

LEXSEE

**TENNESSEE GAS PIPELINE COMPANY, Appellant v. TECHNIP USA CORPORATION AND TECHNIP, S.A., Appellees; TECHNIP USA CORPORATION AND TECHNIP, S.A., Appellants v. TENNESSEE GAS PIPELINE COMPANY, Appellee**

**NO. 01-06-00535-CV**

**COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON**

**2007 Tex. App. LEXIS 9951**

**December 21, 2007, Opinion Issued**

**PRIOR HISTORY:** [\*1]

On Appeal from the 165th District Court, Harris County, Texas. Trial Court Cause No. 2002-60134.

**JUDGES:** Panel consists of Justices Taft, Hanks, and Higley.

**OPINION BY:** Laura Carter Higley

**OPINION**

**MEMORANDUM OPINION**

This is a breach of contract dispute brought by Tennessee Gas Pipeline Company ("TGP") against Technip USA Corporation ("Technip USA") and its parent, Technip S.A. (collectively, "Technip"). TGP engaged Technip USA to construct improvements along an interstate gas pipeline owned by TGP pursuant to a "Lump Sum Turnkey, Engineering, Procurement and Construction Contract" ("Contract"). After project delays occurred, TGP sued Technip to recoup its additional expenses and for allegedly defective work. Technip counterclaimed to recover sums owed under the Contract. A jury found that Technip had breached the Contract and awarded delay damages and defective work damages to TGP. Subsequently, on the motion of Technip, the trial court limited the jury award to certain defective-work damages. Both TGP and Technip have appealed. TGP seeks the total jury award; Technip seeks a holding that TGP take nothing on its claims.

In its appeal, TGP contends that the trial court erred by denying its Motion for Judgment and by [\*2] granting Technip USA's Motions for Summary Judgment Regarding TGP's damages, Technip's Motion to Disregard the Jury Findings, and Technip's Motion for Entry of Judgment Notwithstanding the Verdict because (1) the total damages awarded by the jury constitute "direct damages" to which TGP is entitled as a matter of law; (2) the evidence is legally sufficient to support the jury's finding of damages; and (3) Technip S.A. was required, pursuant to the guaranty it executed, to pay all damages arising from Technip USA's breach of the Contract without limitation.

In its appeal, Technip contends that the trial court erroneously denied its Motion for Judgment Notwithstanding the Verdict on TGP's defective workmanship claims because (1) such claims are barred by the exclusive remedy provisions of the agreement; (2) the evidence is insufficient to support the damages awarded on certain defective work claims; and (3) the trial court improperly applied the stipulated retainage offset and improperly calculated interest and attorney's fees.

We reverse and render, in part, and affirm as modified, in part.

**FACTS AND PROCEDURAL HISTORY**

TGP<sup>1</sup> owns and operates 14,200 miles of pipeline through which it transports [\*3] 6.4 billion cubic feet of gas each day from Texas to the northeastern United

States. Technip USA is an engineering and construction contractor in the oil and gas industry. TGP and Technip USA<sup>2</sup> have conducted business with one another since the 1960s.

- 1 TGP is a subsidiary of El Paso Corporation, one of the world's largest energy companies.
- 2 Formerly known as KTI Fish Corporation.

On August 6, 1999, TGP contracted with Technip USA for the replacement and upgrade of six compressors<sup>3</sup> on one of TGP's main transmission lines, known as the "TGP 100 Line Horsepower Replacement Project" ("Project"), for a "lump sum, fixed amount" of \$86,740,000 ("Contract Price").<sup>4</sup> Work on the Project commenced immediately. TGP expected the Project to be completed within 17 months. Technip contends that the schedule for completion was never formally finalized. Completion of the Project took three years.

- 3 A series of compressors are stationed along the pipeline to maintain pressure and gas flow.
- 4 The Contract Price was later lowered to \$86,550,000, after a credit related to builder's risk insurance was applied.

#### *The Agreement*

The progress and completion of the Project was formally governed by Article 5.2 of the [\*4] Contract, which provides as follows, in pertinent part:

Project Schedule; Critical Path Schedule. [Technip USA] shall perform the Work [its duties and obligations] in accordance with the schedule and management plan set forth in Exhibit E (the "Project Schedule"). Within twenty (20) days after the Effective Date, [Technip USA] shall submit, for [TPG's] review and approval, a critical path method ("CPM") schedule which conforms to the Project Schedule and which sets forth the timing of all elements of the Work and the interrelationship of such elements.

It is undisputed that there was never a Project Schedule "set forth in Exhibit E" of the Contract, as contemplated by Article 5.2.

According to TGP, contemporaneous with the formation of the Contract, a Project Schedule was formulated and was circulated at a meeting involving both parties. The Project Schedule specified that Technip USA would complete the project within 17 months of execution of the Contract. In addition, according to TGP, a CPM schedule was created, also specifying that Technip USA would complete the Project within 17 months. TGP contends that it remained in constant communication with Technip USA and that all parties [\*5] understood that the Project Schedule governed the project. In addition, contends TGP, the Project Schedule was incorporated into the Contract through Article 19.13, which provides that "[a]ll Exhibits, Schedules or other attachments referenced in this Agreement shall be incorporated into this Agreement by such reference and shall be deemed to be an integral part of this Agreement."

Article 5.2A of the Contract also provides that "[m]odifications to the critical path of the Project Schedule shall only be made with the approval of [TGP]" and that "[t]he Project Schedule shall be revised as required under Section 6.5." Article 6.5 provides that "the Project Schedule may only be adjusted to the extent that [Technip USA] can demonstrate that the change impacted the critical path of the Work" and that Technip USA is required to attempt to accelerate the performance of work to minimize the impact of any changes on the Project Schedule.

Pursuant to Article 5.2C, if Technip USA failed to achieve "Substantial Completion within sixty (60) days following that Station's Substantial Completion Date, then the provisions of Section 13.2 shall apply." Article 13.2 was a liquidated damages provision that [\*6] TGP agreed to remove from the Contract in exchange for a \$1.5 million decrease in the Contract Price. The balance of Article 13 provides that "[t]ime is of the essence in the performance" of the Contract and that Technip USA "guarantees that, subject to such adjustments as may be provided hereunder, Substantial Completion shall occur not later than the Substantial Completion Date on a station-by-station basis."

Attached to the Contract is a parent guaranty executed by Technip S.A., guaranteeing the obligations of Technip USA under the Contract and agreeing to indemnify TGP against damages arising from a breach of the Contract by Technip USA.

#### *The Dispute*

During the course of the Project, numerous delays occurred that each party attributed to various causes--including issues with the components being installed, issues involving the new technology or new applications of technology being employed, delays in change orders, shortages of skilled labor, and inclement weather. Ultimately, the Project was finished in April of 2002--delays having ranged from six to twenty months in the completion of five of the six compressor stations. Specifically, Stations 47, 54, 63, 87, and 110 are the subject [\*7] of this dispute. <sup>5</sup>

5 TGP considers the three-month delay that occurred at Station 96 to be an acceptable variance.

Technip USA requested an "equitable adjustment" to the Contract Price based on increased costs incurred as a result of the extended work periods. Subsequently, TGP sued Technip to recover its increased costs, alleging that Technip USA's delays constituted a breach of the Contract. <sup>6</sup>

6 The parties added additional claims and counterclaims through various amendments to their petitions and answers. These additional claims were disposed of and only the breach of contract claims moved forward and are the subject of this appeal.

Technip moved for summary judgment on the grounds that TGP's claims for

1. Project delay costs, sustained in the past
2. Excess gas use differential costs, sustained in the past
3. Excess lube oil costs, sustained in the past
4. Excess labor costs, sustained in the past
5. Extra power at Station 63 costs, sustained in the past
6. Backup generator costs, sustained in the past
7. Allowance for funds used during

construction, sustained in the past

8. Premature energization costs at Station 54, sustained in the past

constituted claims for incidental or consequential [\*8] damages and that such damages were specifically excluded under Article 19.1 of the Contract, as follows:

Consequential Damages:  
Notwithstanding any other provisions of this Agreement to the contrary, in no event shall Owner or Contractor be liable to each other for any indirect, special, incidental or consequential loss or damage including, but not limited to, loss of profits or revenue, loss of opportunity or use incurred by either Party to the other, or like items of loss or damage; and each Party hereby releases the other Party therefrom.

In addition, Technip contended that TGP's workmanship claims for

9. Realignment of compressor costs

10. Excessive blowdown costs, sustained in the past

11. Replacement and installation of operable oil fill system and repair costs for air dryers, sustained in the past

12. Review "as-built" drawings, to be reasonably sustained in the future

were precluded because TGP failed to make written warranty claims as required under the Contract. The trial court granted Technip's motion, in part, holding that claims 1-6, and 8 above were barred and that TGP take nothing on those claims.

TGP moved for a partial summary judgment "on the liability portion of its claim [\*9] that Technip USA breached the Contract by failing to complete the project according to the Project Schedule," which the trial court denied.

Subsequently, on November 19, 2004, The Honorable Reece Rondon of the 334th District Court of

Harris County voluntarily recused himself. The case was transferred to The Honorable Elizabeth Ray of the 165th District Court of Harris County.

The case was tried to a jury beginning October 27, 2005. At a pre-trial hearing, the trial court instructed the parties to place *all* of their evidence concerning damages before the jury, that the jury would be instructed to determine whether a breach occurred and, if so, to

determine the award of damages applicable without regard to whether such damages were precluded under the Contract, and that the trial court would later determine which damages were barred as a matter of law.

The jury found that Technip USA breached the Contract by unreasonable delay and awarded \$ 18,468,361.73 in damages to TGP as follows:

1. Project delay costs, sustained in the past	\$ 4,030,672.07
2. Excess gas use differential costs, sustained in the past	\$ 4,617,717.00
3. Excess lube oil costs, sustained in the past	\$ 233,933.04
4. Excess labor costs, sustained in the past	\$ 950,560.94
5. Extra power at Station 63 costs, sustained in the past	\$ 30,540.23
6. Backup generator costs, sustained in the past	\$ 34,871.69
7. Allowance for funds used during construction, sustained in the past	\$ 6,427,535.70
8. Premature energization costs at Station 54, sustained in the past	\$ 452,368.13
9. Realignment of compressor costs	\$ 964,170.02
10. Excessive blowdown costs, sustained in the past	\$ 14,160.00
11. Replacement and installation of operable oil fill system and repair costs for air dryers, sustained in the past	\$ 156,292.91
12. Review "as-built" drawings, to be reasonably sustained in the future	\$ 555,540.00

In [\*10] addition, the jury found that TGP did not breach the Contract.

Technip moved to disregard the jury findings and for judgment notwithstanding the verdict on the grounds that (1) TGP's delay-related damages were barred by the consequential damages provision of the Contract; (2) TGP's workmanship-related claims were barred by the warranty and exclusive remedy provisions of the Contract; (3) there was no evidence of causation as to TGP's delay-related damages; and (4) there was no evidence that Technip breached the Contract by unreasonably delaying beyond any deadline fixed by the Contract. TGP moved for judgment on the verdict on the grounds that its damages were "direct damages" caused

solely by Technip USA's delay.

The trial court granted each motion in part. The trial court limited the jury award to certain defective work claims-awarding TGP damages for "Realignment of compressor costs," "Replacement and installation of operable oil fill systems," and "Review 'as-built' drawings." In addition, the trial court awarded to TGP pre- and post-judgment interest and, as the parties had stipulated, \$ 1.1 million in attorney's fees. The trial court held that Technip was entitled to a credit against [\*11] the judgment of the \$ 1,650,000 retainage held by TGP, "as stipulated by the parties." The trial court held Technip S.A. jointly and severally liable as guarantor for payment of the judgment.

Technip USA moved to modify the judgment and for a new trial, which were overruled by operation of law. TGP and Technip have appealed. TGP seeks to recover the entire jury award; Technip seeks a holding that TGP take nothing on its claims.

### I. TGP's Appeal

In its appeal, TGP contends that the trial court erred by denying its Motion for Judgment and by granting Technip USA's Motions for Summary Judgment Regarding TGP's damages, Technip's Motion to Disregard the Jury Findings, and Technip's Motion for Entry of Judgment Notwithstanding the Verdict because (1) the total damages awarded by the jury constitute "direct damages" to which TGP is entitled as a matter of law; (2) the evidence is legally sufficient to support the jury's finding of damages; and (3) Technip S.A. was required, pursuant to the guaranty it executed, to pay all damages arising from Technip USA's failure to perform under the Contract.

### The Jury Award

In its first issue, TGP contends that the trial court erred by granting Technip's Motion [\*12] for Judgment Notwithstanding the Verdict because the total damages awarded by the jury constituted "direct damages" to which TGP is entitled as a matter of law. TGP contends that it is entitled to recover the total damages awarded by the jury because (A.) it is entitled, as a matter of Texas contract law, to recover its "benefit-of-the-bargain," namely, "to have efficient compressors in place in seventeen months," and (B.) the plain language of the Contract's damages provision does not limit recovery for "direct damages."

### Standard of Review

A trial court may disregard a jury finding and enter a judgment notwithstanding the verdict ("JNOV") if the finding is immaterial or if there is no evidence to support the finding. Tiller v. McLure, 121 S.W.3d 709, 713 (Tex. 2003); Spencer v. Eagle Star Ins. Co. of Am., 876 S.W.2d 154, 157 (Tex. 1994); Williams v. Briscoe, 137 S.W.3d 120, 124 (Tex. App.--Houston [1st Dist.] 2004, no pet.). A question is "immaterial" when it should not have been submitted to the jury, it calls for a finding beyond the province of the jury, such as a question of law, or when it was properly submitted but has been rendered immaterial by other findings. Se. Pipe Line Co. v. Tichacek, 997

S.W.2d 166, 172 (Tex. 1999); [\*13] Spencer, 876 S.W.2d at 157.

### A. Benefit of the Bargain

The objective in awarding damages for a breach of contract is to provide just compensation for the loss actually sustained by the complaining party. Phillips v. Phillips, 820 S.W.2d 785, 788 (Tex. 1991). Damages for breach of contract protect three interests: a restitution interest, a reliance interest, and an expectation interest. See O'Farrill Avila v. Gonzalez, 974 S.W.2d 237, 247 (Tex. App.--San Antonio 1998, pet. denied). The general measure of damages in a common-law breach of contract claim is just compensation for the loss or damage actually sustained, commonly referred to as the "benefit-of-the-bargain." Bowen v. Robinson, 227 S.W.3d 86, 96 (Tex. App.--Houston [1st Dist.] 2006, pet. denied). The "benefit-of-the-bargain" measure represents the difference between the value expected from the contract and the value actually received by the non-breaching party. Frost Nat'l Bank v. Heafner, 12 S.W.3d 104, 111 n.5 (Tex. App.--Houston [1st Dist.] 1999, pet. denied). The proper measure of damages is a question of law for the court, and the court's charge should limit the jury's consideration to facts that are properly a part of the [\*14] damages allowable. Allied Vista, Inc. v. Holt, 987 S.W.2d 138, 141 (Tex. App.--Houston [14th Dist.] 1999, pet. denied).

Actual damages are either "direct" or "consequential." Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 816 (Tex. 1997). Direct damages are those that flow naturally and necessarily from the breach. *Id.* "Direct damages compensate for the loss, damage, or injury that is conclusively presumed to have been foreseen or contemplated by the party as a consequence of his breach of contract or wrongful act." *Id.* "Consequential damages" are those which result naturally, but not necessarily, from the breach. *Id.* Consequential damages must be foreseeable and must be directly traceable to the wrongful act and result from it. *Id.*

A general measure of damages is subject to any agreement that the parties might have made with respect to damages because parties to a contract are free to limit or modify the remedies available in the event of a breach of the contract. GT & MC, Inc. v. Tex. City Refining, Inc., 822 S.W.2d 252, 256 (Tex. App.--Houston [1st Dist.] 1991, writ denied); *see also Heafner*, 12 S.W.3d at

[110-11](#) (reversing award of consequential damages when contract [\*15] excluded liability for consequential damages).

Here, the Contract reflects that TGP and Technip agreed to limit the remedies available in the event of a breach of the Contract. Hence, TGP's ability to recover its full expectancy interest, or the full benefit of its bargain, is subject to limitations. We consider the nature of the contractual limitations and whether they apply to the damages at issue in this case.

## B. Contractual Limitations

The parties agreed at Article 19.1 of the Contract to limit the remedies available, as follows:

Consequential Damages:  
Notwithstanding any other provisions of this Agreement to the contrary, in no event shall Owner or Contractor be liable to each other for any indirect, special, incidental or consequential loss or damage including, but not limited to, loss of profits or revenue, loss of opportunity or use incurred by either Party to the other, or like items of loss or damage; and each Party hereby releases the other Party therefrom.

The parties do not dispute that Article 19.1 precludes recovery for incidental or consequential damages. Rather, TGP contends that its claims constitute "direct damages" and therefore are not precluded by Article 19.1. Technip [\*16] contends that all of TGP's claims are for incidental, indirect, and consequential damages and thus are barred by Article 19.1.

It is a basic premise of contract interpretation that unambiguous contracts are construed as a matter of law. [Coker v. Coker, 650 S.W.2d 391, 393-94 \(Tex. 1983\)](#). The parties have stipulated that Article 19.1 is unambiguous. When a contract is unambiguous, "the court must enforce it as written." [Transcon. Gas Pipeline Corp. v. Texaco, Inc., 35 S.W.3d 658, 665 \(Tex. App.--Houston \[1st Dist.\] 2000, pet. denied\)](#). In construing the contract, we attempt to ascertain the parties' true intent "as expressed in the instrument." [Nat'l Union Fire Ins. Co. v. CBI Indus., 907 S.W.2d 517, 520 \(Tex. 1995\)](#). We presume that the parties intended for every clause to have some effect. [Heritage Res., Inc. v.](#)

[NationsBank, 939 S.W.2d 118, 121 \(Tex. 1996\)](#). We give terms their plain, ordinary and generally accepted meaning unless the instrument shows that the parties used them in a technical or different sense. *Id.*

Here, we apply these rules of construction to determine whether Article 19.1 precludes TGP's claims. By its plain language, Article 19.1, entitled "Consequential Damages," [\*17] provides that, without regard to any other provision of the Contract, the parties agreed to release each from any liability for any "indirect, special, incidental or consequential loss or damage." The parties defined such damages within this provision as including "loss of profits or revenue, loss of opportunity or use" and "like items of loss or damage."

TGP contends that Article 19.1 has no bearing on its direct damages. TGP contends that, to the degree its damages could be characterized as lost profits or loss of use, Article 19.1 "excludes only 'lost profits' and 'loss of use' that *also qualify* as consequential" and does not preclude it from recovering its lost profits and loss of use that constitute *direct* damages arising from Technip USA's breach.

Technip contends that the language of Article 19.1 reflects that the parties "set out general categories of damages that would be excluded-"indirect, special, incidental and consequential-and then they set out a non-exclusive list of damage claims that are specifically excluded-loss of opportunity, loss of use, lost profits, lost revenue, and 'like items of loss or damage.'" Technip contends that the parties defined damages for loss of [\*18] use, opportunity, and profits as being wholly within the categories of "indirect, special, incidental or consequential damages." Hence, contends Technip *all* claims for loss of use, opportunity, or profits are necessarily barred under Article 19.1.

In addition, Technip contends that the parties' removal of the liquidated damages provision (which specified damages for delay) demonstrates that the parties did not intend to place the risk of lost use, opportunity, or profits on Technip USA. Technip contends that the Contract, as drafted, left TGP without a remedy for its delay claims, but that this was negotiated up front and TGP enjoyed a \$ 1.5 million decrease in the Contract price to assume the risks of delay. TGP contends that the removal of the liquidated damages provision simply left TGP's claims unliquidated, not defunct.

In attempting to harmonize Article 19.1 with the other terms of the Contract, we note that Article 2.5 of the Contract indicates that Technip USA assumed certain risks-including "all risk related to and any right to claim any adjustment in the Project Schedule or Contract Price for (i) topography or soil conditions, (ii) availability of laborers and Subcontractors, [\*19] (iii) adequate availability and transportation of Equipment, and (iv) and [sic] breakdown or other failure of Equipment under the control of or provided by [Technip USA]." In addition, pursuant to Article 13, Technip USA guaranteed that Substantial Completion would not be delayed beyond the "Substantial Completion Date on a Station-by-station basis." Further, Article 19.2 provides, as follows, in pertinent part:

19.2 Limitation of Liability. Except for [Technip USA's] liability arising out of or relating to Articles 12 (warranties), 13 (guarantee of timely completion), . . . , 5.2C (Substantial Completion Date), . . . [Technip USA's] liability arising out of or relating to this [Contract] shall be limited to 50% of the Contract Price, regardless of whether the liability arises out of contract, . . . or any other legal or equitable theory.

Hence, Technip USA agreed to assume certain risks and extended a guarantee with regard to completion. In addition, subject to certain exceptions, the parties agreed to cap at 50% of the Contract Price any liability of Technip USA arising from violations of the provisions of the Contract, regardless of the theory of liability. Notably, the exceptions [\*20] include liability concerning warranties and timely completion, which are not capped.

Considering the Contract as a whole, we conclude that Article 19.1, as written, does not preclude any and all liability that arises from delay under the Contract. Had all such liability been precluded at Article 19.1, Article 19.2 would be rendered meaningless. We conclude that Article 19.1, "Consequential Damages," does not preclude the recovery of direct damages involving loss of use, opportunity, or profits.

We next consider whether the specific claims at issue constitute claims for direct or consequential damage:

1. "*Project delay costs*"

TGP contends that it is entitled to the jury award for its "project delay costs" because the Project took longer to complete than agreed and TGP incurred substantial expenses for the extended administration. Specifically, TGP asserts that it incurred extended expenses for labor, travel, environmental contractors, TGP inspectors, purchase and supply of additional construction consumables, costs for hauling wastewater from the site, and services and utilities. TGP contends that these expenses constitute "direct damages" because they naturally and necessarily flow directly [\*21] from the breach in that the expenses would not have been incurred but for the breach of the Contract by Technip.

Article 4 of the Contract, "Owner's Responsibilities," provides that TGP is required to provide: permits; construction and permanent power; incoming high power transmission lines; storage and lay down areas at the Sites; space at the Sites for construction trailers; water; potable water; fire water; hydrotest media; and operation personnel for commissioning." Hence, the parties clearly contemplated that TGP would incur these costs throughout the Project and a breach of the Contract by delay naturally and necessarily would cause these costs to be extended over a longer period of time.

We conclude that these damages that resulted from the delay represent direct damages because they clearly flow naturally and necessarily from the breach. *See Arthur Andersen & Co., 945 S.W.2d at 816.* Because TGP is expressly responsible for these costs under the Contract, it can be conclusively presumed to have been foreseen or contemplated by Technip that, as a consequence of its breach of the Contract by delay, TGP would have to continue paying these ongoing costs. *See id.* TGP is not precluded [\*22] from receiving these damages under Article 19.1 of the Contract.

2.-4. *Loss of efficiency-excess gas, oil, and labor*

TGP characterizes its claims for "excess gas use," "excess lube oil," and "excess labor cost" as damages for "loss of efficiency caused by the delay" and "lost value." TGP compared the cost of gas and oil used in the old compressors with what it anticipates it would have expended had the new, more efficient compressors been timely installed. As to labor, TGP compared the level of labor costs expended to run the old equipment during the delay with the labor costs it anticipates it would have incurred once the highly automated compressors were installed. TGP contends that these claims represent direct

damages because "the entire reason for the Project [was] to obtain the new compressors on a timely basis."

Technip contends that TGP's claims of lost efficiency constitute claims of consequential "loss of use" damages and are precluded under Article 19.1. We agree that the loss of anticipated savings on the projected efficiency of the new compressor components is not a direct damage because it is too remote to be "conclusively presumed to have been foreseen or contemplated" [\*23] by Technip USA as a consequence of its breach. See [Arthur Andersen & Co., 945 S.W.2d at 816](#); [Wade and Sons Inc. v. Am. Standard, Inc., 127 S.W.3d 814, 823 \(Tex. App.-San Antonio 2003, pet. denied\)](#).

#### 5. "Power at Station 63"

TGP contends that it is entitled to damages for providing extended "Power at Station 63" separately from its "Project delay costs" above. As we concluded in our analysis of the "Project delay costs," because TGP is expressly responsible for providing power under the Contract, it can be conclusively presumed to have been foreseen or contemplated by Technip that, as a consequence of its breach of the Contract by delay, TGP would have to continue paying these ongoing costs. See *id.* We conclude that these damages resulting from the delay also represent "direct damages" because they clearly flow naturally and necessarily from the breach. See [Arthur Andersen & Co., 945 S.W.2d at 816](#). Hence, these damages are likewise not precluded under the Contract.

#### 6. Backup generator at Station 47

TGP contends that, pursuant to Article 3 of the Contract, Technip was required to perform its work according to "Good Engineering and Construction Practices" and to ensure that its work did [\*24] not "unreasonably interfere with the operation of the Facilities." In addition, TGP points to the "Scope of Work" that it contends the parties agreed on that stated that "[r]etirement of existing equipment shall not begin until the replacement horsepower is in service without permission of the Company." TGP complains that Technip USA dismantled an existing backup generator at Station 47 before the new backup generator was fully functional. When a power outage occurred, TGP was forced to rent a backup generator to ensure continuing operations and to comply with regulations. TGP contends

that it is entitled to recover its costs.

Technip contends without discussion that this cost represents an indirect damage "clearly ancillary to the progress of the Project."

We cannot conclude that a power outage and the necessity of a rented backup generator could have been "conclusively presumed to have been foreseen or contemplated" by Technip USA at the time the Contract was formed "as a consequence of [its] breach of contract or wrongful act." See [Arthur Andersen & Co., 945 S.W.2d at 816](#). Hence, we cannot conclude that the damages are "direct." We conclude that the damages resulted naturally, but [\*25] not necessarily, from the breach. See *id.* Hence, these damages are "consequential." Because Article 19.1 of the Contract precludes recovery for consequential damages, the trial court did not err by excluding them.

#### 7. Allowance for funds used during construction

TGP contends that it paid for the project out of its own funds and that it is entitled to damages for the interest that accrued "on the total amount TGP had invested in the Project during the delay period." Although this claim does not involve any actual payment to a third party, TGP characterizes this claim as a "a loss of borrowing power" because it represents interest TGP theoretically could have earned on its money—generally "ranging from five to six percent"—had it invested the funds it spent on this project in other investments during the delay period.

"Interest is an element of damages suffered by the 'loss of use' of money." [Sherrill v. Phillips, 405 S.W.2d 627, 633 \(Tex. Civ. App.-Austin 1966, writ ref'd n.r.e.\)](#); see [Marrs and Smith P'ship v. D.K. Boyd Oil and Gas Co., 223 S.W.3d 1, 24-5 \(Tex. App.-El Paso 2005, pet. denied\)](#) (explaining that "interest as interest (eo nomine) is compensation for the use or detention of [\*26] money" and "interest as damages is compensation for lost use of money"). Here, the record shows that Bert Pineda, TGP's project manager, testified that "the imputed interest claim is a claim for the loss of use of those funds."

The lost use of money represents an indirect loss to TGP because any return that might be attributable to theoretical investments TGP might have made falls outside its Contract with Technip. See [Cont'l Holdings, Ltd. v. Leahy, 132 S.W.3d 471, 475 \(Tex. App.-Eastland,](#)

[2003, no pet.](#)) (explaining that profits lost on other contracts or relationships resulting from the breach are "indirect" or "consequential damages"). Hence, TGP's interest claim is a consequential "loss of use" claim that is precluded by Article 19.1 of the Contract.<sup>7</sup>

<sup>7</sup> TGP's reliance on [Baldwin v. Smith, 586 S.W.2d 624, 631-32 \(Tex. Civ. App.-Tyler 1979\), rev'd on other grounds, 611 S.W.2d 611 \(Tex. 1980\)](#), is misplaced. The court in *Baldwin* held the appellant liable for interim interest owed to a third party because he stipulated in the contract that he would pay the interim interest and hold appellee harmless. Likewise, appellant's reliance on [Roanoke Hosp. Asso. v. Doyle & Russell, Inc., 214 S.E.2d 155, 160-61, 215 Va. 796 \(Va. 1975\)](#) [\*27] is misplaced. There, the court held that, because "[c]ustomarily, construction contracts, particularly large contracts, require third-party financing, . . . a delay in completion requires an extension of the terms of construction financing, . . . [and] the interest costs *incurred* and the interest *revenue* lost during such an extended term are predictable results of the delay and are, therefore, direct damages." *Id.* at 160-61 (emphasis added). Here, as Technip points out, TGP funded the project internally and has not made any actual interest payments. At most, TGP seeks damages for hypothetical investments it might have made and estimates the interest it might have made.

#### 8. Premature energy costs at Station 54

TGP contends that it is entitled to damages for premature energy costs at Station 54 because, asserts TGP, Technip prematurely requested permanent electricity to Station 54. TGP contracted with the utility company to bring in large transmission lines to get electricity to the new motors being installed at the compressor stations. Pursuant to TGP's contract with the utility company, TGP was to pay for a specified amount of electric use to compensate the utility company for laying [\*28] the transmission lines. TGP was given a three-month grace period, after which time TGP either had to begin the use of electricity at the anticipated demand rate or to pay a penalty of 50% of the anticipated demand for each month it did not use any electricity. TGP contends that Technip USA reported that it was ready for electricity in April 2001 and that TGP had the power turned on in May 2001, but that it was not until

nine months later that Technip commissioned the units and used the electricity.

We conclude that the trial court did not err by excluding this claim from TGP's recovery. TGP has not directed us to any provision in the Contract governing this claim. However, even if Technip's conduct constituted a breach of the Contract, we conclude that TGP's damage is indirect or consequential because it involves a relationship outside of the Contract between TGP and Technip; namely, this claim involves a penalty TGP owes under its contract with its utility company. See [Leahy, 132 S.W.3d at 475](#). As an incidental or consequential damage, it is barred by Article 19.1 and the trial court did not err by excluding it.

#### (Claim 10.) Excessive slowdown<sup>8</sup>

<sup>8</sup> We do not consider in this portion of [\*29] the analysis those claims for defective workmanship that were awarded to TGP--9. Realignment of compressor costs, 11. Replacement and installation of operable oil fill system, and 12. Review of "as-built" drawings. These claims are addressed in our analysis of Technip's appeal.

TGP contends that it is entitled to damages as a result of excessive slowdown. TGP asserts that Technip failed to store certain components properly on the job sites, which caused rust to form inside the mechanisms. Subsequently, when gas was introduced into the new facilities, the seals were damaged and certain elements were not tightened properly. TGP asserts that it was forced to vent gas into the atmosphere and perform emergency shutdowns that wasted its gas product. TGP contends that the vented gas represents gas product that TGP was then not able to sell to its gas customers. We construe TGP's claim to be for lost profits.

Lost profits can take the form of direct or consequential damages. *Id.* Profits lost on the breached contract itself are classified as "direct damages." *Id.*; [Hedley Feedlot, Inc. v. Weatherly Trust, 855 S.W.2d 826, 834 \(Tex. App.--Amarillo 1993, no writ\)](#) (holding lost profits from breach [\*30] of cattle purchase contract to be direct damage). If a party's expectation of profit is incidental to the performance of the contract, the loss of that expectancy is consequential. [Naegeli Transp. v. Gulf Electroquip Inc., 853 S.W.2d 737, 739 \(Tex. App.--Houston \[14th Dist.\] 1993, writ denied\)](#) (holding profits lost as result of inability to use electricity

transformer not delivered in breach of contract to be consequential damage).

Here, TGP's expectation of profit through the sale of gas to its customers is incidental to the performance of TGP's Contract with Technip USA concerning the installation of new equipment. We conclude that excessive blowdown damages are incidental or consequential and, as such, the trial court did not err by excluding this damage claim.

In sum, we conclude that all of TGP's challenged damages under this issue were precluded under the terms of the Contract, as a matter of law, *except* those damages awarded for "Project delay costs" and "Power at Station 63." Thus, the question of damages on all but these two claims should not have been submitted to the jury and the trial court did not err in disregarding the jury's findings of damages on these claims. See [Tichacek, 997 S.W.2d at 172](#).

Accordingly, [\*31] we sustain TGP's first issue insofar as it concerns TGP's claims for "Project delay costs" and "Power at Station 63." We overrule TGP's first issue in all other respects.

### **Sufficiency of the Evidence Supporting the Damages**

In its second issue, TGP contends that the trial court erred by limiting the jury award because there was legally sufficient evidence to support the jury findings of damages. We consider only those categories of damages that we determined above are not precluded under the terms of the Contract—those remaining damages are for "Project delay costs" and for "Power at Station 63."

We review a JNOV under a legal sufficiency standard, viewing the evidence and inferences in the light most favorable to the jury's finding. [City of Keller v. Wilson, 168 S.W.3d 802, 807 \(Tex. 2005\)](#) (stating that "the test for legal sufficiency should be the same for summary judgments, directed verdicts, judgments notwithstanding the verdict, and appellate no-evidence review"). We will sustain the granting of a JNOV based on "no evidence" when the record discloses one of the following: (1) a complete absence of evidence of a vital fact; (2) the trial court is barred by the rules of law or evidence [\*32] from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is not more than a scintilla; or (4) the evidence establishes conclusively the opposite of a vital

fact. [Id. at 810](#); [Tiller, 121 S.W.3d at 713](#) (trial court may grant JNOV if there is not evidence to support jury finding on issue necessary to liability). More than a scintilla of evidence exists if the evidence supporting the finding "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." [Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 499 \(Tex. 1995\)](#). With regard to damages awards, the granting of a JNOV is proper if there is no evidence to support the jury's damages finding and if the evidence establishes the trial court's damage award as a matter of law. [Cont'l Coffee Prods. Co. v. Cazarez, 937 S.W.2d 444, 450 \(Tex. 1996\)](#).

TGP contends that "[i]t was not incumbent on TGP to prove what 'caused' the delay or prove that Technip USA was culpable in the delay"; rather, that "the delay by itself was a breach of contract and caused substantial damage." We disagree that TGP bears no burden to prove causation. Recovery under a breach [\*33] of contract claim requires proof of four elements: (1) the existence of a valid contract, (2) performance or tendered performance by the plaintiff, (3) breach of the contract by the defendant, and (4) damages sustained by the plaintiff as a result of the breach. [Crowder v. Scheirman, 186 S.W.3d 116, 118-19 \(Tex. App.--Houston \[1st Dist.\] 2005, no pet.\)](#).

TGP contends that the record is replete with evidence supporting the jury's award of damages for project delay costs and for power at Station 63.

The record shows that TGP submitted evidence of its project delay damages in the form of a chart summary of the expenses it incurred by station for each category of costs during the delay or schedule "slip." In addition, to support the chart summary, TGP submitted a breakdown of expenses per station, listing individual payments made on particular dates within each category of expenses.

In addition, Winston Johnson, El Paso's Senior Vice President of Engineering, testified that he met with Technip USA in July 2000 regarding Technip USA being behind schedule. Concrete at Station 47 had been poured incorrectly by Technip USA and had to be redone. Johnson testified that he met with Technip USA again [\*34] in November 2000 and discussed the lack of progress. Johnson testified that Technip USA never asked for schedule adjustments or submitted change orders regarding the schedule. Johnson also testified that Stations 47, 63, and 87 all had "significant changes to the

scope of work" by TGP. However, Johnson also testified that the project involved state-of-the-art technology and that TGP's engineers concluded that there were issues with the design of the new units, namely, vibration problems and alignment issues.

Dewey McLain, Vice President of Construction for Technip, testified that the engineering was not on schedule, which he attributed, in part, to delays in the document flow between Technip USA and Wartsila (the manufacturer of the components).

William Ellison, Vice President of Engineered Product Sales for CSI (third party that assembles the compressors on skids), testified that the Project involved cutting-edge technology and that there were a number of change orders. Ellison testified that there were problems with vibration in the units. Ellison testified that his company was forced to cease work internally on some occasions because it would receive requests or instructions to change [\*35] scope without written authorization or assurances that CSI would be paid for the changes.

Mike Hanson, an engineering and construction consultant testifying on behalf of TGP, testified that Technip USA installed equipment improperly and wiring had to be redone. Hanson also testified that certain components were not stored properly, which caused rust problems and subsequent leaks, and that Technip USA was at fault because it was in charge of the work site and storing the machines. Hanson also testified that some of the delays that occurred were not the fault of Technip USA and that he did not do a critical path analysis to determine whether any certain delay was attributable to Technip USA or to TGP.

Bert Pineda, TGP's project manager for the Project, testified that Technip USA was 100 percent at fault for the delay. Pineda testified that he met with Technip USA personnel to determine the cause of the delays. Technip USA had labor problems at Station 63. There were commissioning problems at Stations 47, 63, and 87 that were attributable to Technip USA having improperly stored the engines. Rust formed in the engines, which caused broken seals and leaks in water pumps. Pineda testified [\*36] that there were delays at TGP in approving change orders, but that this was attributable to Technip USA's submission of orders that contained errors in the structure and pricing.

Pineda also testified regarding his methodology to determine the delay damages. Pineda testified that he added up all of the time between what was apparently the first day after the date of demobilization and the date of actual substantial completion, and then attributed 100% of the delay in this period to Technip USA. Pineda testified that he did not determine if, within each delay period, Technip USA actually caused the delay. Pineda stated that he did not identify whether any of the issues he believed Technip USA did wrong were associated with any particular period of delay. Pineda testified, for instance, that there were permitting delays as Stations 47, 63, and 87, but that these delays were not taken into account. Pineda also testified that there were numerous alignment issues, but that delays attributable to modifications were not taken into account. Pineda testified that he did not consider what percentage of the delay issues were attributable to TGP and what percentage could be attributed to Technip [\*37] USA.

We conclude that this evidence constitutes more than a scintilla because it "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." [Crye, 907 S.W.2d at 499](#). We hold that, having reviewed all of the evidence in the light most favorable to the jury's finding, the trial court's granting of a JNOV as to the damages was improper because there is evidence to support the jury's damages finding. [See Wilson, 168 S.W.3d at 807](#); [Cazarez, 937 S.W.2d at 450](#).

Accordingly, we sustain TGP's second issue insofar as it relates to its damages for "Project delay costs" and "Power at Station 63." We overrule TGP's second issue in all other respects.

### **Parent Guaranty**

In its third issue, TGP contends that the trial court erred by limiting the jury award because Technip S.A. was required, pursuant to the guaranty it executed ("Guaranty"), to pay all of TGP's damages arising from Technip USA's breach of the Contract.

A guarantor's liability is measured by the principal's liability unless a more extensive or more limited liability is expressly provided for in the guaranty. [W. Bank-Downtown v. Carline, 757 S.W.2d 111, 113 \(Tex. App.--Houston \[1st Dist.\] 1988, writ denied\)](#). [\*38] To determine the extent of the guarantor's liability, we look to the language of the guaranty agreement. *Id.* If the guaranty agreement is so worded that it can be given a

certain or definite legal meaning or interpretation, it is not ambiguous, and we construe the contract as a matter of law. *Id.* at 114. If uncertainty exists as to the meaning of the guaranty contract, and if two reasonable interpretations may be made, we apply the construction most favorable to the guarantor. *Coker*, 650 S.W.2d at 394 n.1 (explaining that "guarantor is entitled to have his agreement strictly construed so that it is limited to his undertakings, and it will not be extended by construction or implication"); *Clark v. Walker-Kurth Lumber Co.*, 689 S.W.2d 275, 278 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.).

Here, the Guaranty provides as follows, in pertinent part:

### 1. GUARANTY

a. On the terms and subject to the conditions contained herein, [Technip S.A.] hereby irrevocably and unconditionally guarantees, to and for the benefit of [TGP], the performance of all [Technip USA's] obligations contained in the [Contract] in accordance with the terms hereof. . . .

b. If, for any reason, [Technip USA] shall [\*39] fail or be unable to duly, punctually, or fully perform the Guaranteed Obligations or commits any breach thereof, then upon [TGP's] request to that effect, [Technip S.A.] shall forthwith perform or shall cause a third party acceptable to [TGP] to perform such obligations and shall indemnify and keep indemnified [TGP] against any loss, damages, costs and expenses arising from the said failure or breach for which [Technip

USA] may be liable in accordance with the [Contract], as if it was the primary obligor.

c. [Technip S.A.'s] obligations and liability under this Guaranty shall in no event exceed [Technip USA's] obligations and liability under the [Contract].

### 2. OBLIGATIONS

[Technip S.A.] agrees that the obligations of [Technip S.A.] set forth in this Guaranty shall be absolute and unconditional, shall not be subject to any counterclaim, set-off-deduction, . . . reduction, or defense (other than full and strict compliance by [Technip S.A.] with its obligations hereunder) based upon any claim [Technip S.A.] may have against [Technip USA] . . . .

The trial court held Technip S.A. jointly and severally liable as a guarantor for payment of the judgment. The parties do not dispute that Technip [\*40] S.A. is liable to TGP under the Guaranty; rather, the parties dispute the extent of that liability.

TGP contends that the Guaranty required Technip S.A. to "keep TGP whole for any breach of the Contract by Technip USA" and that the "evidence conclusively established that Technip failed to do so." Specifically, to support its position, TGP directs us to paragraph 1b of the Guaranty which provides that "[i]f, for any reason, [Technip USA] shall fail or be unable to duly, punctually, or fully perform the Guaranteed Obligations or commits any breach thereof" Technip S.A. is required to "indemnify and keep indemnified [TGP] against any loss,

damages, costs and expenses arising from the said failure or breach for which [Technip USA] may be liable in accordance with the [Contract]." TGP contends that, according to the terms of the Guaranty, Technip S.A. must reimburse TGP for any loss, damages, or costs arising from Technip USA's breach.

Technip contends that Technip S.A. is liable to the same degree that Technip USA is liable and no more. Technip contends, and we agree, that the Guaranty clearly provides that "[Technip S.A.'s] obligations and liability under this Guaranty shall in no event [\*41] exceed [Technip USA's] obligations and liability under the [Contract]." This language means that Technip S.A. is not liable to TGP beyond the level of liability imposed on Technip USA. See [Carline, 757 S.W.2d at 113-14](#).

TGP contends that Technip's focus on this language "ignores the rules of contract construction, which require a court to read the agreement in its entirety and to harmonize its provisions." TGP points us to paragraph 1a, which states that: "[Technip S.A.] hereby irrevocably and unconditionally guarantees, to and for the benefit of [TGP], the performance of all [Technip USA's] obligations contained in the [Contract]."

Reading paragraph 1a in its entirety, as we must, we note that TGP omits significant language from this provision, emphasized as follows:

*On the terms and subject to the conditions contained herein, [Technip S.A.] hereby irrevocably and unconditionally guarantees, to and for the benefit of [TGP], the performance of all [Technip USA's] obligations contained in the [Contract] in accordance with the terms hereof. . .*

(Emphasis added.) By its plain language, Technip S.A.'s guarantee of Technip USA's obligations is subject to the terms and conditions contained in [\*42] the Guaranty. As noted above, those terms include that "[Technip S.A.'s] obligations and liability under this Guaranty shall in no event exceed [Technip USA's] obligations and liability under the [Contract]."

In addition, TGP contends that it is entitled to a judgment against Technip S.A. for the total jury award because the Guaranty prohibits Technip S.A. from claiming any set-off or defense. TGP contends that,

pursuant to the express terms of paragraph 2, Technip S.A.'s obligations are not "subject to any counterclaim, set-off-deduction, . . . reduction or defense" and therefore Technip S.A. cannot apply any reduction to the jury award for the retainage at issue and cannot apply the consequential damages defense asserted by Technip USA.

A closer reading of paragraph 2 indicates that Technip S.A.'s obligations under the Contract are "not subject to any counterclaim, set-off-deduction, . . . reduction, or defense (other than full and strict compliance by [Technip S.A.] with its obligations hereunder) *based upon any claim the Guarantor [Technip S.A.] may have against Contractor [Technip USA].*" (Emphasis added.) Thus, Technip S.A. is precluded from claiming that any set-off, reduction, [\*43] or defense Technip S.A. might have against *Technip USA* reduces its liability to TGP. There are not any claims at issue between Technip USA and Technip S.A. in this case.

Finally, TGP contends that the Contract required Technip USA to obtain a guaranty from its parent, Technip S.A., that was to be in the form of Exhibit "T" to the Contract. TGP contends that the guaranty was to have "no limitation of liability." TGP contends that, because Technip USA failed to execute a guaranty in the form of Exhibit "T," and instead executed a different form of guaranty, TGP was prevented from receiving the benefit of the "intended Technip guaranty, and TGP is entitled to recover that benefit from Technip USA." We must enforce a contract as written, not as one party contends that, in hindsight, it intended for to have been written. See [CBI Indus., Inc., 907 S.W.2d at 520](#) (ascertaining intent of parties "as expressed in the instrument"); [Texaco, Inc., 35 S.W.3d at 665](#) (enforcing unambiguous contract as written).

We conclude that the trial court did not err in limiting Technip S.A.'s liability as guarantor to the liability imposed on Technip USA.

Accordingly, TGP's third issue is overruled.

## **II. Technip's [\*44] Appeal**

In its appeal, Technip contends that the trial court erroneously denied its Motion for Judgment Notwithstanding the Verdict on the issue of TGP's workmanship-related damages because (1) such claims are barred by the exclusive remedy provisions of the

agreement; (2) the evidence is insufficient to support the damages awarded on the realignment and as-built drawings claims; and (3) the trial court improperly applied the stipulated retainage offset and improperly calculated interest and attorney's fees.

### Defective Work Claims

In its first issue, Technip contends that the trial court erroneously denied its Motion for Judgment Notwithstanding the Verdict on the issue of TGP's workmanship-related damages because such claims are barred by the exclusive remedy provisions of the agreement. Specifically, the trial court granted damages to TGP as awarded by the jury on the following workmanship-related claims: "Realignment of compressor costs," "Replacement and installation of operable oil fill systems," and "Review of 'as-built' drawings." Technip contends that there is no evidence that TGP gave notice of the alleged defects to Technip USA, as required under the Contract.

We review the denial [\*45] of this portion of Technip's Motion for Judgment Notwithstanding the Verdict under a legal sufficiency standard. See [Brown v. Bank of Galveston](#), 963 S.W.2d 511, 513 (Tex. 1998); [CDB Software, Inc. v. Kroll](#), 992 S.W.2d 31, 35 (Tex. App.--Houston [1st Dist.] 1998, pet. denied). A JNOV should be entered on "no evidence" when the evidence offered to prove a vital fact is no more than a scintilla. [Wilson](#), 168 S.W.3d at 823. We view the evidence and inferences in the light most favorable to the jury's finding. *Id.* at 807. With regard to damages awards, the granting of a JNOV is proper if there is no evidence to support the jury's damages finding and if the evidence establishes the trial court's damage award as a matter of law. [Cazarez](#), 937 S.W.2d at 450.

Article 12.3 of the Contract, Warranty of Defects, provides as follows, in pertinent part:

C. Remedy. Owner shall provide notice to [Technip USA] of the discovery or any Defective Work as soon as practicable after such discovery.

D. Repair by Owner. If, after notification of a breach of warranty under Section 12.3.C., [Technip USA] delays in commencing, continuing or completing curative action, then [TGP], by written

notice to [Technip USA], [\*46] may correct such Defect(s) in accordance with this Agreement, and [Technip USA] shall be liable for all reasonable direct costs, charges and expenses incurred by [TGP] in connection with such repair or replacement and shall pay to [TGP] an amount equal to such costs, charges and expenses upon receipt of an invoice from [TGP].

Article 12.5 of the Contract provides that

[t]he warranties provided under this [Contract] are the sole and exclusive warranties provided by [Technip USA]. No other warranties, express or implied, are provided by [Technip USA] hereunder. Owner's remedies are limited to those described herein.

Hence, Article 12.3C requires TGP to give notice to Technip USA of any defective work. Article 12.3D requires that, after such notice, if Technip USA fails to cure the defect, TGP must give written notice that it will correct the defect and Technip USA will then be liable for such costs.

Technip contends that there is no evidence that TGP provided notice of the defects at issue, that TGP gave Technip USA a chance to cure the defects, or that TGP gave written notice that it would repair the defects at Technip USA's expense. Technip contends TGP did not avail itself of the warranty [\*47] provision in the Contract, which was its exclusive remedy.

As a threshold matter, TGP asserts that Technip waived this issue on appeal because it failed to plead lack of notice as an affirmative defense. [Texas Rule of Civil Procedure 94](#) requires the affirmative pleading of certain specified defenses and of "any other matter constituting an avoidance or affirmative defense." [TEX. R. CIV. P. 94](#). Generally, if an affirmative defense is not pleaded or tried by consent, it is waived. [Tacon Mech. Contractors, Inc. v. Grant Sheet Metal, Inc.](#), 889 S.W.2d 666, 671 (Tex. App.--Houston [14th Dist.] 1994, writ denied). A general denial is insufficient because it fails to place the plaintiff on notice that defendant intends to bring in evidence of an independent reason why plaintiff is barred

from recovery, even if the plaintiff proves the elements of his cause of action. *Id.*

Here, lack of notice required under the Contract is not an affirmative defense because it does not provide an independent reason to find against TGP. Rather, it goes directly to TGP's cause of action. Performance of any condition precedent is an essential element of a plaintiff's breach of contract case. See *Assoc. Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 283 (Tex. 1998). [\*48] Here, TGP was required to plead that it performed all conditions precedent, which then gave rise to Technip's burden to specifically deny the performance of all conditions precedent.

The record shows that, in its answer, Technip "specifically denied that TGP satisfied the conditions precedent for its claims, including adherence to the contractual procedures for asserting warranty-type claims relating to alleged defects." As Technip contends, this plea was verified pursuant to Rule 93(12), which addresses whether "notice and proof of loss or claim for damage has not been given as alleged." See TEX. R. CIV. P. 93(12). We conclude that Technip did not waive this issue on this basis.

The record shows that lack of notice and exclusive remedy were raised in the trial court through the testimony of Pineda, who stated, without objection, that no formal written notice of the alleged defects was given by TGP. Technip also expressly raised these matters in a motion for summary judgment. Hence, as Technip contends, these matters were tried by consent. See TEX. R. CIV. P. 67; *Roark v. Stallworth Oil & Gas*, 813 S.W.2d 492, 495 (Tex. 1991).

TGP first contends that it was not required to give written [\*49] notice of defects under the Contract, contending that Article 12.2 and not Article 12.3 governs this issue. We disagree.

Article 12.2 concerns the "Owner's Right to Inspect" the work and provides that "[i]f, in the judgment of the Owner, any Work is Defective, then Contractor shall, at its own expense, promptly repair or replace the Defective Work." Article 12.3, as laid out above, directly concerns "Warranty of Defects" and governs the remedies. Article 12.5 states that these warranties are "the sole and exclusive warranties provided by the Contractor." Articles 12.3 and 12.5 clearly govern the defective work claims at issue. Article 12.2 governs only TGP's right to

inspect the ongoing work.

Second, TGP contends that it gave written notice of the defective work. On the realignment claim, TPG directs us to an email concerning a suggested way to rectify the alignment; a letter from CSI to Technip USA concerning measures taken to realign the skids; and punch lists from Station 47 and 87. As to the oil fill systems, TGP directs us to what appear to be internal emails concerning the issue. As to the "as built" drawings, TPG direct us to the testimony of Pineda, who stated that he "believe[d] [\*50] there was a letter sent to Technip" on this claim. These items do not constitute evidence that TGP gave notice of defects to Technip USA pursuant to the warranty provision in the Contract or that, after Technip USA failed to take curative action, TGP submitted written notice that it would repair the defects at the expense of Technip USA.

TGP does not direct us to, and we do not find, any evidence in the record that TGP provided written notice of its defective work claims, as is required under the Contract. We conclude that Technip conclusively proved it is entitled to the JNOV on these claims. See *Wilson*, 168 S.W.3d at 823 (JNOV should be entered on "no evidence" when evidence offered to prove vital fact is no more than scintilla).

Accordingly, we sustain Technip's first issue. We do not reach its second issue, that the evidence was insufficient to support the jury's damages findings on these claims.

### **Interest and Attorney's Fees**

In its third issue, Technip contends that the trial court improperly (1) applied the stipulated retainage offset, (2) calculated interest, and (3) applied attorney's fees.

#### *1. Stipulated retainage offset*

Over the course of the Project, TGP withheld a ten percent retainage [\*51] from its progress payments. The record shows that, at trial, the parties stipulated that "the amount of the retainage at issue between the parties will be \$ 1,650,000." In addition, the parties stipulated that "should TGP prevail in this case and be awarded damages that this \$ 1,650,000 retainage amount would be an offset against their damage award."

On appeal, Technip contends that the trial court erred

by failing to provide "for pre-judgment interest on [the retainage] at the rate specified in section 7.7 of the [Contract] for late payments." The stipulation is a binding contract between the parties and the court. [\*Houston Lighting & Power Co. v. City of Wharton\*, 101 S.W.3d 633, 641 \(Tex. App.--Houston \[1st Dist.\] 2003, pet. denied\)](#). A stipulation is conclusive on the issue, and the parties are estopped from claiming otherwise. *Id.* Hence, having stipulated to the amount of the retainage at trial, Technip cannot be heard to complain of that amount on appeal.

In addition, Technip contends that the trial court erred by failing to subtract the stipulated retainage prior to calculating pre-judgment interest on the judgment. We agree. The judgment reflects that damages and interest were calculated, [\*52] and then \$ 1,650,000 retainage was subtracted. The retainage should be subtracted from the principal amount of the judgment prior to the calculation of pre-judgment interest. See [\*Pringle v. Moon\*, 158 S.W.3d 607, 611 \(Tex. App.-Fort Worth 2005, no pet.\)](#) (applying offset to damage award prior to calculation of pre-judgment interest).

## 2. Interest

Technip contends that the trial court erred by awarding pre-judgment interest on the defective workmanship damages because these damages constitute future damages. Having determined that the trial court erred by denying Technip's motion for judgment notwithstanding the verdict as to TGP's claims of "Realignment of compressor costs," "Replacement and installation of operable oil fill systems," and "Review of 'as-built' drawings," and thereby determining that TGP take nothing on these claims, we do not reach the issue of whether the interest on these claims constitutes interest on future damages.

As to TGP's remaining claims, Technip contends that the trial court generally applied an incorrect rate of interest in its judgment. Specifically, Technip contends that the trial court erred by calculating pre-judgment interest at a rate of nine percent, [\*53] which is the rate of interest provided in the Contract that is applicable only to any late payments made to Technip by TGP under the Contract. Technip contends that the nine percent rate does not apply to pre-judgment interest, nor does the Contract provide for any specific rate in the event of a breach. Technip contends that when the interest rate is not specified in a contract, pre-judgment interest should

be calculated based on the statutory rate provided in [Texas Finance Code section 304.003\(c\)\(1\)](#). See [TEX. FIN. CODE ANN. 304.003\(c\)\(1\)](#) (Vernon Supp. 2007).

There are two legal sources for an award of pre-judgment interest: (1) common law equitable principles and (2) an enabling statute. [\*Johnson & Higgins, Inc. v. Kenneco Energy\*, 962 S.W.2d 507, 528 \(Tex. 1998\)](#). However, in *Johnson*, the Texas Supreme Court harmonized the common law pre-judgment interest accrual scheme with that under the Finance Code. *Id.* The court held that pre-judgment interest is calculated as simple interest and is based on the post-judgment interest rate applicable at the time of the judgment. *Id.* at 532; [TEX. FIN. CODE ANN. § 304.103](#).

When the interest rate is not specified in a contract, pre-judgment interest [\*54] should be calculated based on the statutory rate provided in [Texas Finance Code section 304.003](#). See [TEX. FIN. CODE ANN. 304.003](#); [\*ExxonMobil Corp. v. Valence Op. Co.\*, 174 S.W.3d 303, 319 \(Tex. App.--Houston \[1st Dist.\] 2005, pet. denied\)](#) (applying [section 304.003](#) in breach of contract claim). Although [section 304.003](#) expressly applies to post-judgment rates, pre-judgment interest is computed at the same statutory rate. See [\*Tips v. Hartland Developers, Inc.\*, 961 S.W.2d 618, 624 \(Tex. App.-San Antonio 1998, no pet.\)](#).

Here, the record shows that the Contract provides for interest on any late payments due under the Contract from TGP (as the annual prime plus two percent), but it does not provide for any rate of interest on damages resulting from a breach of the Contract by either party. Because an applicable interest rate is not specified in the Contract, pre-judgment interest is calculated based on the statutory rate provided in [Texas Finance Code section 304.003](#). See [TEX. FIN. CODE ANN. 304.003](#); [\*ExxonMobil Corp.\*, 174 S.W.3d at 319](#).

[Section 304.003\(b\)](#) provides that "[o]n the 15th day of each month, the consumer credit commissioner shall determine the postjudgment interest rate to be applied [\*55] to a money judgment rendered during the succeeding calendar month." [TEX. FIN. CODE ANN. 304.003\(c\)\(1\)](#). [Section 304.003\(c\)\(1\)](#) provides that, with exceptions not applicable here, "the postjudgment interest rate is the prime rate as published by the Board of Governors of the Federal Reserve System on the date of computation." *Id.* [§ 304.003\(c\)\(1\)](#). That rate is published in the Texas Register by the Secretary of State. *Id.* [§](#)

[304.004](#). This court may take judicial notice of the correct, published rate on appeal. [Office of Pub. Util. Counsel v. Pub. Util. Comm'n of Tex., 878 S.W.2d 598, 600 \(Tex. 1994\)](#).

Here, when the trial court entered its final judgment on May 18, 2006, the judgment interest rate as determined by the consumer credit commissioner was 7.75 percent. See Judgment Rate Summary, [http://www.occc.state.tx.us/pages/int\\_rates/Index.html](http://www.occc.state.tx.us/pages/int_rates/Index.html) (last visited Nov. 15, 2007). Thus, the trial court's judgment should have reflected pre-judgment interest at the rate of 7.75 percent, rather than 9 percent.

Accordingly, we sustain Technip's third issue as it concerns the pre-judgment interest rate stated in the judgment.

### 3. Attorney's fees

As to attorney's fees, Technip contends that, although the [\*56] parties stipulated to \$ 1.1 million as reasonable attorney's fees for the prevailing party, if TGP's recovery is reduced in this appeal, the attorney's fees should likewise be reduced. As TGP contends, the stipulation is a binding contract between the parties and the court. [City of Wharton, 101 S.W.3d at 641](#). A stipulation is conclusive on the issue, and the parties are estopped from claiming otherwise. *Id.*

Accordingly, we overrule Technip's third issue as it concerns attorney's fees.

## CONCLUSION

We conclude that the trial court erred by granting judgment notwithstanding the verdict on TGP's claims for "Project delay costs" and "Power at Station 63." We reverse the trial court's judgment as to these claims and render judgment that TGP is entitled to the principal damages awarded by the jury on these claims. We modify the judgment to reflect that the \$ 1,650,000 retainage is subtracted from the principal amount of the judgment prior to the calculation of pre-judgment interest. In addition, we modify that portion of the trial court's judgment awarding pre-judgment interest at the rate of 9% per year to an award of pre-judgment interest at the rate of 7.75% per year. See [TEX. R. APP. P. 43.2\(b\)](#). [\*57] Further, we conclude that the trial court erred by denying Technip's motion for judgment notwithstanding the verdict on TGP's claims for "Realignment of compressor costs," "Replacement and installation of operable oil fill systems," and "Review of 'as-built' drawings." We reverse the trial court's judgment as to these claims and render judgment that TGP take nothing on these claims.

The trial court's judgment is affirmed in all other respects.

Laura Carter Higley

Justice