THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2016-02606

Between

D. RAMPERSAD & COMPANY LIMITED

Claimant

And

KALL CO LIMITED

Defendant

And

KALL CO LIMITED

Ancillary Claimant

And

COMMUNITY IMPROVEMENT SERVICES LIMITED

Ancillary Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: February 10, 2021

Appearances:

Claimant: Ms. L. Kisto instructed by Ms. J. Rogers

Defendant: Ms. K. Bharath-Nahous

DECISION ON APPLICATION TO STRIKE AND SUMMARY JUDGMENT

1. This claim having gone elsewhere and having been remitted to this court by Their Lordships of the Court of Appeal, it now falls upon the court to determine the long outstanding application of the claimant of July 3, 2017 to strike out the amended defence and counterclaim of the defendant and for the grant of summary judgment filed February 22, 2017.

THE CLAIM

2. By Claim Form filed on July 28, 2016 the claimant claimed that in or about July 28, 2015 it received from the defendant a request for quotation ("the RFQ") for the supply, installation and commission of two ECOPOD Wastewater Treatment Systems ("the systems") for the Maracas Beach Facility Improvement Works ("the project"). In response to the RFQ, the claimant sent to the defendant its initial budgetary proposal dated August 21, 2015 ("the initial proposal").

3. The claimant alleged that during the period of September 16, 2015 and October 6, 2015 by reason of the defendant having made several material changes to the RFQ, the claimant issued a revised tender proposal dated October 6, 2015 ("the revised proposal") for the systems.

4. According to the claimant, it subsequently received from the defendant the following;

    i. The defendant's purchased order No. 21125 dated October 13, 2015 (the purchase order") wherein the price stated in the

purchase order mirrored that of the claimant's revised proposal and at the same time;

ii. A copy of the claimant's revised proposal duly stamped, agreed and approved by the defendant's Chief Operating Officer, Roger Ganesh ("Ganesh").

5. The claimant claimed that upon receipt of the aforementioned documents, there was a binding contract for it to supply the defendant with the systems for the price of $4,633,683.76 VAT exclusive. In keeping with the terms of the contract, the claimant awaited the first milestone payment from the defendant which was *"30% upon receipt of purchase order, Net cash"* before placing an order for the systems as the contract afforded the defendant no credit facilities for the first payment. In order to facilitate the defendant in making the first payment and upon the defendant's request for supplemental terms and conditions to the contract, the respective duly authorized representatives of the claimant and the defendant signed mutually agreed supplemental terms and conditions to the contract on February 22, 2016 ("the supplemental terms").

6. According to the claimant, pursuant to the defendant's request, the supplemental terms was dated December 8, 2015 which coincided with the date of the first payment received by the claimant from the defendant by way of cheque. The funds representing the first payment were eventually made available to the claimant's bankers in or about December 18, 2015 and so in or about January 13, 2016 the claimant placed the requisite order for the systems from its third party supplier in compliance with the contract.

7. Further, in accordance with the contract, the second milestone payment was to be made to the claimant by the defendant in the manner of *"40% upon equipment readiness to ship, Net cash"*. As with the first payment, the contract afforded the defendant no credit facilities for the second payment.

8. The claimant claimed that the systems were eventually ready to ship on or about April 27, 2016 which was a delay of about forty days than what was agreed to in the contract and which the defendant agreed and acknowledged as an agreed extended time for same.

9. By reason of the expected date of the readiness of the systems to be shipped, the claimant invoiced the defendant for the second payment in the amount of $2,085,157.69 VAT inclusive ("the invoice") so that the defendant could be notified and make the necessary arrangements for the second payment on a timely basis. The invoice was received by the defendant on or about March, 10, 2016.

10. It was the claim of the claimant that in breach of the contract and/or the supplemental terms, the defendant failed and/or neglected to pay the second payment to the claimant despite the claimant's several and/or repeated demands to the defendant to so do. Consequently, the claimant claimed the following relief;

    i. *Specific performance of the contract in accordance with the provisions of the contract and/or the supplemental terms;*
    ii. *Interest pursuant to section 25 of the Supreme Court of Judicature Act Chap. 4:01 at such rate and for such period as the court shall deem fit;*
    iii. *Such further and/or other relief as the court may deem fit; and*

iv. Costs.

11. The claimant claimed the following relief in the alternative;

i. Damages in lieu of specific performance or at common law;

ii. Damages arising from any consequential loss suffered by the claimant;

iii. Interest pursuant to section 25 of the Supreme Court of Judicature Act Chap. 4:01 on any sum found due at such rate and for such period as the court shall deem fit;

iv. Such further and/or other relief as the court may deem fit; and

v. Costs.

THE AMENDED DEFENCE & COUNTERCLAIM

12. By Amended Defence and Counterclaim filed on February 22, 2017 the defendant claimed that the contract governing the parties' respective obligations was only executed on February 22, 2016 and dated December 8, 2015. This is the document referred to by the claimant as the supplemental terms. According to the defendant, the first payment made to the claimant was by cheque payment dated December 11, 2015 and was made pursuant to the claimant's invoice of October 19, 2015 for the sum of $1,598,620.90.

13. The defendant put the claimant to strict proof that the systems were ready for shipment on or about April 27, 2016. The defendant denied that it agreed and/or acknowledged as an agreed extension of the time for same. According to the defendant, the claimant was in breach of the agreement between the parties for failure to meet the time schedules as set out by

the agreement and its continued delays in the execution of its obligations under the agreement.

14. The defendant admitted that it received an invoice from the claimant for the sum of $2,085,157.69 Vat inclusive. However, the defendant averred that the invoice which the claimant claims to have been sent by reason of the expected date of readiness of the systems to be shipped was issued in breach of the agreement between the parties which expressly provided for the second milestone payment of *"40% upon equipment readiness to ship".*

15. As such, it was the case of the defendant that by reason of the breaches of the terms of the contract, it was entitled to rescind the contract and reject the goods or in the alternative it was entitled to treat the contract as having been repudiated by the claimant.

16. The defendant further admitted that it did not make any payment to the claimant for invoice dated March 8, 2016. According to the defendant, the main reason it did not make any payment to the claimant under that invoice was because the ancillary defendant, Community Improvement Services Limited ("CISL") terminated the substantive contract for the Maracas Beach Facilities Improvement Works ("the project") part of which was the water waste treatment plant which was the subject of the contract between the defendant and the claimant.

17. According to the defendant, the claimant was well aware of the termination of the substantive contract between CISL and the defendant and so the claimant was under a duty to mitigate its losses. The defendant therefore averred that by reason of the aforesaid the performance of the

contract became impossible and it was discharged from further performance of the contract in circumstances where the contract was frustrated.

18. Further and/or in the alternative, the defendant claimed that as CISL wrongfully terminated the substantive contract, it is entitled to be indemnified by CISL in respect of any liability of it to the claimant. This limb of the defence has since been crystalized in an Ancillary claim brought by the defendant against CISL.

19. The defendant counterclaimed for the following relief;

    i. *Damages for breach of contract and/or loss of profit in the value of 15%-20% of the Water Waste Treatment component of the project in the sum of $695,052.56-$926,736.75 plus VAT;*
    ii. *Further and/or in the alternative damages arising from any consequential loss suffered by the defendant;*
    iii. *Interest pursuant to Section 25A of the Supreme of Judicature Act Chapter 4:01;*
    iv. *Such further relief as the Honourable Court may deem fit;*
    v. *Costs.*

THE LAW

The Application to strike

20. Part **26** CPR reads;

> **26.2** (1) The court may strike out a statement of case or part of a statement of case if it appears to the court—
>
> *(c)* that the statement of case or the part to be struck out

discloses no grounds for bringing or defending a claim;

21. In relation to the striking out of a defence, in ***M.I.5 Investigations Limited v Centurion Protective Agency Limited***[1] Mendonça J.A. noted at paragraph 7 that:

> *Where there is a denial it cannot be a bare denial but it must be accompanied by the defendant's reasons for the denial. If the defendant wishes to prove a different version of events … he must state his own version*.

22. Part 10.5 (3) and (4) of the CPR sets out the information which the defendant must include in its Defence. It reads:

> *10.5 (3) In his defence the defendant must say-*
> *(a) Which (if any) allegations in the claim form or Statement of Case he admits;*
> *(b) Which (if any) he denies; and*
> *(c) Which (if any) he neither admits nor denies, because he does not know whether they are true, but which he wishes the claimant to prove.*
>
> *(4) Where the defendant denies any of the allegations in the claim form or Statement of Case-*
> *(a) he must state his reasons for so doing; and*
> *(b) if he intends to prove a different version of events from that given by the claimant he must state his own version.*

[1] C.A.CIV.244/2008

23. Further, in ***Brian Ali v The Attorney General*** CV2014-02843, Kokaram J set out the following:

> *"12. The principles in striking out a statement of case are clear. A court will only seek to strike out a claim pursuant to Rule 26.2(1)(c) of the CPR 1998 as amended on the basis that it discloses no ground for bringing the claim. The language and wording of our Rule 26.2(1) is very generous in that so long as the Statement of Case discloses a ground for bringing the claim, it ought not to be struck out. See UTT v Ken Julien and ors CV2013-00212.*
>
> *13. It is a draconian measure and is to be sparingly exercised always weighing in the balance the right of the Claimant to have his matter heard and the right of the Defendant not to be burdened by frivolous and unmeritorious litigation. The Court in the exercise of its discretion to strike out a claim must always ensure to give effect to the overriding objective. See: Real Time Systems Ltd v Renraw Investment Ltd Civ. App. 238 of 2011.*
>
> *14. It is for the Defendant to demonstrate that there is no ground for bringing the claim. The Defendant can demonstrate for instance that the claim is vague, vexatious or ill-founded. Porter LJ in Partco Group Limited v Wagg [2002] EWCA Civ. 594 surmised that appropriate cases that can be struck out for failing to disclose a reasonable ground for bringing a claim include:*
>
> > *"(a) where the statement of case raised an unwinnable case where continuing the proceedings is without any possible benefit to the Respondent and would waste resources on both sides: Harris v Bolt Burden [2000] CPLR 9;*

(b) Where the statement of case does not raise a valid claim or defence as a matter of law."

24. The principles set out above are of equal applicability to a defence as it is to statement of case.

Summary Judgment

25. The burden of proof in an application for summary judgment rest upon the claimant. The legal requirements for the grant of summary judgment in this case is set out in **Part 15**.2 (a) CPR.

15.2 The court may give summary judgment on the whole or part of a claim or on a particular issue if it considers that—

(a) on an application by the claimant, the defendant has no realistic prospect of success on his defence to the claim, part of claim or issue; or

26. In ***APUA Funding Limited & another v RBTT Trust Limited,***[2] Mendonça J.A. cited with approval the dicta of Lewinson J. at paragraph 4 in the Federal Republic of Nigeria v Santolina Investment Corporation and Ors. [2007] EWHC 437. Mendonça J.A. stated the following principles to be applied in deciding whether or not to give summary judgment:

(a) The court must consider whether the defendant has a "realistic" as opposed to a "fanciful" prospect of success: ***Swain v Hillman*** *[2001] 1 ALLER 91, [2000] PIQR p. 51;*

[2] Civil Appeal No. 94 of 2010

(b) *A "realistic" defence is one that carries some degree of conviction. This means that is more than merely arguable:* ***ED & F Man Liquid Products v Patel*** *[2003] EWCA Civ. 472 at 8.*

(b) *In reaching its conclusion the court must not conduct a "mini trial":* ***Swain v Hillman****;*

(c) *This does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents:* ***ED&F Man Liquid Products v Patel*** *at 10;*

(d) *However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial:* ***Royal Brompton Hospital NHS Trust v Hammond (No. 5)*** *[2001] EWCA civ. 550 [2001] Lloyd's Rep PN 526;*

(e) *Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case:* ***Doncaster Pharmaceuticals***

Group Ltd. v Bolton Pharmaceuticals Pharmaceutical Co. 100 Ltd. *[2007] FSR 63;*

(f) Although there is no longer an absolute bar on obtaining summary judgement when fraud is alleged, the fact that a claim is based on fraud is a relevant factor. The risk of the finding of dishonesty may itself provide a compelling reason for allowing a case to proceed to trial, even where the case look strong on the papers: ***Wrexham Association Football Club Ltd. v Crucialmove Ltd.*** *[2006] EWCA Civ. 237 at 57."*

27. In ***Matias Bienenwald vs Jose Marina***, CV2015-00984, Kokaram J (as he then was) provided guidance at paragraph 2 on how the court exercise its discretion in deciding whether or not to grant summary judgment.

> *….In a summary judgment application, the Court is now engaged in a thorough examination of the facts as presented in a claim where factual discrepancies may not need the expense and resources of a trial to resolve. To determine whether the Claimant's prospect of success is real, the Court must be satisfied that the claim advances grounds which are more than arguable and the chances of succeeding on the propositions advanced are not speculative nor fanciful but deserves fuller investigation*.

Does the Amended Defence disclose no grounds for defending the claim and does the amended counterclaim disclose no grounds for bringing the counterclaim

28. The claimant filed evidence in support of the application from Valmiki Frankstan-Paul, and Jennifer Rogers[3].The defendant filed evidence by Wendell Louis[4].

The defences

29. In essence the pleaded case for the defendant is two-fold. Firstly, it says that one of the terms of the supplemental agreement was that the second milestone payment was set at 40% upon equipment readiness to ship, however the shipment was over 40 days late and it was invoiced prior to readiness to ship as per the agreement. The defendant therefore pleaded that they were billed prematurely. Therefore, it was entitled to rescind the agreement and reject the goods. Alternatively, the legal effect according to the defendant is that the breach amounted to a repudiation of the contract by the claimant and the defendant was entitled to treat the agreement as having been repudiated by the claimant.

30. The second defence is a defence of frustration. It is the pleaded case of the defendant that it was known by the claimant that the purpose of the contract between them was to secure equipment for the Maracas Beach improvement works under a contract between the defendant and CISL the terms of which were governed by the FIDIC Conditions of Contract and that the latter was terminated by letter of April 12, 2016, prior to completion of the terms of the contract between the defendant and CISL.

[3] See affidavits of Valmiki Frankstan-Paul filed July 3, 3017 and February 23, 2018 and affidavits of Jennifer Rogers filed July 18, 2017 and August 10, 2017.
[4] See affidavit of Wendell Louis filed July 28, 2017.

31. In its submissions the claimant has firstly argued that as pleaded the defendant purported to terminate the contract by force majeure[5] but did not rely on same in its defence choosing instead to plead delay in performance on the part of the defendant. However, the claimant has admitted that it issued the invoice for the second payment some 47 days prior to the readiness to ship the equipment. The invoice was issued on March 8, 2016 and the equipment was finally ready for shipping on April 27, 2016 after other earlier dates had been proposed for shipment. It must be borne in mind that the contract of CISL was terminated on April 12 of that year prior to the equipment being ready for shipping on the admission of the claimant in its statement of case[6]. The claimant also avers in its statement of case that it was informed by the defendant on March 1, 2016 that there were specification changes to the systems therefore the claimant provided a new shipping date of April 14, 2016 instead of March 17, 2016 as agreed to in the supplemental agreement. Revised drawings for those changes were only provided by the defendant on March 10, 2016 then again on March 18, 2016.

32. On the case for the claimant as pleaded therefore, despite the change in shipping dates, the claimant appeared to have nonetheless issued its invoice on March 1, after it was made aware of specification changes and after it had informed the defendant that the equipment would be available for shipping on April 14, 2016. So that it is clear on the pleaded case of the claimant that upon the issuance of the invoice for the second payment the claimant knew that the equipment was not ready for shipping.

[5] See letter of May 24, 2016 by the defendant to the claimant attached as V.F.3 to the affidavit of Valmiki Frankstan-Paul filed July 30, 2017.
[6] See pre-action protocol letter of June 14, 2016 attached as exhibit D to the statement of case and paragraphs 3.7, 3.8 and 3.9 of the statement of case.

33. The relevant parts of clause 4 of the agreement reads[7]:

> "4. Kall Co Ltd shall pay D. Rampersad and Company Limited as follows;
>
> - 30% upon receipt of purchase order, Net Cash
> - 40% upon equipment readiness to ship, Net Cash"

In the court's view as a matter of law it appears that the issue is not one of whether the invoice was issued upon readiness of the equipment to be shipped having regard to the simple and ordinary reading of the clause. Clause 4 provides for payment by a specific date, namely by the date that the equipment is ready to be shipped. It must follow that as a matter of effective contractual process, adequate notice of the date of readiness of shipping must be provided. In that regard the claimant has pleaded that it provided the invoice on March 8 so as to notify the defendant of the payment becoming due upon readiness to ship on April 14, 2016. Further, it is pleaded at paragraph 39.9 of the statement of claim that on April 21, 2016, the defendant was informed (although it is not pleaded by what means notice was given) that the shipment was due to be shipped on April 27, 2016. It is to be noted that the evidence of the claimant filed in support of the application does not support the latter aspect of the pleading and appears to be very vague and inconsistent on this fact[8]. However, the court is not trying the claim at this stage so that the absence of the evidence is not material to the present exercise.

34. It therefore appears to the court that as pleaded the case for the claimant is that although the invoice and/or notice is sent prior to readiness to ship,

[7] See exhibit B of statement of case.
[8] See paragraph 14 of the affidavit of Valmiki Frankstan-Paul filed July 30, 2017.

the obligation under the terms of the contract was for payment by the date the equipment was ready to ship which date was extended in this case to a date beyond that originally agreed.

35. The defendant has pleaded that the reasons for the delay were not as a consequences of the specifications it made but were as a result of delays by the manufacturer's supplier and the need for the claimant to clarify options for the supplier. These are issues of fact which the court cannot determine at this stage of the proceedings.

Rescission

36. The learned authors in Halsbury's described rescission generally as follows:

Where one party fails to perform an obligation under the contract and such failure amounts to a breach, the innocent party has a right to damages. The question also arises whether such failure to perform entitles the innocent party to treat himself as discharged from his own obligation to perform. It is clear that it is not every breach which entitles the innocent party to terminate the contract.

The language of 'termination of the contract' for 'breach' is not free from difficulty. First, the contract itself is not terminated, rather it is the obligation to perform; secondly, the contract may be terminated where the failure, or refusal, to perform does not, in fact, amount to a breach because of some lawful excuse. But most instances of failure, or refusal, to perform which give rise to the right to terminate will amount to a breach and 'termination' is preferred over 'rescission', which has been used on many occasions but less so recently, so as to distinguish termination for breach from other forms of rescission, most notably rescission for misrepresentation.

The right to terminate may be said to arise whenever one party is guilty of a 'repudiatory breach', but, again, this terminology is not uniformly applied and a repudiatory breach must be distinguished from what is sometimes referred to as 'repudiation' which is just one of the circumstances in which a breach gives rise to the right to terminate. The idea of a repudiatory breach is employed so as to distinguish termination for breach under the general law which is discussed in this part from the right to terminate for breach under an express provision of the contract.

In the past, a number of tests, or formulae, were devised to determine whether a breach was sufficiently serious to entitle the innocent party to terminate, but they are now of doubtful utility. The present position is that there is a right to terminate for repudiatory breach in the following situations: (1) a substantial, or serious, failure to perform; (2) breach of 'condition'; and (3) repudiation. When one party is entitled to terminate, he is required to take steps to exercise the right, and he may instead affirm the contract; in which case he will be confined to his remedy in damages, if any. Where a repudiatory breach is established ahead of the time when performance is due, the innocent party may be entitled to terminate for anticipatory breach and need not wait until the time when performance was due.[9]

37. Rescission is thus the retrospective avoidance of a voidable contract. There is a live issue in this case as to whether both parties agreed to extend the date for the delivery of the equipment. The notice sent by the claimant with the invoice gave a date of shipping of April 21, but by then the equipment had not been shipped. The claimant avers that the delay from that day was known by the defendant who agreed to or acquiesced to

[9] Halsbury's Laws of England, Vol 22 (2019) para 344

same. The defendant has not answered this allegation. In fact, the defendant's pleaded case and evidence are silent on this issue. The plea however discloses grounds for such a defence and the court so finds.

Repudiation

38. It must be borne in mind that this defence has been pleaded in the alternative. Repudiation is a rejection or renunciation of a duty or obligation. In contract, one party (A) may put himself in breach by evincing an intention, by words or conduct, of repudiating his obligations under the contract in some essential respect. Repudiation will give the innocent party (B) the right to treat the contract as discharge and claim damages. If the innocent party chooses to treat the contract as discharged, he must make his decision known to the party in default and that once he has done so, his choice is final and cannot be withdrawn.[10]

39. The learned authors in Halsbury's stated that repudiation can be express and implied.

    Repudiation may be an express renunciation of contractual obligations by one party (A). This will be so whether A absolutely refuses to perform his side of the bargain or unambiguously asserts that he will be unable to do so. However, it is more commonly implied from failure to render due performance or, in cases of anticipatory breach, by the party in default putting himself in such a position that he will apparently be unable to perform when the time comes. A party (B) seeking to rely on repudiation implied from conduct must show that the party in default has so conducted himself as to lead a reasonable person to believe that he will not perform

[10] See Cheshire, Fifoot & Furmston's Law of Contract, 15th Edition, page 692

or will be unable to perform at the stipulated time; as where A refuses to perform unless B complies with requirements not contained in the contract. The fact that a breach is deliberate is not of itself sufficient but it is a factor which may be taken into account as evidence of an intention no longer to be bound by the contract; nor will words and conduct which do not amount to a renunciation of the contract.

Where the parties genuinely differ as to the meaning of the contract a party will not necessarily be treated as having repudiated if he refuses to perform except according to his own bona fide interpretation of the contract, although that interpretation turns out to be erroneous. A party is not bound before the time for performance to give a definite answer whether he intends to fulfil the contract or not[11].

40. For the defendant to maintain the defence it must demonstrate that the claimant either directly or by its conduct refused to render due performance thereby entitling it to rescind. This again is a question of fact to be decided at trial having regard to the issue of the discussions between the parties leading up to April 27, 2016. In this regard the court repeats that the evidence presented by the claimant at this stage does not appear to have condescended to particulars of any communication between April 14 and April 27. So that on the pleaded case and the available evidence before the court at this stage, the defendant appears to be able to defend by alleging that the date of shipping of April 14, 2016 having elapsed and there being no extension thereafter, the claimant had refused to perform an important contractual obligation.

[11] Halsbury's Laws of England, Vol 22 (2019) para 353

41. An examination of the affidavits of the claimant, in particular the Frankstan –Paul filed July 30, 2017 does not purport to allege that the defendant was notified by the claimant of the new date of shipping being April 27, 2016[12]. Be that as it may, the defence discloses grounds for repudiation and the court so finds.

Frustration

42. The object of the doctrine of frustration is to absolve parties from their contractual obligations when some radical supervening event means it would not be fair to hold them bound.[13]

It frequently happens that a contract is silent as to the position of the parties in the event that something happens subsequent to the formation of a contract which renders its performance impossible, or only possible in a very different way from that originally contemplated.

…….

….the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders

[12] See paragraphs 12.8, 12.9, 13 and 14.

[13] ***Ocean Tramp Tankers Corpn v VO Sovfracht, (The Eugenia)***, [1964] 1 All ER 161, CA, per Lord Denning MR at 166,

….in order to determine whether the doctrine of frustration applies the contract has first to be construed to see whether the parties have provided for the situation that has arisen, and, if they have not provided for it, then the new situation must be compared with the old to see how different it is; the difference must be more than that performance has become more onerous and expensive for one party, it must be such as to make it positively unjust to hold the parties bound.

performance impossible or only possible in a very different way from that contemplated. This assessment has been said to require a 'multi-factorial' approach.

Five propositions have been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it, but due to some outside event or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; nor does the mere fact that a contract has become more onerous allow such a plea.

The mere fact that the parties apparently treated a contract as remaining in force until a late stage in their dispute does not conclusively rule out a plea of frustration.[14]

The effect of Frustration

43. The effect of frustration is that the contract is discharged as to the future, releasing both parties from further performance. It is brought to an end automatically, without any act or election of the parties. Even though both

[14] Halsbury's Laws of England, Vol 22 (2019) para 259

parties to the contract are discharged in respect of future performance, an arbitration clause may remain in force to govern matters up to the date of frustration or the issues arising from frustration itself.[15]

44. In ***Raghunath Singh & Company Limited v National Maintenance Training And Security Company Limited***,[16] one of the issues was whether the contract was frustrated. Rajkumar J, as he then was, cited two relevant cases to describe the doctrine one of which was ***Davis Contractors Ltd v Fareham Urban District Council [1956] 2 All ER 145*** *and* ***CTI Group Inc v Transclear SA*** [2008] EWCA Civ 856 in which the classic statement in respect of frustration was made by Lord Radcliffe at p. 160:

"Frustration occurs whenever the law recognises that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract."

45. The **CTI Group Inc** case involved the issue of whether a seller of goods could rely upon the refusal of his supplier to supply the goods as a frustrating event. The essence of the doctrine of frustration is that there must be a break in identity between the contemplated and the new performance and the courts will not lightly conclude that there has been such a break.[17]

[15] Halsbury's Laws of England, Vol 22 (2019) para 271
[16] CV2007-02193
[17] per Moore-Bick LJ at [14]

46. Rajkumar J, as he then was, opined[18] that the practical approach requires a finding on each of the following:-

    1) *What was contracted for- the terms and construction of the contract.*

    2) *What was the alleged supervening event (together the "data for decision" – per Lord Radcliff in Davis).*

    3) *How does the alleged supervening event affect, if at all, delivery of what was contracted for. Does it render the contractual performance now possible radically different from what was undertaken? – (per Lord Radcliff at 729).*

    4) *What provision does the contract make for happening of the alleged supervening event, expressly, or, (far more likely when frustration is being alleged), impliedly?*

    5) *What did the parties know about the possibility of the alleged frustrating event?*

    6) *Which party if any had a greater degree of control over the happening of the alleged frustrating event?*

    The last three matters, if applicable at all, go directly to the issue of which party impliedly accepted the risk of the alleged frustrating event occurring.

47. The defendant pleads that the contract between the claimant and the defendant was frustrated owing to a change of circumstances that rendered it impossible to fulfil the contract. In that regard it submitted that the contract between CISL and the defendant was terminated by letter of April 12, 2016, received by the defendant on April 21, 2016[19]. By separate

[18] ***Raghunath Singh & Company Limited***, supra, at para. 84
[19] See paragraph 11 of the amended defence.

claim the defendant has brought action against CISL alleging that the contract was wrongly terminated and that matter is still pending.

48. The claimant submitted that the contract between the defendant and CISL was a separate contract. Further that the information before the court both by pleadings and evidence is that the contract being a standalone contract, the claimant was not a sub-contractor of CISL. Finally, that the purpose of the contract appeared to be that of servicing the small village of inhabitants around Maracas beach. With that as the starting point, it is argued that there is no evidence of a frustrating event such as physical destruction of the subject matter, of cancellation of an expected event, of delay regarding the defence of frustration, changes in the applicable law, act of state, death or incapacity. Thus the defence of frustration should be struck out. The court has therefore considered the questions set out by Rajkumar J. It must be appreciated that the court makes no findings at this stage as this is not a trial. The court's views are therefore preliminary in the context of the application it must decide.

What was contracted for- the terms and construction of the contract.

49. The contract entered into on December 8, 2015 sets out in the recitals that the claimant was awarded a contract (the first contract) for the supply, installation and commission of two waste water treatment systems at Maracas Beach. The contract appears not to have been one merely of supply. While not a sub contract, the December 8 contract (the second contract) would not have been in existence but for the existence of the first contract between CISL and the defendant. The claimant was to firstly supply the equipment for which the defendant would be required to pay when same was ready to be shipped. That equipment would then have to

be installed and commissioned by the claimant. The claimant alleges that the contract was not connected to the first contract which was for the entire beach facility, that the contract was in fact only for the village. In that regard the claimant has filed substantial evidence of other bids and specifications in an effort to have this court determine the application in its favour. But none of these matters were pleaded and this is not a trial. Such a dispute of fact which may also depend heavily on expert evidence ought not to be resolved at this stage and the court makes no findings thereon.

What was the alleged supervening event

50. The allegation is that the first contract was terminated without input by the parties to the second contract without fault of either of the parties to the second contract and without their knowledge until April 21, 2016 allegedly.

How does the alleged supervening event affect, if at all, delivery of what was contracted for? Does it render the contractual performance now possible radically different from what was undertaken? – (per Lord Radcliff at 729).

51. The termination of the first contract makes it impossible for the parties to install and commission the required equipment as the defendant is no longer obligated and authorised so to do. This appears to be a radical departure from the entire object of the contract that renders the supply of equipment, even that which was contracted for otiose as far as the parties to the second contract are concerned. The effect is that the claimant is unable to perform its obligations and so is the defendant.

What provision does the contract make for happening of the alleged supervening event, expressly, or, (far more likely when frustration is being alleged), impliedly?

52. Whether implicitly or expressly, on the pleaded case and evidence before the court, the contract appears to make no provision for such an occurrence and does not appear to have been within the realm of contemplation of the parties.

What did the parties know about the possibility of the alleged frustrating event?

53. The pleaded case is that the defendant became aware of the termination when it received a letter of April 12, 2016 from CISL. This letter was received on April 21, 2016[20]. The claimant has not pleaded the date it received the said letter but has set out in its evidence that its business manager Avinash Rampersad would have only been informed of the termination and the letter at a meeting on May 20, 2016. This appears to have been confirmed by a letter from the defendant to the claimant of May 24, 2016 in which the defendant admitted that it informed the claimant of the termination at the meeting of the 20th May 2016. Based on the information before the court on the application there is no indication either directly or by inference that either party knew of pending termination until the first contract was figuratively pulled like a rug from under them sometime after the contract had been entered into and partial performance would have occurred.

[20] Paragraph 11.xi.i of the amended defence and counterclaim.

Which party if any had a greater degree of control over the happening of the alleged frustrating event?

54. Once again the pleadings and the evidence filed on the application by both parties in no way suggest that any party had a greater degree of control over the event. To that end it appears that neither party knowingly or impliedly took a risk that termination may have occurred.

55. When all is considered in the round therefore the court is satisfied that the defence discloses a case of frustration and so ought not to be struck out on that basis. The same applies to the Counterclaim. In so saying the court bears in mind that evidence is still to be led at trial. To that end the court does not accept the submission of the claimant that the evidence that is likely to be led at trial will simply be the same. There are many items of evidence which may be led at trial having regard to the court's ruling above.

Non compliance with Part 10 .7 (4) to (7) CPR

56. The relevant sub rules of Pat 10 read;

> (4) The defendant must certify on the defence that he believes that its contents are true.
>
> (5) If it is impractical for the defendant to give the certificate required by paragraph (4) it may be given by his attorney-at-law.
>
> (6) If the certificate is given by the attorney-at-law he must also certify the reasons why it is impractical for the defendant to give the certificate and that the certificate is given on the

defendant's instructions.

(7) If the defendant is defending in a representative capacity, he must say—

(a) what that capacity is; and

(b) whom he is representing.

57. The claimant submitted that the certificate contained in the amended defence does not comply with the requirement that the truth be certified and that a reason be provided for the non-availability of the representative of the defendant to sign the defence and certify the truth of the contents. The certificate at the end of the amended defence and counterclaim signed by attorney at law for the defendant reads as follows:

> "The facts and information stated in this Amended Defence and Counterclaim are based upon my instructions provided to me by the Defendant. The Defendant is unable to attend my office to execute this Amended Defence in order for same to be filed by the stipulated time."

58. In essence the certificate does not give reasons for the impracticability for the attendance by the representative of the defendant and does not certify that the attorney believes the contents to be true. In the court's view the latter is not a mandatory requirement as the rule provides that the attorney ***may*** give the certificate of truth. In most cases attorneys were not involved in the facts of the case so that for them so to certify would be dishonest. This is more likely than not one of those cases having regard to the volume of material facts pleaded therefore it is not reasonable for attorney to have personally certified the facts in this case. So that in such an instance the most that can be certified by the attorney is that those are

the instructions received. The personal certification of the facts set out in pleading by the attorney at law representing the parties is an exceptional occurrence. In fact, such a certification may rightly raise issues of conflict of interest in some cases.

59. In relation to the former, the absence of the reasons for non-availability is in the court's view of no detriment to the pleading as it is a mere procedural irregularity which can be rectified by Part 26.8. Were the court to stand on ceremony in that regard it would be committing a grave injustice to the defendant by striking out its case for purely technical reasons which goes against the grain of the overriding objective. The argument in that regard is therefore dismissed.

Summary Judgment

Realistic prospect of success on his defence to the claim, part of claim or issue

60. The court is of the view that the defendant has a realistic prospect of success on the issue of frustration but not on the issues of rescission and repudiation. In the court's view the course of dealing between the claimant and the defendant would have established that shipments would be late from time to time for a variety of reasons including the revision of specifications and the availability of supplies so that on the evidence there would have been no realistic basis for the defendant to conclude that the claimant had in fact rescinded the contract thereby entitling it to repudiate.

61. In relation to the second milestone payment and good to be supplied there were at least two prior delays in shipping but neither had led and could reasonably have led to the conclusion that the claimant has rescinded the

contract. While this defence is arguable, it is tenable at most. In that regard it is more likely than not that the evidence to be led at trial on these issues will be unchanged from that presented to the court in the application and no fuller investigation of the facts and law surrounding these are needed.

62. As a consequence, the court will grant judgment to the claimant on these issues set out in both the defence and counterclaim.

63. In relation to the issue of frustration the court finds that the case for the defendant is more than merely arguable having considered the pleadings and evidence put before the court as *set out earlier*. For the reasons discussed above, in respect of which repetition is unnecessary the court is equally of the view that the defendant has a realistic prospect of success in relation to its plea. As a consequence, the application for summary judgment in relation to the issue of frustration will be dismissed in relation to the defence.

64. In relation to the counterclaim, the defendant claims damages arising out of the delay which they allege was partially responsible for the termination of the contract. The very substantial letter of termination of April 12, 2016[21] sets out in detail the reasons for termination including but not limited to the delays allegedly occasioned by the claimant. The court does not accept the submission of the claimant that the claim for damages is inconsistent with the plea of frustration as the damages are alleged to have arisen because of the delay caused by the claimant which in turn was at least partially responsible for the termination of the contract and loss. These are of course all matters in respect of which further investigation by

[21] Exhibit VF7 to the affidavit of Frankstan-Paul of July 30 2017.

way of evidence and cross examination is required. The counterclaim on frustration will therefore also stand.

65. The order of the court is:

1. The application to strike is dismissed.
2. Summary judgment is granted to the claimant on the issues of rescission and repudiation set out in both the defence and the counterclaim.
3. The claim for frustration set out in the counterclaim shall stand.
4. Costs of the application are reserved to be determined at the end of trial.
5. A Case Management conference shall be held on February 17, 2021 at 2:30 p.m. by virtual hearing.

Ricky Rahim

Judge