JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 49/04

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE MARSH, J.A. (AG.)

BETWEEN	**COFFEE INDUSTRY BOARD**	**APPELLANT**
AND	**CONSTRUCTION DEVELOPERS ASSOCIATES LIMITED**	**RESPONDENT**

Maurice Manning & Miss Sherry-Ann McGregor instructed by Nunes, Scholefield, DeLeon & Co., for appellant

Miss Hilary Phillips, Q. C., & Kevin Williams instructed by Grant Stewart Phillips & Co., for respondent

20th , 21st, July, 5th October 12th, 14th December 2006 & 16th November, 2007

HARRISON, P.

This is an appeal from the decision of Mrs. Justice Hazel Harris on 4th May, 2004 ordering that the parties proceed to arbitration and appoint an arbitrator within ten days of the said order.

The facts relevant to this matter are that on 30th May 1994, Construction Developers Associates Ltd ("CDA"), the respondent, entered into a contract with Coffee Industry Board ("CIB"), the appellant on behalf of the Ministry of Agriculture, the respondent. The terms of the contract were that CDA undertook to complete the construction of a central grading and finishing plant, at Salt River

in the parish of Clarendon, at a contract price of $247,563,656.01. A material term of the conditions of the said contract was clause 19.1. It reads:

> "19.1 ... If any dispute or difference of any kind whatsoever shall arise between the Employer and the Contractor or the Engineer and the Contractor in connection with, or arising out of the Contract, or the execution of the Works, whether during the progress of the Works or after their completion and whether before or after the termination, abandonment or breach of the Contract, it shall, in the first place, be referred to and settled by the Engineer who shall, within a period of ninety days after being requested by either party to do so, give written notice of his decision to the Employer and the Contractor." (Emphasis added).

Under the terms of the contract, CIB is the Employer, CDA is the Contractor and the firm of Messrs McMorris, Sibley Robinson is the Engineer.

Clause 22.5 of the conditions of the contract provides that:

> "22.5 ... Not later than one month after the issue of the maintenance Certificate the Contractor shall submit to the Engineer a Final Statement of Account with supporting documents, showing in detail the value of work done in accordance with the Contract together with all further sums which the Contractor considers to be due to him under the Contract. Within six months after receipt of this Final Statement of Account and of all information reasonably required for its verification the Engineer shall issue a final certificate stating:
>
> a) The amount which in his opinion is finally due under the Contract and (after giving credit to the Employer) for all amounts previously paid by the Engineer and for all sums to which the Employer is entitled under the Contract.
>
> b) The balance, if any due from the Employer to the Contractor or from the Contractor to the Employer as the case may be. Such balance shall, subject to Clause 17.8 hereof, be paid to

> or by the Contractor as the case may require within Twenty-Eight (28) days of the Certificate."(Emphasis added).

By letter dated 25th September 1997 the Engineer sent to the appellant the requisite Maintenance Certificate. A copy of this Certificate was sent by the Engineer to the respondent CDA by letter dated 16th October 1997.

By letter dated 24th October 1997 CDA wrote to the Engineer advising that it had received the said Certificate on 17th October 1997 and:

> "... as such we will be unable to meet your 25th October, 1997 deadline for submission of Final Accounts.
>
> We are therefore requesting that an extension be granted to allow our submission of Final Accounts by 31st December 1997."

The Engineer responded by letter dated 27th October 1997, and said, inter alia:

> "We are aware that the Quantity Surveyors, Stoppi Cairney Bloomfield, have submitted to CDA a Provisional Final Account (relating to the project) as of February 25, 1997, and SCB have informed that they are still awaiting a response from CDA.
>
> We are of the opinion, considering the fact that a Provisional Account was submitted for agreement some 8 months ago, that there is no need to extend the period for the final submission beyond Monday, November 17, 1997."

A letter dated 31st October 1997 from CDA to the Engineer, reads, in part:

> "In reference to your letter dated 27th October, 1997, kindly be advised that work has been done on the project since the submission of the Quantity Surveyors Provisional Final Account dated 25th February, 1997. Furthermore, your reference to a Quantity Surveyors Provisional Final Account is

> inconsequential in relation to (i) our preparation of the Final Account, and (ii) the Contract Conditions.
>
> We fail to understand your apparent reluctance to be flexible in this regard, especially when you are allowed up to six months thereafter to issue the Final Certificate."

By letter dated 7th November 1997, the Engineer referred to the Provisional Final Account submitted to CDA by Quantity Surveyors, Stoppi Cairney Bloomfield ("Stoppi Cairney") on 25th February 1997, CDA's delay in delivering information to Stoppi Cairney, as requested, and concluded:

> "In view of the above, and the Contract Conditions governing the matter (Clause 22.5), we cannot extend the date for the submission of the Final Account, and therefore expect your compliance by November 17, 1997."

CDA, by letter dated 11th December 1997 to the Engineer, said:

> "We are not sure what should be understood from your request made to the Quantity Surveyors to prepare an assessment of the final cost of the project.
>
> However, if it is your intention to use such assessment as a Final Account, we wish to be advised of the Contract Conditions that empowers you to take such an action. In the absence of Contractual support, we strongly object to any such intention.
>
> Our Final Account will be submitted by December 31, 1997 as previously advised."

In response thereto, the Engineer by letter dated 16th December 1997 to CDA wrote:

> "The Contract calls for you to submit a Final Statement of Account to me within one (1) month after the issue of my Maintenance Certificate of October 16, 1997.

> It is now in excess of one month since that date and I have not received your Final Statement of Account. I now consider you to be in default and in breach of your Contract.
>
> Since it is necessary to have such an account, I will request the Quantity Surveyors to assist me in its preparation and when completed, will be issued by me as the Project Final Account."

CDA did not submit its Final Statement of Account on 31st December 1997 as promised, but wrote to the Engineer by letter dated 16th January 1998 as follows:

> "As we are at the stage of Final Account on the project, upon review of our files we recognise that there has been no response to some critical issues as follows:
>
> | Date of letter | Subject |
> |---|---|
> | 30/10/95 | Extension of time |
> | 30/01/96 | " " " |
> | 08/07/96 | " " " |
> | 23/10/96 | Defective Work |
> | 21/01/97 | Practical Completion Date |
> | 19/10/94, 12/1/95, 15/4/97 | Water Cost due to omission of re-activation of the well. |
>
> In addition to the foregoing, there are a number of unresolved issues which are represented in our Final Account that will require settlement either amicably or by other means prescribed by the Contract."

By letter dated 2nd November 1998 Stoppi Cairney sent to CDA:

> "... one (1) copy of the draft Final Account for your perusal and agreement"

and claimed the sum of $361,604,442.57.

Woodrow Whiteley and Associates, Chartered Quantity Surveyors ("Woodrow Whiteley") by letter dated 19th January 1999, sent to Stoppi Cairney. "One (1) copy of the proposed final Account prepared on behalf of ...CDA", in the sum of $601,043,675.68, together with supporting documents, and concluded:

> "We recently received a copy of your proposed draft final account dated November 2, 1998. We will be undertaking a review of your submission and compare findings with the contents of C.D.A.'s submission. As soon as we have completed this exercise we will contact you and try to arrange a meeting to commence discussions towards reaching an agreed final account figure at an early date."

Stoppi Cairney responded to the above letter of 10th January 1999, by letter to Woodrow Whiteley dated 21st January 1999 referring to the terms of the said clause 22.5, the fact that the Engineer's maintenance certificate dated 25th September 1997 determined that:

> "... the latest date for the submission of the Final Account Statement was October 25, 1997,"

the request for extension to December 31, 1997, and continuing said:

> "4. The Final Account Statement was however, submitted to us by Construction Developers Associated Ltd., on **January 14, 1998**. The claim was analysed by the Consultants, discussions/meetings were held and further documentation provided to supplement the submission.
>
> 5. On the basis of our assessment of this Claim including the supplementary documentation provided and discussions held, we issued to the Contractor, a draft Final Account dated **November 2, 1998** for perusal and agreement.

> Taking into account the foregoing, we are of the opinion that your Final Account Statement dated January 19, 1999 submitted to us on the 21st instant, is invalid for the following reasons:
>
> a) *A Final Account Statement was previously submitted by the Contractor and assessed by the Consultants.*
>
> b) *The submission of your Claim is not in accordance with the time period stated in CDA's contract.*
>
> We are therefore requesting that you peruse our draft Final Account in relation to the Final Account Statement previously submitted by the Contractor and let us have your comment/agreement."

Woodrow Whiteley, by letter dated 5th February 1999 to Stoppi Cairney, indicated that the final account submitted by letter dated 19th January 1999:

> "... does not represent a re-submission of CDA's final account..."

and in relation to its submission, said:

> "a) this submission contains no adjustment to amounts previously claimed for works which have been measured and priced in accordance with the contract
>
> (b) this submission contains no additional/new contractual claim items for which the contract requires the contractor to submit a claim prior to amounts due being assessed by the engineer and the contract sum adjusted accordingly.
>
> The main change in this report compared to previous submissions from C.D.A. pertains to the format. This latest submission represents primarily a re-formatting of the January 1997 submission with the inclusion of detailed build-ups to items of contractual claims which were

> always included in C.D.A.'s final account but for which detailed computations were not previously submitted."

By letter dated 5th October 1999 CDA wrote to the Engineer, in the following terms:

> *"Attention: Mr. V.R. McMorris*
>
> *Dear Sirs:*
>
> *Re: Central Grading & Finishing Plant*
> *at Tarentum, Salt River, Clarendon*
>
> *We refer to attached letters dated January 19, 1999; February 5, 1999; and June 29, 1999 from our Quantity Surveyors, Woodrow Whiteley & Associates and letters dated January 21, 1999; February 10, 1999; and August 16, 1999 from Stoppi Cairney Bloomfield articulating differing views on our Final Account submission.*
>
> *As the Engineer under the Contract, we are requesting your position on the matter."*

It is the stance of CDA that the latter was a clear indication that a dispute had arisen and was by this means referred to the Engineer for resolution.

Harris, J, in her judgment, at page 212 of the record said:

> "The information communicated to the Claimant by the Engineer in December 1997 with respect to Messrs Stoppi Cairney Bloomfield furnishing the final account cannot be construed as a decision which was final and binding on the parties, as at that time, there was no request by the Claimant to the Engineer, to settle a dispute. Thereafter, a stalemate developed between Messrs Stoppi Cairney Bloomfield and the Claimant surrounding the final statement of account, following which, the Claimant by way of its letter of October 5, 1999 sought to obtain a decision from the engineer touching the matters in dispute. Arising from this request, the Engineer by his letters of October 19 and November 9, 1999 gave written notice of his

decision. On December 22, 1999 the Claimant notified the Engineer of its claim to proceed to arbitration. The date of the notification clearly falls within the 90 days stipulated by the contract of so doing."

The learned trial judge ordered that:

(1) "The parties proceed to arbitration."

(2) "The parties appoint an arbitrator within ten days of the date hereof"

resulting in this appeal.

The grounds of appeal filed, are as hereunder:

"1. The Learned judge erred, in fact and in law, in her determination that there was no decision by the Engineer in December 1997 which in the context of the provisions of Clause 19.1 of the Conditions of the Contract was final and binding on the parties in the absence of a request to refer the matter to arbitration.

2. The Learned judge erred in fact and in law, in her determination that as there was no request by the Claimant/Respondent of the Engineer to settle any dispute in 1997, that there was no decision which could have been challenged under clause 19.1 of the contract.

3. The Learned Judge having found that the *'Engineer's direction that Messrs. Stoppi Cairney Bloomfield prepare the final statement of account formed the foundation of an impasse',* erred in failing to find that the Engineer's stated intention was in fact a decision that fell to be considered under clause 19.1 of the contract as it amounted to a difference or dispute between the Contractor and the Engineer which by necessary implication was settled by the Engineer and disputed by the Claimant who then failed to refer the matter to arbitration.

4. The Learned Judge erred in failing to recognize that there was no dispute or no relevant dispute between the Claimant/Respondent and Messrs. Stoppi Cairney Bloomfield in 1999 and that the Claimant's letter of October 5, 1999 sought to raise a dispute with respect to the Claimant/Respondent's Final Account Submission which the Learned Judge had found was out of time as at November 17, 1997.

5. Based on the evidence before her the Learned Judge erred in failing to find that the Claimant/Respondent's letter dated December 22, 1999 seeking to refer matters to arbitration pursuant to the Conditions of contract Part 1 Clause 19.1 did not raise any matters for which a decision of the Engineer had been sought and given within the preceding 90 days."

Mr. Manning for the appellant argued that the Engineer by its letter dated December 16, 1997 delivered a decision in respect of a dispute that arose between the Engineer and CDA in accordance with clause 19.1. No dispute arose in 1999 between CDA and the Engineer to give rise to any decision for reference to arbitration. The learned trial judge was in error to find that such a dispute arose.

Miss Phillips, Q.C., for the respondent submitted that the refusal of the Engineer to grant to the Contractor the extension of time was not challenged by the Contractor. That was the only issue outstanding at the end of 1997, and therefore there is no dispute in respect of the Engineer's view of the provisions of clause 22.5. The Contractor did not file his Final Statement of Account by November 17,1997 as required, but did so on January 13, 1998.Several items in the CDA's said Account were wrongly rejected by Stoppi Cairney, the Quantity Surveyors

relied on by the Engineer. There were substantial differences between the accounts of the parties. The learned trial judge was correct to find that the differences reflected in the letters of CDA dated October 5, 1999 and December 22, 1999, disclosed a dispute which was properly referred to arbitration.

The principal issues which arise in this appeal are:

1. Whether CDA's request for extension of time to December 1997 was a "dispute" in terms of its contract with the appellant, and a reference to the Engineer for resolution.
2. Whether the Engineer's insistence on the date of 17th November 1997 as the final date for the receipt of the final account from CDA was a resolution of a "Dispute" by the Engineer.
3. Whether the Engineer was authorized, by the terms of the contract, to rely on the provisional final account of Stoppi Cairney in substitution for that of CDA.
4. Whether a dispute arose subsequently, which was referred by CDA to the Engineer for resolution in October 1999 and
5. whether the said dispute, if it arose, was properly referred to arbitration by CDA in December 1999.

A contract entered into between two parties stipulates the terms and agreements by which the parties will be bound. A breach of the contract allows the injured party a choice of options. He may, if the breach is fundamental to the continued operation of the contract, treat the contract as at an end and sue for

damages for any loss. He could, alternatively, hold the party in breach to the contract, and also recover any loss sustained.

An arbitration agreement permits parties to agree on the rules by which they choose to be bound and the procedure that will govern their relationship. Primarily, they choose an arbitrator instead of the court, to determine any dispute or difference between them, and require him to make his award.

The scope of the arbitration clauses, although mutually agreed by the parties, is governed by the normally accepted legal principles.

In the instant case the arbitration agreement in clause 19, contains a rather curious provision, inter alia:

> "If any dispute or difference of any kind whatever shall arise between ...the Engineer and the Contractor in connection with, or arising out of the Contract or the execution of the works ... it shall, in the first place, be referred to and settled by the Engineer ... (Emphasis added.)

The Engineer has been given the extraordinary power to make a decision and settle the "dispute or difference" even in circumstances in which he is a party to the "dispute or difference," and it is "referred to" him "in the first place." This power may no doubt be due to the Engineer's accepted expertise. However, the Engineer, is not the arbitrator.

CDA, under the provisions of clause 22.5 of the contract, was obliged to:

> "22.5 ... Not later than one month after the issue of the Maintenance Certificate the Contractor shall submit to the Engineer a Final Statement of Account with supporting documents, showing in detail the value of work done in accordance with the Contract together with all further sums which the Contractor considers to be due to him under the Contract."

This term contemplated that the Engineer would have sent the Maintenance Certificate to the Contractor. The Engineer on 25th September 1997 sent the document to the appellant and sent a copy to CDA on 16th October 1997. CDA's response by letter dated 24th October 1997, to the Engineer that, "... we will be unable to meet your October 1997 deadline ..." and "... requesting that an extension be granted ... [to] ... 31st December 1997," is a recognition by CDA that it was bound by the terms of the contract, unable to satisfy its terms and seeking a degree of forbearance.

CDA was not claiming that the terms of the agreement permitted the Engineer to consider the grant of an extension to the December 1997 date, nor was CDA contending that the Engineer was obliged to do so.

The Engineer, in its letter dated 27th October 1997 to CDA, did recognize that the receipt of the Maintenance Certificate on 17th October 1997, required a re-computation of the 28 days, to " ...Monday, November 17, 1997...".

CDA thereafter repeated its promise to submit its "... Final Account ... by December 31, 1997 ..." However, CDA submitted its Final Account in January 1998. CDA was not claiming a right under the agreement. It acknowledged that it was in breach, but queried the Engineer's lack of flexibility.

It is my view, in agreement with Harris, J, that there was no dispute arising in 1997. No basis existed for the Engineer to be regarded as having made a decision in 1997, in resolution of a dispute, merely by its insistence that the date for submission of the Final Account was the 17th November 1997. Neither party

saw this decision as a settlement of a dispute or as a reference thereof to the Engineer "...in the first place..".

However, the fact that CDA was in breach of the agreement, and even assuming that a dispute had arisen, which in my view did not, the Engineer was not entitled to substitute the assessment of Quantity Surveyors, as the Final Statement of account of CDA. The Engineer's letter dated 16th December 1997, which, inter alia, maintained:

> "Since it is necessary to have such an account, I will request the Quantity Surveyors to assist me in its preparation and when completed, will be issued by me as the Project Final Account." (Emphasis added)

is not authorized by the agreement, is beyond any known powers of the Engineer and, in all the circumstances, is ultra vires.

The Engineer, in its said letter of December did not specify or intimate that it regarded a dispute to be in existence, whether referred to it by the Contractor or assumed so on its own initiative , and was making a decision in accordance with clause19.1.

The requirement of the submission by CDA of a Final Statement of Account is a fundamental term of the agreement. It is the basis on which a final computation will be made, for final payment for work done. It is clear that the parties to the agreement did not in the agreement, provide for the eventuality, that is, the delay by CDA in submitting its Final Statement of Account.

The breach by CDA in the submission of its account, did not entitle the Engineer to substitute a new term in the agreement, authorizing the Provisional accounts of the Quantity Surveyors to be " the Project Final Account" issued by

the Engineer. There was no power given to the Engineer, under the agreement, to exclude CDA from submitting its Final Statement of Account and to institute its own new terms, even though CDA was in breach. The action of the Engineer was a fundamental departure from the terms of the agreement. Any alteration of the terms of the agreement had to be authorized by the consent of the parties.

In the case of the arbitrator however, there seems to be some power to fill a gap in a contract depending on the powers given to him. In ***Foley v Classique Coaches*** [1934] 2 KB 1, a contract for sale and purchase omitted the price to be paid. The arbitration clause provided that "... if any dispute or difference shall arise on the subject matter or construction of this agreement the same shall be submitted to arbitration in the usual way." It was held that the clause was apt to fix the price in the absence of agreement.

In the instant case, the Engineer had no power to effect such a radical departure from the terms of the agreement consequent on the delay of CDA in submitting its account. The Engineer was acting ultra vires.

There was no repudiation of the contract by the appellant. In October 1997 it was an anticipatory breach on the part of CDA. The remedy for CDA's breach could be satisfied in damages,if claimed by the appellant.

CDA's statement of Final Account which was submitted to Stoppi Cairney on 14th January 1998, to the knowledge of the Engineer, was accepted without any reservation or protest. Stoppi Cairney's letter dated 21st January 1999 to Woodrow Whitely, acknowledging receipt of the Final Account claim on behalf of

Construction Developers Association "... in the amount of $601,043,675.68 for the above project...", confirms that:

> "4. The Final Account Statement was however, submitted to us by Construction Developers Associated Ltd., on **January 14, 1998**. The claim was analysed by the Consultants, discussions/meetings were held and further documentation provided to supplement the submission."

This letter was copied to the Engineer.

Woodrow Whiteley's letter to Stoppi Cairney dated 19th January 1999 submitting the said proposed final account, had referred to certain items to be discussed and resolved. It reads, in part:

> "Copies of the detailed claim build-ups for the following items are enclosed for your information:
>
> - Loss and/or expense
> - Bank Interest Costs due to delay in Certification of claims
> - Overhead costs relating to fluctuations
> - Adjustments due to variations exceeding 15%
> - Fluctuations on head office overhead.
>
> We recently received a copy of your proposed draft final account dated November 2, 1998. We will be undertaking a review of your submission and compare findings with the contents of CDA's submission. As soon as we have completed this exercise we will contact you and try to arrange a meeting to commence discussions towards reaching an agreed final account figure at an early date.
>
> We await your responses."

Previously, by its letter dated 16th January 1998,CDA had asserted to the Engineer that there were several matters of claim still to be resolved. It reads:

"...upon review of our files we recognise that there has been no response to some critical issues "

All parties, particularly the Engineer and Stoppi Cairney, were well aware, in January 1998, that CDA, when submitting its Statement of Final Account, had certain "critical ... unresolved issues ..." in its claim still to be settled. Up to January 1999, items of difference in CDA's Statement of Account were still unresolved.

Stoppi Cairney in its further letter dated 21st January 1999 sought to treat as invalid, Woodrow Whiteley's Final Account dated 19th January 1999 submitted on behalf of CDA for the reason that:

> "a) A Final Account Statement was previously submitted by the Contractor and assessed by the Consultants.
>
> b) The submission of your Claim is not in accordance with the time period stated in CDA's contract." (Emphasis added)

However, Stoppi Cairney in the said letter, regarded CDA's Final Statement of Account as valid and acceptable. It reads in part:

> "We are therefore requesting that you peruse our draft Final Account in relation to the Final Account Statement previously submitted by the Contractor and let us have your comment/agreement."

Stoppi Cairney's letter dated 10th February 1999 reinforced its stance. It reads, inter alia:

> "1. Construction Developers Associates (CDA) submitted a Final Account claim dated **January 13, 1998** in the total sum of **$528,725,769.96.** On **January 19, 1999**, we received from your firm, another Final Account

> Claim for the said project in the total amount of **$601,043,675.68.**
>
> 2. Your statement that the main changes in the above two Final Accounts "*pertains to format*" is incorrect as your claim exceeds the Contractor's own Final Account by **$72,317,905.72.**
>
> ...
>
> The claim submitted by the Contractor dated January 13, 1998 should therefore be assessed in relation to our draft Final Account and we look forward to having this matter settled as soon as possible." (Emphasis added)

This letter was also copied to the Engineer.

Although the Engineer in its letter dated 16th December 1997 to the Contractor, was treating the Quantity Surveyors' preparation of an account to be "issued by me as the Project Final Account," the said Quantity Surveyors in the above-quoted correspondence, were accepting "... the final Account Statement previously submitted by the Contractor ... ," as the proper claim to be assessed. This was known by the Engineer.

There were clear differences in October 1999 between:

(1) the stance of the Engineer and that of Stoppi Cairney in respect of the Contractor's Statement of Account;

(2) the unresolved claims of the Contractor and the Final Account of Stoppi Cairney and

(3) the detailed items claimed by Woodrow Whiteley, as payable to the Contractor, in the "proposed final account ... assessed

at ...($601,043,678.68)", and the objection to such items by Stoppi Cairney on behalf of the Engineer.

In response to the Contractor's letter dated 5th October 1999 to the Engineer, referring to "...differing views on our Final Account submission..." and "... requesting your position on the matter," the Engineer wrote a letter dated 19th October 1999. This letter states, in part:

> "We acknowledge your letter of October 15, 1999 requesting our position on the matters raised by your Quantity Surveyors, Woodrow Whiteley & Associates. At the moment, the opinion expressed in our letter of December 16, 1997 has not changed.
>
> The Project Quantity Surveyor is off the Island and is expected back this week (October 18 – 23). After further consultation on the several matters under reference, we will contact you."

And by letter dated 9th November 1999:

> "We have had further consultation with the Project Quantity Surveyors, and report that the opinion expressed in our letter of December 16, 1997 has not changed."

By letter dated December 22, 1999, CDA advised the appellant that in view of the Engineer's decision in respect of the matters in dispute and still unresolved, it wished to have the matter referred to arbitration. It reads,

> "In acknowledgement of the Engineer's decision in relation to our Final Statement of Account submission, we wish to refer this dispute to Arbitration as provided for under Conditions of Contract Part 1 Clause 19.1 to determine the following:
>
> (i) Whether in the circumstances, the contractor having submitted the final statement of account, the Engineer has the authority to

> prepare or have prepared by the Quantity Surveyor, the final Statement of Account.
>
> (ii) Whether the Final Account submitted by the Contractor dated 13th January 1998 and reformatted on the 19th January 1999 with additional supporting documentation ought not to have been accepted for assessment by the Engineer.
>
> (iii) Whether upon the true consideration of the conditions and conditions of particular application of the contract, the final account must be agreed on by the contractor.
>
> (iv) A determination of the amount due to the contractor in the Final Account.
>
> We are suggesting that a meeting be held to discuss the modus operandi to be adopted within the prescribed guidelines to resolve the issues."

Harris, J., (as she then was) found:

> "... the Claimant by way of its letter of October 5, 1999 sought to obtain a decision from the Engineer touching the matters in dispute. Arising from this request, the Engineer by his letters of October 19 and November 9, 1999 gave written notice of his decision. On December 22, 1999 the Claimant notified the Engineer of its claim to proceed to arbitration. The date of the notification clearly falls within the 90 days stipulated by the contract for so doing."

The learned trial judge was correct to find that CDA had referred a dispute to the Engineer, on 5th October 1999, for its decision, in accordance with the provisions of clause 19.1 of the contract. The Engineer gave its decision.

CDA's letter dated 22nd December 1999 to the appellant, copied to the Engineer, Stoppi Cairney & Woodrow Whiteley, was a proper reference to arbitration within the terms of clause 19.1.

The grounds of appeal are therefore without merit.

This appeal ought to be dismissed with costs to the respondent.

SMITH, J.A.

I agree.

MARSH, J.A. (Ag.)

I agree.

HARRISON, P.

ORDER

The appeal is dismissed. Costs are awarded to the respondent to be agreed or taxed.