THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2016-02182

BETWEEN

OILBELT SERVICES LIMITED

Claimant

AND

TERRITORIAL OILFIELD MANAGEMENT SERVICES LIMITED

Defendant

BEFORE THE HONOURABLE MADAME JUSTICE JOAN CHARLES

Appearances:

Claimant: Mr. Gregory Pantin
Instructed by Ms. Jeanelle Pran

Defendant: Mr. Ian Benjamin S.C.
Instructed by Ms. Elena Araujo

Date of Delivery: 23rd May 2019

JUDGMENT

The Claim

[1] The Claimant Company claimed against the Defendant Company damages for breach of warranty and breach of contract/indemnity in the sum of $6,892,883.56. In the alternative, the Claimant claimed damages in the sum of $6,892,883.56 for breach of contract/warranty.

[2] The Claimant Company is an amalgamation of several companies including Ten° North Operating Company Limited (a company formed as a result of an amalgamation of several companies including Ten° Degrees North Operating Company Limited and Lennox Production Services Limited (LP).) Oilbelt Services Limited is an amalgamation of two companies – the new Ten° Degrees North Operating Company Limited (above) and Oilbelt Services Limited with the surviving entity being Oilbelt Services Limited.

[3] The Defendant (formerly Primera Oilfield Management Services Limited) is a limited liability company incorporated under the Laws of the Republic of Trinidad and Tobago having its registered Office at #30 Forest Reserve Road, Fyzabad.

The Pleadings

Statement of Case

[4] The Claimant pleaded that, through its pre amalgamation Company Ten° North Operating Company Limited (T.D.N.) it entered into a Share Purchase Agreement (S.P.A.) with the Defendant dated 11th May 2007 for the purchase by the Claimant of the entire issued share capital of Lennox Productions Services Limited (LP) and Pioneer Petroleum Company Limited.

[5] Oilbelt Services Limited averred that the Defendant expressly warranted to the Claimant in the SPA that all taxation for which LP was liable to account for had been satisfied by the Defendant prior to the execution of the SPA[1] in the following terms:

> a) *All notices, returns (including any land transaction returns), reports, accounts, computations, statements, assessments and registrations and any other necessary information submitted by the Company to any Taxation Authority for the purpose of Taxation have been made on a proper basis, punctually submitted, were accurate and complete when supplied and remained accurate and complete in all material respects and none of the above is, or is likely to be, the subject of any material dispute with the Taxation Authority.*
>
> b) *All Taxation for which the Companies have been liable or are liable to account for has been duly paid (insofar as Taxation ought to have been paid)*

[6] The Claimant's case is that by Clause 11.1[2] and Clause 3[3] Schedule 1 Part II of the SPA, the Defendant undertook to indemnify the Claimant (and the purchased Company) and to keep the Claimant and the purchased Company indemnified against all losses or liabilities which may be suffered/incurred and which arise or result from the breach of any representation or warranty of the Defendant.

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[1] Schedule I Part II Tax Warranties

[2] The Seller undertakers to indemnify, and to keep indemnified, the Buyer and each of the Companies against all losses or liabilities including in particular, damages, legal and other professional fees and costs, penalties and expenses (collectively the "Liabilities") which may be suffered or incurred and which arise or result from a breach of any representation or warranty of the Seller.

[3] The Seller indemnifies and secures the Buyer and the Companies against all liabilities, costs, damages or expenses which may have incurred thereby including any additional Liability for Taxation.

[7] By notice from the Board of Inland Revenue Division (the BIR), Ministry of Finance dated 8th September 2015 the Claimant was notified that as a result of the corporation tax liability due from the Purchased Company in the sum of $6,074,935.56, such liability was set off against Value Added Tax (VAT) refunds due from the Inland Revenue Division to LP. As a result, the Claimant lost the benefit of certain VAT Tax refunds due to it through LP.

[8] By letter dated 6th December 2013 from LP the Claimant notified the Defendant of LP's tax liability and asserted that the Defendant was in breach of the tax warranties of the SPA and called upon the Defendant to indemnify it for its losses as a result of the breach of warranty.

[9] By letter dated 11th February 2014 from Territorial Oilfield Management Services Limited in response to the Claimant's letter, the Defendant did not deny the tax liabilities of LP yet did not accept indemnification.

[10] By letter dated 27th February 2014 the Claimant once again wrote to the Defendant advising of their breach of the SPA and their duty to indemnify the Claimant for their loss.

[11] By letter dated 8th May 2014 the Defendant denied liability and contended that LP should seek full re-imbursement of its VAT refund from the Board.

[12] The Claimant pleaded that as a consequence of the Defendant's:

i. breach of the terms of the SPA, the Claimant has suffered loss totalling $6,892,883.56 (being the sum of $6,074,935.56 and $817,948.00);
ii. refusal to indemnify the Claimant, the Claimant has suffered loss in the sum of $6,892,883.56.

[13] By Pre Action Protocol Letter dated 25th April 2016 the Claimant called upon the Defendant to pay the outstanding sum of $6,074,935.56.

[14] By letter dated 8th June 2016 from Territorial Oilfield Management Services Limited in response to the Claimant's pre action letter, the Defendant did not accept indemnification.

[15] By letter dated 15th June 2016 the Claimant once again called upon the Defendant to pay the outstanding sum of $6,892,883.56. The Defendant has to date failed to respond to this letter.

The Defence

[16] The Defendant admitted entering a SPA with the Claimant and the terms of said SPA including the warranty pleaded by the Claimant[4].

[17] The Defendant relied on Clauses 11.2(a)[5] and 11.2(b)[6] and 11.3[7] of the SPA which limited the Defendant's liability to indemnify the Claimant where the aggregate sum of the liabilities incurred did not exceed US$160,000.00 and where the claim for indemnification has not been asserted by the Claimant or either of the companies on or prior to two (2) years after completion, with the exception of any claim for indemnification resulting from a tax warranty which would remain in force from the completion date [of the SPA] until ***the expiration of the statutory period***. Additionally, the Defendant relied on the Claimant's indemnity to hold Territorial Oilfield Management Services Limited harmless against the Defendant's liabilities arising out of the Claimant's breaches of any representation or warranties given by the Claimant or by any other covenant or agreement contained in the SPA. The Defendant therefore averred that it is not required to indemnify the Claimant since the sums claimed in respect of

[4] Statement of Case para 5

[5] The Defendant shall not be required to indemnify the Claimant or the Companies unless and only to the extent that, the aggregrate amount of liabilities incurred by them exceeds US$160,000.00;

[6] In no event shall the Defendant have liability to indemnify the Claimant or the Companies with respect to any claim for indemnification that has not been asserted by the Claimant or either of the Companies on or prior to two (2) years after completion save and except any claim for indemnification resulting from a tax warranty which shall remain in force from the completion date until the expiration of the statutory period.

[7] The Claimant hereby agrees to indemnify and hold the Defendant harmless against the Defendant's liabilities arising out of the Claimant's breaches of any representation or warranties of the Claimant or of any other agreements or covenant contained herein.

the unemployment levy - $817,948.00 inclusive of interest, is less than US$160,000.00; this sum is therefore not recoverable by the Claimant.

[18] The Defendant asserted that it is not liable to pay the tax liability to the Claimant by reason of the fact that:

i. The claim is statute barred pursuant to **s.3 (1)(a)**[8] of the **Limitation of Certain Actions Act Cap 7:09** as the cause of action arose on or about September 2011 and this claim was filed more than four (4) years from the date when the cause of action arose;

ii. The parties agreed to a tax warranty which shall remain in force from the completion date ***until the expiration of the statutory period*** as defined under **ss 83(4)**[9] and **89(1)**[10] of the **Income Tax Act Cap 75:01** and **s.19**[11] of the **Corporation Tax 75:02**. In the circumstances the Defendant averred that it was not liable for taxes accrued in the income year 1993 since both more than six (6) years had passed from the year of income and three (3) years from the date of LP's tax return.

iii. The Claimant, in breach of Clauses 3.1 and 3.2 Schedule 1 Part II of the SPA[12] refused and failed to take action to dispute, defend and

[8] (1) The following actions shall not be brought after the expiry of four years from the date on which the cause of action accrued, that is to say: (a) actions founded on contract (other than a contract made by deed) on quasi-contract or in tort

[9] Subject to section 89(2) and (3), if at any time within the year of income or within six years after the expiration of the year of income or three years from the date the tax return is filed, whichever is later, the Board makes an assessment which results in a person being charged to tax for the year of income in respect of a total chargeable income in excess of the chargeable income disclosed in the return of income rendered by such person, the Board may (unless the person assessed proves to the Board's satisfaction that the omission or incorrectness of the return did not amount to fraud, covin, art or contrivance, or gross or wilful neglect) charge such person, in addition to the total tax otherwise charged in the assessment, further tax not exceeding the amount of tax charged in respect of the excess.

[10] Subject to this section, where it appears to the Board that any person liable to tax has not been assessed, or has been assessed at a less amount than that which ought to have been charged, the Board may, within the year of income or within six years after the expiration of the year of income or three years from the date the tax return is filed, whichever is later, assess such person at such amount or additional amount as according to its judgment ought to have been charged, and the provisions of this Act as to notice of assessment, appeal and other proceedings under this Act shall apply to such assessment or additional assessment and to the tax charged thereunder.

[11] (1) A company which fails, neglects or refuses to furnish a return of income for the year of income 1994 and subsequent years after six months from the time required to file the return, shall, thereafter, in addition to any other penalty provided in this Act, be liable to a penalty of one thousand dollars for every six months or part thereof during which such failure, neglect or refusal continues. (2) A company which has not furnished a return of income for any year of income preceding the year of income 1994 and fails, neglects or refuses to furnish such return on or before 31st October 1995 shall, in addition to any other penalty provided in the Act, be liable to a penalty of one thousand dollars in respect of any such return for every six months or part thereof during which such failure, neglect or refusal continues. (3) The Board may waive or reduce the penalty for late filing in circumstances where it is just and equitable to do so.

[12] "**3.1** If the [Claimant] or the Companies become aware of a Tax Claim, the [Claimant] will give or procure that notice in writing is given to the [Defendant] as soon as is reasonably practicable...":

"**3.2** The [Defendant] indemnifies and secures the [Claimant] and the Companies against all liabilities, costs, damages or expenses which may be incurred thereby including any additional Liability for Taxation, the [Claimant] will take and will procure that the Companies take such action as

resist the BIR's claim for additional tax liability for the year of income 1993 as unlawful and outside the statutory period despite the Defendant's reasonable requests that it do so by letters in writing dated 11th February 2014, 8th May 2014 and 8th June 2016.

[19] The Defendant pleaded further that at all material times the Claimant was under a common law duty to mitigate any alleged loss and take advantage of the tax amnesty lasting from the 8th September 2014 and ending on 15th March 2015 pursuant to **Section 19**[13] of the **Finance No. 2 Act 2015** covering tax penalties and interest for late filing of returns and late payment of Income, Corporation Tax, Value Added Tax, Business Levy and Environmental Levy, (Green Fund Levy for years of income up to 2013). In breach of its duty to mitigate its loss the Claimant failed to do so.

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the [Defendant] may reasonably request by notice in writing given to the [Claimant], and/or the Companies avoid, dispute, defend, resist, appeal or compromise any Tax Claim (such a Tax Claim where action is so requested being hereinafter referred to as a Dispute), provided that neither the [Claimant] not the companies will be obliged to appeal or procure an appeal against any assessment to Taxation raised on any of them if, the [Defendant] having been given written notice of the receipt of such assessment, the [Claimant], or Companies have not within thirty [30] days of the date of the notice received instructions in writing from the [Defendant] to do so."

[13] The Income Tax Act is amended— (a) in section 18— (i) by repealing subsection (1) and substituting the following subsection: " (1) An individual to whom section 17 applies who— (a) has attained the age of sixty years, shall be entitled to a personal allowance of seventy-two thousand dollars; and (b) has not attained the age of sixty years, shall be entitled to a personal allowance of sixty thousand dollars."; and (ii) in subsection (2), by deleting the word "sixty thousand" and substituting the word "seventy-two thousand"; (b) in section 18A(1) and (4)(b), by deleting the word "eighteen" wherever it occurs and substituting the word "twenty-five"; (c) in section 28(15), by deleting the word "thirty" and substituting the word "fifty"; (d) by inserting after section 48M, the following section: 48N. (1) A person who in a year of income purchases bonds issued in accordance with the National Tax Free Savings Bonds Regulations, is entitled in that year of income to a tax credit of an amount equal to twenty-five per cent of the face value of the bonds where the maturity period is five, seven or ten years. (2) The tax credits referred to in subsection (1) apply only to such portion of the bonds purchased in a year of income by any person, which does not exceed five thousand dollars in value. (3) The tax credit is allowed only to the original purchaser of the bond, and for the year of income in which it is purchased. (4) N o t w i t h s t a n d i n g subsections (2) and (3) and section 48A, where the amount of the tax credit as computed under subsection (1) cannot be wholly set off against the tax assessed for the person, the amount of the unclaimed tax credit may be carried forward by the person and set off against his tax assessed for succeeding years of income. (5) The amount of the unclaimed tax credit referred to in subsection (4), may be set off as far as possible against the tax assessed for the person in the first succeeding year of income, and in so far as it cannot be so set off, then against the tax assessed for the next succeeding year of income and so on."; and (e) by repealing section 103A and substituting the following section: 103A. (1) Notwithstanding any written law to the contrary, there shall be a waiver of the following liabilities: (a) interest on outstanding income tax, further tax, additional tax, withholding tax, business levy and green fund levy due and payable for the years of income up to and including the year 2013, where such taxes or levy are paid during the period 8th September, 2014 to 31st March, 2015; (b) outstanding interest charged on any income tax, further tax, additional tax, withholding tax, business levy and green fund levy due and payable for the years of income up to and including the year 2013, where such taxes and levy have been paid prior to 8th September, 2014; (c) all penalties due and payable on outstanding income tax and withholding tax for the years of income up to and including the year ending 31st December, 2013, where such taxes are paid during the period 8th September, 2014 to 31st March, 2015; (d) all penalties in respect of income tax and withholding tax due and payable for the years of income up to and including the year ending 31st December, 2013, where such taxes are paid prior to 8th September, 2014, where such penalties have not been paid; (e) penalties on outstanding income tax returns for the years of income up to and including the year 2013, where such returns are filed during the period 8th September, 2014 to 31st March, 2015; and (f) penalties with respect to income tax returns for the years of income up to and including the year 2013 and filed prior to 8th September, 2014, where such penalties have not been paid. (2) For the avoidance of doubt, the waiver granted in this section shall not— (a) affect any liability to income tax, further tax, additional tax, withholding tax, business levy and green fund levy due and payable by a person under this Act; or (b) apply to any interest and penalties paid prior to 8th September, 2014. (3) Where any income tax returns, income tax, withholding tax, business levy and green fund levy remains outstanding after 31st March, 2015, the interest and penalties, which would have been payable on such returns, taxes and levies shall be revived and become payable as if the waiver in subsection (1) had not been granted."

[20] The Defendant pleaded[14] that the Claimant, in breach of Clause 3.1 Schedule 1 Part 2 of the SPA failed to give it notice of the claim as soon as it was reasonably practical.

Reply

[21] In its Reply the Claimant denied that the cause of action herein arose on or about 5th September 2011 and pleaded that:

i. A tax claim came into existence by the assessment of the Board of Inland Revenue dated 5th September 2011;
ii. As a result of that tax claim, the Defendant breached its tax warranty;
iii. The Claimant by letter dated 6th December 2013 to the Defendant asserted that it was entitled to the indemnification provided by the Defendant as a result of the tax claim and breach of the tax warranty;
iv. The Defendant had not, pursuant to Schedule 1, Clause 3.2 given within 30 days of receipt of the assessment of the claim for indemnity instructions in writing to dispute the tax liability;
v. The Defendant provided no substantive challenge or basis as to why that tax liability ought not to have been incurred and to date has failed, neglected or refused to indemnify the Claimant in breach of Schedule 1, Part II, Clause 3.2.

[22] In response to the Defendant's plea of limitation, the Claimant averred that the Defendant's interpretation of Clause 11.2(b) of the SPA is unreasonable in that the completion date, the commencement of the time frame, post-date ***the expiration of the statutory period*** in that said completion date

[14] Defence para 15

– the 11th May 2007 – was more than six (6) years from the end of the income tax year 1993.

[23] In response to the Defendant's averment that the Claimant, in breach of Clause 3.2 Schedule 1 Part II of the SPA, failed to take action to dispute the BIR's claim for additional tax liability for the year 1993 despite said Defendant's reasonable written requests, the Claimant asserted that it was not required to dispute the tax claim where the Defendant failed to give to it notice in writing within 30 days of receipt of notice of the tax assessment; further, that the Defendant provided no material/substantive basis to challenge the assessment.

[24] The Claimant pleaded that it was under no obligation to mitigate its loss and/or take advantage of the tax amnesty which lasted from 8th September 2014 and ended on the 15th March 2015 pursuant to **Section 19** of the **Finance (No. 2) Act 2015**. The Claimant averred further that it could not reasonably have mitigated its loss in respect of the tax liability due from the Purchased Company in the sum of $6,074,935.56, the BIR having already made a unilateral decision to set off the liability against the Claimant's VAT refunds, which was notified to the Defendant by letter dated 6th December 2013.

[25] In answer to the Defendant's plea relating to the Claimant's breach of Clause 3.1 Schedule 1 Part II of the SPA[15] the Claimant averred that it did comply with the requirement of Clause 3.1 aforesaid by giving notice of the tax liability by email dated 6th September 2011. Further, that in or around 18th September 2013 the Claimant was informed that the tax liability was set off when it received the Statement of Accounts from Inland Revenue Division, Ministry of Finance.

[15] Defence para 15

Evidence

[26] Mr. Jeremy Bridglalsingh, the Chief Financial Officer of the Claimant was the Claimant's sole witness while Mr. Joseph Pancham, Director and Lands and Legal Coordinator of the Defendant was the latter's only witness. They both filed witness statements and were cross examined.

Jeremy Bridglalsingh

[27] This witness testified that he began his employment with Trinity in 2012 where he held several positions from Corporate Analyst, Group Financial Controller, Supply Chain Manager, Corporate Development Manager. He stated that as Chief Financial Officer he had custody of and access to the files, documents and records of Trinity and its subsidiaries including:

1. Sale and Purchase Agreement dated 11th May 2007;
2. Amendment Agreement to the SPA dated 17th May 2007;
3. Statement of Account from the Inland Revenue Division Ministry of Finance dated 5th September 2011;
4. Email correspondence dated 6th September 2011 from Mr. Kenrick Balliram to Ms. Tricia Thong;
5. Statement of Account from BIR dated 8th September 2015; and
6. Notice of Unemployment Levy Tax Liability from the BIR dated 18th May 2016.

[28] Mr. Bridglalsingh stated that his experience in Finance spans eleven (11) years; from 2012 to 2015 he reported to and worked alongside the Chief Financial Officer Bryan Ramsumair. He assisted the latter in analysing financial documents including taxation, drafting and preparing documents for external parties and resolving financial and management issues.

[29] This witness stated that after he became Group Financial Controller at Trinity, he became aware that Trinity's Finance Department had received notice from the BIR that LP had an outstanding corporation tax liability and interest for the year 1993. Specifically, that by Statement of Account dated 5th September 2011 the BIR notified Trinity that LP owed the sum of $1,362,896.00 in unpaid corporation taxes. In the same notice, the BIR advised that the unpaid tax liability accrued interest in the sum of $4,668,539.14 and a credit of $16,771.00 amounting to a total liability of $6,014,664.14.

[30] By email dated 6th September 2011, TDN wrote to Tricia Thong of the Defendant Company advising it of the tax liability and attaching the letter from the BIR.

[31] Mr. Bridglalsingh familiarized himself with the terms of the SPA and its amendment. He testified that he participated in the drafting of letters to the Defendant outlining the breach of its terms and demanding an indemnity. More letters[16] were:

1. Letter dated 6th December 2013 to Mr. Jim Krissa wherein LP sought to be indemnified for its losses in the sum of TT$6,074936.00;
2. Letter dated 27th February 2014 to the Defendant in which TDN again requested indemnification;
3. Letter dated 24th June 2014 wherein TDN once again wrote to the Defendant informing them that a request was made to the BIRD confirm that the tax liability was not statute barred.

[32] The Finance Department received written notification from the BIR confirming that the tax liability due from LP (with interest) amounted to $6,074,935.56 was set off against VAT refund due from the BIR to LP.

[16] Witness Statement of Jeremy Bridglalsingh

[33] He stated further[17] that by letter dated 18th May 2016 from the BIR to LP, the BIR advised of a further tax liability due from LP which predated the SPA. The outstanding unemployment levy tax liability for income year 2002, 2003, 2004 and 2005 totalled $817,948.00 (including interest).

[34] In cross examination Mr. Bridglalsingh acknowledged that the claim was filed in 2016 in relation to a breach of the SPA and supplement which were dated 11th and 17th May 2007[18].

[35] He accepted that the SPA provides for an allocation of risk between the parties by way of warranties and indemnities which are also tools to limit liability covered by the indemnity/warranty[19]. This witness agreed that liability limits aforesaid include quantum, amount of the cover, and limits as to the length of time in respect of which the indemnity/warranty is available[20].

[36] Mr. Bridglalsingh also admitted that as an experienced financial officer he is aware that the BIR cannot pursue unpaid taxes where more than six (6) years have expired from the date of return[21]. He later claimed not to understand the term return/notification[22].

[37] Jeremy Bridglalsingh also revealed that the Claimant never complained in writing to BIR about sending LP a tax claim for 1993 after the statutory period to make such a claim had passed[23].

[38] He stated for the first time, contradicting his previous testimony, that the Claimant had written to the BIR querying its claim for tax liability for the year 1993 beyond to six (6) year limitation period[24]. He later agreed that

[17] Witness Statement of Jeremy Bridglalsingh para 21
[18] Notes of Evidence pg 9 ln7-26
[19] Notes of Evidence pg 17 ln 26-27; pg 18 ln 2-5, ln 25-27
[20] Notes of Evidence pg 19 ln 2-9
[21] Notes of Evidence pg 24 ln 8-19
[22] Notes of Evidence pg 29 ln 22; pg 30 ln 17-27; pg 31 ln 7
[23] Notes of Evidence pg 32 lns 3-7
[24] Notes of Evidence pg 45 lns 23-27

no such letter had been disclosed by the Claimant[25]. Mr. Bridglalsingh agreed that the limitation of US$160,000.00 as the level of indemnity referred to in the SPA means that the Claimant cannot claim the first US$160,000.00 for breach of indemnity[26].

[39] This witness stated that the Claimant not take advantage of any amnesty offered by the BIR in 2015 or 2016[27].

Joseph Pancham

[40] Mr. Pancham testified that he has held the position of Lands and Legal Coordinator at the Defendant Company since 2015. He stated that he had access to all the books and records of the Defendant pertaining to all of its past and present transactions and that of its affiliates. Specifically, he was familiar with the SPA and supplemental SPA.

[41] Mr. Pancham testified that the Claimant breached Schedule 1, Part II Clause 3.2 of the SPA and acted contrary to its interest and that of the Defendant by failing to dispute the BIR's statute-barred claim[28].

[42] He asserted that pursuant to SPA, the Defendant was only liable for taxes payable within the statutory period for assessment of a claim pursuant to **ss 83(4)** and **89(1)** of the **Income Tax Act Cap 75:01** - six (6) years from the expiration of the year of income or three (3) years from the date the company's tax returns were filed, whichever is later. He stated that in the circumstances the Defendant was not liable for the tax liability claimed.

[25] Notes of Evidence pg 46 ln 10
[26] Notes of Evidence pg 47 lns 7-14
[27] Notes of Evidence pg 53 lns 4-11
[28] Witness Statement of Joseph Pancham para 17

Issues

(a) Whether the Defendant breached the Tax Warranty under Schedule I Part II of the SPA

(b) Whether the Claimant's claim is statute barred

These two issues are intertwined and will be dealt with together.

Claimant's Submissions

[43] The Claimant submitted that by Clause 1 Schedule 1 Part II[29] of the SPA, the Defendant warranted to the Claimant that all taxation for which Lennox Production was liable to account was duly paid. By its terms the Tax Warranty made clear that all tax liabilities on behalf of Lennox Production were paid and that when the Claimant acquired the entire issued share capital of Lennox Production in 2007, it would be doing so without any tax liabilities. The BIR's assessment dated 05th September 2011 revealed that the tax liabilities arose in 1993. At this point Lennox Production was not owned by the Claimant and so the tax liabilities pre-dates the SPA and the Tax Warranty provided by the Defendant.

[44] The Claimant contended that based on (a) business common sense and (b) the language of the SPA, the parties' express intention was for the Claimant to acquire Lennox Production free from any tax liabilities. The existence of the tax liability proves that the warranty was invalid and the

[29]1.1 All notices, returns (including any land transaction returns), reports, accounts, computations, statements, assessments and registrations and any other necessary information submitted by the Company to any Taxation Authority for the purposes of Taxation have been made on a proper basis, punctually submitted, were accurate and complete when supplied and remain accurate and complete in all material respects and none of the above is, or is likely to be, the subject of any material dispute with any Taxation Authority.
1.2 All Taxation for which the Companies have been liable or are liable to account for has been paid (insofar as such Taxation ought to have been paid).

Defendant in breach thereof. By signing the SPA, the Defendant is bound by the Tax Warranty given at clause 1 Schedule 1 Part II and its failure to deliver Lennox Production free from any tax liabilities amounts to a breach of warranty.

[45] The Claimant further submitted that the Defendant did not, in any of its correspondence to the Claimant prior to 2014 deny that it owed the BIR the tax liabilities. In the Defendant's letters dated 11th February 2014 and 08th May 2014, the only defence advanced by the Defendant was that the claim was statute barred having arisen in 1993 but at no time did the Defendant assert that the taxes were incorrectly claimed or wrongly applied by the BIR. Oilbelt Services Limited argued that the Defendant is therefore liable to pay to the Claimant damages for breach of the tax warranty in the sum of TT$6,892,883.56 representing the outstanding liabilities which the Defendant failed to settle with the BIR prior to the sale of LP.

[46] The Claimant submitted that tax warranties were excluded from the general indemnity limitation period in that pursuant to Clause 11.2(b) any claim for indemnification arising from a tax warranty shall remain in force from the completion date (7th May 2011) until the expiry of the statutory limitation period. Oilbelt Services Limited contended that its claim for indemnification for breach of the tax warranty was not statute barred since the cause of action accrued in 2013. The statutory period would only have expired in 2017. Accordingly, the claim was filed within the limitation period. The Claimant, relying on the case of **Portia Management Services Limited v Port of Spain Limited and the Port Authority of Trinidad and Tobago**[30] submitted that the cause of action only arose when the Defendant refused to indemnify the Claimant when called upon to do so

[30] CV2013-02091

by letter dated 6th December 2013. The limitation time began to run only from that date.

Defendant's Submissions

[47] The Defendant submitted that in determining this issue the court must interpret the SPA in order to glean the objective meaning of the language by which the parties have chosen to express their agreement. The Defendant, relying on the case of **Wood v Capita Insurance Services Limited**[31] argued that where there are rival meanings the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense[32]. It was also argued that the court must consider the quality of drafting of the clause and must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest.

[48] The Defendant urged the court to bear in mind that a provision in a contract may be a negotiated compromise or the negotiators were not able to agree more precise terms. In any event the court is required to read the language in dispute and the relevant parts of the contract that provide context in order to determine the meaning of the disputed clause.

[49] The Defendant argued that its general obligation to indemnify is limited to two (2) years from completion. However, Territorial's obligation to indemnify Oilbelt for breach of its tax warranty is limited to the end of the statutory period. The Defendant submitted that the cause of action accrued upon the incurring of liability to the BIR which was on the 5th September 2011 and not upon the demand for reimbursement by the

[31] [2018] 1 All ER (Comm) 51
[32] Per Lord Clarke para 10 **Wood v Capita Insurance Services Limited**

Claimant. Territorial Oilfield Management Services Limited relied upon the case of **Bosma v Larsen**[33] to support this point.

[50] It was contended on behalf of the Defendant that under Schedule I Clause 1.2 Part II of the SPA the Defendant warranted that all taxes for which the companies have been liable or are liable to account for has been duly paid. It was argued that on the face of this clause, a limit has been placed on the warranty that does not extend to taxation that is not recoverable and therefore not liable to be paid.

Analysis

[51] Pursuant to the terms of the SPA the Defendant warranted to the Claimant that each warranty was true on the date of the agreement[34]. The SPA also provided that any warranties given by the Defendant are deemed to be given to the best of its knowledge, information and belief[35]. It would seem to me that the parties intended that liability would not attach to the Defendant in respect of any breach that he was unaware of or had no knowledge of at the time of the signing of the agreement. On the evidence before me it is reasonable to conclude, that in the absence of any notification from the BIR prior to 2007 in respect of a return submitted by LP in 1993, the Defendant was entitled to assume that the warranty given in 2007 that there was no outstanding tax liability was true. There is no evidence before me to indicate that on the date of the execution of the SPA, or even at the completion date that the Defendant was aware that there was an outstanding claim by the BIR. Indeed, having regard to the provisions of **ss 83(4)** and **89(1)** of the **Income Tax Act Cap 75:01,** which imposes a limitation period of six (6) years on the BIR from the year of income or three (3) years from the date of the company's tax return to

[33] 1966 1 Lloyds's Report 22, 28
[34] Clause 6.2 of the SPA
[35] Clause 6.5 of the SPA

assess a company for tax liability, the Defendant is correct to argue that the fact that some eighteen (18) years after the year of assessment and four (4) years after the completion date of the SPA, the BIR gave notice of an assessment for the year 1993, does not by itself signify that Territorial Oilfield Management Services Limited had breached its warranty. No evidence has been adduced before me that LP had received a notice of assessment or tax claim before September 2011 so as to have put it on notice at the time of the signing of the SPA that there was an outstanding tax liability which had to be disclosed. In the circumstances, I hold that there is no breach of the indemnity contained in Clause 11.1.

[52] Further, by Clause 11.2(b) the period of limitation in respect of which the Defendant can be liable to indemnify the Claimant for a breach of the tax warranty is extended "from the completion date until the expiration of the statutory period" [36]. The completion date is defined in the SPA as the 11th May 2007. In determining the meaning to be ascribed to the words 'statutory period', I must consider the meaning which is more consistent with business common sense. I have looked at the SPA as a whole and taken into account the relevant factors enumerated by Hodge JSC in **Wood v Capita Insurance Services[37]:**

> *"10 The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. … Lord Wilberforce affirmed the potential*

[36] See Footnote 6
[37] Supra para 10-12

relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations….

11. Lord Clarke elegantly summarised the approach to construction in Rainy Sky at para 21f. In Arnold all of the judgments confirmed the approach in Rainy Sky (Lord Neuberger paras 13-14; Lord Hodge para 76; and Lord Carnwath para 108). Interpretation is, as Lord Clarke stated in Rainy Sky (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (Rainy Sky para 26, citing Mance LJ in Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] 2 All ER (Comm) 299 paras 13 and 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: Arnold (paras 20 and 77). Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: Arnold para 77 citing In re Sigma Finance Corpn [2010] 1 All ER 571, para 10 per Lord Mance. To my

mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

This was a commercial agreement between two oil companies with experience in the business world. Clearly the parties realized that if, for instance, a tax return had been submitted two (2) years before the completion date, the liability to the BIR would have extended for a further four years after signing the agreement. As the evidence disclosed, these companies were quite sophisticated and employed highly qualified personnel in their Accounts and Management departments. It is reasonable to assume that when these companies negotiated the terms of the agreement which had been drafted by lawyers, and included therein the term 'statutory period', the plain meaning of the term must be given effect to. I can find no other reasonable interpretation of the term 'statutory period' in the context of the SPA other than the limitation period as defined under **s. 3.1(a) of the Limitation of Certain Actions Act Cap 7:09**. In other words, the Defendant's liability to indemnify the Claimant was limited to a period of four (4) years beyond the completion date of the SPA. The tax claim was made on the 5th September 2011, some four (4) years and four months beyond the completion date of the SPA. In the circumstances the Defendant is not liable under the indemnity contained in Clause 11.2(b) as the claim is thereby statute barred.

[53] Clause 1.2 Schedule I Part II[38] limits the tax warranty to taxation for which the companies ***have been liable or are liable to account for (insofar as***

[38] See footnote (1)

such tax ought to have been paid). Clearly, the BIR notice of the 5th September 2011 is outside of its statutory powers to impose a tax assessment within six (6) years of the date of income or three years of the return[39]. By the expressed terms of the tax warranty the Defendant was not liable and the Claimant ought to have challenged the BIR with respect to the claim when it first arose and certainly well before the BIR applied the Claimant's VAT returns to liquidate this tax claim. In my view the tax claim being invalid and unlawful, and the Defendant having informed the Claimant that it should dispute the claim on the ground that it was outside the limitation period, the Defendant thereby satisfies the requirement of Clause 3.2 Schedule II Part I. It was unreasonable of the Claimant to refuse to dispute the claim and to sit back and rely on the tax warranty under the SPA.

[54] I also hold that the claim for corporation tax liability is statute barred under **s. 3.1(a)** of the **Limitation of Certain Actions Act** since the action was filed more than four years after the cause of action first accrued on 5th September 2011. The Defendant undertook to indemnify the Claimant and each of the companies against all losses and liabilities in the following terms[40]:

> *'The Seller undertakers to indemnify, and to keep indemnified, the Buyer and each of the Companies against all losses or* ***liabilities*** *including in particular, damages, legal and other professional fees and costs, penalties and expenses*

[39] 83(4)Subject to section 89(2) and (3), if at any time within the year of income or within six years after the expiration of the year of income or three years from the date the tax return is filed, whichever is later, the Board makes an assessment which results in a person being charged to tax for the year of income in respect of a total chargeable income in excess of the chargeable income disclosed in the return of income rendered by such person, the Board may (unless the person assessed proves to the Board's satisfaction that the omission or incorrectness of the return did not amount to fraud, covin, art or contrivance, or gross or wilful neglect) charge such person, in addition to the total tax otherwise charged in the assessment, further tax not exceeding the amount of tax charged in respect of the excess.
89(1)Subject to this section, where it appears to the Board that any person liable to tax has not been assessed, or has been assessed at a less amount than that which ought to have been charged, the Board may, within the year of income or within six years after the expiration of the year of income or three years from the date the tax return is filed, whichever is later, assess such person at such amount or additional amount as according to its judgment ought to have been charged, and the provisions of this Act as to notice of assessment, appeal and other proceedings under this Act shall apply to such assessment or additional assessment and to the tax charged thereunder.

[40] Clause 11.1 of the SPA

*(**collectively the "Liabilities"**) which may be suffered or incurred and which arise or result from a breach of any representation or warranty of the Seller.'*

[55] Further, the SPA, by Schedule I Part II Clause 3.2 outlines the expressed indemnity for breach of a taxation warranty below:

"Conduct of Tax Claims

*"**3.2** The [Defendant] indemnifies and secures the [Claimant] and the Companies against all liabilities, costs, damages or expenses which may be incurred thereby **including any additional Liability for Taxation**, the [Claimant] will take and will procure that the Companies take such action as the [Defendant] may reasonably request by notice in writing given to the [Claimant], and/or the Companies avoid, dispute, defend, resist, appeal or compromise any Tax Claim (such a Tax Claim where action is so requested being hereinafter referred to as a Dispute), provided that neither the [Claimant] not the companies will be obliged to appeal or procure an appeal against any assessment to Taxation raised on any of them if, the [Defendant] having been given written notice of the receipt of such assessment, the [Claimant], or Companies have not within thirty [30] days of the date of the notice received instructions in writing from the [Defendant] to do so."*

The accrual of the cause of action in the case of a claim on an expressed indemnity depends of the construction of the contract. Where the indemnity is an indemnity against liability, the cause of action will come into existence when the liability is incurred[41]. In this case the SPA provided

[41] Halsbury's Laws of England 5th Ed Vol 68 para 967

an expressed indemnity in favour of the Claimant and against the Defendant in respect of any outstanding tax liability to the BIR. It therefore follows that when the liability was incurred, in this case on the 5th September 2011, the cause of action for breach of the indemnity for the tax warranty arose on that date. The Claimant filed its claim against the Defendant for breach of warranty on 27th June 2016 some five years after the cause of action arose which was outside the four year limitation period provided under the s. 3.1(a) of the **Limitation of Certain Actions Act Cap 7:09.**

[56] With respect to the Claimant's claim for unemployment levy in the sum of $817,948.00 for income years 2002, 2003, 2004 and 2005, this claim too must fail. Clause 11.2(a)[42] of the SPA limited the liability of the Defendant to indemnify the Claimant to the sum US$160,000.00. The sum claimed by the Claimant is well below this figure; as a result, the Claimant is unable to recover unemployment levy.

Conclusion

[57] In the circumstances I therefore order:

i. Judgment for the Defendant against the Claimant;
ii. The Claimant's claim is dismissed;
iii. The parties to submit a note on costs for determination on or before 29th May 2019;

Joan Charles
Judge

[42] Footnote (5)