THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No.CV2012- 05137

Between

JOHNSON ALEXANDER

[Trading as HES Health and Environmental Solutions]

Claimant

And

GRAND BAY PAPER PRODUCTS LIMITED

Defendant

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES

Mr. Lloyd Elcock for the Claimant

Mr. Stephen Singh instructed by Ms. Tracey Rojas for the Defendant

JUDGMENT

BACKGROUND

1. The claimant claims damages in the sum of $1,076,400.00 (VAT inclusive) for breach of **a written contract** made between the Claimant and the Defendant on or about January 14 2011. Under the written contract the claimant was to be paid a monthly management fee of $18,000.00, *"To develop, implement and manage an OSHA Compliance Management System at the above address for a period of thirty-six (36) months and renewable for the same period at the end of the first contract period after review and satisfaction of service with client."*

2. The Claimant claims that he was entitled to be paid -

(i) Damages representing full payment for the unexpired portion of the written contract, **and**

(ii) Damages on the basis of a quantum meruit, (amounting to three years payment, or alternatively, up to one million dollars,) for work that he performed at the request of the defendant in averting a threatened factory shutdown by the Occupational Safety and Health Agency- (the Agency).

ISSUES

3. A. Whether the contract in writing (with acceptance dated 14th January 2011) ("the written contract") contains the entire agreement between the parties?

B. Alternatively whether,

a. there was a term in the written contract, expressed or implied, that related to **separate compensation** for work involved in averting a shutdown by the Agency or,

b. additional to, and **separate from, the written contract,** there was a collateral contract, or a separate contract, or an obligation to pay, whether arising from quasi contract or otherwise, that if the Claimant avoided the alleged "threatened shut down" of the Defendant's factory by the Agency he would be entitled to additional compensation. (hereinafter "the alleged shutdown prevention contract/obligation")

C. If so, whether the defendant wrongfully repudiated its written contract with the Claimant dated January 14th, 2011, and /or is in **breach** of:

i. A term in the written contract, expressed or implied, that related to separate compensation for work involved in averting a shutdown by the Agency, and / or

ii. Any other term in the written contract, and / or

iii. A separate alleged shutdown prevention contract or obligation.

D. If so, the quantum of damages, if any, payable for

i. Alleged breach of the written contract of any term that related to separate compensation for work involved in averting a shutdown by the Agency, or

ii. Alleged breach of any alleged shutdown prevention contract /obligation, and / or

iii. Alleged breach of any other term of the written contract,

4. **CONCLUSION**

a. The contract in writing dated 14th January 2011 ("the written contract") contains the entire agreement between the parties.

b. There was no term in the written contract, expressed or implied, that related to separate compensation for work involved in averting a shutdown by the Agency.

c. There was no collateral contract, or separate contract, or obligation, quasi contractual or otherwise, that if the Claimant avoided the alleged "threatened shut down" he would be entitled to additional compensation- ("the alleged shutdown prevention contract/obligation").

d. The defendant did not wrongfully repudiate the written contract with the Claimant dated January 14th, 2011.

e. The defendant is therefore not in breach of:-

i. Any term in the written contract, expressed or implied, that related to separate compensation for work involved in averting a shutdown by the Agency, or

ii. Any other term in the written contract, / or

iii. A separate alleged shutdown prevention contract,

because,

i. it was not the party which repudiated the written agreement, and

ii. no term existed in the written contract, expressed or implied, that related to separate compensation for work involved in averting a shutdown by the Agency,

iii .no separate alleged shutdown prevention contract existed.

f. The Claimant has therefore failed to establish:-

i. any basis for an entitlement to damages for breach of the written contract,

ii. any other basis for a claim for damages, whether for breach of a separate shutdown prevention contract, or a term to this effect implied in the written contact, and whether on a quantum meruit basis, or any other basis.

DISPOSITION AND ORDERS

5. i. The claimant's claims are dismissed.

ii The claimant is to pay to the defendant $112,820.00 in costs on the basis prescribed by the Civil Proceedings Rules based on his claimed damages of $1,076,400.00.

ANALYSIS AND REASONING

The alleged contractual arrangements

6. It is essential to determine what were the contractual arrangements that came into being in order to determine the claimant's entitlement, if any, to damages.

7. The Claimant claims that he agreed to:

(a) Develop, implement and **manage** a **safety and health system** to **ensure the Defendant's full compliance with the requirements** of the Occupational Safety and Health Act **("OSHA**") and

(b) Rendered his services and worked extensively from January 2011 to November 2011 **to avoid the threatened shut-down** by the Occupational Safety and Health Agency (the Agency) of the Defendant's manufacturing operations at its factory.

(In this formulation of his claim there was one contract – written – with two obligations to pay for two services, namely

(i) To develop, implement and **manage** a **safety and health system to** ensure the Defendant's **full compliance with the requirements of "OSHA**"

(ii) To **avoid a threatened shut-down** by the Agency.

8. The Claimant claims, alternatively, damages in the sum of $331,200.00 (VAT inclusive) for **breach of a written contract** made between the Claimant and the Defendant on or about January 14 2011 by which the Claimant agreed to ensure the Defendant's **total compliance** with the requirements of the Occupational Safety and Health Act ("OSHA") **plus** the sum of $745,200.00 (VAT inclusive) as a reasonable remuneration or **quantum meruit** for the work done and the services rendered by the Claimant to and for the benefit of the Defendant in or about from January 2011 to November 2011 **at the request of the Defendant** by which the Claimant effectively **avoided the threatened shut-down** by the Occupational Safety and Health Authority of the Defendant's factory and operations at its manufacturing operations at Arima - (the shutdown avoidance obligation).

9. (In this formulation there is a written contract with an obligation to pay **to ensure** the Defendant's **total** compliance with the requirements of OSHA, and another obligation based on work done at the request of the defendant for which compensation was sought on a quantum meruit basis **to avoid a threatened shut-down**).

10. In the reply submissions this was clarified, as it was contended that there were in fact two contracts, the written contract and a shutdown avoidance "contract", and the Court was asked to order the Defendant to pay to the Claimant:

a) $331,200.00 (or $387,000.00), for breach of **the written contract, (**being full payment for its unexpired term),

b) The sum of $1,000,000.00 as a quantum meruit. (It is understood that the claimant is seeking, in the alternative, the sum of $745,200.00 for breach of the **shutdown avoidance** contract). [1]

[1](For convenience only this will be referred to interchangeably as the shutdown avoidance contract or shutdown avoidance obligation, although the term as used in this judgment encompasses an obligation to pay that may not have been strictly contractual. The claimant has suggested that the quasi contractual basis for payment on a quantum meruit for work done at the request of the defendant may or may not have been strictly contractual).

The Defendant's contentions

11. The contract executed on January14th, 2011 is the sole and entire contract between the parties. Further, it was the Claimant, by letter dated the 26th July, 2012, who unilaterally terminated his contract by giving notice of his intention to do so, with the effective date being August 10, 2012, and he was paid up to that date. Therefore, the Claimant is not entitled to any damages. Further, the Claimant is not entitled to be paid on a quantum meruit basis.

The contract as pleaded

12. After seeking a contract with the defendant, (but not securing it because it already had such a contract with another consultant), the Claimant entered into a written contract on April 7th 2010 with TTL, (a sister company of the Defendant) for a monthly retainer of $4,500.00 (exclusive of VAT), and in January 2011 the Claimant secured a written statement of OSHA compliance from the Occupational Safety and Health Agency (the "Agency") for TTL.

13. The Claimant claimed to have learned, in the early part of January 2011 that the Agency was in the process of "fully enforcing their powers" against the Defendant for their continued breach of OSH laws, by shutting down its factory operations. The Claimant immediately communicated the OSH Agency's threat to the defendant's Mr. Abes. They inspected the factory together on January 12th 2011.

14. He claimed to have observed, inter alia, the following:-

a) The Defendant's employees were performing dangerous work without the use of **personal protective equipment** (PPE);
b) Dangerous and **unfenced machines** including an unguarded Tissue Machine and defective and **uncertified industrial cranes were in operation**, exposing the Defendant's employees to risks of serious bodily injury and death;
c) There was **no functional safety and health policy** existing at the time;

15. He claimed that "*in a panic Mr. Abes asked the Claimant to take over the safety management of the Defendant's factory operations and to submit a proposal to prevent the potential threatened shut down of its factory by the OSH Agency and to bring the company up to full compliance with OSHA*"

16. He claimed that the Claimant and the Defendant concluded a written contract on January 14th 2011 for a period of three years for a fee of $18,000.00 per month **subject to the proviso** that **if the Claimant managed to avoid the threatened shut down** of the Defendant's factory by the OSH Agency **the contract would be extended for a further three years f**or the said fee of $18,000.00 per month. This alleged proviso forms the basis of a claim for compensation for prevention of an Agency shutdown.

17. Five of the major areas of OSHA violations to which the Claimant allegedly had to devote his time and efforts, were

(a) Dangerous and unfenced machines,

(b) Defective and uncertified industrial cranes,

(c) The absence of any or any adequate personal protective equipment (PPE),

(d) Establishing and maintaining housekeeping standards, and

(e) Developing and implementing a safety and health policy.

Shut down avoidance activities

18. He alleged that the Claimant's normal or **standard OSHA contract** involves a **fifteen stage implementation process** and this is detailed in a document that is attached to and forms part of the said standard contract. By contrast the work that had to be done, and was done, by the Claimant to avoid the threatened shutdown of the Defendant's operations was a job that the Claimant had never done before and included the following tasks:-

a. "*To **use** the Claimant's influence "as a former OSH Authority Board Member (sic) ,and **his expertise** to **prevent the shutdown** of the Defendant's operations.*

b. *To **prevent** the Defendant from **losing** "approximately one million dollars a day" **by the said shutdown** which could have lasted for weeks; (No admissible evidence was led to substantiate the assertion that loss of profit or earnings per day was of this order or in this amount).*

c. *To change the bad safety image of the Defendant and to "**present the Defendant to the OSH Agency** during their February 10th 2011 inspection as an employer that is*

respectful of the safety and welfare of its employees at work and serious about OSHA compliance";

d. ***To act as the agent and main representative of the Defendant*** *in* ***communicating with OSHA*** *to prevent the shutdown of the Defendant's operations and to be present at any day and at any time and during all inspections by the OSH Agency to treat with all matters relating to the threatened shut down of the Defendant's operations;*

e. *To use the Defendant's rights under the OSH Act to challenge the issue or intended issue of prohibition notices to prohibit the use and operation of plant, equipment or work spaces of the Defendant by the OSH Agency for actual or perceived OSHA violations;*

f. *To relieve the Defendant of and to accept all the legal liability implications for actions taken by the Claimant to prevent the shutdown of the Defendant's operations as allowed under Sections 83:3 and 89 of the OSH Act;*

g. *To prepare and submit to OSHA all necessary written communications and to prepare and reply to all correspondences, calls and concerns from the OSH Agency connected with the prevention of the shutdown of the Defendant's plant and equipment;*

19. (A,) (b), (c), (d), and (g) above appear to be further and better particulars of the same thing- averting shutdown.
(e) and (f) deal with possessing knowledge to deal legally with a shutdown situation under the Act. As a consultant the claimant would be expected to possess such knowledge. In any event there is no suggestion that any preventative action had to be taken by him on behalf of the defendant under the Act.

20. The **fifteen stage implementation process includes,** as specific stages, **Risk Assessment** and OSHA **Compliance Requirements** listings, and **OSHA Certifications**. These are matters which, on their face, address the issue of ensuring compliance with the Act. The written contact was to develop, **implement** and **manage** this program, including those steps.

21. The Claimant alleges that he avoided the threatened shut down of the Defendant's plant by the Occupational Health and Safety Agency (OSHA), and that he should be paid separately for these services.

22. The Claimant therefore alleges in effect that:-

a. either this (avoiding the threatened shut down), was a **separate term**, but which nonetheless formed **part of the initial contract** with the Defendant, and he is entitled to be compensated for breach of this term on the basis agreed – namely an automatic entitlement to a renewal of his contract with the defendant for 36 months at a rate of $18,000.00 plus Value Added Tax (VAT) per month, (valued at $745,200.00), **or**

b. that he is entitled to be paid on the basis that avoiding the threatened shut down is a **separate contract/obligation** for which he is entitled to compensation on a quantum meruit basis, (the quantum of that remuneration being **either** (i) $1 million dollars – that amount he alleges of one day's loss if a shutdown had occurred, or (ii) $745,200.00 (VAT inclusive) – the value of a renewal of his contract with the defendant for 36 months at a rate of $18,000.00 plus VAT per month.)

23. The claimant claims, in effect, that **automatic**, non optional renewal of the contract, was the agreed consideration for performance of his obligation under the shut down avoidance contract/ contractual term /or obligation - (on one of the alternative bases for compensation that he asserts, - the other being one million dollars, the alleged value of the service to the defendant).

24. He also claims, in effect, that implementing and managing the 15 stage program, including **Risk Assessment,** and OSHA **Compliance Requirements listings**, and **OSHA Certifications,** were separate from the steps (a),(b), (c), (d), and (g), as well as (e) and (f), as listed at paragraph 18 supra.

25. As OSHA **Compliance Requirements** listings, and **OSHA Certifications** are steps that, on their face are necessarily aimed at ensuring OSHA compliance, for the purpose of avoiding any infringement or continued infringement of the Act, and thus avoiding the possibility of a shutdown for non compliance or continued non compliance, **shutdown prevention activities are clearly encompassed in the written contract.**

26. If they were not to be encompassed in the written contract, in view of the similar, (and, on a balance of probabilities), overlapping nature of-

(i) The work described at (a) - (g) above, (where the claimant describes what is involved in shutdown prevention), and

(ii) The work defined and described in the written contract, (which includes OSHA **Compliance Requirements listings**, and **OSHA Certifications**),

there was nothing to preclude the claimant from preparing another written agreement making it clear that shutdown prevention was a separate obligation, attracting separate compensation.

As it stands, the only basis of this claim for $745,200.00 for breach of payment obligation for this alleged shutdown prevention contract / obligation, comes from the defendant's own, self-serving testimony.

27. The claimant submitted that it is undeniable that the Claimant **only got the contract because of the fact that the Defendant was under threat of being shut down** by the OSH Agency in January 2011. However, this is all the more reason to infer that the written contract entered into covered **all work** in contemplation by the parties **including shutdown prevention and all steps incidental thereto**.

28. The written contract itself provides for the compensation for work which, on its face, encompasses the very activities that would be involved in shutdown prevention. The burden on the Claimant is to establish on a balance of probabilities the existence of the alleged **separate** shutdown prevention contract.

Alleged shutdown prevention agreement - whether in writing

29. The alleged shutdown prevention contract, unlike the contract in writing executed on 14th January 2011 (the written contract), is not in writing. Further, there is no reason why, if it exists, it should not have been in writing. The claimant himself prepared the written agreement. Accordingly there is no reason why he could not have recorded in written form the alleged shutdown prevention contract.

30. He claims that the activities involved in the written contract, and those for the alleged shutdown prevention contract, were different. Even if the original consideration for the alleged shutdown prevention contract were a renewal of the written contract for 36 months at the rate of

$18,000.00 per month plus VAT, that works out to a considerable sum - $745,200.00. In fact, if the consideration were to be based on the alleged loss averted to the defendant of $1 million, then all the more reason to have accurately recorded it in writing..

31. The amount being claimed is sufficiently significant that the failure to record its alleged basis must be considered critically.

32. The absence of a written agreement, when the claimant has himself prepared a written contract detailing his arrangement between himself and the defendant, for what he claims are separate services, is suspicious. There is absolutely no credible reason why the claimant could not have had any separate shutdown prevention agreement, or term in an agreement, or separate payment obligation, recorded in writing.

33. The inescapable inference is that there was no such term, and no such shutdown prevention agreement, additional to, or separate from, the actual agreement that he did ensure was recorded in writing. This is the contract executed on January 14th 2013.

34. Any additional term or contract, not so recorded in writing, on the basis of which he claims for shutdown prevention, to the alleged value of up to one million dollars, appears to be merely an afterthought.

35. In fact by letter dated July 26th 2012 the claimant wrote to the defendant setting out the reasons for termination. (All emphasis added).

> *Further to **our recent discussions** I hereby confirm **our decision** to bring forward the termination date of **my contract** from January 13th 2014 to August 10 2012 for the following reasons:*
>
> *The **principal objectives** of **my contract ((some of which went beyond the scope of works written** in **my contract document** but which were verbally communicated to me at the time of my hire) have been fulfilled; these were ;*
>
> ***a. to prevent the threatened shut down of the company's operations by OSHA**'s Chief Inspector in 2011 resulting from the company's gross negligence of OSHA laws(sic)*
>
> *b to bring the company to a status of compliance with all OSHA laws ….*

My remaining duties of continuing to manage the company's safety and health program can be successfully done by your Safety and Health Officer Mr. Andre Richards whom I am presently (sic) training.

36. It is clear from this, and the contents of the entire letter, that the claimant and the defendant consensually decided on the termination of the contract.

37. It is also clear, as the claimant himself says so, that the written contract **included as one of its objectives**, even though not so expressly stated**, "to *prevent the threatened shut down of the company's operations by OSHA"***.

38. It is also clear that if there was any such alleged threatened shutdown, (and there is no need for any finding as to whether that alleged shutdown threat even existed), there is no reference in this letter to any agreement for separate compensation for this aspect.

39. In fact this is quite consistent with the wording of the written agreement, and at least two of the stages of the 15 part program. These also apparently encompass prevention of any alleged threatened shutdown, and do not contemplate any separate compensation for this aspect.

40. Although the letter claims a willingness to accept $250,000.00 plus VAT in lieu of a claimed entitlement to the amount remaining under the contract of $387,000.00 plus VAT, this is based on a claimed entitlement to a "buyout" of the amounts payable if the contract had not been terminated and had continued for its full term.

41. The letter itself refers to no breach of contract by the defendant so as to entitle him to payment of any damages flowing therefrom.

42. His proposal for a buyout in the sum of $250,000.00 (plus VAT) when he was a party to a consensual termination of the contract, which itself provided no separate compensation for shutdown prevention, was, not surprisingly, rejected by the Defendant.

43. I find that the written document, prepared by the claimant himself, records the entirety of the contractual relations between the claimant and the defendant.

44. I further find that this is confirmed by the claimant himself in his own communications after the contract was terminated.

45. By his termination letter of 26th July, 2012 he indicated that he was owed the sum of $387,000.00 plus VAT but was willing to accept the sum of $250,000.00 plus VAT. On the 12th August, 2012 he submitted an invoice for $745,200.00. I find that this supports the inference that his attempt to impose an additional claim for $745,200.00 by that purported invoice dated August 12th 2012 is clearly an afterthought. That purported invoice was for "*OSHA shutdown intervention, prevention and management during the period January 2011 to November 2012*". This was the same period as his services under the written contract, which provided for services which included those alleged services for which he was, for the first time, making an additional claim.

46. That additional claim amounts to an attempt to unilaterally impose a fee of almost three quarters of a million dollars for an alleged additional service without the defendant having had the opportunity to accept or reject it.

47. Assuming that any such threat even existed, the Claimant knew of it in the early part of January 2011, before allegedly touring the factory with Mr Abes of the defendant on January 12th 2011. He entered into the written agreement on January 14th 2011. The claimant claims that it was known to both parties that there was an alleged shutdown threat at the time of his tour and before he prepared the written agreement. Under the written contract a reasonable party in the position of the defendant would have been entitled to the view that the written contract encompassed shutdown prevention and all ancillary services.

48. I find that the defendant was never informed that the claimant was of the view that he had an automatic entitlement to a further 3 year renewal of the written contract if an alleged threatened shutdown by OSHA were averted. This is absolutely clear from the written contract, which not only makes no reference to such a renewal, but actually **provides for renewal in terms which are inconsistent with renewal being automatic**.

49. There is no legal basis in those circumstances for the claimant to impose a claim for $745,200.00 where no such agreement has been demonstrated.

Quasi contract

50. Even the alleged basis in quasi contract of,-

(i) A request for services to be provided and

(ii) An implied obligation to pay a reasonable amount therefor,

has not been established.

51. The written contract, which covers inter alia **OSHA certification**, and **Risk Assessment,** and OSHA **Compliance Requirements listings,** is inconsistent with there ever having been any such separate request for separate shut down prevention services, with separate compensation of any type, as alleged.

Period of alleged shutdown prevention services

52. It was also submitted that on the face of the claim the alleged work done and the services rendered by the Claimant to and for the benefit of the Defendant from January 2011 to November 2011 **covers the same period** as that of the written contract – January 2011 to its termination in November.

53. It is obvious therefore that, for this reason also, the claimant must therefore establish that this alleged work is work that has not been compensated under the written contract. If not, he would be claiming to be compensated for the same work:-

a. under a written contract, at a contracted and agreed rate, and then

b. additionally, under a quantum meruit.

See – **Mowlem Plc (Trading as Mowlem Marine) v Stena Line Ports Limited**-2004 EWHC, 2206 per Judge Richard Seymour Q.C. at paragraph 40 (citing Lord Dunedin in **The Olanda**)

> *"As regards quantum meruit where there are two parties who are under contract quantum meruit must be a new contract, and in order to have a new contract you must get rid of the old contract."*

54. He adopted the reasoning of Mason P of the Court of Appeal of New South Wales, in **Trimis v Mina** (2000) 2 TCLR 346 as set out hereunder and found that it represented the law of England also.

> *"The starting point is a fundamental one in relation to restitutionary claims, especially claims for work done or goods supplied.* ***No action can be brought for restitution while an inconsistent contractual promise subsists between the parties in relation to the subject-matter of the claim.*** *This is not a remnant of the now discarded implied contract theory of restitution. The proposition is not based on the inability to imply a contract, but on the fact that the* ***benefit provided*** *by the plaintiff to the defendant was* ***rendered in the performance of a valid legal duty. Restitution respects the sanctity of the transaction, and the subsisting contractual regime chosen by the parties as the framework for settling disputes. This ensures that the law does not countenance two conflicting sets of legal obligations subsisting concurrently****. As Deane J explained in the context of the quantum meruit claim in Pavey & Matthews (at 256),* ***if there is a valid and enforceable agreement governing the claimant's right to payment, there is "neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration".***

55. The claimant also accepts this proposition, which is common ground. It is clear from both the description of the services to be rendered in the written contract, and the period over which the alleged shutdown prevention services were delivered, that the alleged shutdown prevention services were not in fact separate from those expressly contracted for in the written agreement. There is therefore no basis for any entitlement to separate compensation for shutdown prevention services, as these were already compensable under the written agreement.

Provision for renewal

56. The contract details are stated as "*To develop,* ***implement and manage*** *an OSHA Compliance Management System as the above address for a period of thirty-six months (36) and* ***renewable*** *for the same period at the end of the first contract period after review and satisfaction of service with client."*

57. The Contract was prepared by the Claimant and typed on a Health & Environmental Solutions (HES) form. The monthly management fee is $18,000.00. The term of the contract was

36 months. The contract was renewable for the same period after "*review and satisfaction of service with client*".

58. The Claimant alleges that there was a threat from OSHA that the Defendant Company would be shut down at the time that the written contract was prepared by him. There is therefore absolutely no reason why, in his written contract that he prepared, that he would not make express reference to the alleged term/ payment obligation that the written contract would be renewed for a further 3 year period if he averted the threatened OSH shutdown.

59. The written contract is clear and unambiguous. In relation to renewal it states that *it is renewable for the same period at the end of the first contract period after* ***review*** *and satisfaction of service* ***with client***. **There is nothing there concerning automatic entitlement to renewal** if a threatened OSH shutdown is averted. The claimant asks in effect that such a term be implied.

60. If the agreed remuneration under the shutdown prevention agreement or term were the automatic, and therefore non optional, renewal of the original 3 year contract, then there is no reason why it should, inconsistently with that, expressly provide by its terms that it was renewable for the same period at the end of the first contract period "***after review and satisfaction of service with client"***.

61. There would be no reason to limit the future renewal of the contract in this way, if the claimant were to receive compensation, **already agreed at the time the contract was drafted,** as being the renewal of the original contract.

62. In fact the renewal option would have been more accurately stated by words to the effect that-

> " *this contract is to be automatically renewed if the claimant averts the threatened shutdown of the factory by OSHA*."

63. This is especially so as, without any amendment, or addendum to the contract, the written contract is **inconsistent with any automatic**, non optional **renewal**. The written contract, without amendment, continues to state that it was renewable for the same period at the end of the first contract period after **review and satisfaction of service with client**.

64. This suggests that renewal is at the option of the client, (*after review and satisfaction of* (sic) (presumably *with*) *service with client*), or at the option of both client and claimant after review by both, and satisfactory service having been delivered by the claimant. Without satisfactory service there is nothing automatic about the renewal. Without review, there is nothing automatic about renewal.

65. The written contract has not been amended. It is inconsistent on its face with the shutdown prevention term or contract alleged by the claimant. There is no basis for the many inferences that the claimant asks the court to draw to establish therefrom that, inconsistent with the express terms of the written contract that the claimant himself drafted , that he was entitled to an automatic renewal of the written contract, as compensation for averting a threatened shutdown of the factory.

66. There is even less evidence that it was agreed either :-

(a) That his compensation for averting a threatened shutdown of the factory would be one day's earnings, or

(b) That the value of the service was one day's earnings, or

(c) That one day's earnings was in fact one million dollars, or

(d) That this or any sum represented either gross earnings or net profit.

67. The attempt to impute this alleged term or contract or obligation, which is inconsistent with the written contract, amounts to an attempt to renegotiate the contract long after it came into existence, and in fact after it came to an end. This contravenes basic principles of contractual interpretation.

68. The claimant submitted that the engagement of the Claimant to avoid the shutdown was not reduced to writing but the parties attempted to make reference to it in the written contract **by providing for its automatic extension for three years at $18,000.00 per month if he managed to successfully avoid the shutdown.** However this is **definitely not the effect of the evidence.**

69. The claimant sought to explain the intended meaning of the wording of the renewal provision in the written contract and to evade the necessary meaning of the term that he himself included relating to its renewal. He suggests that that some type of severance should apply to that portion as the words used did not reflect his intention, and it should be considered nullified.

70. Even if true, the words inserted by the Claimant could not possibly be given their newly alleged intended meaning. The claimant recognises in the Reply submissions that "*It is established that in interpreting a document a Court has to ascertain the intention of the parties not from what they may have subjectively had in mind but from* ***the meaning of the words that they have actually used****."* The law is clear that *the meaning of the document is what the parties using those words against the relevant background* ***would reasonably have been understood to mean***. There is no basis whatsoever for ignoring the words that were actually used by the parties to the written contract.

Interpretation of the agreement – Principles

71. In the case of **Investors Compensation Scheme Ltd v West Bromwich Building Society and ors**, [1998] 1 WLR 896 per Lord Hoffman at page 912F -913F states as follows: - (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:*
>
> *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.*

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****.*

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.*

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.*

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.'"

72. **A Court must have regard to a document as a whole in order to properly construe same**. See Chitty on Contracts, 30th Ed, vol 1 at para 12-063:

"The whole contract is to be considered. Every contract is to be construed with reference to its object and ***the whole of its terms****, and accordingly, the whole context must be considered in endeavouring to collect the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated word or clause:*

'It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected ex antecedentibus et consequentibus; ***every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done****.'* (Emphasis added)

73. The authorities demonstrate that it is necessary to ascertain the meaning which the agreement would convey to a reasonable person having all the background knowledge which would have reasonably been available to the parties in the situation in which they were at the time of the contract. The parties' intention is ascertained **objectively**.

74. In this case the plain meaning of the agreement is clear. There is no ambiguity in the words used in this agreement. There is little need to choose between alternative ambiguous and conflicting meanings.

75. The Claimant's interpretation of the agreement is that he is entitled to separate compensation for averting a threatened shutdown of the factory, even though
(a) not only does the contract which he himself drew up, not refer to this, but
(b) it in fact contains a term relating to its renewal which is inconsistent with this.

76. Instead, he is seeking to be remunerated, to the extent of $ 1 million, on the basis of an agreement / quasi contractual obligation to pay a reasonable remuneration, for which the only evidence is the oral, entirely self serving, testimony of the claimant himself.

77. The plain meaning of the agreement is that the claimant's services covered all services that he was providing to the defendant for that period. Shutdown prevention services are included within the 15 stage program to which it refers. If there were other separate services, for which separate compensation was intended, then there would be no reason not to reduce that agreement/ obligation also into writing

78. I find that those words- '*renewable for the same period at the end of the first contract period* ***after review and satisfaction of service with client***" are in fact relevant, meaningful, and essential to the construction of this agreement. To ignore and discard those words would be to ignore the context of the entire agreement. It is only by ignoring them that the claimant can succeed in this claim. The claimant's argument in his reply submissions that the clause was badly drafted and failed to convey the intention of the parties must be rejected. So is any submission that in effect, assuming this to be the case, the court can not only ignore the words used , but further , must read into the contract words that they did not use , and intentions that they did not express.

79. It is only by ignoring those words that one arrives at the situation which the Claimant is trying to advance whereby ,-

a. the claimant is now demanding additional compensation of up to one million dollars relating to averting shutdown based on this being an alleged separate contractual or quasi contractual arrangement, the existence of which only he appears to know,

b. the defendant exposed itself to liability of up to one million dollars by this alleged separate contractual or quasi contractual arrangement,

c. that arrangement is inconsistent with the one actually recorded in writing by the claimant himself.

80. Mr. Ali testified that at no time prior to execution of the written contract or afterwards did the Claimant indicate that shut down prevention services attract separate fees, or that these services were different and separate from those that he agreed to provide under the written contract. This is consistent with the documentary evidence and it is accepted.

81. Whether or not there was an absence or presence of crane certification, connected to any alleged threat by OSHA to shut down the Defendant, the fact is ,-

(a) that OSH certifications were expressly part of the written contract , and

(b) there was no provision for compensation additional to that expressly stipulated in the written contract.

Alleged Breach

82. It was submitted by the Defendant that:-

The undisputed evidence is that

(i) The Claimant was always paid his monthly management fee all the way up to the end of August, 2012;

(ii) The Claimant was given unrestricted access to the Defendant in order to carry out his duties;

(iii) The Claimant first terminated his contract with the Defendant in June 2011;

(iv) The Claimant wrote the Defendant on the 26th July 2011 a letter titled "Discontinuation of OSHA Services" wherein he stated that "*further to our discussion I hereby confirm our decision to bring forward the termination date of my contract from January 13 2014 to August 10 2012 for the following reasons "– (*which included that the principal objectives of the contract had been fulfilled – including averting the alleged threatened shutdown*);*

(v) After August 10th 2012 the Claimant no longer attended the offices of the Defendant and carried out no further services.

(vi) There is therefore clear evidence that it was the Claimant who unilaterally terminated the Agreement.

This is the effect of the evidence and it is accepted, save that it appears from the claimant's letter that the termination was consensual.

83. The Claimant has claimed in his Witness Statement that his contract was constructively terminated by the Defendant when the Defendant unreasonably refused to accept the services of Mr. James.

84. He formed the view that the defendant's rejection of Mr James – an employee of the claimant, as his assistant or representative on site, (it is not necessary to determine which), was a "fundamental breach" (sic). Even if this were so, it must be established that such rejection amounted to a repudiation of the contract by the defendant. The fact is that the alleged danger of

shutdown had been bypassed by November 2011, but the contract was being performed by the claimant personally up to around April 2012.

85. The Claimant engaged Mr. James. He was an employee of the claimant. He knew of objections to Mr. James by the defendant but he "allowed" Mr James to work at the plant up to early June 2012.He thought that the defendant's attitude to Mr James was "unfair" and "was undermining his better judgement and his company's right to employ the persons it sees fit to carry out its business". In fact the claimant was free to hire whomsoever it wished. What was objected to was the placement of Mr James, a person whose application to be an employee of the defendant had been rejected previously. It was not established that it was any term of the agreement, far less a fundamental term, that Mr. James, or any other person selected by the claimant in his stead, had to be engaged or accepted by the defendant. The legal basis on which this is alleged to be a "fundamental" term is unclear. There is no evidence that rejection of Mr James rendered performance of the contract impossible, or even excessively difficult.

86. In fact it is arguable that it was unreasonable of the Claimant to expect automatic agreement with his suggestion, as it is quite arguable, as the defendant suggests in the witness statement by Mr. Ali, that the contract with HES was a contract involving personal skill and confidence, and that the attempt to impose the presence and involvement of Mr James, a person in whom the defendant clearly did not repose such confidence in his personal skills, was not permissible under the contract.

87. Further, there is no reason why if that were the situation, the claimant himself could not have either -

(a) Continued, as he had done for several months from the very inception of the contract, to provide the services he had contracted to provide to the claimant, or

(b) Sought to identify some other person who was acceptable to the defendant to perform those services, or assist in their provision, in his stead, in lieu of Mr James.

The claimant himself asserts that it was his CV, and his reputation and experience, that qualified him for this contract, at least initially. On his own evidence therefore, prima facie, his personal skill, experience and reputation were important elements in the performance of this contract.

Yet the claimant (i) assumed, in those circumstances, a right of unilateral delegation of performance to Mr James without the consent of the defendant, and
(ii) further assumed that the defendant, in not accepting Mr James, would be, not only in breach, but in "fundamental" breach of contract, giving rise to a right to the claimant to claim damages from the defendant if it did not accept this unilateral change.

88. It was submitted that, beyond alleging in vague terms that Mr. Ali's attitude and actions created an unpleasant situation, there is an absence of specific examples within which to substantiate this claim. Therefore, on the face of it there has been shown no conduct by the Defendant that would indicate any "fundamental" breach of contract entitling the Claimant to treat the contract as terminated. This is clearly the effect of the claimant's own evidence and is accepted.

89. To characterise this as a term, far less a fundamental term, is tenuous. I find that it could not be such a term, far less a fundamental term as to amount to a repudiatory breach by the defendant if Mr James were not accepted.

90. It appears to be an afterthought to so elevate it in order to place the defendant in alleged breach, and therefore claim that it is liable for the damages claimed. See for example Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/3. CHOSES IN ACTION NOT CAPABLE OF ASSIGNMENT,

> **PARTICULAR CONTRACTS**
>
> **100. Personal contracts and covenants.**
>
> *Where a contract involves personal skill or confidence, such as a contract between an author and publisher that the one shall write and the other publish a book, it is not assignable, and this* ***principle extends to cases*** *where the* ***ability of one party to a contract to conduct his business*** *and make it pay and so to be able to pay the other party* ***is the subject matter of personal confidence***[3]

Although the claimant may not have intended to assign the contract to Mr. James, reposing responsibility for a large part of its performance on him would attract a similar argument. See also addendum – infra. This was clearly the position of the defendant, and in law, cannot be said to be so unreasonable as to constitute a breach of contract. Although the claimant contended vigorously to the contrary he supplied no authority in support.

91. In fact what the claimant then did is to indicate his willingness to terminate the contract before the 36 month period had expired. He claims that he insisted that a **mutually agreed** "settlement price "would have to be paid to him. He was asked to submit his proposal in writing. He did so. He claimed the sum of $250,000.00 plus Value Added Tax. This was not "mutually agreed". In fact it was rejected.

92. That being so the claimant could have continued to perform the services he contracted to perform for the defendant. The claimant however did not continue to provide any services under the contract. He considered that the defendant had "fundamentally" breached the contract. He himself failed to continue to perform the contract. His efforts clearly were redirected to seeking to obtain the compensation for breach to which he believed that he had become entitled.

93. He claimed that "*Mr Ali informed him that he would not be allowed to continue implementing my contract if I did not agree to his rejection of my representative Mr James.*" This evidence is rejected.

94. It is clear that there was no question of "not allowing" the claimant to continue providing services or "implementing" the contract. No such allegation is made in his letter of August 13th 2012, issued 3 days after the meeting at which he was allegedly so informed. On that same day he wrote giving notice of an intention to issue copies of all correspondence relating to his claim to compensation to 17 parties, including the Prime Minister, the U.S. and Canadian Ambassadors, President of the OSH Authority, and the Chief Fire Officer. This was followed up by a further letter on August 14th 2012 threatening to add to that list several other parties including Amnesty International and the United Nations Human Rights Division. The claimant clearly had no difficulty documenting any matters that he considered significant and relevant to his claim for compensation.

Whether the Claimant is entitled to damages for breach of contract

95. I find that as the Defendant was not in breach, the Claimant is not entitled to any damages for breach, or the balance due on the remainder of the Agreement. He was paid for the month of August, even beyond August 10th, the date at which he had proposed to cease providing services.

CONCLUSION

96. a. The contract in writing dated 14th January 2011 ("the written contract") contains the entire agreement between the parties.

b. There was no term in the written contract, expressed or implied, that related to separate compensation for work involved in averting a shutdown by the Agency.

c. there was no collateral contract, or separate contract, or obligation, quasi contractual or otherwise, ("the alleged shutdown prevention contract/obligation"), that if the Claimant avoided the alleged "threatened shut down" he would be entitled to compensation.

d. The defendant did not wrongfully repudiate the written contract with the Claimant dated January 14th, 2011.

e. The defendant is therefore not in breach of:-

i. Any term in the written contract, expressed or implied, that related to separate compensation for work involved in averting a shutdown by the Agency, or

ii. Any other term in the written contract, / or

iii. A separate alleged shutdown prevention contract,

because-

i. it was not the party which repudiated the written agreement, and

ii. no term existed in the written contract, expressed or implied, that related to separate compensation for work involved in averting a shutdown by the Agency,

iii. no separate alleged shutdown prevention contract existed.

f. The Claimant has therefore failed to establish

i. any basis for a claim for damages for breach of a separate shutdown prevention contract, or a term to this effect implied in the written contact, whether on a quantum meruit basis, or any other basis,

ii. any other basis for an entitlement to damages for breach of the written contract.

DISPOSITION AND ORDERS

97

i. The claimant's claims are dismissed.

ii. The claimant is to pay to the defendant $112,820.00 in costs on the basis prescribed by the Civil Proceedings Rules based on his claimed damages of $1,076,400.00.

Dated this 20th day of September 2013

……..

Peter A. Rajkumar

Judge

ADDENDUM

Common Law Series: The Law of Contract/Chapter 6 Third Parties/D Assignment of Contractual Rights/
(All emphasis added)

Personal obligations

[6.305]

Introduction It is a general proposition of contract law that unless waived, a party has a right to have the benefits he or she bargained for performed by the person he or she contracted with. However, where obligations are not personal the law allows for vicarious performance. An obligation may be personal due to its inherent nature, its character in a specific contract or because the parties have agreed that it is not capable of vicarious performance. **Ultimately, this is an issue of construction**[1].

- [1] *Davies v Collins [1945] 1 All ER 247 at 250* per Lord Greene MR ('Whether or not in any given contract performance can properly be carried out by the employment of a sub-contractor must depend on the proper inference to be drawn from the contract itself, the subject-matter of it, and other material surrounding circumstances.'). See also *Edwards v Newland & Co [1950] 2 KB 534 at 538* per Somervell LJ; *Dr Jaeger's Sanitary Woollen System Co Ltd v Walker & Sons (1897) 77 LT 180 at 186* per Lindely LJ; *Southway Group Ltd v Wolff (1991) 57 BLR 33 at 48* per Parker LJ, at 52 per Nourse LJ, at 53 per Bingham LJ.

[6.306]

Vicarious performance and repudiation **In many cases it is argued that an attempted sub-contracting of a personal obligation amounts to a repudiation** as the obligor by its conduct has put it out of its power to perform. These are **two separate issues**:

- (i) the personal nature of the obligation is relevant to vicarious performance;
- (ii) whether the obligor has put the obligation out of its power to perform is relevant to determining whether there is a repudiation or anticipatory breach by the obligor allowing the obligee to elect to terminate the contract.

There is a relationship between these two points in that **if a contract required personal performance** then the hiring of another person to carry out that performance may amount to a breach or repudiation of the contract, and if the obligation is actually carried out by that third party that may in some cases put it out of the power of the obligor perform[1]. In most cases, **whether or not there has been a repudiation will be a matter of degree**[2].

- [1] See *British Waggon Co and Parkgate Waggon Co v Lea & Co (1880) 5 QBD 149 at 153* per Cockburn CJ and *Edwards v Newland & Co [1950] 2 KB 534 at 537-538* per Somervell LJ.
- [2] See eg *Sorrentino Fratelli v Buerger [1915] 1 KB 307*; affd *[1915] 3 KB 367, CA*.

[6.307]

Vicarious performance and companies Given that a company may only operate through its officers, there will usually be an implied right allowing the company to delegate duties to competent persons. **There may, however, be**

cases where a person has contracted with a company because of the particular expertise of a certain officer. Where there is such a reliance, the duty cannot be performed by anyone other than that officer[1].

- [1] See *Southway Group Ltd v Wolff (1991) 57 BLR 33*. Seefurther para 6.300.

[6.309

Not inherently personal In many cases the personal nature of an obligation will not be obvious. In such cases the element of **personal skill**, care, taste, judgment or **confidence**, must be proved by the party so claiming[1]. **The determination of this question is a matter of construction which may in some cases be determined by a characterisation of the obligation itself[2], but generally will also involve a characterisation of the obligation in light of the surrounding circumstances of the contract[3]**. It is possible to identify a number of factors that are relevant to this construction exercise. Clearly the most important factor is the nature of the obligation itself viewed within the surrounding circumstances of the contract[4]. Moreover, **the presumed intention of the parties is more likely to require personal performance in contracts requiring the rendering of a service** than in commercial contracts for the supply of goods[5]. Where performance of the obligation involves an element of personal choice and where that choice is important to the party receiving the benefit of the obligation, the obligation is more likely to be personal. Another important factor concerns **whether a contractor has been chosen because of some previous experience with the contractor** or from what the employer has heard from friends or from **the contractor's public reputation**[6]. In many large or long term contracts, a contracting party will be very concerned about changes in the way the other party performs its contracts as that may affect it receiving the performance contracted for[7]. The requirement of personal attendance or supervision is also an important indicator, although not conclusive, because in certain transactions and businesses it may be normal practice to have an employee, apprentice or student carry out some or all of the work[8], …

- [1] *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd [1903] AC 414 at 417* per Lord Macnaghten; *National Carbonising Co Ltd v British Coal Distillation Ltd (1936) 54 RPC 41 at 46* per Clauson J.
- [2] See eg *Kollerich & Cie SA v State Trading Corpn of India [1980] 2 Lloyd's Rep 32* (seller was given option to appoint one of two inspectors to inspect loading and stacking of certain bags; if carried out the seller would be absolved of liability for shortage or bursting bags; the seller appointed one of the inspectors and although that inspector issued the relevant certificate, the actual work was performed by a third party; it was held that the seller was not absolved from liability to the buyer; on construction it was held that the actual work had to be carried out by one of the two nominated inspectors, it could not be vicariously performed; any other construction was a nonsense, there was no point in nominating an inspector if they could sub-contract the work to a third party).
- [3] Both these aspects of construction are clearly visible in the judgment of Lord Greene MR in *Davies v Collins [1945] 1 All ER 247 at 250-251*.
- [4] *Davies v Collins [1945] 1 All ER 247 at 250* per Lord Greene MR.
- [5] *CB Peacocke Land Co Ltd v Hamilton Milk Producers Co Ltd [1963] NZLR 576 at 582*.

  [6] *Johnson v Raylton, Dixon & Co (1881) 7 QBD 438 at 444* per Cotton LJ; *Southway Group Ltd v Wolff (1991) 57 BLR 33 at 49* per Parker LJ.
- [7] See *Cooper v Micklefield Coal and Lime Co Ltd (1912) 107 LT 457 at 459* per Hamilton J. Cf *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd [1903] AC 414* (where the excessive term of the contract suggested that rights and duties were not personal).
- [8] See *Johnson v Raylton, Dixon & Co (1881) 7 QBD 438 at 444* per Cotton LJ, at 454 per Brett LJ.