

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No. S-1411 of 2000

H.C.A. No. 2979 of 2000

BETWEEN

PETROMAR CONSTRUCTION SERVICES LIMITED

Plaintiff

AND

THE MAYOR, ALDERMEN, COUNCILLORS AND ELECTORS OF

THE CHAGUANAS BOROUGH CORPORATION

First Defendant

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Second Defendant

Before The Honorable Justice David C. Harris

Appearances:

Mr. Abdel Ashraph instructed by Mr. Rennie Gosine for **the Plaintiff**

Mr. Cowie instructed by Mrs. Badree-Maharaj for **the First Defendant**

Mr. Byam instructed by Ms. V. Tangpack **for the Second Defendant**

JUDGMENT

INTRODUCTION

1. The Plaintiff is a Limited Liability Company duly incorporated in Trinidad and Tobago and having its registered office in La Romaine and carries on the business of *inter alia* providing goods, equipment, labour, materials and services in the construction industry. The First Defendant ("the Corporation") is a statutory entity governed by the Municipal Corporations Act Chap. 25:04 and is located and

operates out of Chaguanas. The Second Defendant ("the State" or "the Government of Trinidad and Tobago") is sued pursuant to the State Liability and Proceedings Act Chap. 8:02.

2. The Plaintiff purportedly entered into several contracts with the Government of Trinidad and Tobago, more specifically with the Ministry of Local Government, to effect certain construction works (the "works" or the "project(s)") under the central Government's Unemployment Relief Program ("URP"). The contracts were oral and evidenced by a course of conduct and series of related documentation passing between the parties. Much of the related documents contain clear reference to the State in a manner which suggests the State as a contracting party. The Plaintiff received interim payments from the Government of Trinidad and Tobago. The projects appeared to have been administered through the CEO of the First Defendant Borough Corporation who testified that in relation to the URP works, he was acting under the direction of the Permanent secretary of the Ministry of Local Government and not the Corporation. The CEO's signature and First Defendant's stamp appears on much of the project documentation exhibited and relied upon in this matter. The projects were located in areas outside of the geographic limits of the said Corporation and in the circumstances of this case, outside the jurisdiction of the Corporation. Through a web of connected procedures and documents between the three entities, none of which, it was argued, appeared to have a statutory sanction, the works, the subject of this action, were completed. The Plaintiff is suing for the balance due and owing in the principal total sum of \$704,594.65, for goods and services supplied for four (4) projects by the Plaintiff and received by the First and Second Defendants. There is no dispute and no evidence to the contrary, that the works were commissioned and carried out to completion. The Unemployment Relief Program ("URP") works were administered by a combination of persons in the employ of the Central Government and at the very least, along with the CEO of the Corporation, albeit, as he contended, not as agent of, or under the direction of the Corporation. There is no dispute over the quantum of the balance due and owing to the Plaintiff. At trial, some 12 years after the commencement of this matter, the Plaintiff unsuccessfully applied for leave to amend its pleadings at trial to include a redefined claim; that the Plaintiff contracted directly with the State as the principal and not through the First Defendant as agent/servant of the State.
3. The First Defendant denies liability on the basis that it does not have the statutory authority to either commission the works, the subject of this action, which fell outside of its statutorily defined geographic limits or to contract with a party to do so. Further, the said First Defendant submits that it does not have the statutory authority to undertake and discharge the liability for Central Government's financial obligations or have the capacity to act as the agent for the State as alleged by the Plaintiff, in the circumstances of this case. Finally, the Corporation contends, that on the facts and upon consideration of the course of conduct of the parties, including the project documents moving

between the parties – the existence of which were not contested by the Second Defendant, the Plaintiff clearly contracted directly with the State as a principal, to carry out the subject works.

4. The Second Defendant, the State, filed a Defence, but did not file a witness statement in the matter. The State pleaded and at trial argued, very simply, that in Law, the Corporation cannot act for or bind the State other than in statutorily defined situations that allow for the delegation of that authority to the Corporation¹. They argue that those situations are defined in the Statutes and there is no evidence in the case in support of its invocation nor, in any event, were the factual basis of those circumstances pleaded or indeed even argued. The State contends further, that even if the Corporation could act as agent of the State in the circumstances of this case, the Central Tenders Board Act Chap. 71:91 does not allow for the State to enter into agency contracts other than express contracts as opposed to implied contracts such as the subject contracts. Further, that on the evidence, including the documentary evidence, the Plaintiff clearly contracted with the First Defendant as a principal and not with the First Defendant as agent of the State. They contend that the ingredients of the formation of a contract between the Plaintiff and the First Defendant was proved.
5. The State submits as its principal defence; that the pleaded case for the Plaintiff is that he contracted with the First and Second Defendants, where the First Defendant “...was at all material times a servant and/or agent...” of the State. The State contends the Plaintiff did not plead that it contracted directly and independently with the State, neither did it plead the alternative case for unjust enrichment or any other equitable relief. On the pleadings, submits the Second Defendant, and having regard to the Law and/or the evidence led by the other parties, the pleaded case for the Plaintiff against the Second Defendant must fail.
6. The Plaintiff submitted in response to the Second Defendant's claim that (i) the First Defendant cannot bind the State and (ii) the Plaintiff's pleadings are limited to an action based on the Corporation acting as an agent of the State and therefore do not allow a case for the Plaintiff that it contracted with the Second Defendant directly, thus; **that** the evidential burden is on the Defendants to show that any relevant person or authority acted outside the scope of the relevant Statutes or that any relevant person/party was not a delegate of the Ministry or Permanent Secretary². Further, the plaintiff contends that contrary to the submissions of counsel for the State, it is

¹ Both defendants implicitly if not expressly, accept that the Law allows the Corporation to Act for the State in circumstances specifically provided for under the Central Tenders Board Act and the State Liability and Proceedings Act.

² See the Plaintiffs earlier submissions of April 8, 2011 at paras 2 and 5 therein; See also para 9(ii) of the August 11, 2010 reply of the Corporation to earlier written submissions of the State.

open to the Court on the facts and pleadings to find that the Plaintiff contracted with the State directly.

HELD:

7. The Court holds that the pleadings for the plaintiff, upon proper construction, at para 2, 3 and 5 of the Statement of claim, discloses an allegation and claim against either or both of the Defendants and contrary to the State's submission, does leave it open for a finding against the State on the cause of action pleaded if in the absence of the Corporation's role as "agent", there is sufficient evidence to conclude the constituent elements of a contract between the Plaintiff and State. The State's participation in the process and benefit from the works cannot be disputed. Further, the course of dealing of the First and second Defendant affirmed the Plaintiff's understanding and its principal pleaded case, that he contracted with the second defendant through the agent, the first defendant. The Court holds however, that neither defendant had the legal capacity to enter into the implied contracts (particularly the contract of agency), the subject of this action. The Court holds also, that the URP works were that of the Central Government. Further, the court holds, that on the evidence, the Corporation was not in fact, the principal 'contracting' party. The court further holds that on the evidence, there is insufficient evidence to found a contract in fact, between the Plaintiff and the State as direct principal contracting parties and that in any event, the law does not permit the formation (or enforcement) of such a contract. I so find. No alternative case was pleaded for the Plaintiff for the ostensible authority of the Corporation to Act as the agent of the State; unjust enrichment or any other equitable remedy. The case for the Plaintiff against all the defendants is hereby dismissed. That in the circumstances of this case and the law, the Plaintiff is ordered to pay fifty percent of each of the defendant's taxed Costs .

CASE FOR THE PLAINTIFF

8. The Plaintiff pleaded that there were several oral contracts between it and the First(the Municipal Corporation) and the Second Defendants(the State) arising from dealings between it, the Second Defendant and it and the First Defendant - a Statutory Corporation - in which the First Defendant(the Corporation) acted as the Second Defendant's(the State) agent at all material times.
9. The Plaintiff led evidence of the course of dealings he had with the parties. His evidence was in effect that he contracted with and had a course of dealings with, the State and the Corporation. He acknowledged that the four projects were located outside of the geographic jurisdiction of the defendant Corporation. He testified and produced several exhibits in support of his case: (i) He exhibited Invoice Orders bearing the Corporations letterhead and signed and stamped by the CEO of the Corporation; (ii) he exhibited the letters of Indemnity from the Plaintiff for the benefit of the

Government of Trinidad and Tobago; (iii) he exhibited departmental vouchers bearing the Corporation's letterhead and signed and stamped in the name of the CEO of the Corporation; (iv) he exhibited the Plaintiff's Tax invoice showing the Corporation as the customer; (v) and he exhibited Petromar's delivery notes naming the Corporation as the customer. All of these documents made reference to "URP" and had an Order number that related to a URP project. These facts remain uncontroverted.

10. The Plaintiff said that there was no fixed written contract. An Invoice Order would be issued by the Chaguanas Corporation endorsed; *"URP Chaguanas. Department Head – 150 URP; Subhead 001 Ministry of Local Government"*.
11. Upon receipt a delivery note would be prepared by the Plaintiff. That delivery note would be signed by a Central Government Representative of URP, Chaguanas, acknowledging delivery.
12. A charge bill would then be prepared by the Plaintiff and submitted for payment. This was submitted together with a copy of the delivery note.
13. A Departmental voucher would then be prepared with, *inter alia*, endorsements," *Head – 150 Unemployment Fund; Subhead 01 Ministry of Local Government"*. It would be signed by the Chief Executive Officer of the Chaguanas Borough Corporation. On the overleaf the Chief Executive Officer of the Corporation and the URP Manager would certify that the goods and services had been received. That Department Voucher would then be certified correct by the internal audit of the Ministry of Local Government.
14. Before payment was received the Plaintiff was required to sign a letter of indemnity indemnifying the Government of Trinidad and Tobago and it did so.
15. The Plaintiff did not plead that it contracted with the First Defendant in its own right. He did not plead ostensible authority on the part of the First Defendant to act as the agent of the second Defendant. It did not plead in the alternative, that if no contract subsisted between the Plaintiff and any of the parties, that it is entitled to damages on the alternative basis of Unjust Enrichment.
16. The counsel for the Plaintiff, Mr. Ashraph, contends that there is no averment in the Defence filed by the Attorney General relating to the Central Tenders Board Act or any facts that would tend to show that any person or authority acted outside of the scope of this or any other relevant Act. There is no

plea, he says, that the value of any one of the work orders (or requests for the supply of goods and services) exceeded the amount stipulated by the Act (if any). There is no plea that the relevant parties were not delegates of the Minister or the Permanent Secretaries. He contends that likewise there is no evidence in this regard.

17. The pleadings, witness statements and documents of the Plaintiff substantiate liability in the State contends counsel. These are *inter alia*, the work orders/invoice orders which are all endorsed with "accepted for and on behalf of the Government". The cheques are all drawn on the Local Government Ministry's account AU: 61, under the head 150 Unemployment Fund 001 Ministry of Local Government. The State required of the Plaintiff an indemnity in relation to every work order/invoice order. The letter of indemnity is generated by the State and directed to the Comptroller of Accounts. These are uncontroverted facts. The Unemployment Relief Program fell under specific Ministries and would be related to that part of the Government business that is assigned to the requisite Minister.
18. There is a *live issue* he contends, as between the Chaguanas Borough Corporation and the State as to whether the Corporation was acting as the agent of the State or merely accommodating a program of the State and this issue will ultimately determine whether the State is liable to the Plaintiff. This is especially so he submits, since there is no evidence before the Court that would suggest that the goods and services were not received and/or that the State did not benefit from that supply of goods and services. No third Party proceedings were issued against the first or Second Defendant in this matter.

CASE FOR THE FIRST DEFENDANT

19. The First Defendant's pleaded case was that it did not act as an agent of the State. It facilitated a URP program pursuant to an arrangement sanctioned by Cabinet. It claims that the State was liable to the Plaintiff. The statement of Agreed Facts between the Plaintiff and the Corporation supports the case for the Corporation. However, the Corporation acknowledges that it did not issue any third party notice to the Second Defendant or vice versa.
20. The evidence of the First Defendant's witness and CEO of the Corporation, Mr. Mark, was that the Corporation did not act as agent of the State and he did not act as agent of the Corporation in relation to the URP works.
21. The endorsement at the base of the invoices attached to the specially endorsed Writ of Summons states, "Accepted for and on behalf of the Government". Counsel for the Corporation, Mr. Cowie, contends that the formulation of this endorsement indicates that the Government is to be the paying agency that acknowledges and defrays the sums charged for the supply and delivery of the

respective works and services insofar as they are documented and proved. This, he says, relates to the respective principals' intent to create legal relations.

22. It is also noted that all of the said works, services and materials were furnished outside of the Corporation's geographical boundaries
23. The endorsement on the invoice referred to above, contends the counsel for the Corporation, entirely accords with the additional particulars also stated on the face of the invoice order viz. "URP Chaguanas Department Division vs "Head – 150 URP"; and "Subhead – 001 Ministry of Local Government". These particulars clearly disclose the object and purpose of the procurement and delivery of such works and services as can be proved viz. the Unemployment Relief Program.
24. Regardless of the State's objection or not, to the admissibility of the Presidential Directions (WM2) which reassign the Unemployment Relief portfolio from the Ministry of Works to the Ministry of Local Government in 1997, judicial notice may be taken of this. The Corporation contends that it is therefore clear that URP is Central Government's and not Local Government's affair. No amount of protestation says counsel, will avail the state.
25. The Corporation further submits that neither in the Municipal Corporations Act (Chap 25:04), the Exchequer and Audit Act Chap. 69:01, the State Liability and Proceedings Act Chap. 8:02 or otherwise at law is there either provision or principle whereby the Corporation is obliged to assume any financial obligation for and on behalf of the State or is constituted as the paying agent of necessity or otherwise for and on behalf of any Ministry or Government Department.
26. Indeed the Corporation is subject to the constraints, inter alia, of sections 108 (3), (4), 112(1) (j), 113(4)(f) and 120 of the Municipal Corporation Act which according to Mr. Cowie, counsel for the Corporation, subject the Corporation to audit procedures and which require Ministerial approval for the allocation of monies to purposes other than those to which such monies were allocated under the Act. He makes the point that there is nothing to suggest that any of the provisions have been activated in the circumstances under reference as far as fiscal obligations are concerned.
27. Counsel for the Corporation submits further, that the strictures of the said Municipal Corporations Act prescribe for both the governance and conduct of the Corporation's business such as:-
 - (1) The powers of a Corporation shall be exercised by the Council and subject to the provisions of the Act the Council shall act through its Chief Officers and staff.
 - (2) The Council shall consist of the Mayor, Aldermen and Councilors.

28. The Corporation contends that there is neither any documentary nor other evidence of the Council having either commissioned or mandated the delivery of the said works and materials.

29. In particular, they say, there is absolutely nothing to suggest (nor is it alleged by the Second defendant) that section 269(1) of the Municipal Corporations Act was activated or is being invoked by the Minister having the portfolio for Local Government viz:

269(1) The Minister may give general or specific directions to any Council in relation to Government policy touching or concerning any matter, and it shall be the duty of the Council to govern its actions in accordance with any such directions.

30. In the case of H.C.A. No. 1066 of 1999 (In re the Application by the Chairman and others of the Tunapuna/Piarco Regional Corporation) per Bereaux J. at pp. 31-32 it was held that the Chief Executive Officer had no power to act on the directives of the Minister of Local Government under S. 38 or 269 of the Municipal Corporations Act and that any direction from the said Minister must be to the Council and it must be in furtherance of governmental policy. It is thereafter for the Council to direct its affairs in accordance with those directions. This shows that the CEO is neither the surrogate nor alter ego of the Council.

31. Accordingly submits counsel for the Corporation, the actions of the Chief Executive Officer who was both a civil servant attached to the Ministry of Local Government assigned as such to the Corporation and the Ministry's intermediary between the Plaintiff and itself relative to the works and services cannot be said to be the acts of the Council so as to bind it. The uncontested evidence of the CEO, Mr. Mark, was that he at all times acted under the directions of the Minister, the Permanent Secretary or other Government officials.

32. In any event the Plaintiff within its own principal's Witness Statement of Karamchand Rampersad as well as the Agreed Statement of Facts³ (paras. 4-6) unequivocally acknowledges that all its invoices in respect of the various projects were paid by the Government, not by the Corporation. This, according to the Corporation, effectively establishes a course of dealing between the State and the Plaintiff. (See the learning at pages 8-18 of judgment of Stollmeyer J. in C.L. Singh Transport v Sea Land Service Inc. [H.C.A. No. S-1756 of 1989]).

33. The decision by Her Ladyship Dean-Armorer J. in H.C.A. No. S-2053 of 2002 - In re an Application by Sabita Jagessar and others v The Penal/Debe Regional Corporation and others - at pps. 43 -47, is cited by counsel for the Corporation as also making it abundantly clear that when a Corporation has

³ The Agreed Statement of Fact is between the Plaintiff and the first defendant only.

acted in contravention of the statute it acts in excess of its authority and furthermore that the Chairman of a Corporation cannot arrogate unto himself the exercise of *intra vires* functions of the Corporation (nor any powers which are *ultra vires* its statutory powers for that matter).

34. Counsel for the Corporation submits that section 4 of the said Municipal Corporations Act in any event, by its Second Schedule, demarcates the geographical limits of the boundaries of the Corporation within which the Council exercises the powers of the Corporation.
35. Indeed, according to counsel for the Corporation, there is as indicated, an unequivocal assertion by the Plaintiff that the Government paid all its prior invoices and there is no evidence contradicting this, or that has been alleged or adduced by the State. Quite apart from the foregoing submissions as to the Corporation's incapacity and non-implication in liability, counsel contends that neither the Plaintiff nor the State is in a position to contend that any of the cheques paid to the Plaintiff was out of the banking account of the Corporation and thereby bore two signatures of the Corporation's authorized officers as would have been the case if any payments were made for the Corporation's account⁴.
36. Neither, he contended, was there any resolution at any meeting of the Council (at all of which the public is by section 75(1) of the said Municipal Corporations Act entitled to attend) or any minute of any such meeting either adopted or confirmed within the ambit of section 71 of the Municipal Corporations Act which evidences any commitment on the Corporation's part either to engage in URP related activity or to procure the Plaintiff's delivery of services and/or materials in that behalf.
37. One should not ascribe any legal significance to the caption on the invoice forms "Chaguanas Borough Corporation" cautions counsel for the Corporation. This, he says, is obviously at best a misstatement that is in any event devoid of any substratum that would occasion civil liability to the Corporation. This is all the more so, reads the submission of counsel for the Corporation, insofar as the President has not assigned the URP portfolio to the Corporation pursuant to section 232(p) of the Act or otherwise divested the Ministry of Local Government of that function⁵.
38. In short, counsel for the Corporation submits that the Plaintiff did not contract with the Corporation in fact and could not do so in law either as a principal or as an agent of the State.

⁴ But see para 63 below, for reference to Mr. Mark's evidence in cross examination which is somewhat at variance with this absolute position.

⁵ The Court accepts these facts and conclusion.

CASE FOR THE SECOND DEFENDANT

39. The Plaintiff avers that there was a contract between it and the Second Defendant arising from dealings between it and both the second Defendant and the First Defendant (a statutory Corporation), in which the First Defendant also acted as the Second Defendant's agent⁶.
40. The Second Defendant relies on the provisions and effects of the Central Tenders Board Act and the State Liability and Proceedings Act as precluding the First Defendant from acting as an agent of the Second Defendant on the facts and in the circumstances of this case. The Second Defendant submits further, that even if in law the First Defendant could be an agent of the Second Defendant, the Central Tenders Board Act requires any contract entered into for the purpose of giving effect to an agency arrangement, is to be an express contract as opposed to an implied one. Further, the State argues that on the facts of this case, the court must find that such an express agency did not exist. The evidence of Mr. Mark the CEO for the First Defendant Municipal Corporation, was expressly, that the Corporation did not act as agent for the State.
41. The Second Defendant further contends that on the evidence, it is disclosed that the First Defendant ordered goods and services from the Plaintiff and received these goods and services. Further, the Second Defendant contends that the evidence of the First defendant discloses that the First Defendant had and controlled an account in its own name in which it received and held funds from the Central Government for the purpose of payment to the Plaintiffs for URP works, the subject of the claim. Counsel for the Second Defendant submits that an objective test proves the existence of a contract between the Plaintiff and the First Defendant Corporation as principals and not with the Second Defendant State as Principal.
42. Counsel for the State submits in support of the authority of public officers to bind the State by contract; "Liability of the Crown", 3rd Edition, by Peter W. Hogg and Patrick J. Monahan, at Para. 9.5 on page 225 to 226:

"Apart from statute, the scope of a Crown servant's authority to bind the Crown by contract is determined by the general law of agency. No statute or order in council is required to provide the authority to contract. Unless limited by statute or by order in council (or other direction of cabinet), a Minister as the chief executive officer of a department, has actual authority to bind the Crown by contract in respect of all matters within the scope of his or her department's operations. The Minister's power may be delegated to the deputy Minister and to lower officials, and even in the absence of a delegation, the doctrine of ostensible or usual authority may make contractual undertakings by officials binding".

⁶ See the conjoint effect of paras 2, 3 and 5 of the Statement of Claim.

43. Counsel for the State, Mr. Byam, notes that the authorities on which this passage is based are Canadian cases, but applicable all the same: Verreault-v-A.G. of Quebec (1977) 1 S.C.R. 41 and The Queen-v-Transworld Shipping (1976) 1 F.C. 159. In HCA No. 3461 of 2004; In the Matter of the Legal Profession Act, Frank Solomon and Others-v-The Attorney General, The Honourable Madam Justice Gobin approved (at page 7) the following identical dicta from R-v-CAE Industries 20 DLR (4th)347; (1986) 1 F.C. 129 and CAE Industries-v-Canada 61 N.R. 19:20 DLR as follows:

"In the absence of statutory provisions to the contrary, a minister, in order to have authority to enter into a contract on behalf of the Crown, need not be expressly authorized by statute or order in council provided that the contract in question be directly related to that part of the government business that is assigned to his department."

44. This passage, he submits, needs to be read subject to the Privy Council decision in Attorney General for Ceylon-v-A.D. Silva (1953) A.C. 461. In that case it was held (at page 479) that:

"It is a simple and clear proposition that a public officer has not by reason of the fact that he is in the service of the Crown the right to act for and on behalf of the Crown in all matters which concern the Crown. The right to act for the Crown in any particular matter must be established by reference to statute or otherwise."

45. Mr. Byam submits that these authorities put together are to the following effect:

- (i) A minister or head of department has a common law right to bind the State in contract in matters within the scope of his department's operations.
- (ii) The right of other officers must be established by statute or otherwise.
- (iii) Other than by statute, the right of such an officer can arise by delegation by the minister.
- (iv) The common law right of the minister to enter contracts can be taken away or limited by statute.

46. Under section 2 – the interpretation section - of the State Liability and Proceedings Act Chap: 8.02, "agent" is defined to exclude a Statutory Corporation except where the State has entered into an express contract of agency with the Corporation. Counsel for the Second Defendant contends that the uncontroverted evidence in this matter is that no such express contract has been proved.

47. Counsel for the Second Defendant submits further that in Trinidad and Tobago, the Central Tenders Board Act, Chapter 71:91 puts the minister's common law powers to enter contracts for goods and services in the hands of an independent body, the Central Tenders Board, and allows some of those powers in prescribed circumstances to be exercised by public officers.
48. He sets out as relevant, Section 4 of the Act as follows:
- (1) *There is hereby established a Central Tenders Board which save as is provided in section 20A and in section 35 of this Act shall have the sole and exclusive authority in accordance with this Act:*
- (a) *To act for, in the name and on behalf of the Government and the statutory bodies to which this Act applies, in inviting, considering and accepting or rejecting offers for the supply of articles or for the undertaking of works or any services in connection therewith, necessary for carrying out the functions of the Government or any of the statutory bodies;*
- (b) *To dispose of surplus or unserviceable articles belonging to the Government or any of the statutory bodies.*
- (2) *The Board shall have such other functions and duties as the President may by order prescribe from time to time.*
49. Counsel notes that Section 35 of the Central Tenders Board Act gives the President the power to make regulations under the Act, including, in subsection (e), regulations prescribing financial limits within which public officers may award contracts and purchase articles. The Central Tenders Board Regulations, made under section 35(1) of the Central Tenders Board Act, allow various public authorities and officers (Ministerial committees, Permanent Secretaries and officers to whom powers may be delegated by Permanent Secretaries) the power to make contracts for goods and services within certain limits (see regulations 11 to 15).
50. The combined effect of the Act and the regulations submits Mr. Byam, is therefore to modify the common law, so that if anyone, in accordance with the dicta in **AG for Ceylon, Frank Solomon and Verreault**, wished to establish that an officer of the State had the jurisdiction to enter a contract for the supply of goods and/or the provision of services, he would have to see whether that officer was operating within the scope of his department's operations and with the authority granted by or under the said Central Tenders Board Act. He contends that there is no evidence before the court in this matter nor is it pleaded or otherwise contended that any person or any action was taken under this act to appoint the Corporation as an agent of the State or to so act.

51. Mr. Byam stressed that the Act is not merely procedural. It does not only lay down a procedure for the agents of the State to follow when awarding contracts, but more importantly contends counsel, says who the agents of the State will be. No one else has any authority to enter contracts for goods and services with the government. In H. Young and Co-v-The Mayor and Corporation of Royal Leamington Spa (1883) 8 A.C. 517 it was held that a statutory provision that every contract made by an urban authority with a value of over 50 pounds had to be in writing and sealed with the common seal of the authority was obligatory so that even where the duly appointed agent of the authority had effected such a contract for works without the authority's seal and the authority had the full benefit of the works, the contractor could recover nothing under the contract and could not get around that principle by seeking restitution (at page 522):

"In support of this contention cases were cited to shew that Corporations are liable at Common Law quasi ex contractu you to pay for work ordered by their agents and done under their authority. The cases on this subject are very numerous and conflicting, and they require review and authoritative exposition by a Court of Appeal. But, in my opinion, the question thus raised does not require decision in the present case. We have here to construe and apply an Act of Parliament. The Act draws a line between contracts for more than £50 and contracts for £50 and under. Contracts for not more than £50 need not be sealed, and can be enforced whether executed or not, and without reference to the question whether they could be enforced at common law by reason of their trivial nature. But contracts for more than £50 are positively required to be under seal; and in a case like that before us, if we were to hold the defendants liable to pay for what has been done under the contract, we should in effect be repealing the Act of Parliament and depriving the ratepayers of that protection which Parliament intended to secure for them."

52. Mr. Byam submitted that in a case where the persons purporting to enter the contracts had no authority to do so, that the above principle, *if it is not superfluous*, should apply with even greater force. The protection afforded in **Leamington** was to the people who paid rates to a public authority. The State is a public authority (see **The Danube II** (1921) P 183 at 187), and the Central Tenders Board Act is part of the protection the legislature has given to taxpayers.
53. It was therefore submitted that the First Defendant cannot in law be an agent of the Second Defendant for the purpose of entering contracts for goods and services, and that the Second Defendant is not answerable for any contracts the First Defendant purported to make on its behalf.
54. On the question of *unjust enrichment and restitution*, raised for the first time in the address by counsel for the Plaintiff, Mr. Byam's short response was that neither this nor the factual basis for this alternative defence was pleaded.

55. The Pledged case for the Plaintiff is that at all material times the Corporation was a servant and/or agent of the Second Defendant (Originally this was the Minister of Local Government, until he was struck out as a Defendant) and/or the State of Trinidad and Tobago (represented by the Attorney General who is now the Second Defendant) and contracted with the Plaintiff for the provision of certain goods, materials and services. Mr. Byam submitted that on the pleadings and in law and based on the evidence - the Corporation could not be and in fact was not the agent of the State and could not and in fact did not enter into the subject contracts on behalf of the State so as to bind the State. As a result of this, he said, the State took the calculated decision to file the narrow defence that it did and to not file a witness statement in this matter.
56. Mr. Byam objected to the oral application made by counsel for the Plaintiff at trial to amend the statement of claim so as to aver that in the alternative, the plaintiff contracted with the State independently of the Corporation. Mr. Byam objected to this application on the ground that it had come too late in the proceedings - some 12 yrs after the filing of the Statement of Claim - and that the State would be gravely and unjustly prejudiced by this. Such an amendment he said, would necessitate an amendment of the Defence for the Second Defendant and probably that of the First Defendant, and the filing of witness statements. He said that the case for the State is entirely crafted in response to the existing pleadings, that is; that substantially, the Corporation contracted with the Plaintiff as the agent of the State. He submitted the necessity(if that is what it is) for this pleading would have been patent from the inception of the matter.(The Court's emphasis)
57. Mr. Byam contends that the single issue the Court is asked to decide at this point is whether there is a case pleaded by the Plaintiff against the Attorney General (who is sued as representing the State and is now the Second Defendant) that can stand.
58. The State submits that on the law and the evidence in this matter, the Plaintiff's case against the State must fail and ought to be dismissed as against the State.

CONCLUSION

59. I do not accept the argument for the State that the pleadings do not allow for the Plaintiff to succeed against the State. The effect of the case as pleaded by the Plaintiff is that it contracted with the First Defendant as the agent of the State and alternatively (although not expressed in those words as an alternative in the pleadings), that he contracted with the State. This pleading – even if interpreted as suggested by the second defendant – in the Court's view automatically exonerates the Corporation being held liable as a principal. The Corporation was not sued in its own

independent legal capacity as a principal. The Plaintiff plainly pleaded a case against the State directly in addition to the effect of the pleading that it also concluded business with the State and did so through an agent, the Corporation. The evidence led by the Plaintiff however, and more particularly by the First Defendant, established that the actions of the Corporation did contribute to the perception that the First Defendant did in fact act as the agent for the State⁷. The first defendant's evidence also provided the particulars of the internal non-participation of the Corporation in the affairs of the URP works program and the basis for the assertion that it could not in law so act. The Court accepts the evidence of Mr. Mark in this regard. The Court accepts generally, the factual evidence of Mr. Mark given in his witness statement except where the Court expressly holds otherwise. His evidence is not contradicted on the material particulars in the case for both the Plaintiff and the First Defendant. In my view, in the absence of a lawful role by the Corporation as an agent in the course of dealings between the Plaintiff, the Corporation and the State, there is left, insufficient evidence to establish the constituent elements of a direct contract between the Plaintiff and the State as principals.

60. I accept as the applicable law, that which was put before the Court by both Mr. Byam for the State and Mr. Cowie for the Corporation. The various statutory provisions when applied to the peculiar circumstances of this case, preclude: **(i)** the State from entering into implied (as opposed to express) contracts of agency with a Statutory Corporation; and **(ii)** the Corporation from binding the State in the circumstances of this case. Mr. Mark, the CEO for the Corporation, expressly stated that in that capacity, he did not cause the Corporation to act as an agent of the State.
61. Counsel for the Plaintiff set out for the court in his closing address the three scenarios he submits are open to the court to find. Firstly, that the Plaintiff contracted directly with the Second Defendant as principal contractors; secondly that the Plaintiff contracted directly with the First Defendant as principal contractors; and thirdly, that the Plaintiff contracted with the First Defendant as agent of the State (the principal).
62. Taking the last scenario first, I have, for the reasons provided above, found that the Plaintiff could not in law, contract with the Second Defendant through the First Defendant as its agent. The Plaintiff contended that it is for the State to show that the statutory imperatives for the incapacity of the Corporation to act as its agent did not exist. The first principle is that on the evidence, it is for the Principal to hold out that an agent acted on its behalf. The evidence discloses that the Second defendant conducted itself by its course of conduct as affirming the 'agency' of the First Defendant and certainly, at the material time did nothing to disabuse the plaintiff of that understanding. However, Section 2 of the Central Tenders Board Act requires in the circumstances of this case, that

⁷ See also the contentions of the Defendant in para 41 above.

an express contract of agency be entered into between the Corporation and the State. The proof of this express contract is not peculiarly within the knowledge of the State alone. The Corporation being the other party to such a contract, is well able to prove or disprove the existence of the said contract. The Corporation is not contending that it acted as an agent of the State. But what about the Plaintiff who would not have been a party to any 'agency agreement' between the First and Second Defendant's, but who, through the course of dealings with both defendants had reason to believe that such a legal relationship did exist and acted upon it ?

63. The Corporation has led evidence that it did not act as the agent of the State. The Plaintiff however, has led evidence tending to establishing that the Corporation acted as an agent or servant of the State. Evidence such as the Plaintiff receiving work orders from the Corporation and charge bills being submitted to the Corporation and the CEO of the Corporation not only signing off on several of the transaction documents, but very notably, placing the Corporation stamp on the said documents for his signature, can support inferred findings that the Corporation did act as the *de facto* agent and/or servant of the State and that the Plaintiff had reason to also so believe. Further still, counsel for the Corporation contended that there is no evidence of the Corporation issuing cheques from an account of the Corporation. That is not so. Mr. Mark, in cross examination, did admit that the account from which the URP projects were funded was in the name of the Corporation, albeit, an account that he says was set up for the sole purpose of receiving funds from the Central Government for the sole application to the central government's URP project works.⁸
64. As I said earlier, I am satisfied that the Corporation and State cannot in law enter into an agency agreement. I am also satisfied that no express agency agreement – as also required under the Central Tenders Board Act - was entered into between the Corporation and the State. So can the State avoid liability under these circumstances? Can the proved ostensible authority of the Corporation acting as agent, override the statutory limitations in that regard on the Corporation and State? The Plaintiff has not pleaded ostensible authority. The Plaintiff has not claimed that the defendants or each of them are estopped from denying the relationship that they 'held out' as existing and are therefore liable to the Plaintiff. Further, the statutory requirement for an express contract of agency ought to have put the Plaintiff on notice of the requirement. The Plaintiff ought to have informed itself and taken such steps so as to ensure that it was entering into arrangements for which the contracting parties were authorized to enter into. The Plaintiff contends that burden of proving that the Statutory requirements have not been met is on the Defendants, those facts being peculiarly within their knowledge. I do not agree with this contention in this case. I note that the plaintiff did not avail itself prior to settling the pleadings, of the procedures under the RSC1975 to obtain from the Defendants the pertinent, *further and better particulars* of an express contract of

⁸ See Court's findings on this issue at Para. 67 below. This evidence however, was not contested by the State.

agency between the State and the Corporation or the official designation under the Statutes of the Permanent Secretary or other party giving to them the authority to treat with the Plaintiff, the Corporation and the project works. Upon proper construction of the relevant Statutory provisions relied upon by the Defendants and referred to above, the legal and evidential burden of proof on the issue of whether the Corporation was lawfully acting as an agent of the state was upon the Plaintiff. Looking at the evidence in the case, there is no sufficient evidence from any source, of the express agency agreement between the State and the Corporation.

65. The second scenario, that the Plaintiff and First Defendant were principal contractors, was denied by the First Defendant on four (4) grounds essentially: **(i)** That the Statutory provisions governing the legal status and operations of the Corporations precluded it from entering into the contractual relations with the Plaintiff, the subject of this action. I accept that the geographic limitations of the Corporations authority precluded it from doing so; **(ii)** That the Statutory provisions governing the Corporation precluded it from undertaking to pay the liabilities of the Central Government in the circumstances of this case; **(iii)** That the Plaintiff's pleadings did not allege a contract between the Plaintiff and the Corporation as principals **(iv)** That in any event, on the facts, the First Defendant did not contract with the Plaintiff.
66. On this point, I accept the evidence of the URP works being transferred to the Ministry/State⁹. I find that the subject works were URP works of the Central Government. I accept the evidence of Mr. Mark that he did not cause the Corporation to contract with the Plaintiff and the uncontroverted evidence that the key facilitators of the program/contracts were persons employed by the State and not the Corporation¹⁰. I accept the evidence of Mr. Mark that in relation to the subject URP works, he was operating under the direction of the Minister, the Permanent Secretary and other central government officials. Mr. Mark's evidence was not contradicted by the second defendant. Further, I accept the uncontested evidence of the Plaintiff himself, that he thought that at all material times, the State, not the Corporation, was the principal contractor. He relied on the course of dealings in the matter and including the various procedures he was required to comply with – including procedures such as entering into the indemnity arrangement with the State – and including also, the endorsements on the documents used in the transactions, to conclude he was ultimately dealing with the State and not with the Corporation as principal¹¹.

⁹ The second defendant's objection to the first defendants use and reliance on the Cabinet note and related documents was overruled.

¹⁰ Notwithstanding Mr. Byam's submission that the Project head, Mr Allan Gopaul having contrary to law been appointed by the Permanent Secretary, was thus not in the lawful employ of the State. At the very least, it is clear he was not in the employ of the Corporation.

¹¹ The documents are referred to and pertinent aspects of them are set out in para 9 – para 14 above.

67. The first scenario, is that the Plaintiff and Second Defendant contracted directly and independent of the First Defendant. Contrary to the submission of Mr. Byam for the State, this allegation was, upon my further consideration, in my view pleaded, albeit not entirely clearly. The conjoint effect of section 2, 3 and 5 of the statement of claim establish the alternative pleading. The evidence of the Plaintiff and the first defendant establish and prove the fact of the contractual relations between the plaintiff and the State. Regrettably, the law does not permit this and renders such a contract null and void. No alternative case is pleaded for the Plaintiff in, for instance, Unjust enrichment, or for any other relief that might come to the aid of the plaintiff. The Plaintiff, however, ought to have managed his affairs and be guided by the law prior to entering into legal relations with parties. The legal regime governing both defendants in matters of this nature is set out in the various statutes and learning thereto, well prior to the commencement of the commissioning of the works. It was available to all those who sought the knowledge. The role played by the Corporation, including its role in the payment for the project works out of an account held in the name of the Corporation, albeit an account specifically held for the payment over of the Central Government's URP funds, is critical to the establishment of the legal relations alleged between the Plaintiff and the State. The evidence of the Plaintiff clearly sets out a course of dealings that also relied on the role of the CEO of the Corporation in effecting and performing the contract for the works. Indeed, in the end, the Plaintiff sued the first defendant and alleged that he acted as the agent for the State. In the absence of the 'agency' role of the Corporation, the remaining evidence of the course of dealings, does not support the case that the plaintiff contracted directly with the State alone. All the constituent elements for the formation and performance of a contract would not have been proved. Counsel for the Plaintiff, recognizing this deficiency, at trial applied unsuccessfully to amend his pleadings to incorporate that very cause of action – a contract between the Plaintiff and the State as direct principals.
68. On the question of Costs: Mr. Cowie for the First Defendant submits that in the peculiar circumstances of this case the Court ought to make a 'Sanderson' Costs Order, directing the successful Second Defendant to pay the costs of the similarly successful First Defendant. This type of order is made where an action founded on either contract or Tort against two separate Defendants is successful against one and unsuccessful against the other and the Plaintiff was justified in bringing the action against both Defendants. In the instant case however, both Defendants were successful against the Plaintiff. The 'Sanderson' (and 'Bullock') Orders appear to have survived the CPR (see Irvine v Metropolitan Police Comr. [2005] EWCA Civ. 1293). There is, however, but scant authority that suggests that in truly exceptional circumstances, a Claimant who lost against two separate Defendants can recover the costs of pursuing one Defendant from another. What amounts to a truly exceptional circumstance is not clear. Certainly the circumstances set out in the case authority on this point (where a cause of action was permitted to be added at trial), is not on all fours with the

instant case¹². Further, the 'authorities' on the application of the 'Sanderson Order', if that is what they are, are based on the interpretation of the UK CPR, which is worded as the Trinidad and Tobago CPR 1998 in Rule 66.5 – 66.7, both procedural regimes of which permit the exercise of a wider and more innovative discretion in relation to the award of costs, than under the RSC 1975(the old rules) which governs the instant case. In any event, whereas I observe that both Defendants have in part, common defences in relation to the application of the Municipal Corporation Act, State Liability and Proceedings Act and other statutory regimes; further, whereas I observe the Defendants and each of them have, on the facts as found, entered into a series of legal relations with the Plaintiff and participated and facilitated the Plaintiff's performance of the subject contract works and in the end, each Defendant by their defence and/or in their evidence and addresses, attempted to shunt liability for payment onto the other, the Court still cannot glean circumstances amounting to "exceptional" so as to warrant the making of what would in effect be a modified "Sanderson' Order, in the circumstance of this case. I do find that the Plaintiff was justified in seeking redress from both Defendants. The facts were squarely against the Defendants. The reliance on the substance of the Statutory Defences - which would have been known to both of the Defendants at the time the contract was formed and performed - to avoid liability, has resulted in an unconscionable end for all the reasons set out in the judgment above. There is no dispute that the payments claimed were incurred and the benefit of the works went to the State and the people of Trinidad and Tobago. The second Defendant ought to have paid the monies due to the Plaintiff. The Plaintiff was put through a trial by the Defendants that was not entirely necessary. In the circumstances the Plaintiff is to bear only 50% of each of the Defendants taxed Costs (if not agreed).

69. FOR THE REASONS PROVIDED ABOVE, IT IS HEREBY ORDERED AS FOLLOWS:

- i. That the claim against the First Defendant is not made out and hereby dismissed;
- ii. That the claim against the Second Defendant is not made out and is hereby dismissed;
- iii. That each of the Defendant's Costs to be taxed if not agreed.
- iv. That the Plaintiff to pay fifty percent (50%) of the taxed Costs only.

DAVID C HARRIS

HIGH COURT JUDGE

MARCH 26, 2012

¹² See McGlenn v (1)Waltham Contractors Limited et al [2007] EWHC (T.C.C.); see also Beoco Ltd v Alfa Laval Co. Ltd. and another [1955] 1 QB 137