JUDGMENT : MR. JUSTICE DYSON: TCC. 10th May 1999.

1. On 21st November 1995 Odebrecht Oil and Gas Services Ltd. ("Odebrecht") as contractor entered into a contract ("the conversion contract") with North Sea Production Company Ltd. ("NSPCL") as owner for the conversion of a motor tanker, the DAGMAR MAERSK, into a floating production storage and offtake facility ("FPSO"). On 26th September 1996 the conversion contract was amended by a written addendum. NSPCL is a joint venture company formed pursuant to a joint venture agreement made on 21st November 1995. On the same day NSPCL entered into a contract ("the Conoco contract") with Conoco (UK) Ltd. for the provision of services comprising the extraction of oil and gas from the McCulloch field of the North Sea using the FPSO to be converted by Odebrecht.

   As contemplated by the conversion contract as amended, a performance bond was issued by the New Hampshire Insurance company ("New Hampshire") in favour of NSPCL. Under the bond New Hampshire was named as guarantor, NSPCL as employer and Odebrecht as contractor. The issues that fall for decision in these proceedings concern the true interpretation of the bond in the events that have occurred.

THE BOND

2. So far as material, the bond provides as follows:

   "1. The Guarantor guarantees to the Employer that in the event of a breach of the Contract by the Contractor the Guarantor shall subject to the provisions of this Guarantee Bond satisfy and discharge the damages sustained by the Employer as the result of such breach and for which the Contractor is liable as established and ascertained pursuant to and in accordance with the provisions of or by reference to the Contract and taking into account all sums due or to become due to the Contractor ('the Damages').

   "2(a) If the Employer reasonably believes that there has been a breach of the Contract by the Contractor, he shall give written notice thereof to the Contractor and to the Guarantor, specifying the nature of such breach and his estimate of the amount of the Damages arising therefrom.

   "(b) If within a period of thirty (30) calendar days from the date of the written notice referred to in sub-clause (a) above the Contractor and the Guarantor have not agreed that there has been the specified breach of the Contract or have not agreed the amount of the Damages arising therefrom, the Employer may at his sole discretion appoint an expert ('the Expert') to investigate the alleged breach of the Contract by the Contractor and to assess the Damages. The identity of the Expert shall be subject to the agreement of the Guarantor and the Contractor. If no such agreement can be reached within a further five (5) business days from the expiry of the thirty (30) day period aforementioned the Expert shall be nominated by the chairman of Lloyd's Register of Shipping within the following ten (10) business days or as soon as practicable thereafter. The Expert shall be required to determine as soon as practicable whether or not there has been a breach of the Contract by the Contractor and, if so, what is the amount of the Damages. In making such a determination the Expert shall be required inter alia to seek and consider relevant evidence from the Employer, the Contractor and the Guarantor. Subject to the other provisions of this Clause 2 the Guarantor hereby guarantees to pay to the Employer the amount of the Damages so assessed by the Expert.

   "(c) If the Expert is unable to reach such a determination within seventy-five (75) calendar days of being appointed for this purpose, then provided that he is satisfied that a prima facie breach of Contract by the Contractor has occurred he shall provide a written estimate of the amount of the Damages, if any, for which in his reasonable opinion the Contractor is liable under the Contract. Subject to the other provisions of this Clause 2 the Guarantor hereby guarantees to pay to the Employer the amount of the Damages so estimated by the Expert.

   "(d) If the Employer, the Contractor or the Guarantor shall so require, the Expert may at any subsequent time or times revise his assessment or estimate of the Damages in respect of a particular breach or alleged breach, provided that such revisions shall take place not more frequently than once a month. Where such revised amount of damages exceeds the aggregate amount previously paid by the Guarantor, then subject to the other provisions of this Clause 2 the Guarantor hereby guarantees to pay the difference to the Employer. Where such revised amount of damages is less than the aggregate amount previously paid by the Guarantor, then paragraph (i) of this Clause 2 shall apply. .....

"(g) All payments by the Guarantor in accordance with this Clause 2 shall be provisional amounts and shall be adjusted subsequently by mutual agreement between the parties hereto or otherwise as may be determined by arbitration or judicial proceedings in accordance with the provisions of or by reference to the Contract. .....

"4(a) The maximum aggregate liability (the 'Bond Amount') of the Guarantor and the Contractor under this Guarantee Bond shall not exceed the sum of one hundred and two million pounds sterling (102,000,000)."

THE FIRST NOTICE UNDER THE BOND

3. The works under the conversion contract were not completed by the contractual completion date of 1st December 1996 as defined in Article 1.1 of the conversion contract. By a letter of 12th December 1996 expressed to be pursuant to clause 2(a) of the bond, NSPCL notified Odebrecht that the system had not yet been pre-commissioned in accordance with Article 11.4 of the conversion contract, and that the works had not been completed on or before the contractual completion date in accordance with Article 2.4. The letter continued: *"Under the terms of the Contract, in each case this should have been done no later than 15 November 1996 and 1 December 1996 respectively and accordingly NSP believes that SLP is in breach of the Contract.*

"NSP wishes to protect its position under the Performance Bond and to give notice to New Hampshire in accordance with Clause 2(a) of the Performance Bond.

"NSP estimates that its damages will comprise the following:

"a. Up to 20,000,000 by way of liquidated damages payable to Conoco by reason of the System being late.

"b. Additional finance costs or operating expenses incurred.

"c. Other categories of direct loss arising to NSP as a result of the breach."

4. Odebrecht was previously known as SPL. The letter confirmed the position that had been agreed between Odebrecht and NSPCL that the expert procedure set out in clause 2(b) of the bond would be suspended until either the actual production date was reached under the Conoco contract or NSPCL's contract with Conoco was terminated, should this occur.

5. On 1st April 1997 NSPCL notified Odebrecht that since completion had not yet taken place an event of default had occurred within the meaning of Article 16.1 of the conversion contract. The letter recorded that, subject to the consent of New Hampshire and Chase Manhattan Bank, the agreed position of NSPCL and Odebrecht was that the suspension of the expert procedure was to be maintained.

THE EXPERT DETERMINATION

6. In September 1997 NSPCL informed Odebrecht that it required the expert procedures set out in the bond to be initiated. On 10th October New Hampshire, NSPCL and Odebrecht agreed that Mr. John Prudhoe be appointed as the expert pursuant to the bond. Mr. Prudhoe was duly appointed. He stipulated a timetable for submissions in writing from Odebrecht and NSPCL. In section 2 of its submission of 25th November NSPCL summarised its claim for damages. In its submissions dated 9th December Odebrecht set out its counterclaims against NSPCL, inter alia for additional monies and an extension of time under the conversion contract. It also challenged the validity of notices under the bond of the letters of 12th December 1996 and 1st April 1997, contending that they did not comply with the provisions of clause 2(a) of the bond. On 6th February 1998 Mr. Prudhoe issued his written expert determination. He found (at para.4.4.10) that Odebrecht was not excused from the delay after 7th August 1997 and that it was liable for those damages which were "applicable" up to the actual completion date. He took 31st October 1997 as the cut-off date for his determination. He made a number of rulings. These included that NSPCL was entitled to 3.866 million as a result of delayed completion of the works (para.4.6.3); Odebrecht was entitled to an additional payment of at least 6.762 million (less 2.245 million already paid on account) in respect of claims for changes to the works submitted by 5th April 1997 (paras.4.7.8--4.7.9); and that, as Odebrecht's entitlements extinguished those of NSPCL, the damages payable to NSPCL were nil (para.4.7.9).

PURPORTED NOTICE OF 6TH JULY 1998

7. I now come to the document which has generated this litigation. By letter dated 6th July 1998 to Odebrecht and New Hampshire NSPCL wrote as follows: *"Further to the two previous notices issued pursuant to the Performance Bond dated 12th December 1996 and 1st April 1997, we reasonably believe that*

there has been a further breach or breaches of the Agreement by the Contractor and we hereby give you notice thereof pursuant to Clause 2(a) of the Performance Bond.

"We believe that the Contractor is in breach of the Agreement in that it has failed to fully perform its obligations under the Agreement and to properly complete the Works by the Contractual Completion Date pursuant to Articles 2.1, 2.3, 2.4, 2.5, 3.2, 15.2 and/or 15.11 of the Agreement.

"We estimate that the amount of the Damages arising therefrom is as follows:

"a) Contra charges for materials and services provided by NSP to carry out the works which were the responsibility of, and should therefore have been provided and/or procured by the Contractor. These are currently estimated at 4,200,000.

"b) Outstanding contract works which were the responsibility of and should therefore have been executed by the Contractor. These are currently estimated at 800,000.

"c) Costs of reduced production incurred as a result of the System not being in complete working order. These are currently estimated at 14,500,000.

"The notification in relation to Contra charges in paragraph (a) above is without prejudice to our contention that we have already complied with the notice requirements in Clause 2(a) of the Performance Bond in relation to these charges by their inclusion within our claim submission dated 8th October 1997.

"Further, without prejudice to our contention that the phrase 'all sums due or to become due to the Contractor' in Clause 1 of the Performance Bond necessarily refers to amounts which are indisputably due or are to become due in terms of the provisions of Clause 7 of the Agreement, and any increases thereto that have been agreed between ourselves and the Contractor, we acknowledge that sums may become due to the Contractor pursuant to Article 9 of the Agreement. However, we presently have insufficient information to assess what sums may become due and the basis of evaluation is currently the subject of discussion between us and the Contractor. There are therefore, presently, no such sums to take into account."

8. It is not necessary to refer to all the provisions of the conversion contract which were mentioned in the letter of 6th July. It is sufficient if I refer to the following:

"2.3 The Contractor considers the Statement of Requirements to be a fully acceptable basis for the preparation of the Design Basis. The Contractor is responsible for all costs connected with errors, omissions and discrepancies in relation to the preparation of the Design Basis and the subsequent execution of the Works in accordance with the Design Basis and the Regulations. .....

"3.2 The Contractor represents and warrants that the System will, when delivered to the Owner on the Completion Date, be in all respects fit for the purposes of:

"(a) performing and discharging the Conoco Services in accordance with the terms and conditions of the Conoco Contract; and

"(b) complying with the specifications and requirements set out in the Design Basis as approved by the Owner pursuant to Article 4.1. .....

"15.11 Without prejudice to the foregoing provisions of this Article, or to any other rights of the Contractor under this Agreement or under the general law, the Contractor warrants, represents and undertakes as follows:

"(1) the Works will be performed in a workmanlike manner and will be free of defects in workmanship and materials;

"(2) the Contractor's labour force is suitably skilled to perform the Works, and the workmanship, goods and materials shall be of high quality and will comply at least to the standards specified in the Design Basis and will be in conformity with the requirements of the Classification Society;

"(3) the Works will be carried out in compliance with the Regulations; and

"(4) the Contractor shall take all necessary and appropriate steps to protect areas of the System where work is not being carried out by the Contractor so as to prevent damage during the performance of the Works."

9. Both Odebrecht and New Hampshire objected that the letter was not a valid notice pursuant to clause 2(a) of the bond for reasons which have been repeated in argument before me and to which I shall come shortly. On 5th August NSPCL suggested that Mr. Prudhoe be appointed as expert for the expert determination procedure which they contended had been initiated by the letter of 6th July. The

response from the other parties was that Mr. Prudhoe would have no jurisdiction because there was no valid notice under clause 2(a). The chairman of Lloyd's Register of Shipping became involved. By a letter dated 20th August 1998 NSPCL was notified that once the issue of the validity of the notice of 6th July was resolved, the Chairman would be prepared to nominate Mr.Prudhoe as the expert in default of agreement of the expert by the parties.

10. The present proceedings were started by originating summons issued on 29th January 1999. The summons asked a number of questions but, in view of the course taken by the arguments before me, the issues which I am required to determine have been substantially refined.

THE ISSUES

11. As refined, the issues are:
    1. Was the letter of 6th July invalid as a notice under clause 2(a) on the grounds that it did not give notice of a breach or breaches of contract specifying the nature of such breach or breaches, and did not contain an estimate of the amount of damages arising therefrom? I shall refer to this as the *"specificity issue"*.
    2. Was NSPCL entitled to serve a notice under clause 2(a) in respect of any alleged breaches of contract or damages which had already been the subject of a reference to expert determination under clause 2(b)? I shall refer to this as the *"previous reference issue"*.

THE SPECIFICITY ISSUE

12. On behalf of Odebrecht and New Hampshire it is submitted that the letter of 6th July failed to specify the nature of each of the breaches of contract of which notice was purportedly given. Mr. Blackburn argues that the notice had to identify the acts and omissions complained of which were contended to constitute the breaches of contract. The contractual duties referred to in the letter included both time and quality obligations, and the quality obligations were various. Without this degree of specificity, it was not possible for the other parties to know the basis upon which the estimate for damages had been made, and it would not be possible for the parties to attempt to reach agreement as the opening lines of clause 2(b) contemplated that they would, nor for the expert to carry out his duties to investigate and determine "as soon as practicable" as required by clause 2(b). It is contended that a valid clause 2(a) notice should not only state with precision in relation to each alleged breach what Odebrecht did or failed to do, but also when the alleged breach occurred. Mr. Wilmot-Smith additionally relies on clause 4(b) of the bond which provides that the reduction in the bond amount provided for by that paragraph shall not apply to any breach in respect of which a notification in writing "containing particulars of such breach" has been provided to the guarantor before the bank completion date. He submits that this provision should be read with, and sheds light on, the proper interpretation of clause 2(a).

13. On behalf of NSPCL Mr. Streatfeild-James submits that, unlike the remaining clauses of the bond, clause 2 is not in the nature of a surety guarantee. It is a demand guarantee. Whereas the liability of the guarantor in respect of the former is secondary as surety of Odebrecht, its liability in respect of the latter is primary and arises as soon as an amount is agreed or determined in accordance with the provisions of clause 2(b). Clause 2 confers on NSPCL an option to activate the clause 2 machinery which may lead to the right to receive a provisional payment under the bond, subject to later adjustment once the liability of Odebrecht has been established and ascertained as provided by clause 1. Afailure to exercise its rights under clause 2 has no effect on NSPCL's substantive rights under the bond: see clause 1 and 2(g). Moreover, a clause 2(a) notice does not give rise to a right to be paid, it merely starts a process which, in the absence of agreement between the parties, will involve an expert investigation in which all three interested parties will be required to provide evidence. As such it does not impose any requirement of strict compliance. It does not, for example, attract any of the policy considerations that apply to a letter of credit or an on-demand bond. The purpose of a clause 2(a) notice is only to start the clause 2 procedure. It is to be contrasted with the case where the presentation of a document gives rise to a right to be paid.

14. Basing himself on this approach to the proper construction of clause 2(a), Mr. Streatfeild-James submits that the letter of 6th July did satisfy the requirements of clause 2(a). It did not have to give the

kind of particulars contended for by Mr. Blackburn and Mr. Wilmot-Smith; it was sufficient for the purposes of initiating the clause 2 process. I accept Mr. Streatfeild-James' submissions. The letter of 6th July did identify a number of contractual obligations which had allegedly been broken by Odebrecht's failure "to fully perform its obligations ... and to properly complete the works by the contractual completion date". The complaint is one of lack of particularity. But clause 2(a) only requires the nature of the breach to be specified, not its detail. The purpose of the notice is to enable discussions to take place between the parties with a view to possible agreement or, more likely, to enable the inquisitorial process to be conducted by the expert. Either way, no more than a general description of the nature of the alleged breaches is needed to allow the process to begin.

15. The kind of detail which Mr. Blackburn and Mr.Wilmot-smith say is required is reminiscent of a request for further and better particulars of an inadequate pleading in litigation in the pre-Woolf era. In my judgment, the court should be very slow to impute to the parties an intention to require that degree of particularity to be given as a condition precedent to the right to invoke the clause 2 procedure at all. If Mr. Blackburn and Mr. Wilmot-Smith are right it would often, if not always, be possible to raise an argument as to the sufficiency of the detail of the allegations of breach, thereby substantially emasculating the clause 2 machinery or undermining it altogether. Even in litigation an insufficiently particularised specially endorsed writ, as it used to be called, would not be treated as a nullity, thereby requiring the plaintiff to start again. The plaintiff would be required to give particulars, failing which he risked having his claim struck out. So here it seems to me that what is contemplated by clause 2(a) is that the notice should simply identify the nature of the alleged breach; the detail can be supplied during the course of the clause 2 process. This seems to me to be a workable and sensible interpretation of clause 2(a), having regard to the purpose and effect of the clause, as to which Ibroadly accept the submissions of Mr.Streatfeild-James.

16. I should add that I do not think that clause 4(b) assists Mr. Wilmot-Smith. It is not obvious that a clause 4(b) notice has to contain the same material as a clause 2(a) notice. The two notices serve different purposes. The clause 2(a) notice initiates the clause 2 procedure, which is intended to be relatively swift--note the time limits--and which may culminate in a provisional payment being made to NSPCL. The effect of a clause 4(b) notice in respect of a breach occurring before bank completion date is to disapply the reduction in the bond amount otherwise applicable after bank completion date to any claim for damages arising from that breach. It has effect regardless of whether the clause 2 procedure is initiated. If there is any significance in the use of the word "particulars" in clause 4(b), then if anything it supports the arguments of Mr. Streatfeild-James. This is because the use of different language ("particulars of breach" as distinct from "nature of such breach") suggests that the parties intended something less exacting in clause 2(a) than in clause 4(b).

17. Save in one respect, no separate arguments were addressed to me in relation to the sufficiency of the estimates of damages contained in the letter. Before I turn to the single discrete point made by Mr. Blackburn, I should say that I derive comfort in my general approach to the specificity issue from the fact that Odebrecht and New Hampshire objected during the earlier expert process that the letters of 12th December 1996 and 1st April 1997 were not valid notices, because they did not contain the kind of detail that is required by clause 2(a). The expert decided that it was too late for this objection to be taken and did not rule on the substantive point. I mention this simply because those letters contain no more detail than the letter of 6th July, but that did not prevent the expert from embarking on and completing the process that was required by clause 2(b) and (c). As one would have expected, he did this by requesting and receiving from the parties a succession of detailed submissions during a process which lasted eight or nine days.

18. I turn to the discrete quantum point. In my judgment, there is no doubt that the letter did contain an estimate of damages under three separate heads, namely (a) contra charges estimated at 4.2 million, (b) outstanding contract works estimated at 800,000, and (c) costs of reduced production estimated at 14.5 million. But it is submitted on behalf of Odebrecht that these were not proper estimates because they did not take into account all sums due or to become due to Odebrecht as required by clause 1 of the bond. As stated in the letter, NSPCL acknowledged that sums might become due to Odebrecht

under Article 9 of the conversion contract for changes to the works, but it did not have sufficient information to assess what those sums might be. Accordingly, NSPCL made it clear that no such sums were taken into account. Clause 2(a) does not require the estimate of damages to be correct nor does it have to make allowance for every claim made by Odebrecht even if that claim is rejected by NSPCL. The estimate made by NSPCL might ultimately be shown to be wrong for a number of different reasons. One such reason might be that the head of loss claimed is too remote to be recoverable in law. Another might be that, contrary to the opinion expressed in the notice, some credit is required to be given to Odebrecht for sums due or to become due to it.

19. In my view, even if ultimately substantiated, these would not be good grounds for impugning the validity of the notice under clause 2(a). They are factors which are relevant to the amount of damages to be agreed by the parties or determined by the expert pursuant to clause 2(b). The only material requirement of clause 2(a) is that the notice contains estimates of the damages arising from each alleged breach of contract that has been specified. An estimate does not cease to be an estimate merely because it is demonstrated that it is flawed in some respect. If the validity of a notice were to depend on issues of that kind, clause 2(b) would be unworkable.

20. For all these reasons I reject the arguments that the letter of 6th July was not a valid notice pursuant to clause 2(a).

THE PREVIOUS REFERENCE ISSUE

21. On behalf of Odebrecht and New Hampshire it is submitted that NSPCL is not entitled to serve a notice under clause 2(a) in respect of any alleged breach of contract or any issue of principle concerning the assessment of damages which has already been the subject of a decision by an expert pursuant to clause 2(b) or (c). They say that the expert has no jurisdiction to deal with such matters having already dealt with them once. Clause 2(d) does, however, permit "pure issues of quantum" to be revised, but not more frequently than once a month. Although the question included in the originating summons, question A3, was directed to issues which had been the subject of a previous reference to, rather than a decision by, an expert, I understood Mr. Blackburn and Mr.Wilmot-Smith to confine their submissions as to the effect of a decision by the expert rather than a reference to him.

22. Mr. Streatfeild-James submits that where the expert has made a decision on an issue, this does not afford a good reason for preventing NSPCL from having a second bite at the cherry, even in relation to an issue of liability. In an impressive and closely reasoned argument, he contends as follows: the starting point is clause 2(a) which provides that whenever NSPCL reasonably believes that there has been a breach of contract it may initiate the clause 2 process by giving a notice. This right is unqualified. It is illogical to construe that right as qualified by clause 2(d). It simply does not follow from the fact that clause 2(d) gives a limited right of review of an expert's decision that the apparently untrammelled right given to NSPCL by clause 2(a) should therefore be curtailed. It would have been easy for the parties to provide expressly that the decision of the expert was conclusive and binding on the parties subject only to the right of review under clause 2(d) but they did not do so. The contract works perfectly well even if it does give NSPCL the right to give notice under clause 2(a) repeatedly in respect of the same issues. What is more and in any event, on its true construction, clause 2(d) permits a review of a decision on a question of breach as well as a question of quantum. It is common ground that clause 2(d) permits the revision of an estimate made by the expert under clause 2(c) of damages for which, in the expert's reasonable opinion, the contractor is liable, where he is satisfied that a "prima facie breach" of contract has occurred. It is also common ground that the phrase "alleged breach" appears in clause 2(d) to deal with revisions to estimates made under clause 2(c), i.e. where all that has been established to the satisfaction of the expert is a prima facie breach. Thus, submits Mr. Streatfeild-James, clause 2(d) is in any event not limited to issues of quantum.

23. Attractively though Mr. Streatfeild-James developed the argument, I cannot accept it. The question raised does not depend on the resolution of an issue of general law. For example, no questions of res judicata or abuse of process arise. The point has to be determined by reference to ordinary principles of construction of contract and/or the implication of terms. In my judgment, clause 2(d) provides the key to what the parties intended should be the scope of any review of an expert's decision. I do not

consider that upon its true construction clause 2(d) allows for the revision of a finding on an issue of liability. I find it impossible to read clause 2(d) in this way. It provides that an expert may "revise his assessment or estimate of the Damages in respect of a particular breach or alleged breach" (emphasis added).

24. Clause 2(d) is concerned only with damages. It would have been simple enough to provide that the expert may revise his opinion as to a particular breach and/or prima facie breach as well as his assessment of the damages but the parties did not do so. It is clear that clause 2(d) is directed to the revision of assessments or estimates of damages only. On the argument of Mr. Streatfeild-James the parties would have given NSPCL two parallel routes to seek a review of any previous decision of the expert in relation to liability, namely clause 2(a) and 2(d). It is inherently unlikely that they would have intended to do this. In my judgment, the bond does not have this effect.

25. As has been seen, however, that is not sufficient to dispose of Mr. Streatfeild-James' argument, which does not necessarily depend on the wide interpretation of clause 2(d) which I have just rejected. He asserts quite simply that clause 2(a) is unqualified. But, in my view, clause 2 must be read as a whole. It provides a code as to the circumstances in which, and the conditions subject to which, provisional payments may be made pending final adjustment by agreement, arbitration, or litigation: see clause 2(g). If NSPCL gives a notice under clause 2(a) specifying a breach of contract, its right to receive a provisional payment in respect of that breach is exhaustively governed by the remaining paragraphs of clause 2. This includes the right to have the assessment or estimate of damages revised in accordance with clause 2(d). It does not include the right to serve a fresh notice under clause 2(a) in respect of the same breach and start the process all over again. If it had been intended to give NSPCL an unqualified right to require a review of the expert's decision on liability for any reason, surely this would have been done by an extension to clause 2(d). It would have been most surprising if it had been intended that in such a situation the parties should go through the clause 2(a) and (b) procedures a second time. And, if a second time, there would be nothing to prevent the process from being repeated again and again. In my view, the parties did address their minds to the question in what circumstances may any of the three parties seek a second bite at the cherry. The result appears in clause 2(d). Thus clause 2(a), although not expressed to be subject to clause 2(d), must nevertheless be construed as qualified by it.

26. So far I have considered the question whether Odebrecht can raise on successive occasions an issue of breach of contract on which the expert has already ruled, and have held that it cannot do so. Mr. Blackburn submits additionally that Odebrecht cannot raise for a second time an issue of principle concerning quantum on which the expert has already ruled. An example has arisen in this case. The expert decided that in assessing the damages "sustained" by NSPCL, he could not take into account any future losses, because the phrase "damages sustained" in clause 1, which is imported into clause 2(a), can only be referring to sums already and actually incurred.

27. Mr. Blackburn submits that it is not open to NSPCL to seek to persuade the expert to take a different view on this point of construction on a review under clause 2(d). Iconfess that I cannot see why this should be so. The question is one of the proper interpretation of clause 2(d). I see no reason why a revision cannot be based on a re-appraisal of legal arguments about the assessment of damages, just as a revision can be based on a re-appraisal of the facts relating to the assessment. Clause 2(d) imposes no limit as to the circumstances in which or the reasons why there may be a revised assessment. The only limiting factor is that the revision should be of the assessment or estimate of damages, i.e. that it should concern quantum only. I can see no justification for holding that some quantum issues are within the scope of clause 2(d) and others are not. Indeed, I think it would be difficult to draft a clear dividing line of that kind. The parties made no attempt to do so in clause 2(d).

28. I would hold therefore, that NSPCL is not entitled to give a notice under clause 2(a) in respect of breaches of contract which have been the subject of an earlier notice which in turn has led to a determination pursuant to clause 2(b), but that there are no restrictions on its right under clause 2(d) to require the expert to review his assessment or estimate of the damages in respect of a particular breach or prima facie breach of which he has already been satisfied.

THE RELIEF

29. Subject to any further argument from counsel it seems to me that I should declare that the letter of 6th July 1998 did comply with the specificity requirements of clause 2(a) of the bond. As for the consequences of my decision on the second issue, Idid not hear argument directed specifically to this point. My provisional view is as follows. An examination of the letters of 12th December 1996 and 6th July 1998 shows that both included allegations of breaches of the obligation to complete the works in accordance with Article 2.4. To that extent, the letter of 6th July 1998 was not a valid notice under clause 2(a) of the bond. Insofar as NSPCL wished to claim further damages under the bond for breach of Article 2.4 of the conversion contract, it should have invoked clause 2(d). But the later letter also alleged a number of other breaches which concerned the quality of the work. To the extent that it did this, the letter was a good notice for the purposes of clause 2(a) of the bond.

MR. J. BLACKBURN Q.C. and MR. R. PLANTEROSE (instructed by Messrs. Fenwick Elliott) appeared on behalf of the Claimant.
MR. STREATFEILD-JAMES (instructed by Messrs. Masons) appeared on behalf of the First Defendant.
MR. WILMOT-SMITH Q.C. (instructed by Messrs. Halliwell Landau, Manchester) appeared on behalf of the Second Defendant.