

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

COMMERCIAL DIVISION

CLAIM NO. SLUHCM2020/0056

BETWEEN:

GEARING UP LIMITED

Claimant

And

FDL CONSULT INC

Defendant

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini

High Court Judge

Appearances:

Mr Leslie Haynes QC with Mrs Brenda Floissac-Fleming **and** Mrs Mellissa Modeste-Singh for the Claimant

Mr Mark Maragh with Ms Candace Fletcher for the Defendant

2021: November 15; 16;
2022: February 21;
March 21;
April 11;
June 27.
July 26 [Re-Issued].

JUDGMENT

[1] **ST ROSE-ALBERTINI, J. [Ag]:** Gearing Up Limited (GUL) filed a fixed date claim against the FDL Consult Inc (FDL), seeking orders for an account, inquiries or directions, for the

purpose of determining sums alleged to be due as profits to GUL. The profits stem from execution of three solar installation projects undertaken in Saint Lucia, St Vincent and Grenada.

- [2] GUL claims that it is entitled to 25% of the net profits derived from each of the projects on the basis of (i) a Memorandum of Understanding dated 20th June 2016 (“the MOU”) executed with FDL, (ii) a consortium partnership formed in March 2018 for bidding and executing the projects, and (iii) an oral agreement with FDL on profit split for each project. GUL says despite repeated requests for payment, FDL has neglected or refused to provide an account of the expenses incurred on the projects, to determine the net profits due from each project.
- [3] In response FDL avers that GUL is not entitled to a share of the profits, as each of the projects were undertaken through a Joint Venture Agreement (“JVA”) between FDL and another entity, High Peaks Solar (“HPS”), and they were the only two partners contracted for the projects. GUL was not a partner to the JVA, but was instead engaged as a sub-contractor and has been fully reimbursed for all services rendered in that capacity. Furthermore, the JVA clearly outlined profit split between FDL and HPS, and the confidentiality clause in the JVA forbids disclosure of financial information of the joint venture, to GUL. FDL contends that GUL is not entitled to any of the relief sought, and asks that the claim be dismissed with costs.

The issues

- [4] The claim is made pursuant to Part 41 of the Civil Procedure Rules 2000 (“CPR”). The parties were unsuccessful at mediation. Thereafter, it was agreed at case management conference, that preliminary issues of fact concerning the nature of the contractual relations which existed between GUL and FDL should be tried, pursuant to CPR 41.2(2)(a). The outcome would determine whether the Court should direct that an account be taken, to establish what profits, if any, are payable to GUL. The matter advanced to a trial of the following preliminary issues:-

1. Was there an MOU and/or a Consortium Agreement between the GUL and FDL and what were the contractual obligations if any, which arose from these agreements.

2. Alternatively, was there a sub-contract between GUL and FDL and what were the terms?

Background

- [5] GUL and FDL are private companies, each having registered offices in Saint Lucia. GUL is described as a technology company specializing in engineering, procuring and construction of solar photovoltaic (“pv”) installations. FDL is an engineering consultancy firm.
- [6] In June 2016, the parties executed the MOU¹ to collaborate on projects relating to engineering, procuring and construction services for solar pv installations, amongst other things. GUL asserts that through the MOU it partnered with FDL on three solar pv installation projects, which were funded by the World Bank. Further, in March 2018, FDL, HPS and GUL formed a consortium partnership to bid, execute, and share the net profits from these projects, the scope of which were as follows:
- (i) Supply and Installation of a Solar-PV Array for the St Vincent and the Grenadines Community College at the contract price of \$1,555,105.52 (the SVG project);
 - (ii) Supply and Installation of a Solar-PV Array for the EU Owen King Hospital in Saint Lucia at the contract price of \$1,366,705.80 (the SLU project); and
 - (iii) Supply and Installation of a Solar-PV Array for the T. A. Merryshow Community College in Grenada at the contract price of \$1,390,296.36 (the GD project).
- [7] It is not disputed that the bid documents contained a strict stipulation that only two parties were allowed to form a joint venture for bidding purposes. GUL asserts that it was a challenge to fit all three entities into a two party joint venture. Ultimately FDL and HPS as the parties with the requisite financial and technical capabilities formed a joint venture partnership, for bidding and on the projects. Their bids were successful and they were awarded for all three projects. The contracts for each project were concluded between the respective Government and FDL and HPS as the joint venture partners. Thereafter a JVA was executed between FDL and HPS, in respect of each of the projects.

¹ See Exhibit DB1

- [8] There is no dispute that the projects were successfully completed, and the contract sum for each project was fully drawn down.
- [9] GUL claims that after the joint venture was established, its status continued as a partner to the three party consortium, and as such it is entitled to 25% of the profits derived from each project. Additionally its relationship with FDL, in executing the projects was premised on the MOU. FDL asserts that a consortium was never formed, GUL was not a partner in the joint venture, and the MOU was never pursued in relation to the projects. Thus, GUL is not entitled to an account or to profits, and that GUL was paid as a subcontractor for the work that it undertook for each project, in accordance with the fee structure that GUL submitted at the bidding stage of the projects.

GUL's Case

- [10] Five witnesses testified on behalf of GUL.
- [11] David Bristol : Mr Bristol is a director and the sole shareholder of the company. He stated that in June 2016 the MOU was executed to collaborate on solar projects. In December 2017 he became aware of the opportunity to bid on the SLU project. Upon purchasing the bid documents he realized that GUL would need partners to meet the criteria for financial capability, and experience and technical capacity, to submit a compliant bid. In January 2018 he spoke with Mr Gilbert Fontenard ("Mr Fontenard") of FDL to discuss his interest in collaborating on the bid, and received a positive response. In February 2018 himself and Mr Chad Auguste ("Mr Auguste") of FDL attended the bid meeting. Thereafter, he commenced designing the system on which the costings for the bid was based. He approached other partners to meet the technical capabilities and in the process he met Mr Mike Stangl ("Mr Stangl") who introduced him to Mr Kevin Bailey ("Mr Bailey") of HPS, operating out of New York. It became evident that HPS had the technical capability to meet this aspect of the bid criteria and he commenced discussions with HPS.
- [12] Mr Bristol says he proceeded to prepare a template for the form of consortium which would be required to mount a successful bid. The template contained the projected roles and

responsibilities for each party and formed the basis for discussion between GUL, FDL and HPS. On 24th March 2018 representatives of the three entities held a teleconference to discuss formation of the consortium. They considered the constraint in the bid documents which limited a joint venture to two parties. The three entities confirmed their desire to proceed with the bid and discussed the proposed profit split, if successful. Mr Bailey requested 30% for HPS involvement, and Mr Fontenard stated that FDL and GUL would discuss the profit split of the remaining 70%. Thereafter Mr Stangl and Mr Bailey exited the call and Mr Fontenard, along with his assistant Ms Kristal Mathurin-Charles (Ms Mathurin) continued the call with him. Ms Mathurin proposed 50% to FDL and 20% to GUL, which he countered with an agreed 25% minimum for GUL, considering that the project roles would require that GUL be responsible for the bulk of the project. He was however willing to accept the guidance of FDL, which had the greater experience in dealing with projects under multilateral agencies.

- [13] Thereafter it was decided that FDL and HPS would be the two entities to form the joint venture partnership to bid on the SLU project, and GUL's formal involvement would be based on the existing MOU between FDL and GUL. He says these matters are contained in an email dated 27th March 2018². It was agreed that FDL would be the lead party for dealing with the client, which included billing and collection of payments. This was captured in a proposed organizational chart contained in another email of 27th March 2018³. Thereafter he finalized the project design, collected quotations from GUL's suppliers and created the projected costings⁴. There were ongoing discussions concerning the costings, via text messages with Ms Mathurin of FDL⁵. Details of the joint venture were agreed in subsequent discussions between the three consortium partners, for inclusion in the bid proposal. He dealt with responses for clarification on the SLU project, in preparation of the final bid documents, and prepared a comprehensive methodology as part of the proposal. He also sourced manufacturer's authorizations from GUL's supply partners, as a mandatory

² See Exhibit DB11

³ See Exhibit DB12

⁴ See exhibit DB13

⁵ See Exhibit DB14 & 15

requirement for the bid submission. On 26th April 2018, the bid proposal for the SLU project was finalized and submitted.

- [14] While working on this bid the opportunity arose for the SVG and GD projects. The consortium agreed to bid based on their prior partnership for the SLU project. He undertook all preparatory works, and the respective bids were also submitted in April 2018. GUL says the consortium was successfully awarded all three bids and the respective award letters and contracts were issued⁶. In July 2018 he began sourcing materials for the projects. The JVA's were formalized for each project and executed by FDL and HPS⁷, and there were no further discussions on changes to the consortium. Mr Auguste of FDL worked on a daily basis with GUL, engaging in ongoing dialogue via text messages⁸.
- [15] GUL worked on the deliverables (final design plans, work schedule and installation plans) for each project, and conducted site visits to each of the three locations, to finalize the design details. Mr Auguste and Mr Yanick Lubin of FDL also joined GUL for site visits to the SVG and GD projects. Mr Bristol says he finalized all component orders, with shipping and delivery details and forwarded the documents to Ms Mathurin to prepare the purchase orders for the joint venture, and payment by FDL, to the suppliers. He set up websites for each of the projects and provided full access to the consortium, and even paid for Mr Bailey's Microsoft Office 365 subscription. Thereafter GUL's team was integrally involved in the field work, and all three projects were successfully completed. The SVG project was handed over to the client in March 2019, the SLU project in August 2019, and the GD project in September 2019.
- [16] In December 2018 he met with Mr Fontenard to discuss the arrangement for payment of work completed to date. Mr Fontenard stated that payment would be forthcoming without providing any dates. He also requested information on payments received by FDL from the clients, on behalf of the consortium, to share such information with Mr Bailey. No information was received. Thereafter, there was an exchange of emails concerning whether expenses

⁶ See Exhibits DB16, 17 & 18

⁷ See Exhibit DB19

⁸ See Exhibit DB20

should be billed at the projected or the actual costs expended⁹, as the industry practice is that bid costs are projected, but on completion actual cost must be met. Subsequently GUL received payments from FDL totaling \$296,000.00 in the following order:

- i) 5th March 2019 - \$50,000.00 - SVG Project
- ii) 15th March 2019 - \$15,000.00 - SVG Project
- iii) 16th September 2019 - \$90,000.00 - SLU project
- iv) 17th October 2019 - \$196,000.00 – combination of SLU, SVG and GD projects

[17] On 17th December 2019 GUL emailed FDL requesting payment of the balance due from the projects, to which there was no response¹⁰. There were several exchanges of letters and emails between FDL, HPS and GUL concerning final payments. Several options were put forward for settlement, but to no avail¹¹. Mr Bristol stated that at all times GUL acted in the best interest of the consortium, by using all of its resources, expertise, experience, and extensive networking contacts, to ensure that all the projects were delivered with minimum delay and to the highest quality. He says FDL on the other hand acted in a high handed and non-transparent manner by refusing to share any accounting information, and the projects were completed without full compensation for GUL's services. Mr Bristol maintains that since completion GUL has not received its 25% profit share, for each of the projects. Further, FDL had failed to account for disbursements and expenses, to enable GUL's share of the profits to be determined and paid, and should be ordered to provide an account.

[18] Michael Stangl : Mr Stangl resides in New York and is a professional engineer. So far as is relevant, he deposed that he was invited by Mr Bristol to assist GUL with the bid for the SLU project. He recommended Mr Bailey of HPS, a solar engineering, procurement and construction company based in New York. In discussions Mr Bristol presented the idea of forming a consortium to bid for that project, and suggested working with a local engineering firm that could meet the financial requirements for bidding. On 29th March 2018 Mr Bristol emailed HPS informing that FDL and GUL wanted to form a consortium to bid on the project.

⁹ See Exhibit DB25

¹⁰ See Exhibit DB28

¹¹ See Exhibits DB29-35

The email discussed members roles and responsibilities and presented a possible template for the consortium organization.¹²

[19] Thereafter the team began to operate as a consortium, and decided that a joint venture partnership would be formed between FDL and HPS, for submitting the bid. HPS possessed the bid requirements for project management and technical expertise, while FDL possessed the financial requirements. As the bid documents limited a joint venture to a maximum of two members, GUL could not be shown as a formal member, however its involvement as a full partner of the consortium was considered essential as the team leader, for compiling the project management, cost, and technical aspects of the joint venture bid documents. GUL prepared the cost estimates, design, and technical documents used as the basis for the bid, and facilitated communication between all members of the consortium, during the bid preparation.

[20] The same consortium was kept in place, and the same model was used for preparing the bids for the SVG and GD projects. GUL was also the team leader for project management, cost, and technical aspects for these bids. After the bids were awarded GUL organized the construction of the systems at all three sites, and handled all aspects of management logistic, including equipment procurement, and provided all labour and materials for the projects. GUL also commissioned the systems and provided operation and maintenance training to the clients. Mr Stangl opined that the joint venture partners could not have won and implemented the projects without the involvement of GUL, which remained a full partner in the consortium which was formed to undertake these projects. In cross examination Mr Stangl conceded that he was not present at all the conversations held between GUL, FDL and HPS regarding formation of a consortium. He never saw a signed agreement between the three entities for that purpose, and would not be surprised if HPS said that it had no knowledge of such agreement.

[21] George McClellan: Mr McClellan is the Senior Technical Sales Manager of REC Americas LLC ("REC"), a manufacturer of solar products located in California. According to him, in this capacity he was aware that GUL was instrumental in negotiating with REC, for the three

¹² See Exhibits MS3, MS 4 & MS5

projects. He discussed and defined module loading, racking requirements, warranty conditions and an array design limitation, with Mr Bristol. All manufacturers authorization documentation for the projects was coordinated through GUL, and based on the relationship with GUL the projects were provided with the most favoured pricing by REC.

[22] Oswald Freeman: Mr Freeman is from Saint Lucia and is the Chief Solar Technician at GUL. He testified that he worked as part of GUL's team on all three projects, and was responsible for some aspects of commissioning the systems. He knew Mr Bailey of HPS, who was present for a few days during the installation of the SVG and GD projects. However in his view, Mr Bailey did not carry out any project management duties. He stated that he represented GUL in Grenada at the handing over ceremony for the GD project.

[23] In cross examination he stated that he never saw a signed contract by GUL, for the SLU project. He only liaised with Mr Bristol who told him that he had signed a contract with the World Bank. That contract may have been with FDL, but he never saw the document. As far as he knew a consortium was set up between GUL, FDL and HPS. He was aware that Mr Bailey of HPS had done projects of that magnitude, which was a requirement as part of the team. GUL had done several projects, but none of that particular size. He agreed that he was not qualified to assess the structural integrity of roofs and buildings, and this would have to be done by a qualified structural engineer. He had never done CAD drawings, and as far as he knew they were done by a structural engineer. He agreed that the preparation of structural reports are done by a structural engineer, and that CAD drawings and structural reports could not be done by Mr Bristol or himself. He was unaware that the work undertaken by him on the projects, was on behalf of FDL and HPS. He also did not know that his presence at the hand-over ceremony in Grenada was on behalf of FDL and HPS. He said he only dealt with Mr Bristol of GUL throughout the projects, and was not aware that he was acting as Technician for a joint venture between FDL and HPS. He insisted that Mr Bristol of GUL was the project manager for all the projects, and was not aware that Mr Bailey of HPS was the project manager.

[24] Widden Lubin: Mr Lubin is from Saint Lucia and is the Chief Solar Roof Installer at GUL. So far as is relevant, he testified that he worked with GUL on solar projects across the islands

and was trained by Mr Bristol in all aspects of solar installation. Mr Bristol informed him of the three projects, and he was responsible for the array installations at the respective sites. He was not aware that FDL was involved in any of the projects and although Mr Auguste of FDL was present at some of the sites, his role was minimal. He saw Mr Fontenard of FDL on one occasion at the site of the SLU project, when they encountered a supplier error. He did not know Ms Mathurin and never met her on any of the project sites. He knew Mr Bailey of HPS and had met him on the SVG project site, when he was there for a few days, but he was unaware that Mr Bailey held a project management role. In cross examination he disagree that both himself and GUL worked as subcontractors, on the projects.

[25] Patricia Benjamin: Ms Benjamin resides in St Georges, Grenada, and is a lecturer and former Associate Dean at the T.A. Marryshow Community College. In summary she stated that in her role as Associate Dean of the College she was involved in all the discussions and decisions regarding the GD project. She met Mr Bristol who led GUL's team, in April 2018, when he attended the first site visit. GUL was the only entity that she dealt with during installation. She also met GUL's Chief Technician Mr Freeman, who acted as the Project Supervisor during the installation phase. She claims that she had no prior knowledge of FDL or its involvement, and Mr Bristol was at all times the lead person with whom the College administration interacted. Mr Bristol and Mr Stangl carried out staff training and commissioning of the system, and GUL was represented by Mr Freeman at the formal handing over ceremony. To date she continues to deal with Mr Bristol and GUL's team for ongoing responses to queries, and matters relating to the warranty for the system.

[26] In cross examination she stated that before the trial she had no knowledge of FDL. When questioned about a WhatsApp chat exchange with Ms Mathurin, she recalled she was contacted by an individual from Saint Lucia sometime in 2019 during installation, when a shipment of material for the project was detained by customs in Grenada. She assumed that the person who contacted her was from GUL. She was able to identify the WhatsApp chat exhibited by FDL as the exchange between herself and Ms Mathurin. She agreed that she had a conversation with a young lady and they spoke about the detained shipment. Ms Benjamin maintained that FDL is new to her, she thought she was dealing with someone from GUL, and did not know they were separate companies. FDL was never introduced to

her as part of GUL, or as a partner. She knew Mr Bristol as the individual involved and did not know anyone else. He was the one giving instruction and telling others what to do. She saw in him a qualified and skilled person who could do the work. She did not know his personal qualifications; but in her opinion the job was well done. Everything she saw was done by Mr Bristol and the GUL team, from installation to hand over and no one else has asked about the functioning of the system. Training for teachers and students was undertaken by agreement with GUL and everyone was well trained during the installation phase. She knew that matters concerning warranty are to be handled by the contractor but did not know of FDL, and is only now hearing of then. She was informed by Mr Bristol that he had responsibility for fixing these issues. She disagreed that she was liaising with GUL who had no authority to remedy warranty issues, and stated that she always saw GUL as being in charge of the GD project.

[27] Lance Peters: Mr Peters is from Belmont, St Vincent, and is the Deputy Director at the Energy Unit there. He stated that he was responsible for the SVG project and knew Mr Bristol and GUL's team who carried out installation of the system, as well as follow up maintenance. As far as he knew GUL's team managed the project from start to finish, including hand over of the system. He did not know Mr Fontenard, and was not aware of FDL's role in relation to that project.

[28] When cross examined about the contract for the project he stated that he knew that it was signed with the Ministry of Economic Planning, Sustainable Development, Industry, Information, and Labour, and by virtue of this he was familiar with FDL. He could not say whether GUL was doing the work under the instructions of FDL. He worked with GUL's team, and all communication and work was done through GUL and the Energy Unit. Mr Bristol was the person on the ground, with whom the Unit worked. He says to date maintenance is still carried out by GUL's team. Some 8 to 10 months ago when a problem arose with the inverters for the system, it was Mr Bristol who alerted the Unit of the problem and undertook the necessary maintenance. Presently the system is up and running and any maintenance requirement under the warranty is monitored by Mr Bristol who undertakes repairs as required. He agrees that matters relating to the warranty were the responsibility of the contractor, but did not know whether GUL was a party to the contract. All he knew was from

commencement of the SVG project he interacted with Mr Bristol, the Energy Unit worked with GUL, and that is the only entity with which they interacted.

FDL's Response

- [29] Mr Fontenard and Ms Mathurin testified on behalf of FDL.
- [30] Mr Fontenard is a Civil Engineer and Project Manager by profession, and also director of FDL. He admitted that FDL and GUL executed the MOU but says that it was not limitless in scope and does not constitute a binding contract between them. It is devoid of the usual commercial terms and other particulars associated with contracts for services. He says the MOU is vague, it lacks certainty, and is unenforceable.
- [31] According to him, the bid document which Mr Bristol says was purchased by GUL was a public document under the World Bank Rules, and the information was available to the public on the Bank's external website. He exhibited a copy of the World Bank webpage containing publication of information relating to the SLU project¹³. He admits that GUL purchased the bid document, but was reimbursed for all associated costs. He also admits having spoken to Mr Bristol in January 2018 about the SLU project but says he did not commit to any binding obligation personally, or on behalf of FDL. He only agreed to have a discussion on the proposals being made by him, at that time. He received the email dated 9th January 2018¹⁴, however the parties were discussing, and had not committed to any working relationship on the project, at that time. In February 2018, Mr Auguste was the one who represented FDL, at the bid meeting for the SLU project.
- [32] Mr Fontenard stated that he received the emails and proposal prepared by Mr Bristol, for the formation a consortium between GUL, FDL and HPS. However, no consortium agreement was executed, as discussions were still nascent and the World Bank requirements for the bid had not been assessed. Upon further discussion between GUL, FDL and HPS the concept of a consortium was jettisoned, as the bid documents limited a joint venture to two

¹³ See Exhibit GF1

¹⁴ See Exhibit DB5

parties, and GUL agreed to this. At that point given the financial and technical capacity, and experience of FDL and HPS, it was agreed that a joint venture would be formed by these two entities. He says neither GUL or HPS agreed to satisfy any of the financial requirements of the bid, be it for want of capacity or refusal. FDL alone bore all the risk associated with that commitment, and GUL bore no liability to the client. GUL did not have an adequate understanding of the requirements, which FDL had to explain at a meeting held on 18th June 2018.

[33] Thereafter the JVA for the SVG project was executed between FDL and HPS on 5th July 2018. The JVA for the SLU project was executed on 3rd August 2018, and the JVA for the GD project was executed on 5th September 2018¹⁵. As GUL is not a party to these agreements, it derives no rights under them. Article 10 of the JVA provides for keeping of books of accounts and other records of the activities of the joint venture, and Article 6 makes provision for a duty of confidentiality in that regard. FDL is contractually bound to HPS by this confidentiality clause, as the other joint venture partner. Mr Fontenard says no agreement was made with GUL regarding profit sharing, as this would have necessitated a corresponding discussion for agreement on costs, expenses and contribution to any losses, and no such discussion was ever held. He denied that the MOU was used to determine the relationship between FDL and GUL for the projects, and says it was agreed that GUL would be hired as a sub-contractor for the joint venture, and be paid its agreed, or reasonable costs, and expenses. Mr Fontenard stated that FDL was the lead partner under the JVA, and not by way of a consortium agreement, which does not exist. Further the JVA was not a product of any consortium, as the latter was never agreed and never came into existence at any time. He maintained that GUL has been reimbursed for the works undertaken on each of the projects, according to GUL's own fee schedule submitted at the bid preparation stage, and is not entitled to any profits derived from the projects.

[34] Ms Mathurin is the Accountant and Assistant General Manager of FDL. She is responsible for finance and accounting, negotiating with suppliers and clients, procurement, bid preparations and logistics. She refutes Ms Benjamin's assertion that FDL was not known to

¹⁵ See Exhibit GF2.

her, stating that they had conversations in relation to FDL's shipment of materials to Grenada, and in particular a shipment which was detained by customs in 2019. Ms Benjamin was also contacted to meet FDL's broker to sign documents for release of that shipment.¹⁶ Ms Mathurin stated that FDL's representatives in Grenada were Jenny Alexander, Project Coordinator and Jade Hutchinson Solar Project Manager, whom she met at a meeting in September 2018.¹⁷ Mr Bristol was interacting with Ms Benjamin, as GUL was responsible for installation of the system at the College, and would have worked closely with her. However, GUL was not the lead person for the project. Most of FDL's interactions were with the client, at the level of the respective Ministry. She exhibited the Special Conditions of Contract¹⁸ to confirm this. She stated that FDL was the party invited to the handover ceremony, however as Mr Freeman was still in Grenada at the time, and was the installer under the contract, he was asked to attend on behalf of FDL. She stated that matters concerning warranty are the responsibility of FDL under the contract, and not GUL, and exhibited the pertinent documents.¹⁹

- [35] Regarding the evidence of Mr McClellan, Ms Mathurin stated that although he was involved in the initial bid preparation, she dealt with several other personnel at REC, upon award of the contracts. She exhibited several email exchanges between FDL and other representatives of REC.²⁰ These emails concerned ordering, purchasing, payment, and shipment of solar pv arrays by FDL, for all three projects.

Issue 1 : Was there an MOU and/or Consortium Agreement between the parties and what were the contractual obligations which arose from these agreements?

GUL's Submissions

- [36] Counsel for GUL submitted that by agreement between GUL, FDL and HSP the consortium was formed to carry out the three projects. Thereafter the consortium established the joint venture comprising FDL and HPS, in order to satisfy the bid requirements. The real issue is

¹⁶ See Exhibit KMC1

¹⁷ See Exhibit KMC2

¹⁸ See Exhibit KMC3

¹⁹ See Exhibit KMC4

²⁰ See Exhibit KMC5

whether on a balance of probabilities the evidence supports a finding that the consortium was formed, albeit that an agreement was never signed by the intended partners. GUL further submits that the nature of the discussions between FDL and itself, coupled with its actions and conduct in the myriad of roles performed at all stages, from inception, to bid notice, to final project delivery, are consistent with that of a consortium partner and not of a sub-contractor. The term was only fabricated by FDL, since the claim was filed. GUL says that FDL has agreed, irrespective of the contractual relationship, whether contractor, sub-contractor, principal or agent, GUL should be paid a reasonable fee for its work, which GUL says is on a quantum merit basis, at rates to be determined.

[37] GUL says FDL was not a registered bidder for the SLU project and could not have submitted a bid, were it not for GUL's involvement as a partner under the MOU. In this regard, Mr Bristol stated that on 3rd July 2018 he received a call from Mr Fontenard concerning the validity of the bid submission for the SLU project, by the joint venture partners FDL and HPS. It had been raised that the joint venture had not satisfied the requirement of pre-registering as a bidder, by requesting, paying for, and receiving the bid documents. He responded by texting and emailing Mr Fontenard and Ms Mathurin to confirm correspondence which he says referred to the MOU as the link between the unregistered joint venture and GUL as the pre-registered bidder, and pointed to the relevant 'Instruction to Bidders' section of the bid documents. He says the explanation of the relationship between GUL and FDL as embodied in the MOU was accepted by the Project Co-Ordination Unit, and this prevented a potential rejection of the joint venture bid.

[38] Further GUL was the only partner with experience in designing and installing solar pv systems in hurricane prone areas, which was a qualifying requirement listed at clause 3.1 (ii) (c) and (d) (3) in addendum 002 of the bid documents. This was important for designing and installing a resilient system, and non-compliance would have led to a non-qualifying bid. Thereafter Mr Fontenard and himself attended a site visit for the SLU project. Both Mr Fontenard and Ms Mathurin called on him several times leading up to the submission of the bid proposal to enquire whether GUL/FDL and the potential partners were able to meet the qualification criteria, and whether they would be able to submit a bid within the submission deadline. Mr Bristol says this illustrates Mr Fontenard's keenness in partnering, as FDL had

no solar pv installation experience and could not qualify on its own, to mount a successful bid. A copy of the email, WhatsApp chat messages and addendum to the bid documents were exhibited.²¹

[39] GUL also says after inquiry was made at the Project Co-Ordination Unit for the SLU project, seeking clarification on whether three parties would be allowed for a joint venture, and it was confirmed that it was a maximum of two, the consortium agreed that FDL and HPS would form the joint venture, to meet the bid requirement. There was no agreement to dissolve the consortium, and in actuality the joint venture consisted of the three entities which made up the consortium, with the arrangement between GUL and FDL being the stated objectives in the MOU. On that basis, GUL says that all references to FDL in the JVA's should be interpreted as GUL/FDL. GUL further says that long after the bids were submitted Mr Bristol received an email dated 27th June 2018²² from Ms Mathurin, in which she stated that she was preparing the JVA and that the consortium agreement with all parties would follow thereafter. It is said that this confirms the continued existence of the consortium and the intention to have an agreement drawn up between all the parties.

[40] Thereafter FDL sent a copy of the JVA to be reviewed by GUL, prior to sending it to HPS. GUL was included on a 3-way conference with FDL and HPS and provided clarification to queries raised by Mr Bailey. GUL contends that this illustrates its integral role as a party to the consortium and its role in the fundamental aspect of approving and setting up the joint venture. Further, GUL was included on emails containing HPS banking information, which shows that none of the documents relating to delivery of the projects were confidential, and they were circulated among the consortium, with the exception of the detailed billings and collection done by FDL.²³ Each party was responsible for its projected role and GUL understood its role. It is Mr Bristol's view that without GUL, the consortium and by extension the joint venture, would have been placed at risk. He says the bid price was determined by GUL, and completion of the bid sheets and final submission was done by FDL. He took issue with FDL's position that the risk, liability, and responsibility for the project costs were borne

²¹ See Exhibits DB 43,44 & 45

²² See Exhibit DB52

²³ See Exhibits DB 53 & 54

solely by FDL, and says GUL bore the actual project delivery costs, which is outlined in its billing documents. Further, GUL responded directly to the Project Co-Ordinating Unit for the SLU project, on numerous occasions via email, and handled the flow of supplier interaction for all the projects.

[41] Mr Bristol says on all three occasions GUL was informed by FDL of the outcome of bid award, and this confirms that there was a consortium partnership. Interaction with FDL was mainly with Mr Auguste and Ms Mathurin, with limited interaction with Mr Fontenard, and GUL's role on the projects included:-

- (i) preparation of the drawings in collaboration with Mr Stangl as the systems designer, as FDL did not have the capacity to prepare the drawings;
- (ii) GUL provided FDL with the drawings and other technical documents which GUL had prepared for submission and was concerned that all references to GUL were removed and substituted with FDL's information prior to submission to the clients;
- (iii) FDL was given access to GUL's in-house subscription-based software SMARTDRAW to allow efficient collaboration for timely and accurate drawings and provision of the designs to FDL;
- (iv) preparation of full detailed costings in an excel spreadsheet²⁴ containing the projected costs for project pricing as contained in the bidding documents, created in conjunction with FDL, and FDL had access to the file in Office 365, to allowed for simultaneous online collaboration;
- (v) Gul provided final review for all bid submission documents, which were then forwarded to FDL for inclusion in the bid submissions; and
- (vi) GUL provided the bulk of the project management from concept to completion, which was outlined in the projected roles as a shared responsibility between GUL and FDL. It was expected that FDL would provide the bulk of this service but that did not materialize.

[42] Mr Bristol further stated that GUL did not question the assurance given by Ms Mathurin, that the consortium agreement was being prepared, and he would not have been concerned about the lack of a written agreement based on the pressing nature of getting the three bids out in quick succession, and to deliver the projects in tandem, within a short timeline. At all times GUL's team focused on the successful completion of the projects, to the satisfaction of the consortium's client, and its duty to the consortium partners. He says the projects were achieved by the three-party consortium, as FDL had no competence in solar pv projects, and relied on GUL's experience on projects it had supervised, which had a solar or renewable energy component.

²⁴ See Exhibit DB60

[43] GUL contends that nothing precluded a consortium partner from carrying out any task related to the projects, in the absence of a subcontract which outlined the exact tasks required to be performed. The services provided by GUL cannot be disputed. GUL was privy to all aspects of the JVA, and was the driving force behind the consortium. Further, because of its involvement the projects were successfully completed, the relevant training was provided to the clients, and to date GUL continues to provide warranty services to all the clients. For these reasons, GUL submits that it is unreasonable, as the initiator of the consortium, and the party that delivered the lion's share of the projects, it would accept \$296,000.00, in full payment, for projects which exceeded \$4.0 million in total revenue.

FDL's Submissions

[44] FDL says the MOU is not legally binding, and the consortium was jettisoned when the joint venture was established. Thereafter GUL became a sub-contractor to the joint venture arrangement. FDL agrees that irrespective of the nature of the contractual relationship GUL should have been paid a reasonable fee for its work, that "*reasonable fee*" has been paid, and GUL is owed nothing further.

[45] Mr Fontenard stated that GUL is a civil engineering firm of over 30 years' experience, with expertise and certification to design and install resilient systems even in hurricane prone areas. GUL had no professional competence to undertake hurricane resistant design, which falls within the purview of a structural engineer. Further HPS through Mr Bailey also possessed the required technical and financial expertise, and NABCEP certification to satisfy the bid requirements. This was acknowledged in an email to Ms Mathurin, which is exhibited by GUL.²⁵ He claims that even if there was communication between the parties concerning the formation of a consortium, this did not translate to a willingness to form a partnership between FDL and GUL. GUL was hired to prepare the bid documents and communication between the parties was expected in that regard.

²⁵ See Exhibit DB48

- [46] By satisfying the requirements of the bid documents FDL was considered competent to carry out the project and was accepted to lead the joint venture. Although GUL prepared separate bid prices which were submitted to FDL, these were updated and finalized by FDL, and submitted to the clients. It is industry practice for a third party (GUL in this case) to be engaged in preparing prices for a bid, and to be paid for these services. Such engagement does not confer a consortium partnership, and GUL was fully reimbursed for its bid preparation services. FDL says the correspondence suggests that HPS was not privy to such agreement, and demonstrates that no such arrangement came to fruition.²⁶
- [47] The inclusion of GUL in correspondence between the joint venture parties was necessary to access information required during the bid preparation stage. It was not a free pass to GUL, to all information concerning the joint venture, and that is not indicative of a consortium. Further, GUL did not incur any financial commitment for the bids, and any monies expended during the bidding process was fully repaid by FDL. At all times FDL provided the requisite financial backing, which GUL did not possess. The success of the projects was not hinged on a consortium agreement, but rather on the part played by the joint venture partners, and GUL as a subcontractor. Mr Fontenard says FDL was surprised to learn that GUL was providing warranty services for the projects, when there is an express provision for this in the contract between the clients and joint venture partners.²⁷
- [48] FDL submits it had sole responsibility for procuring all materials for the projects. Any procurement done by GUL was on its own volition, having been instructed to refrain from doing so, as shown in the email thread produced as Exhibit GF9. The role performed by GUL was design and installation, for which it was paid. GUL was not part of the joint venture, nor were the joint venture partners party to a consortium. As a subcontractor GUL was reimbursed for all services provided. GUL did not provide the financial backing, or the requisite experience, or undertook any risk in relation to the projects. All risks were borne by FDL, and there was no requirement to name GUL as a subcontractor in the bid documents. A complete bid was submitted, with all the services required to complete the project reflected in the personnel identified therein. Mr Fontenard says the success of the bids did not rest on

²⁶ See Exhibit GF7

²⁷ See Exhibit GF8

the experience of GUL's employees, as FDL and HPS on their own had the qualifications to mount a successful bid.

[49] There was no agreement orally or in writing to share profits with GUL and profits were shared 70:30 between FDL and HPS. GUL was paid in accordance with the fee structure presented by Mr Bristol at the time of bidding.²⁸ It is not unusual in the industry to seek assistance from GUL as a sub-contractor, and to pay for these services, and GUL did not carry out the bulk of the work. Although tasked with identifying the materials needed, all payments, shipping and storage was done by FDL, and GUL was told explicitly that it should not engage in procurement.²⁹ GUL did not determine the final bid price, this was done by FDL having regard to its own costs and the risk undertaken. GUL did not bear the actual project cost; this was borne by FDL. GUL's conduct was not consistent with a consortium, but of a sub-contractor, and there was no agreement for any payment outside of the fee structure which was submitted by GUL at the time of bidding.

[50] Mr Fontenard further stated that the quality of services delivered by GUL has never been in dispute, but there was never any partnership with FDL, for these projects. The mere review of a bid document does not indicate the existence of a consortium, and Mr Bristol identified GUL as a sub-contractor in the email shown as Exhibit GF9. Furthermore, informing GUL of the bid awards was not unusual, as it was normal to inform all parties engaging in the project.

[51] In cross-examination Ms Mathurin agreed that in response to the email dated 27th June 2018³⁰ from Mr Bristol she stated that '*...a consortium agreement with all parties will follow thereafter...*' but this never happened. She agreed that the reference to a consortium agreement, was in relation to everyone who had worked on putting the bids together at the early stage of the projects. Mr Bristol was requesting that the draft consortium agreement be sent to him but there was none. What he was referring to was the proposal which he had prepared, with GUL being part of that proposal. She stated that her main concern at the time was preparing and finalizing the JVA, and she requested the scope of works which Mr Bristol was finalizing for Mr Bailey, for inclusion. She said this was typical for these kinds of projects,

²⁸ See Exhibit GF11

²⁹ See Exhibits GF9 & GF 12

³⁰ See Exhibit DB52

and it would be incorrect to say that contractors do not set out the scope of works, and that is done by the employer.

- [52] Further, what she conveyed was that any discussion and drafting of a consortium agreement would be done, subject to approval being given by Mr Fontenard as director of FDL, as she had no authority to approve a proposal for a consortium, on behalf of FDL. Such approval could only come from its director, who would then instruct her to prepare the agreement. Ms Mathurin emphatically denied GUL's assertion that on 24th March 2018 a teleconference continued between Mr Bristol, Mr Fontenard and herself, where she proposed a profit split of 50:20, which Mr Bristol countered with 25% for GUL. She says no such discussion took place, and she would not have been authorized to bind FDL in this matter. . She also says it was not agreed that a consortium agreement would be drawn up, however the proposal was drafted by Mr Bristol, and it contained no reference to profit sharing.

Analysis

The MOU

- [53] A memorandum of understanding is a form of agreement which may or may not create binding contractual obligations between parties. It is typically referred to as a preliminary agreement, letters of intent; pre-contract protocol or term sheet.³¹ In that context it provides a broad outline of the mutually accepted expectations of the parties, based on mutual respect. It may also signal that the parties intend to enter into a binding contract, in relation to a particular transaction, at some future date.
- [54] The case of **Walford and others v Miles and another**³² establishes that the law does not recognize a contract to enter into a contract, when there are fundamental terms yet to be agreed, for the simple reason that it is too uncertain to have any binding force. Thus, whenever fundamental terms are left undecided, and are to be the subject of subsequent negotiations, there is no binding contact.

³¹ Lexis PSL Commercial Practice Notes

³² [1992] 1 All ER 453

[55] To give rise to a legally binding agreement, a memorandum of understanding must satisfy all the elements of a valid contract. In **Eurick Dorset v Valentine Thomas**³³ it was said that to be enforceable, a memorandum of understanding must reflect the intention of the parties, its terms must be certain, and there must be adequate consideration for the discharge of its various obligations.

[56] Counsel for FDL puts it this way:-

*“1. there must be two or more separate and definite parties to the contract;
2. an offer and subsequent acceptance;
3. consensus ad idem between the parties;
4. an intention to create legal relations in the sense that the promises of each are to be enforceable simply because they are contractual promises; and
5. the promises of each party must be supported by consideration, or by some factor which the law considers sufficient.”*

[57] FDL and GUL agree that their partnership under the MOU was based on common aims, common values, complimenting each other's skill sets, a commitment to fairness based on trust, and a long-term commitment to business development. They agreed to use their joint strengths to carry out solar pv projects, develop areas of common interest outside of solar electricity, and to collaborate on projects. The details of such projects would be documented in specific addenda to the MOU, which would outline the support obligations to be provided by each of them, amongst other things. The parties disagree on the legal effect of the MOU, in relation to the three projects.

[58] FDL contends that it is simply an understanding which is not legally binding, and did not commit FDL to a partnership with GUL in relation to the projects. It expressly required that the terms for specific projects would be contained in subsequent addenda, and there are none in relation to the projects. FDL further submits that the language of the MOU indicates that the parties were merely outlining a proposed course of dealings. The incompleteness and absence of key terms contained in commercial agreements demonstrates that there was no intention to be bound by it. Further, the surrounding circumstances, including

³³ Claim No. SKBHCV 2009/0105 at paragraph 14

contemporaneous correspondence, and the conduct of the parties, indicate that they were not acting in furtherance of the MOU, in relation to the projects, as suggested by GUL.

- [59] I have examined the MOU. It is a 3-page document couched in very general language, and contains no stipulation that it is to be legally binding between the parties. From this, it is evident that it took the form of what is more commonly referred to as a preliminary agreement which expressed a formal understanding between FDL and GUL, to collaborate on future projects, the specificity of which would be contained in addenda to the MOU. The first paragraph states the following:

*“FDL Consult Inc, (FDL) is a limited liability company based in Saint Lucia which provides project management, architectural, civil engineering and construction services; and Gearing Up Ltd (GUL), a limited liability company based in Saint Lucia, hereinafter called (“the Partners”) **find it mutually beneficial to have a formal understanding between the two Partners** in taking up collaborative activities in the field of solar electricity in Saint Lucia and the Caribbean region.”* [Emphasis added]

- [60] At clause 3.1 it states:

*“The Partners agree to the following:
3.1 . To collaborate on projects, the details of which will be documented in specific addenda to this MOU.”*

- [61] In my opinion, the requirements for giving effect to legally binding obligations in relation to the projects, are absent from the MOU. The terms are very general, and it contains no specificity for the projects to be undertaken, until some future date, presumably when the specific details and terms of a project are agreed and an addendum executed. Despite GUL having obtained the bid documents in December 2017, the cost of which FDL says was reimbursed, the broad purpose of the MOU in relation to the projects was never achieved, because of the absence of addenda outlining the specific terms and conditions, in relation to each project. The stipulation in clause 3.1 ought to have been complied with, to give credence to the MOU in relation to these projects. It is worth noting that the MOU contained no provision for profit sharing, as part of the formal understanding between the parties. It is reasonable to assume that this would have been negotiated for a particular project and stated in an addendum, at the appropriate time. This was never done. In my view, the MOU

as executed, lacked the ability to create a partnership, or any binding contractual relations between GUL and FDL, for the three projects.

GUL's Proposal for a Consortium

- [62] In support of the contention that the projects were undertaken through a consortium between GUL, FDL, and HPS, GUL has proffered a three-page document bearing the date 23rd March 2018, headed "Proposal for Consortium between FDL Consult INC (FDL), Gearing Up Limited (GUL) and High Peaks Solar LLC (HPS)".³⁴ It commences with the following opening statement:-

"This proposal arises from the opportunity to tender for contracts where the bid requirements include specifications that cannot be met by an individual partner. These contracts are outlined in RFPs for World Bank funded solar photovoltaic projects in Saint Lucia, Saint Vincent and Grenada."

- [63] It states that the proposed partners are GUL, FDL and HPS and outlines respective areas of expertise, sets out the motivation, goals, stated achievements, measure of success, and the last page contains a flow chart which delineates roles and responsibilities. The document is incomplete in several respects, in relation to FDL and HPS, and contains no express provision for profit sharing. It is not formatted for signatures and is not initialed by any of the intended parties.
- [64] Concerning this consortium, I begin with the documents tendered by GUL as Exhibits DB43, DB44 & DB45 which contains an email of 9th January 2018 from Mr Bristol to Mr Fontenard. It expresses amongst other things (i) Mr Bristol's interest in bidding for the SLU project and partnering with FDL, in order to meet the annual revenue turnover requirement of US\$1.0 million over the past three years, (ii) Mr Bristol's assessment of the key requirements for bidding and the timelines for bidding, and (iii) a reference to his previous recommendation for project partnering, which could be implemented for this project. I note that there was no response from FDL, as none was furnished by GUL. These exhibits also contained a series of WhatsApp chat messages on various matters, as well as the bid instructions with an addendum on the requirements to potential bidders. The email confirms GUL's desire to

³⁴ See Exhibit DB9

partner with FDL on the SLU project, while the other documents were information sharing in nature.

[65] GUL exhibited an email thread between the parties which runs from 13th to 29th March 2018³⁵ as the basis of the agreement by the three parties, to form a consortium. These emails are not indicative of acceptance by FDL or HPS, of a consortium arrangement. For the most part GUL was advancing positions which Mr Bristol says were agreed, either in discussions between GUL and FDL and GUL and HPS, without ensuring that these parties gave a firm or final commitment on their respective positions. GUL further says the email of 27th March 2018 confirms agreement by FDL and HPS to form the consortium. This email is from Mr Bristol to Mr Bailey and Mr Stangl, copied to several other persons including Mr Fontenard and Ms Mathurin. In summary it states that following discussion between FDL and GUL they were happy to proceed with discussions on the consortium and bids, however the challenge has been to fit the three parties into the two party joint venture, but they should be able to provide a solution. This email does not constitute evidence of formation of a consortium, rather it signals that discussions were taking place.

[66] It is GUL's position that the details of the consortium, and profit sharing between GUL and FDL, was concluded at a teleconference between FDL, GUL and HPS, held on 24th March 2018. Mr Bristol says at this conference 30% profit split was agreed for HPS. Thereafter HPS exited, and the call continued with FDL and GUL. An offer was then made by Ms Mathurin of 20% profit split to GUL, to which he made a counter-offer of 25%, which he says was agreed by Ms Mathurin. There is no transcript of this teleconference, and the only evidence is Mrs Bristol statements in that regard. Ms Mathurin denied that such conversation took place, stating that she had no authority to negotiate such matters on behalf of FDL. The assertion is vigorously disputed by Mr Fontenard who says that as the director of FDL he had no such discussion or agreement with Mr Bristol. FDL provided transcripts of two teleconferences held on 22nd June 2018 between GUL, FDL and HPS, and between GUL and FDL. The transcript of the meeting between the three parties documents a general discussion and agreement of 30% profit split for HPS, with nothing said, or mentioned in

³⁵ See Exhibit DB10

relation to GUL, and no mention is made of the consortium. The transcript of the meeting between GUL and FDL contains no discussion on profit sharing or the consortium, except for a passing comment by Mr Bristol that there are some costs which could possibly be cut significantly, and put towards profits. Otherwise the discussion mainly concerned project implementation.

- [67] In the email of 29th March 2018 Mr Bristol wrote that HPS was pleased to be part of the consortium as the other JV partner with FDL, that GUL's involvement is based on GUL/FDL MOU, and a draft JV document was required. Several other matters were addressed as positions which GUL says were agreed. This included roles and responsibilities, with a final decision to be taken based on bid success, profit sharing principle, project personnel, technical proposal and performance security. The following was stated in relation to profit sharing :

"Profit sharing - agreed principle based on:

a. Service provided by partner as percentage overall

b. Risk taken by partner as percentage overall

c. Need to make algorithm to address practical splitting on invoices/certificates/payments"

- [68] To my mind there is a discrepancy in Mr Bristol's evidence that the percentages for profit split were agreed for all three parties at the teleconference held on the 24th March 2018, yet four days later he was circulating what he says was agreed in discussion with HPS in relation to profits, in such board terms, as opposed to simply stating the agreed percentages. It is clear that during the month of March 2018, GUL circulated extensive information and material for a proposed consortium. However, no clear indication was given by FDL or HPS, on their agreed positions on these matters. GUL says Ms Mathurin's undertaking to circulate the consortium agreement, in the email dated 27th June 2018 is continuing evidence of the agreement to form the consortium partnership. Ms Mathurin on the other hand has explained that Mr Bristol misunderstood what was communicated in that email. At that time she was preparing the JVA and was following up on at the scope of works for Mr Bailey, and what she conveyed was that the consortium agreement would follow once she had received approval from Mr Fontenard. She agreed that an agreement was never circulated. Mr Bristol

says he was satisfied with her assurances, and was busy ensuring that the projects were executed to the right standard and on time, to worry about an agreement.

[69] GUL also says that in January 2020, in email correspondence from HPS, Mr Bailey offered to reduce its profit share, to allow GUL a larger portion of the profits. I have reviewed these emails in which Mr Bailey offered to reduce HPS profit share to allow GUL to benefit from additional revenue. GUL was beseeched to accept this gesture in acknowledgment of its hard work in delivering the projects, considering the conflicting information surrounding the arrangements between GUL and FDL. I agree with Counsel for FDL that this was an attempt by HPS to share its 30% profit split with GUL, in the absence of any evidence, documentary or otherwise, to prove that there was an agreement for profit sharing between GUL and FDL. I accept that it was done to foster amicably resolution the matter out of court, and was not indicative of a consortium partnership, or an agreement for profit sharing.

[70] The consortium proposal was not in legal form and did not contain the legally recognized attributes of an valid contract. It was never converted to a formal contract and was never executed by any of the parties. I have found nothing in the plethora of email exchanges which says that FDL or HPS accepted or committed to the proposal, which in the form presented, could not have created contractual obligations between them. FDL says at this stage discussions were being held, however when it became evident that only two parties could form the joint venture things took a different direction. It is notable that the proposal, prepared by Mr Bristol, was devoid of any stipulation for profit sharing between the intended parties. One would have thought that a matter as important as this, would have featured in either the MOU or the consortium proposal, even in board parameters contained in the email of 29th March 2018.

[71] It is GUL who has made the assertion, that a consortium was formed, but has provided no evidence to prove same, and appears to be relying on FDL to provide this evidence. It is still settled law that "he who asserts must prove" and GUL has not presented any evidence to confirm this discussion which took place at the meeting of 24th March 2018, at which he says the parties agreed to form the consortium and agreed profit split. It is for GUL to show on a balance of probabilities that the consortium was formed on the basis of the discussions,

which largely took place through email exchanges. Whilst this may have been GUL's desire, the evidence does not confirm that it was accepted or came to fruition. What emerges is that FDL and HPS branched off into the joint venture, and were awarded the contracts for all three projects, while GUL took no steps to ensure that its terms of engagement were concluded with FDL, and at the very least culminated in an addendum to the MOU, with respect to each of the projects. I am not persuaded that FDL agreed to a 25% profit split for GUL in relation to each of the projects, as asserted by GUL. Judging from the conduct of the parties, it was Mr Fontenard as director of FDL who signed the MOU, the bid documents and subsequently the JVA's. As director and principal officer of FDL he would have been the one with authority to bind FDL as the partner to the joint venture, in connection with profits, and not Ms Mathurin. There is simply no evidence that he did so.

FDL and HPS Joint Venture Agreement

[72] In support of its contention that there was no consortium, and GUL was not a partner for the projects, FDL relied on the JVA executed with HPS, for each of the projects. This agreement captured the full scope of the joint venture arrangement, in which FDL is described as the First Partner and HPS as the Second Partner, and is duly executed by both partners. It is in full legal form, and meets all the requirements of a legally binding contract. It contains clauses in relation to bids, awards, execution of the projects and profit sharing between FDL and HPS.

[73] Clause 10, under the rubric "**Fees, Costs and Profits/Losses**" expressly provides as follows:

"1. The total FEE to be paid to the Second Partner for the execution of the Scope of Works described in Appendix 1, shall be Eastern Caribbean Fifty-Four Thousand Dollars (XCD 54,000.00).

2. At the close of the project, the Joint Venture's net profit or net loss shall be determined in accordance with the accounting principles agreed to be employed by the First Partner for the predation of income tax and splitting of the profits.

3. The Joint Venture's profits and losses shall be shared between the Partners in the following manner: 70% to the First Partner and 30% to the Second Partner.

4. Profits will be disbursed at the end of the Contract and on receipt of all payments from the Client."

[74] The full bid documents exhibited by FDL, were submitted for the projects, as a joint venture between FDL and HPS. The award notification letters for each project were exhibited as DB16, DB17 and DB18. They clearly state that each project was award to “JV- FDL Consult Inc and High Peak Solar.” GUL was not named in any of the letters, yet Mr Bristol says the bids were awarded to the consortium. GUL is not named in the bid documents, award letters, or the JVA. The JVA makes no reference to GUL as a partner, or to GUL’s principal or employees. It makes no reference to GUL for entitlement to profits or profit sharing. I accept the JVA as the contract which governed the relationship between FDL and HPS in relation to the projects.

[75] GUL maintains that the joint venture was the vehicle used to do the bidding on behalf of the consortium, while its formal involvement was based on the MOU.³⁶ GUL further says it was agreed that FDL would be the lead consortium agent for dealing with the client and would be responsible for billing and collecting all payments from the client. FDL countered, that GUL did not have the technical experience or expertise, or the financial capacity to meet the qualifying conditions to bid for the projects. This, FDL says was admitted by Mr Bristol, and the matters undertaken by GUL such as payment for bid documents and attendance at a bidding event were matters which could have been undertaken by anyone, and were open to the general public. In any event, FDL says, the evidence confirms that GUL was paid for all such services undertaken on its behalf.

[76] Mr Bristol says a WhatsApp chat conversation with FDL provides confirmation that the Project Co-Ordination Unit for the SLU project was informed of the link between GUL as the pre-registered bidder, and GUL and FDL as one and the same joint venture partner by virtue of the MOU. The relevant portions of the WhatsApp chat messages reads as follows:

“.....

[03/07/2018, 10:15:14] David Bristol, Hi Gilbert

[03/07/2018, 10:16:08] David Bristol: need your advice on deposits

[03/07/2018, 12:42:41] Gilbert Fontenard: ok

[03/07/2018, 12:42:44] Gilbert Fontenard: Call

³⁶ See Exhibit DB11

[04/07/2018, 08:53:20] David Bristol: Morning Gilbert

Forwarded emails from PCU

I think that GUL/FDL MOU is key to understanding arrangement and it is reflected/confirmed in Oswald's experience in submitted CV. Your call

[04/07/2018, 08:56:26] David Bristol: Do not think that all potential JV partners would have to register by purchasing separate sets of documents as JVs could be set up after the bid meeting. No clause to this effect in bidding documents

[04/07/2018, 08:59:21] David Bristol: ITB Eligible Bidders – no ref to purchasing documents or registering

[04/07/2018, 08:59:29] David Bristol: Section 4

[20/07/2018, 06:56:02] David Bristol: Morning – completed responses – please advise how to send – in word document will need copy of submitted proposal please

[20/07/2018, 10:35:31] Gilbert Fontenard: Not sure what you mean. Copy of proposal

[20/07/2018, 10:36:06] David Bristol: what was submitted

[26/07/2018, 08:56:43] David Bristol: morning Gilbert

What time is meeting?

[26/07/2018, 09:08:00] Gilbert Fontenard: 10am

[26/07/2018, 09:08:13] Gilbert Fontenard: Pick you up for 9:30

[26/07/2018, 09:09:37] David Bristol: 

[26/07/2018, 09:17:37] Gilbert Fontenard: We are there

[31/07/2018, 06:.....”

[77] It was difficult to deduce from the above, any of the matters which GUL says were conveyed to the Unit, to confirm that references to FDL as a joint venture partner was a reference to both GUL and FDL. FDL has maintained its position that at no time did it commit to a consortium and the only document which governed the bidding and execution of each project, is the JVA, which is conclusive on who the partners were.

[78] Several emails exchanges with Mr Bailey were exhibited by both GUL and FDL. They clearly demonstrate that he was unaware of a consortium partnership between FDL and GUL, or otherwise. It seemed peculiar that Mr Bristol says GUL had the requisite hurricane zone experience (through the experience of its employee Mr Freeman), yet admits that HPS was solicited for its technical competence, and GUL agreed that HPS and not GUL should be the

joint venture partner with the technical expertise to meet the bid requirements. Mr Bristol admitted in his affidavit evidence and in cross examination that GUL did not have the financial or technical capability to submit a complaint bid on its own and would have had to seek partners. Hence the reason for soliciting FDL for its financial and engineering expertise, and HPS for its technical expertise. He admitted in cross examination that GUL and FDL could not mount a successful bid, neither could GUL and HPS. The only fit based on the bid requirements was FDL and HPS. As GUL could not be included as a partner in the joint venture, it ought to have ensured that its contractual status was settled with FDL, or the joint venture partners before assuming roles and responsibilities on the projects. In any event, FDL has provided an explanation of how this relationship continued to unfold after the joint venture was established, and it is not the case that GUL performed without remuneration for the services which were rendered.

[79] Clause 10 of the JVA deals with confidentiality of accounts and financial information for the projects. GUL being an external party to the JVA would not be entitled to such information. Although GUL repeatedly states that the consortium was formed between the three entities from which FDL and HPS were selected as the joint venture partners, what emerges from the evidence is that GUL prepared a consortium proposal which was circulated and discussed at length. Telephone conferences were held and emails exchanged but ultimately FDL and HPS did not commit to the formation of the consortium, and instead proceeded as joint venture partners.

[80] The thread of email exchanges between HPS and GUL, over the period January to March 2020, after the projects were completed, provides great insight into the disarray which occurred with respect to discussions and agreement on the consortium and profit sharing, with Mr Bailey expressing that he had no knowledge of these matter and was at pains to understand what the relationship was between GUL and FDL.³⁷ He continuously probed Mr Bristol for the evidence of this arrangement, which from all indications was undocumented. HPS appeared even more removed and unaware of a consortium partnership between GUL and FDL, and was only aware of the joint venture, as the final position. The fact that GUL

³⁷ See Exhibit DB35

circulated a proposal and discussions were held is not conclusive of a partnership being formed or that the proposed arrangement automatically became binding on the parties. Equally the fact that GUL repeatedly referred to FDL and HPS as partners is not conclusive of a partnership. The relationship between FDL and HPS crystalized into a JVA for each of the projects which was executed between them. It contained a clause concerning profit sharing of 70% to FDL and 30% to HPS, and is the only document in which profit sharing is referenced and conclusively addressed, as between FDL and HPS.

- [81] GUL says that in the past it had collaborated on projects with FDL, through consortium arrangements, with the parties having interchanging lead roles depending on the project requirements. This was the nature of the relationship which had developed between them after executing the MOU. In support GUL exhibited letters, email threads, various prequalification documents and agreements.³⁸ What emerges from these documents is that on these occasions the arrangements were clearly stipulated as a two-party consortium between GUL and FDL. The relevant documents were duly signed by their principals, namely Mr Fontenard on behalf of FDL and Mr Bristol on behalf of GUL. In contrast with the present case, there is no concluded or executed consortium agreement between FDL and GUL, with respect to the projects, which could have served as an addendum to MOU.
- [82] The evidence of GUL's witnesses did not assist in resolving these issues. Mr Stangl eventually admitted that he was not a party to all discussions on the consortium, and had never seen a signed agreement. He also stated that GUL provided all labour and materials for the projects, which is not entirely accurate, as the evidence revealed that FDL as the JVA partner was the party who financed the purchase of materials for the project. Mr McCallan evidence addressed a relationship between REC and GUL in a coordinating role, and does not assist in determining the nature of the relationship which existed between FDL and GUL.
- [83] Mr Freeman and Mr Lubin were employees of GUL, who only interacted with Mr Bristol and they merely repeated what he had conveyed to them, about the projects. They spoke from their limited observations of what they saw on project sites, which was not determinative of

³⁸ See Exhibits DB91, DB92 and DB93

the relationship between GUL and FDL. They had no knowledge of matters concerning the contractual arrangements for the projects.

[84] Ms Benjamin and Mr Peters also appeared removed from the contractual aspects of the projects. Neither one took the time to investigate who the true contractor was, and simply made assumptions from their observations and interactions with GUL's team. The WhatsApp chat messages which Ms Benjamin confirmed as having taken place between Ms Mathurin and herself commences with the following statement "*Hi Ms Benjamin this is Kristal from FDL Consult this is the number above for the broker.*" To which Ms Benjamin responded "*Thank you. I called him.*" The chat continued in relation to collecting documents, and information was given concerning a wire transfer from FDL. Yet Ms Benjamin maintained that she had never heard of FDL before the trial. Mr Peters eventually admitted that he was aware of FDL in connection with the contract which was signed with the Ministry.

[85] Their evidence did not assist in resolving matters relating to the existence of a consortium between FDL and GUL or FDL, GUL and HPS. FDL readily admits that GUL was responsible for installation, which means that its team would have been on the ground, at the respective project sites, undertaking this aspect of the works, for which it was reimbursed.

[86] The quality of the services provided by GUL has never been questioned, and was acknowledged by both FDL and HPS. FDL says that GUL was duly compensated for these services based on the prices which were submitted by GUL, at the early stage of bid preparations. In my opinion, it cannot be said from the conduct of the parties and the evidence on the whole that a consortium partnership was formed. Much of the evidence is conflicting in terms of what transpired between FDL and GUL, after the joint venture was formed. Thus, I am unable to infer any agreement on formation of a consortium partnership which created any contractual obligations capable of being enforced, between GUL and FDL.

Issue 2 : Was there a sub-contract between GUL and FDL.

[87] GUL contends that the onus is on FDL to prove the assertion that it was no more than a sub-contractor of FDL. GUL submits that this burden has not been discharged as the evidence

is more in keeping with the formation of a consortium. Mr Bristol stated that the consortium was not jettisoned and remained in effect during the rollout of the projects. He did not agree to being hired as a subcontractor by the joint venture, as to do so would be a denial of the true role of GUL as consortium lead, without whom the projects could not have been delivered. GUL was not declared as a sub-contractor in the bid documents for the projects and the words "not applicable" were inserted where a sub-contractor's name should have been listed in the bid documents. Further, he did not agree to any payments other than payment for all actual work done, actual expenses, and 25% profit share.

- [88] Mr Fontenard says in this case, as is done at the beginning of a construction project, a spreadsheet is developed, in which each of the sub-contractors provided their fees. It is in the table shown as Exhibit DB49, and is the spreadsheet which provided the basis for the payments made to GUL. It shows the items of services, the provider and chargeable rates for these services. GUL is recorded as provider for System Design, SCADA/ COMMS, and for Bid Preparation jointly with FDL; the project managers were Mr Bailey and Mr Stangl of HPS; and FDL was the provider for all the financial arrangements. There were two sub-contractors for the projects who were Mr Stangl and GUL. There were no written agreements, but it was structured so that they were the sub-contractors for HPS and FDL, respectively. Further, there was no need to place any label on the nature of the relationship with GUL, as GUL recognized that its role was as a sub-contractor.

Analysis

- [89] In the absence of any oral or written agreement, it is difficult to determine the true nature of the relationship which obtained between FDL and GUL. There was no conclusive agreement for a consortium partnership, as had occurred with past projects between them, and no addenda to the MOU, as GUL was unable to successfully team up either with FDL to bid for the projects. Thus, the MOU could not have been the basis for GUL's assertion that it became a partner with FDL under the JVA, for the purposes of the projects. From the evidence their relationship continued undocumented and shrouded in uncertainty, with GUL proceeding on the premise that a consortium partnership existed, and FDL proceeding on the premise that GUL was a sub-contractor. After FDL and HPS were identified as the

entities who were best suited for the joint venture, GUL never proceeded to establish orally or in writing the nature of its relationship with FDL or the joint venture, and was left to work in the roles outlined in the spreadsheet³⁹. FDL does admits that it continued to engage with GUL within the scope of the roles outlined for GUL, in the spreadsheet, but no formal agreement was executed.

[90] I can only conclude therefore, that after the JVA's were executed, GUL and FDL continued to operate on a very loose arrangement. They never saw it fitting to formalize their relationship in writing, or to secure some record of the agreed terms and conditions, in the event that a difference of opinion arose, as has occurred. GUL has received the sum of \$296,000.00 which FDL says is full compensation for the services rendered on all three projects, at the rates provided by GUL. In my opinion, this conclusion is logical as GUL's own description of its involvement in the projects is in keeping with the roles stated in the spreadsheet, which Mr Bristol admits was prepared by him.

Conclusion

[91] The MOU executed between GUL and FDL amounts to an understanding to undertake projects for their mutual benefit, for which the terms and conditions would be the subject of addenda to the MOU as and when such projects arose. There is no addendum between FDL and GUL, in relation to any of the projects, and the MOU contains no provision for profit sharing. Although a proposed consortium agreement was canvassed by GUL there is no evidence to support a finding of finalization, execution and implementation of the proposal between FDL, GUL and HPS. Taken at its highest the evidence is inconclusive of a consortium being formed, and even if it could have been said such a group existed, the proposal was never converted into a formal contract and which could be said to contain terms and conditions from which contractual obligations would flow, as between GUL and FDL, or GUL, FDL and HPS. Moreover, as a proposal initiated by GUL, the document contained no provision for profit sharing.

³⁹ See Exhibits GF11 and DB49

[92] The contracts for all three projects were awarded to FDL and HPS as partners of the joint venture. There is no written contract of engagement as a sub-contract between GUL and FDL, or between GUL and the joint venture partners. It is accepted by all, that GUL provided bid preparation and installation services for the projects. These services are not inconsistent with services which may be outsourced to a sub-contractor or provider, on projects of this nature. In my view that relationship came closest to an arrangement for provision of GUL's services to FDL, or the joint venture as a sub-contractor or service provider, on the basis of the information contained in the spreadsheet⁴⁰ prepared by GUL. It was described by GUL as a detailed costing of the bid prices to be presented to the clients, and stipulated the rates for GUL's services. In my view, this the only basis on which the relationship between GUL and FDL could have proceeded, for the projects.

[93] Having made the findings above, the Court is well placed to address the remainder of the claim which concerned a request for FDL to account for expenses for each of the projects to arrive at the profit margins, with a view to profit sharing with GUL. If GUL now says that it has not been fairly compensated for actual expenses incurred on the projects, this is not a matter for an account or inquiries of FDL under Part 41. If FDL was billed for actual sums expended and failed to pay, this would be a matter for a debt recovery claim. GUL would substantiate its claim, and if found liable FDL would be ordered to pay. It would be for GUL to determine how best to pursue these matters, which did not form the basis for requesting that FDL be ordered to give an account. In the circumstances there could be nothing further to be ventilated, in relation to the substantive claim.

[94] I therefore make the following declarations and orders:-

1. The MOU between GUL and FDL was not legally binding, in the absence of an addendum for each of the projects, and on its own the MOU could not give rise to any contractual obligations in relation to the SLU, SVG and GD projects.
2. There was no finalized consortium or duly executed consortium agreement between GUL and FDL, or GUL, FDL and HPS, which had the effect of creating legal or contractual obligations between the parties.

⁴⁰ See Exhibit DB49

3. There was no written agreement for a sub-contract between FDL and GUL, and the relationship between them in relation to GUL's role on the projects derived its basis from a spreadsheet containing defined roles and estimated fees for the respective roles, in which GUL provided Bid Preparation Services, Systems Design and Installation, in relation to the projects.
4. As GUL was not a party to the JVA it is not entitled to an account of the finances of the JVA, which are protected by a confidentiality clause, as stipulated in clause 6 of the JVA.
5. GUL's claim seeking orders for an account to be made, or inquiries and directions be given for the purpose of determining profits due to GUL under the respective projects is dismissed.
6. Cost is awarded to FDL, which shall be assessed, if not agreed within 21 days.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar