 October 2024

Appellant
Rowan Pennington-Benton
Nicholas Leah
(Instructed by Sheridans (London))

Respondent
Ian Benjamin SC
Raphael Ajodhia
(Instructed by Signature Litigation (Gibraltar) Ltd)

LORD LEGGATT:

Introduction

1. The Fédération Internationale des Ingénieurs Conseils (FIDIC) publishes standard forms of contract suitable for use between employers and contractors on international construction projects. These standard forms are widely used. One of them, "Conditions of Contract for Plant and Design-Build", known as "the Yellow Book", is intended for use in projects where the contractor has the main responsibility for design as well as the construction of plant or equipment on site. The Yellow Book, in its original 1999 version, formed the basis of two contracts to design and build water treatment plants made between the parties in this case.

2. The claimant (and appellant) was the contractor, a company incorporated in Trinidad and Tobago called Waterworks Ltd. The employer was the Water and Sewerage Authority of Trinidad and Tobago, a public authority established by the Water and Sewerage Act, Chap 54:40: it is the defendant and respondent to the appeal. In this judgment the Board will refer to the parties, respectively, as "the Contractor" and "the Authority".

3. Like other FIDIC standard forms, the Yellow Book terms allow the employer to terminate the contract at any time for its "convenience", without the need to show any default by the contractor or other justification. Under the terms of the more recent 2017 editions of the FIDIC standard forms, the contractor is entitled upon such termination to be paid compensation for loss of the profit that it would have made if it had completed the works. Under the 1999 forms, however, no compensation for loss of profit could be recovered and the general aim of the clause applicable upon such termination was simply to reimburse the contractor for work done and costs incurred. To that end, clause 19.6 of the FIDIC General Conditions of Contract provided:

> "Upon such termination, the Engineer shall determine the value of the work done and issue a Payment Certificate which shall include:
>
> (a) the amounts payable for any work carried out for which a price is stated in the Contract;
>
> (b) the Cost of Plant and Materials ordered for the Works which have been delivered to the Contractor, or of which the Contractor is liable to accept delivery …;

(c) **any other Cost or liability which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the Works**;

…"

4. The words highlighted are those on which the dispute under appeal turns. The two contracts between the parties were terminated by the Authority for "convenience" before the designs for the plants had been finalised and any construction had begun. Over a year earlier, however, relying on preliminary designs, the Contractor had already entered into contracts with a third party for the purchase of equipment for the construction of the plants. No steps were ever taken to perform those contracts, which were terminated when the design and build contracts were terminated. Under the terms agreed with the third party supplier, the Contractor was liable to pay cancellation charges calculated as 30% of the total price quoted for the equipment. The question, on which the courts below reached opposite conclusions, is whether the liabilities to pay the cancellation charges were "reasonably incurred by the Contractor in the expectation of completing the Works" so as to fall within clause 19.6(c).

Factual background

5. The two design and build contracts have been referred to as "the Matura contract" and "the Yarra contract" after the locations of the two planned water treatment plants. In each case the Contractor made a successful tender. The Matura contract was executed on 30 July 2007 and the Yarra contract on 3 October 2007. The date for commencement of the Works was 14 days after the contract was signed. The Contractor had 15 months to complete the Works, unless time was extended. Broadly speaking, under the relevant contract terms the Contractor was entitled to an extension of time for any delays attributable to the Authority or certain unexpected events. If the Works were not completed within the time stipulated or any extended time, the Contractor was liable to pay liquidated damages.

6. The general scheme of the Works involved three stages: (1) preparation by the Contractor and approval by the Authority of preliminary designs; (2) preparation by the Contractor and approval by the Authority of final designs and working drawings; and (3) construction of the plant to such final designs and drawings.

7. At around the time the Yarra contract was signed, the Authority informed the Contractor of various issues relating to the project sites. In particular, the Authority still needed to acquire the land proposed as the site for the Yarra plant, which was owned by a private individual who would need to be rehoused. The Contractor was also told that the site proposed for the Matura plant might need to be changed. The Authority did not

have a Certificate of Environmental Clearance and had not yet commenced an environmental impact assessment for either project. In each case topographic surveys needed to be carried out.

8. Under both contracts there appear to have been delays by the Authority in commenting on the preliminary designs prepared by the Contractor. These were "30% designs", meaning that they comprised 30% of all the design work required for the project. On 14 March 2008 the Contractor completed its preliminary design report for each project, which was the subject of a presentation at the premises of the Authority on 26 March 2008.

9. At the time of the tenders the Contractor had engaged a Canadian company called MAAK Technologies Group Inc ("MAAK") to provide "design and construction supervision services" for each project. It appears that most of the design work was in fact carried out by MAAK. In March 2008 MAAK also provided quotations to the Contractor to supply equipment for use in building each plant. MAAK's quotation for "Matura Water Plant Equipment" at a total price of TT$15,396,761 was dated 14 March 2008, and its quotation for "Yarra Water Plant Equipment" at a total price of TT$11,926,474.88 was dated 25 March 2008. The Contractor accepted the quotation for the Yarra plant by issuing a "purchase order" dated 4 April 2008. The Contractor issued a similar (undated) purchase order accepting the quotation for the Matura plant at around the same time.

10. It is agreed that in each case the issue of the purchase order had the effect of creating a contract between the Contractor and MAAK on the terms of MAAK's quotation. The Board will refer to the two contracts thereby created as "the MAAK contracts". No equipment was ever shipped or delivered or invoiced under the MAAK contracts. There is a dispute, discussed below, about the legal nature of the contracts. But it is not in dispute that each contained a term providing for a minimum cancellation charge equal to 30% of the quoted price of the equipment.

11. Neither the Yarra contract nor the Matura contract progressed beyond the design stage. In relation to each project various meetings were held to discuss issues relating to the proposed site. At the end of September 2008, the Contractor submitted 75% detailed designs for both projects. 100% detailed designs for the Matura project were submitted at the end of October 2008. In mid-November 2008 the Authority informed the Contractor that it was contemplating a possible change of site for the Matura project. There is no evidence that any significant further work was done by the Contractor in relation to either project after that.

12. By a letter dated 24 June 2009, the Authority gave notice to the Contractor of its intention to terminate the Yarra contract for convenience under clause 15.5 of the FIDIC General Conditions of Contract. At a meeting in September 2009 the Contractor was told

that the Authority also intended to terminate the Matura contract, and this was confirmed by a letter dated 12 October 2009.

13. The Contractor submitted financial claims under each contract, which included 30% cancellation charges for the two MAAK contracts. In each case the financial claim was submitted to the Engineer for determination in accordance with clause 19.6 of the FIDIC General Conditions of Contract (quoted at para 3 above). In each case the Engineer accepted some items claimed and rejected others. The items rejected included the cancellation charges. They are the only items that remain in dispute on this appeal.

The High Court proceedings

14. After the Contractor was sued in the High Court by a lender, it brought ancillary proceedings against the Authority for (among other sums) the cancellation charges. Its claim to recover those charges succeeded at a trial before Jones J.

15. Although there were known to be problems with both project sites, the judge found that before June 2009 with respect to the Yarra contract, and September 2009 with respect to the Matura contract, no indication was given to the Contractor that the contract was going to be terminated by the Authority before completion or that the difficulties faced were insurmountable. Up to that time the Contractor was proceeding in the expectation that the projects would be completed and was "entitled and in fact duty bound under the contracts to complete the contracted works with due expedition and proceed without delay until completion".

16. One of the Contractor's witnesses was the President of MAAK, Mr Alnoor Allidina. The judge accepted Mr Allidina's evidence that it was "necessary and normal business practice" for contractors to enter into agreements with subcontractors at the tender stage of the transaction binding the subcontractor to provide services or equipment at the prices used as the basis of the tender. Such an agreement avoids increases in prices which might otherwise occur by the time of execution of the construction contract or the implementation of the works.

17. The judge recorded that under cross-examination Mr Allidina accepted that, before actually procuring the equipment from MAAK, the Contractor would need to have submitted and obtained the Authority's approval for final designs. On this basis the judge concluded that it would have been premature for MAAK to have issued purchase orders for "the actual supply of the equipment" at any time before the termination of the Yarra and Matura contracts. The judge took the view, however, that the Contractor had not done this and that the documents accepting MAAK's quotations were not purchase orders "in the true sense of the word". Rather, the Contractor had merely "sourced, priced and locked

in prices" for the supply of the equipment in the future. Her key conclusion as to the nature of the MAAK contracts was expressed as follows (at para 50 of the judgment):

> "From an examination of the relevant documents I am satisfied that the arrangement between [the Contractor] and MAAK was not for the actual obtaining of the equipment at that time but rather an arrangement by which [the Contractor] agreed to procure the equipment from MAAK at some time in the future at the prices quoted to it by MAAK in 2008. What [the Contractor] did by entering into these contracts therefore was to secure the equipment at the quoted price. The cost of that benefit to [the Contractor] was that it was required to bind itself to purchasing the equipment from MAAK and commit itself to the payment of 30% of the contract price if it cancelled the contracts. In other words in 2008 [the Contractor] sourced the equipment and entered into an arrangement by which the equipment was to be made available to them in the future at a price fixed at the time the equipment was sourced."

18. The judge rejected an argument that, as no final designs had been prepared when the quotations were obtained from MAAK, the Contractor could not at that stage have been in a position to identify the equipment needed for the construction of the water treatment plants. She found that, to prepare its tender, a contractor must be able to ascertain the cost of the equipment that it is likely to require for the project and that the preliminary designs prepared for the purposes of the tenders contained sufficient information to enable MAAK to quote prices for supplying the equipment.

19. On the basis of Mr Allidina's evidence as to normal business practice, the judge found that it was reasonable for the Contractor in the early stages of the projects to take steps to ensure that the cost of the equipment did not exceed the cost used as the basis of its tenders, and that this was what the Contractor had done by entering into the MAAK contracts. The termination of the Yarra and Matura contracts resulted in the Contractor having to cancel its commitments to MAAK and incurring the cancellation charges. The judge held that these liabilities were reasonably incurred by the Contractor in the expectation of completing the Works.

Decision of the Court of Appeal

20. The Authority appealed from this decision to the Court of Appeal, which allowed the appeal. The lead judgment was delivered by Rajkumar JA, with whom Mendonça and Smith JJA agreed. Smith JA also made some additional observations of his own. The

main reasons given by the Court of Appeal for overturning the decision of the trial judge in relation to the cancellation charges were, in short:

(i) Having found that actually to purchase equipment for the water treatment plants at such a preliminary stage would have been premature, and therefore unreasonable, the judge should have concluded that it was also premature to commit to liabilities to pay charges that were intended to arise upon the cancellation of such purchases.

(ii) The judge's finding that the purchase orders issued by the Contractor were not for the actual supply of the equipment was inconsistent with the clear language of the contractual documents and was not sustainable.

(iii) Even if the judge's finding about the nature of the purchase orders had been correct, the judge failed to consider whether it was reasonable to agree to a cancellation charge of 30% of the prices quoted for the equipment if the orders were cancelled before MAAK actually purchased the equipment.

(iv) The judge was wrong to find that the preliminary designs on which the quotations were based were sufficiently detailed to allow the equipment to be identified and ordered. It was illogical to infer, as the judge did, that because the preliminary designs were sufficient to ascertain the likely cost of the equipment for the purpose of making a tender, they were also sufficient to identify the equipment with the degree of detail needed for construction of the plants.

This appeal

21. The Contractor appeals from the decision of the Court of Appeal to the Board as of right. It argues that there was no proper basis for the Court of Appeal to overturn the judge's findings (a) as to the nature of the MAAK contracts and (b) that the preliminary designs contained sufficient information to identify the equipment needed to construct the water treatment plants. The Contractor contends that, based on those findings, it was open to the judge to conclude that the Contractor acted reasonably in entering into the MAAK contracts, and thereby locking in the prices quoted by MAAK. It was also relevant that the 15 months allowed for performance of the contract was very short considering the scale of the projects and the Contractor needed to get on with the Works, which included "lining up" the necessary equipment. In these circumstances the judge was entitled to find that the liabilities to pay cancellation charges to MAAK were reasonably incurred so as to fall within clause 19.6(c) of the FIDIC General Conditions.

The meaning of "reasonably incurred"

22. As part of its case, the Contractor made some submissions about the meaning and correct approach in law to the application of clause 19.6(c). The Board will consider this question first.

23. Counsel for the Contractor submitted that, in interpreting and applying clause 19.6(c), it is important to have regard to the nature of the contract containing the clause and, in particular, to the features that the Contractor was obliged to complete the Works at a fixed price within a specified time. Counsel also emphasised the final words of the clause ("in the expectation of completing the Works") and submitted that they are forward-looking and presuppose that the Works will be completed rather than terminated prematurely. Counsel for the Contractor argued that, given this context, there will generally be no justification for disallowing costs or liabilities incurred as a result of planning ahead and ordering materials or equipment in advance. A contractor is entitled to proceed on the basis that the entire contract will be performed and to order, for this purpose, whatever materials and equipment will be needed. For costs or liabilities to fall within the scope of clause 19.6(c), it is sufficient to show that they have been incurred in genuine expectation of completion of the works and that, had the works been completed, those costs or liabilities would have been no more than reasonably necessary to perform the contract.

24. The Board agrees that as a general rule under a contract of this kind the contractor is entitled to proceed and to incur costs and liabilities on the assumption that the contract will be performed. Arguments that, because the contractor knew or ought to have known that the employer was likely to exercise its right to terminate the contract early for its "convenience", the contractor acted unreasonably in ordering materials or equipment required if the works were to be performed will not generally carry weight. The Board is not persuaded that this follows as a matter of implication from the words used. But it follows from the allocation of risk under the contract. Clause 8.1 of the General Conditions of Contract (as modified) obliged the Contractor to "proceed with the works with due expedition and without delay, until completion". To hold back from expeditious performance because of an expectation that the contract was likely to be terminated before completion would be inconsistent with that obligation and would also expose the Contractor to a risk of liability to pay liquidated damages and incurring other additional costs in the event that the contract was not terminated early for which it would not be entitled to any compensation from the employer. It is unreasonable to expect the Contractor to take such a risk.

25. The upshot is that the problems that arose in this case in relation to the project sites, the absence of environmental approvals and other factors which gave rise to risks that the Authority would decide to terminate the contracts early for convenience were not relevant to whether the Contractor acted reasonably in entering into the MAAK contracts

and incurring the cancellation charges. It certainly does not follow, however, that all questions of timing are irrelevant in applying the test of reasonableness. A prudent contractor would not generally commit itself to purchasing equipment before it is needed (taking into account delivery times) and before the designs to which the equipment must conform have been finalised. The thrust of the Authority's case is that this is just what the Contractor did.

Was it premature to purchase equipment?

26. In maintaining this case, the Authority is entitled to rely on the trial judge's finding that it would have been premature for MAAK to have issued purchase orders for the supply of equipment for the water treatment plants at any time before the termination of the Yarra and Matura contracts (see para 17 above). In his oral submissions on behalf of the Contractor, Mr Rowan Pennington-Benton sought to cast doubt on this finding by suggesting that the judge misunderstood the contractual position. Clause 4.0 of the Scope of Works required the Contractor to submit designs and drawings to the Authority and provided that:

> "Construction to such designs and drawings shall not commence until the Employer's Representative has consented thereto."

27. The Board sees no reason to suppose that the judge was under any misapprehension about the terms of the contracts. Her finding that ordering equipment would have been premature was not based on any suggestion that it would have been a breach of contract but rather on Mr Allidina's acceptance under cross-examination that, before procuring the equipment, the Contractor would need to have submitted and obtained the employer's approval for final designs. Mr Allidina's evidence was in turn not based on his reading of the contracts applicable in this case but on his experience of what was normal and proper practice. The rationale which he accepted for needing to obtain the employer's approval for final designs before actually procuring the equipment was practical rather than legal. It was that, until the final designs were approved, the designs and therefore the details of the equipment were subject to change. Similar evidence was given by the project engineers appointed by the Authority, Mr Eric Jones and Ms Shenelle Yearwood.

28. It was not inconsistent for the judge to find, as she also did, that before the final designs were approved it was possible to identify the equipment likely to be needed with sufficient certainty to obtain a quotation for the cost of supplying it. That could be done on the basis of the preliminary designs. Provided the contractor did not actually order the equipment, subsequent changes in the designs including details which affected the exact specification of the equipment could be accommodated.

The nature of the MAAK contracts

29. Critical, therefore, to the judge's finding that entering into the MAAK contracts was not unreasonably premature was her analysis of the nature of those contracts and her conclusion that they were not contracts for "the actual supply of the equipment"; rather, they were merely an arrangement by which the Contractor had "sourced, priced and locked in prices to the prices applicable in 2008".

30. A difficulty with this analysis is that the judge evidently regarded the arrangement made as more than the grant of an option to the Contractor to purchase the equipment at the prices quoted. She saw it as involving a binding promise by the Contractor to purchase the equipment at some (unspecified) time in the future. In the Board's view, such an agreement is too vague to constitute an enforceable obligation. Agreement on the time when the property in the goods and possession of the goods will be transferred to the buyer is an essential element of a contract to sell goods. A binding contract can be created without expressly agreeing those matters, provided the contract specifies a mechanism for resolving them or they can be implied by law. But they cannot simply be left at large. If it is not possible to determine when property and possession are to pass without the parties reaching a further agreement, there will be no contract.

31. That problem, however, does not arise here because the Court of Appeal was clearly right to hold that the "purchase orders" issued by MAAK were indeed purchase orders in "the true sense of the word" which created contracts for the actual supply of equipment.

32. By issuing the purchase orders, the Contractor accepted the terms of MAAK's quotations. Those quotations were on their face offers to sell the equipment described in the quotations at the prices quoted on "Terms and Conditions as per attached". Attached were MAAK's "Standard Terms and Conditions of Sale", which included the following:

> "1) Applicable Terms. These terms govern the sale of products and systems (Product) by MAAK Technologies Group Inc (MAAK). Any additional, different or conflicting terms contained in Buyer's request for proposal, specifications, purchase order or any other written or oral communication from Buyer shall not be binding in any way on MAAK unless explicitly agreed with written confirmation.
>
> 2) Delivery. Product shall be delivered FOB as specified on quotation. MAAK point of shipment with title to the Product and risk of loss or damage for the Product passing

to buyer at that point. Buyer shall be responsible for all transportation, insurance and related expenses including any associated taxes, duties or documentation. MAAK may make partial shipments. Shipping dates are approximate only and MAAK shall not be liable for any loss or expense (consequential or otherwise) incurred by Buyer or Buyer's customers if MAAK fails to meet the specified delivery schedule.

3) Pricing & Payment. (a) Payment - Unless otherwise stated, all payments shall be net 30 days from invoice date payable in the currency quoted. …

…

10) Applicable Law. The agreement and terms shall be governed by the laws of the province of Ontario, Canada.

…

12) Cancellation. Buyer shall be liable for cancellation charges, as follows: (a) Minimum amount equal to 30% of the quoted price of Product and additional expenses as may be notified [to] the Buyer by MAAK as incurred in connection with the Agreement. (b) Maximum amount of 100% of the quoted price of Product depending on the time of cancellation."

33. The judge did not identify the features of the contractual documents which led her to conclude that the arrangement was not "for the actual obtaining of the equipment at that time". But the Board presumes that she had in mind the fact that neither the quotations nor the purchase orders specified any shipping dates or delivery schedule for the goods, as contemplated by clause 2 of MAAK's standard terms. Nor did the quotations specify the place of delivery. The purchase orders stated "FOB: Port of Spain", which is hard to reconcile with clause 2 of the standard terms and, in particular, the words "MAAK point of shipment".

34. These difficulties, however, can be resolved. Under the terms of the quotations MAAK was entitled to choose the point of shipment at which title and risk would pass to the Contractor and was not obliged to transport the equipment to Port of Spain unless it agreed to do so. As for the time for delivery, the general rule under the common law is

that, if the contract is silent about this, the seller is bound to deliver the goods within a reasonable time. That rule is reflected in section 30(2) of the Trinidad and Tobago Sale of Goods Act, Chap 82:30. If the court were to look at the law of Ontario in accordance with clause 10 of MAAK's standard terms, section 28(c) of the Ontario Sale of Goods Act 1990 is similarly worded. What is a reasonable time is a question of fact: see section 56 of the Trinidad and Tobago Sale of Goods Act and section 54 of the Ontario Sale of Goods Act. The judge was therefore wrong to regard the arrangement as being to supply the equipment at some undetermined time in the future. The agreements were contracts of sale under which MAAK was bound to deliver the equipment within a reasonable time.

35. For the Contractor, Mr Rowan Pennington-Benton sought to argue that, even if this was the effect of the contractual documents, the judge's finding about the nature of the arrangement was not based exclusively on the documents. He submitted that the judge found that the Contractor and MAAK made what he described as an "agreement on the ground" that the purchase orders would effectively be "put on ice" and would not be implemented until the equipment was actually needed to construct the water treatment plants.

36. The judge, however, did not make any such finding. She stated expressly that her finding about what was agreed was derived "[f]rom an examination of the relevant documents". She did not refer to any evidence of any "agreement on the ground" or find that there was any such agreement. Furthermore, there was no evidence of any such agreement that Mr Pennington-Benton was able to show the Board on which the judge could have based such a finding.

37. Mr Pennington-Benton sought to rely on Mr Allidina's testimony, accepted by the judge (see para 16 above), that it was necessary and normal business practice for contractors to enter into agreements with subcontractors to bind the subcontractor to supply equipment at the prices used as the basis of the tender. This, however, was evidence only about what normal practice would be. It was not, and could not reasonably have been understood to be, evidence that an agreement not recorded in or evidenced by any document before the court was made between the Contractor and MAAK regarding the supply of the equipment specified in MAAK's quotations.

38. All that can be said is that there was no evidence that any steps were taken by either party to seek to arrange shipment or delivery of any of the equipment at any time during the period of over 14 months from when the purchase order relating to the Yarra plant was issued to when the Yarra contract was terminated by the Authority or during the period of some 18 months or more before the Matura contract was terminated. Consistently with this, no invoices were ever issued by MAAK. No doubt that was a result, one way or another, of the fact that neither project ever reached the stage where the designs to which the plants would need to be constructed were completed and approved.

The Contractor's burden of proof

39. The absence of evidence on this point exemplifies a wider difficulty for the Contractor's case. The Contractor has the burden of proving that it incurred a cost or liability that falls within clause 19.6(c). In some cases reasonableness may be inferred from the contract requirements, the nature of the cost or liability incurred and the stage which the project had reached. But here no such inference can be drawn from those bare facts. In circumstances where only preliminary designs had been completed and much of the design work for the water treatment plants remained to be done, it was on the face of things unreasonably premature for the Contractor to enter into unconditional contracts to purchase most of the equipment for the plants. The fact that nothing was done to perform those contracts reinforces that impression. In particular, it was prima facie unreasonable for the Contractor to undertake obligations to pay cancellation charges if the purchase orders were cancelled when MAAK was not, so far as the evidence shows, itself incurring any costs or liabilities for which those charges could be regarded as compensation.

40. In these circumstances to have any prospect of displacing the appearance that the liabilities to pay cancellation charges were unreasonably incurred, the Contractor needed, at least, to adduce evidence from a witness to explain its decision to enter into the MAAK contracts and why this was thought at the time to be in the Contractor's interests.

41. No such evidence, however, was adduced. The Contractor's Project Coordinator, Mr Raymond Thomas, gave evidence about the history of the two projects which included confirmation of the fact that the Contractor had entered into the MAAK contracts. But he offered no evidence to explain the decision to do so or about any negotiations or other communications between the Contractor and MAAK concerning the supply of equipment which preceded or followed the purchase orders. Nor did Mr Allidina – who, as mentioned, was also called as a witness by the Contractor – give any evidence on this subject.

42. In the absence of evidence giving any reason for entering into the MAAK contracts, Mr Pennington-Benton was reduced to speculation. He emphasised that the equipment was to be shipped from Canada and suggested that ordering the equipment well in advance of the time when it might be needed was reasonable so that "MAAK could commence the process of organising the items and preparing to arrange export and import permissions and so on". There was, however, no evidential basis for any such suggestion. So far as the evidence shows, MAAK's business consisted in providing professional services and did not extend to manufacturing equipment or systems for use in constructing water treatment plants. It therefore seems likely that MAAK would itself have had to purchase the equipment from a manufacturer or distributor. But once again there was no evidence about this. Mr Allidina said nothing about what steps MAAK would have had to take to acquire the equipment ordered by the Contractor, whether any of it needed to be manufactured to order or whether it was all immediately available off

the shelf, where it would be shipped from, what shipping arrangements would need to be made, how long the equipment would take to ship to Port of Spain and what, if any, export and import permissions were required.

43. There was also no evidence (a) that MAAK in fact did anything at all after the purchase orders were issued by the Contractor to prepare to fulfil them or (b) to explain this apparent total lack of activity.

44. The only potential benefit of entering into the MAAK contracts to which the Contractor could properly point was the suggestion that they had protected the Contractor against subsequent price increases. But there was no evidence that this actually played any part in the Contractor's thinking when issuing the purchase orders nor as to why, if it did, the Contractor had thought it important to "lock in" prices in April 2008 when it had not thought it necessary to do so at the time of tendering for the Matura contract in November 2005 or the Yarra contract in June 2006 or at any time since. As the judge recognised, Mr Allidina's evidence about what was "necessary and normal business practice" at the tender stage of the transaction was not capable of justifying the action of actually buying equipment or entering into a binding agreement to do so before it was needed and on the basis of only preliminary designs. If the objective was to obviate any later price increases, that could be achieved by some form of agreement to hold prices at their current levels for an agreed period of time or to afford the contractor an option to buy specified items of equipment at prices quoted by the supplier within a stipulated period. No explanation was given for why, rather than making such an arrangement, the Contractor had entered into contracts with MAAK for the actual sale and purchase of equipment.

45. In these circumstances there was nothing to displace, or which was capable of displacing, the inference that it was unreasonable for the Contractor to enter into the MAAK contracts when it did. More specifically, there was no good reason given or shown for undertaking obligations to pay cancellation charges equal to a minimum of 30% of the prices quoted by MAAK if the purchase orders were later cancelled, regardless of whether at the time of such cancellation MAAK had taken any steps whatever to perform the contracts. In short, this was a very bad bargain for the Contractor to have made.

46. The Board considers that the judge's evaluation of reasonableness was vitiated by two key errors – both correctly identified by the Court of Appeal: first, a mistaken view of the legal nature of the MAAK contracts; and second, a failure properly to analyse whether or on what basis it could said to be reasonable at the stage which the projects had then reached for the Contractor to bind itself to pay cancellation charges equal to 30% of the prices quoted by MAAK if the purchase of the equipment did not proceed.

Conclusion

47. For these reasons, which are substantially the same as those given by Rajkumar JA, the Board is satisfied that the Court of Appeal was right to overturn the judge's decision and hold that the Contractor's liabilities to pay cancellation charges to MAAK did not fall within clause 19.6(c) of the FIDIC General Conditions of Contract. The appeal will therefore be dismissed.