REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2018-03231

BETWEEN

SIERRA SAFETY AND PROTECTION SERVICES

Claimant

AND

DTL PROPERTY DEVELOPERS COMPANY LIMITED

Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: March 26, 2020.

Appearances:

Claimant: Mr. F. Hove Masaisai instructed by Mr. I . Jones.

Defendant: Mr. F. Scoon instructed by Scoons Attorneys and Counselors at Law.

JUDGMENT

1. This is a claim for a breach of contract. At the hearing of the trial the parties agreed that the main issue to be determined is quantum as the defendant has accepted liability in that it accepts that services were provided to it but it challenges the value of the services provided.

THE CLAIM

2. The claimant is a provider of safety and security services. The defendant engaged in the services of the claimant by a written contract dated November 25, 2016 ("the principal contract") to commence on November 27, 2016 for a period of six months. Pursuant to the contract the claimant provided security services at La Forteresse, a housing and townhouse development project being built under contract by the defendant.

3. The November contract is reproduced in part, verbatim since it is crucial to this action. The relevant clauses read:

   2. The Contractor shall provide one (1) baton guard between 6:00 a.m. and 6:00 p.m. and two (2) baton guards from 6:00 p.m. to 6:00 a.m. daily.

   5.In consideration for its services the Company shall pay the Contractor at the rate of Twenty-Five Dollars and Sixty Cents ($25.60) plus VAT per hour, per security guard.

   ……

8. Clocking cards shall be used as the basis for payment. Accordingly, security personnel shall indicate their presence on the site by clocking in and out on entry and exit respectively.

9. The Company shall make every effort to facilitate payment for one month by the fifteenth day of the following month PROVIDED always that an invoice, along with supporting documents are provided by the Contractor and in good order by the seventh day of the following month to the Company.

4. By January 2017 and thereafter, the claimant encountered problems receiving payment from the defendant and several items of correspondence were delivered calling upon the defendant to satisfy the outstanding debt.

5. The contract ended in May 2017 and the parties entered into a supplemental agreement for a period of three months by letter dated June 5, 2017. By this time, the defendant had only made partial payments of the sum outstanding to the claimant.

6. However, to date, the amount due to the claimant for the period January to September 2017 remains unpaid in the sum of $190,378.19 as is evidenced by invoice sent to the defendant.

7. The claimant contends that as a consequence of entending their services to the defendant it lost two security service contracts following the defendant's non-payment of the outstanding sum. The loss incurred for twelve months were:

Tropical Marine- $251,640.00

Exim Bank- $273,000.00.

8. As such the claimant claims:

   i. Damages for breach of contract in the sum of $190,378.19;
   ii. Special damages in the sum of $678,840.00;
   iii. Consequential damages and General damages for breach of contract;
   iv. Interest;
   v. Costs.

THE DEFENCE

9. The defendant denied that it owes the sum of $190,378.19 and averred that the clocking cards and the submission of invoices were a precondition for payment. Consequently, in the defendant's calculation it owes for November 27, 2016 to the beginning of August 2017 in the amount of $127,619.02, it having received no clocking cards for the months of August and September 2017.

10. The defendant denied that it was responsible for any consequential losses incurred by the claimant and maintained that the claimant agreed to a moratorium on payments until September 1, 2017 even after the defendant's delay in settling the outstanding sums.

ISSUES TO BE DETERMINED

i. Whether the claimant has proven that it is entitled to the outstanding sum of $190,378.19;

ii. What, if any, is the quantum of special damages to be awarded to the claimant following said breach of contract;

iii. Whether the claimant was entitled to damages for consequential loss, and, if so what is the quantum of that loss; and

iv. Whether the remedy of exemplary damages is available to the claimant.

CASE FOR THE CLAIMANT

11. The claimant called two witnesses, Frank Dyer and Ricardo Dyer. A witness statement was also filed by the claimant for one Marilyn Abraham-Gidarree and two witness summaries in the names of Shawn Phillip and Chris Allen. However, they were not called at trial and therefore not cross-examined. No explanation was given for their absence.

Frank Dyer

12. Frank Dyer is the Chief Executive Officer ("CEO") of the claimant. The claimant began to experience problems with remuneration from the defendant by the fourth month of the November contract by receiving partial payments.[1] Oral requests were made to the defendant to settle all outstanding sums but to no avail, thereafter letters were written to the General Manager of the defendant, Mr. Lucien Delpesh from February to September 2017.

13. By letter dated February 16, 2016 Frank Dyer wrote to Mr. Delpesh requesting payment for the months of December 2016 in the sum of

[1] Exhibited as "F.D.2" namely invoice summary for December 1, 2016 to September 29, 2017 in thesum of $190,378.19 attached to his witness statement.

$34,214.40, January 2017 in the sum of $33,177.60 inclusive of VAT and an additional sum of $15,000.00 plus VAT.

14. Mr. Delpesh responded to the said letter on February 17, 2017 stating that the defendant regretted their delay in settling the invoice referred to and payment would be brought forward.

15. On March 29, 2017 Frank sent a letter by email to Mr. Delpesh calling upon the defendant to settle the invoice of January 2017 and also set out that the delay in settling the previous invoices was causing the claimant financial difficulties. Mr. Delpesh replied to the said email on May 5, 2017, referring to an earlier conversation and sought an extension to make payment.

16. Frank Dyer again emailed Mr. Delpesh and one Junior Best on July 3, 2017 stating the claimant can no longer provide their services until payment is made. By email dated August 30, 2017, Frank sent an attached invoice up to that period and a credit note.

17. Mr. Delpesh made an oral request to defer payment until September 14, 2017 and sent an email to Frank on September 29, 2017 regarding resumption of security services by the claimant and the defendant's intention to pay the outstanding sums due.

18. The defendant wrote to Frank by letter dated June, 5, 2017 agreeing to extend the security services provided by the claimant for the period of three months with effect from June 1, 2017 with the same terms and conditions in the November 28, 2016 agreement.

19. The November contract was extended for three months with effect from June 1, 2017.

20. The additional terms were:

The contractor has agreed to a moratorium on payments for its services at La Forteresse from the Company unit 1st September, 2017. Notwithstanding the moratorium, the Company will endeavour during this period to make small payments on the outstanding balance to the Contractor, should it be in a position to do so.

The Company shall pay the Contractor on 1.9.17 fifty percent (50%) of the outstanding balance due on 31.8.17 and bring the account up to date by 30.11.17.

In consideration for its services the Company shall pay the contractor Twenty-Five Thousand Dollars ($25,000.00) per month, effective 1st June, 2017.

21. To sustain the company and pay wages, Dyer used his personal resources. The claimant was also threatened with legal action by other suppliers. Throughout the contract period, the claimant communicated with the defendant's CEO Mr. Daniel Lambert who promised to pay the outstanding sum.

Cross-examination

22. Frank testified the claimant had four administrative staff members, excluding himself. There were six security officers assigned to the defendant. He accepted that clocking cards were the measure used to ascertain the hours during which the security guards worked at La

Forteresse. At the end of every two week period he would collect the clocking cards from the defendant, examine them and prepare an invoice. He explained that the July invoice is reflective of the month of June and the invoice dated August 2, and September included overtime and services provided on public holidays.

23. Frank also accepted that the clocking cards are not in evidence. He admitted that although the defendant continually failed to settle the outstanding sum, he agreed to engage in a supplemental contract with them with the expectation that the outstanding sums would be paid.

24. He was referred to the letter of February 16, 2017 and accepted that there were no details of what the claimant considered to be additional costs set out therein. He also accepted that despite the correspondence from the defendant, it was unable to settle the outstanding sum, but the claimant continued to provide their services.

25. Attorney for the defendant spent some time seeking to establish when the claimant foresaw that it would lose it's contracts with Exim Bank and Tropical. Frank testified that by May 2017 and the non-payment by the defendant, he was worried about the claimant's financial status. At that time the claimant did not lose their contract with Exim Bank but lost the contract with Tropical Marine. He also testified that by December 2016, the claimant did not foresee that he would lose contracts with other clients.

26. The agreement between the parties ended on September 15, 2017. Frank admitted that by email dated September 27, 2017, he wrote to Mr. Delpesh, in good faith, asking that the defendant confirm the resumption

of services by the claimant. However, the defendant having realized that it could not service the contract wrote to the claimant saying that it could not enter into a new agreement.

27. He also testified that the loss of the claimant's employees affected their contracts with Exim Bank and Tropical. At that point, the defendant was their biggest clients and the money the claimant invested in and lost, affected the services with their other clients.

28. Frank further testified that he used money from his personal accounts to pay the claimant's creditors.

Ricardo Dyer

29. Ricardo Dyer is an ex- employee of the claimant and also the elder brother of Frank Dyer. He worked at Tropical Marine, Chaguaramas and Exim Bank, Port of Spain for several years. He then worked as a baton guard at the defendant's company, La Forteresse Housing Development, St. James and he was paid $17.00 per hour.

30. During cross examination, Ricardo Dyer testified that he could not recall the time period he worked at Exim Bank or Tropical Marine. He also did not know when the agreement between the claimant and these companies commenced. When the claimant ran into financial difficulties, he was not paid on time and Frank paid him from his personal account. The other workers threatened Frank for late payment of their salaries.

CASE FOR THE FIRST DEFENDANT

Daniel Lambert

31. This was the only witness called by the defendant. Lambert is the Chief Executive Officer of the defendant and has personally managed the affairs that have materially affected the defendant.

32. Sometime in February 2017, the defendant began to experience financial challenges that made it difficult to fulfill its obligations to the claimant. The position remained the same for several months as it was owed by it's creditors. However, during that time, the representative of the defendant, Mr. Lucien Delpesh was in constant communication with the claimant's representatives.

33. When the contract ended on May 1, 2017, a pattern of dealing was established and the contract between the parties was extended for three months. The defendant agreed to pay the claimant fifty percent of the accrued balance on or before August 31, 2017 and the balance on or before November 30, 2017.

34. The defendant continued to experience financial difficulties and was unable to settle the amount owed to the claimant. Notwithstanding same, the defendant relied on clauses 8 and 9 of the principal agreement which provides that the balance due for services rendered must be substantiated by clocking cards.

35. Lambert provided a statement of accounts in the sum of $127,619.02 along with the clock cards of the claimant's security officers. The

information provided shows that some security officers did not clock out and in some instances there was only one guard on shift[2].

Cross-examination

36. Lambert admitted that the statement of accounts dated October 30, 2019 did not provide for the work periods of August and September 2017. He accepted that the claimant's invoice for January 2017 (15-16 073) in the sum of $34,214.40 reflects the same amount in the defendant's Statement of Account. He also accepted the letter dated February 17, 2017 acknowledges *a* debt.

37. Lambert testified that the defendant made partial payments to the claimant and all cheques were made in the name of the claimant. He accepted that all the correspondence from the claimant indicated an urgent need to be paid and the defendant's promise to satisfy the outstanding debt.

THE COURT'S APPROACH

38. In **Horace Reid v Dowling Charles and Percival Bain, Privy Council Appeal No. 36 of 1897** at page 6, Lord Ackner delivering the judgment of the Board stated that where there is an acute conflict of evidence, the trial judge must check the impression that the evidence of the witnesses makes upon him against:

[2] See the attached exhibit "D.L.2" namely Statement of Account dated October 30, 2019 in the witness statement of Daniel Lambert.

i. Contemporaneous documents;
ii. The pleaded case; and
iii. The inherent probability or improbability of the rival contentions.

39. This approach is of particular importance in this case as both parties have failed to properly articulate their evidence in such a manner as to be conducive to clarity. In those circumstances the court has been left to do the best that in can in the circumstances.

ISSUE 1- Whether the claimant has proven that it is entitled to the outstanding sum of $190,378.19

40. It is undisputed that the supplemental contract did not refer to clocking cards however the principal agreement did. The claimant's evidence is that there was a positive averment in the corresponding letters and there was no dispute with the amount. It follows that the basis of calculation for the purpose of invoicing was that of attendance per officer to be reckoned by way of the clocking cards. The supplemental agreement however changed the basis of payment from one of payment for work actually performed to one of a flat rate of $25,000.00 per month.This is so despite the parties having agreed that the prinicpal agreement continued because in so far as the sum payable was concerned this had been specifically changed by the parties.

41. It follows that the onus lay with the claimant to prove the sum owing by virtue of production of the clocking cards together with the invoices to prove that the services were performed as per the terms of the principal contract for the sums it claims during the period under which the terms of the principal contact operated.

42. In lieu of such proof the claimant is in law entitled to rely on an admission of a specific sum as the debt owing by the defendant. Such an admission must be a clear one referable to the specific amount the claimant claims.

43. In that regard the claimant wrote to the defendant on the 16th February 2017 and attached two invoices, one for December 2016 in the sum of $34,214.00 VAT inclusive and the other for January 2017 in the sum of $33, 177.60 also VAT inclusive. In that letter the claimant also claimed the sum of $15,000.00 for expenses the nature which were not set out. The response of the defendant of February 17, 2017 ackowleged the debt owing by way of the invoices which would have included the sum of $15,000.00.

44. Thereafter, there were no specific responses by the defendant that appeared to clear it ackowlegde the sums being claimed from time to time. It was therefore incumbent on the claimant to prove that it performed its end of the contract by way of proof of the clocking cards for the balance of the period up to June 2017, the date upon which the supplemental took effect.

45. In this case only the defendant presented clocking cards to the court and has been able to give a figure based on the calculations consistent with the evidence provided by the clocking cards. Further, the claimant has been unable to provide to the court a proper break down of the sums owing, the precise period for which they are owed and the precise sum outstanding for each period. In those circmstances the claimant has failed to fulfil the evidential burden that lay on it to prove its case that it is owed the sum of $190,378.19.

46. However, the defendant has apparently not given consideration in the sum it has admitted, to the flat rate payments for the period of three months pursuant to the supplemental contract in the sum of $75,000.00.

47. This sum when added to that which it admits amounts to $202,619.02. The claimant has however claimed only the sum of $190,378.19, the inference being that part of the sum of $202,619.02 was in fact paid by the defendant. The court therefore finds that the claimant is in fact owed the sum of $190,378.19 as it claims in breach of the contract for services by the defendant.

ISSUE 2- What is the quantum of special damages to be awarded to the claimant following said breach of contract

48. It is settled law that special damages must be specifically pleaded and proven.[3]

49. In the Court of Appeal case of **Anand Rampersad v Willies Ice Cream Ltd Civ. App. No. 20 of 2002**, His Lordship Archie JA (as he then was) considered the duty to prove special damages. At paragraph 8, His Lordship stated as follows:

> "I wish to emphasise at the outset that the fact that a Defendant may not challenge the values of destroyed items given by the Plaintiff does not automatically entitle the Plaintiff to recover whatever is claimed. The rule is that the Plaintiff must prove his

[3] See Grant v Motilal Moonan Ltd (1988) 43 WIR 372 per Bernard CJ and reaffirmed in Rampersad v Willies Ice Cream Ltd Civ App 20 of 2002.

loss. The correct approach is, as stated by Lord Goddard, CJ in Bonham Carter v Hyde Park Hotel [1948] 64 Law Times 177: "Plaintiffs must understand that if they bring actions for damages, it is for them to prove their damage, it is not enough to write down the particulars, so to speak, throw them at the head of the court saying 'this is what I have lost, I ask you to give me these damages.' They have to prove it."

50. The claimants pleaded special damages in the sum of $154,200.00 namely:

TTMF-	$57,000.00;
Landlord-	$60,000.00;
NLCB-	$25,000.00;
TSTT-	$ 1,700.00;
Digicel-	$ 5,500.00;
Courts-	$ 3,500.00;
Attorney's fees	$ 1,500.00.

51. None of these pleaded special damages have been proven. There is however, a letter dated June 22, 2018 from Business Advisory Services stating Dyer's indebtedness to one Mr. Robert Gryspeerdt for rent owed in the amount of $60,500.00. This letter is ambiguous to say the least. Further and in any event, even if the proceeds of the contract price were to have been applied to the rent, there is no evidence before the court that there was distress or other action by way of termination of a lease or

matters of the like by the landlord consequent upon the non payment of rent. Special damages will therefore not be awarded.

ISSUE 3- Whether the claimant is entitled to damages for consequential loss, and, if so what is the quantum of that loss

52. It must be borne in mind that every award of damages must be justifiable. The claimant's case is it lost two security contracts from long standing clients, as a direct result of the defendant's breach of contract when their past employees complained about the non-payment of the employees' salaries. This is a very general statement the details of which have not been disclosed to the court in order to properly establish a causal link between the claim for consequential loss and the actions of the defendant.

53. Proof under this head will necessarily involve the leading of evidence of the resources available to the claimant, the fact of the claimant was forced to remove those resources from one business to supply the other, or as in this case, the fact of employees having left their jobs as a consequence of non payment of salaries and the inability of the claimant to mitigate the losses by hiring more staff. There is in this case no such evidence save and except for a bad empty statement.

54. In that regard the evidence is that the claimant provided security services to Tropical Marine for approximately seven years and Exim Bank for approximately four years and the sum of $524,640.00 was lost as an income from these companies. At the end of the trial the claimant informed the court it would not be pursuing the loss of Exim Bank. Their written submissions likewise did not treat with the issue. It also pleaded

that it's reputation and that of the CEO, as well as their goodwill have been damaged within the security industry.

55. These were of course all statements with no evidential proof. In fact one would have reasonably expected that had this been the effect or the impending effect of the non payment, there may have been some evidence of same as a basis for urgent payments set out in the letters of demand sent to the defendant by the claimant but there is none. The ability of the claimant to continue in business was a most serious matter which would certainly have reared its head in discusions whether in writing or otherwise.

56. Further no financial records or other documents have been led into evidence by the claimant to prove this state of affairs. In fact it is Frank Dyer, the employee who testified that the claimant was no longer in business but there was no such evidence from his brother who for all intents and purposes was the controlling manager of the business.

57. McGregor on Damages, 17 th Ed. Para 33–065 at p. 1109 sets out the learning on consequential damages. It reads in part:

"On the other hand, the claimant's loss of profits on contracts made with third parties has tended to form too remote an item of damage. That such loss may be recoverable is recognized (Re Simms 1934 Ch. 1. C.A. at 29), but it has been allowed only where it could have been anticipated by the defendant. Thus in Bodley v. Reynolds (1846) 8 QB 779 the claimant recovered for his loss of custom by reason of the defendant's conversion of the tools of his trade, but of this decision it was said in France v. Gaudet (1871) L.R. 6 Q.B 199 at 205 that the defendant must be shown to

have known that in the nature of things inconvenience beyond the loss of the tools would be caused to the claimant".

Remoteness

58. The conventional approach to the question of remoteness (in contract) dates back to the judgment of Alderson B in **Hadley v Baxendale (1854) 9 Exch 341**, in which losses were split into two limbs:

    Limb I**:** direct losses, where the type of loss was reasonably foreseeable as not unlikely to result from the breach concerned, in the ordinary course of things; and

    Limb II**:** indirect loss, where the type of loss arises from the special circumstances of the case that could reasonably be supposed to have been in the parties' contemplation when the contract was made.

59. In **Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 K.B. 528**, the claimants sued for, inter alia, loss of profits from specific contracts. The losses it was said, arose because the defendants, a firm of engineers, delayed in delivering a new boiler to the claimant which was known to be in the dry cleaning business. Asquith LJ. at page 543, held that the specific lucrative contracts were not recoverable because the parties could not have contemplated that the contract breaker would have been liable for these contracts unless they were brought to the specific attention of the defendant. However, this did not mean that "the plaintiffs are precluded from recovering some general (and perhaps conjectural) sum for loss of business in respect of dyeing contracts to be reasonably expected, any more than in respect of laundering contracts to be reasonably expected".

60. In **Koufos v. Czarnikow Ltd [1969] AC 350**, known as *the Heron II*, Lord Reid at page 383 A-B went so far as to say that the words "not unlikely" denote a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable. In that case their Lordships made the point, that what is foreseeable in a contractual breach, is what is considered to be within the contemplation of the parties at the time the contract was made.

61. In **Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas) [2008] UK HL 48**, Lord Hope at page 73 G-H:

"The fact that the loss was foreseeable - the kind of result that the parties would have in mind, as the majority arbitrators put it - is not the test. Greater precision is needed than that. The question is whether the loss was a type of loss for which the party can reasonably be assumed to have assumed responsibility."

62. In **Siemens Building Technologies FE Ltd v Supershield Ltd [2010] EWCA Civ 7** at [43] per Toulson LJ.

"*Hadley v Baxendale* remains a standard rule but it has been rationalised on the basis that it reflects the expectation to be imputed to the parties in the ordinary case, i.e. that a contract breaker should ordinarily be liable to the other party for damage resulting from his breach if, but only if, at the time of making the contract a reasonable person in his shoes would have had damage of that kind in mind as not unlikely to result from a breach. However, *South Australia* and *Transfield Shipping* are authority that there may be cases where the court, on examining the contract and the commercial background, decides that the standard approach would not reflect the expectation or intention reasonably to be

imputed to the parties. In those two instances the effect was exclusionary; the contract breaker was held not to be liable for loss which resulted from its breach although some loss of the kind was not unlikely. But logically the same principle may have an inclusionary effect. If, on the proper analysis of the contract against its commercial background, the loss was within the scope of the duty, it cannot be regarded as too remote, even if it would not have occurred in ordinary circumstances".

63. Therefore, foreseeability test is objective in nature.

64. Lord Reid [37-38] in **One Step (Support) Ltd v. Morris-Garner [2018] 2 WLR 1353** highlighted that there are some cases where the quantification of economic loss is inherently impossible. He stated at paragraph 38:

"Evidential difficulties in establishing the measure of loss are reflected in the degree of certainty with which the law requires damages to be proved. As is stated in Chitty, para 26-015: "Where it is clear that the claimant has suffered substantial loss, but the evidence does not enable it to be precisely quantified, the court will assess damages as best it can on the available evidence." In so far as the defendant may have destroyed or wrongfully prevented or impeded the claimant from adducing relevant evidence, the court can make presumptions in favour of the claimant. The point is illustrated by Armory v Delamirie (1721) I Sir 505, where a chimney sweep's boy found a jewel and took it to the defendant's shop to find out what it was. The defendant returned only the empty socket, and was held liable to pay damages to the boy. Experts gave evidence about the value of the jewel which the socket could have accommodated, and Pratt CJ directed the jury "that, unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him, and make the

value of the best jewels the measure of their damages: which they accordingly did".

Findings

65. It is abundantly clear to the court that the impending or forseable loss of two lucrative contracts were never specifically communicated to the defendant and it was therefore completely unaware of it. Further though and more importantly, on an objective view, it would have been reasonably foresaeable that the provision of employees on the contract with the defendant (in resepct of which the evidence is that the defendant failed to make payments) could have resulted in inability of the claimant to fulfil its other contracts. While the letters exchanged do not specify the names of the businesses that the claimant was likely to loose contracts with, the gradual increase in financial capability was sufficiently articulated to the defendant and they tell a story of increasing inability to pay salaries, creditors, suppliers and very importantly its bankers.

66. The relevant pieces of correspondence are as follows;

Letter dated February 16, 2017 from Frank Dyer to Lucien Delpesh, General Manager, DTL Property Developers

"We have provided invoices for services for the months of December 2016-15-16 073 in the sum of 34,214.40 VAT inclusive, and January 2017-16-006 in the sum of $33,177.60 VAT inclusive, and have incurred additional costs to date in excess of $15,000.00 plus VAT……..

This situation has caused this company to find itself in a position where we can no longer facilitate its regular payments to employees, suppliers and bankers, thus putting us in a very embarrassing position".

Email dated March 29, 2017 to from Frank Dyer to Lucien Delpesh

"Once again I must point out that the late settlement of your invoices continue to make it difficult for us to continue to service our creditors in a timely basis as funds have to be prioritized and diverted to settle same".

Email dated April 20, 2017 from Frank Dyer to Lucien to Delpesh

"Our finances have reached a critical stage at this time with a number of our creditors being unpaid to date due to unavailability of funds".

"You must understand that we are relatively small company and rely on prompt settlement of invoices in order for us to meet our commitments".

Email dated July 3, 2017 from Frank Dyer to Lucien Delpesh

"….I believe that I can no longer accommodate with the provision services until we can pay the officers"

Email dated September 11, 2017 from Frank Dyer to Lucien Delpesh

"It would be appreciated if this settlement includes an open cheque made out to myself in the sum of no less than $20,000.00. The balance can be made out to the company. This is in order to accommodate timely payment of salaries".

67. As is obvious from the above, the defendant was informed that the claimant's financial position was deteriorating. It would therefore have been reasonably foreseeable to the informed onlooker as a matter of objective assessment that continued non payment may have resulted in the inability of the claimant to service some of its other contractual obigations.

68. The evidence of the claimant has however failed to prove to the court's satisfaction the extent of the loss suffered in relation to Tropical Marine. In other words it has not proven a loss of $524,640.00. It is nevertheless entitled in the court's view to nominal damages for the loss of the contract with Tropical Marine. The court will therefore award the sum of $15,000.00 under this head.

ISSUE 4- Whether the remedy of exemplary damages was available to the claimant.

69. The claimant made an oral application to amend their pleadings to include a claim for exemplary damages followed by written submissions. The defendant has not filed submissions in response, despite having the opportunity to do so on February 18, 2020.

70. The claimant relied on the case of **Aaron Torres v Point Lisas Industrial Port Development Corporation Ltd - (2007) 74 WIR 431** as authority for the application to amend their claim after trial.

71. If the court accepts the submissions of the claimant, it further submits that it is entitled to exemplary/aggravated damages since the defendant

was aware that the claimant was experiencing financial difficulties with their employees but the defendant continued to delay payments.

Amendment after trial

72. In **Torres**, supra, the Court of Appeal identified the factors the court ought to consider in exercising its discretion in allowing/disallowing an application for an amendment. At paragraph 73, Mendonca JA stated:

"Counsel however accepted that an amendment may be made at any stage of the proceedings, even during or after the closing addresses, and therefore, without more, the application could not be said to be too late. Under Ord 20, r 5(1) an amendment may be granted at any stage of the proceedings on such terms as to costs or otherwise as may be just and in such manner (if any) as the court may direct. The judge in the exercise of his discretion to amend therefore should be guided by his assessment of where justice lies. In a case such as this, where the amendment sought is not within Ord 20, r 5(3)(5), then subject to the consideration of the impact of the amendment on the administration of justice, it is, generally speaking, an appropriate exercise of the judge's discretion to grant an amendment no matter how late it is made if the prejudice to the parties may be compensated by an order as to costs. After all, the purpose of an amendment is to formulate the real issues between the parties. Of course, in determining whether a party can be adequately compensated by an order as to costs the court should consider all the circumstances and may take into account such matters as the strain litigation imposes on the litigants, particularly if they are personal litigants rather than corporate entities; the anxieties occasioned by facing new issues; the raising of false hopes; and the legitimate expectation that the trial will determine the issues one way or the other (see *Ketteman v Hansel*

Properties Ltd [1988] 1 All ER 38, [1987] AC 189, [1987] 2 WLR 312). The court should also take into account the impact on the administration of justice if an amendment were to be granted".

73. It is to be noted that the above was decided under the old regime of the Rules of the Supreme Court 1975. The face of civil litigation has dynamicaly shifted since then as is obvious from a reading of the Overriding Objective of the CPR to say the least. The principles which the court should apply when faced with very late applications to amend was helpfully distilled by the Court of Appeal in **Swain-Mason v Mills & Reeve [2011] EWCA Civ 14, [2011] 1 WLR 2735 and Hague Plant Ltd v Hague [2014] EWCA Civ 1609**. In that case the application to amend was made at the start of the trial.

74. The key points emerging from that judgment are that:

    i. In last minute applications to amend, the correct approach is not that a very late amendment should be allowed.
    ii. There is a heavy burden on a party seeking a very late amendment.
    iii. Parties have a legitimate expectation that trial fixtures will be kept.
    iv. It is not enough to state that the other party can be compensated in costs.
    v. It is more readily recognised that costs may not be adequate compensation.
    vi. It is incumbent on a party seeking the indulgence of the court to raise a late claim to provide a good explanation for the delay.
    vii. A much stricter view is taken of noncompliance with the Civil Procedure Rules and directions of the court.

viii. Parties can no longer expect indulgence if they fail to comply with their procedural obligations.

75. This claim would have run the gamut of case management and the issues would have been clearly defined well in advance of trial. In that regard there has been no good explanation provided for seeking such an amendment at what is the end of the trial literally.

76. Further, the evidence set out above in relation to the correspondence to the defendant was known to the claimant from the beginning of this claim and more so its potential effect on the relief claimed but the claimant failed to make an application to amend at that stage or thereafter. Should it have done so, the defendant would have had an opportunity to reply by way of its pleaded case and by way of evidence on the point so that to permit it to so do now will be manifestly unfair to the defendant.

77. The claimant has therefore failed to discharge the very heavy burden imposed on it the time for amendment under the CPR having long gone. The oral application to amend is therefore dismissed.

DISPOSITION

78. The order of the court is as follows:

i) The defendant shall pay to the claimant damages for breach of contract in the sum of two hundred and five thousand three hundred and seventy eight dollars and nineteen cents ($205,378.19) together with interest at the rate of 2.5% per annum from the date of filing of the Claim Form to the date of judgment.

ii) The defendant shall pay to the claimant the prescribed costs of the claim.

Ricky Rahim

Judge.