REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2016-03434

BETWEEN

CLINITECH COMPANY LIMITED

Claimant

AND

SOUTH-WEST REGIONAL HEALTH AUTHORITY

Defendant

Before the Honourable Madam Justice Margaret Y Mohammed

Date of Delivery July 31, 2019

APPEARANCES:

Mr. Anand Ramlogan S.C., Mr. Alvin Pariagsingh instructed by Ms. Kavita Sarran Attorneys at law for the Claimant.

Mr. Roger Kawalsingh instructed by Mr. Ravi Mungalsingh Attorneys at law for the Defendant.

JUDGMENT

1. The Defendant is a statutory body established in 1994. One of its statutory functions is to provide competent medical personnel and to do all things necessary for the delivery of an efficient and safe system of health care within its area of responsibility. The instant action concerned an allegation by the Claimant that the Defendant has breached a contract which they entered into for the Claimant to supply the Defendant with certain medical equipment. The Claimant seeks damages for the breach of the contract.

THE CLAIMANT'S CASE

2. The Claimant contended that in October 2014 the Defendant advertised in a local newspaper inviting persons to bid for the supply, installation and commissioning of medical equipment for the radiology department, operating theatres and others under its control. On the 10 November 2014, the Claimant presented a bid ("the Bid") and by letter dated the 14 September 2015 ("the Letter of Award") the Defendant notified it that the Bid had been accepted. The Claimant was further informed that the costs of the contract was not to exceed the sum of $5,000,000.00.

3. The Claimant presented a Performance Bond, dated the 18 September 2015, for the sum of $500,000.00 on the 23 September 2015 and made a down payment in the sum of US$91,800.00 to the master distributor Medimax on the 22 day of September 2015.

4. The Claimant awaited delivery of the contract and purchase orders which were referred to in the Letter of Award. However, the Defendant failed and or refused to provide the Claimant with a copy of the contract and or the purchase order. By letter dated the 13 day of June 2016 the Claimant was informed by the Defendant that the Letter of Award had been rescinded and that the performance bond was being released.

5. The Claimant's case is that the Letter of Award created a binding contract between the parties with an obligation on the part of the Defendant to pay. It also created a legitimate expectation on its behalf that the contract would be performed and payment would be forthcoming.

6. The Claimant pleaded particulars of special damages for the cost of the down payment for "Machinery and Equipment" in the sum of US $91,800.00, loss of profits in the sum of $2,016,110.00 and loss of job opportunity. The Claimant also set out particulars in support of its claim for aggravated and exemplary damages.

THE DEFENCE

7. It was not in dispute by the Defendant that: (a) on the 3 November, 2014 it advertised and invited tenders for the supply, installation and commissioning of medical equipment for the radiology department, operating theatres and others of the Defendant; (b)the Claimant submitted its tender bid to the Defendant on the 10 November, 2014; (c) the Defendant issued the Letter of Award to the Claimant, notifying the Claimant that it was successful in its bid for the supply of One (1) 3D Digital Mammography System (d) in the Letter of Award the Defendant indicated that the Bid for the supply, installation and commissioning of medical equipment for the Radiology Department, Operating Theatres and others of the Defendant had been accepted in conformity with the specifications and the price; (e) the Letter of Award stated the delivery schedule as stated in the Tender dated the 10 November, 2014 and that the total cost was not to exceed $5,000,000.00; and (f) subsequent to the acceptance of the Bid, in September 2015 the Claimant provided a performance bond in the sum of $500,000.00.

8. The Defendant's position was that there was no contract between the Claimant and the Defendant as : (a) no contract was in place until the purchase order was issued; (b) there was no signed contract; (c) the Bid was the foundation for the contract and if the Bid could not be maintained it rendered the Tender process voidable at the Defendant's option; (d) if the acceptance of the Bid was binding, any attempt to vary the said terms by the Claimant amounted to a breach of the terms agreed and/or a repudiation of the Bid. This Defence was based on the following facts.

9. The Bid was accepted subject to (a) the provision of a performance security; (b) the appropriate contract and purchase orders being forwarded by the Defendant to the Claimant; and (c) the conditions that govern the purchase of goods and services by the Defendant as set out in the Procurement and Contract Policy which is a subset of the 'Finance & Supply Chain Policy and Procedures' manual ("the Manual") as approved by the Defendant's Board of Directors on 31 October, 2013.

10. The Defendant averred that Section 9.6(26) of the Manual provided that for contract values over $1,500,000.00 or the limit as determined by the Ministry of Health, the Tender is sent to the Ministry of Health for further approval. If approved by the Ministry of Health, the procedure set out at Section 9.7 of the manual is followed. If not, the recommendation of the Ministry of Health will be applied.

11. The Defendant pleaded that Section 9.7 of the Manual stated the steps to be taken upon the approval of a tender. The steps include inter alia: the issuance of a letter of Award/Letter of Acceptance to the awarded Supplier/Contractor notifying the Supplier/Contractor of the Authority's acceptance of the bid submitted; the requirements to enter into a formal contract and to provide the performance security; upon receipt of the performance bond, the contract is prepared and given a contract number; the contract, if issued, consists of: purchase order, form of tender, conditions of contract, price and delivery schedule; bill of quantities; quotations and technical characteristics; purchaser's notification of award; and the performance bond.

12. According to the Defendant upon completion of the contract, the forms of the contract are signed by the CEO of the Defendant and by a relevant signatory of the selected Company. Until such time that the contracts are signed by the CEO of the Defendant and by a relevant signatory of the selected Company, there was no contract between the Claimant and the Defendant.

13. The Defendant stated that part of its duty, as a Health Authority is to ensure that its medical equipment is properly maintained, working and modern, which ensures that it can properly and efficiently discharge its duty to the members of the public in relation to the services that are provided. The Defendant also averred that it also owes a duty of care to the Ministry of Health to ensure that any and all equipment that it purchases are capable of carrying out the work that it is required to do and to ensure that the equipment is reasonably priced and not exorbitantly overpriced.

14. The Defendant contended that although it requested the Claimant to expedite the delivery of the 3D Digital Mammography System, the Claimant was under no obligation to provide the said item until such time that the Claimant issued the purchase order and entered into a written contract.

15. The Defendant also contended that forwarding the written contract document did not ipso facto mean that a contract was entered into by the parties and that in order for there to be a contract the purchase order had to be issued and the contract executed.

16. According to the Defendant by email dated the 1 October 2015, the Claimant requested an update on the availability of the contract and purchase order for the 3D Mammography Unit and the Neurosurgical Drill. By email dated the 1 October 2015, the Claimant was notified that the purchase orders had been created and that the Defendant was awaiting instructions to proceed. By email dated the 2 October 2015, the Claimant enquired which department provides the further instructions to proceed. The Defendant responded by email dated the 2 October 2015, and informed the Claimant that the Defendant was awaiting instructions from the Ministry of Health on the Tenders which required its approval.

17. By letter dated the 13 June 2016 the Claimant was informed that the Letter of Award was rescinded. The reasons the Defendant rescinded the Letter of Award were due to the lack of sufficient funds; the Claimant's indication by way of letter that the quoted prices for the 3D Digital Mammography System had to be revised; and the subsequent failure of the Claimant to furnish the Defendant with the revised quotation for its consideration. The Defendant contended that the variation of the quoted price of the item amounted to a repudiation of the original terms of the Tender bid.

18. In response to the particulars of breach set out in the Claimant's Statement of Case, the Defendant contended that the Bid was subject to the delivery and submission of the purchase order and contract; by letter dated the 14 June, 2016, the Defendant wrote to Messrs.

Furnace Anchorage General Insurance Limited requesting that the performance bond be released; the Defendant put the Claimant to strict proof of its averment that a deposit was paid to Medimax towards the supply of one 3D Digital Mammography System as the document referred to as "Annex C" of the Statement of Case did not state that the payment was towards the supply of one 3D Digital Mammography System. Furthermore, the Claimant has failed and/or refused to disclose the particulars of its purported agreement with Medimax, as such, the Defendant put the Claimant to strict proof of the said agreement; the Defendant admitted that a written contract was not supplied to the Claimant.

THE ISSUES

19. Based on the pleadings the broad issues which arose for determination at the trial are:

    (a) Was the Letter of Award sufficient to make a binding contract between the parties for the provision of the medical equipment?

    (b) Was there a legitimate expectation by the Claimant that the contract would be performed?

    (c) If there was a contract, did the Claimant breach and or repudiate the contract by attempting to vary the terms?

    (d) Did the Defendant breach the contract?

    (e) If the Defendant breached the contract, has the Claimant suffered any loss?

WAS THE LETTER OF AWARD SUFFICIENT TO MAKE A BINDING CONTRACT BETWEEN THE PARTIES FOR THE PROVISION OF THE MEDICAL EQUIPMENT?

20. It was submitted on behalf of the Claimant that upon the Defendant's acceptance of the Claimant's bid, the parties entered into and were bound by the contractual terms for the provision of the medical equipment since the Letter of Award was sufficient to make an effective contract.

21. Counsel for the Defendant argued that the Letter of Award did not have any effect of making a binding contract for the provision of the medical equipment since at that stage the parties

had not arrived at any consensus on the contractual terms and there was no certainty in agreement.

22. A binding contract comprises four elements: an offer, acceptance, consideration and the intention to create legal relations. The authors in the text **The Law of Contract (Common Law Series)**[1] provided the following useful guidance on the aforesaid elements. At paragraph 2.139 the authors described the nature of the offer and acceptance as:

> "…the emphasis on agreement recognises that the contracting parties must be in agreement as to the scope of their respective obligations and the terms on which these obligations are undertaken. This aspect of the concept of agreement is sometimes reflected by saying that the parties must have reached consensus ad idem. Where they have embodied the terms of their agreement in a formal document, there will be no difficulty in concluding that they have reached agreement and the court's task will be to construe that agreement. Where a contract is alleged to have resulted from a process of negotiation between the parties, or to have arisen from less formal dealings between them, the court's task may be more difficult. In order to decide if the parties have reached the required state of mutual agreement as to the terms of their bargain, their negotiations are analysed in terms of 'offer' and 'acceptance'. One party, the offeror, must have made an unequivocal promise to the other, the offeree, which the latter has unequivocally and unconditionally assented to by accepting it. An offer is any statement which indicates that the person making it is willing to undertake a legal obligation if the terms it contains are satisfied by the person to whom it is made doing something, forbearing to do something or undertaking to do or forbear from doing something, in return. An acceptance is a statement made in response to an offer which indicates that the person making it, to whom the offer was made, agrees without qualification to all of the terms proposed by the offeror. Once an offer is

[1] 6th ed at Chapter 2C The Concept Of Agreement and the Assessment of Intention":

met by an unequivocal acceptance, both parties are legally bound, and, since an acceptance must agree to all the terms of the offer, without addition or variation, the terms on which the parties are bound are those contained in the offer.

Offer/acceptance analysis may therefore be used to determine the moment when contracting parties become legally bound to one another. It is particularly important in relation to bilateral executory agreements when the price named by the offeror for his promise is a counter-promise from the offeree. In such a case the offeror indicates that he will assume an obligation only if the offeree assumes a counter-obligation in terms defined by the offer. If the offeree assents to those terms he assumes the stipulated counter-obligation and both parties are bound. In such a case the offeree's acceptance also constitutes the consideration for the offeror's promise. If, however, the offeree does not accept the offeror's terms, the condition on which the offeror's promise depends has not been satisfied and that promise therefore cannot mature into obligation. By determining the exact moment when the parties become bound, offer/acceptance analysis may also be used to determine other issues which depend on the moment the parties' agreement becomes binding. Thus, the contract is made in the place where acceptance occurs…

23. The certainty and completeness of the terms of the agreement are essential in order to enforce a contract. The authors of **The Law of Contract** at paragraph 2.157 stated:

> "If an agreement is to be enforced as a contract the parties to it must have reached agreement on all its essential terms which must be expressed with sufficient clarity to permit enforcement. If the terms of an agreement are incomplete, unclear, ambiguous or uncertain it will often be assumed that the parties did not intend their agreement to be legally binding, or that they have not yet reached a final agreement; and since an acceptance must agree to all the terms of the offer, it follows that the offer must contain all the terms of the contract, so that a statement which contains terms which are unclear or

ambiguous is unlikely to be regarded as an offer. Similarly a statement which indicates that important issues remain to be agreed is unlikely to be construed as an offer."

24. At paragraph 2.158 it was stated that:

> "A failure to agree on all the essential terms of a bargain is generally fatal to a finding that there is a contract. It follows that in order to be regarded as an offer a statement must contain all the essential terms of the proposed contract. As a minimum, therefore, an offer will normally contain a statement of the offeror's proposed undertaking and the price (consideration) demanded in return for that undertaking. However, **agreement on price will not be sufficient if there is an indication that other terms remain to be agreed.** Similarly a proposal which indicates a price will not be construed as an offer if there is any other explicit or implicit indication that the person making the proposal does not intend to assume a legal obligation if the proposal is accepted." (Emphasis added).

Offer and Tenders

25. It was not in dispute that the parties in the instant action were brought together by way of a tender arrangement. The Defendant issued by public notice an Invitation to Tender for the supply, installation and service of certain medical equipment for use within the Radiology Department, Operating Theatres and Others of the Defendant. The Claimant responded by tendering a bid and the Claimant's bid was accepted by the Defendant by the Letter of Award dated 14 September 2014.

26. **Chitty on Contracts**[2] at paragraph 2-022 state the following in relation to offers and tenders:

[2] 31st Ed Vol 1

"At common law, a statement that goods are to be sold by tender is not normally an offer to sell to the person making the highest tender; it merely indicates a readiness to receive offers. Similarly, an invitation for tenders for the supply of goods or for the execution of works is, generally, not an offer, even though the preparation of the Tender may involve very considerable expense. **The offer comes from the person who submits the Tender and there is no contract until the person asking for the Tenders accepts one of them."** (Emphasis added)

27. At paragraph 2-039 in relation to the acceptance and tender, **Chitty on Contracts** stated:

"The submission of a tender normally amounts to an offer; and the effect of an "acceptance" of such a tender turns on the construction of the acceptance and the Tender in each case. **Where a tender is submitted, e.g. for the erection of a building, a binding contract will normally arise from acceptance of the Tender, unless it is expressly stipulated that there is to be no contract until certain formal documents have been executed."** (Emphasis added)

28. In this jurisdiction, Kokaram J examined in **Lutchmeesingh's Transport Contractors Ltd v National Infrastructure Development Company Ltd**[3] the effect of the first phase of the Tender process when one party submits a bid in compliance with a tender. In that case, the Defendant had issued an Invitation for Tenders ("the ITT") for the construction of a flyover for which the Claimant responded. The Claimant made the second-best tender but after negotiations with the best tenderer failed, the Claimant was invited by the Defendant to enter into negotiations for the said project. During this period of negotiations, the Defendant withdrew from negotiations on the basis that it did not anticipate arriving at an agreement within the scope and price of the contract. The Claimant sued for damages for breach of contract on the basis that the Defendant had wrongfully withdrawn from negotiations without giving sufficient or detailed reasons for same.

[3] CV 2015-01192

29. Kokaram J examined the relevant law and stated at paragraphs 19 to 27 of the judgment the following:

> "19. The issuance of an ITT is obviously not an offer by the invitee. Equally, a tender is merely an offer to the invitor which it may accept or reject. However, in a typical tendering arrangement there may arise two contracts. **First, the Tendering process itself is to be viewed as being guided by the terms and conditions agreed to by the parties which are gleaned from the express and implied terms arising from the invitation to Tender. This has been referred to as Contract A.** See **Harmon CFEM Facades Ltd v Corporate Officer of the House of Commons** [1999] 67 ConLR 1.
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> 20. The body of case law in the Commonwealth amply demonstrates that by the language used in the ITT, both parties, the invitor and tenderer, can create a tender evaluation process governed by rules and procedures, which are more than a matter of mere expectation, but can themselves have contractual force. To that extent, the parties do intend to create contractual relations to the limited extent provided by their arrangement. This conclusion can be made by adopting the Contract A/B approach of the Canadian Jurisdiction (**M.J.B Enterprises Ltd v Defence Construction** [1999] 1 R.C.S 619, **Ellis Don Construction Ltd Naylor Group** [2001] 2 RCS 943) or examining whether the language gave rise to a preliminary procedural contract (**Pratt Contractors Limited v Transit New Zealand** [2003] UKPC 83) in determining whether by the mandatory language used it is consistent with the imposition of binding obligations on the parties. (**Hughes Aircraft Systems International v Air Services Australia).**
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> 21. **Second, there is the actual contract covering the subject scope of works. This is referred to as "Contract B".** Both contracts deserve their own independent consideration and analysis and this case involves an interpretation

of the rights and obligations of "Contract A" between the Claimant and Defendant.

22. The limited contractual rights and/or duties that arise in Contract A includes the right to consider the invitor's tender in conjunction with all conforming tenders and a duty to act fairly and in good faith. But ultimately, the determination of this agreed tender evaluation process is a task of examining the express terms of the ITT and the implied terms that of necessity must arise in such a contract. See **Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council** [1990] 1 WLR 1195, **Fairclough Building Limited v BC of Port Talbot** (1992) 62 BLR 82, **Pratt Contractors Limited v Transit New Zealand** [2003] UKPC 83**, Hughes Aircraft Systems International v Air Services Australia** [1997] FCA 558, **Cooperative Centrale Raiffeisen –Boerenleenbank BA v Motorola Electronics Pte Limited** [2010] SGCA 47, **Gerard Martin v Belfast Education & Library Board** [2006] NICh 4, **M.J.B Enterprises Ltd v Defence Construction** (1951).

23. What is important therefore is that the submission of a tender in response to an invitation to tender may give rise to contractual obligations, quite apart from the obligations associated with the construction contract to be entered into upon the acceptance of a tender**,** depending upon whether the parties intend to initiate contractual relations by the submission of a bid. If such a contract arises, its terms are governed by the terms and conditions of the Tender call and such terms that are to be reasonably implied. See **M.J.B Enterprises Ltd v Defence Construction** [1999] 1 R.C.S 619, para 19.

…

26. **Blackpool** simply illustrates that although in the world of private commercial parties it would be tempting to import such public law notions of

fairness and reasonableness and equity one cannot rewrite the contract for the parties if it fails the test for the implication for terms as discussed above. Where the Tenderer has assumed all the risks in making the Tender and the invitor has clearly put itself in the most advantageous position it would be wrong to import obligations and duties alien to either or both parties.

27. This point is also illustrated in **Pratt Contractors Ltd v Transit New Zealand**19 where Lord Hoffman opined that the duty of good faith did not impose a duty on the invitor to act judicially. It would therefore be wrong to import the public law notions of fairness and a duty to provide reasons. The Court of Appeal in **NH International (Caribbean) Limited v Urban Development Corporation of Trinidad and Tobago Limited** Civ. App. No. 95/2005 clearly recognised that the relationship between tenderer and invitor resides in private and not public law." (Emphasis added")

30. The effect of **Lutchmeesingh** was to apply the position adopted in Canada of parties' obligations during the Tendering process into a Contract A and Contract B. It established that Contract A is a collateral or separate contract, which governs the tender process, and Contract B is the contract for the substantive matter.

31. The facts of the instant matter can be distinguished from **Lutchmeesingh**. In the instant case, there was an acceptance of the Bid while in **Lutchmeesingh,** there was no acceptance of a bid but the parties were in negotiations to enter into a contract.

Subject to contract

32. At paragraph 2.193 of **The Law of Contract** the authors state the following on the issue of preliminary agreements and agreements subject to contract:

"…..an agreement may be made which expressly or impliedly anticipates that it will be superseded by a later, more formal, agreement. A letter of intent, as

already explained, is one example of such an arrangement. It is then a matter of construction whether the initial agreement is legally binding or if the parties' intention is that they should not be bound until execution of the formal contract…..the words subject to contract or subject to formal contract….The words indicate the intention of the parties not to be legally bound until the conclusion of a formal contract, which customarily (although not invariably) will be brought about by the exchange of two corresponding parts of the contract. The rule is so well settled, and so well known and relied upon, that the courts are reluctant to disturb it…

Where 'subject to contract' has its normal meaning, both parties remain free to withdraw from negotiations so long as their agreement remains 'subject to contract', and in the event of withdrawal losses will lie where they fall. Each party is deemed to know of and assume the risk that the other may withdraw from the negotiations. Thus if one incurs expenditure in anticipation that an agreement 'subject to contract' will mature in due course into a binding contract, he will be unable to recover it from the other if no contract is concluded. Nor is it unconscionable to withdraw from negotiations expressed to be subject to contract so that such withdrawal cannot normally, without more, give rise to a proprietary estoppel."

The test to be applied

33. In deciding whether the parties have reached an agreement, the courts normally apply the objective test. Under this test, once the parties have to all outward appearances agreed in the same terms on the same subject matter, then neither can generally rely on some unexpressed qualification or reservation to show that he had not in fact agreed to the terms to which he had appeared to agree. Such subjective reservations of one party therefore do not prevent the formation of a contract[4].

[4] Chitty on Contracts 31st Ed Vol 1 at paragraph2-002

The evidence

34. The evidence from the parties on this issue were from Mr Wazir Mohammed ("Mr Mohammed") for the Claimant and for the Defendant, Mrs Gail Miller-Meade ("Ms Miller-Meade") and Ms Allana Baney ("Ms Baney"). The parties agreed to tender the witness statements into evidence and there was no cross examination by agreement.

35. Mr Mohammed is the President of the Claimant. He testified that he observed the advertisement of the Tender from the Defendant and the Claimant made a bid to supply the items in the Tender. The Claimant paid $500.00 for the Tender documents. At page 63 of the Tender Documents under the rubric "4- INSTRUCTIONS TO TENDERERS" Clause 4.14 Purchasers Right to Accept any Tender and to Reject and or All Tenders, stated as follows:

> "4.14.1 The Purchaser reserves the right to accept or reject any bid and to annul the Tendering process and reject all bids at any time prior to the award of the Contract without incurring any liability to the affected Bidders or any obligation to inform the affected Bidders of the grounds of the Purchasers actions."

36. On 10 November 2014, the Claimant presented a bid in response to the Tender, specifically: 3D Digital mammography system; hologic selenia dimension avia with all related FDA approved modalities; Neurosurgical drilling system; Nouvag hysurge system and all related accessories ("the medical equipment"). The Claimant was informed by the Letter of Award dated 14 September 2015 that its bid had been accepted as stated in its tender dated 10 November 2014 and maintained in email dated 21 August 2014.

37. Mr Mohammed annexed a copy of the Letter of Award which was an agreed document by the parties. It stated that:

    a. The Claimant's bid had been accepted in conformity with the specifications and the price and delivery schedule as stated in its tender dated 10 November 2014.
    b. The total cost was not to exceed Five Million Dollars VAT exclusive.
    c. "The terms and conditions of procurement will be detailed in our General Conditions of Contract (GCC)."

d. “Particular attention should be paid to Clauses 9.11 (Payment) and 9.15 (Performance Security)”.
e. The guaranteed uptime of the items of equipment shall be of not less than 99% of the full time of duration of the Warranty.
f. It listed the items for the technical service training programme.
g. A performance security in the sum of TT$500,000.00 was to be submitted to the Defendant within 10 days of the notification of the Letter of Award.
h. The performance security was necessary to facilitate completion of the order.
i. The Defendant requested that the Claimant expedite the delivery of the items based on the contractual obligations.
j. “As soon as the Performance Security is provided, the Defendant will forward the appropriate Contract and Purchase Order(s)”.

38. According to Mr Mohammed, at the material time, he was advised via a telephone conversation with Ms Paula Armour, Senior Supplies Chain Officer of the Defendant to “start putting things in place” as the equipment was urgently needed and the contract was a mere formality. In good faith, the Claimant took steps to perform the contract. The Claimant presented the performance security dated 18 September 2015.

39. Mr Mohammed stated that the Defendant did not, prior to issuing the Letter of Award inform the Claimant that approvals would be needed from the Ministry of Health and the Defendant did not provide the Claimant with any Manual which the Defendant was obliged to follow for contracting for goods and services and or any Procurement and Contract Policy.

40. Mr Mohammed contacted the representative of Medimax, Mr Antonio E. Sola Fonseca who offered the product at the price of USD$459,000.00. The Claimant accepted the price and was required to make a down payment of USD$91,800.00, which it paid via wire transfer on 22 September 2015.

41. According to Mr Mohammed, the Letter of Award had stated that as soon as the Performance Security was provided the Claimant would be forwarded with the appropriate contract and purchase orders. Having not received the contract and purchase orders he emailed Ms Amour, on 1 October 2015 enquiring of the delay. By email dated 1 October 2015, Ms Amour responded indicating that the Defendant was awaiting instructions from the Ministry of Health on which tenders would require their approval. Mr Mohammed annexed the thread of emails to his witness statement as "W.M 7". However, the full thread of the emails starting with Mr Mohammed's initial email of 1 October 2015 was exhibited as "A.B 6" to the witness statement of Ms Baney.

42. In Mr Mohammed's email dated 1 October 2015 at 7:09 am he wrote to Ms Armour indicating that the performance bond was provided and he requested an update on the availability of the contract and the purchase order for the items awarded. Ms Armour responded later the same day at 3:58 pm indicating that that the purchase orders had been created and that she was awaiting instructions to proceed and once approval was received the purchase orders would be scanned and emailed to him. Mr Mohammed responded on the next day at 4:16 am requesting who or which department was to provide the further instruction to proceed. Ms Armour stated later on the same day that the Defendant was awaiting instructions from the Ministry of Health on which tenders required its approval and when the Defendant received the Ministry's response, the Defendant would prepare and expedite all outstanding works.

43. According to Mr Mohammed, due to the passage of time, he wrote the Defendant by letter dated 23 March 2016 informing it that despite the delay by the Defendant in completing the contractual agreement, the Claimant would guarantee the agreed price for 6 months. He received a letter in response from Ms. Miller-Meade dated 8 April 2016 in which she stated that the Claimant did not state its revised prices and requested a proposal. Mr Mohammed telephoned Ms Miller-Meade and explained what his letter meant and informed her that it was not possible for the Claimant to provide the revised pricing because the Claimant had made no decision on it due to the mercurial nature of the foreign exchange pricing. He

assured her that the Claimant was ready, able and willing to deliver the product at the contractually agreed price.

44. Mr Mohammed annexed the letters dated 23 March 2016 and 8 April 2016 as "WM 8" to his witness statement. In the letter dated 23 March 2016 Mr Mohammed indicated to the Defendant that:

> "We wish to advise as follows:
>
> ITEM 1: One (1) High Surg 30 Dual Motor Neurosurgical Drill
>
> Unable to maintain the validity of the prices quoted on our tender document. If these items are still required by the SWRHA, a revised quotation will be provided to reflect the new pricing. If no longer require, we kindly request the performance bond be released as soon as possible.
>
> ITEM 2: One (1) 3 D Digital Mammography System.
>
> Our last letter dated February 5th indicated the manufacturer of the mammography system, Hologic, would have a new pricing schedule effective after March 31st. We have spoken to Hologic about this price change with particular reference to the Tender award in question.
>
> Due to the present economic climate in Trinidad and Tobago, Hologic and by extension Clinitech Company Limited has decided to maintain the prices provided for item 2 of the captioned tender for another six (6) months from the date of this letter."

45. In the Defendant's letter dated 8 April 2016 it requested that the Claimant submit the revised prices for the medical equipment on or before a date in April 2016.

46. Mr Mohammed testified that by letter dated 13 June 2016[5], the Defendant informed the Claimant that due to insufficient funds, it decided to discontinue purchase of the 3D Mammography Unit and the Letter of Award was rescinded. According to Mr Mohammed,

[5] Exhibit WM 9 to the witness statement of Wazir Mohammed

this was the first time the Claimant was informed that there was a lack of sufficient funds to undertake the contract.

47. Ms Baney testified that she is the Supply Chain Officer of the Defendant. She prepared tenders and contract documents and oversaw the process from tenders to contracts. She stated that she was familiar with the Regional Health Authorities (Contracting for Goods and Services) Regulations as approved by the Defendant's Board of Directors on 31 October 2013.

48. Ms Baney explained that section 9.6.8 of the Manual instructed them how they were to advertise tenders. Section 9.6 (22 to 25) of the Manual provided that subsequent to the Tender process, when a successful bidder was selected, the team leader of the Evaluation Team working on the specific tender prepared a Tenders Evaluation Report indicating the methodology and criteria used in determining the successful bidder; and the successful bidder payment terms. The document must be signed off by the evaluation team. The Tenders Evaluation Report must be submitted by way of a Tenders Committee Note to the Tenders Committee for consideration. Once the Tenders Committee had approved the award of the Tender, the information was submitted to the Board of Directors for notification. Section 9.6 (26) of the Manual provided that for contract values over $1,500,000.00 or the limit as determined by the Ministry of Health, the Tender was sent to the Ministry of Health for further approval. She annexed a copy of section 9.6 of the Manual as "A.B. 3" to her witness statement.

49. According to Ms Baney, section 9.7 of the Manual set out the steps to be taken upon approval by the Ministry. The steps included a Letter of Acceptance to the awarded supplier/contractor notifying the supplier/contractor of the Defendant's acceptance of the submitted bid, the requirements to enter into a formal contract and to provide the performance security. Upon receipt of the performance bond, the contract was prepared and given a contract number. This included the issuance of a Letter of Award/Letter of Acceptance. She annexed a copy of section 9.7 of the Manual as "A.B. 4" to her witness statement.

50. Ms Baney testified that the Claimant was issued the Letter of Award dated 14 September 2015. In the Letter of Award the Defendant indicated that the Claimant's bid was accepted in conformity with the specifications; the price and delivery schedule as stated in the Tender dated 10 November 2014 and the total cost was not to exceed $5,000,000.00.

51. Ms Baney stated that the award was approved by the Defendant's previous Board prior to 31 August 2015 but it was put 'on hold' by a directive from the Ministry of Health. The Tenders Committee at its second meeting on 2 March 2016 requested that the said awards be re-prioritised and re-submitted to the Board with further justification. Consequent on the Board's decision, a re-tender was done for the product. According to the Board decision dated 20 April 2016 further to the letter of complaint submitted by the Claimant, the Senior Legal Officer of the Defendant, advised that the Defendant meet with the Claimant, release it from the intended obligations and then decide whether it could complete the Tender process as already commenced or it would have to reopen or annul the award. The Board agreed to re-tender the product.

52. According to Ms Baney, the purchase order and contract documents were not issued, agreed upon and/or signed by the relevant parties. The process of advertising for tenders or for the issuance of the letter of acceptance did not mean that the Defendant intended to purchase the machine since it was necessary that the subsequent procedures be followed:

    (i) Claimant was required to submit a performance bond;
    (ii) Upon submission of the performance bond, the purchase order is prepared and sent to the CEO for signature;
    (iii) Upon receipt of the purchase order, the form of contract is prepared and the contract number compiled;
    (iv) Upon completion of the contracts, the contracts are signed by the CEO of the Defendant and the signatory of the selected company;
    (v) The contract includes the signed purchase order, therefore when the supplier signs and collects the contract, they would also collect the original purchase order.

53. Ms Baney testified that by email dated 1 October 2016, the Claimant requested an update on the availability of the purchase order and the contract. By email of even date, the Claimant was notified that the purchase orders had been created and that the Defendant was awaiting instructions to proceed. According to Ms Baney, Clause 9.3 of the General Conditions of Contract of the Tender documents provided as follows:

(i) All requests to supply goods, services and/or works must be placed in writing on a purchase order form of the Defendant numbered in serial;

(ii) The purchase order number must be quoted on all documents, correspondence and packages generated in reposed to the particular purchase order;

(iii) The Defendant shall be bound by its purchase order placed on an Official Purchase Order duly signed by an authorised officer of the Defendant.

54. Ms Baney stated that by email dated 2 October 2015 the Claimant enquired which department provided further instructions to proceed. By email of even date, the Defendant responded that it was awaiting instructions from the Ministry of Health on the Tenders since it required its approval. She also stated that the Claimant was asked to expedite the delivery of the product on the creation of a contractual obligation but that this obligation did not exist until the purchase order was issued and the contract signed.

55. Ms Baney testified that prior to the issue of the purchase order and the contract by the Defendant, the Claimant wrote to the Defendant by letter dated 23 March 2016 indicating that they were unable to maintain the prices quoted on their tender document for the products and a revised quotation would have to be provided; and that for the Digital Mammography System price would be maintained for another 6 months. By letter dated 8 April 2016 the Defendant wrote to Mr Mohammed indicating that the said letter did not include the revised price of the product. The Defendant also requested that the proposal be submitted on or before 12 April 2016.

56. According to Ms Baney, by letter dated 14 June 2016, the Defendant wrote to Messrs Furnace Anchorage General Insurance Limited with respect to the performance bond and it indicated inter alia that the security guarantee could be released. On 14 June 2016, she emailed Mr Mohammed indicating that the letters for the release of the performance bond submitted for the product could have been collected.

57. Ms Miller-Meade testified that she was the Secretary, Tenders Committee for the period July 2005 to May 2017. She was also the General Manager Finance and Supply Chain in the Defendant. She was also familiar with Section 9.6(26) of the Regional Health Authorities (Contracting for Goods and Services) Regulations. Her evidence was also similar to that of Ms Baney on the procedures followed by the Defendant subsequent to the Letter of Award and the communication orally and in writing between the Claimant and Defendant after the Letter of Award was issued.

58. Ms Miller-Meade also testified that the Defendant rescinded the Letter of Award due to a lack of sufficient funds and at a meeting, of which date she was unable to recall, members of the Board of the Defendant brought to the Tenders Committee's attention that they were of the opinion that the price quoted by the Claimant was exorbitant and the Board could not honestly and in good conscience ratify the decision of the previous Board, even though it was in a position to do so.

59. Ms Miller-Meade testified that due to the Claimant's indication that the quoted prices had to be revised and the subsequent failure of the Claimant to furnish the Defendant with the revised quotation the Defendant was entitled as a result of the variation of the quoted price to accept the abandonment of the original terms of the Tender bid. She stated that all times prior to the Claimant's letter of 23 March 2016, the Defendant was prepared to enter into a written contract with the Claimant at the agreed tender bid, subject to confirmation from the Ministry of Health. By letter dated 14 June 2016, the Defendant wrote to Messrs Furnace

Anchorage General Insurance Limited referencing the performance bond and indicating that the performance bond could be released.

The Court's Findings

60. At the time the Letter of Award was issued by the Defendant to the Claimant, the following information were within the knowledge of the parties:

    (a) The Invitation to Tender documents;

    (b) The Bid by the Claimant;

    (c) The Letter of Award;

    (d) The Regional Health Authorities Act[6]; and

    (e) The Regional Health Authorities (Contracting for Goods and Services) Regulations.

61. Although the Defendant has sought to rely on the Manual which set out its internal procedure from the issue of the invitation to tender until the execution of the contract, there was no evidence from the Defendant's witnesses to demonstrate that the Manual was within the knowledge of the Claimant before the Letter of Award was issued. As such, the Defendant cannot import its internal process as contained in the Manual into assessing the objective facts which were before the parties at the time of the Defendant's issuing of the Letter of Award.

62. In my opinion, the Letter of Award was not sufficient to make a binding contract between the parties for the supply of the medical equipment for the following reasons.

63. First, it was clear to the Claimant from Clause 4.14.1 of the invitation to tender document that the Defendant reserved the right to reject all bids at any time prior to the award of the contract. Clause 4.14.1 did not state the Letter of Notification or Letter of Award but it spoke about a contract and in my opinion both could not be equated with or mean the same. Therefore, it was within the Claimant's knowledge from the invitation to tender document

[6] Chapter 29:05

that there were two stages in the process, the Letter of Notification or Letter of Award and then the award of the contract.

64. Further, Clause 4.18.1 of the Tender specifications inviting the Tenders made the process clear to the Claimant. It stated:

> "4.18.1 Once an award has been made, the SWRHA will notify the successful Bidder in writing of the acceptance of the bid.
>
> 4.18.2 Within **ten (10) days** of the notification of the award, the successful Bidder shall furnish the Performance Bond (where applicable) in accordance with the conditions of the Contract.
>
> 4.18.3 Failure of the successful Bidder to comply with the above requirements shall constitute grounds for annulment of the award of the Contract.
>
> 4.18.4 Once the recommended Supplier has accepted the award, then the unsuccessful participants will be notified."

65. In my opinion, according to Clause 4.18.3 if the performance bond was not provided the Defendant reserved the right to annul awarding the contract. This supports the position that there were two phases namely the award of the contract where the Defendant would have indicated to the selected bidder that its bid was successful and then the execution of the contract after the terms and conditions were settled.

66. Second, the Claimant's reliance on the authority of **WASA v Sooknanan**[7] did not support its case. It was submitted on behalf of the Claimant that there was no need for a written formal contract and purchase order to be prepared and executed in order for there to be a valid contract. In **WASA,** the Court found that the failure to enter into a formal contract which was

[7] Civ Appeal No 106 of 1989

normally expected to be initiated by WASA would have defeated the rights of Sooknanan since the Central Tenders Board had assured it that there was a binding contract between Sooknanan and WASA. Section 20 of the Regional Health Authorities Act provides:

20. (1) For the purpose of any transaction, contract or covenant a Board may, on behalf of the Authority for which it was constituted—

(a) invite, consider, accept or reject offers for the supply of goods or the undertaking of works or services necessary for carrying out the objects of the Authority; and

(b) dispose of surplus or unserviceable articles belonging to the Authority.

(1A) Notwithstanding subsection (1) and where it is economically expedient to do so, a Board may-

(a) pursuant to an agreement with any other Authority;

(b) in accordance with Regulations made under this Act for the purpose of this subsection; and

(c) acting on behalf of its Authority and an Authority referred to in paragraph *(a)*,

invite, consider, accept or reject offers, and enter into contracts for the supply of goods or the undertaking of works or services necessary for carrying out the objects of the respective Authorities.

(2) For the purpose of this section, the provisions of the Central Tenders Board Act shall not apply.

67. Regulations 21 and 22 of the Regional Health Authorities Regulations, made under section 35 (b) provides:

REGIONAL HEALTH AUTHORITIES (CONTRACTING FOR GOODS AND SERVICES) REGULATIONS

21. Where a tender has been accepted, a Board or Committee shall cause the tenderer to be notified of its acceptance and, in appropriate cases, of the requirement to enter into a formal contract with the Authority and provide security in the manner and to the extent as the Board or Committee determines.

22. Every formal contract shall be in such form as a Board or Committee from time to time determines and shall specify, inter alia, wherever applicable—

(a) a description of the goods to be supplied or the works or services to be undertaken;

(b) the price to be paid for the supply of such goods or the undertaking of such works or services;

(c) the period within which the matters contemplated by the contract are to be performed;

(d) the amount of damages payable by the contractor for delay or non-completion within the period stipulated;

(e) provision for termination on breach.

68. In my opinion, **WASA** is distinguishable from the instant case since the Defendant's tendering process was not managed by the Central Tenders Board. The evidence of the Defendant's witnesses was that the Defendant managed its own internal tendering processes which the Claimant ought to have known from Section 20. It was clear from **WASA** that the Court acknowledged that the normal process where there was a tender by a statutory entity, that said entity was responsible for preparing and executing the formal contract. Regulations 21 and 22 clearly indicated that a formal contract was to be prepared by the Defendant and the details of the information which were to be contained in the contract.

69. Third, the Letter of Award made it clear to the Claimant that after the provision of the performance bond, the contract and the purchase order would be forwarded to the Claimant. The Defendant expressly indicated to the Claimant that there was no contract until these two

documents were forwarded and executed by the parties. The Claimant understood this since by his email of 1 October 2016 he made enquiries from Ms Amour on the status of the purchase order to which she responded.

70. Fourth, there was no unequivocal acceptance of the offer made by the Claimant in the Letter of Award. The Letter of Award did not expressly use the words "subject to contract". When the contents of the Letter of Award are examined, the information contained therein was in effect a conditional acceptance by the Defendant of the Claimant's offer to supply the medical equipment. The conditions as stated in the Letter of Award were: the Claimant was required to provide a performance bond of TT $500,000.00 and upon the provision of the said bond, the Defendant would forward the contract and the purchase order. The language in the Letter of Award was clear that there was a counter notice in it. In my opinion, the use of the words "as soon as possible, based on the contractual obligation" in the Letter of Award cannot be considered in isolation but in the context of the other requirements set out in the Letter of Award.

71. Fifth, in any event, the Claimant ought to have known that any future action by the Defendant after the bids were tendered, were "subject to" the approval of the Ministry of Health. Section 6 of the Regional Health Authorities Act states:

> "6. The powers and functions of an Authority are—
>
> (a) to provide efficient systems for the delivery of health care;
>
> (b) to collaborate with the University of the West Indies and any other recognised training institution, in the education and training of persons and in research in medicine, nursing, dentistry, pharmacy and bio-medical and health science fields, veterinary medicine as well as any related ancillary and supportive fields;
>
> (c) to collaborate with and advise municipalities on matters of public health;
>
> (d) **to operate, construct, equip, furnish, maintain, manage, secure and repair all its property;**
>
> (e) to facilitate new systems of health care;

(f) to provide the use of health care facilities for service, teaching and research;

(g) to establish and develop relationships with national, regional and international bodies engaged in similar or ancillary pursuits; and

(h) to do all such things as are incidental or conducive to the attainment of the objects of the Authority." (Emphasis added)

72. Section 16 of the Regional Health Authorities Act provides:

16. (1) Subject to the approval of the Minister an Authority may—

(a) acquire, hold and enjoy any property, real or personal by purchase, devise, bequest, gift or in any other way;

(b) lease, accept surrenders of leases, mortgage, grantor accept licences, rights of way or easements.

(2) An Authority shall, in accordance with this section and with the approval of the Minister, dispose of property which is no longer required for the purposes of the Authority.

(3) Property which was transferred to and vested in the Authority by the State without consideration or for a nominal consideration shall be transferred by the Authority to the State without consideration or for the same nominal consideration, as the case may be.

(4) Property other than that to which subsection (3) applies shall be offered to the State for purchase at a fair market price.

(5) If the State does not wish to purchase the property offered to it under subsection (4) it shall notify the Authority in writing within ninety days of receipt of the offer, after which time the Authority may dispose of the property on the open market to the Authority's best advantage.

73. Section 17 states:

17. The funds of an Authority shall consist of—

(a) such amounts as may be appropriated there for by Parliament;

(b) special grants of funds as may be provided by the State for the financing of special programmes and projects;

(c) sums arising from grants, covenants, donations and other receipts from persons, including national and international bodies;

(d) all sums received by, and falling due to, the Authority as fees or payments for services rendered and the provision of facilities;

(e) sums borrowed by the Authority in accordance with section 19; and

(f) all other sums or property that may in any manner become lawfully payable to or vested in the Authority in respect of any matters incidental or conducive to its objects.

74. In my opinion, the Claimant ought to have known from the aforesaid statutory provisions that since the funding of the Defendant was from the State, and it was contracting with a public authority, that approval from the Minister was required.

75. Sixth, the appropriate contract documents were neither issued nor executed by the authorized persons. After the performance security was provided Mr Mohammed on behalf of the Claimant enquired by email dated 1 October 2015 about the purchase order. Ms Armour informed him by emails dated 1 and 2 October 2015 that the purchase order had not been issued. Therefore, in October 2015 Mr Mohammed knew that the Letter of Award was not a binding contract since the purchase order had never been issued which supported the Defendant's contention that there was not an unequivocal acceptance of the Claimant's offer by the Defendant.

76. Lastly, the Claimant by his conduct understood that the Letter of Award was not a binding contract for the supply of the medical equipment. By the Claimant's letter dated the 23 March 2016 it informed the Defendant that it could only guarantee the price of $5 million for 6 months. In my opinion, the Claimant knew that by the 23 March 2016 the consideration was

not an agreed term of the contract and that the parties were still in negotiations and that was the reason Mr Mohammed articulated the Claimant's position on the price. If the Claimant was of the opinion that the Letter of Award was the contract then it would not have indicated that the price/consideration could have changed since it would have been bound to supply the equipment for the contracted price or obtained the Defendant's approval for a variation of any alleged contract. Therefore, the Claimant's conduct in March 2016 demonstrated that there was no binding contract between the parties for the supply of the medical equipment since negotiations were still taking place.

77. Having found that there was no contract there is no need to address the other issues since this effectively brings the matter to an end. However, for completeness I will still address the issues of legitimate expectation and damages.

WAS THERE A LEGITIMATE EXPECTATION BY THE CLAIMANT THAT THE CONTRACT WOULD BE PERFORMED?

78. Aboud J in the case of **Surendranath Ramnath & Ors v The Public Service Commission**[8], summarised the principle of "legitimate expectation" as follows:

> "The law recognises that for an expectation to be legitimate it must be either induced by the decision-maker expressly, by means of a promise or undertaking, or implicitly, by means of settled past conduct or practice. In 2002, the English Court of Appeal in R v Newham London Borough Council ex parte Bibi [2002] 1 WLR 237 further clarified the definition of legitimate expectations, and gave a salutary warning. This is what Lord Justice Schiemann said:
>
> "17. We gratefully adopt what was said of the phrase "legitimate expectation" by Lord Fraser of Tullybelton in Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629, 636:
>
> 'It is in many ways an apt one to express the underlying principle, though it is somewhat lacking in precision. In Salemi v MacKellar (No 2) (1977) 137 CLR 396,

[8] H.C.A. NO. S-628 of 2004

404, Barwick CJ construed the word 'legitimate' in that phrase as expressing the concept of 'entitlement or recognition by law'. So understood, the expression (as Barwick CJ rightly observed) 'adds little, if anything, to the concept of a right'. With great respect to Barwick CJ, their Lordships consider that the word 'legitimate' in that expression falls to be read as meaning 'reasonable'. Accordingly 'legitimate expectations' in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis: See R v Criminal Injuries Compensation board, Ex p Lain [1967] QB 864."

18. The case law is replete with words such as 'legitimate' and 'fair', 'abuse of power' and 'inconsistent with good administration'. When reading the judgments care needs to be taken to distinguish analytical tools from conclusions which encapsulate value judgments, but do not give any indication of the route to those conclusions. In all legitimate expectation cases, whether substantive or procedural, three practical questions arise.

19. …The first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do."

79. The Claimant has pleaded that the Letter of Award created a legitimate expectation on its behalf that the contract would be performed and payment would be forthcoming.

80. In my opinion, this assertion by the Claimant must fail for the following reasons. First, there were no pleaded particulars of this legitimate expectation. The pleading was that the Letter of Award created a legitimate expectation on the Claimant's behalf that the contract would

be performed and payment would be forthcoming. Therefore, there was no pleading of the details of what the Defendant committed itself to either by promise, past conduct or practice.

81. Second, there was no evidence in the Letter of Award that the Defendant had promised or undertaken to enter into a contract with the Claimant. The letter encouraged the Claimant to ensure that it has put things in place to ensure that it is not disqualified from entering into the contract, that is, obtaining the requisite performance bond.

82. In the email conversation on the 1 to 2 October 2016, Ms Armour made it clear to Mr Mohammed that whilst the purchase orders had been created, the Defendant was awaiting further instructions to proceed and that once they got approval, they would be forwarded to him.

IF THE DEFENDANT BREACHED THE CONTRACT, HAS THE CLAIMANT SUFFERED ANY LOSS?

83. The Claimant pleaded special damages for:

a. Cost of down payment for machinery and equipment US $91,800.00.
b. Loss of profits in the sum of $2,016,110.00.
c. Loss of Job opportunity (no sum was pleaded)

84. The measure of damages awarded for damages in contract was described in **Halsbury Laws of England**[9] at paragraph 499 as:

> "The normal function of damages for breach of contract is the same as that in tort: namely, compensatory, aiming to compensate the true loss suffered by the innocent party and place him in the same position, so far as money can do it, as if the contract had been performed. Only in exceptional circumstances do courts depart from this policy and award some greater sum."

[9] Volume 29 Damages

85. The law on the requirements in the pleading, the proof of the loss and the approach the Court is to take in being satisfied when awarding loss for special damages was examined in detail by Rajkumar J (as he then was) in **Raghunath Singh and Company Ltd v National Maintenance Training and Security Company Ltd**[10] at paragraphs 93 to 95 which is worth repeating here:

> **"Law - Proof of special damages**
>
> 93. Pretrial loss is an item of special damage. It has to be pleaded, particularized and strictly proved. See **Charmaine Bernard (Legal Representative of the Estate of Regan Nicky Bernard) v Ramesh Seebalack [2010] UKPC 15** at paragraph 16 Sir John Dyson SCJ (citing **Perestrello) infra:**
>
> **In Bonham Carter v Hyde Park Hotel [1948] 64 TLR Lord Goddard CJ** stated that parties "must understand that if they bring actions for damages, it is for them to **prove their damage**; It is not enough to write down the particulars, so to speak, throw them at the head of the court saying 'this is what I have lost; I ask you to give me these damages'. **They have to prove it."**
>
> 94. **The degree of strictness of proof that is required depends on the particular circumstances of each case**.
>
> (a) As Bowen L.J. stated in **Ratcliffe v Evans** (1892) 2 Q B 524, 532 - 533: (all emphasis added)
>
> "In all actions accordingly on the case where the damage actually done is the gist of the action, **the character of the acts themselves** which produce the damage and **the circumstances** under which these acts are done**, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved**. **As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done.** To insist upon less

[10] CV 2007-02193

would be to relax old and intelligible principles to insist upon more would be the vainest pedantry."

(b) In Civil Appeal 41 of 1980 **Gunness and Another v Lalbeharry**, the appellant was injured in a vehicular collision. In an action for damages for negligence, the Judge allowed certain claims and disallowed others. Among the claims disallowed was a claim for special damages relating to the loss of various items of jewellery, handbag, cosmetics and $75.00 in cash. On Appeal, the Court held that the Judge erred in disallowing the claim. Braithwaite J.A with whom the other members of the Court of Appeal agreed stated (@ page 2):

> "In disallowing the appellant's claim for these items, the judge merely stated:
>
> 'From the evidence which she gave and which was unsupported, I find that you failed to prove such loss.'
>
> There is no evidence to contradict the evidence of the appellant nor had she been shown not to be a credible witness. There is therefore no justification for the judge's finding in this respect. The fact that her evidence is unsupported is clearly not sufficient to deny her claim for a loss which must be taken, in the absence of evidence to the contrary, **in the circumstances of her loss of consciousness** to be at least strong **prima facie evidence** of the fact which she alleged." (All emphasis added)

(c) That a measure of flexibility exists in the degree of proof required for special damages was confirmed by the Court of Appeal in Civil Appeal 162 of 1985 **Uris Grant v Motilal Moonan Ltd.** and **Frank Rampersad**, where **Ratcliffe v Evans** was applied.

The appellant's furniture and other articles were destroyed when a vehicle ran off the road and crashed into a house in which she lived. She claimed damages in respect of the destroyed chattels. According to the evidence, the appellant had made a detailed list of the things destroyed the day following the accident. In the statement of claim, the Appellant's special damage claim had been particularized. A default judgment was taken up, and in the assessment before the Master, the appellant produced in evidence the **list** she had prepared which itemized each item and the **price** thereof. She however produced **no receipt** verifying the price she had paid for the items. She admitted that she did not have such receipts, nor did the appellant retain the services of a valuator to value the damage.

The Master held that the appellant had failed to prove the value of the items and awarded an "ex gratia" payment. The Court of Appeal held that the Master erred. The Court at page 16 noted that the appellant's evidence as to her loss represented strong prima facie evidence and was unchallenged. With respect to the lack of receipts to support her claim, it stated: - By the production in evidence of the list of chattels destroyed together with the costs of their replacement, the appellant had established **a prima facie** case both of the **fact of loss** of those articles and of the **costs of their replacement** at the time. Her special damage had to be established on a balance of probabilities. The respondent called no evidence in rebuttal. In the event, the Master, in my view, either had to accept the appellant's claim in full or, **if for whatever reason she had reservations** she should have approached the matter along the lines in Ratcliffe's Case by **applying her mind judiciously to each item and the cost thereof** in the list. This she did not do. Instead she merely, as stated earlier, made an ex gratia award. She did so on the premise, wrongly in my view, that the appellant had called no evidence of any kind in support of her claim.

In my view, the Master erred. The appellant did call **prima facie evidence** of her replacement costs the fact of which, as I said was **unchallenged**. At this stage, I must pose the question whether in this country it is **unreasonabl**e, in a case of this kind, for a person to be unable to produce bills for **clothing, groceries, watches, kitchen utensils, furniture and/or other electrical appliances** and/or for that matter to remember the time of the purchase. To my mind, this is clearly in the negative and to expect or insist upon this is to resort to the "vainest pedantry."

With regard to proof of special damage the authors of McGregor on Damages citing the dictum of Bowen, L.J. in Radcliffe's Case supra and quoted earlier in this judgment state that in proof as with pleading, "the courts are realistic and accept that the particularity must be tailored to the facts." (all emphasis added)

(d) In a more recent decision of the Court of Appeal, **David Sookoo, Auchin Sookoo v Ramnarace Ramdath Cv. App No. 43 of 1998** per M.A de la Bastide, C.J, delivered 12th January 2001, it was confirmed that that degree of flexibility had limits, depending on inter alia:-

(i) The circumstances,

(ii) The nature of the claim,

(iii) The difficulty or ease with which proper evidence of value might be obtained, and

(iv) The value of the item involved.

"It is common experience that items of special damage are sometimes not proved to the hilt and yet the Court may make an award in respect of them. **It is a matter which depends on the circumstances and evidence in each case.** The Court has to decide whether on the material before it, it can arrive at some acceptable conclusion as to the amount which it should award." (At page 4)

"…..These are the cases on which counsel for the Respondent relies. **The sort of evidence** which a Court should insist on having before venturing to quantify damages **will vary** according to the **nature of the item in respect of which the claim is made** and **the difficulty or ease with which proper evidence of value might be obtained**. It would also, **depend in part on the value of the individual item**. It may not be reasonable to require expert evidence of the value of used household items but where one is dealing with a motor vehicle which usually has considerable value, and **in respect of which there should be no difficulty in securing proper evidence of value**, then the **Court is entitled to adopt a more stringent approach**.

I, accept the correctness of the decision in **Grant's** case but that case is clearly distinguishable on the facts from ours". (At page 5)

(e) See also the discussion on proof of special damages by the Honourable Justice of Appeal Archie as he then was at pages 8 to 11 of the case of Civ. App. No. 20 of 2002 Anand Rampersad v. Willie's Ice Cream Limited – applying all of the above cases – as follows:-

At page 8 – "I wish to emphasise that the fact that a defendant may not challenge the values of destroyed items given by the plaintiff does not automatically entitle the plaintiff to recover whatever is claimed. The rule is that **the plaintiff must prove his loss**".

At page 10 – "None of the latter three cases should be understood as derogating in any way from the principle that the plaintiff must prove any special damages claimed. In particular, Uris grant, which may appear to bear some similarity to the present case, is merely an example of a case where the degree of particularity accepted by the Court of Appeal was considered to be appropriate in those special circumstances. In this case the Plaintiff/Respondent is a **commercial enterprise. It would have been reasonable to expect that some**

evidence of the value of the larger items could be found in its books and records."

At page 10 –"a lesser degree of strictness would apply to proof of the value of smaller items such as kettles, mops (etc. . In accordance with Uris Grant the Master, in the absence of any evidence to the contrary, would have been entitled to accept a reasonable figure".

At page 10-11 "the plaintiff cannot simply present a list of prices, it must show the basis on which the figures are established" (all emphasis added)

In **Hudson's Building and Engineering Contracts, Eleventh Edition, Volume 1** at paragraph 8-172 it is stated:-

"Loss of Profit

Terminated Contracts

In 'total prevention' cases, where a contract has been discontinued as a result of the owner breach, the Robinson v Harman compensatory principle will, in the more usual case where work has been partially performed at the time of termination, entitle the contractor to the full contract value of any work done up to that time, less sums previously paid and **possibly also, ... a sum for profit lost on the remaining work...**

...establishing a claim for loss of profit on uncompleted work following a contractor's rescission or termination may not be practical for a number of reasons, namely:

(1) The contractor must be able to establish that his contract prices for the remaining work would as a fact have been profitable. This will depend primarily on the adequacy of his original estimating and pricing of the cost of the contract, rather than any profit percentage used when pricing ..." (emphasis added)

Cost of down payment for machinery and equipment

86. Although the Claimant pleaded the sum of US $91,800.00 as its loss for the costs for the down payment of the machinery and equipment, Mr Mohammed indicated at paragraph 26 of his witness statement that this loss was not being pursued since the said sum had been refunded by Medimax Limited. Mr Antonio Fonseca in his witness statement also confirmed this position.

Loss of profits

87. Mr Mohammed stated at paragraph 31 of his witness statement that:

> "As a result of the unlawful termination of the contract Clinitech sought the advice of its accountant Mr Haroon Mohammed. I provided Mr Mohammed with the necessary information which he required to provide his analysis. Mr Mohammed subsequently advised Clinitech that its losses in profit amounted to the total sum of two million sixteen thousand and one hundred and ten dollars ($2,016,110.00) which it would have made had the SWRHA honoured the contract. A copy of the Analyst of Profit and Loss supplied to Clinitech by Mr Mohammed is hereto attached and marked "W.M.11".

88. The document "W.M.11" was dated the 11 October 2016 and it detailed the Profit and Loss Account for the contract as:

	TT$
Contract Value Awarded	5,000,000.00
Cost of Mammography Equipment	
459,000.USD x 6.38	2,928,420
Freight Cost- 1,500 USD x 6.38	9,570
Customs Brokerage (as per Quote)	20,000
Performance Bond	15,900
Miscellaneous/ handling Charges	10,000
Total Cost	2,983,890
Surplus/Projected Profit	2,016,110

89. The Profit and Loss Account was admitted into evidence through a hearsay notice. In my opinion, no weight can be attached to that document since it was Mr Mohammed who sought to rely on its contents but did not provide any details on how the figures were arrived at.

90. The loss which the Claimant sought as loss of profits was a significant sum. Based on Mr Mohammed's own evidence he provided Mr Haroon Mohammed with the information to produce the profit and Loss Account but Mr Mohammed failed to set out this information which he provided to Mr Haroon Mohammed. In my opinion even if the Claimant had succeeded in proving that the Defendant breached the contract, Mr Mohammed failed to provide cogent, detailed evidence to prove this significant loss

Loss of job opportunity

91. **Chaplin v Hicks**[11] established that a party could receive damages for loss of opportunity. In that case, the Defendant's breach of contract prevented the Plaintiff from taking part in a beauty contest and deprived her of a chance of winning one of the prizes. The Court of Appeal upheld the judge's award on the basis that while there was no certainty that she would have won; she lost the chances of doing so.

92. The onus is still on the party making the claim to prove the loss suffered. In **Gregg v Scott**[12] at page 183, Lord Nicholls of Birkenhead said as follows at para 17:

> "In order to achieve a just result in such cases the law defines the claimant's actionable damages more narrowly by reference to the opportunity the claimant lost, rather than by reference to the loss of the desired outcome which was never within his control. **In adopting this approach, the law does not depart from the principle that the claimant must prove actionable damage on the balance of probability.** The law adheres to this principle but defines actionable damage in different, more appropriate terms. The law treats the Claimant's loss of his

[11] (1911) 2 KB786
[12] (2005) 2 AC 176

opportunity or chance as itself actionable damage. The claimant must prove this loss on balance of probability. The Court will then measure this loss as best it may. The chance is to be ignored if it was merely speculative, but evaluated if it was substantial: See Davies v Taylor (1974) AC 207, 212 per Lord Reid."

93. Mr Mohammed testified that he is the President and Secretary of the Claimant. However, his witness statement was silent on the job opportunities which were available to it and which it could not pursue due to its contractual obligation with the Defendant. For this reason alone, even if the Claimant had proven that the Defendant breached the contract, no damages could have been awarded for this pleaded loss.

Aggravated and/or exemplary damages

94. Although the Claimant made a claim for aggravated damages he would not have succeeded as aggravated damages are not awarded in actions for breach of contract since the general rule is that the Defendant's motives and conduct are not to be taken into account in assessing damages and damages are not to be awarded in respect of insult or wounded feelings[13].

95. Exemplary damages may be awarded where there is the presence of outrageous conduct disclosing malice, fraud, insolence and cruelty. In **Rookes v Barnard**,[14] Lord Devlin stated that exemplary damages are different from ordinary damages and will usually be applied –

(i) where there is oppressive, arbitrary or unconstitutional conduct by servants of government;

(ii) where the defendant's conduct had been calculated to make a profit; and

(iii) where it was statutorily authorised.

96. Jones JA in the local Court of Appeal decision of **Darrell Wade v the Attorney General of Trinidad and Tobago** [15] and **Jason Superville v The Attorney general of Trinidad and**

[13] Halsbury Laws of England Volume 29 (Damages)
[14] [1964] AC 1129
[15] Civ Appeal 172 of 2012

Tobago[16] provided the following guidance in awarding exemplary damages and the approach the Court should take. At paragraph 18 to 21 it was stated:

> 18. In this regard while the purpose of an award of exemplary damages is different than that of an award of compensatory damages the method of arriving at an award of exemplary damages ought not to be much different than the method used to arrive at an award for compensatory damages. The figure arrived at should be one which in the mind of the assessor satisfies the criteria for exemplary damages, aligns with awards in comparable cases and meets the justice of the case.
>
> 19. Unlike compensatory damages:
>
> > "The object of exemplary damages … is to punish and includes notions of condemnation of denunciation and deterrence (see Rookes v Barnard [1964] 1 All ER 367 at 407, [1964] AC 1129 at 1221). Exemplary damages are awarded where it is necessary to show that the law cannot be broken with impunity, to teach a wrongdoers that tort does not pay and to vindicate the strength of the law (see Rookes v Barnard [1964] 1 All ER 367 at 411, [1964] AC 1129 at 1227). An award of exemplary damages is therefore directed at the conduct of the wrongdoer. It is conduct that has been described in a variety of ways such as harsh, vindictive, reprehensible, malicious, wanton, wilful, arrogant, cynical, oppressive, as being in contempt of the plaintiff's rights, contumelious, as offending the ordinary standards of morality or decent conduct in the community and outrageous." **Per Mendonca JA Torres v PLIPDECO**.
>
> 20. Although essentially a case on the applicability of exemplary damages in breach of contract cases, the decision in Torres sought to provide general guidance on the manner in which a court should exercise its discretion in making an award for exemplary damages.

[16] Civ Appeal 173 of 2012

> 21. Torres determined that an award of exemplary damages has to be proportional to the defendant's conduct. Proportionality had to be examined in serval dimensions, namely: (i) the blameworthiness of the defendant's conduct, (ii) the degree of the vulnerability of the plaintiff, (iii) the harm or potential harm directed specifically at the plaintiff, (iv) the need for deterrence, (v) after taking into account penalties both civil and criminal which had been or were likely to be inflicted on the defendant for the same conduct, and (vi) to the advantage wrongfully gained by the defendant from the misconduct."

97. The evidence from the witnesses for the Defendant was that the purpose of the Tender was for the provision of the medical equipment, to be used in the public health facilities which were managed by the Defendant. Ms Miller-Meade stated at paragraph 33 of her witness statement that the Defendant rescinded the Letter of Award not only due to the lack of sufficient funds by as she explained at paragraph 34 of her witness statement that it was brought to the attention of the Tenders Committee by members of the Defendant's Board that the Board was of the opinion that the price quoted by the Claimant was exorbitant and that the Board could not ratify the decision of the previous Board in good conscience.

98. Ms Baney stated at paragraph 23 of her witness statement that the Ministry of Health had approved the Defendant proceeding with the acquisition of the medical equipment on 11 August 2015 but when the Government changed, the award was out on hold and the new Board of the Defendant had to obtain the Ministry of Health re-approval to proceed.

99. The Defendant's letter dated 13 June 2016 rescinding the award stated that the reason was due to lack of sufficient funds.

100. In my opinion, the Claimant would not have succeeded in making out a case to be awarded exemplary damages since the reasons the Defendant did not finalise the contract were not due to malicious, oppressive or vindictive behaviour by the Defendant.

COSTS

101. The Defendant having successfully defended the claim, costs follows the event. Therefore, the Claimant is to pay the Defendant's its costs. In terms of quantum, the relevant rule is Rule 67.5(2)(b) (i) CPR as amended by Legal Notice 126 of 2011 which provides:

> "(1) The general rule is that where rule 67.4 does not apply and a party is entitled to the costs of any proceedings those costs must be determined in accordance with Appendices B and C to this part and paragraphs (2)-(4) of this rule.
>
> (2) In determining such costs the "value" of the claim shall-
>
> (a) In the case of a claimant, be the amount agreed or ordered to be paid;
>
> (b) In the case of a defendant-
>
> i. Be the amount claimed by the claimant in his claim form; or
>
> ii. If the claim is for damages and the claim form does not specify an amount that is claimed, be such sum as may be agreed between the party entitled to, and the party liable to, such costs or if not agreed, a sum stipulated by the court as the value of the claim ;or
>
> iii. If the claim is not for a monetary sum, be treated as a claim for $50,000.00"

102. The Claimant's action was for damages for breach of contract. The sums pleaded for special damages were TT $2,016,110.00 and US $91,800.00. No specific sum was claimed for loss of job opportunity so I have not taken this into account in considering the total quantum. Pursuant to Rule 67.5(2)(b) (i) CPR I have quantified the costs on the prescribed basis in the sum of $174,910.75.

Order

103. The Claimant's action is dismissed.

104. The Claimant to pay the Defendant the costs of the action pursuant to Rule 67.5 (2) (b) (i) CPR in the sum of $174,910.75.

……..

Margaret Y Mohammed

Judge