THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO: CV2016-04617

BETWEEN

TRINIDAD AND TOBAGO SECURITY SERVICES LIMITED ("TTSSL")

CLAIMANT

AND

WATER AND SEWERAGE AUTHORITY OF TRINIDAD AND TOBAGO ("WASA")

DEFENDANT

Before the Honourable Madame Justice Quinlan-Williams

Appearances: Mr. Fyard Hosein S.C. leads Mr. M. Simon De la Bastide and Mr Assif Hosein Shah instructed by Ms. Theresa Hadad for the Claimant

Mr. John S. Jeremie S.C. leads Mr. Kerwyn Garcia instructed by Ms. Raisa Caesar for the Defendant

Date of Delivery: 13th December, 2019

JUDGMENT

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1. The claimant by its amended claim form filed on the 5th May 2017 claim against the defendant the sum of $157,719,365.04. This sum include amounts of $113,404,383.00 for breach of contract and $44,314,982.04 for damages consequent on breach of contract. The claimant, the provider of specialized security services, was awarded contracts on separate occasions by the defendant for the provision of security. The claimant also asserts that there were ancillary Oral Contracts to provide additional security services. During the tenure of the business relationship, issues arose relating to unpaid invoices and the ancillary Oral Contracts. Ultimately the relationship ended without resolution of the fractious and discordant issues. Those issues are the subject of these proceedings.

Issues

2. The main issues for the court's determination are whether:
    a. It was a term of the 2010 Contract, the 2014 Contract and/or the Oral Contracts that the invoices submitted by the claimant for services provided, only became due and the defendant's liability to pay only arise, upon the defendant's verification of those invoices ("the verification issue");
    b. Under the terms of the 2010 Contract and by extension the Oral Contracts which were made during the subsistence of the 2010 Contract, the defendant is liable to pay overtime rates ("the overtime issue");
    c. The defendant's Manager, Security Services had actual or ostensible authority to enter into the Oral Contracts on behalf of the defendant ("the Oral Contracts issue");
    d. The mobile patrol services provided by the claimant to the defendant were required by or in accordance with the terms of the 2014 Contract ("the mobile patrol issue");

e. The claimant was entitled to repudiate the 2014 Contract ("the repudiation issue"); and

f. The claimant is entitled to damages in respect of the consequential losses including the loss of profits, liability for severance benefits and interest accruing on its overdraft facilities ("the damages issue").

The Claimant's Case

3. By WTC 14/2010 Letter of Award ("2010 Letter of Award") dated the 11th May 2011 the defendant offered the claimant a contract to provide security services including the provision of baton officers, firearm officers, canine and handler security services, portable toilets, a mobile booth with generator, vehicles and a motor bike patrol to 80 of the defendant's designated locations. The locations were identified and itemized in the Appendix to the said 2010 Letter of Award.

4. The WTC 14/2010 Written Agreement ("2010 Contract") was executed between the parties on the 25th August 2011. The terms that governed the provision of these services included Clause 2 of the 2010 Contract, which prescribed:

> "2. The following documents shall be deemed to form and be read and construed as part of this Agreement:
>
> a) The Special Conditions of Contract;
> b) The General Conditions of Contract;
> c) The Scope of Works;
> d) The invitation to Bid dated 2010 March 23;
> e) The Addenda:
> i. Addendum #1 dated 2010 April 12;
> ii. Addendum #2 dated 2010 April 20;
> f) The Contractor's Bid dated 2010 April 14;
> g) The Performance Bond;
> h) The Letter of Award dated 2011 May 11 with attached Appendix;
> i) The Letter of Authority dated 2011 June 02."

5. Clause 3 stated that in the event of inconsistency or conflict between the 2010 Contract and the documents listed in Clause 2 above, the provisions of the 2010 Contract would prevail and that those documents listed in Clause 2 shall have priority in the order listed above.

6. By Clause 10 of the 2010 Contract the parties agreed that the commencement date was the 1st June 2011 and the completion date would be two years from the date of commencement (31st May 2013).

7. At the end of the stipulated two-year period the defendant extended the 2010 Contract on a monthly basis from the 1st June 2013 to the 30th September 2014. The extensions to the 2010 Contract were executed by 15 letters signed by both parties.

8. Clause 6 of the 2010 Contract provided:

> "IN CONSIDERATION of the payment of rates to be made by the Authority to the Contractor as detailed in the appendix attached to the Letter of Award dated 2011 May 11, the Contractor hereby covenants with the Authority to perform and complete the services in accordance with the provisions of the Contract."

9. Clause 16 of the General Conditions of Contract provided with regard to payment for the services rendered under the 2010 Contract:

> "16.1 The payment to be made to the Contractor under this Contract shall be specified in the Letter of Award.
>
> 16.2 The Contractor's request(s) for payment shall be made to the Authority in writing, accompanied by an invoice, describing as appropriate the Services delivered and performed, and upon fulfillment of any other obligation stipulated by the Authority.

16.3 Payments shall be made promptly by the Authority, but in no case later than sixty (60) days after submission of an invoice or claim by the Contractor.

16.4 The currency or currencies in which payment is made to the Contractor under this Contract shall be subject to the following principle of payment will be made in the currency or currencies in which the payment has been requested in the Contractor's Bid."

10. Despite the abovementioned provisions of the 2010 Contract regarding payment, the claimant claims that in breach of contract, the defendant has failed to pay a large number of its invoices for services provided. Accordingly, the sum due and owing for unpaid invoices under the 2010 Contract amounts to $21,285,026.85.

11. By WTC 41/2014 Superseding Letter of Award ("2014 Letter of Award") dated the 28th May 2015 the defendant offered the claimant a contract for a period of three years at a total cost of $147,946,048.00 VAT exclusive. The total cost comprised the amount of $122,983,552.00 for the provision of security services and $24,962,496.00 for the provision of vehicle rental and patrol services.

12. The Appendix of the 2014 Letter of Award described the services that were to be provided to the defendant. Accordingly, the claimant was required to provide security services including baton officers, armed officers and canine and handler security services to 69 of the defendant's designated locations. In relation to the vehicle and patrol element, specified numbers of mobile patrols were to be provided for various divisions of the country, each mobile patrol consisting of one armed officer and a vehicle.

13. On the 22nd July 2015 the parties executed the WTC 41/2014 Written Agreement ("the 2014 Contract") for the daily provision of the

abovementioned services commencing from the 1st October 2014 to the completion date of the 30th September 2017 as per Clause 14. Clause 2 of the 2014 Contract listed the documents that formed and were to be construed as part of the contract:

> "2. The following documents as are annexed hereto shall be deemed to form and be read and construed as part of this Agreement:
>
> a) The Special Conditions of Contract;
> b) The General Conditions of Contract;
> c) The Scope of Services;
> d) The Invitation to Tender;
> e) The Letter of Authority dated 2014 October 01;
> f) The Superseding Letter of Award dated 2015 May 28 with attached Appendix;
> g) The Contractor's Bid, together with attachments;
> h) The Performance Bond; and
> i) The Cash Performance Deposit Receipt."

14. Clause 3 stated that in the event of inconsistency or conflict between the 2014 Contract and the documents listed in Clause 2 above, the provisions of the 2014 Contract would prevail and that those documents listed in Clause 2 shall have priority in the order listed above.

15. Clause 6 of the 2014 Contract provided:

> "It is hereby agreed that the total sum to be paid under the Contract shall not exceed the sum of ONE HUNDRED AND FORTY-SEVEN MILLION, NINE HUNDRED AND FORTY-SIX THOUSAND AND FORTY-EIGHT DOLLARS ($147,946,048.00) inclusive of all associated costs and exclusive of Value Added Tax, which said sum represents the total estimated value of the Services. For the avoidance of doubt, the Contractor shall be paid based upon the rates stated in the Appendix to the Superseding Letter of Award and the Services actually provided by the Contractor."

16. Clause 3 of the Special Conditions of Contract stated the agreement as it relates to payment:

"GCC 16.1- Payment shall be made as detailed in the Appendix to the Superseding Letter of Award. Payment shall be made no later than thirty (30) days after submission of the documents specified int GCC 16.2, save and except where such documents contain errors or inconsistencies or are in respect of payments contrary to the terms of the Contract."

17. Clause 16 of the General Conditions of Contract in turn stated:

"16.1 The method and conditions of payment to be made to the Contractor under this Contract shall be specified in the Superseding Letter of Award.

16.2 The Contractor's request(s) for payment shall be made to the Authority in writing, accompanied by an original invoice, describing as appropriate the Services provided, and (ii) upon fulfillment of any other obligation stipulated by the Authority.

16.3 Payments shall be made promptly by the Authority, but in no case later than thirty (30) days after submission of an original invoice or claim by the Contractor.

16.4 The currency or currencies in which payment is made to the Contractor under this Contract shall be subject to the following general principle: payment will be made in the currency or currencies in which the payment has been stated in the Superseding Letter of Award."

18. The claimant avers that in April 2016 the defendant paid the sum of $1,083,465.40 which related to a few invoices issued April 2015 and one invoice in June 2015 for security services rendered. However, a vast majority of the claimant's invoices for services rendered during the period March 2015 to December 2015 have not been satisfied. As a result, in breach of the agreement between the parties, the sum of $71,664,671.35 remains due and owing to the claimant consequent to unpaid invoices under the 2014 Contract.

19. The claimant asserts that the parties shared a long working history predating the awarded contracts in dispute. In 2008, the parties executed the WTC 3/2008 Contract and thereafter pursuant to that 2008 Contract, the claimant provided services and the defendant paid for those services.

20. Throughout the history of the relationship between the parties, the defendant through its Security Manager, Mr. Mervyn Pierre would habitually and orally request the provision of additional security services. These requests were often at very short notice. Without any written agreement, the additionally requested security services were provided in order to accommodate the impromptu demands and needs of the defendant. There developed "ad hoc" contracting practices by the defendant.

21. The working history for the most part was harmonious as the claimant was accustomed to receiving regular payments for services which it orally agreed and did provide to the defendant. To that end, there was no reason for the claimant to query the practice of the defendant's entry into such additional Oral Contracts with the claimant.

22. During the tenure of the 2010 Contract and the 2014 Contract, the practice by the parties of entering into additional Oral Contracts continued. This practice was adopted due to pressing, unforeseen and unaddressed security needs of the defendant, not covered by the 2008 Contract, the 2010 Contract and the 2014 Contract. Additional services were sometimes provided on an ongoing basis which could range from months to years.

23. It was an implied term of the Oral Contracts that the defendant would pay the claimant at rates in accordance with the relevant coeval contractual rate that had been agreed under the parties' contemporaneous written

documents for the same and/or commensurate services. Alternatively, it was an implied term of each Oral Contract that the claimant would be paid reasonable rates for the services it provided.

24. The claimant asserts that despite its repeated demands for payment pursuant to the invoices relating to the Oral Contracts, the defendant has failed to satisfy the said invoices. At no material time has the claimant ever received any formal complaint questioning the fact that the relevant services under the Oral Contract were in fact provided, nor up to the filing of this claim, has there ever been any dispute or challenge by the defendant as to the particulars of the unpaid Oral Contract invoices. Consequently, the total sum of $20,454,684.50 is due and owing to the claimant for services freely accepted and benefited from by the defendant.

25. Over the long working relationship between the parties, it became normative to have a mounting accumulation of unpaid invoices and unmaterialized assurances by the defendant for the payment of the services enjoyed by the defendant. As a result, the claimant wrote several letters in March and April 2016 explaining, inter alia, the acute financial difficulties experienced to the extent that its entire business operations were threatened including its inability to meet payroll commitments. Despite the requests of the claimant with respect to payment for the services rendered, the defendant failed to satisfy the claimant's invoices or provide any substantive responses to the said letters.

26. The claimant avers that due to the defendant's failure to pay outstanding invoices, the claimant has incurred substantial and debilitating debt, loss and damage. In order to maintain its level of service to the defendant, the claimant had several overdraft facilities with the RBC Royal Bank Trinidad and Tobago Limited and First Citizens Bank Limited. Those overdraft

facilities were known to the defendant. Due to the longstanding default in payment, the claimant maximized its overdraft facilities and have consequently sustained interest charges and penalties in the sum of $8,346,753.53.

27. Moreover, the extended default in payment also resulted in the claimant's inability to meet its payroll commitments to many of its officers and was left with no choice but to terminate the employment of approximately 700 of its officers. This has caused the claimant to incur liabilities under the Retrenchment and Severance Benefits Act Chapter 88:13 in the sum of $6,938,893.82.

28. Consequently, the defendant's serious and sustained failure to satisfy the claimant's 2014 Contract invoices, in breach of its obligations to the claimant, resulted in the termination of the contract. This termination was communicated to the defendant by letter dated the 26th April 2016. Notwithstanding the said letter, the defendant by letter dated the 27th April 2016 purported to terminate 2014 Contract.

29. By reasons aforesaid, the claimant suffered loss and damage and/or incurred direct loss and/or expense in the sum of $157,719,365.04 and claims against the defendant:
    a. The sum of $21,285,026.85 being the sums due (inclusive of VAT) and owing for services rendered by the claimant to the defendant pursuant to and/or under the WTC 14/2010;
    b. The sum of $71,664,671.35 being the sums due, (inclusive of VAT), and owing for services rendered by the claimant to the defendant pursuant to and/or under WTC 41/2014;

c. The sum of $20,454,684.50 being the sums due (inclusive of VAT) and owing for services rendered by the claimant to the defendant pursuant to the Oral Contracts;
d. The sum of $22,451,435.99 representing the claimant's loss of profits under the WTC 14/2014;
e. The sum of $8,346,753.53 representing interest incurred by the claimant in bank interest on its overdraft facilities as at 5th December 2016;
f. The sum of $6,938,893.82 representing liabilities and costs incurred consequent upon the termination of approximately 700 employees who served as security officers on the defendant's premises and locations.

The Defendant's Case

30. The existence of and terms of the 2010 Contract and the 2014 Contract are not disputed by the defendant.

31. At the times the claimant provided its services, the defendant avers that the claimant made entries into the station diaries placed at each location designated by the defendant for the provision of specified security services. The entries made in the station diaries were used by the defendant's police to fill out data verification forms on a monthly basis. The data verification forms were then used to verify the claimant's invoices so as to create Purchase Requisitions.

32. The claimant submitted its invoices to the office of the Manager, Security Services. The defendant describes the majority of the claimant's invoices as draft invoices which still had to be approved. Usually, when the claimant's invoices were submitted there was a back and forth between

the claimant and the defendant regarding the information. The services rendered and the hours of work had to be verified and reconciled from the data verification forms by a clerk in the employ of the defendant to ensure that the invoices were accurate. Once the invoices were verified, they were submitted to the defendant's Finance Department for processing for payment; payment is only made in respect of original invoices.

33. The defendant's case is that despite clause 16 of the General Conditions of the 2010 Contract and the 2014 Contract which provided for payment, the defendant continually communicated to the claimant, and the claimant agreed, that the sums due on the invoices would only be paid after the invoices were verified by the defendant. Alternatively, based on the circumstances of the parties having consistently adopted a particular course of dealing in relation to the payment of the claimant's invoices, it was a course of dealing between the parties and/or it was an implied term of the contractual relationship between then and/or it was agreed that the defendant would pay the sums due on invoices issued by the claimant only if and after the invoices were verified by the defendant. Accordingly, to the extent that such verification remains outstanding, the occasion for payment of the invoices issued by the claimant has not yet arisen.

34. The defendant denies any liability for the sum of $21,285,026.85 in respect of unpaid WTC 14/2010 invoices, as those invoices include charges for overtime which the defendant is not liable to pay.

35. The Price Schedule in the Claimant's Bid included both a unit rate per hour and an overtime rate per hour at time and a half and double time on public holidays. However, the Appendix to the Letter of Award date 11th May 2011, which was accepted by the claimant, made a provision for a fixed rate and made no provision for increased rates for services provided either

beyond a certain number of hours, or on public holidays or on weekends. Further, the said Appendix made no provision at all for the payment of fixed rates in respect of additional or overtime hours claimed.

36. The defendant avers that the 2010 Contract takes priority over all other contract documents. The rates to be paid by the defendant to the claimant are those specified in Clause 6 of the 2010 Contract which are detailed in the Appendix to the Letter of Award dated May 11, 2011. Additionally, Clause 17 of the General Conditions of Contract provides that the prices charged by the claimant for services delivered and services performed under the contract shall not vary from the prices quoted in the Appendix of the Letter of Award.

37. While acting under and/or through a mistake of fact and/or law and/or through inadvertence, the defendant accepts that it initially made payments in respect of the claimant's overtime claims. However, after receiving legal advice that it was not bound to make payments to the claimant for overtime charges, the defendant by letter dated the 14th September 2012 wrote to the claimant requesting that it re-submit its invoices for the months of July and August 2012 and onwards without overtime claims.

38. Following a meeting between representatives of the defendant and claimant on the 22nd October 2012, the claimant agreed to issue alternative invoices which did not contain the disputed time and a half rates. Instead of charging separately for overtime, the claimant claimed for more or extended hours of works at the fixed rates, the effect of which is that the claimant did in fact charge for overtime for which it is not entitled.

39. In relation to the claimant's invoices for the provision of mobile patrol services under 2014 Contract, the defendant states that it has been unable to reconcile such invoices because the claimant makes claims for services that were not required by or provided for in accordance with the terms of the contract.

40. The defendant admits that the Appendix to the 2014 Letter of Award in relation to the vehicle rental and patrol element, specified numbers of mobile patrols were to be provided for various divisions of the country and that each mobile patrol consisted of one armed officer and a vehicle inclusive of one baton officer (driver). However, the defendant contends that the claimant did not provide the stipulated security and vehicle patrol services agreed pursuant to 2014 Contract on a daily basis for the period 1st October 2014 to the 26th April 2016.

41. There were often mobile patrols where the composition of officers present in the vehicle were not in keeping with and/or in breach of the terms of the contract. There were instances in which there were two officers where neither one carried any firearm; two officers where one carried a fire arm; three officers where one carried a firearm; and two officer where neither carried a firearm and where one of these was a supervisor. Furthermore, in breach of the terms of the contract, the commencement of many mobile patrols were three hours after the scheduled start time as per the contract and finished approximately three hours before the scheduled end time as well.

42. Notwithstanding the claimant's failure to provide the services in the manner stipulated by the contract and the aforesaid breaches of the contract, the defendant states that the claimant wrongly continued to invoice the defendant for mobile patrols on a continuous basis from

October 2014 to April 2016. In this regard, the defendant denies that the sum of $71,664,671.35 is currently due and owing to the claimant under the 2014 Contract.

43. Insofar as the claimant's claim concerns the Oral Contracts, the defendant avers that it's Manager, Security Services issued verbal instructions, without authority, to the claimant by requesting the provision of additional security services to the defendant. However, verbal instructions were issued only in relation to the Eastern Regional Complex Location, the St. James Office Location and the Oropouche Booster Location. Mr. Pierre had neither the actual nor the ostensible authority to bind the defendant by way of Oral Contracts. The claimant was well aware that any and/or all such verbal instructions would have had to been put into writing in order for same to be enforceable. In any event, based on the course of dealings and/or the implied term of the contractual relationship between the parties as it relates to payment of the claimant's invoices, verification of the said invoices remains outstanding and therefore the occasion for payment has not yet arisen.

44. The defendant acknowledges that verbal assurances were given by its officers that payment would be imminent, once the defendant's verification process was completed. The defendant also acknowledges that it did not respond to the claimant's letters between the months of March and April 2016 because they were engaging in discussions regarding the payment of any outstanding sums for services already completed subject to the verification of the invoices.

45. The defendant confirms having received the claimant's letter dated the 26th April 2016, which reinforces the position that any and/or all verbal instructions and/or Oral Contracts were required to be but into writing in

order to be enforceable. This position was even confirmed by the claimant in its letter to the defendant dated the 18th February 2016.

46. As it relates to the defendant's obligations under the 2014 Contract, the defendant denies ever breaching same and such a breach could not amount to a repudiation of the 2014 Contract as the time for payment did not go to the root of the contract. Nevertheless, the defendant states that by letter dated the 27th April 2016 it did terminate the 2014 Contract. In the said letter, the defendant avers that it informed the claimant that discussions would be continued with respect to payment of any outstanding sums for services already completed, subject to the verification of their invoices.

47. Additionally, in January 2016, there was a fire at the defendant's Head Office. The records of the Corporate Services Division with respect to security services were severely compromised and, in some instances, completely destroyed. Many of the data verification forms which captured the security manpower coverage at the various sites as well as the station diaries which captured the events that took place at these same sites were and remained unaccounted for to date. The said fire caused significant delay in and significantly compromised the defendant's ability to verify and/or promptly verify the claimant's entitlement to payment. Nevertheless, the defendant asserts that it intends to make all payments on invoices in respect of which the claimant's entitlement to payment is verified.

48. In relation to the alleged substantial and debilitating debt and the loss and damage incurred, the defendant asserts that such loss is too remote to be recovered against the defendant. The defendant denies that it was aware at all material times that the claimant had secured overdraft facilities in

order to finance the provision of services under the contracts with the defendant. At the time the contracts were entered into, it was not in the contemplation of the defendant that the claimant would require such overdraft facilities to finance the provision of services. Furthermore, it was never communicated to the defendant through any of its agents, either before or at the time the contracts were executed that the claimant had applied for support from its bankers to meet its payroll commitments and to finance vehicle purchases to undertake the contracted works for the defendant.

49. By letter dated the 28th July 2015, the defendant agrees that First Citizens Bank requested contract proceeds for the claimant to be assigned to it. By letter dated the 1st July 2015, the defendant informed First Citizens Bank that it was in the process of dispensing outstanding payments up to September 2014 due to the claimant in the amount of $26,627,407.05.

The Claimant's Reply

50. The claimant maintains that all the invoices submitted to the defendant were final invoices and were prepared by the claimant based on information recorded by the claimant's employees in location diaries belonging to both parties at each location where services were provided pursuant to the 2010 Contract, the 2014 Contract or the Oral Contracts.

51. During the periods in which the claimant provided services, the defendant occasionally disputed the amounts charged in the invoices submitted based on differences between the information that its personnel had recovered from the defendant's location diaries and the information presented in the invoice by the claimant. In such instances, the dispute was raised by the defendant within two to three weeks of the submission of the invoice and the amount disputed was relatively small. Therefore, in

order to expedite payment, the claimant submitted to the defendant an amended invoice that conformed to the defendant's information and issued a further invoice for the disputed amount.

52. The claimant specifically denies that it was communicated by the defendant to the claimant, or that it was a course of dealing, or that it was agreed by the claimant, or that it was an implied term of the contractual relationship between the parties that the invoices issued only became due and payable if and after the invoices were verified by the defendant. The claimant asserts that by the terms of the contracts the defendant was required to pay the invoices issued by the claimant promptly. In the case of the 2010 Contract not later than 60 days after submission of an invoice and in the case of the 2014 Contract not later than 30 days after submission of an invoice.

53. Furthermore, it was a term of each of the contracts that no variation in or modification of the terms of that contract could be made except by written amendment signed by both parties. Since there was no written amendment signed by both parties, any such term as to the defendant's verification of the claimant's invoice before payment became due, allegedly incorporated into the contract, is of no effect. Alternatively, if there was an implied term which varied the contractually stipulated periods of payment, the claimant asserts that it would have been entitled under any such implied term to be paid within a reasonable period after the submission of its invoices. In any event, the requirement for payment within a reasonable period was breach by the defendant in relation to the unpaid 2010 Contract's and 2014 Contract's invoices.

54. With respect to the payment for overtime works in the 2010 Contract, the claimant states that it was entitled to receive those payments for services

performed during the period June 2011 to September 2012, calculated by the application of the overtime rates pursuant to the terms of the said contract. However, in or around September 2012, the defendant informed the claimant of its view that the latter was not entitled to receive payment under the 2010 Contract and requested that the defendant amend its invoices for the months of July and August 2012 to exclude all overtime claims and to resubmit the same. The claimant was further advised to exclude all overtime claims from invoices submitted in the future.

55. In response, the claimant informed the defendant that it was entitled to be paid overtime at the rates incorporated into the 2010 Contract by virtue of paragraph 2(f) thereof as well as in accordance with the Minimum Wages Act Chapter 88:04 and the Minimum Wages Order of 2010. Nevertheless, the claimant agreed to disaggregate the standard charges and overtime charges in separate invoices to facilitate the payment of the former while the parties decided on the mechanisms to facilitate payment of the overtime charges.

56. During the period June 2012 to September 2014 the claimant invoiced the defendant separately for overtime as requested. The claimant received some payment for same totaling $17,649,544.50 during the course of the years 2013, 2014 and 2015.

57. In the alternative, the claimant asserts that the defendant is liable to pay the claimant for overtime services rendered to and freely accepted by the defendant for its benefit by way of quantum meruit and/or in the further alternative asserts that the defendant is estopped from denying its liability to pay for overtime services performed by the claimant under the 2010 Contract. The defendant was well aware that the overtime services were being provided by the claimant in the expectation of being paid at the

overtime rates as prescribed by law and continued to accept the provision of same without protest.

58. The claimant denies that verbal instructions and/or the Oral Contracts were required to be in writing in order to be enforceable and that it was unaware of any such requirement. Mr. Pierre had actual authority and/or apparent authority to enter into the Oral Contracts on behalf of the defendant by virtue of the defendant's representation to the claimant that Mr. Pierre had the authority to enter into the Oral Contracts on the defendant's behalf; as well as the claimant entering into the Oral Contracts and providing services pursuant to those contracts in the belief induced by the defendant's said representation that Mr. Pierre had authority to enter into the Oral Contracts on its behalf.

59. The claimant avers that the defendant permitted Mr. Pierre in his capacity as Manager Security Services, to purport to enter into numerous Oral Contracts with the claimant on the defendant's behalf under the terms of which it agreed to accept. The defendant regularly, routinely and knowingly allowed the claimant's security personnel access to its premises and to its location diaries for the purpose of providing it with security services as well as accepted and received the benefit of those services provided under the said Oral Contracts. In addition, the defendant paid certain of the invoice issued pursuant to the Oral Contracts. As a result, the defendant by its conduct ratified the Oral Contracts.

Law and Analysis

a. The verification issue

60. The defendant submitted that it was an implied term of the contracts and/or the understanding, agreement and practice of the parties that

monies would become due and owing only when the sums claimed in the claimant's invoices were confirmed/verified through reasonable checks by the defendant. In so doing, the claimant waived strict compliance with the times for payment as stipulated under its various contracts with the defendant. As a result, the claimant cannot now demand payment in this action in accordance with those stipulated times.

61. The defendant asserted that the time when payment becomes due is a question of construction of the contractual terms. Sometimes the time for payment must be implied from the circumstances of the contract[1]. Clause 16 of the General Conditions of the 2010 Contract provides that payment shall be made promptly by the Authority, but in no case later than 60 days after the submission of an original invoice or claim by the Contractor. Clause 16 of the General Conditions of the 2014 Contract is similar, save that, payments must be made no later than 30 days after the submission of an original invoice or claim by the Contractor.

62. In light of the commercial contracts between the parties which ought to be construed in a sensible business-like fashion[2], the defendant's case is that the contracts cannot sensibly be construed to mean that monies became automatically due and owing by the Authority without more and in particular, without regard to the accuracy of the claims raised in those invoices, no later than the 60 day and 30 day periods as the case may be.

63. The accuracy of the claims raised in the claimant's invoices is central to the obligation to pay, further demonstrated by Clause 3 of the SCC in the 2014 Contract which is intended to prevail over the GCC:

[1] Chitty on Contracts Volume 1 General Principles 29th Edition at paragraph 21-053
[2] *Southland Frozen Meat and Produce Export -v- Nelson Brothers* [1898] A.C. 442 at page 444

> "GCC 16.1- Payment shall be made as detailed in the Appendix to the Superseding Letter of Award. Payment shall be made no later than thirty (30) days after submission of the documents specified in GCC 16.2, save and except where such documents contain errors or inconsistencies or are in respect of payments contrary to the terms of the Contract."

64. Consequently, the exception carved out by Clause 3 as to the time for payment is a contractual command to the parties to ensure that the claims raised in the claimant's invoices are confirmed as accurate before the occasion for their payment can arise. The effect of Clause 3 in the 2014 Contract and what must be understood, is that in relation to any contract between the parties (written or oral), there is an implied term into every such contract that a condition precedent to payment is the verification of the accuracy of the claims upon which payment is to be made.

65. A term may be implied in any given case from the circumstances of the parties having consistently on former and similar occasions, adopted a particular course of dealing: Chitty on Contracts Volume 1 General Principles 29th Edition at paragraph 13.022.

66. The defendant acknowledges that while Clause 16 of the GCC specified times by which payment became due, the evidence on both sides is overwhelmingly illustrative that at all material times the parties adopted a particular course of dealing under which payments were regularly made outside of the times stipulated in the contracts.

67. The defendant's witness Peter Gajar, gave evidence in his witness statement[3] and under cross examination that it was the usual practice for the defendant to pay the claimant's invoices in excess of 30 days after the receipt of same from the claimant. Under both the 2010 Contract and the

[3] Trial Bundle 2 Volume 2, Part 2 of 3 pages 4842-4844- at paragraphs 6 to 11

2014 Contract this was the established course of dealing in relation to the payment of the claimant's invoices. He stated that such a practice was both inevitable and unavoidable given the number of invoices received by the defendant from the claimant and the bureaucracy to be got through in the different departments before a cheque could be prepared. Mr. Gajar further explained that given the fact that the defendant was utilizing public funds, it was continuously communicated by the defendant to the claimant that payment of the invoices would only be made after the verification process. This practice or course of dealing was the only way for the contractual relationship to work between the parties.

68. The verification process was also confirmed by the witnesses Leon Elliot[4] and Aldwin Brown[5] who gave evidence that the defendant continually communicated to the claimant, and the claimant always accepted, that notwithstanding the provisions of the written contracts between them as to the dates by which the claimant's invoices are to be paid, the defendant would pay the sums due only if and after the claimant's invoices were verified by the defendant.

69. Mr. Towfeek Ali also reiterated that the defendant's payments were always late[6]. He stated that it was customary for the defendant to pay the claimant's invoices after lengthy delay in no discernable pattern, in that, the defendant would pay aged invoices as well as recent ones without reference to those earlier in time which had not yet been paid[7]. His viva voce evidence was that despite large sums outstanding, it was his desire to continue to work with WASA.

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[4] Trial Bundle 2 Volume 2, Part 2 of 3 pages 4792- Witness Statement of Leon Elliot at para 6
[5] Trial Bundle 2 Volume 2, Part 2 of 3 pages 6266- Witness Statement of Aldwin Brown at paragraphs 36 and 37
[6] Trial Bundle 2 Volume 2, Part 2 of 3 pages 3806- Witness Statement of Towfeek Ali at para 30
[7] Trial Bundle 2 Volume 2, Part 2 of 3 pages 3827- Witness Statement of Towfeek Ali at para 77

70. Furthermore, under cross examination, the claimant's expert Mr. Anil Seeteram who was engaged for the purposes of formulating and calculating certain aspects of this financial claim against the defendant, stated that during the course his evaluation, he interview people at TTSSL and they indicated that their invoices had to be verified by WASA.

71. The defendant's case is that the delay in payment was necessary in order to permit the defendant to first verify the accuracy of the claimant's invoices. Furthermore, the claimant nor the defendant, prior to the bringing of this action, ever sought to enforce the terms of the contract strictly. In this regard, the claimant waived strict compliance with the times for payment as stipulated under its various contracts with the defendant. In support of its propositions the defendant relied on *W.J. Alan & Co. Ltd. -v- El Nasr Export and Import Co.* [1972] 2 Q.B. 189 at page 213 where Lord Denning highlighted the principle of waiver:

> "If one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so…"

72. Additionally, Justice Rajnauth-Lee J.A. in the case of *Andre Baptiste -v- Investment Managers Limited* CA No. 181 of 2012 at paragraph 35 also opined on the principle of waiver:

> "The party who forbears will be bound by the waiver and cannot set up the original terms of the agreement. If by words or conduct he has agreed or led the other party to believe that he will accept performance in a different manner from that provided in the contract, he will not be able to refuse that performance when tendered. Where one party had induced the other party to accede to his request, the party seeking the forbearance will not be

permitted to repudiate the waiver and to rely on the letter of the agreement."

73. The defendant submitted that a breach can only arise when payment is due and is then not made. A claim for money due and owing only arises from the date the money in fact becomes due and owing[8]. In the circumstances, money becomes due and owing after the defendant completed its verification process. To the extent that the defendant has not completed its verification of the claimant's invoices, the occasion for payment has not yet arisen and the claimant cannot enforce payment without such verification.

74. The claimant in response to the defendant's submission that the claimant waived strict compliance with the times for payment as stipulated under the various contracts, it was submitted that defendant failed to lead the necessary evidence to establish the elements of waiver by estoppel/equitable forbearance as follows:
    a. An existing relationship between the parties (promisor and promisee) giving rise to enforceable rights and duties between them;
    b. A clear and unequivocal promise that the promisor will not enforce one or more legal rights against the promisee;
    c. The promise must have been intended to affect the legal relationship between the parties;
    d. The promisee must have acted upon the promise in the way in which the promisor intended or a way in which it was reasonable for him to act;
    e. Reliance by the promisee upon the promise;

[8] CV 2010-01244 *A & A Mechanical Contractors and Company Limited -v- Petroleum Company Trinidad and Tobago* at paragraph 16

f. The promisee will suffer detriment in the event that the promisor does not honor his promise[9].

75. As it relates to the 2010 Contract, the claimant on the other hand submitted that Clause 16.3 is explicitly clear that the claimant invoices were to be paid within 60 days of submission to the defendant. The claimant asserted that there has been no variation of this condition to payment. Had the claimant in fact agreed to such a condition that the invoices would only become payable after the defendant conducts its verification exercise, then pursuant to Clause 19 of the GCC, there would have been evidence of a written amendment of the 2010 Contract, or an agreement to amend that contract incorporating the verification condition.

76. As a result, in the circumstances any agreement made between the parties as to the verification of the claimant's invoice before payment is of no effect since such an agreement was not in writing and was not signed by the parties. The claimant's awareness of such a process is not an indication of its agreement to the alleged verification condition.

77. According to the evidence adduced by the defendant along with their submission, one can surmise the particular meaning to be ascribed to "verification". Verification, has four prongs: firstly, that the services were provided; secondly, proof from the defendant's records established by the defendant's internal processes; thirdly, proof independent of the claimant's invoices and input; and lastly without any regard to timelines.

[9] The Law Relating to Estoppel by Representation by Spencer Bower Turner 4th Edition at pages 449-486; The Law of Waiver, Variation, and Estoppel by Sean Wilken QC and Karim Ghaly

78. The court does not agree that the claimant, by their conduct waived the provisions requiring payment within 60 days and 30 days under the 2010 Contract and 2014 Contract, respectively. Towfeek Ali's evidence is that he frequently called the WASA's Head of Finance and the Chief Executive Officer about payment of the claimant's invoices. At one point WASA's Head of Finance or Acting General Manager, Mr. Yorke was asked to and did communicate with the claimant's bankers regarding the outstanding payments due to the claimant.

79. One would imagine that because the services were provided to a state agency, the claimant did exercise some degree of contractual and relationship patience, as oppose to waiving the terms of the contracts.

80. In further proof that there was no waiver, Nyree Alphonso's evidence is that between the years 2012 and 2013, she had conversations with the Minister with responsibility for WASA, WASA's chairman and Deputy Chairman and acting Chief Executive Officer. Those conversations were about the debt owed to the claimant and their consequent heavy reliance on bank financing to meet the claimant's payroll commitments. The witness Patricia Alphonso also spoke about her communication in 2016 with personnel from WASA to have the outstanding invoices settled. Brigadier-General Calton Alfonso also gave evidence that he wrote to WASA in 2016 lamenting the fact that Towfeek Ali's letters concerning payment of outstanding invoices and that the claimant was not in a position to meet the February 2016 payroll.

81. The defendant did not dispute any of the claimant's evidence regarding requests over the years, for WASA to settle the outstanding invoices. The court therefore finds that the defendant was contractually bound by the

provisions of the 2010 Contract and 2014 Contract to make payment promptly or within 60 and 30 days respectively.

82. No claim for verification, as defined by the defendant could or did alter the clear and unambiguous terms of the 2010 Contract and the 2014 Contract.

83. In relation to the law on terms to be implied into a contract, the claimant stated that there are different types of implied terms as per the learnings set out in The Law of Contract (Common Law Series) at paragraph 3.19:

> "A term may be implied by custom, on the basis that the parties contracted against the background of the relevant custom. Terms may also be implied in fact or law … Terms implied because a contract is of a certain type, may be referred to as terms implied in law. Those implied into particular contracts on the basis that the parties intended to include them, may be referred to as terms implied in fact. In addition, term which have not been expressed in the making of the particular contract, may nevertheless be imported into it on the basis of a course of dealing between the parties, and terms may be implied by statute into particular types of contract."

84. The principles to be applied with respect to terms implied in fact were set out by Lord Neuberger in *Marks and Spencer plc -v- BNP Paribas Securities Services Trust Company (Jersey) Ltd.* [2016] 4 All ER 441. In that case Lord Neuberger endorsed the following test for implied terms stated by Lord Simon in *BP Refinery Westernport Pty Ltd -v- Hastings Shire Council* (1997) 180 CLR 266:

> "… for a term to be implied it had to be reasonable and equitable, it had to be necessary to give business efficacy to the contract so that no term would be implied if the contract was effective without it, it had to be so obvious that it went without saying; it had to be capable of clear expression, and it had not to contradict any express term of the contract."

85. The court in *Marks and Spencer plc* [supra] also added the following comments:

> "(i) the implication of a term was not critically dependent on proof of an actual intention of the parties when negotiating the contract; (ii) a term should not be implied into a detailed commercial contract merely because it appeared fair or merely because one considered that the parties would have agreed it if it had been suggested to them; those were necessary but not sufficient grounds for including a term; (iii) it was questionable whether the first requirement, reasonableness and equitableness, would usually, if ever, add anything: if a term satisfied the other requirements, it was hard to think that it would not be reasonable and equitable; (iv) although the requirements were otherwise cumulative, the second and third requirements, business necessity and obviousness, could be alternatives in the sense that only one of them needed to be satisfied, although in practice it would be a rare case where only one of those two requirements would be satisfied; (v) if the issue was approached by reference to the officious bystander, it was vital to formulate the question to be posed by him with the utmost care; (vi) necessity for business efficacy involved a value judgment; a more helpful way of putting the second requirement was that a term could only be implied if, without the term, the contract would lack commercial or practical coherence."

86. Further, the claimant also posited that an implied term may be incorporated into a contract by virtue of the parties having consistently on former and similar occasions adopted a particular course of dealing. Thus, where parties have entered into a number of similar contracts containing certain standard terms but on one occasion they are not expressly incorporated, those terms may be incorporated by way of a course of dealing. The test as to whether a term has been incorporated by virtue of a course of deal according to the Law of Contract (Common Law Series) at paragraph 3.18 is

> "… whether at the time of contracting, each party as a reasonable person was entitled to infer from the past dealings and the actions and the words of the other in the instant case, that the standard clauses were to be part of the contract."

87. In determining whether a term has been incorporated into a contract by way of a course of dealing, the courts have also applied many of the same principles that are applied in determining whether an 'implied term in fact' as discussed in *Marks and Spencer plc* [supra] has been so incorporated. Thus, in *M'Cutcheon -v- David MacBrayne Ltd* [1964] 1 All ER 430 Lord Reid applied the officious bystander test to the issue as to whether a term had been incorporated through a course of dealing:

> "The only other ground on which it would seem possible to import these conditions is that based on a course of dealing. If two parties have made a series of similar contracts each containing certain conditions, and then they make another without expressly referring to those conditions it may be that those conditions ought to be implied. If the officious bystander had asked them whether they had intended to leave out the conditions this time, both must, as honest men, have said "of course not".

88. Additionally, Andrew Smith J. in the case of *Glencore International AG -v- MSC Mediterranean Shipping Company SA and another* [2015] EWHC 1989 (Comm) highlighted that for a term to be implied by way of a course of dealing it must not contradict an express term of the contract:

> "[27] The first problem with this argument is that the implied term sits awkwardly with (if it does not contradict) the express provision in the B/L that the goods or a Delivery Order are to be provided in exchange for it. In *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518, [2001] 2 All ER 801 Lord Hoffmann said (at para 35) that, ". . . any terms which the courts imply into a contract must be consistent with the express terms. Implied terms may supplement the express terms of the contract but cannot contradict them". This requirement of consistency does not only preclude an implied term that is starkly inconsistent with what is expressly agreed, but, as the speech of Lord Hoffmann reflects, the law implies terms that work harmoniously with the scheme of the agreed arrangements, and the less readily harmonious a term would be, the less readily it is implied."

89. As a result of the foregoing, with respect to the defendant's defence that it was a particular course of dealing that it would pay the sums due on invoices issued by the claimant only if and after it completed its verification process, the claimant asserted that such a course of dealing would be incapable of incorporation into the 2010 Contract. The verification condition's inability to be incorporated into 2010 Contract is due to, inter alia, its unusual and onerous nature, it contradicts clause 16 of the GCC failing the officious bystander test, there was no evidence that the said condition was necessary and this particular course of dealing did not precede the contract.

90. In relation to the 2014 Contract, the payment requirement as set out in Clause 16 of the GCC (as amended by clause 3 of the SCC) is the same as that of Clause 16 of the GCC of the 2010 Contract save for the reduced period for payment from 60 days to 30 days. The exception under Clause 16 of the GCC applies to circumstances in which invoices were found to contain errors, inconsistencies and the like. It cannot be extended to all invoices as averred by the defendant and subjected to its verification process.

91. The defendant was bound, in the court's opinion to specifically identify those errors or inconsistencies or request for payments contrary to the terms of the Contract to allow the claimant an opportunity to correct, explain or accept the defendant's assertion.

92. The claimant noted that what was not expressly stated in the contract were the conditions for payment in cases of such inconsistencies. Nevertheless, the claimant submitted that it is well established that where a contract fails to specify a time within which a party is to perform his obligations, the law implies an obligation to perform the act within a

reasonable time having regard to all circumstances of the case[10]. The claimant submitted that in most cases this would be not more than four months from the date on which the invoice as submitted.

93. The court is in disagreement with the submissions of the defendant that the verification process, as described by the defendant, was in fact incorporated into the various contracts by virtue of a course of dealing, it held with the claimant. The 2010 Contract and the 2014 Contract were detailed commercial agreements between the parties. Further, they were not the first and second contracts that the parties had signed. The verification identified was not included in the first contract and if the defendant believed it was important to be included as a contractual term the court is satisfied that the parties would have negotiated around the particulars of the verification process the defendant was desirous of including in the contract.

94. The verification process, as described by the defendant is very unfair to one party, the claimant. It requires the claimant to sit and wait for an indeterminate time, without the ability to have an input in the process. More so, in these circumstances where the defendant averred that the records they need to verify the claimant's invoices have been destroyed by fire. On the defendant's averments, they can never verify the claimant's invoices by the process they have described.

95. The verification process, as described by the defendant, is neither a business necessity nor is it obvious. Certainly the defendant would need to ascertain that the services invoiced were provided. It was clear from the evidence that the defendant put measures in place to allow for such checks; including the location diaries. The purpose of putting measures in

[10] Chitty on Contracts 30th Edition Volume 1 paragraph 21-020

place was to allow the defendant the ability to check at whatever interval they chose, that the service was provided. One cannot imagine that the defendant would await being invoiced to then go from location to location to make those checks. However, if that is what they choose to do, such a practice does not impose or import into the contractual arrangement, as a business necessity, the defendant's verification process.

96. It also not obvious that such a verification process was required as a term of the contract between the parties. An obvious term would be, for instance, suspending the 60 and 30 day periods, until specific queries to identified invoices were resolved within a reasonable time.

97. The fact that the claimant was aware of the defendant's delay to make payments and never sought to enforce the relevant time frames for payment under the 2010 Contract and 2014 Contract does not mean that the verification condition was incorporated, by implication, into the contracts.

98. The 2010 Contract and the 2014 Contract did not lack commercial or practical coherence. The evidence pointed to inefficiencies in WASA's internal processes; they cannot pass those off to the claimant. This attempt is similar to the passing off of a business expense to a customer by an increase in price – however they are not analogous.

99. Where a course of dealing is inconsistent with the strict enforcement of the terms of the contract, such dealings may raise an implication that those terms inconsistent with the parties' behaviour have been waived by the party who would have benefited by them[11]. The Honorable Mr. Justice Rahim in the case of CV2012 *Gambit Investments Limited -v- Deborah*

[11] *Hiscox v Outhwaite* [1992] 1 AC 562 at 574

Thomas Felix at paragraph 38 of his judgment set out the law on waiver as follows:

> "According to Halsbury's Laws of England, (Vol 47(2014)), paragraph 250, waiver is defined as "the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted". Waivers normally occur by way of an election. The party against whom the breach has occurred has the option to either accept the other party's breach as repudiation of the contract, or he can continue to affirm it. This affirmation causes the party to waive or abandon his right to end the contract. The Halsbury's further sets out that a waiver can either be express, or it can be implied by way of conduct. Sub- paragraph 3 states,
> "Where the waiver is not express, it may be implied from conduct which is inconsistent with the continuance of the right, without the need for writing or for consideration moving from, or detriment to, the party who benefits by the waiver, but mere acts of indulgence will not amount to waiver; nor may a party benefit from the waiver unless he has altered his position in reliance on it. The waiver may be terminated by reasonable, but not necessarily formal, notice unless the party who benefits by the waiver cannot resume his position, or termination would cause injustice to him."
>
> Halsbury's summarizes the issue in referring to the waiver as a party's promise or assurance to another, whether by words or conduct, upon which the other party relies. The party who has promised a certain stance in a legal relationship cannot then alter or revert said stance. He must keep himself limited to the new qualifications of the relationship that he created."

100. The evidence suggest was that the claimant by its conduct in permitting the defendant to deviate from the stipulated 60 day and 30 day period for payment respectively, under the 2010 Contract and the 2014 Contract raised the implication of a waiver.

101. The evidence is that the defendant continually communicated to the claimant that WASA would pay the sums due on invoices only if and after the claimant's invoices were verified, that the defendant always paid

late and that such behavior was customary. The lateness in payment was also due to the large number of invoices submitted by the claimant for payment. Based on the evidence, the claimant through its conduct of habitually accepting late payment by the defendant waived the 60 day and 30 day time period for payment. By not enforcing the terms of the contract, the defendant relied on this conduct as an extension of time by which it could complete its verification exercise on the large volume of invoices which involved bureaucracy that had to be got through in the different departments before a cheque could be prepared.

102. However, the defendant's position that they have not yet verified the claimant's invoices, appears to be an argument to waive payment of the unpaid invoices in perpetuity. This is illogical and cannot be the case.

103. The course of dealing between the parties whereby the defendant paid the claimant's invoices late because of the volume of invoices submitted and that it had to conduct checks on the said invoices, does not satisfy the conditions for the implication of a term into either contract. Clauses 16 of the GCCs in the 2010 Contract and the 2014 Contract was unambiguously clear on the provisions as to payment. The provisions of both contracts expressly stated that payment had to be made promptly by the Authority. However, where promptness was not able to be achieved by the Authority for whatever reason, then it had to make payment specifically with 60 days in the case of the 2010 Contract and 30 days pursuant to the 2014 Contract. Therefore, the contractual provisions made it clear that monies in fact became due and owing no later than 60 days and 30 days, as the case may be, after the claimant submitted its invoices for payment.

104. In this regard, in accordance with the law set out in *Marks and Spencer plc* [supra], the court does not find that without the defendant's verification condition the contract would be rendered ineffective or lack commercial or practical coherence. As a matter of fact, it appears that the contract did contemplate and made allowances for such a verification process. The general position was that payment had to be made promptly upon the submission of the contractor's invoice. The word 'prompt'[12] according to the Merriam-Webster dictionary is defined as being performed readily or immediately. Therefore, upon the claimant's submission of its invoices, by the terms of the contract, the defendant was obliged to pay the said invoices immediately or readily.

105. The court agrees with the defendant that these were commercial contracts which ought to be construed in a sensible and business-like fashion, however, the defendant's submission is inconsistent with their assertion. It can never be sensible for the defendant to assert that to the extent that it has not completed its verification of the claimant's invoices the occasion for payment has not yet arisen. The evidence suggests that there are invoices originating from February 2013 that have not yet been paid as a result of the defendant's failure and/or inability to verify the claimant's invoice. Based on the defendant's arguments, they suggest that pursuant to the implied verification condition that the claimant must wait however long it takes the defendant to verify an invoice before it becomes entitled to payment.

106. The court finds that it is unlikely that any commercial entity would agree to such an onerous condition wherein they would potentially have to wait years for payment. Such a condition is not reasonable or equitable

[12] https://www.merriam-webster.com/dictionary/prompt

in the circumstances. It is surely unjust to the claimant who has provided services over six years ago to still be awaiting payment as a result of the defendant's failure to verify the invoices. For this reason, the verification condition fails the officious bystander test as per *M'Cutcheon* [supra] as this is not a condition that one would say was obviously intended by both parties to be included into the contract. No notional reasonable person would have intended to include or agree to such a condition.

107. Furthermore, the verification condition cannot be incorporated into any of the contracts as it contradicts the expressed terms for payment in Clause 16 of the GCCs of both the 2010 Contract and 2014 Contract which provides for payment no later than 60 days and 30 days respectively. In accordance with *Glencore* [supra] implied terms can supplement the expressed terms of the contract but cannot contradict them. The verification condition that payment becomes due after the defendant checks the accuracy of the claimant's invoices, however long that process may take, does not sit harmoniously with the scheme of the agreed arrangements for payment between the parties.

108. The court takes note that despite the defendant's case that in relation to the unpaid invoices under the 2010 Contract and the 2014 Contract the defendant maintained even in their closing submissions that the verification process was not completed therefore the occasion for payment has not yet arisen, the evidence of Mr. Lancelot Lezama given under cross examination establishes that this condition has indeed been satisfied in respect of unpaid invoices amount to approximately $103 million.

109. Mr. Lezama the defendant's Finance Manager, stated that during December 2016 to in or around May 2018 he conducted an analysis by

which he compared certain data verification forms prepared by the defendant's personnel with the claimant's invoices to ensure that they correctly reflected the information. He came to the conclusion that approximately $103 million was owed to the claimant for security services provided under the 2010 Contract and the 2014 Contract.

110. Based on his evidence adduced in cross examination, it appears that on the defendant's own assertion, the occasion for payment has arisen. The defendant's Finance Manager checked the claimant's invoices against its own data verification forms for the accuracy of the invoices. In or around May 2018 Mr. Lezama came to the conclusion that the sum of $103 million was owed to the claimant yet there was no admission as to liability by the defendant in these proceedings, not even in relation to part of the claimant's claim. In addition, Mr. Leon Elliot the Director of Corporate Services (Ag) at the time, also admitted that Mr. Lezama provided the verification information to him and that the reports would have gone to the Finance Department. Notwithstanding the verification by Mr. Lezama and the possession of the information by Mr. Elliot, the defendant failed to disclose the completion of this exercise and the verification of the claimant's invoices.

111. The defendant allowed the verification issue to be ventilated in the trial which took place in March 2019 and allowed both written and oral submissions to made in this respect wherein judicial time and costs could have been saved based on this fatal piece of evidence adduced in cross examination. The defendant's conduct of maintaining the said claim after the change in circumstances, is contumacious. The defendant's untruthful and uncooperative behavior is damning to its case on the basis that the court has to make a finding of fact. Truth of the circumstances was only obtained during cross examination of Mr. Lezama. Even then, Mr. Elliot a

senior executive of the defendant continued to deny liability throughout his evidence even up to the stage of cross examination.

112. The court noted references in the evidence to the fire at the defendant's Head Office whereby the records of the Corporate Services Division with respect to security services were severely compromised and, in some instances, completely destroyed. This evidence has had no impact on the court's deliberations and fact finding.

113. The court noted, however, that the destruction of the defendant's records suggests that their proposed verification exercise is impossible to accomplish and the fire cannot be used as an excuse or defence to non-payment.

114. Based on the aforementioned, the defendant's admission that the verification process was completed in or around May 2018 in respect of the claimant's unpaid invoices amounting to $103 million invalidates the defendant's case. Additionally, there can be no finding that the verification condition was implied into the contracts. The court prefers the claimant's evidence over the defendant's. The court finds that the verification condition was not a term of the 2010 Contract and the 2014 Contract. The invoices submitted by the claimant for services provided, became payable and the defendant's liability to pay arose, promptly after the invoices were submitted. Where this was not possible, the defendant had 60 days in respect of the 2010 Contract and 30 days in respect of the 2014 Contract, to satisfy the claimant's invoices.

b. The overtime issue

115. In these proceedings the claimant seeks to recover the sum of $21,285,026.85 against the defendant being the sums due and owing for overtime services rendered by the claimant to the defendant pursuant to the 2010 Contract. The payment of overtime and the basis of the claimant's claim is premised on the claimant's Bid (refer to Security Tender Proposal in reference to WTC 14/2010[13]) ("the 2010 Tender). The claimant at Section Four of the 2010 Tender expressly communicated to the defendant that:

> "Additional rates as required by Legal Notice No. 10 of 1995
>
> (i) Hours worked beyond an 8 hour shift (up to four hours) one and a half times the hourly rate.
>
> (ii) For work performed on public holidays twice the normal rate."

116. The claimant also computed these overtime rates in its Price Schedules attached to its Tender dated the 14th April 2010 for the defendant's attention. The claimant concedes that the 2010 Letter of Award does not provide for overtime rates. However, Clause 3 of the 2010 Contract states that in the event of a conflict or inconsistency between the claimant's Bid and the 2010 Letter of Award, the former shall prevail. Accordingly, the 2010 Contract including the 2010 Letter of Award is to be construed as providing for overtime rates as set out in the claimant's Bid.

117. On the contrary, the defendant asserts that it is not liable to pay these overtime rates as the Clause 6 of the 2010 Contract provides for payment of rates to be made by the Authority as detailed in the Appendix attached to the Letter of Award dated the 11th May 2011. The appendix of the 2010 Letter of Award which was signed by Mr. Towfeek Ali the

[13] Exhibit F to the Witness Statement of Nyree Dawn Alfonso and B1 of the Claimant's Electronic Bundle of Documents

Managing Director of TTSSL provides for a flat fixed rate for the duration of 24 hours which does not include overtime.

118. Consequently, it is the defendant's case that in accordance with Clause 3 of the 2010 Contract which states that in the event of there being any conflict or inconsistency between the 2010 Contract and the documents listed in Clause 2 of the 2010 Contract, the provisions of the 2010 Contract shall prevail. Therefore, since the provision stated in Clause 6 of the 2010 Contract stipulates the payment of rates in accordance with the appendix of the 2010 Letter of Award providing for a flat rate, the defendant is not liable to pay any overtime rate pursuant to the claimant's Bid.

119. The question therefore is whether there is a conflict between the Letter of Award dated 11th May 2010 and the Contractor's Bid dated 20th April 2010. The two positions are not reconcilable; a flat rate of payment for the hours worked and increase rates of a time and a half or two times the usual rate for overtime. The solution, according to the contract between this "conflict or inconsistency" has to be resolved by recourse to the documents listed in Clause 2. According to the priority listing of those documents, the Contractor's Bid has a higher priority.

120. The defendant initially paid overtime invoiced under the 2010 Contract. The charges were contested during the periods 1st June 2011 to the 30th September 2014, the defendant alleged that the payments were mistakenly and inadvertently made. The defendant's evidence is that in or around September 2012 the defendant through Mr. Aldwin Browne became aware of its alleged mistake. Pursuant to legal advice received, it requested that the claimant desist from submitting invoices with overtime

charges under the 2010 Contract[14]. The defendant by its letter dated the 14th September 2012[15] wrote to the claimant and informed that in order to process payments the claimant was required to resubmit its security services invoices for the months of July and August 2012 and onwards, without overtime claims. Mr. Elliot states that on the 22nd October 2012 a meeting was held between the representatives of the defendant and the claimant wherein the claimant agreed to issue replacement invoices which did not include the disputed time and a half rate. Nevertheless, the claimant still claimed for additional and extended hours of work at the fixed rate.

121. The claimant submitted that the defendant's contention that payments of overtime charges was as a consequence of mistake or inadvertence is an attempt to escape its contractual obligations and an argument of convenience. The claimant averred that in stark contrast to the defendant, it recalls the meeting held in the 22nd October 2012 much differently. The witness statement evidence of Ms. Nyree Dawn Alfonso states:

> "28. On 22nd October 2012 I, together with Towfeek attended a meeting with Mr. Doodnath Bhola ("Mr. Bhola") who was WASA's then Director of Corporate Services. The meeting was convened by Mr. Bhola in his office situate in WASA's Head Officer in St. Joseph. I advanced the position to Mr. Bhola, that I had advised TTSSL that overtime rates would apply to the contracted rates agreed to by the parties based on the incorporation of these rates in TTSSL's tender proposal to WASA ("F"). I further informed Mr. Bhola that in my opinion WASA was estopped from denying its liability to pay the said overtime rates.
>
> 29. I explained to Mr. Bhola the basis of my legal advice to TTSSL and informed him that my written advice had been shared in advance of the said meeting with Messrs. Yorke and Adbool who

[14] Witness Statement of Aldwin Browne at paragraphs 17 to 21
[15] Witness Statement of Aldwin Browne exhibit "A.B. 7"

were WASA's Chief Financial Officer and interim Chief Executive Officer respectively at the material time I had also provided Mr. Bhola with a copy of the said Advice. Mr. Bhola informed me that he had obtained contrary legal advice than I had provided to TTSSL.

30. At the conclusion of my meeting with Mr. Bhola I proposed that TTSSL's charges would be disaggregated from its core invoices and invoiced separately in the interregnum. This interim measure was proposed by me on the basis that Mr. Bhola's information that no invoices containing overtime charges would be processed or paid until he received further directions from his "bosses". Mr. Bhola specifically assured Towfeek and I that once his "bosses" approved the payment of TTSSL's charges the company would receive settlement of same "churrup churrup". In fact TTSSL did receive payment in respect of its invoices for overtime charges after this meeting as set out in the spreadsheet exhibit hereto and marked "K". This spreadsheet has been prepared at my request by TTSSL's accounting staff for the purpose of this litigation and in particular, this, my witness statement.

31. By the date of this said meeting TTSSL had not been paid for any security services rendered to WASA for over four (4) months and I therefore sought to put in place an interim measure that would allow the company to receive some of the payments due to it for services which had been fully performed. I maintained my position that TTSSL was entitled to the overtime charges invoiced. On 22nd November 2012 I drafted and prepared a letter for Towfeek's signature in which I confirmed the agreements reached during my meeting with Mr. Bhola on 22nd October 2012. A true copy of this letter is attached to this Witness Statement and marked "M".

32. I drafted and prepared a second letter for Towfeek's signature on 9th September, 2013, a true copy which is annexed to this witness statement and marked "N". In this letter TTSSL called upon Mr. Bhola to facilitate settlement of TTSSL's now disaggregated invoices generated in respect of overtime rates and charges. I am aware that between the two letters drafted by me ("M" and "N") that Towfeek was speaking to Mr. Dion Abdool who was at one time the interim CEO of WASA, Mr. Gerald Yorke who was the Chief Financial officer and Mr. Pierre in an effort to have payments made in respect of overtime paid. TTSSL continued to pay its security officers in accordance with the statutory provisions set out in the Minimum Wages Act."

122. The claimant submitted that despite the position the defendant has opted to take, the defendant has always understood its obligations and duly paid the claimant's overtime rates during course of the 2010 Contract[16]. The defendant's Director of Corporate Services (Ag) Mr. Aldwin Browne confirmed during cross examination that the defendant paid numerous invoices relating to overtime until the end of the 2010 Contract. The fact that payment was made through inadvertence, was something that was told to him. Mr. Lezama further confirmed that as late at the 18th March 2014 payments were made by the defendant in respect of overtime.

123. Moreover, the claimant averred that such behaviour predates the current contracts in dispute since it is the uncontested evidence of Ms. Nyree Dawn Alfonso, the Director, Corporate Secretary and major shareholder of TTSSL, that the defendant paid overtime charges during the pendency of the WTC 3/2008 Written Agreement and that all such charges were paid in full[17].

124. Nevertheless, the defendant affirmed that it is not estopped from refusing to pay overtime rates as claimed by the claimant. The evidence suggest that the defendant paid the claimant what it believed was due and owing to the claimant pursuant to the invoices between August 2010 to June 2012. There is no evidence to suggest that the defendant made any representations to the claimant other than by paying what was believed to be paid on the claimant's invoices. Therefore, in line with the case of *IVS Enterprise Limited -v- Chelsea Cloisters Management Limited* [1994] WL 1060818, the defendant stated that there is no evidence for the finding of

[16] Exhibit K of the Witness Statement of Nyree Dawn Alfonso and Exhibit AB6 of the Witness Statement of Alwin Browne
[17] Witness Statement of Nyree Dawn Alfonso at paragraph 26

a waiver or of the making of any relevant representation to hold that estoppel by convention has been made out.

125. The issue concerning whether in fact the 2010 Contract expressly made provisions for payment of services provided by the claimant at an overtime rate, the court finds that the said contract provided a flat fixed rate for the duration of the 24 hour period pursuant to the Appendix to the 2010 Letter of Award. Clause 3 of the 2010 Contract clearly states that in the event of a conflict or inconsistency between the 2010 Contract and the documents listed in Clause 2 that the provisions of the 2010 Contract would prevail. There are clearly inconsistencies in the 2010 Contract with respect to overtime rates. The Price Schedule attached to claimant's Bid dated the 14th April 2010 reflects the payment of overtime rates. Payment for work up to 8 hours was at the flat rate, and time and a half was to be paid for the remaining hours (up to four hours) of the shift. For work performed on public holidays, the workers were to be paid double the flat rate. On the contrary, the Appendix to the Letter of Award stated the fixed flat rate regardless of the services being provided on a 24 hour per day basis and made no provision as to public holidays.

126. While the court accepts on the list of documents forming and to be construed as part of the 2010 Contract, the claimant's Bid is higher on the list and is deemed to prevail over the 2010 Letter of Award, based on Clause 3 of the 2010 Contract (stipulating the priority of the documents), the said Clause 3 makes it clear that the provisions of the 2010 Contract prevails over any of those documents listed. Clause 6 of the 2010 Contract which prevails over any document listed, is clear on the terms for payment. Clause 6 highlights that the rates to be paid by the defendant for services provided by the claimant are those rates that were detailed in the

Appendix attached to the 2010 Letter of Award. Based on Clause 3 of the 2010 Contract, the inconsistencies in the contract as it relates to the rates must be in accordance with Clause 6 of the Contract which provides for a flat fixed rate for services rendered in line with the rates stated in the Appendix of the 2010 Letter of Award.

127. Clause 6, of the 2010 Contract, the Consideration Clause, states:
"IN CONSIDERATION of the payment of rates to be made by the authority to the Contractor as detailed in the appendix attached to the Letter of Award dated 2011 May 11, the Contractor hereby covenants with the Authority to perform and complete the Services in accordance with the provisions of the Contract"

128. The traditional definition of consideration[18] describes the contractual terms of benefit and detriment for each party's perspective. There is no reason for this court to depart from the traditional definition of consideration. WASA's benefit is the services provided in accordance with the 2010 Contract. The contract is described as including all the documents in Clause 2 of the 2010 Contract. WASA's detriment is the payment of rates attached to the Letter of Award dated 11th May 2011. Therefore the court is satisfied that the rates of pay under the 2010 Contract was those rates identified in the Letter of Award dated 11th May 2011. The Letter of Award made no provision for overtime payments.

129. However, based on the evidence adduced, the court has to determine whether the defendant waived the expressed terms of the contract by its conduct and is now estopped from denying any liability to pay the overtime rates.

[18] Chitty on Contracts. Thirty-third edition paragraph 4-007

130. There is no dispute that the defendant did raise an issue relative to overtime payments in September 2012. The defendant realized, pursuant to legal advice it obtained on its own accord, that the claimant was not entitled to overtime. As a result, the defendant asserts that it asked the claimant to stop submitting invoices with overtime charges under the 2010 Contract. Consequently, at the meeting held on the 22nd October 2012 and without agreeing to that interpretation, the claimant agreed to issue replacement invoices which did not include the time and a half rate. The claimant was concerned with having payment made to them and intended to continue negotiations and discussions on the overtime issue.

131. Interestingly, the evidence of the defendant is contradictory to its case. While the defendant asserts that after receiving legal advice that the claimant was not entitled to payment for overtime sometime in or around September 2012, the defendant continued to satisfy numerous of the claimant's overtime invoices even up to August 2014. The fact that after October 2012, the claimant was invoicing separately for overtime, is important evidence that supports the claimant's submission of their entitlement to such payments.

132. The defendant's case in this regard is illogical. If the events unfolded as the defendant asserts, then the court does not believe that the defendant would have continued to make payments in relation to the claimant's overtime invoices. After the agreement was reached at the meeting held on the 22nd October 2012 whereby the claimant agreed to disaggregate their invoices, the defendant would have paid those invoices at the flat fixed rate only as they were appraised by their attorney at law, the position as it relates to the overtime charges. It makes absolutely no sense that after receiving legal advice as to the claimant's non entitlement to overtime charges that the defendant would continue to make payments

by mistake or through inadvertence. The court is of the belief that this is another one of the defendant's fabrication to avoid payment of the claimant's invoices.

133. The defendant submitted that it is not estopped from refusing to pay the overtime charges of the claimant as it paid what it believed was due. In accordance with the case of *IVS Enterprise* [supra] there was no evidence to suggest a waiver or the making of any relevant representation to hold that estoppel by convention had been made out. The Honorable Madam Justice Jones in the case of CV2011-02039 *Peak Petroleum Trinidad Limited -v- Primera Oil and Gas Limited and others* affirmed the law as it relates to the concept of estoppel by convention and in particular a statement of the law in this regard by Lord Steyn in the case of *The Indian Endurance (No.2) Republic of India v India Steamship Company Limited* [1998] AC 878 at page 913:

> "It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts if it would be unjust to allow him to go back on the assumption."

134. The court prefers the claimant's evidence as it relates to the events surrounding the overtime payments. Not only is the claimant's evidence logical, it is supported by contemporaneous documentary evidence. Furthermore, the credibility of the defendant generally, has been crippled because of the evidence withheld in relation to the verification issue and the fabrications with respect to the overtime issue.

135. The claimant's evidence is that the issue of overtime payments was resolved in the meeting held on the 22nd October 2012 by the parties' agreement that the overtime charges would be disaggregated from the

claimant's core invoices. Once the overtime charges were approved, payment would be made "little by little". This arrangement was agreed to by the claimant as a result of the financial constraints inflicted by the defendant's failure to make any payments for over four months. Ms. Alfonso in her letter dated the 22nd November 2012 confirmed the agreements as to overtime payment and again called upon the defendant to settle outstanding overtime payments in her letter dated the 9th September 2013.

136. The evidence demonstrates that the defendant made payments in respect of overtime charges both prior to and after the meeting of the 22nd October 2012. In fact, the evidence illustrates that invoices for overtime claims dated the 11th August 2014 were satisfied by the defendant. This is despite the defendant's assertions that it received legal advice in 2012 that the claimant was only entitled to payment at the flat fixed rates pursuant to the 2010 Contract.

137. The court is of the view that in accordance with the learnings of Lord Steyn in *The Indian Endurance* case that there was an assumption by the claimant that it was entitled to payment at an overtime rate. Therefore, it continued to submit its invoices reflecting the overtime rates. The defendant by its conduct of paying the claimant's overtime invoices well into 2014 acquiesced the claimant's overtime invoices. Consequently, as the parties to the 2010 Contract acted on the assumed state of fact that the claimant's overtime invoices were due and owing which were satisfied by the defendant, even after it realized that such payment was a mistake, creates an estoppel by convention. The effect of an estoppel by convention prevents the defendant from denying the assumed facts if it would be unjust to allow him to go back on the assumption.

138. The court finds that it would indeed be unjust to the claimant for the defendant to deny the overtime payments. The defendant allowed the claimant to believe that it was entitled to payment years after the defendant was informed of the contrary state of affairs. The defendant failed to enforce it right by ceasing to pay the claimant. As a result, for approximately two years later, the claimant continued to pay their staff at the overtime rate. In these circumstances, the court finds that an estoppel by convention was created and the claimant is entitled to the sum of $21,285,026.85 consequent to its overtime invoices.

c. The Oral Contracts issue

139. The claimant claims against the defendant the total sum of $20,454,684.50 for security services which it provided under the Oral Contracts during the periods the 2010 Contract and the 2014 Contract subsisted. Liability is denied as the defendant avers that the claimant was well aware, that in order for there to be an enforceable contract between them, it was necessary for such an agreement to be put into writing which was acknowledged by the claimant.

140. It is the claimant's evidence that Mr. Pierre always told Mr. Towfeek Ali that when additional security services were requested of him "Legal" and/or procurement would "do up" the necessary "paperwork" with respect to the additional security works[19]. The claimant also admits that at the meeting of the 29th February 2016, Mr. Elliot told Ms. Patricia Alfonso that the defendant would only be paying the claimant's invoices which conformed to the 2014 Contract and that all "off-contract" services undertaken by the claimant would not be paid by the defendant[20].

[19] Witness Statement of Towfeek Ali at paragraph 9
[20] Witness Statement of Patricia Alfonso at paragraphs 18 and 19

141. In the evidence of Brigadier-General Carlton Alfred Alfonso is what the defendant claims as an admission that the claimant asked the defendant to (a) document its request for the additional "off contract" security services and provide additional details of the duties expected of the claimant and (b) provide the defendant's proposals for payment for the services[21]. Brigadier-General Carlton Alfred Alfonso further stated that he understood that it was necessary to force the defendant to document its requests for additional services since the defendant was claiming that it was not liable to pay invoices in respect of works that were commissioned by way of oral requests from Mr. Pierre. In addition, the claimant's letter dated the 18th February 2016[22] mentions that the claimant requested WASA's representatives to document its requests for additional ex-contractual security services and acknowledged that without such documentation payment could not be made.

142. For these reasons, the defendant affirms that the claimant's assertions that the necessary paperwork was never done[23] is invalid. Based on the course of dealing between the parties, the claimant ought to have known and was in fact expressly put on notice that for an agreement to be concluded it had to be subjected to proper documentation: *Rodgers and another -v- Reeds Rains Prudential Ltd and others Nolan -v- Norglen Ltd and others* [2000] All ER (D) at paragraph 224.

143. The defendant further contended that even in cases of emergency, any oral request for additional services had to be reduced into writing. The uncontroverted evidence of the defendant in this regard is that pursuant to Clause 17 and 18 of the Water and Sewerage Authority Rules and

[21] Witness Statement of Brigadier-General Carlton Alfred Alfonso at paragraph 13
[22] Witness Statement of Nyree Alfonso exhibit "DD"
[23] Witness Statement of Brigadier-General Carlton Alfred Alfonso at paragraph 15

Procedures for the Invitations and Consideration of Tenders for the Award of Contracts for Articles Works and Services ("the Tender Rules"), in cases of emergency where the safety of people, property, plant and equipment is in jeopardy or where the continuity of the Authority's operations demand that the contract(s) be awarded, the most senior official on duty may award contract for Articles, Works or Services necessary to avert danger or bring the situation under control[24].

144. Mr. Lancelot Lezama[25] the Finance Manager of WASA stated that in every such case of emergency, the articles, works or services so awarded must subsequently be approved by the respective authority whether by the Tenders Committee or the Board of Commissioners, within 48 hours of awarding same. After the respective authority gives its approval based on documentation put forward by Management, contractual documents will be prepared by the Purchasing and Supplies and Legal Departments.

145. As it relates to Mr. Pierre's authority to make binding oral contracts, the defendant asserts that the evidence demonstrates he had no actual or ostensible authority to enter into contracts on behalf of the defendant. The onus of proving such authority lies with the claimant[26]. The defendant asserted that at the highest, the claimant may be able to establish that Mr. Pierre held himself out as having the requisite authority. However, in accordance with the case of *Attorney General of Ceylon -v- Silva* [1953] A.C. 461 at 479 no representation by an agent as to the extent of his authority can amount to a 'holding out' by the principal. All ostensible authority involves a representation by the principal as to the extent of the agent's authority. The representation by the agent himself

[24] Witness Statement of Lancelot Lezama at paragraph 14
[25] at paragraph 14 of his witness statement
[26] CV2016-00541 *Trevlon Hall -v- The Tourism Development Company* at paragraph 78

that he had authority, cannot create apparent authority in him, unless the principal can be regarded as having in some way instigated or permitted it, or put the agent in a position where he appears to be authorized to make it[27]. In this regard, the defendant submitted that there is no evidence to suggest that WASA instigated or permitted Mr. Pierre's representations or put Mr. Pierre in a position where he appeared to be authorized to make them.

146. The defendant further submitted that even if the claimant held the view that Mr. Pierre had the actual and/or ostensible authority to enter into contracts with the defendant for emergency services, the claimant has not and cannot establish that it was within Mr. Pierre's purview to enter into such contracts orally without same being reduced into writing. The very need for paperwork underscores Mr. Pierre's lack of actual and/or ostensible authority to contract on behalf of the defendant in the manner suggested by the claimant.

147. The defendant stated that the evidence showed that Mr. Pierre was a point of contact between the claimant and the defendant and no more. He did not himself execute any agreements on behalf of the defendant nor did he have the power to do so. This is the irresistible inference to be drawn from an examination of the 2010 Contract and the 2014 Contract which were executed by Mr. Towfeek Ali on behalf of the claimant and by persons other than Mr. Pierre on behalf of the defendant.

148. The claimant submitted the case of *RTS Flexible Systems Limited v Molekerei Alois Muller Gmbh Co KG (UK Production)* [2010] 3 All ER 1 where Lord Clarke of Stone-cum-Ebony JSC opined on the well-established principle in determining whether parties have entered into a contract:

[27] Bowstead on Agency 18th Edition at page 337 paragraph 8-022

> "The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement."

149. In *G Scammell & Nephew v H C & JG Ouston* [1941] 1 All ER 14 Lord Wright stated:

> "The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted."

150. The claimant contended that the defendant's defence[28] denied entering into any of the Oral Contract but admitted Mr. Pierre issued verbal instructions to the claimant requesting the provision of "additional services" but only in relation to three of the 40 locations named by the claimant[29]. Mr. Towfeek Ali gave evidence that it was the defendant's practice of orally requesting, accepting and paying for additional services not covered under either the 2010 Contract or the 2014 Contract. This practice began during the pendency of the 2008 Contract.

[28] At paragraph 22 of the Amended Defence
[29] At paragraph 36 of the Amended Statement of Case

151. He stated that the usual process that preceded and culminated in the claimant providing additional services at a particular location included an oral request by Mr. Pierre to Mr. Ali for the additional services. The services were usually needed urgently with short notice being given to the claimant. Where the additional service requested for instance in respect of a new location, the defendant carried out a security analysis, following which Mr. Ali visited the location with Mr. Pierre to assess the strength of security required. Mr. Ali then made a recommendation as to the appropriate type of security for the location to which Mr. Pierre would either agree or would propose other security arrangements. Upon the defendant deciding the service it required, the claimant provided same almost immediately. Following the provision of those additional services, invoices were issued whereby the claimant called upon the defendant to pay its charges for providing the additional services. These invoices were routinely paid by the defendant[30].

152. In addition, the claimant asserted that the requests for additional services was for the purpose of filling a "gap" in the security requirements of the defendant. Such requests were issued in context of the relevant contract in place at that time and in respect of security services that remained unaddressed within the relevant contract in place. There was also a well-established history of the said procedure being followed, and in particular of the defendant requesting and then paying the claimant for the provision of additional services since the 2008 Contract. Ms. Alfonso's evidence was that by agreement, the additional services requested were provided at the rate applicable to the relevant contract subsisting at the time of each oral contract.

[30] Witness Statement of Towfeek Ali at paragraphs 19 to 22

153. For these reasons the claimant states that the unchallenged evidence established that Mr. Pierre did enter into the Oral Contracts on behalf of the defendant with the claimant.

154. The claimant submitted the case of *Freeman & Lockyer (a firm) -v- Buckhurst Park Properties (Mangal) Ltd.* [1964] 2QB 480 wherein Diplock L.J. explained the common law principles applicable to the authority of agents to bind their corporate principals:

> It is necessary at the outset to distinguish between an "actual" authority of an agent on the one hand, and an "apparent" or "ostensible" authority on the other. Actual authority and apparent authority are quite independent of one another. Generally they co-exist and coincide, but either may exist without the other and their respective scopes may be different. As I shall endeavour to show, it is upon the apparent authority of the agent that the contractor normally relies in the ordinary course of business when entering into contracts.
>
> An "actual" authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties. To this agreement the contractor is a stranger; he may be totally ignorant of the existence of any authority on the part of the agent. Nevertheless, if the agent does enter into a contract pursuant to the "actual" authority, it does create contractual rights and liabilities between the principal and the contractor…
>
> An "apparent" or "ostensible" authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract… The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting

that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

In ordinary business dealings the contractor at the time of entering into the contract can in the nature of things hardly ever rely on the "actual" authority of the agent. His information as to the authority must be derived either from the principal or from the agent or from both, for they alone know what the agent's actual authority is. All that the contractor can know is what they tell him, which may or may not be true. In the ultimate analysis he relies either upon the representation of the principal, that is, apparent authority, or upon the representation of the agent, that is, warranty of authority.

The representation which creates "apparent" authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has usually "actual" authority to enter into.

In applying the law as I have endeavoured to summarise it to the case where the principal is not a natural person, but a fictitious person, namely, a corporation, two further factors arising from the legal characteristics of a corporation have to be borne in mind. The first is that the capacity of a corporation is limited by its constitution, that is, in the case of a company incorporated under the Companies Act, by its memorandum and articles of association; the second is that a corporation cannot do any act, and that includes making a representation, except through its agent.

…

The second characteristic of a corporation, namely, that unlike a natural person it can only make a representation through an agent, has the consequence that in order to create an estoppel between the corporation and the contractor, the representation as to the authority of the agent which creates his "apparent" authority must be made by some person or persons who have "actual" authority from the corporation to make the representation. Such "actual" authority may be conferred by the constitution of the corporation itself, as, for example, in the case of a company, upon the board of directors, or it may be conferred by those who under its constitution have the powers of management upon some other

person to whom the constitution permits them to delegate authority to make representations of this kind. It follows that where the agent upon whose "apparent" authority the contractor relies has no "actual" authority from the corporation to enter into a particular kind of contract with the contractor on behalf of the corporation, the contractor cannot rely upon the agent's own representation as to his actual authority. He can rely only upon a representation by a person or persons who have actual authority to manage or conduct that part of the business of the corporation to which the contract relates.

The commonest form of representation by a principal creating an "apparent" authority of an agent is by conduct, namely, by permitting the agent to act in the management or conduct of the principal's business. Thus, if in the case of a company the board of directors who have "actual" authority under the memorandum and articles of association to manage the company's business permit the agent to act in the management or conduct of the company's business, they thereby represent to all persons dealing with such agent that he has authority to enter on behalf of the corporation into contracts of a kind which an agent authorised to do acts of the kind which he is in fact permitted to do usually enters into in the ordinary course of such business. The making of such a representation is itself an act of management of the company's business. Prima facie it falls within the "actual" authority of the board of directors, and unless the memorandum or articles of the company either make such a contract ultra vires the company or prohibit the delegation of such authority to the agent, the company is estopped from denying to anyone who has entered into a contract with the agent in reliance upon such "apparent" authority that the agent had authority to contract on behalf of the company. If the foregoing analysis of the relevant law is correct, it can be summarised by stating four conditions which must be fulfilled to entitle a contractor to enforce against a company a contract entered into on behalf of the company by an agent who had no actual authority to do so. It must be shown:

> (1) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;
> (2) that such representation was made by a person or persons who had "actual" authority to manage the business of the company either generally or in respect of those matters to which the contract relates;

> (3) that he (the contractor) was induced by such representation to enter into the contract, that is, that he in fact relied upon it; and
> (4) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent."

155. In relation to Mr. Pierre's actual authority, the claimant relied on the Tender Rules as the document stemming from the corporate body principal to illustrate the actual authority conferred upon Mr. Pierre.

156. With respect to Mr. Pierre's apparent authority to enter into the Oral Contracts, the claimant stated that the evidence establishes that the defendant, including those who without a doubt had the requisite actual authority to manage the defendant's business relating to the management of security matters, by their conduct, represented to the claimant that Mr. Pierre had the authority to enter into binding oral agreements for the provision of security services. In particular, this representation was made by the appointment of Mr. Pierre as the Manager, Security Services and by the course of dealing between the parties.

157. In the alternative, the claimant submitted that if neither actual nor apparent authority to enter into the Oral Contracts is established then the defendant by its conduct has ratified those contracts, and accordingly they are binding on the Defendant. The claimant relied on the learning of Bowstead & Reynolds on Agency 18th Edition at paragraph 2-047 which states:

> "Where an act is done purportedly in the name or on behalf of another by a person who had no actual authority to do that act, the person in whose name or on whose behalf the act is done may… , by ratifying the act, make it as valid and effectual, subject to the

provisions of Articles 14 and 20, as if it had been originally done by his authority, whether the person doing the act was an agent exceeding his authority, or was a person having no authority to act for him at all."

158. Article 14 of that text states:

"Every unauthorised act, whether lawful or unlawful, which is capable of being done by means of an agent ... is capable of ratification by the person in whose name or on whose behalf it was purportedly done."

159. And Article 20 of that text states inter alia:

"The effect of ratification is to invest the person on whose behalf the act ratified was done, the person who did the act, and third parties, with the same rights, duties, immunities and liabilities, in all respects as if the act had been done with the previous authority on whose behalf it was done; ..."

160. The claimant submitted that there is a general rule that for a person to have ratified an act done without his authority, it is necessary that at the time of the ratification he should have full knowledge of all the material circumstances in which the act was done. However, Bowstead & Reynolds on Agency notes that the requirement of knowledge should be more easily established in cases of contract than that of tort. There ought to be a "blanket ratification" in contract as the related notion that a person may be taken to know matters of which he might be expected to be aware may obviously allow the inference of ratification, whereas this would not be permissible in a tort case.

161. With regard to ratification by companies, Bowstead & Reynolds on Agency at paragraph 2-078 states:

"An act or transaction done or entered into on behalf of a company may be ratified by the directors, if they have power to do or enter into such an act or transaction on behalf of the company and a

ratification by the directors will be implied from part of performance made or permitted by the company."

162. With regards to the Oral Contracts issue the court has to determine whether: the Oral Contracts are legally binding between the claimant and the defendant; Mr. Pierre had actual and/or apparent authority to enter into such contracts on the defendant's behalf; and the defendant ratified the Oral Contracts.

163. The defendant in disputing the formation of the Oral Contracts between the parties, referred to evidence which suggests that it was a fact well known to the claimant that for an agreement to be concluded, it had to first be subjected to proper documentation. The defendant alluded to the Mr. Towfeek Ali's knowledge that legal and/or procurement had to "do up" the necessary "paperwork" for additional security services; that pursuant to the meeting of the 29th February 2016, Mr. Elliot told Ms. Patricia Alfonso that all "off-contract" services undertaken by the claimant would not be paid for by the defendant; and Brigadier-General Carlton Alfred Alfonso at the said meeting requested that the additional "off contract" security services to be documented. In addition, the defendant relied on the Tender Rules which provide that services provided in cases of emergency had to be approved by the Tenders Committee or the Board of Commissioners after which contractual documents would be prepared.

164. The procurement of additional services by the defendant through the Oral Contracts did not amount to a variation of the 2010 Contract and the 2014 Contract. These additional services not provided for in accordance with different contracts; the Oral Contracts. The 2010 Contract and the 2014 Contract did not need to be amended in writing and signed by both parties pursuant to Clause 19 of the GCC.

165. As it relates to legal and/or procurement preparing the necessary "paperwork" and contractual documents being approved the Tenders Committee or the Board or Commissioners for additional security services, there is no documentary evidence before this court to demonstrate that these procedures were upheld by the defendant or that without such paperwork the Oral Contracts would not be legally binding.

166. The evidence suggest that throughout the pendency of the 2008 Contract, the 2010 Contract, and the 2014 Contract Mr. Pierre repeatedly entered into numerous oral agreements for the provision of such services with the Claimant. The defendant accepts that verbal instructions were given in relation to additional services in three of the 40 locations listed by the claimant pursuant to the Oral Contracts. Therefore, it is not in dispute that the defendant did indeed request additional services though Mr. Pierre. If, according to the defendant Mr. Pierre had the actual authority to enter into three oral contracts, the court does not understand how they in the same breath deny that Mr. Pierre had such authority.

167. The court agrees with the evidence of the claimant that this was a usual practice that occurred between the parties. The evidence of paid invoices pursuant to oral contracts date back to the 2008 Contract which demonstrates that requests for additional services were made and paid for by the defendant. The existence of this practice is not novel between the parties.

168. The evidence adduce by Mr. Towfeek Ali states that Mr. Pierre would orally request additional services which is tantamount to the verbal instructions admitted to by the defendant. The claimant would then provide the relevant security or perform a security analysis to determine

the strength of security required. Upon the defendant deciding the service it required, the claimant offered the security requested and the defendant accepted the claimant's offer by allowing the officers to go onto the various locations to perform their duties. The claimant would then invoice the defendant for the services it provided and the evidence establishes that some payments were effected by the defendant in relation to the 2010 Oral Contracts[31].

169. The evidence illustrated that under the Oral Contracts the defendant received additional services and paid for same without query or complaint and without putting the agreement into writing. Therefore, based on the working history and the course of dealing between the parties they were accustomed to entering into binding oral contracts.

170. With respect to the meeting dated the 29th February 2016, it is noted that relations between the parties were strained because for some considerable time, the claimant was not being paid by the defendant and Mr. Towfeek Ali and Ms. Alfonso was out of the jurisdiction at the time. The strained relationship is further evidence by the termination of the 2014 Contract by the claimant and defendant on the 26th April 2016 and 27th April 2016 respectively. In the circumstances, it is not unreasonable for Brigadier-General Carlton Alfred Alfonso to ask for documentation of oral requests, especially when at the said meeting Mr. Elliot told Ms. Patricia Alfonso that all "off-contract" services undertaken by the claimant would not be paid for by the defendant.

171. It appears that these terms were introduced by the defendant due to the breakdown of the relationship between the parties as such terms did not govern their relationship in the prior contracts. In any event, the

[31] Witness Statement of Nyree Dawn Alfonso at paragraph 23

emergence of these new terms occurred after the formation of the Oral Contracts are irrelevant given that the claims for payment for the provision of additional security services were made prior to February 2016.

172. Based on the evidence and the law set out in *RTS Flexible Systems Limited* [supra] there is no doubt that the parties had intentions to create legal relations for the provision of additional services. There was a well-established history of the defendant requesting and then paying the claimant for the provision of additional services since the 2008 Contract. As a result, there was already an established business relationship between the parties. It is not the case that the claimant was providing these services as a favor to the defendant. Such oral contracts made during the pendency of the 2008 Contract[32] and the 2010 Contract were indeed paid for. Therefore, the state of minds and the conduct between the parties illustrate that they indeed had intentions to create legal relations.

173. The elements of offer and acceptance required for the formation of a valid contract was also made out on the evidence. The provision of the additional services was required as the relevant contract did not provide for all the unforeseen gaps that arose as the contract endured. When the need for such additional services arose, an offer was made by the claimant to provide services and defendant accepted the services provided by the claimant by allowing the security officers onto their compound to perform the requested service.

174. The paid invoices relative to the 2010 Oral Contracts demonstrates that the services were not restricted to the three locations the defendant admitted that it gave verbal instructions in relation to. In addition, as previously discussed, the defendant's credibility had been compromised

[32] Witness Statement of Nyree Dawn Alfonso at paragraph 10

due to the inconsistencies and fabrications in its evidence. Therefore, the court is satisfied that binding Oral Contracts were formed between the claimant and defendant.

175. In terms of Mr. Pierre's actual authority to enter into the Oral Contracts, the court is satisfied that the claimant has successfully discharged its burden of proving such authority. The evidence provided with respect to the Tender Rules, demonstrates that the most senior official on duty had the actual authority to award contracts in cases of emergency. Despite the Tender Rules were not adduced into evidence, both parties agreed on its contents.

176. The common law principles of agency are applicable to limited liability companies as identified by Diplock L.J. and are applicable to the instant case given that the defendant is a corporate body incorporated by section 3 of the Water and Sewerage Act and comprises of a Board of Commissioners whose role and functions appear to be broadly similar to those of a Board of Directors of a limited liability company.

177. The Tender Rules which were made by WASA the corporate body principal expressly gives the most senior official on duty the power to award contracts for Articles, Works or Services necessary to avert danger or bring the situation under control. Based on the evidence given by Mr. Elliot as to Mr. Pierre's duty in his role of Manager, Security Services, the court is satisfied that he was the most senior official on duty. While the Finance Manager of WASA, Mr. Lancelot Lezama stated that services so awarded must subsequently be approved by the respective authority whether by the Tenders Committee or the Board of Commissioners, within 48 hours of awarding same and thereafter contractual documents would be prepared, there is no evidence of the Tender Rules to say that until the

services are approved and the contract is formalized in writing, there is no binding contract between the parties. The court agrees with the claimant that such a requirement/condition would be impractical, especially in the context of an emergency, as approval of that service and the formalization of the contract may take some time to obtain.

178. The evidence also substantiate that Mr. Pierre had the apparent authority to enter into the Oral Contracts. At all material times during the formation of the Oral Contracts (even including the 2008 Oral Contracts), the defendant appointed and employed Mr. Pierre as the Manager, Security Services. Mr. Elliot averred that Mr. Pierre's duties in that role included the planning and management of all security matters. He developed and coordinated security programmes and activities, maintained liaisons with officials of external agencies and other Heads of Security, he managed WASA's Estate Police and also managed and monitored the performance of the external security service providers retained from time to time by WASA, including the Claimant[33].

179. The defendant by appointing Mr. Pierre as Manager, Security Services and giving him the duties and responsibilities as described, the defendant represented to persons dealing with Mr. Pierre that he had the authority to enter into the Oral Contracts. In so doing, the defendant permitted Mr. Pierre to act in the management of WASA's security needs and demands. Mr. Pierre issued verbal instructions pursuant to the authority granted to him by the defendant due to his role of managing all security matters including external service providers.

[33] Witness Statement of Leon Elliot at paragraph 12

180. In addition, the court agrees with the claimant's submission that the defendant further represented that Mr. Pierre was authorized to enter into the Oral Contracts through his historical dealings with the claimant. The undisputed evidence of Ms. Alfonso and Mr. Ali is that all of the additional services provided under the 2008 Oral Contracts, the 2010 Oral Contracts and the 2014 Oral Contracts were requested by Mr. Pierre and accepted by the defendant without query or complaint by the defendant. Furthermore, all of the invoices issued by the claimant for additional services under the 2008 Oral Contracts, and many of the invoices for additional services provided under the 2010 Oral Contracts were paid by the Defendant again without query or complaint by the Defendant even after its alleged verification exercise was satisfied. This course of dealing would have induced any reasonable person, to believe that Mr. Pierre was authorised by the defendant to enter into binding oral contracts with the Claimant for the provision of additional security services, on its behalf.

181. As a result, the defendant by empowering Mr. Pierre to manage all its security affairs, and Mr. Pierre by his conduct exercising the power given to him as Manager, Security Services, represented to the claimant that he had the authority to making binding oral contracts on the defendant's behalf. Mr. Ali's unchallenged evidence states that since the company was receiving payments for additional services commencing under the 2008 Oral Contract, there was no reason for him to doubt that Mr. Pierre was not operating within the scope of his power[34]. The claimant's evidence established that based on the unambiguous representation made to them by the defendant, they continued to provide additional services on short notice, whenever it was requested by the defendant. Since the 2008 Contract, the defendant was in the habit of

[34] Witness Statement of Towfeek Ali at paragraph 127

satisfying these invoices. Even some of the invoices of the 2010 Oral Contracts were paid by the defendant. Consequently, the claimant acted upon the representations made by the defendant when it continued to operate its business in this manner even during the pendency of the 2014 Contract. Therefore, the defendant is estopped from asserting that it is not bound by the 2010 Oral Contracts and the 2014 Oral Contracts.

182. The court also finds that the act of Mr. Pierre entering into the Oral Contracts on behalf of WASA was ratified by those agents of the defendant who had the power enter into such contracts. The formation of Oral Contracts was a regular occurrence during the working relationship between the parties as demonstrated by the number of invoices generated in this regard. The evidence of Mr. Towfeek Ali is that after Mr. Pierre requested the additional services and sought approvals, from time to time, the Chief Executive Officer's staff and the Chief Executive Officer himself would telephone, requesting clarification and/or further details of the additional services to be provided[35]. Also, those services were performed 'visibly'[36] and were accepted and paid for by the defendant. The verification of invoices by the defendant which it paid would have revealed that the additional services were not covered by the written contracts and the defendant including its Commissioners, ought to have been aware that no written contract for the additional services was signed by the parties.

183. These proceedings revolve around the law of contract and as such the requirement of knowledge is more easily established as the persons designated to run the affairs of the company is taken to know the matters of which he be expected to be aware. The evidence illustrates that the CEO of WASA was aware of the additional services requested as he sought

[35] Witness Statement of Towfeek Ali at paragraph 127
[36] Witness Statement of Towfeek Ali at paragraph 22

clarification on same. Furthermore, the formation of oral contracts has been a phenomenon since the 2008 Contract and is not a novel or new practice. Therefore, those representatives of the defendant with the power to enter into contracts with claimant ought to have been aware of the ongoing practice.

184. For these reasons, the court is satisfied that the requirement of knowledge for proving ratification was fulfilled and therefore the defendant's behaviour ratified the actions of Mr. Pierre when he entered into the Oral Contracts with the claimant.

185. Based on these findings and that Mr. Pierre had actual authority and apparent authority to enter into the Oral Contracts with the claimant, the defendant is liable to the defendant in the total sum of $20,454,684.50.

d. The mobile patrol issue

186. The claimant's pleaded case is that it provided vehicle patrol services on a daily basis for the period 1st October 2014 to 26th April 2016 as agreed under the 2014 Contract, and in particular the Appendix to the 2014 Letter of Award. The defendant denies this and says that the composition of officers in the mobile patrol was not in keeping with the terms of the 2014 Contract; and that many patrols commenced three hours after the scheduled start time of the patrol and finished three hours before the scheduled end time of the patrol.

187. From the onset, it is worthwhile setting out the evidence surrounding the parties' entry into the 2014 Contract. Mr. Towfeek Ali at

paragraphs 55 to 62 of his Witness Statement sets out the evidence in this regard. His evidence was not disputed by the defendant.

188. Before the 2014 Contract dated the 22nd July 2015 was in existence, there was an Original Letter of Award dated the 15th September 2014. Subsequently, the Original Letter of Award was replaced by four Superseding Letters of Award ending with the one dated the 28th May 2015 ("the 2014 Letter of Award").

189. In or about late September 2014 Mr. Diaz (the then Director of Corporate Services) held a meeting amongst himself, Mr. Pierre and Mr. Towfeek Ali wherein the latter was informed that the cost for one armed officer was included in the Original Letter of Award despite the said letter providing for the complement of two armed officers and one unarmed security driver. Nevertheless Mr. Diaz insisted that there should be no interruption in the mobile patrol service notwithstanding the said error in cost, as Management would amended this aspect of the 2014 Contract and the issue of missing security locations and would seek the approvals for the additional expenditure.

190. As such, the claimant provided mobile patrols pursuant to the Original Letter of Award between October 2014 and April 2015 in the absence of a written agreement, but only billed for one armed officer according to the financial aspect of the Original Letter of Award and the two other Superseding Letters of Award dated the 26th September 2014 and the 18th February 2015 respectively.

191. The Appendices to the Superseding Letters of Award dated the 13th March 2015 and the 28th May 2015 (the 2014 Letter of Award which was incorporated into the 2014 Contract), subsequently provided that the

mobile patrol service comprise one armed officer in addition to the unarmed baton officer driver.

192. In or around February or early March 2015, Mr. Pierre informed Mr. Towfeek Ali that he had received instruction for the provision of one armed officer per mobile patrol. However, after expressing that such was a security risk, Mr. Towfeek was told to continue with the same complement of two armed security officers and one unarmed driver.

193. At the end of April 2015, since variation of the 2014 Contract with reference to the mobile patrol's complement of armed officers as well as the missing locations from the said agreement was not approved and TTSSL was providing services and not being paid, Mr. Towfeek Ali proposed a cost cutting measure whereby TTSSL would bill for a precepted security officer but would still continue to provide a second armed officer when possible. Mr. Towfeek Ali specifically advised that sometimes a precepted but unarmed officer would be supplied in mobile patrols in place of the second armed officer. Mr. Towfeek Ali also proposed that TTSSL's billing format would be changed from May 2015 onwards to reflect the cost cutting arrangement.

194. The defendant submitted that the general rule is that a party to a contract must perform exactly what he undertook to do. When an issue arises as to whether performance is sufficient, the court must first construe the contract in order to ascertain the nature of the obligation (which is a question of law); the next question is to see whether the actual performance measures up to that obligation (which is a question of "mixed fact and law" in that the court decides whether the facts of the actual performance satisfy the standard prescribed by the contractual provisions

defining the obligation): Chitty on Contracts Volume 1 General Principles 29th Edition at paragraph 21-001.

195. The promisor, in the absence of waiver or subsequent variation of agreement, cannot substitute for the agreed performance anything different, even though the substituted performance might appear to be better than, or at least equivalent to the agreed performance: Chitty on Contracts Volume 1 General Principles 29th Edition at paragraph 21-004.

196. The defendant avers that Clause 8 of the 2014 Contract provides for the payment of rates by the defendant to the claimant as detailed in the Appendix of the 2014 Letter of Award whereby the claimant covenanted with the defendant to provide security services and vehicle rental and patrol services for three years in accordance with the provisions of the 2014 Contract. The Appendix of the 2014 Letter of Award provided that each mobile patrol was to consist of one armed officer and a vehicle.

197. The defendant contended that although Senior Counsel for the claimant took Mr. Lezama through the Scope of Works which provided for two armed officers and that pursuant to Clause 3 of the 2014 Contract, the Scope of Works took priority over the 2014 Letter of Award, in cases of inconsistency between the 2014 Contract and the documents listed in Clause 2, Clause 3 of the 2014 Contract provides that the provisions of the said contract shall prevail. Therefore, it is the defendant's case that Clause 8 of the 2014 Contract required the claimant to provide security services and vehicle rental and patrol services as detailed in the Appendix to the 2014 Letter of Award which had to consist of one armed officer, one unarmed officer and a vehicle.

198. The undisputed evidence before the court is that even though the claimant agreed to provide mobile services with two officers where one carried a firearm, the claimant provided mobile services where the composition of officers was not as required by the contract; and that notwithstanding these anomalies, the Claimant wrongly continued to invoice the Defendant for mobile patrols on a continuous basis from October 2014 to April 2016.

199. It was further asserted that even if the Scope of Works took priority over the 2014 Letter of Award, the claimant still did not perform the mobile patrol services in accordance with the terms of the Scope of Works which provided for two armed officers.

200. The defendant asserts that contrary to the 2014 Contract there were instances where two officers were provided where neither carried a firearm; three officers where one carried a firearm; or two officers where neither carried a firearm and where one of these was a supervisor. Accordingly, the claimant in failing to fulfill its obligations under the 2014 Contract by providing the contracted complement of officers for the mobile patrol, (even if the substituted performance might appear to be materially equivalent or better that the services agreed to be performed), is not entitled to the sum of $9,318,652.65.

201. The claimant contested that the defendant's case is not that the claimant applied the wrong contract rates, or that it applied rates not provided for in the contract in respect of the mobile service that was in fact provided by the Claimant. Accordingly, the defendant has not pleaded it has been charged for more than it received, it has only pleaded that what it received was not in accordance with the contract. Nor has the defendant pleaded that it has suffered any loss as a result of the claimant's alleged

breach of contract in failing to provide a mobile patrol service that had a composition of officers that was in accordance with the 2014 Contract.

202. The claimant averred that it tendered for the 2014 Contract on the 27th May 2014 and received the Original Letter of Award from the Defendant dated the 15th September 2014. Thereafter, the claimant received 4 Superseding Letters of Award, with each Letter of Award replacing the previous one. The final Superseding Letter of Award dated 28th May 2015 was incorporated into the 2014 Contract. However, the claimant contended that although the 2014 Contract was dated the 22nd July 2015 it provided for a commencement date of 1st October 2014, almost 11 months prior. Thus, during the period 30th September 2014 to 22nd July 2015 the claimant provided the security services to the defendant without any formal contract in place.

203. Mr. Ali's unchallenged evidence is that during the period October 2014 to April 2015 the composition of the mobile patrol was in accordance with the Letters of Award subsisting during that period. To the extent that from May 2015 to July 2015 the services provided did not comply with the Letters of Award then in place, it was in compliance with the composition of the mobile patrols instructed by Mr. Diaz. The claimant asserted that since there was no formal contract in place between the parties at that time, what governed the composition of the mobile service services to be provided were the Appendices to the Letters of Award and Mr. Diaz's instructions.

204. In this regard, the claimant's case is that Clause 2 of the 2014 Contract incorporates a number of documents into the said contract including the Scope of Works and the 2014 Letter of Award. Recital A of the 2014 Contract states that the defendant desired the provision of

security services and vehicle rental for a period of 3 years "as detailed in the Appendix to the Superseding Letter of Award dated 2015 May 28 … in accordance with the Authority's Scope of Services attached hereto".

205. There exists a conflict between the 2014 Letter of Award and the Scope of Services. The 2014 Letter of Award indicates a mobile patrol with a complement of one armed officer and one baton driver. The Scope of Services provides that the mobile patrol are to consist of two armed officers and a vehicle (operated by one baton driver). In such cases, Clause 3 of the 2014 Contract states that the Scope of Services prevail over any conflicting provisions in the 2014 Letter of Award. Furthermore, the result is consistent with Recital A to the 2014 Contract. Therefore, under the 2014 Contract the claimant's case is that the personnel composition of the mobile patrol is two armed officers and one baton driver.

206. The claim for the debt under the 2014 Contract in the amount of $71,664,671.35 includes an amount in the sum of $9,318,652.65 for mobile services. A summary of the arrangement for and the composition of the mobile patrol services is contained in Table 1 below.

Table 1. Arrangements for and Composition of Mobile Service.

Arrangement for Mobile Patrol	**Composition of Mobile Patrol**
Original Letter of Award dated the 15th September 2014	Letter of award provided for two precepted armed officers but built out a cost for one baton. Director of Corporate Services indicated that this was an error and would be corrected in the contract. Services with two precepted armed officers and one baton officer was provided from October 2014 and April 2015.

First Superseding Letter of Award dated 26th September 2014	First Superseding Letter of Award made provision for two precepted armed officers and one baton officer. It made provision for payment for one precepted officers and one baton officer.
Second Superseding Letter of Award dated 18th February 2015	Second Superseding Letter of Award made provision for two precepted armed officers and one baton officer. It made provision for payment for one precepted officers and one baton officer.
Third Superseding Letter of Award dated 13th March 2015	Appendix provided for one precepted armed and one baton officer.
Fourth Superseding Letter of Award dated 28th May 2015	Appendix provided for one precepted armed and one baton officer.
2014 Contract signed 26th July 2015	One precepted armed officer and one baton officer.

207. The court accepted the claimant's evidence that the disparity between the arrangements for and the composition of the mobile patrol under the Original Letter of Award was resolved when Mr. Diaz instructed the claimant to provide those services consistent with the costing arrangements made; that is for two precepted armed officers and one armed officer.

208. This arrangement continued until the Third Superseding Letter of Award dated 13th March 2015. From that arrangement and date the issue was contractually clear for the composition of the mobile patrol; one precepted armed officer and one armed officer.

209. The 2014 Contract was signed, on 26th July 2015 but said to take effect on the 1st October 2014. However, it would be impossible for the

2014 Contract to resolve the disparity around the composition for the mobile patrol as those services were already provided to the defendant by the claimant.

210. The most equitable manner to resolve this part of the claim, in the court's view is for the defendant to be liable to pay and for the claimant to recover for those services which they both agreed should be provided and paid for.

211. With respect to those invoices adduced into evidence for mobile patrol services, the claimant shall recover from the defendant, for the period 1st October 2014 to 12th March 2015 for two precepted armed officers and one baton officer as long as those services were provided. Additionally, for the period 13th March 2015 to the 26th April 2016, the claimant shall recover from the defendant, the sum for one precepted armed officer and one baton officer, as long as those services were provided.

212. Where the composition of officers provided were not the correct amount of precepted armed and baton officers, the defendant shall be liable to pay for more than what the parties agreed to. For instance if for the period 1st October 2014 to 12th March 2015, there were three officers, all baton, the defendant shall pay at that rate. If the claimant provided three precepted and armed officers the defendant shall pay for two armed precepted and one baton officer.

213. If for the period 13th March 2015 to 26th March 2016 there were three officers all precepted armed officers, the defendant shall pay at the rate of one precepted armed and one baton.

214. If more officers were provided than agreed to, the claimant will bear the cost of that service. This is not unfair or unexpected as the claimant had indicated, via the evidence of Mr. Towfeek Ali, that they were prepared to absorb, clearly as a business expense, the cost of additional security to ensure proper arrangement were made for the safety of their security officers.

215. The claimant shall bear the costs of this accounting exercise to ensure that the invoices adduced into evidence accord with the court's order.

e. The repudiation issue

216. The claimant's pleaded case is that the defendant's sustained and serious failure to pay its invoices for security services under the 2014 Contract and the 2014 Oral Contracts amounted to a repudiation of the 2014 Contract which was accepted by letter dated the 26th April 2016 when the claimant terminated those contracts. The defendant contends that non-payment of the claimant's invoice is not a repudiatory breach because timing of payment does not go to the root of the contract.

217. The law recognizes three types or categories of contractual terms, namely conditions, warranties, and innominate terms. Any breach of a term that is a condition entitles the innocent party to treat the contract as repudiated whereas a breach of a warranty will never entitle the innocent party to do so. A condition is a stipulation which is fundamental to a contract but a warranty is a provision which is collateral to the main purpose of the contract. The practical distinction lies in the consequences; a breach of a condition will entitle the innocent party to treat the contract as being at an end, but a breach of warranty entitles the innocent party

only to damages[37]. If every breach of a term is likely to be serious the term will generally be treated as a condition, whereas if some breaches will probably not be serious the term is less likely to be construed as a condition.[38]

218. Clause 16 of the GCC in the 2014 Contract (as amended by Clause 3 of the SCC) at it relates to payment can be construed as a condition, even if not expressly so stated in the contract. Naturally, the consequence of non-payment is a serious breach which entitles the claimant to terminate the contract. However, late payment beyond the 60 or 30 day periods is a warranty as this provision is collateral to the main purpose of the contract. The evidence is illustrative that the breach, whereby the defendant continuously paid invoices late, was one occurring even before the conception of the 2014 Contract. Therefore, late payment may be construed as a breach of a warranty not entitling the claimant to accept the breach and repudiate the 2014 Contract.

219. Where a contractual term can be breached in various ways, or where the consequences likely to result from the promisor's breach are uncertain, the term is more likely to be construed as an intermediate term than a condition[39]. The breach of an innominate or intermediate term cannot be said to entitle the innocent party to terminate the contract nor can it be said no breach of that term will entitle the innocent party to do so. Therefore such breach may or may not amount to a repudiation of the contract depending on the nature and consequences of the breach[40].

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[37] Halsbury's Laws of England (3rd Edn) 194, 195
[38] The Law of Contract (Common Law Series) 6th Edition at paragraph 7.13
[39] The Law of Contract (Common Law Series) 6th Edition at paragraph 7.14
[40] *Bunge Corporation -v- Tradax Export S.A.* (1981) Vol 2 Lloyd's Law Reports p.1 at 7; *Hong Kong Fir Shopping Co Ltd -v- Kawasaki Kisen Kaisha Ltd* (1962) 2 QB p. 26 at 69-70

220. Based on the nature of the contract, it must have been the intention of the parties that Clause 16 of the GCC would be treated as a condition[41].

221. The history of late payment, based on the number of unpaid invoices coupled with the time that they have remained unpaid, has evolved in the court's view to non-payment. Payment is the whole benefit to be derived from the contract on the claimant's behalf, making it a serious term of and not collateral to the contract.

222. In the case of *Hong Kong Fir Shopping Co Ltd -v- Kawasaki Kisen Kaisha Ltd* (1962) 2 QB p. 26 Lord Diplock L.J. held that where events resulting from the breach had (as at the time the innocent party purported to rescind/terminate the contract) deprived the innocent party of substantially the whole benefit which it was the intention of the parties (as expressed in the contract) that he should obtain from the contract, then the innocent party might treat the breach as a repudiatory breach and terminate the contract.

223. A number of other tests have been applied in determining whether a breach entitles the innocent party to terminate the contract. It has been said that the breach must "affect the very substance of the contract", or "frustrate the commercial purpose of the venture" or "go to the root of the contract". Further in making that determination regard must be had to the nature and consequence of the breach[42].

224. The undisputed evidence suggest that at the date the claimant terminated the 2014 Contract on the 26th April 2016, a vast majority of the

[41] The Law of Contract (Common Law Series) 6th Edition at paragraph 7.9
[42] Chitty on Contracts 30th Edition Col 1 at paragraph 24-040

invoices from 1st October 2014 to 26th April 2016, spanning a period of 19 months, issued in respect of security services were unpaid by the defendant. As at the termination date, the sum of $71,664,671.35 (less the sum of $9,318,625.65 pending the accounting exercise to bring the sum due and owing for mobile patrol services in compliance with the court's order) remained due and owing to the claimant.

225. Particularly from in or about 2014 TTSSL was experiencing acute difficulty in obtaining payment of their invoices from the defendant and was heavily dependent on bank financing. At times, Ms. Nyree Alfonso would lend the claimant money to meets it bank payments and the salaries of security officers. Towards the second half of 2015 the defendant's payments became increasingly rare and no sums were paid for several months[43].

226. At the termination date as a result of the defendant's non-payment of the 2014 invoices the claimant was unable to meet its payroll commitments to its employees and was forced to terminate the employment of over 500 of its security personnel.

227. Based on the evidence, the court is satisfied that the breach of the condition in Clause 16 of the GCC in the 2014 Contract entitling the claimant to terminate the contract. At the date of termination, there were outstanding invoices under the 2010 Contract which had not been paid by the defendant. Such non-payment after the completion of the contract, with no assurance as to payment suggests that the defendant was trying to abscond from its duties.

[43] Witness Statement of Nyree Alfonso at paragraph 66

228. The claimant was experiencing such financial hardships that it had to take loans, was heavily dependent on its bank facilities and had to obtain court orders to meet its financial obligations. Despite repeated requests and demands for payment, the defendant still did not fulfill its obligations of payment. This is even despite the defendant's acknowledgement that sums were due and owing to the claimant, and after completion of its audits the figure of approximately $103,000,000.00 was determined. Nevertheless, the defendant advanced no payments to the claimant. In this regard, the court finds that there was a repudiatory breach of the 2014 Contract.

f. The damages issue

229. The claimant pleads at paragraphs 53 to 64 of its Amended Statement of Case that as a result of the defendant's failure to pay the Unpaid 2014 Invoices it incurred the following consequential losses:

i. interest in the amount of $8,346,753.53 (as at 5th December 2016 which increased to $14,568,088.92 as at 24th January, 2018 when the banking facilities were liquidated on 24th January, 2018), incurred on bank overdraft facilities which it was forced to utilize to cover the costs of providing the security services in accordance with the 2014 Contract in the absence of payment of its invoices issued for services rendered under the 2010 Contract, the 2014 Contract, the 2010 Oral Contracts and the 2014 Oral Contracts;

ii. loss of profits in the amount of $6,577,899.00 had the defendant not cause the claimant to terminate the Oral 2014 Contracts by its repudiatory breach of those contracts;

iii. loss of profits in the amount of $8,346,753.53 had the defendant not cause the claimant to terminate the 2014 Contract by its repudiatory breach of those contracts; and

iv. liabilities and costs in the amount of $6,938,893.82 incurred under the Retrenchment and Severance Benefits Act Chapter 88:13 consequent upon the claimant's termination of the employment contract of approximately 700 of its employees.

230. Where a breach has been established, to be entitled to damages the common law principle of remoteness of damages must also be satisfied. The principles were initially laid down in *Hadley -v- Baxendale* [1843-60] All ER Rep 461 as follows:

> "We think the proper rule in such a case as the present is this. Where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. If special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the real multitude of cases not affected by any special circumstances, from such a breach of contract."

231. In *Victoria Laundry -v- Newman* [1949] 2 KB 528 Asquith L.J. restated those principles as follows:

> "(1.) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: (Sally Wertheim v. Chicoutimi Pulp Company (1)). This purpose, if relentlessly pursued, would provide him with a

complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognized as too harsh a rule. Hence,

(2.) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.

(3.) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.

(4.) For this purpose, knowledge "possessed" is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the "ordinary course of things" and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the "first rule" in F (2). But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the "ordinary course of things," of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the "second rule" so as to make additional loss also recoverable.

(5.) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result."

232. In *Czarnikow -v- Koufuos, The Heron II* [1969] A.C. 350 the House of Lords and in particular Lord Reid disagreed with that restatement to the extent that it applied the test of reasonable foreseeability in determining what loss arose naturally i.e. in the normal course of things, or could be supposed to have been in the contemplation of the parties. According to

Lord Reid (with whom the other members of the Court agreed) the proper test is whether the loss in question is:

> "of a kind which the defendant, when he made the contract, ought to have realised was not unlikely to result from the breach .... the words "not unlikely" ... denoting a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable."

233. It is well established that the termination of a contract for repudiatory breach by the innocent party does not prejudice or exclude a party's right to claim damages for breaches of the contract that occurred prior to the termination, and indeed the innocent party is also entitled to damages for losses which it has incurred as a consequence of the termination of the contract. With regard to the latter entitlement, the termination of a contract for repudiatory breach does not put an end to the contract for all purposes, it merely puts an end to all primary obligation of both parties remaining unperformed[44]. Lord Diplock in *Photo Production Ltd -v- Securicor Transport Ltd* [1980] 1 AII ER 556 explained that where the innocent party elects to terminate the contract:

> "…(a) there is substituted by implication of law for the primary obligations of the party in default which remain unperformed a secondary obligation to pay monetary compensation to the other party for the loss sustained by him in consequence of their non-performance in the future and (b) the unperformed primary obligations of that other party are discharged."

234. Based on the repudiatory breach of the 2014 Contract by the defendant, the claimant is entitled to damages naturally arising, according to the usual course of things stemming from the breach itself. There is no issue of remoteness of damages for the defendant's breach of the 2014

[44] Chitty on Contract 30th Edition Vol 1 at paragraph 24-047

Contract in that regard as these damages put the claimant in the position had the contract not been breached.

235. In addition, the claimant claims loss profits in relation to the 2014 Contract and the 2014 Oral Contracts. In accordance to Lord Diplock's explanation whereby the innocent party elects to terminate the contract, the court finds that the there was a primary obligation of the defendant under the 2014 Contract to pay the claimant at contractual rates for the security services it provided. Upon the claimant's termination of the 2014 Contract, that primary obligation was replaced by a secondary obligation to pay monetary compensation to the claimant for the loss sustained by it in consequence of the claimant no longer providing and the defendant no longer paying for such services. Such loss would clearly include any loss of profit that the claimant would have derived from such payments had the contract not been terminated.

236. The fact that the claimant suffered a loss of profit which it would have earned had the 2014 Contract not been terminated, in the amount of $22,451,435.99 was proven by the evidence of Mr. Anil Seeteram which was not challenged in cross examination or contradicted by evidence led by the Defendant. Therefore, the claimant is entitled to $22,451,435.99 for loss of profits under the 2014 Contract as consequential losses.

237. In relation, to the claimant's claim for loss of profits pursuant to the 2014 Oral Contracts in the amount of $6,577,899.00 as a consequential loss, prima facie appears to be too remote. According to *Victoria Laundry* [supra] in cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as at the time the contract was made, was reasonably foreseeable to result from the breach.

238. The 2014 Contract was signed on the 22nd July 2015. However, security services were being performed under this contract since 30th September 2014 before the contract was signed. The evidence suggest that special circumstances exist between the claimant and the defendant since the 2008 Contract whereby oral contracts formed and were paid for by the defendant in cases of emergency and to fill the gaps of the coeval written contract. Such requests for additional services were made by Mr. Pierre in circumstances where new security requirements arose which were not required when a contractual award was being made or where other security providers had been moved from duties and/or when different security requirements were required by WASA. The evidence further suggests that due to the gap between the 2010 Contract and the 2014 Contract Mr. Pierre requested that additional services be continued in various locations[45].

239. Under the second limb of *Hadley -v- Baxendale* there were special circumstances existing whereby oral contracts were made for additional services at the time the 2014 Contract was signed by the parties. This arrangement existed since the 2008 Contract and continued into the interim period before the 2014 Contract was signed. Therefore at the time the 2014 Contract was made, it was reasonably foreseeable that continued practice of making oral contracts to fill the gaps in the 2014 Contract would have been required. Therefore, based on the evidence the court is satisfied the claimant's claim for loss of profits pursuant to the 2014 Oral Contracts in the amount of $6,577,899.00 as a consequential loss is not remote.

240. As it relates to the claimant's claim for consequential loss pursuant to interest from its overdraft facilities in the amount of $14,568,083.92,

[45] Witness Statement of Towfeek Ali at paragraphs 44 to 46

Mr. Towfeek Ali at paragraph 30 to 33 of his Witness Statement state that the defendant's payments of the claimant's invoices was always late and that in telephone conversations he held frequently with Mr. Pierre and Mr. Yorke, the Head of the defendant's Finance Department and subsequently its Acting Chief Executive Officer, he specifically informed them that the defendant had reached the limits of its overdraft facilities and would not be able to meet its impending payroll commitment. He further gave evidence that these conversations were held as early as during the pendency of the 2008 Contract.

241. Mr. Towfeek also gave evidence that after the expiry of the 2010 Agreement on 30th September 2014 but prior to the signing of the 2014 Contract on 22nd July 2015 (during the period when the claimant provided security services to the defendant pursuant to the Superseding Letters of Award when no written contract was in place) he and Mrs. Floral Marajh, a Senior Manager of First Citizens Bank Limited, also had a teleconference with the defendant's Mr. Yorke with regard to payment of TTSSL's invoices.

242. Furthermore, the evidence of Ms. Nyree Alfonso at paragraph 57 of her Witness Statement is that between 2012 and 2015 she held conversations with the defendant's Chairman and Deputy Chairman and always told these respective gentlemen that TTSSL was heavily reliant on bank financing to meet payroll commitments and to finance vehicle purchases which were used in the mobile patrols provided to the Defendant under both the 2010 Contract and the 2014 Contract.

243. Based on the evidence the court is satisfied that at the time the defendant entered into the 2010 Contract, the 2014 Contract and the Oral Contracts, it was known to the defendant that the claimant had overdraft facilities at its bankers to run its business. This course of dealing was

evident since the 2008 Contract. Moreover, the defendant admits that it always paid the claimant's invoices late and have yet not satisfied invoices for services it received because it has not verified the claimant's invoices to determine whether the amount invoiced matches the services provided. The fact remains that the claimant provided services for which it was not paid. It is not unreasonable or unforeseeable that the claimant had to have overdraft facilities to keep its business afloat and manage its affairs based on the conduct of the defendant. For these reasons, the court is satisfied that it was reasonable foreseeable at the time the contracts were made that had a breach in payment occur that the claimant would have accrued interest on its overdraft facilities.

244. The claimant claims against the defendant the sum of $6,938,893.82, representing liabilities and costs which it incurred under the Retrenchment and Severance Benefit Act Chapter 88:13 because it was forced to terminate over 500 of its employees as a result of the failure of the defendant to pay its invoices for services provided under the Contracts. The court finds that damages in this regard is too remote. It could not reasonably be in the contemplation of the defendant at the time the Contracts were formed that if there was a breach of the terms, the claimant would be forced to terminate its employees, more so over 500 of them.

245. The claimant's evidence is that it incorporated and operated a security company before their business relationship with WASA. While WASA was a large customer, it was not their only customer. The defendants would not be aware of the claimant's business affairs at the time the contracts were made. This includes making provision for severance when the contracts ended as a result of the effluxion of time.

Therefore, the liabilities and costs incurred under the Retrenchment and Severance Benefit Act Chapter 88:13 it too remote and not recoverable.

246. As a consequence of the court's findings, IT IS HEREBY ORDERED, that there be judgment for the claimant against the defendant in the following terms:

a. The defendant shall pay claimant the sum of $21,285,026.85 for the debt due and owing for overtime services pursuant to the 2010 Contract;

b. The defendant shall pay the claimant the sum $20,454,684.50 for debt due and owing for the additional Oral Contracts entered into during the pendency of the 2010 Contract and the 2014 Contract;

c. The defendant shall pay the claimant the sum $71,664,671.35, less the sum of $9,318,652.65of debt due under the 2014 contract. The amount due and owing for mobile patrols is to be recalculated in keeping with the court's order;

d. The defendant shall pay damages to the claimant in the amount of $14,568,088.92 for interest charges incurred by the claimant as a result of the defendant's breach of contract;

e. The defendant shall pay damages to the claimant for the repudiation of the contract, consequent on the defendant's behaviour, resulting in loss of profit on the unexpired term for the 2014 in the amount of $22,451.435.99;

f. The defendant shall pay interest at the rate of 2% on the debt due and owing and the damages awarded from the date of filing to the date of judgment;

g. The defendant shall pay the claimant's cost, as prescribed. The claimant being unsuccessful in certain aspects of the claim, shall be entitled to 90% of the prescribed costs;

h. The debt due and owing to the claimant shall be reduced by $27,884,909.40 as a consequence of the orders of the Court of Appeal dated the 28th September 2017 and 15th January 2018; and

i. There shall be a stay of execution for 28 days.

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Justice Avason Quinlan-Williams

JRC: Romela Ramberran