THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

San Fernando

Claim No. CV 2017-03645

BETWEEN

THE CHAIRMAN, ALDERMAN, COUNCILLORSAND ELECTORS OF

THE REGION OF MAYARO/RIO CLARO

Claimant

AND

HEERALAL RAMPADARATH

Defendant

Before the Honourable Mr. Justice Frank Seepersad

Date of Delivery: December 18, 2019.

Appearances:

1. Mr. Kemrajh Harrikissoon S.C and Mr. Narad Harrikissoon instructed by Ms. Hynia Harrikissoon for the Claimants.
2. Mr. Anand Ramlogan S.C and Mr. Che Dindial instructed by Ms. Alana Rambaran for the Defendant.

Decision

1. Before the Court for its determination is the Claimant's claim against the Defendant for unjust enrichment. The Claimant contends that the Defendant breached his contractual obligations and failed to wash and sanitize the Mayaro market services which were crucial and which were outlined in "the specification and conditions of contract" which formed part of the tender package.

2. At the conclusion of the first day of trial, there was an agreement that the parties would attempt to agree on the value of the claim and on the morning of the second day of trial, the Court was informed that the agreed value of the claim would be $879,307.18.

3. No qualification or condition precedent was raised with the Court and the Court operated on the premise that the agreed figure was the value for the purpose of calculating costs and was the sum to be awarded in the event that the Claimant was successful.

4. The Court also noted that the cross examination by both parties did not thereafter focus upon the issue as to the quantum of damages claimed and this course of action further cemented in the Court's mind the view that the quantum of damages claimed was no longer in issue, the said sum having been agreed.

5. In determining the Claimant's entitlement to the relief sought, the Court had to determine the following issues:
    a. What was the intention of the parties to the disputed contract;
    b. Whether the Defendant was contractually bound to wash and sanitise the Mayaro Market.
    c. What are the legal consequences that flow from the Claimant's course of action in relation to its washing and sanitizing of the Mayaro Market.
    d. Whether the alleged agreement by the Defendant to repay the Claimant any payments made in excess of the quantum of works done is valid;

e. Whether there is any basis to substantiate a claim for unjust enrichment; and

f. Whether the Claimant has proved its claim for damages.

The Claimant's Case

6. The Claimant relied upon the evidence of the following witnesses of fact:

i. Keith Seenath – Circulatory Sanitation Officer (of the Claimant)

ii. Curtis Doyle – Procurement Manager (of the Solid Waste Management Company Ltd)

iii. Motilal Ramsingh – Chief Executive Officer (of the Claimant during the time of contract)

iv. Dr Kamaluddin Amin – Principal Medical Officer of Health (of the Claimant)

Evidence of Keith Seenath

7. This witness testified that he would sign off on works that were satisfactorily completed. The witness also stated that he was of the belief that the Defendant's only task was to collect the garbage, and accordingly he signed off on the cartage receipts.

8. Mr. Seenath was asked "*In your experience, when a new contractor comes a briefing will be done*?" and in response the witness said, "Yes". Mr. Seenath was further asked "*And what you were told about my client is that they were responsible for the collection of the garbage?"* Mr. Seenath again responded, "*Yes*".

9. Mr. Seenath in cross-examination was also asked, "*When the corporation has persons to clean up the market, what will they be called?*" Mr. Seenath responded "*well sanitation workers*". Senior Counsel for the Defendant then asked Mr. Seenath "*And because the market opens at*

different hours they will be required to work after the market closes?". Mr. Seenath responded, "*not after the market closes, there are two shifts*". Mr. Seenath was then asked "*The second shift starts when?*". Mr Seenath responded "12 to 7". Mr. Seenath was then asked "*If I start at 12 and finish at 7 do I get overtime*?". In response Mr. Seenath stated "*No sir*!".

Evidence of Curtis Doyle

10. Mr Doyle is a Procurement Manager employed by Solid Waste Management Company Limited (SWMCOL).
11. Mr Doyle was not involved directly in the tendering process as it related to the awarding of the contract to the Defendant in 2013.
12. Mr Doyle maintained during his evidence that the specimen contract is the same contract as the one which should have been executed between the Claimant and the Defendant.
13. During cross examination the witness was taken through the various clauses of the specimen contract and acknowledged that the tender notice did not include washing and sanitising.
14. Mr Doyle produced no SWMCOL records to show that the Defendant was responsible for cleaning and sanitising the market but he did assert that it was the Claimant who was responsible for the cleaning and sanitising of the market.
15. In cross examination Mr. Doyle was asked, "Before a contract is going to end SWMCOL will write for specs from the corporations?" and he responded "*Once we get cabinet approval we will write the corps inviting them to submit their schedules*". The witness was then asked "*That schedule will be the scope of works*?" Mr. Doyle answered "*Yes*". Mr. Doyle was also asked "*And that SOC will in turn inform the advertisement, the tender*?" and he answered "Yes". The

witness agreed that in the process of sourcing a service provider, the Corporation is like a client of SWMCOL who then in turn acts on the instructions provided.

16. Mr. Doyle in cross-examination was asked by Senior Counsel for the Defendant, "*The costing for the tender, what do you call the committee that does that?*" Mr. Doyle responded, "*The tender evaluation committee and you would have the engineer's estimate*". Mr. Doyle was then asked, "*That costing would be the template to evaluate the tenders?"* Mr. Doyle responded in the affirmative. Mr. Doyle was then specifically asked, "*Did you produce the engineers estimate for this project*". Mr. Doyle answered, "*No*". Further, Mr. Doyle was asked, "*Did you produce the tenders evaluation committee report".* The witness again answered *"No". The witness was then asked, "Did you tell this court what was SWMCOL's internal estimate for the washing of the Mayaro market*?" In response Mr. Doyle answered "*No*".

Evidence of Motilal Ramsingh

17. Mr. Ramsingh was the Chief Executive Officer ("CEO") of the Claimant for select periods during the material time.

18. Mr. Ramsingh accepted that the Claimant was not aware of what was included in the scope of works in the tender package as the tender package was issued by SWMCOL.

19. In his *viva voce* evidence, Mr Ramsingh maintained that the Defendant accepted that he was not performing his contractual obligations.

20. In cross examination it was put to Mr Ramsingh that, *"your position was that my client was breaching his contract because he was not performing the sanitising and washing of the market?*" to which Mr Ramsingh stated yes, and he was further questioned whether the Defendant agreed to that, and he again maintained yes.

21. During cross examination the witness also accepted that the tendering process would start with a letter that the Corporation wrote to SWMCOL outlining the service desired. Mr. Ramsingh also accepted that this crucial letter would inform the entire process to be followed. Senior Counsel for the Defendant then put to Mr. Ramsingh that the said crucial letter was not placed before the Court and the witness accepted that the letter was not before the Court.

22. The witness also admitted that the Claimant was not privy to and had no knowledge of tender notice issued by SWMCOL, the scope of works issued by SWMCOL in the tender package or the bids submitted by the Contractors.

23. Senior Counsel for the Defendant put to Mr. Ramsingh two (2) main assertions as regards the Claimant's intention to any contractual arrangement with the Defendant. Firstly, it was put to Mr. Ramsingh that "*it was never part of the contracted scope of works for my client to wash and sanitise the Mayaro Market*?" and the witness responded by saying "*I don't know because at the time of leaving I did not get any clarification*". Secondly, it was put to Mr. Ramsingh that the Claimant's Public Health Inspector Mr.William Kitson in February of 2013 informed the Defendant at an orientation meeting that "*the contracted scope of works did not include for him the washing and sanitizing of the market as that would be done in-house*". In response Mr. Ramsingh simply responded '*I do not know*'.

24. The witness did however state in his witness statement at paragraph 3 that in 2012 the Claimant "*via facsimile, indicated to the Solid Waste Management Company Limited ("SWMCOL"), the cleaning and sanitation services it required*", and that the schedule of works included the washing and sanitizing of the market floor, walls and stairs.

25. The witness confirmed that the Claimant was privy to and had knowledge of the contents of the Award of Contract issued to the Defendant dated 7th February 2013 which comprised the "Collection of Municipal waste for a period of 3 years from 1st March 2013 to 29th February

2016. The award of contract letter made no mention of the washing and sanitizing of the Mayaro/Rio Claro market and the MRCRC made no objection to same at the time of the issuing of the contract to the Defendant.

26. Mr. Ramsingh admitted under cross examination that the Claimant was seeking clarification from the Ministry on the scope of works to be done at the Mayaro/Rio Claro market even up to the date of the meeting on 3rd October 2013. He stated that he allegedly wrote three (3) letters to the Permanent Secretary seeking this clarification, however these letters were not disclosed. No minutes of any meeting between the Claimant and the Council were annexed to Mr. Motilal's witness statement whereby the Claimant sought clarification from the Council on the precise scope of works to be done by the Defendant.

27. By letter dated 23rd September 2013, the Defendant was informed that another contractor, Superior Waste Disposal, was awarded the contract to clean the M2 area. At paragraphs 6 and 7 that of his witness statement the witness stated that "*in or around June the Checkers of the Claimant discovered that the 2013, Defendant was not performing, or had not properly performed, certain aspects of the said works schedule*".

28. The witness testified that there was a concession made by the Defendant that he was in breach of the agreement to wash and sanitize the Mayaro/Rio Claro Market and that there was an agreement by the Defendant to repay any excess money to the Claimant and that the alleged agreement occurred at the meeting of the 3rd October, 2013. In support of this contention, the Claimant relied upon the contemporaneous record of the minutes of the meeting of the 3rd October, 2013.

29. Mr. Motilal however admitted under cross examination that the Council was never informed of this and the Claimant sought no approval from the Council for such an agreement.

30. The minutes of the meeting held on 3rd October 2013, did not reflect that there was any concession by the Defendant in relation to the washing and sanitizing of the market.

31. During cross-examination Mr. Ramsingh was asked "*At the meeting according to you my client accepted that he was not performing the washing and sanitisation of the market*?" The witness answered "*Yes*. On a further question whether he, Mr. Ramsingh would consider that admission a critical admission the witness also answered yes. The witness also accepted that the record of the minutes of the meeting would be accurate. On being shown the record of the minutes of the meeting the witness was asked by Senior Counsel for the Defendant "*I want you to show us what you consider as a critical admission by my client that he was not washing and sanitizing the market, show us where it was recorded"*. The witness on reading the minutes accepted that the alleged admission was not recorded.

32. Mr. Ramsingh in cross-examination was asked pursuant to the agreement, whether at the meeting of 3rd October, 2013 the methodology was agreed by which the amount owed would be arrived at. The witness answered no. The witness was further asked whether the Claimant had agreed with the Defendant that if it was determined that there had been overpayment '*we go work something out'* and he answered in the affirmative.

33. Senior Counsel for the Defendant asked Mr. Ramsingh "*Do you all do any internal costing for work like this*". Mr Ramsingh's response was "*Nope, not in this case*". Mr. Ramsingh was then asked "So you all do costing?" to which he replied "*If we're awarding the contract yes*". Further, in cross-examination Senior Counsel for the Defendant again asked Mr. Ramsingh "*This so called agreement, you said the corporation did no internal costing for this contract".* Mr. Ramsingh answered in the negative. Mr. Ramsingh was also asked "*Therefore you had no internal costing for the market*", in response he said "*No*".

Evidence of Dr Kamaluddin Amin

34. In essence, Dr. Amin testified that he was unaware as to the terms of the contract awarded to the Defendant. Accordingly, he never had any cause to raise an issue with the CEO regarding the Defendant's garbage collection services.

35. Dr. Amin was at the material time the Principal Medical Officer of Health at the Mayaro/ Rio Claro Regional Corporation. Dr. Amin was asked during cross examination "*At the meeting of October 2013 it was not put to my client that he was not washing the market"*. The witness responded "*I can't recall*". The witness was further asked "*At the meeting, did my client concede that he was not washing and santising the market?*". The witness responded "*I can't recall*". Senior Counsel for the Defendant then put to the witness that at the meeting of the 3rd October, 2013 the Claimant did represent an ultimatum to the Defendant that he would not be paid unless he signed the without prejudice agreement to repay. The witness answered "*Yes*".

THE DEFENDANT'S CASE

36. The Defendant relied upon the following witnesses:

    i. Juanita Ramnanan – Retired Checker of the Claimant
    ii. Gewan Lal – Retired Supervisor of the Claimant
    iii. Suruj Baboolal – former Chairman of SWMCOL (Chairman at the material time)
    iv. Heralal Rampadarath – Defendant.

Evidence of Juanita Ramnanan

37. This witness accepted that the Mayaro Market was an old small market in 2013 and she accepted that there were taps, tanks to the back, and if one were to wash the market, one could use a hose to wash it down.

38. In her witness statement at paragraph 4, Ms Ramnanan testified that at a meeting with Mr. Kitson, the Public Health Inspector and the acting CEO of the Corporation, Mr. Eelise, Mr. Kitson indicated that "*the Corporation would use its own workers to clean and sanitise the markets as the contractors only had to pick up the garbage from the markets.*"

39. The Court asked the witness the following questions and the questions and her responses were as follows:

    "*J: Who was present that you can recall?*

    A: Mr Kitson and other Checkers.

    J: In terms of officials, other than Kitson, do you recall who else was present?

    A: The clerk, maybe. I cannot really vouch for that."

Evidence of Gewan Lal

40. The witness conceded that the market remained open for the garbage truck workers to enter and he accepted that the market was always open to the Defendant.

41. Mr. Lal started as a labourer, then became a foreman and progressed to the rank of Supervisor and displayed intimate knowledge as to the layout of the market. When questioned, he testified that the market had storage tanks to hold water, that there were about four 1000 gallon tanks, a water pump and he said that there was always a constant supply of water at the market.

42. Mr. Lal was asked, "*In the year 2013, what was used to sanitise the market*?" to which he responded, "*Clorox, disinfectant, hose, scrub, Pinesol*." He further succinctly stated, "*then was hose, now is pressure washer*."

Evidence of Suruj Baboolal

43. Mr Baboolal was the Chairman of SWMCOL in 2013, the time at which the contract was awarded. He was responsible for overseeing the operations of SWMCOL and, in particular, *"for overseeing the process for the negotiation, procurement and award of contracts on behalf of Municipal Corporations."*

44. Under cross examination by Mr Harrikissoon SC, Mr Baboolal conceded that included in the tender package was a document which outlined that the first service required was the washing and sanitising of the market floor, walls and stalls.

45. Mr Baboolal also conceded that from his knowledge, a document was included in the tender package which stated that "*All sanitising agents to be used in the cleaning of the market must be approved by the Corporation*."

46. When cross examined regarding the Letter of Award, Mr Baboolal accepted that the specifications would have been the scope of works and that the conditions would have been identified. When asked whether the tender would have been awarded in accordance with the specifications and conditions of contract, Mr Baboolal responded in the affirmative.

Evidence of Heralal Rampadarath

47. At paragraph 14 of his witness statement the Defendant stated that he entered in an oral agreement with the Claimant.

48. At paragraph 17 the Defendant stated, "*[t]here was no condition of the said Agreement that I was required to conduct the washing and/or sanitising of the market floor, walls and/or stalls of the Mayaro market and hence I was never contracted to do so.*"

49. At paragraph 19, he stated that Mr Kitson said to him "although *the scope of works included the washing and or sanitising of the market…*"

50. Under cross-examination the Defendant conceded to having a copy of the scope of works. He was further asked whether he had heard the evidence of Mr Baboolal and if Mr Baboolal was correct that those documents formed part of the tender package and he responded "*correct*."

51. Mr Rampadarath was then directed to the documents he received in the tender package from SWMCOL and he was asked whether he sent in his tender based on those documents, to which he responded "*yes*".

52. Mr Harrikissoon SC cross-examined Mr Rampadarath extensively about the special conditions of contract, and Mr Rampadarath admitted that he was aware of same, yet he chose to ignore same.

53. The Defendant was asked the following questions and responded as follows:

"Q: You accept you received special conditions of contract?

A: Yes

Q: Conditions to satisfy?

A: Yes

Q: Received as part of the tender package?

A: Yes

Q: Did you read it?

A: Yes

Q: Did you understand it?

A: Yes

Q: Special conditions of contract?

A: Yes

Q: All sanitizing agents must be approved?

A: Yes"

54. When further cross-examination by Senior Counsel the Defendant stated as follows:

"*Q: I am suggesting to you that you knew all along that you had to wash and sanitise the market?*

[…]

Q: You'd have known all this and tendered appropriately?

A: I will have to say yes."

55. The Defendant was asked whether he agreed that in order for his tender to be accepted he was required to follow the Special Conditions of Contract. The Defendant answered in the affirmative. On a follow-up question the Defendant was asked whether on submitting his tender he ignored Special Condition No. 7 which pertains to the approval of all sanitization agents to be used in cleaning the market to be approved by the Corporation. The Defendant responded that in preparing his bid he ignored that condition.

56. The Defendant was then shown page 178 of Trial Bundle 2 Volume 1 and asked whether he was aware that he was to wash and sanitize the market floor, walls and stalls. In response, the Defendant indicated that he did not take that stated service into account when submitting his bid. During the Defendant's cross-examination the Court requested further clarification from the Defendant as to what he meant when he stated that he did not take into account the required service of washing and sanitizing the market when submitting his bid. In response the Defendant stated "*Because the tender notice did not state the equipment required. The required man-power will be stated in the scope of works. To clean and sanitise the market you would need to specify the man power and equipment. I thought it was an error*".

57. The Defendant explained that in his experience if special services were required such as the washing and sanitizing of the market, the tender notice would have specified the services required and the equipment required to do so.

58. The Defendant produced a notice to all regional corporations and the notice had the subject "SCAVENGING SERVICES-COMPACTOR AND OPEN TRAY TRUCKS". The notice specifically requested the respective Chief Executive Officers to submit their schedules for the specified service within their respective corporations. In response, a tender notice was advertised by SWMCOL. The tender notice was also specific to the "*collection*" of municipal solid waste.

59. The Defendant at paragraphs 18 and 19 of his witness statement indicted that the Claimant's Public Health Inspector Mr. William Kitson in February of 2013 informed him at an orientation meeting that he was not required to wash and sanitise the Mayaro market's floor, walls and stalls and such tasks will be performed "in-house".

60. The Defendant at paragraph 10 of his Defence stated that having not been paid for July, August and September of 2013 "*was told that resumption of payments would only take place if he agrees to sign an agreement relative to the quantum of works and the possibility of excess payment.*"

61. A letter dated the 25th August 2014 was attached to the Defendant's witness statement and the Defendant's former Attorney-at-Law refuted the alleged agreement to repay the Claimant any monies paid in excess.

Analysis of the evidence and resolution of the case.

62. The first issue which the Court sought to resolve related to the contractual intent of the parties and whether it was intended and agreed that the Defendant had to wash and sanitise the market.

63. In **Chitty on Contracts- Thirty Second edition** Volume 1 at paragraph 2-022:

> "*Similarly, an invitation for tenders for the supply of goods or for the execution of works is, generally, not an offer, even though the preparation of the tender may*

involve considerable expense. The person who submits the tender makes the offer and there is no contract until the person asking for the tenders accepts one of them.

64. In **Bank of Credit and Commerce International SA ((in Liquidation)) v Ali (No. 1) [2001] UKHL 8 , [2002] 1 AC 251** Lord Bingham of Cornhill stated at paragraph 8 as follows:

*"In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does **not** of course inquire into the parties' subjective states of mind **but makes an objective judgment based on the materials already identified**."*

65. Although Mr. Doyle on behalf of SWMCOL expressed the view that the responsibility to sanitize and wash the market fell upon the Defendant but there was no clear and ascertainable contractual intent by SWMCOL to enter into any contract with the Defendant for the washing and sanitizing of the market.

66. The Court adopted the view that if the Claimant hoped or intended for the washing and sanitizing to be part of the contracted scope of works and SWMCOL did not act on its instructions, that such a circumstance was a matter as between SWMCOL and the Claimant. The evidence however suggested that SWMCOL who was the body that tendered for the works, evaluated the bids and awarded the contract operated on the basis that the services to be provided did not include the washing and sanitizing of the market. Neither the tender notice nor the letter of award dated February 7th, 2013 indicated that there was a requirement to wash and sanitize the market.

67. The Court considered the evidence of Mr. Baboolal who oversaw the procurement on behalf of SWMCOL at the material time. The Court found as a fact that the tender package did include documentation which expressed that the washing and sanitisation of the market was an outlined service, however, the Court accepted the Defendant's position that he disregarded the request concerning market sanitisation given that the tender notice did not specify the equipment or man power which was required. The Court found that it was plausible to conclude that the Defendant concluded that the inclusion was in error. The Court's view was fortified when it considered the letter of award and the value of the contract awarded to the Defendant. The Court found that the Defendant's explanation as to the contract expenses given the hours of operation inclusive of the need to have after hours repair services was plausible and that the contract price could not have reasonably included the cost associated with the washing and sanitisation of the market and same must have been contemplated as a separate aspect of the scope of works.

68. Although Mr. Baboolal's evidence is that the requirement for washing and sanitising of the market as well as the need for all sanitisation agents to be used in cleaning the market needed to be approved by the Corporation were included in the tender package, the fact remains that those requirements were not incorporated into any other subsequent document which governed the relationship between the parties.

69. In his cross examination the Defendant said he had tendered appropriately and he expressly stated that he disregarded the requirement to sanitise and clean the market.

70. The Court considered that the Claimant's tender form which was issued to the Defendant and noted that same was entitled "TENDER FOR COMPACTOR AND/OR OPEN TRAY TRUCK SERVICES." In addition, the subject matter of the award of contract letter dated 7th February 2013 was "AWARD OF CONTRACT LETTER FOR THE COLLECTION OF MUNICIPAL WASTE FOR A PERIOD OF THREE (3) YEARS- FROM MARCH 1ST 2013 TO FEBRUARY 29TH 2016". There was also other documents which referred to "COMPACTOR AND/OR OPEN TRAY TRUCK

SERVICES." Other than the documentation contained in the tender package, there is no other documentation which established that the clear intent of the parties was that the Defendant was required to wash and sanitize the Mayaro/Rio Claro Market.

71. The burden of proof rests upon the Claimant and the onus of proof therefore is on the Claimant to prove its case that the Defendant was required to wash and sanitize the Mayaro/Rio Claro Market. No evidence was led by the Claimant or extracted in cross-examination to contradict the evidence of the Defendant that Mr. Kitson informed him that he was not required to wash the market. The Court noted that although he was an employee of the Claimant, Mr. Kitson was not called to give evidence in support of the Claimant's case that there was never any representation that the Corporation would carry out the washing and sanitizing of the Mayaro/Rio Claro Market.

72. The Court however remained mindful of the fact that the evidence in relation to alleged statements by Mr. Kitson was essentially hearsay evidence and so the Court took a guarded approach and did not place much emphasis on this aspect of the evidence.

73. In ascertaining the parties' contractual intent, the Court is required to make an objective judgment based on the evidence adduced. On the evidence, there was no certainty as to whether the contract awarded and entered into with the Defendant included the washing and sanitizing of the Mayaro Market. This conclusion is supported by the contemporaneous documents in evidence including the award letter and the draft specimen contract which should have been executed.

74. The evidence also established that notwithstanding the specification of the contract which was contained in the tender package the Claimant did not seek to query the omission of the washing and sanitization of the market from the Tender Notice and/or the Letter of Award. This failure stood out in the Court's mind, as the Court felt that if there was a clear contractual intent in relation to the washing and sanitisation of the market then an objection ought to

have been raised at that time. In addition the former CEO of the Claimant sought clarification from the Ministry as to the scope of work and evidently there was no clarity as to contractual intent.

75. Evidently, no steps were taken by the Claimant to correct SWMCOL's error in issuing a tender notice which only dealt with the collection of municipal waste. The Court was, on the evidence, not satisfied that the Claimant established on a balance of probabilities that it did request the washing and sanitisation of the market. Although the washing and sanitisation service was referenced in the tender package there was simply no subsequent meeting of the minds on this issue. The Court found as a fact that the Defendant did not factor these services into his bid and the price charged for the M2 area could not have reasonably included the associated costs attributable to the cleaning and washing of the market.

76. The Court also noted that at paragraph 5 of its Statement of Case the Claimant accepted that no agreed schedule of work was provided to the Defendant.

77. Assuming that the Court's view as to the contractual intent of the parties is inaccurate and the contract did provide for the Defendant's washing and sanitisation of the Mayaro Market, the Court considered the legal consequences which followed for the Claimant's assumption of the responsibility to wash and sanitise the said market.

78. On the evidence adduced the Claimant unilaterally assumed the responsibility post contract to wash and sanitise the market and there is no evidence to suggest that the Defendant was called upon to discharge any such contractual obligation and that he thereafter refused to do so.

79. The Court found on the evidence that the Claimant acknowledged that the Defendant performed the contracted work satisfactorily when the Claimant's Checkers inspected the work done on a regular basis and approved his periodic payment of $2,195.00 plus V.A.T for

the work done during the relevant period from 1st March 2013 to 29th February 2016 .The Court also found as a fact that the Claimant's payment was issued to the Defendant on the basis that the contracted work had been discharged: i.e. the removal of all refuse generated from the Mayaro Market and the Rio Claro Market as well as the removal of garbage from the Naparima Mayaro Road and the Guyaguayare Road.

80. The Court accepted the Defendant's evidence that the Claimant, its agents and/or servants were informed by him at the meeting on 3rd October 2013 that any additional washing services to be done would cost an additional $1,200.00 per day and at no time did the Claimant request that additional service at an additional cost;

81. Although payments to the Defendant were stopped by the Claimant in June 2013, the payments resumed on 16th October 2013 and the Defendant continued to, *inter alia*, remove all refuse generated from the Mayaro Market.

82. The learned authors of **Chitty on Contracts- Thirty Second edition** within Volume 1 at paragraph 22-040 'Waiver of forbearance' states as follows:

"Where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, the court may hold that he has waived his right to require that the contract be performed in this respect according to its original tenor. Waiver (in the sense of "waiver by estoppel" rather than "waiver by election") may also be held to have occurred if, without any request, one party represents to the other that he will forbear to enforce or rely on a term of the contract to be performed or observed by the other party, and the other party acts in reliance on that representation."

83. The Claimant pleaded at a meeting on October 3rd, 2013 that it was *"**subsequently** agreed upon however by the Claimant on one part and the Defendant of the other part, through its agents and/or servants that **in the absence of an agreed Schedule of Work** and to ensure*

*that the cleaning services under the said contract not be disrupted, payments to the Defendant would continue. However, any monies paid in excess of the quantum of work done by the Defendant in providing cleaning services to the **M2** area, were to be repaid by it to the Claimant, once quantified."*

84. The minutes of the meeting held on 3rd October 2013, recorded no concession by the Defendant that he had failed to wash the market in breach of contract or that he had entered into any subsequent agreement to wash and sanitize the Mayaro/Rio Claro Market or that he agreed to repay any money having accepted that he had breached his contract.

85. The evidence established that the Claimant elected to contract with another provider to clean and sanitise the market.

86. Having reviewed the evidence the Court formed the view that the agreement effected on October 3rd, 2013 was uncertain and imprecise. There was no certainty as to the cost of the cleaning and washing services or the methodology to be adopted in the determination of a fair and reasonable price. Dr. Amin's evidence in fact conveyed to the Court the feeling that the Defendant was given an ultimatum as it was represented to him that he would not be paid unless he signed the contract agreeing to repay excess sums.

87. On this issue there was also contradictory positions in the Claimant's case. The Claimant's pleading outlined that the agreement was made subsequent to the October 3rd meeting but Mr. Ramsingh's evidence before the Court was that the terms of the agreement were agreed at the meeting.

88. By the time the meeting of the 3rd October, 2013 occurred the Defendant had not been paid for his services for the preceding three (3) months. Clearly the Defendant was in a compromised position and it is likely that he could have felt pressured into effecting a resolution.

89. The Court therefore found as a fact that it was more likely to conclude that the Defendant signed the agreement so as to protect his economic interest and ensure that his payments resumed and succumbed to economic pressure.

90. Based on the evidence adduced the Claimant failed to prove its claim for unjust enrichment. The evidence revealed that the Claimant never called upon the Defendant to wash and sanitize the market. At all material times the Claimant was uncertain as to whether the scope of works in the contract awarded by SWMCOL required the Defendant to perform such duties and in the interim the Claimant assumed responsibility for the washing and sanitizing of the market.

91. There was also no evidence to suggest that there was inequitable conduct on the part of the Defendant to establish a claim in unjust enrichment a Claimant must prove, and therefore plead, three material factors: (i) that the Defendant has been enriched; (ii) that the enrichment was at the Claimant's expense; and (iii) that there was an unjust factor, that is, something the law recognizes as making the enrichment unjust and requiring the Defendant to make restitution of it – **Banque Financiere de la Cite v Parc (Battersea) Limited (1999) 1 AC 221**, Lord Steyn at 227 and Lord Hoffman at 234.

92. The learned authors of **Chitty on Contracts- Thirty Second edition** Volume 1 at paragraph 29-018 states that:

> *"The claimant bears the burden of proving the elements of the unjust enrichment claim, namely that the defendant has been enriched at the claimant's expense and that one of the recognized grounds of restitution apply. Once this has been established, the burden shifts to the defendant, either to deny that and element of the cause of action has been established or to identify reason why the defendant should not be liable or why the liability should be reduced by pleading a defence. So, for example, if the defendant argues that there was a legal basis for the receipt*

of an enrichment, such as a valid gift, this is properly characterized as a denial of the claim, because the claimant bears the burden that the burden of proving that there was no legal basis for the enrichment."

93. The Court found as a fact that the Defendant, consistent with the letter of award, provided the services for which he had placed a bid and he was remunerated for the discharge of the said service.

94. **The facts in this case registered a degree of disquiet in the Court as it reinforced the perception that with an alarming degree of regularity the use of public funds is not prioritized. The evident lack of clarity as to the scope of the contracted works is a circumstance which ought never to occur. Statutory bodies like the Claimant must exercise caution and care when executing contracts and given the size of the market the Court cannot understand why the cleaning could not be undertaken in house by corporation employees and why the Claimant, given the relatively small size of the market, would have expended over $879,000.00 to clean same over a 3 year period.**

95. **The limited resources of the State has to be utilized with greater care and value for money must be the operative factor which guides decision *making***.

96. Accordingly and for the reasons outlined the Claimant's claim is hereby dismissed and the Claimant shall pay to the Defendant costs calculated on a prescribed costs basis on the sum of $879,307.18 plus V.A.T.

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FRANK SEEPERSAD
JUDGE