REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2011-04679

Between

WEST INDIES PLAYERS' ASSOCIATION

Claimant

and

WEST INDIES CRICKET BOARD INC.

Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. D. Kissoon instructed by Ms. S. Jadoonanan for the Claimant

Mr. C. Hamel-Smith SC instructed by Mr. L Hamel-Smith for the Defendant.

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Judgment

Introduction

1. The advent of British colonialism in the West Indies introduced to these islands a structure of governance and administration that has endured over time in one form or another and has served the West Indies well into the post colonial era. Concomitant with that structure was the introduction of a game which has since united the West Indian people in ways never before seen. From the first official international test match played by the West Indies cricket team in 1928 to the test matches of today, West Indies cricket has been at times a source of much pride and inspiration to both the young and old alike regardless of ethnicity or political affiliation.

2. However, the relationship between the players and the governing body has not over the years been of similar character. It has ultimately given rise to the dispute which forms the basis of this claim.

Disposition

3. For the reasons that follow the order of the court in respect of the claim is as follows:

    i. The interim order made on the 1st March 2012 is discharged.

    ii. The Claim is dismissed.

    iii. The Claimant shall pay to the Defendant the prescribed costs of the claim in the sum of $555,535.00.

Undisputed Facts

4. WIPA (West Indies Players Association) is the exclusive representative and bargaining agent for the players selected for their territorial teams and for the West Indies Cricket team and retained players. WICB (West Indies Cricket Board) is a company incorporated under the laws of the British Virgin Islands. The present dispute centres on the interpretation of a Collective Bargaining Agreement (CBA) and a Memorandum of Understanding (MOU) to which both WIPA and WICB are signatories. The said CBA/MOU was signed on the 4th September but had retroactive effect from the 1st October 2005. The period of the agreement was stated to continue in force from the 1st October 2005 through 30th September 2008. The CBA/MOU was never registered with the Industrial Court of Trinidad and Tobago.

5. Despite having been incorporated in the BVI, and notwithstanding the CBA expressly provides that the governing law is that of Antigua and Barbuda, WICB has agreed, by way of an amendment to the CBA dated the 22nd June 2007, that the governing law between WIPA and WICB in relation to the CBA/MOU will be that of Trinidad and Tobago.

6. The relevant provisions are as follows;

Express provisions of CBA

Article IV of the CBA:

The Incorporation of Related Documents into Collective Bargaining Agreement

The following documents are hereby incorporated into and should be read together with the Collective Bargaining Agreement:

(a) The Memorandum of Understanding

(b) The WICB Player Contract (Retainer Contract)

(c) The WICB Match/Tour Contract

(d) The Territorial match Contract"

Article V of the CBA:

Period of the Collective Bargaining Agreement

This agreement shall be for a period of three (3) years with effect from 1st October, 2005 and shall continue in full force and effect through September 30th 2008.

Article VI of the CBA:

Revision of the Collective Bargaining Agreement

a. Notice for the revision of this Collective Bargaining Agreement shall be given in writing at least three months before the expiration of the current agreement.

b. Either WICB or WIPA shall serve notice, in writing, for the revision of this Collective Bargaining Agreement and shall set out in such notice the proposed revisions to the Collective Bargaining Agreement.

c. Subject to clauses (a) and (b) of this Article, the terms of the existing Collective Bargaining Agreement, Memorandum of

Understanding, WICB Player Contract, WICB Match/Tour Contract & Territorial Match Contract shall remain in force until revised and such revisions signed by the Parties to the agreement."

Article XI of the CBA:

Section 1

(a) If a dispute arises between the WICB and WIPA out of or in relation to this agreement, a party may not commence any litigation proceedings relating to that dispute unless it has first complied with this article;…

(b)…The parties shall no later than 21 days after the other party have received the notice enter into good faith negotiations to bring about a resolution of the complaint

…

Section 2

(a) If a dispute is not resolved through good faith negotiations held within twenty-one (21) days from the date of the notice of the complaint the parties shall refer the dispute to mediation.

…

Section 4 Binding Arbitration

If there is no resolution of the grievance procedure by mediation, the aggrieved party may refer the matter to an arbitration tribunal for the expressed purpose of hearing the grievance of determining the matter."

Express provisions of MOU

Article I (k) of the MOU:

Term means the period commencing 1st October, 2005 and ending on 30 September 2008

Article IV (d) of the MOU:

Effect of Termination

The termination of this agreement will not impair, limit or terminate the rights and obligation of the WICB, a Territorial Board or a Player under any contract."

7. The CBA/MOU continued into another term without revision following the parties' inability to agree to a revision in 2009. By letter dated 30th March 2011 the Defendant gave notice of revision of the CBA/MOU by 30th June 2011 and also notified the Claimant of termination of the CBA/MOU effective the 30th September 2011 should there be no revision. It is this notice of termination which is the subject of the present dispute.

The Case for the Claimant

8. The Claimant claims that the CBA/MOU is incapable of unilateral termination. The Claimant avers that the CBA/MOU could only be terminated by:

   (1) Mutual assent of both parties;

   (2) The revision of the CBA/MOU; or

   (3) The mechanism set out in the Article XI of the CBA (Dispute Resolution Clause).

9. Consequently, the Claimant claims that the Defendant has attempted to illegally unilaterally terminate the agreements despite the CBA/MOU being clear that the intention was for the agreements to remain in force until revised. If, as was the case

here, the parties could not agree to revised terms, the Claimant avers that the agreements would either roll over for an additional term or the dispute mechanism would take effect ultimately requiring an arbitrator of the Court to determine the most suitable terms of a revised agreement. It is the Claimant's case that Article VI (Revision) ensures that where notice is given to revise the agreement the current agreement remains in force during negotiations and until the agreements are revised.

The Case for the Defendant

10. The Defendant denies that the intention of the CBA/MOU was that it would last in perpetuity subject to revision as agreed by the parties. The Defendant avers that it was clear that the parties intended the CBA/MOU to be terminable. The Defendant contends that the only two possible interpretations of the CBA/MOU which are consistent with the language of the CBA are that:

    a) Article V of the CBA (Period of CBA) should be taken to mean that the agreement was intended to last for three years, after which the CBA/MOU expires by effluxion of time or continues for an indefinite period terminable at any time upon reasonable notice by either party; or

    b) The agreement rolls over for three year periods on the same terms. Three months before each rollover the parties have an opportunity to amend or terminate, however after the agreement rolls over the parties must wait for another three year period before either can seek to amend or terminate.

11. The Defendant asserts that on a true construction of the terms of the CBA/MOU, the CBA/MOU may not be terminated or amended by either party for fixed period of three years (until 30th September 2008). A party may, three months prior to this date, give notice of revision. If the parties are unable to reach an agreement on revision, the unrevised CBA/MOU continues in effect until the end of the term. Thereafter, if no

notice of termination is given by either party, the agreement either (1) expires by effluxion of time (2) expires by agreement by the parties (which may be evinced through their conduct) or (3) remains in effect for an indefinite term until terminated by either party with reasonable notice.

12. The Defendant submits that it was not the intention of the parties that the dispute resolution mechanism be applied to the present circumstances. It submits that to find that this was the intention of the parties would essentially be to find that an arbitrator would be authorised to determine the suitable terms of a revised agreement. The Defendant avers that as a matter of law for an arbitrator to have the power to *create a new contract* between the parties such a power would have to be expressed in the clearest of terms. The Defendant claims that Article XI of the CBA does not meet this standard.

Issues

13. The court understands the issues to be determined as follows:

    i. Whether on a true construction of the terms of the CBA/MOU, there is provision for termination of the Agreements.

    ii. Whether estoppel as argued by the Claimant arises to prevent the Defendant from asserting that the Agreements are terminable.

    iii. Whether the dispute resolution clause is applicable to the present circumstances.

14. For clarity and completeness, the court will seek to set out the submissions and evidence as it relates to theses issues.

Submissions

Claimant's Submissions

15. Counsel for the Claimant submitted that in interpreting the CBA/MOU the court ought to have regard to the background surrounding the making of the agreements. Counsel contended that interpretation involved ascertaining the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time of the contract. Consequently, it was submitted that a strike action in 2003 lead to the execution of the agreements. Further, counsel contended that this background indicated that both parties required a framework to be put in place for the survival of West Indies Cricket and also a dispute resolution mechanism. Counsel for the Claimant therefore argued that it went against common sense that any party would have intended for the agreements to be terminated by merely giving reasonable notice.

16. Attorney for the Claimant cited the case of ***Holding & Barnes Plc v Hill House Hammond Ltd. [2002] L & TR 7*** for the proposition that *"if the ordinary meaning of the words make sense in relation to the rest of the document and the factual background, then the court will give effect to that language, even though the consequences may appear hard for one side or the other"*. Counsel was of the view that the Claimant's evidence demonstrated that:

    a. The express terms of the Agreements are clear on its face, that is, that there is no provision for unilateral termination;
    b. The Agreements are expressed to be in force until revised and signed by the parties;
    c. The WICB stood to lose considerable monies should the players have the ability to strike;
    d. The players stood to lose on income and experience should the WICB have the ability to engage in lockouts for whatever reason;

e. The background or the matrix of fact leading up to the execution of the Agreements show that the main catalyst for the execution of the Agreements was a strike action by the players in 2003. The evidence of both Dinanath Ramnarine and Anthony Deyal also shows that both parties acknowledged that the playing field was not even, and that the acrimonious relationship between the parties needed to be changed. Both parties felt the need for continuity and a permanent structure to govern the relationship between the parties, to guarantee certain rights, benefits and obligations, to provide for dispute resolution and to ensure that this framework always remained, albeit amended from time to time;

f. The WICB never contemplated terminating the Agreements until 2011.

17. It is the Claimant's contention that although the court may rely on the business common sense principle in construing the agreements, this notion is limited where the words of a contract are clear. Where the words are clear the court is compelled to give effect to them even if they have no discernible commercial purpose. Counsel submitted that the general principle is that in addition to the words of the instrument, and the particular facts proved by evidence admitted in aid of interpretation, the court may also be assisted by a consideration of the commercial purpose of the contract, and in considering that purpose may rely upon its own experience of contracts of a similar character to that under examination: ***Lewison, Chapter 2.07 "Business Common Sense" page 42***. Thus, Attorney for the Claimant argued that in making its argument that the agreements and in particular Article VI(c) of the CBA makes no business common sense, the Defendant ignores the plain and unequivocal wording of the clause which states the Agreements "shall remain in full force until revised and signed by the Parties to the agreement".

18. Further, and in the alternative, the Counsel for the Claimant submitted that the ability to terminate the agreements by giving reasonable notice flouts business common sense for two main reasons:

    a. The parties spent considerable time, human and financial resources (over a period of three years in negotiations and countless meetings in various countries) in negotiating the Agreements and it does not make good business sense to invest this much in Agreements where either party can simply terminate by giving reasonable notice;
    b. The Agreements provide a mechanism for settling disputes. This means that the players cannot decide to embark upon a strike and the WICB cannot impose a lockout on players. Should the players decide to strike for example, the WICB is exposed to serious risks losing considerable revenue in TV and broadcast rights, and wasted monies in advertising and stadia costs. The Agreements protect the business interests of the WICB.

19. It was submitted on behalf of the Claimant that in light of the factual background and clear wording of the agreements the court ought not to imply a term for termination of the agreements. Notwithstanding this, Counsel submitted that the implication of terms into a contract depends on the presumed intention of the parties. Counsel argued that the position is that nothing ought to be implied into a contract and the more detailed and apparently complete the contract, the stronger the presumption against implying terms. It was submitted that a term would only be implied when the term spells out what the contract, read against the relevant background must be understood to mean. Further, it was submitted that a term could not be implied if it contradicts an expressed term in the contract. Consequently, it was submitted that since Article VI of the CBA states that the terms of the existing agreements "[s]hall remain in force until revised and such revisions are signed by the Parties to the agreement", the clear and unequivocal language of this agreement conveys to a reasonable person having the required background knowledge, that the parties agreed to keep the terms of the

contracts in place to protect both parties until such time as a new agreement is signed. Accordingly, the Claimant submitted that for the court to imply a termination clause is impermissible as a matter of law.

20. The Claimant argued that contrary to the Defendant's belief that the Claimant's argument renders the agreements' life indefinite, the construction of the agreements show that the agreements are definite for three reasons. First, the Claimant argued that the agreement operates for a three year period and if nothing is done to the agreement at the end of that period it rolls over for another three years, not indefinitely. Secondly, the Claimant contended that the term may come to an end by mutual agreement and thus does not operate indefinitely. Thirdly, the Claimant asserted that if the parties cannot agree to revision or termination, the dispute resolution clause in the agreements come into play. The Claimants submitted that where a contract incorporated an arbitration clause there is a presumption that the parties intended all their substantive disputes to be determined by arbitration: ***Lobb Partnership Ltd v Aintree Racecourse Co. Ltd [2000] B.L.R. 65***. It is the Claimant's submission that once the dispute resolution mechanism has successfully run its course, the terms of the agreements come to an end, ultimately replaced by another series of agreements. It was further submitted that since the agreements contain express provisions for their term, and accordingly, to imply a duration is contrary to the clear wording of the agreements and is therefore impermissible as a matter of law. The Claimant argued that in any event, if it is found that there is no termination clause, it does not automatically mean that one can be implied, the court must look at the facts and circumstances surrounding the agreements.

21. Further, it was argued on behalf of the Claimant that the Defendant is estopped from going back on an interpretation which they themselves gave to the agreements. Counsel submitted that evidence of pre-contractual negotiations is admissible to support a claim for rectification or estoppel: of ***Amalgamated Investment and***

Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1981] 1 All ER 923; Chartbrook Ltd v Persimmon Homes Ltd and another [2009] 4 All ER 677. It was also contended that post-contractual conduct was also admissible in support of the Claimant's claim for estoppel. The Claimant contended that in the Defendant's own minutes dated 22nd September 2008, President Julian Hunte's representations, and from the course of dealings between the parties, the Defendant has previously repeatedly confirmed that the agreements renew or continue in force until both parties agree to an amendment. This representation has been relied on by the Claimant and the Defendant is now estopped from acting contrary to their own representation and terminating the agreements by utilizing procedure outside the scope of the agreements and intention of the parties.

22. It was submitted as an alternative that there is sufficient evidence to warrant a finding that the dispute resolution clause should be rectified to reflect the true intention of the parties with respect to the applicability of the dispute resolution mechanism, or a finding that there is a collateral contract between the parties that the dispute resolution clause applies to revise the terms of the agreements.

23. Counsel for the Claimant concluded that as a direct and foreseeable consequence of these breaches of contract by the Defendant, the Claimant has suffered loss and damage, not being able to obtain much needed sponsorships despite its ability to do so in the past, and having to expend vast resources in order to protect its rights, rather than enhance its role in West Indies cricket.

Defendant's Submissions

24. The Defendant submitted that although the Claimant pleaded estoppel, on the evidence no such estoppel arose in this case since:

b. The actual representation that was made by WICB was the very different (and much more limited) representation (as reflected in the contemporaneous documentation) to the effect that: "*In terms of continuity of the Collective Agreement, changes to Board/Management cannot repudiate or revoke the agreement in force at the time of such changes. In other words, new Boards, Executives etc will not affect the legitimacy of the agreement.*"

c. WIPA has failed to prove its allegation that WICB made the very different (and much broader) representations to the effect alleged and on which WIPA seeks to rely as the foundation for its plea of estoppel.

25. The Defendant submitted that in order for estoppel to arise there must be a clear and unequivocal representation. Thus, the Defendant argued that the alleged representations (even if they had been made) would not give rise to an estoppel for a number of additional reasons, including that:

    a. They are so ambiguous as to be incapable of giving rise to an estoppel by representation;

    b. They relate to representations of law and/or of future intention;

    c. WIPA has not proven detrimental reliance;

    d. WIPA cannot use estoppel as a sword to found its cause of action.

26. What is more, the Defendant asserted that the Claimant has failed to identify the particular type of estoppel to which it considers the Defendant subject. Additionally, it was submitted that for estoppel to arise:

1. The representation must be a false representation of existing facts. To this the Defendant asserts that if the court finds that the Claimant has proved the alleged representation they must show that the statements of fact were false. The Defendant contends that they were not.

2. The relevant representation cannot be a representation of law or opinion. The Defendant contends that the representations were of law or opinion and that they are not statements which relate to or purport to say anything about existing facts at the time they were allegedly made. Thus the Defendant argued that other than the actual evidence as to whether or not the representations were made, both the parties rely on legal argument concerning principles of construction to establish the truth or otherwise of the representations *(which is denied)* and it therefore cannot be representations of fact.

3. The relevant representation cannot be a representation as to future intention. The Defendant argued that in the alternative the alleged representations are representations indicating the Defendant's future intention. It was submitted that if the Defendant is right on its case on construction, i.e. the CBA/MOU came to an end at the end of their term, WICB is not estopped from relying on that termination by an expression (which is denied) of an intention in the future to consider itself bound by a contract which, in law, had terminated. Also the Defendant argued that representations (if any, which are denied) as to how the parties might subsequently agree to resolve disputes that may arise over revised terms of the CBA/MOU cannot give rise to an estoppel since that would be a representation as to future intent.

4. There must be detrimental reliance. The Defendant contended that the Claimant has not established that it acted in reliance on the alleged representations to their detriment.

27. The Defendant has articulated in submissions the same principles of interpretation as the Claimant. However, the Defendant contends that the court cannot rely on the previous negotiations of the parties and their declarations of subjective intent when interpreting contracts: ***Prenn v Simmonds [1971] 1 WLR 1381***.

28. The Defendant was also of the view that in addition to considering express terms in a contract, the common law may also imply terms into a contract that have not been expressly made. The Defendant submitted that this ability to imply terms extended to the implication of termination terms and whether a term can be implied depended on the intention of the parties: **Chitty on Contracts, 31st Edition** paras. 13-003, 13-004, and 13-029.

29. It was contended on behalf of the Defendant that the court ought to look at the express terms of the agreements. As such, Counsel noted the following articles of the CBA/MOU: Articles IV, V, VI, and XI of the CBA, and Articles I (k) and IV (d) of the MOU. It was submitted therefore that the express language contained in these sections is inconsistent with the interpretation proffered by the Claimant. Counsel for the Defendant contended that Article V of the CBA which stipulates that the agreements remain in force and effect for a period of three years shows that the parties intended termination of the agreements and to hold otherwise would be to disregard the express stipulation. Further, Counsel noted that Article VI (d) of the MOU adds support to the Defendant's interpretation of the CBA/MOU and actually recognises that the CBA/ MOU can be terminated otherwise than by mutual consent.

30. The case of ***Crediton Gas Company v Crediton Urban District Council [1928] CH 447*** was cited by Counsel for the Defendant as being on par with the present dispute.

Counsel argued that this case supported the proposition that the express terms of Article IV (d) of the MOU provide further recognition of the fact that the MOU/CBA is terminable. The court of appeal in this case was called upon to determine whether the trial judge had been right in the decision he gave on the construction of an agreement. The agreement in question was one by which the plaintiffs undertook to supply the defendants with gas for public lighting, and it was said by the plaintiffs that as the agreement contained no provision for determination, it must apparently be regarded as continuing forever. The court held that there were clear indicators in the agreements that showed that it was contemplated that the agreement should be subject to determination. Of importance, was the passage cited from ***Crediton Gas Company*** at page 461 by Counsel for the Defendant in the present case:

> *"If any further confirmation were required of that view, it is to be found in the supplemental agreement of June 30, 1921, because in Clause 1 (c) of that agreement there is, as it appears to me, a definite, recognition of the position that the agreement is determinable. It was suggested that clause 1 (c) referred only to the possibility of a determination by mutual agreement, but that is not to my mind a possible view. Clause 1 (c) is providing for what is to take place if the contract is determined, and that would be unnecessary if it could only be determined by agreement, for the agreement for determination would naturally include all necessary terms. Clause 1 (c) is, in my opinion, entirely consistent with the view I have already expressed."*

31. It was submitted that it is inconceivable that the Defendant and Claimant would intend that they be bound by the same terms of the CBA/ MOU in perpetuity, unless both parties mutually agreed to change those terms. Additionally, the Defendant argued that the Claimant's position that the issue is open to the dispute resolution clause is implausible. It was contended that there was nothing in the language of the CBA/MOU that even remotely suggests that the Dispute Resolution Mechanism in Article XI of the CBA is to be utilised for the purpose contended by the Claimant.

Conversely, it was argued by the Defendant that the language used by the parties was consistent with the Defendant's interpretation that the Dispute Resolution Mechanism in Article XI of the CBA was intended to be used for resolving disputes which are justiciable and not for the purpose of resolving any impasse in negotiations over the terms of the revised MOU/CBA which are inherently non-justiciable matters. Counsel argued that in order for a dispute to be referred to arbitration if must relate to a matter capable of being decided in civil proceedings between the parties and being capable of being compromised by accord and satisfaction: ***Halsbury's Laws of England, Volume 2 paragraph 603***; ***Jager v Tolme & Runge and the London Produce Clearing House Limited [1916] 1 KB 939***.

32. Counsel contended that if the issue was fit for arbitration the arbitration clause in the agreements was required to be extraordinarily clear. An example from ***Calvan Consol Oil & Gas Co. Ltd v Manning [1959] S.C.R. 253*** was given of a clear arbitration clause which allowed for an arbitrator to essentially draft a new contract for the parties. The clause in that case was as follows:

> *"It is agreed that the terms of the formal agreement are to be subject to our mutual agreement, and if we are unable to agree, the terms of such agreement are to be settled for us by arbitration by a single arbitrator, pursuant to The Arbitration Act of the Province of Alberta."*

33. In this regard it was submitted that there is nothing in the language of the CBA/MOU that can be considered specific terms giving the Court or an arbitrator the power to make a contract for the parties. Because the Defendant is of the view that no agreement can be reached for the revision of a new CBA/MOU, it was submitted that an arbitrator would be required to determine potentially all the terms of the agreement. On the contrary, it was argued that the nature of the language used is inconsistent with and negates any such suggestion as it focuses the use of Article XI

on the resolution of disputes, complaints and grievances and not on the resolution of any impasse in negotiating contractual terms.

34. On the issue of damages for alleged breaches of contract, the Defendant submitted that from the Amended Statement of Case it was unclear what the Claimant's cause of action is with respect to its claim for campaign to breach. To the extent that this claim is understood the Defendant submitted that:

    a. It discloses no cause of action; and/or

    b. Is based on terms of the CBA/MOU that are unenforceable for uncertainty; and/or

    c. May lead to double recovery by the Claimant; and/or

    d. Must be pursued if at all through the Dispute Resolution process set out at Article XI of the CBA; and/or

    e. It is based on a purported aggregation of matters, some of which have been the subject of other proceedings giving rise to cause of action estoppel, some of which have little or no connection with the CBA/MOU, which have no common theme and do not illustrate any campaign by the Defendant.

35. Finally, the Defendant submitted that there was no evidence of loss to the Claimant and that the sum of US$10,000,000.00 was grossly exaggerated.

The Evidence

The evidence on behalf of the Claimant

36. The Claimant called two witnesses in support of its case: Mr. Dinanath Ramnarine and Mr. Anthony Deyal.

37. Mr. Ramnarine is a Director of WIPA. He is the former President and Chief Executive Officer of WIPA and acted in this capacity from April 2002 to March 2012. He was also a member of the Board of Directors of WICB from 2007 to 2009.

38. Mr Ramnarine gave evidence of a somewhat tumultuous history in the relationship between the parties, to say the least. He testified that in March 2003, the players decided to strike because they were weary of the oppressive attitude of WICB toward them. According to Mr. Ramnarine, owing to this strike action WIPA and WICB held a meeting on 28th March 2003. Mr. Ramnarine gave evidence that at this meeting, Reverend Wes Hall, the WICB President, indicated that the meeting was an attempt to level the playing field and address the outstanding issues between WIPA and WICB as well as develop a framework for a collective bargaining agreement to permanently establish the relationship between the parties for the future of West Indies cricket.

39. Subsequent to this meeting, Mr. Roger Brathwaite, the then CEO of the WICB, released a statement highlighting the issues between the parties as:

Board Issues

1) *The establishment of future collective bargaining procedures between the WICB and the WIPA.*

2) *The WICB is prepared to commence negotiations with the WIPA from Wednesday April 3 with both sides being represented by their industrial relations advisors.*

3) *The development of a mutually agreed format for identifying membership of the WIPA.*

4) *The WICB will unreservedly recognise the WIPA as the Bargaining Agent for the players as long as it is satisfied of the authenticity of its membership.*

5) *The WICB is prepared to financially support training in leadership and industrial relations for the members of the WIPA and the WICB.*

Players' issues

1) *For the purposes of this negotiation, the WIPA represent the interest of all first-class players.*

2) *The issues for negotiation and discussion are:*

    a. *Player fees for Carib Beer 2003 Cricket Series et seq.*

    b. *Compensation for injury and loss earnings for West Indies players from 1999 onwards.*

    c. *Payment for Ryan Hinds.*

40. Pursuant to this agreement, the negotiations took place between 22nd April 2004 and 6th September 2006. Mr. Ramnarine claims to have been present at every meeting. He testified that from the onset of negotiations, the representatives of WICB, including Mr. Brathwaite, Mr. Greaves and Mr. Barthley, repeatedly represented to and agreed with him that the Agreements would be continuous. Further, the representatives of WICB represented that the terms would be in place until a revised agreement was

executed regardless of the time taken to negotiate revised terms and that changes of the WICB Board could not repudiate or revoke the Agreements. According to Mr. Ramnarine the continuity and the inability to unilaterally terminate the Agreement were fundamental agreements of both the WICB and WIPA since both parties desired that they be protected at all times in light of the parties' prior unregulated acrimonious relationship.

41. Mr. Ramnarine gave evidence that on 26th April 2004, at a negotiation meeting, the issue of the Defendant's previously proposed termination clause contained in the CBA was trashed out. The result, according to Mr. Ramnarine was that the proposed termination clause (Article 15) was not included. Mr. Ramnarine's evidence was that Mr. Brathwaite had expressed the view that it was unusual to have a termination clause in a CBA and each side agreed to remove either party's ability to unilaterally terminate the Agreements.

42. Mr. Ramnarine testified that he was assured by Mr. Brathwaite, Mr. Barry Thomas, Mr. Greaves and other members of WICB that revision terms would be for a period of three years. Further, should the three year term come to and end, with one party serving a revision notice, the Agreements would continue in force until revised, regardless of the time it took to come to and agreement on revision. In the event that no notice of revision is served the Agreements roll over for an additional three year term.

43. Mr. Ramnarine recalled that during negotiations, both parties expressly agreed that there should be a dispute resolution procedure to deal with issues in an effective manner which would be in the interest of cricket. Mr. Ramnarine gave evidence that on or about 8th August 2006, he met wit Ken Gordon and Anthony Deyal to discuss

the Agreements. He testified that both Mr. Gordon and Mr. Deyal expressed to him that the idea of a dispute resolution mechanism to deal with any and all disputed was comforting for WICB.

44. Though Mr. Ramnarine's evidence was quite lengthy, to say the least, the evidence focused on areas of conflict between WIPA and WICB painting a picture of discord between the parties. The general direction of his evidence was that he was assured on several occasions that the agreements would not be unilaterally terminable and that the dispute resolution clause would be applicable to all situations of controversy in relation to the Agreements. He testified that WICB has failed in totality to honour its obligations under the Agreements, the result of which is that there remain many areas of unresolved dispute between the parties. These unresolved issues, according to Mr. Ramnarine resulted in WIPA serving several notices of dispute pursuant to Article XI of the CBA including one sent on the 12th July 2011 and an amended notice of dispute on the 14th July 2011. However, Mr. Ramnarine testified that WICB maintained its position to terminate the Agreements.

45. Mr. Ramnarine gave evidence that WIPA has suffered and continues to suffer financial harm in light of the Defendant's attempt to terminate the Agreements. He stated that WIPA has claimed the sum of US$5,000,000.00 to compensate it for its losses as well as for exemplary damages. He testified that since receiving the Defendant's notice to terminate the Agreements, WIPA has been unable to secure sponsorship to aid in its operations.

46. Mr. Deyal was the Corporate Services manager and subsequently Corporate Secretary of WICB from 1st September 2006 until 28th July 2008. He was a WIPA advisor from 2003 to 2006 and was active in the process leading to the Agreements.

47. Mr. Deyal testified that at a meeting held between the parties on the 22nd April 2003, Wesley Hall expressed the desire to have an agreement that no new board or no new board member could just bring to an end. According to Mr. Deyal, Mr. Hall was adamant that he did not want the Agreement to be terminable by any one party but that both parties would have to agree to changes in it.

48. Mr. Deyal's evidence was that he was present at several meetings and that from the discussions he witnessed he was of the view that the parties had this mutual understanding with respect to the time frame for the Agreements. He stated that at no time did he ever consider that the Agreements would be terminated but that they would re-negotiate them.

The evidence on behalf of the Defendant

49. Mr. Ernest Hilaire was the sole witness for the Defendant. He was the CEO of WICB from October 2009 to September 2012. Mr. Hilaire was however not present at any of the negotiations leading up to the signing of the agreements and his evidence was a result of reading the minutes to the meetings and that which he was told of the negotiations.

50. His evidence was that the CBA/MOU is out of date and ambiguous and as a result fails to meet the needs of the parties. He denied any representations being made by WICB on the continuation of the Agreements. In negotiating the Agreements, Mr. Hilaire said that the parties had regard to the Australian model which was predicated on a fixed term contract for a specified number of years. In so stating, Mr. Hilaire was

of the view that both parties understood this to be the position. In cross examination however he admitted that although the Australian model included a section entitled termination, the Agreements in the present dispute do not.

51. Mr. Hilaire testified that WICB was not opposed to negotiating new Agreements, however having the position that the old Agreements ought to be retained in default of agreement is wrong. His testimony was that even after the WICB expressed their intention to terminate the Agreements the parties still tried to re-negotiate. However, Mr. Hilaire expressed the view that it appears unlikely that an agreement can be reached.

52. Mr. Hilaire gave evidence that the breaches alleged by the Claimant are irrelevant to the issues at hand and if the allegations show anything at all it is the unworkability of the Agreements.

The First Issue

53. The court is of the view that the law on interpretation of contracts was correctly stated in ***Investors Compensation Scheme Ltd v West Bromwich Building Society and ors [1998] 1 WLR 896*** per Lord Hoffman at page 912F -913F - *(all emphasis added)*

> *"...I think that I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this breach of the law, particularly as a result of the speeches of Lord Wilberforce in Prenn –v- Simmonds [1971] 1 WLR 1381, 1384-1386 and Reardon Smith Line Ltd –v- Yngvar Hansen-Tangen [1976] 1 WLR 989, is always sufficiently*

appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarized as follows:

> *(1) Interpretation is* ***the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.***
>
> *(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next,* ***it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.***
>
> *(3)* ***The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent****. They are admissible only in an action for rectification. The law makes this distinction for practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion to explore them.*
>
> *(4) The meaning which a document (or any other utterance) would convey to a reasonable man* ***is not the same thing as the meaning of its words****. The meaning of words is a matter of dictionaries and grammars;* ***the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous***

but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax*: see Mannai Investments Co Ltd –v- Eagle Star Life Assurance Co Ltd, [1997]AC 749.*

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the ***common sense*** *proposition* ***that we do not easily accept that people have made linguistic mistakes particularly in formal documents****.* ***On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.*** *Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera SA –v- Salen Rederierna AB, [1985] AC 191, 201:*

> *'****if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense****.'"*

54. In ***<u>Mannai Investment Co. Ltd</u> v <u>Eagle Star Life Assurance Co. Ltd</u> [1997] AC 749***
Lord Hoffman stated at page 775 C-E and 779 F – H:-

"It is of course true that the law is not concerned with the speaker's subjective intentions. But the notion that the law's concern is therefore with the 'meaning of his words' conceals an important ambiguity. The ambiguity lies in a failure to distinguish between the meanings of words and the question of what would be understood as the meaning of a person who uses words. The meaning of words, as they would appear in a dictionary, and the effect of their syntactical arrangement, as it would appear in a grammar, is part of the material which we use to understand a speaker's utterance. But it is only a part; ***another part is our knowledge of the background against which the utterance was made****.* ***It is that background which enables us****, not only to choose the intended meaning when a*

word has more than one dictionary meaning but also, in the ways I have explained, ***to understand a speaker's meaning****, often without ambiguity,* ***when he has used the wrong words****. When, therefore, lawyers say that they are concerned, not with subjective meaning but with the meaning of the language which the speaker has used, what they mean is that they are concerned with what he would objectively have been understood to mean. This involves examining not only the words and the grammar but the background as well.*

…

In the case of commercial contracts, the restriction on the use of background has been quietly dropped. ***There are certain special kinds of evidence, such as previous negotiations and express declarations of intent, which for practical reasons which it is unnecessary to analyse, are inadmissible in aid of construction. They can be used only in an action for rectification****. But apart from these exceptions, commercial contracts are construed in the light of all the background which could reasonably have been expected to have been available to the parties in order to ascertain what would objectively have been understood to be their intention: Prenn v. Simmonds [1971] 1 W.L.R. 1381 , 1383. The fact that the words are capable of a literal application is no obstacle to evidence which demonstrates what a reasonable person with knowledge of the background would have understood the parties to mean,* ***even if this compels one to say that they used the wrong words****. In this area, we no longer confuse the meaning of words with the question of what meaning the use of the words was intended to convey."*

55. These principles have been applied locally and most recently in ***National Insurance Board of Trinidad and Tobago v CLICO Investment Bank Limited; Trinidad and Tobago Securities Exchange Commission H.C.4450/2009. CV.2009-4450.***

56. The primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage and where the parties have used unambiguous language the courts must apply it even if it produces a commercially improbable result. However, the process of interpretation is a 'unitary exercise' in the sense that the courts do not consider the words used in a vacuum but always in the context of the background. If, in that context, there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other: ***Halsbury's Laws of England. VOLUME 22 (2012) 5TH EDITION para 360; Investors Compensation Scheme Ltd v West Bromwich Building Society and ors [1998] 1 WLR 896*** per Lord Hoffman at page 912F -913F; ***National Insurance Board of Trinidad and Tobago v CLICO Investment Bank Limited; Trinidad and Tobago Securities Exchange Commission (supra).***

57. In the context of the present dispute the court notes that both parties are in agreement that the Agreements were borne out of a tumultuous relationship between the parties. The background to the Agreements in the court's opinion can be found in the evidence for the Claimant as well as the Defendant in the multitude of disputes between the parties leading to the Agreements. It is quite clear on the authorities above that the court cannot rely on the previous negotiations of the parties and their declarations of subjective intent when interpreting contracts, contrary to the submission of the Claimant.

58. The court is of the view that because the aim of the Agreements was to develop a framework whereby the parties would be on equal footing, the never ending continuation of these Agreements may through the effluxion of time eventually augur to the disadvantage of both parties and by extension to West Indies cricket. See Article III of the CBA provides for the general purpose of the CBA which sets out as follows:

(a) To promote and maintain harmonious industrial relations between the WICB and WIPA

(b) To promote orderly collective bargaining relations between the WICB and WIPA as well as an effective machinery for settling disputes

(c) To provide and maintain standards for remuneration and working conditions and determine the terms and conditions of engagement of the players

(d) To promote training in leadership, communications, industrial relations and personal development skills of the players

(e) To promote through collaborative effort the success of West Indies cricket.

59. The court considers that the workings of the agreement depend on a harmonious relationship being maintained. The intention of the parties is clearly encapsulated in Article III above. The evidence shows that the relationship between the parties has been far from harmonious and thereby far from that which the parties originally intended. It is therefore readily apparent that the intention of the parties could not be the never ending continuation of the agreements in circumstances where the relationship between the parties is acrimonious. The Agreements cannot or will not operate in the way envisioned in Article III if one or both parties are at odds with the terms of the Agreements. In construing the Agreements the court cannot and ought not to ignore the expressed purpose for which parties entered into the Agreements and the court shall consider this in the round with the other considerations.

60. In construing the Agreements on the issue of whether it is capable of termination, the Agreements must be read as a whole. It is true that where the words are clear the court is compelled to give effect to them even if they have no discernible commercial

purpose. However in the present situation the words of the Agreements are by no means clear on the issue of termination. On a true construction of the Agreements, there appears to be no expressed or implied term dealing with the termination of the Agreements. When Article V and Article VI are read together it is clear that the Agreements operate for a term of three years and allows for at least three months notice for its revision to be given by either party.

61. There being no express term for termination, the Claimant suggests that the CBA/MOU could only be terminated by:

    (1) Mutual assent of both parties;

    (2) The revision of the CBA/MOU; or

    (3) The mechanism set out in the Article XI of the CBA (Dispute Resolution Clause).

62. The Defendant asserts that on a true construction of the terms of the CBA/MOU, the CBA/MOU may not be terminated or amended by either party for fixed period of three years (until 30th September 2008). A party may, three months prior to this date, give notice of revision. If the parties are unable to reach an agreement on revision, the unrevised CBA/MOU continues in effect until the end of the term. Thereafter, if no notice of termination is given by either party, the agreement either (1) expires by effluxion of time (2) expires by agreement by the parties (which may be evinced through their conduct) or (3) remains in effect for an indefinite term until terminated by either party with reasonable notice.

63. Both parties submitted that whether a term can be implied into a contract, depends on the party's intention. From the submissions the court understands the Claimant to be saying that an implied term as to termination was not intended as is evident by the very detailed Agreements. The Defendant of course argue the opposite and claim that termination clauses can be implied and it is what the parties intended.

64. In ***Attorney General Belize v Belize Telecom Ltd. [2009] 2 All E.R. 1127***, giving the advice of the Privy Council, Lord Hoffmann further clarified the law applicable to implication:

> ***"[I]n every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean****.....The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls. In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean.* ***In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means****."[Emphasis mine]*

65. The court does not believe that the intention of the parties, coming from a situation of discord, would be that the only way the Agreements could be terminated was by mutual consent. One need only look at the history of high tension and the passion with which both sides championed its respective causes, to see that mutual consent to terminate the Agreements is something unlikely. Having regard to the relationship between the parties it is quite apparent that there may never be mutual consent to terminate. It is unlikely given the industrial nature of the contracts that an unworkable and outdated Agreement would be binding between parties in perpetuity. As time changes and player needs develop outdated Agreements would prove to frustrate the very aim of the Agreements, and that is to develop a framework where the parties would be on equal footing.

66. In this case, the reasonable addressee would not understand the instrument to mean that the only way the Agreements could be terminated was by mutual consent. He would consider that the only meaning consistent with other provisions of the instrument, and in particular Article III, read against the background of distrust and acrimony as set out in the evidence of Ramnarine, is that the question of termination must arise. The instrument may not have expressly said so, but this is what it must mean. It must be that the parties intended that should there be no agreement something was to happen, namely termination. Consequently the court is called upon to imply a term as to method of termination. See ***Attorney General Belize v Belize Telecom Ltd (supra)***.

67. The court has regard to the industrial nature of the Agreements, although they are not registered under the Industrial Relations Act and do not carry the same weight and force of registered agreements. They are nonetheless agreements which prescribe the relationship between employer and employee at the same time providing protection to

one or both parties and an element of certainty in their duration. The court is therefore of the view that it ought to be implied that the Agreements roll over for a three year period on the same terms. After the Agreements roll over, if no notice to revise has been given in keeping with their provisions, or reasonable notice of termination effective at the date of expiration of the agreements, parties must await another three year period before either can seek to revise or terminate in like manner. It follows that the agreements may only be terminated at the expiration of the term and not during that term. In this regard the court therefore agrees with the arguments of the Defendants that the Agreements ought to be terminable by reasonable notice: 13-029 of **Chitty on Contracts, 31st Edition**.

68. The court therefore disagrees with the submission of the Claimant that to imply such a term would be to flout business common sense. To the contrary the court is of the opinion that the implication accords not only with business common sense but also with the clear intention of the parties to craft an agreement that also consists of an industrial relations component.

69. The question whether the notice given by the Defendant was reasonable has not been made an issue by the Claimant. The Claimant has argued that the Agreements could not have been terminated other than by mutual consent; revision of the CBA/MOU; or the mechanism set out in the Article XI of the CBA. Neither was the reasonableness or otherwise of the notice argued in the alternative. It is nonetheless the duty of the court to render its decision in such a manner that the parties understand the full effect of the court's ruling.

70. The Defendant notified the Claimant of termination of the CBA/MOU by letter dated 30th March 2011 such termination to take effect on the 30th September 2011 *(the*

expiration of the current term) should there be no revision prior to this date. There was no revision. In this regard the court is of the view that the Defendant is able to argue from a very strong position that the six month period was a reasonable period and that the agreements have been validly terminated as at 30th September 2011.

The Second Issue

71. The Claimant's claim of estoppel is based on alleged representations by President Julian Hunte in minutes dated September 22, 2008, and the course of dealings between the parties. Specifically, the Claimant alleges that the Defendant has previously repeatedly confirmed that the Agreements renew or continue in force until both parties agree to an amendment. The Claimant submitted that they have relied on these representations and the Defendant is now estopped from acting contrary to their own representation and terminating the Agreements by utilizing procedure outside the scope of the Agreements and intention of the parties.

72. The court understands the argument of the Claimant to be estoppel by representation. An estoppel by representation arises when there has been a representation made by one person on which another person relies and on which he acts so as to alter his own previous position; thus it may be described as 'reliance-based' estoppel. In common law estoppel by representation, the representation relied on is a straightforward statement of fact: ***Halsbury's Laws of England Fifth Edition, Volume 16 (2) para 956***.

73. Mr. Deyal testified that he recorded all the minutes of the meetings held during negotiations and that he took the notes verbatim. This witness in his evidence, could

not point to any express representations, but sought to explain what the parties meant by the words used. The evidence in this regard was unhelpful in ascertaining whether representations were in fact made. The court observed no such representation from the "verbatim" minutes.

74. For estoppel to arise the Claimant must prove that there had been a representation of fact made. In this regard, the Defendant submitted and the court agrees that the correct position with respect to the nature of the representations that were made by the Defendant to the Claimant was confirmed by Mr. Ramnarine under cross examination when:

    (a) He agreed that the representation that was really made by the WICB to WIPA was the same as that reflected in the contemporaneous documentation, i.e. that *"In terms of the continuity of the collective agreement changes of Board/management cannot repudiate or revoke the agreement in force at the time of such changes. In other words, new Boards, executives, et cetera, will not affect the legitimacy of the agreement."*

    (b) He confirmed:

        (i) That this was the representation that WICB made from the very onset of the negotiations (at the meeting held on the 22nd April 2003);

        (ii) That this was the same representation that WICB repeatedly continued to make to WIPA thereafter;

        (iii) That in his view, this was the same representation with which WICB's conduct was consistent.

75. Notwithstanding these admissions by Mr. Ramnarine under cross-examination, he sought to preserve the Claimant's estoppel plea by asserting that in his view there was absolutely no difference between the representation that the Defendant made to the Claimant that *"changes of Board/management cannot repudiate or revoke the agreement in force at the time of such changes"* and the alleged representations upon which the Claimant sought to rely.

76. The court however disagrees and finds that the Claimant, on a balance of probabilities, has failed to prove its allegation that the Defendant made the representations on which the plea of estoppel has been founded. Mr. Ramnarine's admission that the actual representation was that *"changes of Board/management cannot repudiate or revoke the agreement in force at the time of such changes"* fortifies the court in its view. There is an obvious difference between this and an allegation that the Defendant represented that the Agreements renew or continue in force until both parties agree to an amendment. The Claimant's plea of estoppel therefore fails.

The Third Issue

77. The Claimant's contention on this issue is that the Dispute Resolution Mechanism in Article XI of the CBA ought to be utilised to have a third-party craft the terms of the contract between the parties in the event they were unable to agree on new or revised terms of the MOU/CBA pursuant to Article VI of the CBA.

78. The Defendant on the other hand argue that there is nothing in the language of the MOU/CBA that even remotely suggests that the Dispute Resolution Mechanism in Article XI of the CBA is to be utilised for the purpose contended by the Claimant. On the contrary, all of the language used by the parties (with the benefit of their advice from their respective Attorneys-at-Law) is consistent with WICB's interpretation which is that the Dispute Resolution Mechanism in Article XI of the CBA was intended to be used for resolving disputes which are justiciable and not for the purpose of resolving any impasse in negotiations over the terms of the revised MOU/CBA which are inherently non-justiciable matters. Further, if the issue was to be referred to arbitration, the arbitration clause in the agreements was required to be extraordinarily clear.

79. In deciding on the ambit of the Dispute Resolution Clause, the court must have regard to the wording of the clause as the scope of authority is derived from the clause itself. The clause provides:

"*Section 1 Compliance with this Article*

a. If a dispute arises between the WICB and the WIPA ***out of or in relation to this agreement****, a party may not commence any litigation proceedings relating to that dispute unless it has first complied with this article…" [Emphasis mine]*.

80. Parties may, if they wish, include in their contract a provision for adjudication that extends more widely than disputes 'under the contract', for example, extending to disputes 'in connection with' or 'relating to' the contract, or to disputes of whatever nature arising during the course of the works. The scope of such a provision will depend upon the exact words used, understood in their contractual and factual

context. In relation to an arbitration it has been held that a clause empowering an arbitrator to decide disputes arising in connection with the contract gave him jurisdiction to decide disputes about mistake, misrepresentation, negligent misstatement and rectification of the contract. ***Atkin's Court Forms/Alternative Dispute Resolution (Volume 6 (2))/Practice/F: ADJUDICATION/2: THE STATUTORY RIGHT TO ADJUDICATION/63. Extending the scope of an adjudication clause***.

81. However, in order to be open to the arbitration there must be a 'dispute'. In ***Amec Civil Engineering Ltd v Sec of State for Transport*** **[2005] EWCA Civ 291 May LJ** considered the learning on when a dispute arises at para 29:

> *"... 1. The word 'dispute', which occurs in many arbitration clauses and also in section 108 of the Housing Grants Act, should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.*
>
> *2. Despite the simple meaning of the word 'dispute', there has been much litigation over the years as to whether or not disputes existed in particular situations. This litigation has not generated any hard-edged legal rules as to what is or is not a dispute. However, the accumulating judicial decisions have produced helpful guidance.*
>
> *3.* ***The mere fact that one party (whom I shall call 'the claimant') notifies the other party (whom I shall call 'the respondent') of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted***.

4. The circumstances from which it may emerge that a claim is not admitted are protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.

5. The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the respondent who has a legal duty to consider the claim independently and then give a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.

6. If the claimant imposes upon the respondent a deadline for responding to the claim, that deadline does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the court comes to consider what is a reasonable time for responding.

7. If the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication.

[30] *In Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd [2004] EWCA Civ 1757, Clarke LJ at para 68 quoted Jackson J's seven propositions and said of them:*

63. For my part I would accept those propositions as broadly correct. I entirely accept that all depends on the circumstances of the particular case. I would, in particular, endorse the general approach that while the mere making of a claim does not amount to a dispute, a dispute will be held to exist once it can reasonably be inferred that a claim is not admitted. I note that Jackson J does not endorse the suggestion in some of the cases, either that a dispute may not arise until negotiation or discussion have been concluded, or that a dispute should not be likely inferred. In my opinion he was right not to do so.

64. It appears to me that negotiation and discussion are likely to be more consistent with the existence of a dispute, albeit an as yet unresolved dispute, than with an absence of a dispute. It also appears to me that the court is likely to be willing readily to infer that a claim is not admitted and that a dispute exists so that it can be referred to arbitration or adjudication. I make these observations in the hope that they may be of some assistance and not because I detect any disagreement between them and the propositions advanced by Jackson J."[Emphasis mine]

82. The Defendant submitted, and the court agrees that in circumstances where two parties are negotiating the revised terms (including the economic and commercial terms) of a new contract (here MOU/CBA) to govern the relationship between them, it is not accurate to say that there is a "*dispute"* between them if they are unable to reach agreement on all or some of the terms. It was further submitted that in plain and simple language they may be described as having reached an "impasse" in their negotiations, but they are not in "*dispute".*

83. The court is of the view that while negotiation and discussion are likely to be more consistent with the existence of a dispute, in this case, it is not open to the Claimant to

refer to an impasse in negotiations as to the existence of the very root from which the power to arbitrate springs *ab intio* as a dispute. What the parties are at variance with is not the application of a term of the Agreement or rectification of a term of the agreement. The Claimant is not putting forward a claim to which the Defendant does not agree. In the court's view there is no claim and no disagreement, but instead an inability to arrive at a mutually accepted position in relation to a new agreement on new terms at least for the time being. The mechanism for resolving disputes emanates and derives jurisdiction from the agreement between the parties which governs their relationship with each other. The dispute resolution mechanism must relate to the matters set out in the agreement while in existence. To accept to the contrary would be to aver unto the arbitrator the power and function of crafting the will of the parties in an artificial exercise that may result in some clauses being included or omitted although one party or the other have not agreed to them. This is not the essence of agreement which by definition is voluntary and not imposed. For these reasons, he court therefore does not consider that the failure to agree new terms amounts to a 'dispute' as contemplated by Article XI of the CBA.

84. Further, the Defendant submitted and the court agrees that there is nothing in the language of the CBA/MOU that can be considered as specific terms giving the Court or an arbitrator the power to make a contract for the parties. In ***Calvan Consol Oil & Gas Co. Ltd v Manning [1959] S.C.R. 253*** the court considered what a clear clause allowing for an arbitrator to essentially draft a new contract for the parties would entail. The clause in that case was as follows:

> *"It is agreed that the terms of the formal agreement are to be subject to our mutual agreement, and if we are unable to agree, the terms of such agreement are to be settled for us by arbitration by a single arbitrator, pursuant to The Arbitration Act of the Province of Alberta."*

85. In the absence of such a clear indication of the scope of the arbitration covering such a situation, the court is unable to find that the dispute is fit for arbitration.

86. Finally, the Claimant alleges in the pleadings and submissions that the Defendant has displayed wanton disregard for the express terms of the Agreements, including Articles II, III, IX of the CBA and Articles II and IV of the Memorandum of Understanding. On this issue of the alleged breaches of agreements by the Defendant, the court however is of the view that these alleged breaches are in fact disputes within the meaning of Article XI of the CBA. The court ought not to therefore make a finding on the breach of contract and damages claimed in this regard and these appear to be matters which ought properly to be subject to the dispute mechanism set out in the agreements.

Costs

87. The Claimant claimed the sum of $10,000,000.00 USD. In calculating the costs to be paid the court applied an exchange rate of $6.4307 TTD. The court therefore considered the claim as one for the sum of $64,307,000.00.

88. In relation to the costs of the injunctive proceedings the court shall proceed to assess costs in keeping with the order made on the 1st March 2012.

Dated this 26th day of March 2013.

Ricky Rahim
Judge

Judicial Research Assistant: Ms. Kimitria Gray