Michaelmas Term

[2020] UKPC 25

Privy Council Appeal No 0068 of 2019

JUDGMENT

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

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

before

Lord Reed

Lord Lloyd-Jones

Lord Briggs

Lady Arden

Lord Sales

JUDGMENT GIVEN ON

19 October 2020

Heard on 17 and 18 June 2020

Appellant	Respondent
James Ayliffe QC	Simon Hughes QC
Simon Atkinson	
(Instructed by Ward Hadaway (Newcastle))	(Instructed by Blake Morgan LLP (Oxford))

LORD BRIGGS AND LORD SALES: (with whom Lord Reed and Lord Lloyd-Jones agree)

1.
This appeal is concerned with the ownership of a fund of money held in a bank account pursuant to a freezing order made by the High Court ("the Fund"). The money frozen by the order of the High Court was originally part of moneys provided by Clico Investment Bank Ltd ("the Bank") as a loan to the respondent, National Stadium Project (Grenada) Corporation ("NS") under a Facility Agreement dated 15 May 1997 ("the Facility Agreement") to provide financing for the construction of a national sports stadium for Grenada ("the Project"). The developer for the project was ICS (Grenada) Ltd ("ICS"), which took over that role from an associated company, Imbert Construction Services Ltd ("ICSL"). NS was established as a subsidiary of ICSL, and subsequently of ICS, to be a special purpose development

company to implement the Project with funding arranged by the Bank. The principal building contractor for the Project was the appellant, NH International (Caribbean) Ltd ("NH").

2.
NH claims that it is the beneficial owner of the Fund. NS claims that it is. NH was successful at first instance after a trial before Rajkumar J in 2011. NS sought to appeal. Initially, its appeal was dismissed without a hearing. However, on an appeal to the Board against that disposal, the Board held that NS was entitled to a hearing. By a decision dated 28 November 2018, the Court of Appeal (Jamadar, Bereaux and Pemberton JJA) allowed NS's appeal and held that it is entitled to the Fund. Pursuant to leave granted by the Court of Appeal, NH appeals to the Board.

Factual background

3.
In January 1997, the Government of Grenada ("the Government") entered into a Memorandum of Understanding with ICSL and the Bank ("the MOU") by which it engaged ICSL to implement and manage the Project via a special purpose development company, which would hold the land on which the stadium was to be constructed and would borrow the moneys needed for carrying out the Project, with financing arranged by the Bank. NS was then incorporated as the special purpose development company. By a further Memorandum of Understanding in April 1997, it was agreed that ICS would step into the shoes of ICSL and assume all its rights and liabilities in respect of the Project. Mr Colm Imbert was a director of each of ICSL, ICS and NS. Following a tender process, ICS chose NH as the primary sub-contractor to carry out the building works for the Project.

4.
A suite of detailed agreements was negotiated and put in place on 15 May 1997 to regulate the relevant relationships between the Government, ICS, NS and the Bank, comprising (i) an agreement between the Government, ICS, NS and the Bank, whereby ICS agreed to implement the Project and construct the stadium using finance arranged by the Bank under the Facility Agreement and provided via NS ("the Development Agreement"), (ii) the Facility Agreement, whereby the Bank agreed to arrange funding of the order of US$23m for the Project by lending funds to NS against notes issued by NS, which were placed with investors, and (iii) an agreement between NS and ICS, under which ICS agreed to act as developer to construct the stadium for US$23m ("the Main Construction Contract"). On 12 May 1997 the Grenadian parliament passed the Grenada National Stadium (Development and Financing) Act 1997, to which final drafts of these agreements were scheduled, to give them the force of law in Grenada once they were entered into. Nothing turns on this legislation, and Mr Ayliffe for NH did not suggest that it did. So far as rights under private law are concerned, the effect of the legislation turns upon (and confirms) the effect of the commercial agreements scheduled to it. The relevant terms of the Development Agreement and the Facility Agreement are examined in detail below.

5.
The MOU, the Development Agreement, the Facility Agreement and the Main Construction Contract contemplated that NS would operate as the special purpose development company for the Project, in that it was established as a company with no other business than to implement the Project, it would be the recipient of the moneys for the Project provided under the Facility Agreement and it would pay out from those moneys sums due to contractors. In this way, the role of NS provided a degree of security for contractors working on the Project, since the funding stream and its operations were entirely dedicated to the Project. Contractors did not have to take the credit risk associated with an

operating company carrying on general business activities across a number of projects (which might go wrong and give rise to liabilities) and mixing up its moneys in a general fund available to meet all and any liabilities it might incur.

6.
The site for the Project was vested in NS. Once constructed, the stadium was to be leased to the Government. The site was mortgaged to the Bank as security for the funds advanced to NS under the Facility Agreement. Under the terms of the Development Agreement, if the Government paid off the sums due from NS under the Facility Agreement, the site (with the stadium) would be vested in the Government.

7.
NH, an experienced construction company, was chosen by ICS to be the principal sub-contractor to construct the stadium. ICS would pay NH some US$16m for this, to be funded from the moneys provided under the Facility Agreement. On 6 June 1997, ICS and NH entered into an agreement to this effect ("the Construction Sub-Contract").

8.
Before the Construction Sub-Contract was signed, there was an exchange of letters. On 4 June 1997, NH wrote to ICS to raise various issues, including the following:

"1. Financing Agreement

We require confirmation that the Financing Agreements have been fully satisfied and are in place. …

2. Assignment of loan proceeds

We require confirmation of the Agreement that the moneys due to us under the contract would be assigned and paid directly to us from [the Bank]."

9.
ICS wrote to NH on 5 June 1997 to accept NH's tender for the Construction Sub-Contract. In that letter, ICS included at para 17 its response to NH's point about assignment of loan proceeds, as follows:

"All moneys due to [NH] under the [Construction Sub-Contract] shall be assigned and paid directly to [NH]."

10.
At trial, the judge found as a fact that in negotiations leading up to the signing of the Construction Sub-Contract, conducted orally and by this correspondence, "ICS agreed to assign, and did assign, to NH so much of the moneys payable to it under the Facility Agreement as would from time to time be due to NH under the [Construction Sub-Contract]" (para 138). The judge also found that Mr Imbert arranged for the Bank to put aside some US$16m out of the sums advanced to NS under the Facility Agreement, for the purpose of allowing the Bank to make payments to NH in respect of moneys due to NH under the Construction Sub-Contract (para 135).

11.
The contractual arrangements ran smoothly for a period. The Bank lent money to NS pursuant to the Facility Agreement and in return NS issued bonds to the Bank (as Trustee in relation to the bonds) acknowledging NS's indebtedness, which bonds the Bank allocated to the investors. As construction proceeded, sums became due to ICS from NS under the Main Construction Contract and became due

to NH from ICS under the Construction Sub-Contract. NS authorised the Bank to pay NH directly the sums due to it from ICS, setting that against the sums due from NS to ICS.

12.
In October 1999 ICS and NH fell into dispute. ICS purported to terminate the Construction Sub-Contract and obtained an injunction in Grenada to exclude NH from the Project site. ICS and NS proceeded to complete the Project without NH, using funds obtained by NS from outside the Facility Agreement arrangement. NS used these funds to discharge its obligations to ICS under the Main Construction Contract and to pay other contractors who worked on the Project.

13.
NH denied that ICS had any right to terminate the Construction Sub-Contract. As at the date of the purported termination, NH claimed that sums amounting to ECD 7,430,724.70 (equivalent to about US$2.6m) were owed to it for construction services it had performed under the Construction Sub-Contract.

14.
On 5 November 1999, NH obtained an ex parte interlocutory injunction from Tam J in the High Court against the Bank, and directed also to ICS and NS, as a freezing order to restrain the Bank from paying ICS or NS under the Facility Agreement moneys which would reduce the balance of those held by NS in its account with the Bank below the amount NH claimed was owed to it at the date of the purported termination. In this way, the Bank's compliance with the injunction constituted the Fund which is in issue in these proceedings. At about the same time, NH issued a claim in the High Court against the Bank, ICS and NS to claim the Fund. Later, in 2004, the injunction was varied to require the Bank to pay the Fund into an account with the United Trust Corporation of Trinidad and Tobago ("UTC"), to be held in the joint names of the lawyers for the parties pending trial or further order.

15.
In February 2000 NH commenced arbitration proceedings against ICS, claiming damages for wrongful repudiation of the Construction Sub-Contract and payment of sums due under that contract. By an award in March 2002, NH was successful in its claims. ICS's attempt to have the arbitral award set aside by the High Court failed.

16.
In August 2002, the Government repaid all the sums owing by NS to the bondholders under the bonds, equivalent to the full amount of the advances and interest owing under the Facility Agreement. As a result, the site and the stadium became vested in the Government.

17.
In 2004, NS issued proceedings against ICS in Grenada, claiming payment for remedial and other works on the Project. ICS did not defend that claim and a default judgment was entered against it in July 2004. In May 2005, NS petitioned to wind up ICS.

18.
In May 2006 NH issued a new claim against the Bank and NS in the High Court seeking, among other things, declarations that the Fund had been held on trust for NH and that it continued to be held on trust for NH in the account with UTC. In due course, NS counterclaimed for a declaration that it was entitled to the Fund in the account with UTC.

19.

The 1999 proceedings and the 2006 proceedings were consolidated and tried in the High Court (Rajkumar J) in October 2010. Neither the Bank nor ICS appeared at trial. The judge gave judgment on 28 January 2011, in favour of NH. He held that the Fund belonged beneficially to NH pursuant to a trust in its favour ("the Trust issue") and/or pursuant to an equitable assignment by ICS to NH of ICS's own beneficial interest in the Fund ("the Equitable Assignment issue"). The judge made declarations to that effect and ordered that the Fund (including accrued interest) be released to NH from the joint account at UTC. By a further judgment in February 2011, the judge ordered the Bank to pay a further amount into the joint account, representing interest due, as an addition to the Fund.

20.
By a notice of appeal dated 11 March 2011, NS appealed. NH filed an application to dismiss NS's appeal without a hearing on the merits. That application was initially successful, but pursuant to a judgment of the Board ([2015] UKPC 6) NS's appeal was reinstated.

21.
Prior to the hearing of the appeal, NH obtained an order dated 1 November 2017 permitting it to enforce the order made by the judge, with the result that the Fund in the joint account with UTC was paid out to NH.

22.
On 28 November 2018, the Court of Appeal gave judgment, allowing NS's appeal. Pemberton JA gave the main judgment, with which Jamadar and Bereaux JJA agreed. On the Trust issue, the Court of Appeal held that NH had had no beneficial interest in the Fund by virtue of a trust in its favour. On the Equitable Assignment issue, the Court of Appeal held that ICS had had no beneficial interest of its own in the Fund to assign to NH, and in any event, if it had had a beneficial interest in the Fund, the assignment would have failed for want of writing, as required by the Statute of Frauds 1677. In consequence, the Court of Appeal held that NS had been entitled to the Fund ("the Entitlement issue"). The Court of Appeal ordered NH to pay to NS all sums released to NH from the joint account at UTC plus an amount in respect of interest. The Court of Appeal granted NH leave to appeal to the Board and its order was stayed pending this appeal.

23.
The questions which arise on this appeal are whether the Court of Appeal was in error in relation to any of the Trust issue, the Equitable Assignment issue or the Entitlement issue.

24.
It should be emphasised that these issues are concerned with which person or persons had a proprietary interest in the Fund, recognised at law or in equity. Resolution of the appeal does not require any full examination of merely personal claims, in relation to which there may have been an expectation at the time of contracting that they would be satisfied out of moneys derived from the Facility Agreement without giving rise to any proprietary claim in respect of those moneys. ICS acquired personal contractual rights against NS under the Main Construction Contract for payment in respect of work carried out on the Project and NH acquired personal contractual rights against ICS to be paid for its work on the Project under the Construction Sub-Contract. It was, of course, open to ICS to assign its personal rights under the Main Construction Contract to NH, by way of assisting NH to be paid what it was owed under the Construction Sub-Contract. But such personal claims as ICS and NH might have would not give either of them a beneficial interest of a proprietary character in the Fund.

The terms of the Facility Agreement and the Development Agreement

25.
The only parties to the Facility Agreement were the Bank and NS. The Bank was designated as “the Trustee” and NS as “the Company”. The recital to the agreement stated:

“… the Trustee has agreed to arrange a Bond issue on behalf of the Company the proceeds of which are to be used to construct a sporting complex at Queens Park, St Georges in the Island of Grenada upon and subject to the terms and conditions of this Agreement.”

26.
Clause 2.1 provided, in the relevant part, that “[u]pon and subject to the terms and conditions of this Agreement … the Trustee agrees to make advances to or on behalf of the Company up to [a specified maximum principal amount]”; these advances were defined as the “Facility”. Clause 3.1 provided: “The Facility shall be used solely for the purpose of the Project.” NS agreed to make information available to the Bank and to allow access for inspections (clause 3.2) and to pay for the Bank to appoint a quantity surveyor to review matters to ensure proper control of expenditure (clause 3.3). Clause 3.4 provided that “[d]isbursements by the Trustee on account of the Facility shall be made on the basis of proper invoices and/or documentary credits acceptable to the Trustee. Disbursements in respect of work done and materials supplied in respect of the construction of the Project shall be made on the basis of interim and other certificates of a Quantity Surveyor appointed for the purpose and approved by the Trustee. …”.

27.
Clause 4 set out various conditions precedent which were required to be satisfied before any drawdown under the Facility. These included that the Builder (defined in clause 1 as NH and Emile Elias and Company Ltd) should have established an irrevocable performance bond in favour of NS with the Trustee’s interest endorsed on it (clause 4.2(c)). These were the only references to NH in the Facility Agreement.

28.
Clause 5 dealt with the bonds to be issued and security in relation to the Facility. On the date of each advance of moneys to NS under the Facility Agreement, NS was to issue Interim Bonds to the Trustee equal in amount to the advance (clause 5.1). After the issue of the completion certificate for the Project, NS would replace these with permanent debt instruments in the form of Floating Rate Bonds with a fifteen year maturity as set out in the First Schedule to the Trust Deed annexed to the Facility Agreement (clause 5.2). By clause 5.5, NS agreed to execute a mortgage of the site in favour of the Trustee and a charge over the performance bond to be issued by NH. Clause 7.1 provided, “All sums payable by the Company under the Trust Deed shall be paid in full without any set-off or counterclaim whatever …”.

29.
Clause 9 made provision for termination in case of default. Clause 9.1 defined various Events of Default, including “If default is made by the Company in the performance of its obligations under [the Facility Agreement]” (clause 9.1.12). Clause 9.2 provided:

“If an Event of Default occurs and is not remedied within thirty days of such occurrence then in any such event and at any time thereafter if such event is continuing the Trustee shall by notice in writing to the Company cancel any unadvanced amount of the Facility and the entire amount of the Facility then outstanding shall become immediately due and payable.”

30.

The Trust Deed annexed to the Facility Agreement was between NS (designated “the Project Company”) and the Bank (designated “the Trustee”). It set out the elaborate terms according to which the Bank would act as Trustee for the bondholders. The recitals to the Trust Deed stated that NS had determined to borrow a sum not exceeding US$29m by the issue and sale of floating rate bonds constituted and secured according to the terms in the Trust Deed (recitals A and B), that the net proceeds from the issue of the bonds were to be used to finance the Project (recital C) and that the Trustee had agreed to act as such for the benefit of the bondholders (recital D). The Trust Deed set out elaborate terms governing the issue and operation of the bonds.

31.
Clause 4.01 stated that the principal amount of the original bonds was limited to US$23m, and provided that the whole of the original bonds should constitute secured obligations of the Project Company and should rank pari passu among themselves. Clause 4.02 provided that “The proceeds of all Original Bonds shall be receivable by the Project Company and shall be applied for the purposes set out in Recital C …”.

32.
Clause 6 dealt with Events of Default. Clause 6.01 provided that the bonds should become immediately due and repayable with accrued interest and the security should become immediately enforceable if certain events occurred. These included a failure to pay moneys due under the bonds, presentation of a petition to wind up NS, threats by NS to stop payment of its obligations generally or to cease to carry on its business, if NS was deemed to be insolvent or unable to pay its debts and so forth. Clause 7 dealt with security and provided that NS should execute a collateral deed of mortgage in favour of the Trustee over the site and a collateral deed of charge of the lease with the Government. Clause 8 dealt with enforcement of the notes and security by the Trustee on behalf of the bondholders.

33.
Clause 9 dealt with the application of moneys. If NS were wound up, all amounts received by the Bank in respect of repayment of the bonds were to be held by it on trust to pay the bondholders pari passu, after the Bank’s expenses were met. Clause 9 concluded with the statement that if the Trustee should hold any moneys in respect of bonds which had become void under condition 11 of the relevant schedule to the Trust Deed (ie if not presented for repayment within a stipulated period), “the Trustee shall … pay the same to the Project Company”, ie NS.

34.
The recitals to the Development Agreement, to which the Government, the Bank, ICS and NS were parties, recorded that the Developer (ICS) intended to finance the construction works for the Project by means of finance provided by the Bank and that NS and the Bank had entered into the Facility Agreement “for the making of Advances by [the Bank] on behalf of the Government through [NS] to the Developer, or a consultant or supplier or other provider of goods and services in respect of the Project”.

35.
Clause 2 provided in the relevant part that the Developer should develop and carry out the works. Clause 5 provided that the Developer would fund the works through the Bank as set out in the Facility Agreement. Clause 6 provided that, in consideration of the agreement of the Developer in clause 2, NS should grant the lease of the site to the Government and, at clause 6.5, that the Bank as Financing Agent should:

“under and pursuant to the Facility Agreement pay or cause to be paid through the Project Company all moneys due under or pursuant to the Contract Documents [ie, as defined in clause 1.1.10, the proposal for the Project, the award of the Project to ICSL, the MOU and the Development Agreement] to the Developer, consultants, suppliers and other providers of goods and services in relation to the Project.”

The Trust issue

36.
In the courts below, there was debate about the possible application of a Quistclose resulting trust: see Quistclose Investments Ltd v Rolls Razor Ltd [1970] AC 567 and Twinsectra Ltd v Yardley [2002] UKHL 12; [2002] 2 AC 164. However, on the appeal to the Board it is common ground that the answer to ownership of the Fund is not provided by looking for a Quistclose resulting trust. The moneys in the Fund derived from the bondholders, but they do not claim any proprietary interest in the Fund. The moneys they provided were to be advanced to NS in accordance with the Facility Agreement, which made no provision for them to retain any beneficial interest in the moneys once that was done (save possibly in the event of a liquidation of NS: see clause 9 of the Trust Deed). Furthermore, their bonds have been paid back by the Government, on behalf of NS. Neither NH nor ICS provided the moneys in the Fund and so NH cannot hold a beneficial interest in the Fund by reason of any resulting trust in favour of itself or ICS.

37.
The question whether NH had a beneficial interest in the Fund depends upon the mutual intention of the relevant parties in establishing the suite of agreements for the implementation of the Project, comprising the MOU, the Development Agreement, the Main Construction Agreement and, in particular, the Facility Agreement. (The Construction Sub-Contract was entered into later on, and neither the Bank nor NS, one or other of which is alleged to be trustee for NH or ICS of the moneys held in the Facility account, was a party to it or to the exchange of letters on 4 and 5 June 1997 which preceded it.) For the purposes of the Trust issue, that mutual intention is to be ascertained by an objective assessment of the terms of the agreements which constitute the relationship between the Bank, NS and NH with reference to the money advanced to NS and placed in its Facility account with the Bank, part of which was the subject of the freezing order and constituted the Fund which was then placed in the holding account with UTC. For the purposes of the Equitable Assignment issue, what matters is the objective assessment of the terms of the agreements which constitute the relationship between the Bank, NS and ICS with reference to that money and the Fund, in examining whether ICS had a beneficial interest in the money which constituted the Fund which it could assign to NH.

38.
An objective approach to identification of intention where a trust is claimed is always appropriate, since a trustee and any beneficiary need to know what their obligations and rights are and need to ascertain this from the objective circumstances giving rise to the trust. It is especially important in a commercial context like the present, where the trust which is claimed to exist is enmeshed in and is said to arise out of a network of agreements put in place to accommodate the interests of a range of participants in the Project. All of those participants needed to be able to understand clearly what were the rights and obligations of themselves and others, in particular in respect of any credit risk they were required to accept when participating in the Project. To state the obvious, if certain contractors (in this case, NH or ICS) are able to assert a beneficial interest in a trust in respect of a substantial part of the funds made available for a development scheme, they will obtain preferential treatment as

against other contractors if the scheme runs into difficulties and the funding entity becomes insolvent. In a context like this, a court will be astute to ensure that a trust relationship in respect of money held to fund the scheme is clearly indicated in the contractual documentation. A trust will not readily be found to exist if that would undermine or contradict what appears to be a network of purely contractual relationships providing on their face for personal rather than proprietary rights as between the participants.

39.
The relevant starting point for analysis is the position in relation to the moneys advanced by the Bank to NS pursuant to the Facility Agreement. The funding arrangement to be implemented under the Facility Agreement was that the Bank would raise money for the Project by arranging a bond issue by NS to private investors and would act as designated Trustee on the investors' behalf in relation to enforcement of the bonds. In anticipation of the issue of bonds by NS, the Bank would advance moneys to NS. This would be done either by providing the moneys directly to NS by way of an ordinary loan, achieved by showing the moneys as a credit in an account of NS with the Bank for NS to use later, or by paying moneys directly to a contractor on the Project on behalf of NS, ie in accordance with NS's instructions (see clause 2.1 of the Facility Agreement), thereby achieving the same result as if the Bank had first provided the money to NS as a loan and NS had itself paid the contractor.

40.
In this case, the Board is concerned with moneys which were loaned to NS by the Bank and remained in NS's account with the Bank, since it is such money which was caught by the freezing order issued by the High Court in 1999 and so constituted the Fund now in issue, which was later paid into the holding account with UTC. In the Board's view, once the Bank had lent the Facility moneys to NS in this way, the relationship between them in relation to the money in NS's account, according to the Facility Agreement, was a purely contractual relationship of the ordinary kind between a banker and a business customer. The language of clause 2.1 is clearly to that effect: the Bank agreed "to make advances to or on behalf of [NS]". In that context, it could not be said that the Bank held any part of the money advanced to NS on trust for someone else.

41.
The Facility Agreement was the instrument pursuant to which NS's account with the Bank was set up. Only the Bank and NS were parties to the agreement. Clause 2.1 indicates clearly that it was intended that their relationship in relation to moneys advanced by the Bank and held in NS's account should be an ordinary banker/customer relationship. The description of the advances as the "Facility" reinforces the point. In such a relationship, so far as the banker is concerned, the customer has full legal and beneficial ownership of the moneys sitting in the account (or, more accurately, of the chose in action against the banker which is represented by the customer's credit entry in the account). The fact that clause 2.1 contemplated that the Bank might pay others directly "on behalf of the Company" also shows that the Bank acknowledged no obligation to apply the moneys which constituted the Facility for the benefit of anyone other than NS.

42.
Mr Ayliffe for NH sought to place weight on clause 3.1 of the Facility Agreement, according to which the Facility could only be used for the Project. But this provision falls far short of creating any trust relationship as regards the money in NS's account with the Bank. It simply imposes an obligation on NS not to use the Facility moneys for other purposes, in recognition of NS's role as a special purpose development company as explained above. Even though NH was to be the main contractor to

construct the stadium, it was contemplated that many other contractors would also be involved in the Project. Clause 3.1 was directed to ensuring that the Facility moneys would be available to meet their many claims. It did not stipulate that any of the contractors would have a trust-based claim to the moneys, giving them preferential access to those moneys as compared with others. Similarly, clauses 3.3 and 3.4 simply set out the mechanisms according to which the Bank (as Trustee for the bondholders) would maintain oversight in respect of payments out of NS's account or on behalf of NS. These were applicable in relation to all contractors on the Project, not just NH, and do not indicate that there was to be a trust of moneys in the account for the benefit of NH, ICS or anyone else.

43.
Mr Ayliffe placed particular reliance on clause 6.5 of the Development Agreement. However, in the Board's view, this does not support his submission that NH had a beneficial interest in any Facility moneys, and is indeed inconsistent with that submission. Two features of this provision are significant. First, it reflects clause 2.1 of the Facility Agreement, in that it contemplated that all moneys required to finance the Project would be paid by the Bank to NS (the Project Company) or would be paid "through the Project Company" (ie for and on behalf of NS, as described above) to the range of contractors working on the Project. Thus, as with clause 2.1 of the Facility Agreement, this provision contemplates that the relationship between the Bank and NS should be an ordinary banker/customer relationship, without any trust element being interposed. Secondly, clause 6.5 contemplates that payments would need to be made out of the Facility moneys to a wide range of persons ("the Developer [ICS], consultants, suppliers and other providers of goods and services in relation to the Project"). If there were cost overruns, or the Project had to be aborted, NS might not have sufficient funds from the Facility to meet the full claims of all contractors. There is nothing to indicate that NH or ICS was to have preferential status as compared with other contractors, in terms of access to the Facility moneys. Rather, it was contemplated that the range of contractors would have personal contractual claims against relevant parties which contracted with them, to be satisfied as between themselves in the usual way and subject to the normal credit risk inherent in such relationships.

44.
Nor do the MOU, the Facility Agreement, the Development Agreement or the Main Construction Agreement contain any terms which indicate that NS agreed to hold any part of the moneys lent to it by the Bank (and ultimately by the bondholders) on trust for NH or anyone else. On the contrary, terms in the Facility Agreement and the Development Agreement indicate that NS assumed no trust obligations in relation to those moneys. Furthermore, it is clear that the drafters of these sophisticated agreements knew very well how to set out terms to constitute a trust when that was required, as is demonstrated by the Trust Deed annexed to the Facility Agreement. This may be contrasted with the other parts of the agreements, where there is a complete absence of language appropriate to create a trust relationship.

45.
Taking the Facility Agreement first, it (and the Trust Deed annexed to it) set out the repayment and other obligations of NS in relation to the Facility. Since NS had been established as a special purpose development company for the Project, it was not contemplated that it would have any source of funding apart from the Facility (and rental payments by the Government when the stadium was completed, when it would be leased back to the Government in accordance with clause 3(iv) of the MOU). NS issued bonds in the form of credit notes in respect of the entirety of the sums advanced to it (clauses 5.1 and 5.2) and provided security as assurance for its repayment of the entirety of those sums and interest thereon (clause 5.5). This is all indicative of an intention that NS would retain full

ownership and control of the moneys in the Facility account and ensure that they were spent as it thought fit with a view to bringing the Project to completion, or to meet its debt obligations if that could not be achieved.

46.
Similarly, the terms of the Trust Deed indicate that NS was intended to receive the proceeds of the bond issue on its own behalf, rather than on trust for anyone else: see clause 4.02 (the proceeds were to be received by NS and applied to implement the Project, as to which see para 42 above) and the last paragraph of clause 9 (once the bondholders were repaid, NS would be the beneficial owner of any remaining money from the Facility).

47.
Clause 9.2 of the Facility Agreement is a further indication to that effect. It provided that if an Event of Default occurred and was not remedied within 30 days, the Bank could stop any future advances and "the entire amount of the Facility then outstanding shall become immediately due and payable". This is inconsistent with any idea that NS might be holding the moneys in its Facility account on trust for any other person, such as NH or ICS. As mentioned above, it was not contemplated that NS would have any funding before completion of the Project other than by way of the Facility. Therefore, in order to implement clause 9.2 in the case of an Event of Default, the parties to the Facility Agreement intended that the Bank should be able to claim back moneys sitting in NS's account, which it could not do if they were held on trust for others.

48.
The points made above as to why the Bank was not a trustee of the moneys in NS's Facility account also indicate that NS was not intended to be a trustee of those moneys either. Such trusteeship would have cut across the ordinary relationship of banker and customer which was intended to be created pursuant to the Facility Agreement and would have undermined the intended operation of the suite of agreements which were put in place.

49.
Attempts were made by Mr Ayliffe to rely upon the Construction Sub-Contract and the exchange of letters on 4 and 5 June 1997 as part of the materials from which an intention to create a trust could be discerned. However, neither the Bank nor NS was a party to that contract or the exchange of letters and the Board does not accept that they are relevant to the identification of the requisite common intention to create trust obligations binding on NS or the Bank in favour of NH or ICS. Even if they were relevant, there is nothing in them to support the inference that it was intended that NS or the Bank should act as trustee of any part of the Facility moneys for NH or ICS. In fact, as is unsurprising in the context of the carefully drafted, interlocking commercial agreements in issue on this appeal, the only trust obligations which it was intended should exist were those explicitly set out in clear terms in the Trust Deed appended to the Facility Agreement.

50.
For these reasons, the Board considers that the Court of Appeal was right to allow NS's appeal on the Trust issue.

(ii) The Equitable Assignment issue

51.
The second basis of NH's claim to a beneficial proprietary interest in the Facility moneys advanced to NS which came to comprise the Fund is by way of equitable assignment. The assignment case has

been presented to the Board in three ways: first, on the basis that ICS was the beneficiary under a trust for its benefit of moneys held in NS's Facility account with the Bank and assigned its beneficial interest under that trust to NH; secondly, as a chain of assignments from NS to ICS and then from ICS to NH; and thirdly as a direct assignment from NS to NH. In the latter two alternatives, the subject-matter of the assignments is said to be NS's rights against the Bank, alternatively described as a beneficial interest in the fund constituted by the advances held by the Bank as trustee or as a contractual right to receive the advances, arising from the Facility Agreement.

52.
It is convenient to deal with these arguments in reverse order, starting with the case based on direct assignment by NS. Mr Ayliffe frankly acknowledged that this was a new case, presented for the first time to the Board, not having been advanced in either of the courts below. But he said that it arose from the same facts as the case for an assignment by ICS, so that no prejudice would be caused by its being put forward now, as an alternative, if the argument for an assignment by ICS was not made good.

53.
The Board disagrees. The trial judge did find that there was an assignment from ICS to NH (para 138). That was a mixed finding of fact and law which the Board will examine as part of the case for a chain of assignments. But it is inconsistent with a direct assignment by NS to NH, for which, unsurprisingly, the judge made no findings of fact at all. Furthermore, if a case was to be advanced that NS made a direct assignment to NH it needed to be pleaded, so that it could be defended at trial and the evidence (if any) in support of it properly examined by way of forensic challenge. None of this occurred and it cannot fairly be carried out within the framework of a second appeal.

54.
Turning then to the second case on assignment presented to the Board, based on a chain of assignments, NH's argument runs as follows. Clause 6.5 of the Development Agreement, read in context, amounted to an equitable assignment, or agreement to assign, by NS to ICS, sufficient of the advances made to NS under the Facility Agreement to satisfy ICS's entitlement to payment by NS from time to time for its work on the Project under the Main Construction Contract. This gave ICS an immediate equitable interest in the advances out of which it could carve a sub-assignment of part to NH. By its confirmation in paragraph 17 of its letter to NH dated 5 June 1997, ICS did just that, by an assignment or agreement to assign from its entitlement to the advance moneys enough to satisfy NH's entitlement from time to time under the Construction Sub-Contract. By this means effect was given to the common intention between NS, ICS, the Bank and NH that NH should be entitled to direct payment by the Bank out of the advance moneys. Since the subject matter of both assignments was NS's contractual rights to receive the advance moneys under the Facility Agreement, these were equitable assignments of a legal chose in action, to which the requirement for writing in the Statute of Frauds did not apply, and for which equity imposed no other formal requirements, or even the need to demonstrate the necessary intention.

55.
Mr Ayliffe sought to place NH's assignment case within a framework recognised by equity by reference to the following dicta of Lord Truro cited by Lord Wrenbury in Palmer v Carey [1926] AC 703, 706:

"The law as to equitable assignment, as stated by Lord Truro in Rodick v Gandell [(1852) 1 De GM & G 763, 777-778], is this: 'The extent of the principle to be deduced is that an agreement between a

debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund, in other words, will operate as an equitable assignment of the debts or fund to which the order refers.'"

Mr Ayliffe relied on both limbs of Lord Truro's formulation of the principle. Under the first limb, NS agreed with ICS that its debt to ICS under the Main Construction Contract should be paid out of the advance moneys promised to NS, and ICS then agreed with NH that its debt to NH under the Construction Sub-Contract should be paid out of that proportion of the advance moneys coming to ICS. Under the second limb, NS gave to ICS an order directing the Bank to pay what was owed to ICS out of the advance moneys, and then ICS gave to NH an order directing the Bank to pay what was owed to NH out of the advance moneys.

56.
Both those formulations make it essential that ICS should have had or acquired some proprietary or other interest in the Facility advance moneys, either as "a specific fund coming to" ICS or as a person to whom the Bank owed money or for whom the Bank held a fund. Although he cited Lord Truro's dicta, the trial judge did not explain how he thought that this requirement was satisfied, if there was not a trust of the Facility advance moneys of which ICS was a beneficiary. The Court of Appeal regarded the lack of any such entitlement in ICS as fatal to NH's case on assignment.

57.
The Board has already concluded (contrary to the finding of the trial judge) that there was no trust of the Facility advance moneys under which anyone other than the investors or NS was a beneficiary. The better view is that there was no trust at all, other than under the Trust Deed, which constituted the Bank as Trustee for the bondholders. As set out above, the Trust Deed recognised that when the bondholders had been repaid, NS would be left as beneficial owner of any Facility moneys left over. On a proper analysis, NS had a contractual right to be paid the advances under the Facility Agreement, which included a right to direct the Bank to pay others direct, at NS's order. ICS had no such rights, not being a party to the Facility Agreement.

58.
Logically therefore the first question is whether NS made an equitable assignment of any of its rights under the Facility Agreement to ICS. This is the first of the chain of assignments relied upon by NH. In the Board's view there is nothing which supports that conclusion. The common intention found by the trial judge to have been shared and orally agreed between NS, ICS, NH and the Bank was not that ICS should receive its entitlement under the Main Construction Contract gross, and then pay NH out of that receipt, but that NH should be paid direct by the Bank. That is what later happened, until ICS and NH fell out. So the oral agreement is arid territory from which to conjure an equitable assignment of the Palmer v Carey type in favour of ICS.

59.
Mr Ayliffe again relied mainly upon clause 6.5 of the Development Agreement, to which both NS and ICS were parties, set out above. It takes the form of a covenant, not by NS but by the Bank (as Financing Agent), to make payments to or through NS (the Project Company) of moneys due "under or pursuant to the Contract Documents" to a range of contractors, including ICS (the Developer). According to the relevant definition, the Contract Documents do not include either the Main

Construction Contract (the agreement under which ICS was to be paid) or the Construction Sub-Contract (the agreement under which NH was to be paid).

60.
In the Board's view clause 6.5 cannot amount to, or evidence, an equitable assignment of anything by NS to ICS. First, it is a personal covenant by the Bank, not a promise or agreement by NS to do anything. Secondly, it is a covenant which applies equally in its intended effect to (or in favour of) ICS, consultants, suppliers and providers of goods and services in connection with the Project. None of them apart from ICS is a party to the Development Agreement. If clause 6.5 had been intended to operate by way of assignment, one would have expected there to be precise identification of the intended assignees, rather than a general reference to an undifferentiated group of potential recipients of funds, one of whom happens to be ICS. Thirdly it does not promise, or evidence an agreement for, payment direct to ICS but rather payment "through" NS. In short it simply has nothing to do with the assignment of property or other rights at all. It is neither an agreement nor an order within either of the limbs of equitable assignment identified in Palmer v Carey. If an equitable assignment to ICS had been intended, it would have been simple and straightforward for the Development Agreement to have provided for that in clear express terms.

61.
That conclusion is sufficient to dispose of the second variant of NH's assignment case. Since ICS held no relevant rights as assignee from NS, there was nothing upon which an assignment by ICS to NH could bite. But the Board does not read paragraph 17 of the 5 June letter (set out at para 9 above) either as an immediate equitable assignment by ICS, or as an agreement that ICS should itself assign anything. It was an affirmative response to the request, in paragraph 2 of the letter from NH to ICS of 4 June 1997, under the heading "Assignment of loan proceeds" (set out at para 8 above). An understanding of those two paragraphs is to some extent bedevilled by an unexplained use of "Agreement" and "Contract" as if they were defined terms. "Agreement" in the 5 June letter looks as if it is the Construction Sub-Contract, because that is the only agreement under which moneys were to become due to NH. Similarly, the reference to the "Contract" in the 4 June letter appears to be to the Construction Sub-Contract, for the same reason. The puzzle is as to the "Agreement" referred to in the 4 June letter. It appears to be something different from the Construction Sub-Contract, which does not contain any provision for direct payment. There had been an oral agreement for direct payment, as found by the trial judge, but it is odd to find that referred to as an "Agreement" with a capital A. But if not, it is not clear to what other contractual document it refers, because none of them contain a promise or provision for direct payment, as opposed to payment through or on behalf of NS. The Board will assume without deciding that it refers to the oral agreement for direct payment, which understandably NH may have wanted to be confirmed in writing.

62.
True it is that both the request and the response refer expressly to assignment. But they do so as part of a phrase "assigned and paid directly" and as something to happen in the future, presumably as and when moneys actually became due to NH. Nor do the relevant passages speak of an assignment by ICS itself. ICS was certainly not to be the payer, and it is not clear why ICS should be the assignor either, since it had nothing to assign. The request for confirmation is made to ICS presumably because ICS was to be in administrative charge of the project. In that context the Board would interpret the exchange as the request for and giving of confirmation that ICS would ensure that the direct payment process which had been agreed would actually be implemented, as and when payments became due,

as in fact occurred until ICS fell out with NH. In that context “assigned” adds little to “paid” if both were to happen at the same time.

63.
At the highest therefore the exchange of letters in June 1997 amounted to an agreement by ICS that there would be a direct assignment and payment of moneys to NH as and when they became due. An agreement to assign after-acquired property may of course have a proprietary effect in equity, but since there was not at any later stage property coming into ICS’s hands upon which that agreement could bite, it never amounted to more than a personal undertaking by ICS which it later repudiated, so as to sound in damages, for which NH would unfortunately be an unsecured creditor in ICS’s liquidation.

64.
Finally, in so far as NH seeks to maintain the first variant of its assignment case referred to above, based on assignment of the beneficial interest of ICS under an alleged trust of the Facility moneys in NS’s account with the Bank, similar points can be made. This appears to have been the principal case on assignment presented by NH at trial and in the Court of Appeal. In the Board’s judgment, this version of the assignment argument fails for the simple reason that no such trust existed for the benefit of ICS: see the discussion of the Trust issue, above.

65.
On the basis of the analysis above, no issue arises under the Statute of Frauds and it is unnecessary to discuss that Act.

66.
For these reasons, the Board considers that the Court of Appeal was right to allow NS’s appeal on the Equitable Assignment issue.

(iii) The Entitlement issue

67.
The reasoning above is sufficient to give the answer to the Entitlement issue. Neither ICS nor NH had any proprietary interest in the Facility moneys advanced to NS, from which the Fund is derived. When those moneys sat in NS’s account with the Bank, NS had full ownership rights in relation to them. Since the Fund represents such moneys and no other entitlement has intervened, NS is entitled to the Fund. That is also the outcome provided for by the last paragraph of clause 9 of the Trust Deed.

68.
The Board would also observe that this outcome appears fair. NS assumed the obligation to repay the advances made to it under the Facility Agreement, including by issuing bonds in the amount of those advances. In this way, it was NS which provided the relevant consideration to acquire the money in the Fund. The Government discharged NS’s obligations under the bonds by paying the bondholders on behalf of NS, but contrary to the contention of Mr Ayliffe this was not a windfall for NS. In return for the Government’s payment of the bonds on its behalf, NS had to transfer ownership of the site and the stadium to the Government, in accordance with clause 3(vi) of the MOU. Furthermore, had NS’s use of the money not been blocked by the freezing order, NS would have been able to put it to use to complete the Project using a contractor other than NH. As events transpired, however, NS had to raise money from elsewhere to do that. Restoration of the Fund to NS simply puts it back into the position in which it would have been, had the freezing order not been granted on the basis, now

shown to be incorrect, that NH had a proprietary interest in the Facility moneys then held in NS's account with the Bank.

69.
Finally, for the first time on this appeal, Mr Ayliffe sought to raise a new argument in relation to the Entitlement issue, based on an alleged estoppel. This was not pleaded, nor was it the subject of evidence or submissions at trial. This is a new issue which is not suitable to be raised or determined on an appeal to the Board. Accordingly, the Board does not give permission for it to be raised at this stage.

Conclusion

70.
For the reasons given above, the Board dismisses NH's appeal. It confirms the order made by the Court of Appeal, for NH to repay the amount of the Fund plus interest to NS.

LADY ARDEN: (dissenting)

71.
The conclusion that NH has no remedy against the Fund for work it has carried out on the construction of the national stadium of Grenada is surprising to me. After all, as Lord Briggs and Lord Sales explain, the Fund represents the balance of the Advances made by the Bank to NS under the Facility Agreement, and NS expressly agreed in clause 3.1 of the Facility Agreement that "the Facility shall be used solely for the purpose of the Project". That meant that the advances under the Facility would be used to meet (so far as they were available to do so) the claims of contractors to the Project, or at least the Developer/main contractor, ICS, which had a direct claim against NS.

72.
NH appears to be only one contractor to the Project remaining unpaid, and it is indisputably owed by ICS EC$7,430,724.70 for work done by it on the construction of the stadium.

73.
The Bank agreed to make the Advances on fixed dates, and not for example when stages in the development were reached. That was one of the reasons why a fund could arise out of the Advances. The Fund represents money belonging to NS. It is a chose in action belonging to NS which can be the subject of an express trust or an assignment.

74.
It was (according to the recitals to the Development Agreement) the Developer, ICS, which was instrumental in structuring the financing package for the Project. The money to pay for the project was to be provided by the project company, NS, and NS was to be put in funds to do this by the Bank, which was to enter into the Facility Agreement "for the making of … advances through the Project Company to the Developer or a consultant, or a supplier or other provider of goods and services in respect of the Project" (recital (4) to the Development Agreement).

75.
The Development Agreement may thus have intended that the persons mentioned other than the Developer should have a direct claim on the Fund, but at the very least it was clear that the Developer would have a claim for those sums which it was liable to pay to those persons, and, in law, they, including NH as the main contractor, would be able to require the Developer to enforce that claim in

order that it should receive any payment due. Just to make sure, NH took an assignment of ICS's rights against the Fund.

76.
The Facility was financed by the issue of bonds by NS and the proceeds of issue were paid to the Bank as trustee for the bondholders to enable it to make the Advances. The original interim bonds were, and were always intended to be, replaced by bonds with a 15-year redemption date and secured on the site so they constituted long-term capital. There were events of default in the Facility Agreement, such as the insolvency of NS (which has not occurred), on the occurrence of which the Advances could be rendered repayable but the primary security of the bondholders would have been the security which they took over the site of the national stadium. The bondholders were not given any security over the Fund and so they cannot compete with the holder of any beneficial interest in the Fund. The bonds are therefore not material to the issues on the appeal. They have in any event been redeemed by NS without the occurrence of any event of default.

77.
It is, with respect to the majority of the Board, hard to think that the terms of clause 6.5 of the Development Agreement, when read with the machinery set up by the Facility Agreement for the funding of the Project including payment to those who supplied goods and services, constituted, as the majority of the Board has concluded, a purely personal covenant in favour of the Developer (or, possibly, any other person). There was an earmarked amount (the balance of the Advances) which NS had agreed to use solely to fund the Project. Clause 3.1 of the Facility Agreement) provided:

"**3. PURPOSE AND UTILISATION OF FACILITY AND DISBURSEMENTS**

3.1 The Facility shall be used solely for the purpose of the Project."

78.
The remainder of clause 3 dealt with covenants for the benefit of the bondholders, such as provisions for information to be supplied to the Bank as trustee for the bondholders and for contractors' claims to be verified. The provision for verification of claims was incorporated into the operation of the Development Agreement as I shall explain. What is important is that the Bank would be making the payments for Project purposes out of the proceeds of the Advances. It would have been obvious to everyone involved that it was in pole position to see that the restrictions on the use of those proceeds were observed. This payment role and mechanism was meant so that the relationship between NS and the Bank was far removed from the ordinary banking relationship between NS and the Bank. That is confirmed by the fact that the Bank assumed the new title of Financing Agent. The Bank made payments to contractors and, in the case of NH, the Bank made these payment direct to it until the dispute between the parties arose.

79.
The majority have rejected the idea of ICS having a beneficial interest in the Fund partly on the basis that it did not lend any money to NS. But the appellant did not rely on any such trust. I understand the appellant to rely on an express trust for either itself or ICS. I have difficulty in seeing why clause 6.5 of the Development Agreement, read as it must be with the Facility Agreement, is not effective to create a trust of the Fund in favour of ICS to the extent of any moneys remaining to be paid by it in respect of the Project which were due from NS to ICS.

80.
Clause 6 provided:

“**6. Consideration**

In consideration of the agreement of the Developer set out in clause 2 the Project Company shall … and the Financing Agent [the Bank] shall:-

6.5 under and pursuant to the Facility Agreement pay or cause to be paid through the Project Company all moneys due under or pursuant to the Contract Documents to the Developer, consultants, suppliers and other providers of goods and services in relation to the Project.”

81.
The opening words “under and pursuant to the Facility Agreement” are a reference back in particular to clauses 2.1 and 3.1 of the Facility Agreement. There was no other source of funds for carrying out clause 6.5 available to NS other than the facility which NS agreed to take up in the Facility Agreement. What the Bank was undertaking to do in clause 6.5. was to distribute those moneys to the Developer and potentially others and to do so in compliance with the Facility Agreement to which it was party as trustee for the bondholders. NH’s claims were accordingly passed for payment in accordance with the procedure laid down in clause 3 of the Facility Agreement.

82.
As to the words “under or pursuant to the Contract Documents”, the majority have given clause 6.5 of the Development Agreement an unduly restrictive interpretation. The majority interpret those words as extending only to “the Contracts” as expressly defined in the Development Agreement, which did not include NH’s agreement with NS for the construction of the national stadium. The majority’s interpretation gives no meaning to the words “or pursuant to”. If the interpretation of the majority were correct and “the Contracts” did not extend to the contracts with NH and subcontractors and suppliers, there would have been no reason to include in clause 6.5 the words “consultants, suppliers and other providers of goods and services in relation to the Project”. On my interpretation, the claims in respect of which the Bank was to make payments under clause 6.3 included the claims due under the main contract with the Developer to contractors such as NH.

83.
The majority also hold that the provision for payment “through the Project Company” indicated that there was no trust and no assignment. The majority conclude that the arrangement was only that the Bank should make or cause to be made payments through NS, which, in the opinion of the majority, is inconsistent with an assignment. Respectfully I consider that that misses the point. There is an irrevocable instruction for payments through NS to be made to ICS (see the next paragraph). NH does not have to go further and show that the payments were to be made to other contractors as well or that the Financing Agent was to make payments direct and not through NS, Payments needed to be made through NS so that it could be deducted with the cost. The fact that they were to be made “through the Project Company” is on analysis a factor against the majority’s interpretation since it is consistent with the obligations under the Facility Agreement of NS to use the Facility solely for the purposes of the Project as being incorporated into the Development Agreement.

84.
Moreover, making a payment through a trustee or assignor is not in any way inconsistent with the existence of a trust or assignment.

85.
The Developer can enforce the provisions of the Development Agreement and, to the extent incorporated by clause 6.5, the Facility Agreement, by starting proceedings against NS and obtaining

an injunction against it to observe the relevant provisions. By taking such proceedings, it had the ability to invoke the court's assistance to prevent the misapplication of the Fund in breach of clause 3.1 of the Facility Agreement and clause 6.5 of the Development Agreement.

86.
That capability is the hallmark of a beneficial interest. Because of its ability to prevent the diversion of the proceeds of the Advances, the Developer has a beneficial interest in the Fund (contra paras 56 and 61 above). The Developer's rights in the Fund were assignable (contra para 60 above). Any assignee of the rights to the Developer's rights could take the same proceedings and obtain the same injunctions provided that the Developer has been joined as a party. The Developer is a party to these proceedings. The consequence is that NH also has to the extent of the rights of ICS assigned to it by ICS a beneficial interest in the Fund.

87.
This conclusion is reinforced by the legislation passed to give effect to the agreements entered into for the purposes of the Project. All the agreements with which this appeal is concerned were given the force of law in Grenada by the Parliament of Grenada. Section 3 of the Grenada National Stadium (Development and Financing) Act 1997 ("the Act") provided:

"3. The Facility Agreement, as contained in Schedule B, the Development Agreement, as contained in Schedule C, the Re-conveyance Agreement, as contained in Schedule D, and any other agreement with respect to the Grenada National Stadium Complex shall, when executed, have he force and effect of law in Grenada."

88.
Neither the Development Agreement nor the Facility Agreement contained any provision for revocation of any of its provisions, and so, once section 3 had been enacted, NS could not revoke the provisions of, for example, clause 3.1 of the Facility Agreement, which remains in full force and effect to this day and attaches to the Fund until it is exhausted in the payment of the construction costs of the national stadium or all such costs are paid. The majority have not taken into account the implications of section 3. Section 3 means that the obligations in clause 3.1 of the Facility Agreement and in clause 6 of the Development Agreement are irrevocable.

89.
The provisions of section 3 are also inconsistent with the agreements being unenforceable because of some other provision of Grenadian law, such as the Statute of Frauds.

90.
Additionally, to address a hypothetical situation considered by the majority, it was not possible for the Bank, by calling in its advances, to prevent the application in accordance with clause 3.1 of the Facility Agreement of any moneys actually advanced and required for the purposes of the Project because that too would be involve departing from the status given to clause 3.1 of the Facility Agreement by the Act.

91.
Another objection which has found favour with the majority is that there might be cost overruns so that the Facility might be exceeded. As to that, the Facility was for US$22.8m. (The value of the works to be done by NH under NH's contract was in excess of US$16m). It is inconceivable that the contractors would not consider the earmarking of the proceeds of the advances for the completion of the Project an important and valuable right even though there remained the possibility of overruns.

92.
Clause 2.1 of the Facility Agreement states that the advances will be paid “to or on behalf of” NS. That enabled the Bank in an appropriate case to make a payment out of the advances to a person to whom NS owed money in respect of the Project. This remains the position if the payee has a beneficial interest in the proceeds of the advances or is an assignee of the right to receive the same.

93.
That is sufficient for NH’s purposes because the judge found that ICS assigned its claim to these moneys to NH: Rajkumar J held:

“I find that, on a balance of probabilities, ICS agreed to assign, and did assign, to NH so much of the moneys payable to it under the Facility Agreement as would from time to time be due to NH under the Construction Agreement (para 138, emphasis in the original) (contra, para 58 above).”

94.
That assignment is also evident from the letter agreement of 4/5 June 1997 as I interpret it. In its letter of 4 June 1997, under the heading “Assignment of loan proceeds”, NH required “confirmation of the Agreement that the moneys due to us under the Contract would be assigned and paid directly to us from [the Bank]” and in its letter of reply, ICS said that “all moneys due to NHIC under the Agreement shall be assigned and paid directly to NHIC”. The clear intention of the arrangements between ICS and NH was that NH would (if it was not already entitled to be so paid) be paid the moneys due to it out of the moneys which the Bank had power to distribute so long as there remained any part of the facilities to pay it. The words used in these letters have a discernible and proper meaning. The most that went wrong with the letter of 4 June was that the word “Agreement” was inappropriately capitalised. In the second letter, “the Agreement” is clearly the contract awarded to NH. These letters are in any event not necessary because of the judge’s clear finding of fact set out above.

95.
I do not consider that the resultant arrangements were uncommercial. It is not unknown for parties to a large construction contract to set up a project bank account as in this case, particularly where shell companies, such as NS and ICS, were involved. I understood counsel for the respondent in argument to accept that was so and he also accepted that it would have been of concern to the contractors to the Project that they should be protected in some way from the risk of the insolvency of one or both of the shell companies, NS and ICS. (As to project bank accounts, there are standard form JCT terms for this purpose. In the present case the parties used FIDIC standard terms but we have no access to those).

96.
To the extent that assignment is needed for the purpose of this analysis, whether there was an assignment does not depend on the intention of the parties to an agreement but on the objective meaning of the words used (there being no requirement to use any particular form of words) and on the question whether it is sufficiently clear that the fund in question had been made over to others (whom, it appears from other case law need not be parties to the assignment to enforce it): see William Brandt’s Sons & Co v Dunlop Rubber Co Ltd [1905] AC 454, 462 which was placed before the Board. That the money is to be paid through the assignor is not determinative of whether a covenant amounted to an assignment.

97.

The majority of the Board does not share my view that the result which they uphold is surprising and counterintuitive so I will not pursue this matter in more detail. On the basis of the conclusions of the majority, the Fund will be paid to NS, and not, as NS agreed in the Facility Agreement to do and was mandated by the Grenadian Parliament to do, to meet the construction costs of the Project.