

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2015-02478

BETWEEN

BOLD MERCHANDISING AND PROMOTING COMPANY LIMITED

Claimant

AND

CARIB BREWERY LIMITED

Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: 25 March 2022

Appearances:

Mr Martin A. George instructed by Ms Sarah Lawrence for the Claimant

Mr Keston McQuilkin instructed by Ms Tonya Rowley for the Defendant

JUDGMENT

I. INTRODUCTION

[1] This matter involves a claim for outstanding fees and damages for breach of contract owed to the Claimant by the Defendant pursuant to a Merchandising Agreement between the parties.

[2] On 17th July 2015, the Claimant instituted these proceedings by filing its Claim Form and Statement of Case. The Claimant sought against the Defendant, the following relief:

1. The sum of \$133,373.25 as balance of monies due and owing on Invoice #0072 dated 3rd January 2014, Invoice #0073 dated 1st February 2014, Invoice #0074 dated 1st March 2014 and Invoice #0075 dated 18th March 2014;

2. Statutory Interest at the rate of 12% pursuant to the Supreme Court of Judicature Act for such period as the Court may deem just;
3. Damages for breach of contract;
4. Costs; and
5. Such further reliefs and/or other reliefs as the Court deems just.

[3] On 17th February 2016 the Defendant filed its Defence. No Reply to the Defence was filed by the Claimant. During the case management stage of these proceedings several adjournments were granted to afford the parties the fairest opportunities to attempt to resolve the claim amicably and without the need for a trial. Needless to say, all attempts proved futile. The matter therefore progressed to trial.

[4] At the trial, the Claimant called four (4) witnesses, namely, Germaine Vinita Dickson, Kathleen Wade, Michelle Fletcher (Sealy) and Edwin Sealy. Notably, additional witness statements were filed for Sherwin Soogrim and Haresh Ramdial but these witnesses were not called to give evidence at the trial. The Defendants called three (3) witnesses, namely, Ava Figaro, Ingram Lee Young and Miguel Marquez.

[5] Written submissions were filed by the parties and having considered same along with the totality of the evidence of the case at bar, this Court now proceeds to give its judgment in the matter.

II. THE CLAIMANT'S CASE

[6] On 21st June 2010, the Claimant (hereinafter referred to as “Bold”) entered into a written Merchandising Agreement with the Defendant (hereinafter referred to as “Carib”) wherein Bold agreed to perform merchandising services of Carib’s range of products, in both wholesale and retail trade, and to generally carry out the necessary merchandising activities and operations. Pursuant to the Agreement, Bold performed merchandising services of Carib’s products at 52 retail locations across South Trinidad.

[7] In consideration for the services provided it was agreed that Carib would pay Bold on a monthly basis \$215 per day per merchandiser employed and a professional fee of \$12,000.000. This professional fee was later increased by oral agreement between the

parties in or around April 2011 to \$12,500.00 per month as the number of stores to which Bold provided contractual services had increased. In addition to these fees, it was agreed that a bi-annual performance incentive of one month's service fee would be paid to Bold based on their efficient execution of duties.

[8] It is Bold's assertion that from the execution of the Merchandising Agreement to December 2013, they had carried out all merchandising activities and operations in accordance with the terms of the Agreement and Carib has paid without any dispute.

[9] On 3rd January 2014, Bold submitted to Carib, Invoice #0072 for the sum of \$1,437.50 representing the cost of Christmas Decorations done in December 2013. On 1st February 2014, Invoice #0073 was submitted by Bold to Carib for work done for the month of January in the sum of \$121,550.75.

[10] Bold averred that despite not receiving payment of Invoices #0072 and #0073 for the Christmas decorations and for the works done in the month of January, they continued to hire merchandisers and carry out their services in good faith and in accordance with the terms of the Agreement; in fact, they continued to perform the services and operations required under the Agreement until 14th March 2014.

[11] On 19th February 2015, Bold caused its attorneys to write to Carib requesting payment of the monies due and owing on Invoice #0073.

[12] Although payment was not made, Bold continued to submit invoices to Carib and on 1st March 2014, they submitted Invoice #0074 to Carib for the sum of \$103,513.00 for works and services performed for the month of February.

[13] On 5th March 2014, Bold's caused its attorneys to write further correspondence to Carib indicating that no payments were made and that, as a result, Bold was unable to continue operations. Bold further indicated that it understood that Carib was disputing the amounts of monies owed and requested the undisputed sums of monies to be paid.

[14] By 14th March 2014, Bold averred that they could not continue the Agreement with Carib having not received the promised payments from Carib from Invoices #0072,

#0073, #0074 and being unable to pay its employees' salaries, Bold decided to terminate the Merchandising Agreement.

[15] A few days later on 18th March 2014, Bold submitted to Carib Invoice #0075 for the sum of \$43,184.00 representing works and services provided by Bold for the month of March prior to the termination of the Agreement. At that date, Bold asserted that Carib owed the company the total sum of \$269,685.75 representing fees due and owing for services performed by Bold between the months of December 2013 to March 2014.

[16] On 21st March 2014, Carib forwarded to Bold a cheque in the amount of \$136,312.00 representing the fees which Carib did not dispute as due and owing to Bold for services performed between the months of December 2013 to February 2014. As such, Bold insisted that Carib owed them the outstanding balance on Invoices #0072, #0073, #0074 and #0075 in the sum of \$133,373.25. However, Carib has failed and/or refused to respond or pay the said sum or any at all. By letter dated 7th April 2014, attorneys for Bold acknowledged Carib's payment made but noted the outstanding sum was still owed to them. Yet, no further payments were made towards the invoices.

[17] On 15th July 2014, an extensive meeting was held at the office of Bold's attorneys with Carib's Corporate attorney, Mr Sean Griffith, and oral assurances were made by him that the disputed sum of \$133,373.25 would be paid by Bold within two (2) days of the said meeting. Bold averred that they made several attempts to contact Carib for the collection of the outstanding debt, however, these attempts proved futile. It was thus submitted that Carib has failed and/or refused to honour the terms of the Merchandising Agreement and is in breach of same.

III. THE DEFENDANT'S CASE

[18] Carib averred that pursuant to Schedule 1, Clause 9 of the Merchandising Agreement, Bold was required to submit on a monthly basis to Carib duly completed worksheets, completed monthly route schedules and monthly reports for each merchandiser in the employ of Bold. These documents were required to assist in Carib's verification and reconciliation of the work performed by the Claimant and the amount billed.

- [19] With respect to the payment of the Bonus Incentive as prescribed in Schedule 3 of the Agreement, Carib asserted that this was determined by them subject to Bold's performance of the items thereunder at an acceptable level.
- [20] Carib asserted that when Ms Figaro informed Ms Fletcher of the requirement to submit aforementioned documents, Ms Fletcher on behalf of Bold acknowledged the request and agreed to comply with same. However, between October 2013 and March 2014, Bold failed to submit the completed documents which correlated with the amount billed.
- [21] Carib further averred that they consulted with their customers who were unable to provide corroborating information that Bold had completed all of the work for which they billed. Carib thus denied that Bold performed all of the merchandising activities and operations in accordance with the Agreement.
- [22] With respect to Invoice #0073, Carib asserted that this was submitted without all the documents to support the amount billed and when Carib contacted Bold informing them of the incomplete supporting documents and requesting same, Bold provided them with piecemeal additional information. Upon Carib's reconciliation, it was noted that the supporting documents evidenced only \$77,079.50 worth of work performed by Bold and not the sum of \$121,550.75. Similar discrepancies were noted by Carib with respect to Invoice #0074.
- [23] Carib asserted that Bold repudiated the contract and although Carib requested to meet with Bold to discuss their repudiation, Bold failed and/or refused to meet with them.
- [24] It was averred by Carib that they paid Bold the sum of \$136,312.00 which they say accurately represents payment for the services performed by Bold based on the documents that Carib has in its possession. Carib admitted that they did not provide Bold with the sums claimed as Bold was in breach of the Agreement as it has not substantiated the invoices submitted with any supporting documents; and the documents that have been provided by Bold, failed to correlate with the Invoices.
- [25] As it relates to Invoice #0075, Carib asserted that they agreed to pay this invoice as the documents submitted could substantiate the work done by Bold. They thus prepared a cheque with respect to same and were prepared to issue it to Bold. It should be noted that

after the filing of the claim, Carib submitted a cheque in the sum of \$40,175.00 representing the undisputed sums owed to Bold in respect of Invoice #0075. This payment was accepted by Bold. Accordingly, this Court deducted this sum from the amount claimed and will now determine whether Bold is entitled to the outstanding sum of \$93,198.25 in respect of the monies due and owing under the respective invoices.

IV. ISSUES

[26] Upon consideration of the pleadings filed by both parties, evidence led at the trial and the submissions of Counsel on both sides, the main issues that fall to be considered by this Court are as follows:

- (i) **Whether Bold is entitled to recover the outstanding sums of money under the relevant invoices for the work done? In consideration of this issue the following sub-issues must be determined:**
 - a. Was the submission of the monthly worksheets per merchandisers by Bold to Carib an obligation under the Agreement?*
 - b. Was the Agreement an entire obligation contract?*
 - c. Whether the submission of the monthly worksheets per merchandisers was a condition precedent for payment?*
 - d. Did Bold abandon the Agreement?*
 - e. Is the principle of substantial performance relevant to the case at bar?*
- (ii) **Whether Bold is entitled to claim damages for breach of contract?**

V. LAW & ANALYSIS

Issue 1(a): Was the submission of the monthly worksheets by Bold to Carib an obligation under the Agreement?

[27] According to **Chitty on Contracts**, “the general rule is that a party to a contract must perform exactly what he undertook to do. When an issue arises as to whether performance is sufficient, the court must first interpret the contract in order to ascertain the nature of the obligation (which traditionally considered to be a question of law); the next question is to see whether the actual performance measures up to that obligation (which is a question of “mixed fact and law”) in that the court decides whether the facts of the actual

performance satisfy the standard prescribed by the contractual provisions defining the obligation.¹”

[28] Carib submitted that the Merchandising Agreement prescribed the obligations of the parties. The nature of the obligation required Bold to provide Merchandising services to Carib. The performance of those activities was supposed to be captured in monthly worksheets, monthly route schedules and monthly reports for each merchandiser in accordance with Schedule 1 provided by Bold to Carib.

[29] The worksheets were required to be duly completed on a monthly basis in accordance with the said Schedule 1, Clause 9. Duly completed meant in the proper way or in the appropriate way. Therefore, the Agreement expressly provided for the nature of Bold’s obligation.

[30] It was submitted that the services provided by Bold’s merchandisers generally included retrieving stock from the storeroom of the outlet, product placement and positioning in accordance with the planogram provided by Carib and store support services including the replenishing of stock on the shelves and in chillers.

[31] Carib’s obligation was mainly to pay Bold upon completion and verification of merchandising services provided to them.

[32] A worksheet was supplied by Carib to Bold which provided space for the Merchandisers to complete the following information:

- (i) Name of the Supermarket/outlet;
- (ii) Time they arrived and departed the supermarket/outlet;
- (iii) What was done i.e. the quantity and brand of goods packed unto the shelves and chillers; and
- (iv) Signature from the manager or supervisor of the store.

[33] It was submitted by Carib that the purpose of the worksheet, as admitted by the witnesses for Bold, was to assist Carib in verifying what work has actually been done.

¹ 33rd edition page 1587

The worksheets were reconciled with the invoices submitted by Bold. Further, they assisted Carib in understanding the movement of its products. Carib would be able to ascertain which products were doing well i.e. consumed more in certain areas and therefore allow them to ensure adequate stock was provided. Additionally, Carib would be able to assess which products were underperforming.

[34] It should be noted that prior to October 2013, Bold did not submit monthly worksheets for each merchandiser employed with their invoices. At that time the Sales Manager was Mr. Sheldon Roach who left Carib in September 2013.

[35] On 29th October 2013, Ava Figaro (the then Assistant Business Development Manager) for Carib informed Bold via email through its Director, Michelle Fletcher, that they were required to submit weekly and monthly report sheets from their merchandising team for the month of October and every month thereafter by the fifth working day of the new month in order to facilitate the processing of payments.

[36] Upon receipt of the worksheets and invoices, Ms Figaro was responsible for reviewing the worksheets submitted by Bold. She was required to review each sheet and check it against the Invoice submitted by Bold. Thereafter, Ms Figaro reported to Mr Lee Young, the Sales Manager with the responsibility for Supermarket Merchandising, that the Worksheets and invoices matched. The Sales Manager would sign off for payment to Bold. Any discrepancies identified were reported to the Commercial Director, Mr Marquez.

[37] In the evidence of Ms Figaro, she stated that from November 2013, Bold started submitting their worksheets. Carib contended that there is no evidence that Bold complained, or opposed the requirement on the basis that it did not form part of the Merchandising Agreement. They complied with the request to submit the duly completed worksheets. They were therefore well aware of their obligation to provide Carib with monthly worksheets duly completed in the manner set out in the document.

[38] Bold, however, took issue with Carib's rationale for non-payment which was based on their alleged failure to provide "duly completed worksheets". Bold contested Carib's

argument that the worksheets were not duly completed because they did not contain the name of the products, the name of the supermarket or signatures from managers. According to Bold, these specific requirements were not provided for in the Merchandising Agreement under Schedule 1:9 and in requiring same, Carib was effectively seeking to impose unilateral and completely new requirements into the Agreement ex post facto as their ruse or devise to avoid payment of the sums lawfully owed.

[39] Bold also contended that Carib had applied requirements relative to the Bold's eligibility for the bi-annual performance incentive to the requirements for basic pay under the contract with respect to this worksheet. They asserted that this could not be allowed by the Court as Carib could not unilaterally super-impose extraneous terms and conditions from the arrangement for the performance bonus pay and then apply them arbitrarily to the specific contract for basic pay.

[40] It was suggested by Bold that Schedule 1:9 only required the submission of duly completed worksheets for each merchandiser on a monthly basis, no specifications were given as to the content. However, according to Schedule 3:14 of the Agreement, in order for Bold to qualify for the Performance Incentive, the company was required to "prepare and submit daily and summary reports on performance, stock usage, stock movement. This requirement for daily reports on the performance and information relating to stocks was required only as it relates to Bold's eligibility for the bi-annual performance incentive and it was not a condition precedent for basic payment.

[41] Bold advanced that Carib has submitted no evidence to suggest that Bold failed to carry out its obligations in relation to its merchandising activities for basic pay pursuant to the Merchandising Agreement or received any negative reports about Bold's services.

[42] From the submissions and evidence on both sides, it is evident that both parties agreed that there was a contractual obligation on the part of Bold to submit duly completed worksheets to Carib.

[43] However, the bone of contention was whether the contents and manner of completion of the worksheets required by Carib was contemplated under the Agreement as a requirement for basic remuneration for the services of Bold's merchandisers. It is clear

on the evidence that at the time of the signing of the Merchandising Agreement, there was no standard form worksheet agreed between the parties. In fact, this requirement for the submission of worksheets was first being properly canvassed and enforced three years after the commencement of the Agreement.

[44] While Bold in its submissions tried to advance that the specifications of the name of the products, the name of the supermarket or signatures from managers were not contemplated by the Agreement and were new requirements unilaterally imposed by Carib, this Court was not convinced with this argument.

[45] This was a commercial contract between the parties and both parties are expected to construe the terms in sensible business-like manner. In the Privy Council case of **Southland Frozen Meat and Produce Export Co. Ltd. v. Nelson Brothers Ltd. [1898] A.C. 442**, Lord Herschell in delivering the judgment said, at p. 444, that the commercial agreement:

“... must be construed in a business fashion, and that the words must not be applied to everything that might be said to come within a possible dictionary use of them, but must be interpreted in the way in which business men would interpret them, when used in relation to a business matter of this description.”

[46] While the words ‘duly completed’ literally mean in an appropriate or proper manner, what was appropriate or proper had to be construed in relation to the nature of merchandising agreement between the parties.

[47] The evidence of Ms Fletcher, under cross-examination, clearly evinced that although the contract did not specify what duly completed worksheets meant she accepted that worksheets were supposed to include the name of the merchandiser, the date the merchandiser worked, the supermarket they worked at, the time that the merchandiser was there at the supermarket, the stock that was replenished or packed at the supermarket if there was need to do so and general comment if no such stock was packed out.

[48] Ms Fletcher also accepted that the reason that this detail was required by Carib was because Carib wanted to keep an eye on the work that was done and its stock at different

supermarkets and agreed that she understood the importance of Carib's rationale for requiring a completed worksheet with all the aforementioned information.

[49] In light of this evidence, it was clear that Bold fully appreciated what the contents of a duly completed worksheet required. The absence of actual specification in the Agreement of the meaning of 'duly completed' or a standard form agreed between the parties at the onset did not prevent the parties from reasonably construing what the term meant.

[50] Moreover, Bold raised no complaint with Carib as to the contents of the worksheets for several months until Carib denied payment to them due to worksheets that were missing or improperly completed.

[51] I therefore reject Bold's argument that the specification amounted to an imposition of new contractual requirements by Carib in the worksheets they provided. I also reject that these specifications were requirements solely for the eligibility for the Performance Incentive. It is this Court's view that the contents of the worksheet provided by Carib included specifications that were reasonable given the nature of the parties' business arrangements as they provided Carib with relevant information to ascertain and verify the work and services performed by Bold under the Merchandising Agreement. Accordingly, Bold had an obligation to submit worksheets that were properly completed in the manner prescribed by the document.

[52] It is thus left to be determined whether the fulfilment of this obligation by Bold was a condition precedent for payment of their invoices by Carib.

Issue 1(b): Was the Merchandising Agreement an entire obligation contract?

[53] It is Carib's submission that the Agreement was an entire obligation contract. Carib asserted that Bold had to completely perform their merchandising services as a condition precedent for their receipt of payment. The contract was not divisible. If Bold failed to perform the Agreement in its entirety, then Carib was not obligated to make any payments. Similarly, if Bold failed to perform or abandoned the Agreement before completion, then they are not entitled to sue for past work.

[54] Bold, however, argued that Carib's reliance on the doctrine of entire contracts was misconceived as it relied on the principle as its basis for applying the specific bonus pay requirements to the basic pay terms and conditions. It was submitted that during the course of dealings, payment was made to Bold in proportion to the work done for the particular month, specifically using the number of merchandisers that worked and the number of hours worked. This sum was subject to change depending on these factors and payment for those services were independent of the bi-annual performance incentive requirements.

[55] It is Bold's position that the Merchandising Agreement contained divisible basic merchandising obligations which Bold is entitled to be paid for, separate and apart from the issue of whether the Head Merchandisers claims are substantiated or not. It was submitted that notwithstanding the challenge to the Head Merchandisers duties, Carib has not pleaded in respect of all the other merchandisers that work was not done.

[56] Guidance on the principle of entire contracts is set out in **Chitty on Contracts**. It states:

*"A contract is said to be "entire" when complete performance by one party is condition precedent to the liability of the other, in such a contract the consideration is usually a lump sum which is payable only upon complete performance by the other party (hence, the reference is sometimes to a "lump sum contract"). The opposite of an "entire contract" is a "divisible contract" which is separable into parts, so that different parts of the consideration may be assigned to severable parts of the performance e.g. an agreement for payment pro-rata."*²

[57] It was well established in the seminal case of **Hoenig v Isaacs [1952] 2 ALL ER 176** that whether a contract is entire or divisible is a question of construction. A determination on same will essentially be the deciding factor on whether a party would be entitled to recover monies for work done under a contract.

[58] **Halsbury's Laws of England** states:

² 33rd edition para 21-028

*“Where the contract or obligation is 'entire' then a claim for payment cannot be brought for work done under the contract unless the claimant has fully or substantially performed the obligation in respect of which payment is sought. In contrast, where the contract is divisible or severable the claimant is entitled to recover payment for those obligations the performance of which he has completed, even though his failure to complete performance of the contract as a whole is a breach of contract. Thus the obligation to pay for work done under a divisible part of a contract is independent of the performance of other parts of the contract.”*³

[59] The effect of entire contracts was well seen in the *locus classicus* case of **Sumpter v Hedges [1898] 1 Q.B. 673**, a decision of the Court of Appeal of England and Wales. In that case the Plaintiff, a builder, was contracted to erect two houses and stables upon the Defendant’s land for a lump sum payment. After he had completed part of the work done, he received payment of part of the price. He later informed the defendant that he was out of funds and could not continue the work and he left the job. Thereafter, the defendant finished the buildings on his own accord and utilized certain building material which the Plaintiff left on the ground of the premises. Accordingly, the plaintiff brought an action against the Defendant for work done and material provided.

[60] At the lower Court, the learned judge found that while the Plaintiff was entitled to the value of the materials so used by the Defendant, he denied the claim for works done and he concluded that the actions of the Plaintiff amounted to an abandonment of the contract. This decision was affirmed by the Court of Appeal. It was held that the Plaintiff could not recover the lump sum payment pursuant to the contract but could recover for work done on a *quantum meruit* if there was evidence of a fresh contract to pay for the work already done. However, no such evidence of a fresh contract to pay for work done was found and as such the appeal was dismissed.

[61] This learning was followed in the case of **Hoenig v Isaacs (supra)** where it was stated at paragraph 178 of the judgment that

³ Halsbury’s Laws of England Vol 88 (2019) para 517

“In a contract to erect buildings on the defendant's land for a lump sum, the builder can recover nothing on the contract if he stops before the work is completed in the ordinary sense—in other words, abandons the contract”.

[62] Similar conclusions were made in the case of **Appleby v Myers (1867) LR 2 CP 651**.

In this case, while the work was in progress, the premises and the work so far done on them were destroyed by fire. Although the court held that both parties were excused and no liability was apportioned, Blackburn J at (L. R 2 C. P 661) noted that-

“... the plaintiffs, having contracted to do an entire work for a specific sum, can recover nothing unless the work be done ...”

[63] In determining whether the Merchandising Agreement was an entire contract, due consideration of the construction of the Agreement was carried out by the Court. I found Sections 1, 5, 11.2, and Schedules 1 and 2 to be of particular relevance.

Section 1 of the Agreement referred to **Services to be provided by Contractor to the Company**. It states:

The services must be provided in accordance with the service guidelines set out in Schedule 1 hereto.

Section 5 referred to the conditions for **Remuneration** and it states:

In consideration of the Services to be provided by the Contractor to the Company, the Contractor will receive the service fee as set out in Schedule 2.

Section 11.2 under Miscellaneous Provisions, deals with **Amendments** to the Agreement. It states:

No amendment, variation or waiver of this Agreement or any provision of this Agreement shall be effective unless it is in writing and duly executed by or on behalf of both parties.

Under **Schedule 1**, there were 11 **Service Guidelines** listed that the Contractor was required to perform. An example of some of the Guidelines referred to are as follows:

*1. The Contractor **shall** perform all duties as shall be directed by the Company through an authorized person.*

2. *The Contractor **shall** employ all such personnel and equipment as may be necessary to effectively perform his duty in his assigned geographic area and ensure that all such personnel are trained in their duties and shall at all times project an image in keeping with the Company's high standard as a producer and distributor of high quality products and services.*
7. *The Contractor **shall** merchandise the Company's range of products in line with accepted merchandising principles and practice as regards to price, position and presentation.*
9. *The Contractor **shall submit** to the Company duly completed worksheets for each merchandiser on a monthly basis.*
10. *The Contractor **shall submit** to the Company a complete monthly route schedule and duly completed reports on a monthly basis for each merchandiser in its employ.*

Under **Schedule 2 on Fees**, it states:

In consideration of the services to be provided, the Company agrees to pay the Contractor on a monthly basis as per the following schedule based on the number of merchandisers employed. Additionally, a professional fee would be paid on a monthly basis.

All payments will be inclusive of statutory and all other charges and expenses not limited to but including Administration, secretarial, stationary, Vehicle Maintenance, PAYE, NIS, Health Surcharge and Vacation expenses.

[64] From the above-mentioned contractual terms, it is noted that the services to be provided under Agreement were required to be performed in accordance with Schedule 1. Schedule 1 dictated eleven (11) mandatory Service Guidelines that were to be performed by Bold and by extension its merchandisers. Remuneration was to be paid by Carib in accordance with Schedule 2 in consideration of the services to be provided by Bold. Mutual performance was required by both parties for the operation of the Agreement, thus Bold was required to comply with the mandatory service guidelines and in exchange Carib was

required to pay them on a monthly basis based on the number of merchandisers employed as well as a professional fee.

[65] It is this Court's view that the Agreement was a lump sum contract that contemplated that the consideration was one and entire, accordingly, consideration (in this case the remuneration fees under the Schedule 2 of Agreement) did not pass to Bold unless and until the entire of the Agreement was performed. There was nothing on the construction of the Agreement that suggested that remuneration was contingent on Bold's performance of severable parts of the Agreement or some of its services. In this regard, I find the Merchandising Agreement was an entire contract and performance of all the services guidelines were required for remuneration to be paid to Bold.

Issue 1(c): Whether the submission of the monthly worksheets per merchandisers was a condition precedent for payment?

[66] It was admitted by Carib that prior to October 2013, Bold did not submit worksheets to Carib. At the time the Sales Manager was Mr. Sheldon Roach who left Carib in September 2013. However, according to the evidence of both Ms. Figaro and Mr. Marquez, in October 2013 as a result of a meeting with the Auditors, Bold was advised by an email to submit all of their worksheets by the fifth day of the following month to facilitate payment being processed. On 30th October 2013, Mr Fletcher replied indicating, "*OK Ava. We will get them to you.*"

[67] Ms. Figaro also stated that after November 2013, she frequently reminded Bold of the deadline to submit worksheets. Upon receipt, she went through the worksheets, reconciled them and then sent them to Mr. Lee Young. If anything was missing she would request the missing documents from the merchandising supplier.

[68] It was submitted by Carib that even if they had erred in enforcing the terms and conditions of the Agreement prior to October 2013, they began to do so thereafter and made it clear to Bold that they wanted the worksheets in support of their invoices. They further indicated to Bold that they would be paid after reconciliation of the worksheets with the invoices. If that reconciliation could not be accomplished due to late submission of the worksheets, then Bold was aware that they would not be paid until the reconciliation was complete.

[69] Carib submitted that Bold ought not to have been surprised when they were asked to provide worksheets to support the sums claimed in the invoices. Even if they had grown accustomed to certain procedures, they could not complain because Carib's request was consistent with the terms and conditions of the Agreement and these documents were essentially proof of Bold's performance of their merchandising services.

[70] Bold, however, submitted that submission of worksheets and detailed route schedules for the merchandisers was not a condition precedent to payment. Based on the parties' course of dealings for years, prior to October 2013, the worksheets were not submitted to then Sales Manager at Carib, Mr Sheldon Roach. Submission of such documentation therefore did not go to the root of the parties' dealings and payment was never dependent upon same. It was asserted that Carib was fully aware through the actions of its Sales Manager, Mr Roach, that such documentation was never a pre-requisite for payment to be made.

[71] In fact, the evidence of Ms Figaro revealed that the requirement for submission of worksheets only came about due to a meeting with Carib's auditors in October 2013, where the auditors indicated that the worksheets were necessary for the audit. Bold submitted that Ms Figaro also admitted that the worksheet requirement was derived purely out of an internal audit function. Accordingly, the submission of the worksheets was not a pre-condition for payment of invoices as invoices were paid for many years without it and more importantly, it formed no part of the contractual obligations for basic Merchandisers' pay.

[72] It was asserted that there was a history of payment in the absence of worksheets/timesheets being submitted. It was advanced that Ms Figaro in her witness statement admitted that payments were made to Bold by Carib between 2012 and 2013 without worksheets. Furthermore, in the evidence of Mr Miguel Marquez he indicated that he only became aware that Bold was not submitting invoices after the former Sales Manager, Mr Roach, left or around September 2013. Additionally, Mr Marquez admitted that payments were made in December 2013 even though worksheets were not submitted because he was satisfied that services were rendered. This, Bold asserts, was clear evidence that the submission of worksheets was never a requirement or pre-condition for payment.

[73] Moreover, Mr Lee Young confirmed that at the time Bold submitted worksheets for December 2013, the invoice for the same month was already paid by Carib. This thus evidenced payments had been made without the submission of worksheets/timesheets and was therefore not a requirement or pre-condition for payment.

[74] From the evidence led at the trial, it is evident that prior to 2013, Bold did not submit monthly worksheets to Carib although it was a requirement under the Agreement. Although, this Court accepts that Carib had neglected in its duties to enforce the requirement for the submission of worksheets, I do not agree with Bold's argument that the submission of monthly worksheets did not go to the root of the contract. As discussed above, the worksheets were designed to provide Carib with the relevant information to ascertain and verify the work done by Carib. It was essentially evidence of performance of the Agreement. It was admitted by Carib that they had erred in that regard and in the evidence of Mr Marquez, this amounted to a "dereliction of duty" on the part of Bold as well as Carib in its failure to enforce the requirement.

[75] It was an important condition precedent to the contract that Carib failed to enforce. This failure was a matter of inefficient commercial practice and a contractual oversight that was identified by Carib's auditors but it did not negate the importance of the condition. In fact, while there was no evidence of any express waiver of the requirement to submit monthly worksheets, it is this Court's view that prior to 2013, Carib had impliedly waived the condition that Bold was required to submit monthly worksheets when it made payments to them in the absence of same.

[76] **Halsbury's Laws of England, Vol. 16(2), 4th Edn., Para 907**, sets out that a waiver can either be express, or it can be implied by way of conduct. It states:

"The expression 'waiver' may, in law, bear different meanings. The primary meaning has been said to be the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may arise from a party making an election, for example whether or not to exercise a contractual right..."

Waiver may also be by virtue of equitable or promissory estoppel; unlike waiver arising from an election, no question arises of any particular knowledge on the part of the person making the representation, and the estoppel may be suspensory only...

*Where the waiver is not express, it may be implied from conduct which is inconsistent with the continuance of the right, without the need for writing or for consideration moving from, or detriment to, the party who benefits by the waiver, **but mere acts of indulgence will not amount to waiver; nor may a party benefit from the waiver unless he has altered his position in reliance on it. The waiver may be terminated by reasonable, but not necessarily formal, notice unless the party who benefits by the waiver cannot resume his position, or termination would cause injustice to him.***” [Emphasis mine]

[77] Accordingly, Carib’s conduct prior to October 2013 was inconsistent with the express contractual terms of the Agreement when they made payments without enforcing the requirement for the submission of monthly worksheets and thus Bold benefitted from same. However, I find that this waiver was terminated or revoked in October 2013 when Ms Figaro gave reasonable notice to Bold that they would be required to submit the worksheets by the fifth day of the following month to facilitate payment being processed.

[78] It is noted that inconsistencies were also found in Invoice #0071 which was submitted by Bold to Carib for work done in the month of December but it was paid for by Carib before final verification of the invoice against the worksheets. While, it was submitted by Bold that this was clear evidence that the submission of worksheets was never a requirement or pre-condition for payment, I cannot agree with this assertion.

[79] With respect to the **December Invoice #0071**, I noted that Ms Figaro made a request to Ms Fletcher to identify the relief merchandisers and provide the missing invoices and worksheets. However, Bold did not supply the missing items requested. Ms Figaro informed Mr Marquez that Bold was paid for this invoice although items were missing.

[80] I find that Carib's payment of the December invoice prior to the receipt of the worksheets was a mere act of indulgence. It was admitted by Mr Lee Young that this was an oversight due to the busyness of the Christmas session, however, request was made thereafter for Bold to supply Carib with the outstanding worksheets. This request, in this Court's opinion, amounted to a reassertion of Carib's rights. Thereafter, Carib continued to assert their right to enforce the Agreement. This payment in December therefore did not amount to a waiver but a mere indulgence. Accordingly, I find that the submission of worksheets was a condition precedent for payment under the Agreement.

[81] Having already established that the Merchandising Agreement amounted to an entire contract and the submission of the worksheets was a condition precedent for payment, the outcome of this case essentially turns on whether Bold has provided evidence of their satisfaction of this condition to be entitled to payment.

[82] According to Carib, discrepancies were identified by Ms Figaro in the Invoices #0072, #0073, #0074 and #0075 and supporting documents submitted by Bold. There were incidences of incomplete worksheets as well as missing worksheets for merchandisers who were recorded as employed for respective days.

[83] The evidence led by Carib showed that several requests were made between January and March by Carib to Bold for clarification and rectification of inconsistencies in their invoices. A summary of these requests are itemised below:

- On 11th February 2014, Ms Figaro informed Ms. Fletcher that there were missing sheets in respect of **January Invoice #0073** which highlighted a discrepancy between the invoice and the sheets submitted for the days worked by the merchandisers. In response by email dated 12th February 2014, Bold submitted their own typed timesheets and not the handwritten worksheets required by Carib which omitted the relevant data Carib required to verify work done, such as the signature of the managers and the work actually done. As a result of these inconsistencies, Carib proposed a meeting with Bold for 13th February 2014. Bold did not attend the meeting and it was rescheduled to 17th February 2014 but Bold also did not attend on that date.
- On 13th February 2014, Ms Fletcher received an email from Ms Figaro where she indicated that the timesheets submitted for Ms Fletcher and Mr Sealy could

not be processed. It is important to note that in these timesheets submitted for the both parties, a notation of “Head Merchandisers- All Routes” was made. Ms Figaro explained that she was under the impression that their services were covered under the monthly professional fee. This precipitated several email responses back and forth between the parties whereby Ms Fletcher asserted that the Professional fee paid to Bold was paid to Bold as a company and was totally separate from their personal capacities as Merchandisers.

- On 14th February 2014, Mr. Marquez received an email from Michelle Fletcher explaining Bold’s position. He responded by email on the same day stating that Carib was not going to pay unless they received the completed worksheets.

[84] A reconciliation exercise of all the invoices were conducted by Mr Lee Young in respect of all the documents received by Carib between December 2013 and March 2014. A summary of the inconsistencies identified by Carib in their reconciliation of the invoices of Bold is as follows:

- **December Invoice #0071:** a claim was made for work performed by 27 Merchandisers, 13 regular, 3 relief and 11 Temporary. However, based on the worksheets submitted for that month there were no worksheets for the 3 relief merchandisers and of the 510 days for the regular and temporary merchandisers, only 377 days are accounted for on the worksheets provided. Also, a sum of reimbursement for tape and dusters was unsupported by bills evidencing the amount claimed.
- **January Invoice #0073:** Bold’s Invoice for the month of January included a claim for work performed by 16 Merchandisers, 13 regular and 3 relief merchandisers. However, based on the worksheets submitted for that month there are only 15 merchandisers and not sixteen. Bold submitted a claim for “Free offer stickers”, however, no supporting invoice for this item was provided. Carib concluded that Bold did not qualify for the performance incentive which was included in the January invoice as they had failed to provide the worksheets required. These discrepancies accounted for a difference of \$25,702.50 between the invoice submitted by Bold and Carib’s reconciliation.

- **February Invoice #0074:** Bold's Invoice for the month of February included a claim for work performed by 17 Merchandisers, 13 regular and 4 relief merchandisers. However, based on the worksheets submitted for that month there are only 15 merchandisers and not seventeen. Bold submitted a claim for 23 hours of overtime, however, only 20 hours are calculated based on the documents provided by Bold. These discrepancies account for a difference of \$12,116.25 between the invoice submitted by Bold and Carib's reconciliation. The worksheets were not fully completed; names, times and even amounts of goods were missing.
- **March Invoice #0075:** Four (4) relief merchandisers were claimed for however, there were only 2 relief merchandisers listed in the timesheets. Further, Marissa Sagram was listed as a relief merchandiser but she was a regular merchandiser. Similarly, Shanice Jaipaul was a regular merchandiser but documents were submitted that she was listed as a relief merchandiser. These discrepancies meant that there was a difference of \$3,010.00 between the invoice submitted by Bold and Carib's reconciliation

[85] Carib asserted that cross-examination of Bold's witnesses also revealed further discrepancies, including:

- worksheets that were not fully completed, names, times and even amounts of goods were missing;
- the number of days claimed for work done by Merchandisers did not accord with the worksheets submitted, for example Shernice Louison claimed 21 days of work, worksheets for 20 days submitted; Nalini Mangru claimed 25 days of work, worksheets for 22 days submitted; and
- marked deficiencies were noted in a worksheet submitted by Shernice Louison dated the 2nd, 3rd and 4th January 2014. According to this worksheet, Ms. Louison arrived at the same time of both days to the same supermarkets, left the same supermarkets at the same time on both days; packed or re-stocked the shelves with the same products in the same quantities on both days; listed the time she arrived at the second supermarket on the list as 8am and the time she left the supermarket at 9am. However, her arrival time at the third supermarket is 8.30am. It is not possible for Ms. Louison to arrive at the third supermarket

whilst still at the second. Further, Bold submitted a claim for overtime for 15 merchandisers, however, upon cross-examination of Bold's witness they showed that Merchandisers, Shernice Louison, Kathleen Wade, Shanice Jaipaul and Anna Solomon did not work more than the requisite number of regular hours to qualify for overtime. Yet a claim was made by Bold for those persons for overtime.

[86] Carib advanced that Bold failed to provide documents that supported the entirety of the invoices claimed by them and they also did not challenge the reconciliation done by Mr Lee Young under cross-examination. This according to Carib, evinced the lack of documentary proof provided by Bold in support of their invoices.

[87] It was asserted by Carib that the major issue with the worksheets submitted by Bold for the months of January and February 2014 were worksheets submitted on behalf of Ms. Michelle Fletcher and Mr. Edwin Sealy. Carib contended that both of them were not among the regular merchandisers agreed with Carib. It was submitted that at the time of signing the agreement Ms Fletcher was the Manager of Bold and not a merchandiser. In accordance with the Agreement, Bold, managed by Ms. Fletcher, would be paid a professional services fee of \$12,000.00 per month, which was increased to \$12,500.00. Bold would therefore be responsible for managing the Merchandisers and ensuring, inter alia, that the Agreement was performed. Moreover, despite arguments to the contrary by Bold, Ms Fletcher and Mr Sealy's evidence did not collectively indicate that on a daily basis they were performing the job of merchandisers, i.e. collecting stock from the stockrooms of the various supermarkets and restocking the shelves.

[88] Additionally, the worksheets actually submitted on behalf of Ms. Fletcher and Mr. Sealy, simply drew a line through the sheet and had written on it "Head Merchandiser All routes." The expressed statement by them both was that they were at all of the supermarkets in the entire Southern area of Trinidad every day, all the time. Carib submitted it is impossible and/or improbable, that they performed the services of merchandisers at each supermarket every day all day for the entire months of January and February 2014, when geographically it is impossible to do, a fact admitted by Ms. Fletcher in cross-examination.

[89] Further, the worksheets that Carib refused payment of were only submitted in March 2014. Carib concluded that this meant that neither Ms. Fletcher nor Mr. Sealy kept any record of what they did in the months of January and February 2014 and only when challenged to provide evidence by Carib of the work done that they produced improperly prepared Worksheets.

[90] Additionally, Bold had failed to provide any evidence that the work performed by Ms. Fletcher and Mr. Sealy in overseeing the performance of the Merchandising Agreement and assisting on occasion was not captured by the payment of the Professional Services Fee.

[91] It should be noted that Bold did accept that their claim for payments in respect of the Head Merchandisers were unsupported by evidence. This Court was hard pressed to accept the evidence of Ms Fletcher and Mr Sealy that they visited all the outlets or routes on a given day to support their claim for payment of the daily merchandiser fees. Moreover, indication written on the timesheets and worksheets of 'All Routes' did not provide any evidence to indicate the nature of work performed by them to entitle them for payment as regular merchandisers. Frankly, from the evidence advanced by the Claimants, their role appeared to be more supervisory and managerial and was thus separate and apart from the duties performed by the regular merchandisers. In fact, such supervisory duties were more appropriately accounted for under the Professional Services Fee. Whether or not that sum was reasonable to sufficiently compensate Mr Sealy and Ms Fletcher for their duties, is irrelevant to this Court's determination of the entitlement. Accordingly, I am not satisfied that these worksheets were proof of work done to support payment.

[92] Since the worksheets with respect to Ms Fletcher and Mr Sealy were submitted by Bold to resolve the inconsistencies without more, there is no evidence before this Court to controvert the discrepancies identified in the reconciliation done by Carib and prove that the work claimed for was actually done.

Issue 1(d) and 1(e): Abandonment of the Agreement; and the relevance of the principle of substantial performance, are dealt with together hereunder.

[93] Further, Carib asserted that it is Bold's pleaded case that they decided to terminate the Merchandising Agreement on or about 18th March 2014 before completing their obligations pursuant to the Agreement. Their termination was accepted by Carib. Having regard to the aforementioned authorities, Carib surmised that Bold was therefore not entitled to sue for past work, they having abandoned the contract.

[94] Additionally, it was advanced that Bold could not correctly complain that Carib failed to pay them on time for the work performed in January and February 2014, since they failed to submit on time and in accordance with the Merchandising Agreement, their duly completed worksheets. It was noted that the January 2014 worksheets were only submitted in March 2014. That failure, Carib concluded, meant that Bold did not fully perform their obligations under the Merchandising Agreement and therefore could not maintain a claim against Carib for their failure to pay.

[95] It was however advanced by Bold that even if the Court interpreted the contract to be an entire obligation and found that the provision of duly completed worksheets was a condition precedent to payment, Bold was nevertheless entitled to payment for services substantially performed. Bold denied Carib's argument that they were owed nothing as they only partly performed its obligations.

[96] Bold asserted that they did not leave any work unfinished or abandoned the contract. Further, Bold never received complaints either orally or in writing from Carib about the services provided. Thus, Carib could not withhold payment on account that some worksheets singled out for certain months were not "duly completed".

[97] Bold submitted that they did not abandon the contract, rather, they were forced to bring the contract to an end as it could not afford to pay its workers and thus Bold's inability to perform the contract was due to the fault of Carib which allowed Bold to terminate the contract. In fact, despite Carib's delayed payments for a number of months and non-payment for sums claimed, Bold nevertheless continued to duly provide merchandising services until March 2014. Thus they ought to be paid for work substantially done.

[98] In support of their submissions on the doctrine of substantial performance, Bold relied on the cases of **H. Dakin & Co Limited v Lee [1916] 1 KB 566**, **Hoenig v Isaacs (supra)**

and **Chitty on Contracts**. Upon review of the aforementioned authorities, I did not find them to be of relevance based on the facts of this case.

[99] Unlike the cases cited by Bold which concerned construction contracts, evidence of work performed in this case was not immediately or tangibly apparent on the face of it. Unless Carib through its representatives were physically present at the outlets in which Bold's merchandisers were employed, there was no evidence of proof of work besides the worksheets or reports which assisted in verification of work done. In the absence of same the question of substantial performance does not rise as there is no evidence to dictate or verify that work was in fact done or substantially done by the merchandisers for which a claim was made. As the Contractor hired under the Agreement to perform merchandising services, the burden of proof was on Bold to provide Carib with the relevant documentary evidence to show the work that was done to support their invoice for payment. While it was asserted by the representatives of Bold that they provided Carib with timesheets for each merchandiser to support payment, I did not find that these timesheets were of any assistance to Carib and certainly this Court in determining what work was done by Bold merchandisers. They merely included the name of the merchandiser and the days worked.

[100] Despite submissions by Bold to the contrary, absence of complaint is not evidence of work done. Certainly, in the ignominious tale of the Emperor's New Clothes the fact that the Emperor did not complain was assuredly no proof that the weavers had in fact sewn his clothes. Accordingly, Bold could not claim for work done by their merchandisers based on the doctrine of substantial performance as there was no evidence that any work was done by these merchandisers.

[101] With respect to the issue of abandonment of contract, the Court accepts the evidence of Bold that Carib's non-payment of their invoices placed them in some financial difficulty and affected their ability to pay its workers. However, I find that the position taken by Carib not to pay the invoices was justified given that Bold's provision of the worksheets were a condition precedent for payment.

[102] It is this Court's view that the fault of Bold's financial difficulty laid not at the feet of Carib but at theirs. Carib disputed payment of Bold's invoice on 11th February 2014. It is evident from the email exchanges between the parties that they both shared differing

views as to the inconsistencies with the invoices and the worksheets provided. A meeting was proposed by Carib to discuss the issues between the parties but Bold failed to attend on both occasions even when the meeting was scheduled. It is this Court's opinion, that with this proposed meeting the stage was set for both parties to potentially have meaningful discussions and resolve the issues regarding the worksheets and invoices.

[103] Instead, Bold chose to engage Counsel (which was their right) first and forwent the opportunity for possible amicable settlement or mutual understanding that could have arisen from a face to face discussion. Unfortunately, the introduction of attorneys did not bridge the divide between the parties but produced further acrimony. The Court cannot turn a blind eye to this approach taken by Bold.

[104] Further, from the email correspondence of Mr Marquez on 14th February 2014, Bold was well aware that Carib was not prepared to settle the invoices received in the absence of the relevant supporting documents. Yet, Bold though aggrieved, did not suspend performance in the absence of payment but continued to employ merchandisers to their detriment until March 14th when they terminated the Agreement. They also waited until March 2014 to supply Carib with the requested outstanding worksheets. By this delayed submission of documents, Bold ought to have anticipated that payment would not have been automatic as Carib would have required time to verify the documents before processing payment.

[105] In the given circumstances, I find that Carib cannot be blamed for their non-payment of the invoices and Bold's termination of the contract. In fact, I find that Bold abandoned the Agreement and thus could not claim for past work performed. Accordingly, the Court makes the following finding with respect to Invoices #0072, #0073, #0074, #0075.

Invoice #0072

[106] With respect to this invoice representing the cost of Christmas decorations, I agree with the submissions of the Defendant that the Claimant is not entitled to the sum of \$1,437.50 in the absence of documentary evidence in support of their claim. Notwithstanding the oral evidence of Ms Fletcher/Mr Sealy that such works were performed by Bold, there is no other evidence before this Court, whether it be by way of photographs or receipts or any other direct evidence to substantiate Bold's claim.

Invoice #0073

[107] As it relates to Invoice #0073, I also find that the claim for monies owed is bound to fail. As discussed above the disputing worksheets of Mr Sealy and Ms Fletcher as Head Merchandisers cannot be accepted. Further, the “Free Offer Stickers” were unsupported bills and thus cannot be paid.

[108] With respect to the performance incentive, according to Schedule 2, this was to be paid bi-annually by to Bold “based on the efficient execution of duties”. Bold contended that they were entitled to the sum as they had performed the requisite work for the period of July to December 2014 without complaint by Carib. However, Carib argued that Bold failed to hand in worksheets on time and there were also missing worksheets which meant Carib could not verify whether the worked claimed had in fact been done. Further, worksheets submitted were missing required information. In this regard, Mr. Lee Young therefore concluded that Bold did not qualify for the performance incentive.

[109] It is this Court’s finding that Bold was also not entitled to payment of the Performance Incentive as they failed to provide the necessary deliverables to support payment. It was admitted by Ms Fletcher under cross-examination that Bold did not satisfy all the deliverables required to qualify for the Performance Incentive. In the absence of any evidence to the contrary, lack of complaint does not satisfy the Court that Bold efficiently performed its duties to qualify for the bonus. In any event, their abandonment of the contract disentitled them to any payment if it was owed. Thus, their claim for the bonus Incentive must fail.

Invoice #0074 and Invoice #0075

[110] In the absence of evidence to the contrary that accounts for the work done for the additional merchandisers and overtime hours, the claims under these invoices must fail. Bold is also not entitled to claim for the past work done in accordance with the doctrine of entire contracts.

[111] In the given circumstances, this Court finds that Bold is not entitled to the outstanding sum of \$93,198.25 in respect of their claim for monies due and owing under the respective invoices.

Interest

[112] Given the Court's finding that Bold was not entitled to the sums claimed under the respective invoices, the claim for interest must fail.

Issue 2: Whether Bold is entitled to damages for breach of contract?

[113] With respect to the issue of damages, Carib asserted that Bold could not maintain a claim for damages for breach of contract if that breach was Carib's failure to pay a debt. In support of this submission, Carib relied on the learning of the authors of **Chitty on Contracts at para 21-041** which states as follows:

“there is an important distinction between a claim for payment of a debt and a claim for damages for breach of contract. A debt is a definite sum of money fixed by the agreement of the parties as payable by one party or on the occurrence of some specified event or condition, whereas, damages may be claimed from a party who has broken his primary contractual obligation in some way other than by failure to pay such a debt.”

[114] Carib submitted that Bold has not particularized as part of their claim any consequential losses arising from the alleged breach of contract. In addition, there is absolutely no evidence before this Honourable Court of any consequential losses suffered by Bold. Thus, Bold was not entitled in law to recover any damages for breach of contract.

[115] It is notable that no submissions were made by Bold with respect to this issue notwithstanding its claim for this relief.

[116] Given this Court's conclusion that Carib did not breach their Agreement with Bold, I find that Bold is not entitled to any relief of damages for breach of contract. In any event, even if a breach was established, Bold failed to particularize any consequential losses

suffered by the company as a result of the breach and also failed to advance convincing evidence to prove same.

VI. Costs: Entitlement

[117] On the question of costs, the general rule on the award of costs is that the Court must order the unsuccessful party to pay the costs of the successful party: **Part 66.6(1) of the CPR**. Although this general rule is now considered to be the starting point and that the Court must take into account all the circumstances including the factors set out in **Part 66.6(4), (5) and (6) of the CPR** before deciding where costs should be allocated, I can see no basis or justification for departing from this general principle that costs follow the event.

[118] The Defendant will therefore be entitled to recover costs to be quantified on the prescribed scale. However, before such costs can be quantified the **value of the claim must first be determined** in accordance with **Part 67.5(2) of the CPR 1998**. On the basis that (i) the Defendant is the successful party; and (ii) there is a monetary amount claimed by the Claimant in the claim form, i.e., the sum of for **\$133,373.25**, in accordance with **Part 67.5(2)(b)(i)** the value of the claim is determined as **\$133,373.25**. The matter having been determined after a full trial, the Defendant will be entitled to the full prescribed costs as I have not found any reason(s) for reducing their entitlement. Prescribed Costs on **\$133,373.25** are therefore quantified in the sum of **\$29,006.29** in accordance with the **Scale of Prescribed Costs in Appendix B of Part 67 of CPR**.

VII. DISPOSITION

[119] Accordingly, in light of the foregoing analyses and findings, the order of the Court is as follows:

ORDER:

1. The Claimant's Claim and Statement of Case filed on 17th July 2015, be and are hereby dismissed.

2. Pursuant to Part 67.5(2)(b)(i) of the CPR 1998 the Claimant shall pay to the Defendant costs quantified in the sum of \$29,006.29 in accordance with the Scale of Prescribed Costs in Appendix B of Part 67 of CPR.
3. There shall be a stay of execution for 42 days.

Robin N. Mohammed
Judge