

EASTERN CARIBBEAN SUPREME COURT**IN THE HIGH COURT OF JUSTICE****SAINT LUCIA
COMMERCIAL DIVISION****CLAIM NO. SLUHCV2012/0628****BETWEEN:**

[1]	MARGARETTA FRANK
[2]	WALTER LOUISY
[3]	RAPHAEL FELIX
[4]	JOHN HENRY
[5]	TREVOR NICHOLAS
[6]	JOHN LEONIE
[7]	THERESA EMILIEN
[8]	RUFINA PAUL
[9]	CHRISTINA BRETNEY
[10]	THOMAS HAYNES
[11]	PAUL CELESTIN
[12]	CHRISTOPHER JULIAN
[13]	JOHN JEAN
[14]	PETER JN BAPTISTE
[15]	FERGUS SANITOLE

Claimants

and

CASTRIES CONSTITUENCY COUNCIL

Defendant

Appearances:

Mrs Lydia Faisal with Mr Bernick Faisal for the Claimants
 Mr Peter Foster QC with Ms Renee St Rose and Ms Ann Alicia Fegan for the Defendant

2016: November 28; 29; 30; December 1; 6
 2017: May 4

Enforceability of contracts – whether claimants are employees, dependent contractors or independent contractors - termination - damages.

JUDGMENT

- [1] **ST ROSE-ALBERTINI, J. [Ag]:** This is an action instituted by 15 claimants against the Castries Constituency Council ("CCC" or "the defendant") alleging that they were engaged under fixed term contracts of service with the CCC, for provision of maintenance and janitorial services, which contracts were terminated without lawful cause. They seek special damages equivalent to the sums they would have earned for the unexpired portion of their contracts. Collectively the claim is for \$3,759,055.00, interest and costs.
- [2] The CCC says that the contracts were not properly executed and defective in material respects, which rendered them invalid and unenforceable. Further the claimants were independent contractors engaged under contracts for service which could have been terminated without notice or payment in lieu of notice. In the circumstances it is not liable for breach of contract.

THE ISSUES

- [3] The issues for the court's determination are:-
1. Did valid, enforceable contracts exist between the claimants and the CCC?
 2. Were the claimants' employees, dependent contractors or independent contractors?
 3. Were the contracts lawfully terminated?
 4. If the answer to issue 3 is no, what is the measure of damages that the claimants are entitled to, for breach of contract?

BACKGROUND

- [4] Prior to the introduction of CCC its predecessor was a corporation called the Mayor and Citizens of the City, established under the Castries Corporation Act¹. That corporation was capable of acting through its council called the Castries City Council (the Council) which by law was authorized to exercise all powers vested in the corporation². The CCC was later established under the Constituency Councils Act³ (the Act). When the Act came into effect in April 2012 the CCC subsumed all the land, property, rights, privileges and obligations of the previous corporation. The functions of the CCC are set out in section 6 of the Act and include assisting with delivery of services to constituents, among other things.
- [5] In September 2011 the claimants were engaged by the Council, under fixed term contracts for 5 years. They are labourers and sanitation workers who were required to provide maintenance and janitorial services within the City of Castries and its environs. The contracts were prepared by the Council and signed by the claimants at its office. The claimants provided the services as agreed, in areas designated by the Council. Their earnings were deposited into their respective bank accounts every fortnight.
- [6] Under the Act the boundaries of the areas governed by the CCC were extended and with this came the attendant increase in providing sanitation services to constituents. In April 2012 a new Council was appointed, which immediately undertook a review of the obligations and liabilities of the CCC. According to the CCC the review revealed that its financial liabilities far exceeded its income. There existed some 33 independent sanitation contracts which were vague and incomplete, with ambiguities which made it difficult to perform its obligations under these contracts.
- [7] The CCC says that the claimants' refusal to have the contracts regularized by accepting revised contracts and budgetary constraints, led to the decision to terminate the contracts.

¹ No. 22 of 1967

² Section 7 of the Castries Corporation Act

³ Cap 17.19 of the Revised Edition of the Laws of Saint Lucia

[8] Having performed the services for over 12 months in the case of the 10th claimant and slightly under 12 months for the remaining claimants, termination letters were issued to each of them in the months of May and June 2012.

[9] The letters were identical and stated the following:-

"Pursuant to the appointment of the new Council and an initiative taken to review existing contracts, a policy to restructuring the operations of the Castries City Council has been adopted.

In light of the foregoing, we regret to inform you that a decision has been taken to terminate your cleaning contract for the specified area as of June 15, 2012⁴

Your cheque for the period May 16-30, 2012 will be forwarded to the bank as usual. A final payment for the period ending June 15, 2012 will be paid subsequently.

We thank you for your services and wish you all the best in your future endeavours.

[10] They were signed by the Acting Town Clerk and copied to the Chairperson of the CCC.

[11] Trial spanned a period of 5 days. The court heard from 19 witnesses, including the 15 claimants, Mr Lambert Nelson former Town Clerk and Mr Arthur Charles Sanitation Supervisor at the CCC, who testified on behalf of the claimants. Mrs Shirley Lewis former Chairperson and Mr Lyndell Brown former Councilor of the CCC testified on behalf of the defendant. Written closing submissions were filed following conclusion of trial.

PRELIMINARY POINT

Admissibility of disclosed documents not tendered through witness statements

[12] At commencement of trial Counsel for the claimants Mrs Faisal took a point in *limine*, objecting to the use of certain documents contained in Trial Bundle 4⁵, lodged by the defendant. She asserted that the documents were not admissible, as they were not

⁴In the case of the 10th claimant the termination date was May 15, 2012 and for 7th, 8th and 9th Claimants it was July 6, 2012

⁵ See pages 281 to 318 of Trial Bundle 4

exhibited in any of the defendant's witness statements or mentioned in pleadings. The documents comprised copies of correspondence between the Council and those claimants who were previously employed there and particulars of registration of business names by some of the claimants.

- [13] She accepted as admissible the remaining documents⁶ which included the purported contracts between the Council and the claimants, the termination letters issued in 2012 and a spreadsheet listing the redefined locales for which the CCC was responsibility under the Act. The reason being that these documents were exhibited with the defendant's witness statements.
- [14] Counsel for the defendant Ms St Rose in response stated that the rules of disclosure required the defendant to disclose all documents in its possession, relating to the claim and upon which it intends to rely at trial. A party need not exhibit every document in a witness statement, in order to make use of it at trial. A disclosing party has the right to question a witness on any document which has been disclosed, even where it has not been tendered as an exhibit in the traditional way.
- [15] She relied on PD 69C rule 7.1 (f) and 9.1 to support the CCC's position that a party is entitled to use any document which has been disclosed, provided the court is informed at the close of trial, which of these documents the party intends to rely on as part of its case. In conclusion she stated that all the documents challenged were disclosed in the defendant's List of Documents which was filed and served within the stipulated time.
- [16] Mrs Faisal replied that even if documents are disclosed this is not all that is required to make them admissible. They must form part of the evidence of a witness who will be giving evidence at the trial. She referred to rule 10.5 (1) of the Civil Procedure Rules 2000 (CPR) which says that a defendant must include in its defence all the facts on which it intends to rely to dispute a claim. Accordingly the contents of witness statements are contingent upon the defence. If one has not pleaded a matter by way of defence it is not possible to produce a document by simply throwing it at the other side. A party must have an

⁶ See pages 319 to 429 of Trial Bundle 4

opportunity to know from the pleadings what the case is that it is expected to answer. She cited an excerpt from Blackstone Civil Practice 2003⁷, which says that an issue of fact dependent on evidence cannot be decided unless it has been set out in a statement of case. Further CPR 29.5 (1) (g) requires that a witness statement must sufficiently identify any documents to which the statement refers and implicit in the rule is the understanding that a document must be introduced by a witness.

- [17] I directed that the claimants case be opened and undertook to provide a ruling on the issue on Day 2 of trial. The defendant was to refrain from using any of the challenged documents pending the court's ruling, with liberty to recall any witnesses.

The Court's Ruling

- [18] The challenged documents were listed in Schedule 1 Part 1 of the defendant's List of Documents, filed some 4 months before trial. They were numbered from 1 to 66 in the List and referenced by the same numbers in the Trial Bundle.
- [19] Having filed a List of Documents as ordered, I accept that the defendant had given adequate notice of the documents which it intended to rely on. The claimants had the opportunity as provided by CPR 28.11 to inspect the documents and request copies in order to raise challenges and develop a strategy for dealing with them, in conducting their case.
- [20] CPR 28.18 (1) stipulates that a party shall be deemed to admit the authenticity of any document disclosed; unless that party serves notice that the documents must be proved at trial and such notice must be served no less than 42 days before trial.
- [21] As I understand the rule, if a party to whom a document is disclosed fails to take certain steps within the stipulated time, that party is deemed to have admitted that the document is what it purports to be. Thereafter the disclosing party need not call any evidence to prove

⁷ At para 24.1 on page 302

that fact and the need to adduce evidence concerning its origin, through a witness statement, is diminished.

- [22] PD69C guides procedure in the Commercial Court and Rule 9 gives the following directions in relation to evidence at trial:-

"9.1 Legal Practitioners should bear in mind that the mere inclusion of an admissible document in the court bundles does not mean that the document forms part of the evidence in the trial. It is the legal practitioner's responsibility to indicate clearly to the court before closing his or her case the written evidence which forms part of that case.

9.2 To adduce the document in evidence, a legal practitioner needs to draw the attention of the court to it as part of the case. This should be done in the written opening statement or in the oral opening statement. Documents which have not previously been put in evidence before the closure of the parties' cases should not normally be referred to as evidence in the course of final speeches."

- [23] The English Admiralty and Commercial Court Practice Guide at paragraph J8.1 also provides some useful guidance on the matter and it states:-

"There remains some confusion amongst advocates as to what is necessary to adduce a document other than a witness statement or expert report in evidence. Whereas there can be no doubt that any disclosed document can be relied on as evidence of the facts contained in it or as evidence of its existence or the use to which it was put..., the mere inclusion of a document in the agreed trial bundles does not in itself mean that it is being adduced in evidence by either party. For this to happen either the parties must agree that the document in question is to be treated as put in evidence by one or other of them and the judge so informed, or they must actively adduce the document in evidence by some other means. This might be done by counsel inviting the judge to read the document relied upon before calling oral evidence or using it in cross examination. The appropriate procedure will be a matter for the judgment of the advocates in each case. Whichever course is adopted, it will not normally be appropriate for reliance to be placed in final speeches on any document, not already specifically adduced in evidence by one of the means described above."

[24] The courts have long recognized that it may not always be feasible to adduce documents as part of witness statements. CPR 28.12 (1) which requires that the duty of disclosure should continue until proceedings are concluded leaves room for documents to be disclosed very late in proceedings. CPR 28.12 (2) explains how such documents may be adduced. Once a document has been disclosed it remains the duty of Counsel to determine the method which in all practicality is best suited for adducing a document at trial.

[25] I ruled that the defendant was entitled to rely on any of the challenged documents, subject to the dictates of PD69C rule 9.

[26] At trial the claimants were cross examined on some of the documents. The defendant's witnesses stated in cross examination that they had no personal knowledge of any of the documents and were not capable of answering any questions on them. At the close of the defendant's case Mr Foster QC informed the court of the documents which the defendant wished to rely on.

[27] In written closing submissions Mrs Faisal returned to the issue stating that the claimants were prejudiced by the introduction of these documents, because they had no opportunity to cross examine or discredit the defendant's witnesses on them.

[28] I do not agree that the claimants were prejudiced in any way, since the documents were disclosed some 4 months prior to trial, which allowed ample time for inspection, to determining how to treat these documents. Disclosure is useful for pro-active litigation and is the stage at which documents must be scrutinized for further insight into a party's case. Documents must also be challenged within the prescribed time and for the right reasons.

LAW AND ANALYSIS

Did valid, enforceable contracts exist between the parties

[29] The arguments advanced by CCC on this point are as follows:-

- (1) The contractual certainty and completeness required for the contracts to be valid and enforceable were absent because the following fundamental terms were uncertain:-
 - (a) The parties to the contracts;
 - (b) The designated areas for performance of the claimants' duties;
 - (c) The payment due to the claimants under the contracts
 - (d) The term of the contracts.
- (2) The obligation of the claimants would have been to carry out works in clearly defined and designated areas which could be easily ascertainable by anyone reading the contracts. What was to be done and where it was to be done was not stated in the contracts. The contract fee as consideration which the defendant was to pay to the claimants was also not stated.
- (3) Pursuant to Article 918 of the Civil Code⁸ (the Code), to be valid a contract must have a subject and lawful consideration. The parties to it must be legally capable and their consent legally given. According to Article 991 a valid subject is something to be given, to be done, or not to be done.
- (4) What exists then are two parties to a contract, with signatures by these parties, in most cases but an abject failure to provide for the very substance for carrying out these contracts, which are the consideration and designated areas of work.
- (5) Pursuant to Article 926 of the Code error is a cause of nullity when it occurs in the nature of the contract itself, or respecting that which is the subject of the contract, or the principal consideration for making it.
- (6) That Article 1163 of the Code precludes proof by way of testimony in a matter in which the principal sum of money or value in question exceeds \$48.00. Each claimant has made claims in excess of this sum. Consequently the sum of money the defendant was to pay to the claimants for the work done cannot be ascertained under the contract or from oral testimony.
- (7) Pursuant to Article 1164 of the Code oral testimony cannot be received to contradict or vary the terms of a valid written instrument. Additionally the contracts contained a clause that no changes, additions or waivers to any of the provisions shall be binding unless expressed in writing and signed by an authorized representative of the parties.
- (8) For these reasons the contracts are nullities and unenforceable.

⁸ Cap 4.01 of the Revised Edition of the Laws of Saint Lucia

[30] The claimants advanced the following arguments:-

- (1) The contracts were largely in writing, but some of the terms were oral.
- (2) Despite the errors and omissions they were ratified by the claimants and the defendant by their mutual performance for over one year in one case and nine months in others.
- (3) The essential terms which were not stipulated although references were made to them, were the contract fee, the designated area of work and the method of evaluation. These omissions would be oral terms incorporated into the contract as the claimants each reported for work in separate areas and were paid fortnightly for their services at an agreed rate, deposited into their respective bank accounts. The termination letters illustrated that this method of payment was the "usual" practice of the defendant for payment. Additionally these omissions did not prevent continuous mutual performance of the contracts by the parties, over several months.
- (4) The contracts were crafted and drafted by the defendant, who was solely responsible for their contents. The majority of the claimants were unskilled labourers who were functionally literate and though able to sign their names were incapable of reading and writing.
- (5) The contra proferentum rule will operate against the CCC, to require that any deficiencies in form or uncertainties in the contracts be resolved against the CCC and not the claimants, as CCC was the party who prepared the contracts and presented them to the claimants for signing.

[31] The contracts were between the Council and the respective claimants. At paragraph 5 of its defence CCC averred that the Council was not a legal entity capable of entering into contracts with the claimants. The claimants' responded at paragraph 2 of their Reply that section 7 of the repealed act⁹ legitimized the Council as the agency clothed with the ability to exercise all the powers vested in the predecessor corporation. That point was not ventilated further by either side.

[32] I will first address the circumstances of the 10th claimant, Thomas Haynes. His contract was worded differently to that of the other 14 claimants and was executed on March 7, 2011 between the Council and Thomas Haynes trading as City Sanitation Services. Clause 1 stipulated that it was for a period of 5 years commencing from the execution date. Clause 2 set the consideration at \$22,920.00 per month payable in two instalments on the 15th and 30th of each month, for provision of maintenance services which were fully

⁹ supra n 1

described in clause 3. Clause 1 also stated that the services were to be carried out at the Castries and Marchand Markets and the Vendors Arcade. The other clauses were general but the contract did not contain a termination clause. It was signed by both parties¹⁰.

[33] Mr Haynes stated in cross examination that he formed a company but it was never registered. No documents were produced to verify incorporation of a company or registration of a trade name by him. I formed the view that he was operating under a trade name which was not registered; therefore the issue of separate legal persona did not arise.

[34] I concluded that his contract conformed to the legal requirements for a valid contract and was lawfully executed. Consequently it was valid and enforceable.

[35] The remaining claimants had identical contracts, worded differently to that of the 10th claimant. Clause 1.2 referred to a contract fee of an amount payable in the manner set out in section 5, but that section dealt with "Inspection and Evaluation". No contract fee was stated there or anywhere else in the contracts. Clause 1.3 referred to the designated area of work described in the First Schedule but no schedule was appended. The services were to be graded in accordance with the standards set out in the Second Schedule but that schedule was not appended.

[36] The contracts exhibited by the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, and 11th claimants contained an execution date of September 1, 2011. In clause 1.1 the contract duration of 5 years was manually inserted and the stamp of the Castries City Council bearing the date "-1 SEP 2011" affixed in that clause. Based on the wording of the clause, I accepted the stamped date as the commencement date of these contracts, although in some instances it was hardly legible. These contracts were signed by both parties.

[37] No contracts were exhibited by the 8th and 9th claimants but copies were produced by the defendant¹¹. They were accepted by Counsel for the claimants as admissible. These

¹⁰ Exhibit TH 1 on page 184 – 185 of Trial Bundle 3 and 319 – 320 of Trial Bundle 4

¹¹ See pages 370 to 376 and 377 to 383 respectively of Trial Bundle 4

contracts had an execution date of September 1, 2011 but contained no duration or commencement date at clause 1.1. They were signed only by the respective claimants.

[38] The contracts exhibited by the 12th and 13th claimants contained no execution date. In clause 1.1 the duration of 5 years and commencement date of September 1, 2011 were typed in as part of the clause. They were signed by both parties.

[39] The contract exhibited by the 14th claimant had no execution date. In clause 1.1 the contract duration of 5 years was manually inserted with the stamp of the Castries City Council bearing the date "-1 SEP 2011" as the commencement date. It was signed by both parties.

[40] The contract exhibited by the 15th claimant contained an execution date of September 1, 2011. In clause 1.1 the duration of 5 years and commencement date of September 1, 2011 were typed in as part of the clause. It was signed by both parties.

[41] There is no question that these contracts contained some deficiencies in formalities, as well as omissions in material clauses.

[42] Mr Nelson who was the Town Clerk when the contracts were issued and signed on behalf of the Council testified that he was employed as Town Clerk from 1999 to 2012 with a period of absence in 2003 to 2007. He knew the claimants by virtue of his position and was integrally involved with them for several years. Some of them were previously employed as daily paid labourers for many years. They were not highly educated and some were not proficient in the English language. The Council commenced issuing 5 year contracts for sanitation services from about 2000 and some of the claimants were awarded their first contract around that time, which had continued uninterrupted until they were terminated.

[43] He stated that the claimants had no role in drafting and preparing the contracts, which was undertaken by the Council's lawyers. When cross examined on the omissions he explained that as far as he was aware there was a standard sanitation contract on file which was prepared by the lawyers, to be issued to the claimants. He could not explain why the schedules and other terms were missing but he knew that they existed.

- [44] He testified that it was the Council who assigned and showed each claimant their respective area of work and the demarcation of these designated areas were always clear and distinct. When he left the employ of CCC in 2012 the claimants were still working there and the CCC had no intention to terminating them, as they were all proficient in their work.
- [45] Mr Arthur Charles was the Sanitation Supervisor from 2007 to present. He testified that the designated areas where the claimants worked were assigned to them by the Council, which was also responsible for sending trucks to collect all the garbage and waste generated from the claimants work. In supervising the work he was charged with directing the claimants to return to correct any unsatisfactory work and their pay would be withheld if they did not comply.
- [46] The claimants all say that the contracts were prepared by the CCC and they went to the office to sign. Some stated that they could not read or write. Some spoke only *Kweyole* and required the use of a court interpreter. Others spoke and understood some English and they could all sign and recognize their names. It was argued that the contra proferentem rule be applied, to cause all the deficiencies in the contracts to be resolved against the CCC and in favour of the claimants.
- [47] The learned authors of Halsbury's Laws of England explains the rule as follows:-

"Contra proferentem may refer to the rule that, in the event of any ambiguity, wording in a contract is to be construed against a party who seeks to rely on it in order to diminish or exclude his basic obligation, or any common law duty which arises apart from contract. It may also refer to the rule that wording is to be construed against the party who proposed it for inclusion in the contract. The latter is a rule of 'last resort and can only apply if a document, properly interpreted, admits of doubt¹²."

¹² Halsbury's Laws of England Vol 22 (2012) para 363

[48] In **Tam Wing Chuen and Another v Bank of Credit and Commerce Hong Kong Ltd. (in Liquidation)**¹³ Lord Mustill put it this way:

“....., the basis of the contra proferentem principle is that a person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests, so that if the words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not.”

[49] As I understand the rule, it is applied for resolving doubt and ambiguity in contracts by construing the document strictly against the drafting party, but where the words used are free from ambiguity in the sense that they can be fairly and reasonably construed and capable of only one meaning, the rule has no application.

[50] The claimants relied on the Canadian case of **Sydney Fletcher v Chippewas of Kettle & Stony Point First Nation**¹⁴ which cited **Ceccol v Ontario Gymnastic Federation**¹⁵ as authority for the position that where a defendant was the one who had drafted a fixed term contract of employment any uncertainty in the contract must be resolved against the defendant who drafted it.

[51] On this point I found Articles 945 and 951 of the Civil Code to be similar in effect to these principles and instructive for resolving doubt and uncertainty in the contracts. They state:-

“945. When the meaning of any part of a contract is doubtful, its interpretation is to be sought rather through the common intent of the parties than from a literal construction of the words.”

“951. In cases of doubt, the contract is interpreted against him or her who has stipulated, and in favour of him or her who has contracted the obligation.”

[52] In construing the incomplete or inconsistent clauses of the contracts Articles 945 allows the court to look to the common intention of the parties to arrive at what should have been captured as the exact terms. Article 951 allows areas of doubt or ambiguity to be resolved

¹³ [1996] 2 BCLC 69, at page 77

¹⁴ (2009) CanLII 41358 (ONSC)

¹⁵ (2001), 55 OR (3d) 614

against the party who has specified the terms (the originator or drafter), in favour of the party who has contracted responsibility for the subject of the contract.

- [53] Clause 2 of the contracts set out the contractor's obligations and in sub-clause 2.1 it provides details of the services to be performed in the designated area. Designated area is defined in clause 1.3 as the area described in the First Schedule. Clause 1.2 defined consideration as a contract fee of an amount paid in the manner set out in section 5 of the agreement. Clause 5 refers to a regime for inspection and evaluation of the works in accordance with the standards in the Second Schedule. As stated before there were no schedules and section 5 did not speak to the contract fee.
- [54] Mr Nelson stated unequivocally that a contract fee and the schedules existed as part of the contracts but he could not give any reason for the inconsistency or omissions in the contracts.
- [55] It is not disputed that all the claimants performed under the contracts from September 1, 2011 and were paid an agreed fee on the 15th and 30th of each month. The wording of clause 1.2 indicates that the parties intended to have the contract fee stated in the contract but for the drafting error which gave rise to an inconsistency between clauses 1.2 and clause 5.
- [56] Mr Nelson conveyed that the claimants worked in designated areas which were pointed out to them by the CCC. In some instances the areas were designated a few years ago, under similar contracts which had been renewed two or three times and most of the claimants continued to work in the same area. Mr Arthur inspected and certified the works in accordance with the standards set by the CCC, following which payment was effected. In my view this confirms that a procedure existed between the CCC and the claimants for meeting their respective obligations where these matters were concerned.
- [57] I am satisfied on the evidence that the claimants played no part in the preparation of the contracts. It was the CCC who prepared and presented them to the claimants for signing and was responsible for what I considered as drafting errors. The omitted terms were

known to all the parties and it was their common intention that these terms should have formed part of the contracts.

[58] Applying the Articles and rule of law to these facts, the contracts must be strictly construed against the CCC as the author; with the effect that the CCC is precluded from relying on these errors and uncertainties to nullify the contracts, to be relieved of its obligations.

[59] It is the law that a term may be implied into a contract if without it, the contract would lack commercial or practical sense, or it is necessary to give a transaction the business efficacy that the parties had intended¹⁶. The courts will not usually imply terms into a contract unless there are 'very exceptional circumstances', such as where the contract could not work or would lead to an absurdity.

[60] In my view implied terms concerning (i) the contract fee as the fee agreed to by the parties and paid to the claimants from commencement of the contracts, (ii) the designated area as the area determined and shown to each claimants by the CCC; and (iii) the standard of evaluation as the method determined and administered by the CCC from commencement of the contracts, should be read into the contracts.

[61] It is also the law that a contract may be oral or written or partly oral and partly written and may also contain implied terms. There is no doubt that without the missing terms the end result would be an absurdity, because both CCC and the claimants had performed their respective obligations as intended, from inception of the contracts. I am satisfied that this case amounts to one of exceptional circumstances to warrant the missing terms being read into the contracts.

[62] I am satisfied that the contracts of Margareta Frank, Walter Louisy, Raphael Felix, John Henry, Trevor Nicholas, John Leonie, Theresa Emilien, Paul Celestin, Christopher Julian, John Jean, Peter Jn Baptiste and Fergus Sanitole were partly written and partly oral, with the omissions being read into the contracts.

¹⁶ *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72

[63] With respect to Rufina Paul and Christina Bretney whose contracts were partially executed, they signed the contracts and the CCC omitted to sign. These claimants operated on the premise that all was in order and provided the services. The CCC performed its obligations by inspecting and paying for the services for several months. In the circumstances I concluded that their contracts were oral, in the same terms as the contracts which they signed.

[64] It is true that Article 1164 precludes testimony which will contradict or vary a valid written contract. In my view the claimants' testimony did not contradict or vary the contract but was required to complete the expressed terms of the contracts, to reflect the true intentions of the parties. I do not agree that such testimony offends Article 1164.

[65] I also concluded that Articles 926 and 1153 would not avail in this case, as it was the CCC itself which had precluded the claimants from having properly worded contracts as cogent evidence of the contract fee.

[66] For these reasons I conclude that the contracts were valid and enforceable.

Were the claimants' employees, dependent contractors or independent contractors

[67] On this issue the defendant contends that the claimants were independent contractors as opposed to employees and are not entitled to the same protection given to employees under a fixed term contract. That the CCC who contracted their services did not have direct control over their work but was only concerned with the end product.

[68] Counsels referred the court to the principle that a servant is under the control of his principal not only as to what he does but also as to the manner in which he executes his work. The independent contractor on the other hand undertakes to produce a given result and is not under the order or control of the principal in his manner of execution¹⁷. The court

¹⁷ Chitty on Contracts 26th edition Volume II at para 31-010

must look to the agreement made between the parties if a determination of their status is ambiguous¹⁸.

- [69] They contend that the very nature of the services provided by the claimant supports the conclusion that they are not employees. They were given a designated area within which to work and everything else with regard to how that work was to be carried out was left within their purview. They were responsible for the method of cleaning, determining and procuring added assistance, selecting the kind of equipment required and sourcing same and they had their own employees. In that regard the test to be applied is as stated by Lord Justice Ackner in **Young & Woods v West**¹⁹, where the court has to ask:-

"Is the person who has engaged himself to perform these services performing them as a person in business on his own account? If the answer to that question is yes the contract is a contract for services. If the answer is no then the contract is a contract of service."

- [70] Counsels for the claimants contend that they were employees or dependent contractors and the latter is defined in section 2 of the Labour Act²⁰ which provides that:-

"dependent contractor" means a person, whether or not employed under a contract of employment, who performs work or services for another person for compensation or reward on such terms and conditions that ***he or she is in a position of economic dependence in relation to that person, and under an obligation to perform duties for that person more closely resembling the relationship of employee than that of an independent contractor;*** (Emphasis added)

- [71] They contend that the claimants were required to work for more than 40 hours per week which placed them in a position of economic dependence on the CCC, as that is the maximum number of hours which can be legally demanded from an employee under the Labour Act²¹. Had they been truly independent the CCC would not have been able to

¹⁸ Massey v Crown Life Insurance [1978] 2 ALL ER 576.

¹⁹ [1980] IRLR 201

²⁰ Cap 16.04 of the Revised Edition of the Laws of Saint Lucia

²¹ Section 27

control their hours of work, to the extent that they were unable to work elsewhere to generate income, other than by virtue of their contracts with the CCC.

- [72] That it is erroneous to conclude that because the contracts stated that the claimants were independent contractors, this was in fact the case. In support of this argument the claimants relied the Barbados Court of Appeal decision in **Sagicor Insurance Co Ltd v Carter and Others**²² in which that court applied dicta of Lord Denning in **Massey v Crown Life Insurance**²³ when he said:-

"The law as I see it, is this: If the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label on it."

- [73] In the claimants written submissions the court's attention was directed to the various factors to be applied in determining the true nature of the relationship which existed between the parties namely; control, integration, economic reality and multifactor tests. Several authorities were cited which explained the application of these factors.

- [74] What I deduced from the several cases cited by both sides, on this issue, can be aptly stated in the words of Cooke J in **Market Investigations Ltd v Ministry of Social Security**²⁴ when he said:-

"No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases."

- [75] Mitchell J after conducting a thorough examination of the leading authorities in **National Insurance Board v Bottlers (St Vincent) Ltd**²⁵ which turned on somewhat similar facts, explained his findings as follows:-

"The more modern approach is to abandon the idea of a simple test, and to take a multiple factor approach. The later cases show the courts assessing all aspects of the relationship. The factors relevant in a particular case may include: control; integration; the method of payment; any obligation to work only for that employer;

²² 2007 WIR 74

²³ supra n 16

²⁴ [1969] 2 QB 173 at 184-5

²⁵ Civil Suit No.365 of 1998 unreported at para 12,

stipulations as to hours; overtime; holiday; payment of income tax; national insurance contributions; whether the individual may delegate work; who provides tools and equipment; who ultimately bears the risk of loss and the chance of profit; the nature of the work; and how the contract may be terminated."

- [76] That approach was amplified by Simmons CJ in the **Sagikor Case**²⁶ where the court determined that certain categories of professional workers of the insurance company were to be considered as employees and stated the following:

*"Upon an analysis of established authority and tests formulated therein, including the control test, the organization or integration test, the economic reality test, the multifactor test and mutuality of obligations, **the proper approach to the issue required a thorough examination of all aspects of the relationship between the parties including an examination and construction of the terms expressly set out in the written contracts as well as the manner in which the contracts were performed.** The written contracts were the principal, though not the only, sources of information as to the nature of the contractual relationship between the parties. There were other factors or features of the relationship that required examination. **No single factor or feature was likely to be decisive in itself. Each might vary in weight or direction pointing either towards a contract of service or a contract for services.** Having given such balance to the respective factors in all the circumstances on the evidence the ultimate question was whether the worker was carrying on business on his/her own account or not. **It was a mixed question of fact and law, depending not solely upon a construction of the written contracts but also an investigation and evaluation of the factual circumstances in which the work was performed**.....As Lord Wright advised in *Montreal v Montreal Locomotive Works Ltd. (supra)* at p.169: **"In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties....."** (Emphasis added).*

- [77] The above suggests as the first step, a thorough examination of the express terms of the contracts together with the manner in which the contracts were performed. To embark on this examination a brief history of the relationship of the claimants with the CCC is germane.

- [78] The 10th claimant Thomas Haynes is 76 years old. He was first employed with the Council in 1969 and that relationship ended in 1992. In 2001 the Council contacted him to provide sanitation services. He was awarded a first contract for 5 years in 2001. When that

²⁶ Supra n 22

contract expired he was awarded another in 2006 and the third one in 2011. He was required to provide all equipment and supplies necessary for the services. The CCC had responsibility for overall supervision of all projects undertaken by him and conducted regular inspection of all work in progress. Although he used a trade name no evidence was presented of the name being registered. He was registered as an employer with the National Insurance Corporation and paid contributions on behalf of his workers, as required by the CCC²⁷.

[79] His witness summary stated that he worked from 7:00am to 3:00pm from Monday to Friday. Unlike the other contracts his contract did not stipulate any day or time of work. Contrary to what was stated in the summary, he agreed in cross examination that his contract did not state the days or time for work, but he worked every day of the week including weekends and holidays.

[80] He admitted that his contract did not preclude him from working anywhere else but since he was employed full time with CCC there was no need to seek other work. He said he did not provide a method of evaluation for his services because it was the CCC who did so. He had helpers and supervised the work until 2010 when he could no longer move around freely. He put someone in charge as supervisor, who was doing a great job. The CCC assessment forms will show that his team worked well. He had 3 pressure washers for use at the markets, for which he provided a supply of gas every Sunday. After the contract was terminated he was unable to look for work because he is incapacitated and no one would hire a sick person. He appeared unwell and stated that he suffers from diabetes. He is unable to walk and was taken to court in a wheelchair.

[81] The 1st, 2nd, 7th, 8th, 9th and 15th claimants Margaretta Frank, Walter Louisy, Theresa Emilien, Rufina Paul, Christina Bretney and Fergus Sanitole were engaged as employees of the Council for an extended period prior to 2001. Some of them acknowledged signing letters²⁸ requesting early retirement and receiving payment of terminal emoluments.

²⁷ See exhibit TH3 on pages 187-188 of TB3

²⁸ See pages 308 – 312 and 315 – 316 of Trial Bundle 4

However they did not ask for this and only did what they were told to do. They signed the letters in order to get the contracts. The CCC also made it a condition that they engage some of its former employees as helpers in order to get the contracts. Everything was done by CCC at its office. They received their first five year contract in 2001, another in 2006 and in 2011 the third contract was issued. Some of them stated that at the commencement of the first contract in 2001 they were provided with a set of tools including wheelbarrows, spades and rakes belonging to CCC.

- [82] The 3rd, 4th and 5th, claimants Raphael Felix, John Henry and Trevor Nicholas received their first contract in 2009 (for 2 years), 2006 (for 5 years) and 2008 (for 3 years) respectively. Before that they worked part time for CCC, performing sanitation and maintenance works, for short stints. Their contracts were renewed a second time in 2011, for 5 years.
- [83] The 13th and 14th claimants John Jean and Peter Jn Baptiste received their first and only contract in 2011 but had worked previously with CCC for short stints.
- [84] The 6th, 11th and 12th claimants John Leonie, Paul Celestin and Christopher Julian received their first and only contract in 2011 and had not worked with the CCC before that.
- [85] The claimants are between the ages of 51 and 76. There were commonalities in their evidence where the contracts were identical. They provided their services to the CCC from Monday to Friday between the hours of 7:00am to 3:00pm (clause 2.2.5). They were unable to accept any outside work during those hours because their services were exclusively contracted to CCC. They relied solely on CCC for survival and it paid the only income that they earned. None of them were free to set their own standard of performance or quality control and they had to observe the rules, regulations and instructions of the CCC (clause 5). On completion of the work the CCC would be notified and a supervisor came to inspect. If it was not done to the required standard they would be asked to do the work over to the accepted standard, in order to get paid.

[86] They hired helpers at the behest of the CCC to carry out the work and were required to replace any helper that the CCC felt was undesirable or detrimental (clause 2.3.4). They were required to obtain equipment tools, supplies and materials at their own cost (clause 2.4) and in one instance a used vehicle was purchased to transport tools and helpers. The contracts could not be assigned without the permission of the CCC but the CCC had the right to assign or transfer all rights under the contracts (clause 6). At the request of the CCC they were all required to pay National Insurance contributions for themselves and their helpers (clause 2.3.6).

[87] Mr Nelson testified that the claimants were very good workers and had the necessary experience to execute the work required by CCC, to keep the City clean. The intent behind the contracts was to give those previously employed as labourers some form of security of tenure and incentive to work well with the CCC. It was also the intention of the CCC to make the claimants private contractors by ceasing to pay National Insurance contributions on their behalf and insisting that they paid it for themselves and their helpers. When contracts were first awarded in 2001 it was the CCC who required those claimants' to engage as helpers other employees of the CCC, who were not awarded contracts. The CCC paid the claimants and they in turn paid their helpers.

[88] He stated that despite these intentions the CCC maintained supervision over the claimants work and required them to work 40 hours a week. They were engaged fulltime and the CCC occasionally convened meetings with them on the evaluation of their work, which was done by completing the Sanitation Service Evaluation Form²⁹ provided by the CCC.

[89] He was aware that some of the claimants had business names but could not recall all the names. They were not considered employees of CCC under the contracts and in that regard clause 9 of their contracts specifically stated-

"The CONTRACTOR is at all times and for all intents and purposes under this Agreement an independent CONTRACTOR and is not in any sense an agent, employee or servant of the COUNCIL."

²⁹ Exhibit MF2 on page 16 of Trial Bundle 3

[90] Concerning the degree of control which CCC may have exerted over the claimants, in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance**³⁰ MacKenna J defined "control" for these purposes. He said:-

"Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where, it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant."

[91] His Lordship went on to say: --

"To find where the right resides, one must look first to the express terms of the contract, and if they deal fully with the matter one may look no further. If the contract does not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication."

[92] Applying these principles to the facts it was the CCC who decided what needed to be done and how (maintenance and janitorial services in clause 2.1); the place where it shall be done (designated areas in clause 1.3), the time for doing the work (daily from 7:00am to 3:00pm in clause 2.2.5), and the way in which it should be done (inspection and evaluation in clause 5). Termination would be automatic if a claimant received three notices which assessed the services below a benchmark of 76 percent (clause 5.5). I concluded on the basis of these clauses that the CCC exercised to a sufficient degree of control over the claimants, such that they could not be considered independent contractors.

[93] The question whether the claimants were integral to the defendant's business (contract of service) or were only accessory to it (contract for service) would turn on the extent to which the claimants were separate from or independent of the defendant's business. The claimants contention is that part of the CCC's mandate as enshrined in section 102 of the Act is to apply funds or monies belonging to it in the management of markets, maintenance and preservation of its property and disposal and destruction of street and house rubbish, amongst other things. The contract of the 10th claimant provided for the cleaning and upkeep of the markets, whilst the others were for the general sanitary upkeep of public areas. As such they were integral to the defendants business.

³⁰ [1968] 2 QB 497 at 515.

[94] In my view the services provided constituted part of the defendant's business and it is difficult to see how CCC could have met that aspect of its mandate without the services of the claimants. On this point I concluded that they were integral to that aspect of the defendant's business.

[95] In **Montreal Locomotive Works Ltd v Montreal and Attorney General for Canada**³¹ the essence of economic reality was analyzed by whether the worker is in business on his or her own account as an entrepreneur and Lord Wright explained the criterion in this way:-

'It is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior.'

[96] Having observed the general demeanor of all the claimants, it was evident that they were semi-literate unskilled labourers. They did not appear to possess even the most basic entrepreneurial skills. They certainly did not have an understanding of risk, investment or profitability. Some admitted that they gave the contract a name but they had no knowledge of the process of registration and were not sure how that was done. Some recall signing documents at the CCC's office and could only say that if business names were registered it was done by the CCC. It appeared to me that they merely complied with whatever the CCC instructed them to do, without any real appreciation of the implication. I do not consider registration of business names sufficient to conclude that they were in business on their own account, taking investment risks or bearing losses, calculated at making profits for themselves.

[97] The CCC was the only institution they worked for. The manner in which the services were performed did not lend itself to determining their own level of income. This was confined to the fee paid by the CCC. They did not have the opportunity for making a profit through sound management of the tasks which they undertook. Even if they provided tools and engaged helpers, in reality they were in a position of economic dependence on CCC, as their only source of income. There was no evidence to suggest that they provided these

³¹ [1947] 1 DLR 161 at 169

services to anyone who required it for extra income. The exclusivity of the relationship and the semblance of permanency in some cases support a finding that they could not have been in business for themselves, but were providing these services only to CCC.

[98] Clause 9 of the contracts stated that the claimants were independent contractors. The authorities across jurisdictions agree that it is not what the parties call themselves in the written contract that determines the relationship which exists. The court must look beneath the label, to the conduct and administration of the relationship, to see if the label is true or false. Some of these authorities are cited at paragraph 72.

[99] In **Young & Woods Ltd v West**³² the respondent, a skilled sheet metal worker in a factory, was given the option of becoming an employee in the ordinary way or self-employed. He chose to be treated as self-employed with no deductions made from his pay for tax and he was responsible for his own national insurance contributions. He did not receive any holiday pay or sickness benefit. In an action for unfair dismissal the court ruled that he was an employee and although the parties intended to call the contract between them a contract for services the true relationship of the parties was not considered to be that of a self-employed agent working independently of the company.

[100] I found nothing spurious about the inclusion of clause 9 in the contract bearing in mind the CCC's intention to shed some of its responsibilities as an employer and to make its former employees contractors. However on close examination of the relationships which existed and the manner in which the respective obligations were performed; clause 9 in my view did not preclude a finding that the claimants were not independent contractors.

[101] Clause 2.3 required that the claimants provide personnel to assist in fulfilling the services. On this matter I concur with and adopt the reasoning of Mitchell J in the **National Insurance Board Case**³³ where he said:-

³² supra n 17

³³ Supra n 25 (At para 14)

"Because a worker is permitted to hire whomsoever he wishes at his own cost to help him in the performance of his duties, does that automatically make him an independent contractor? I cannot find either in law or applying commonsense that that is the inevitable conclusion."

- [102] Clause 3 of the contracts addressed liability and indemnity. I do not believe this clause on its own could be sufficient to justify a finding that the claimants were independent contractor, in the face of all the other factors which weighed against such finding.
- [103] The Labour Act has introduced the category of dependent contractor, which is defined at paragraph 70 above and includes this category in the definition of an employee. Therefore a dependent contractor³⁴ is considered to be an employee.
- [104] Having examined the contracts and factual circumstances under which the services were performed I concluded that the claimants' relationship with the CCC more closely resembled that of employees and the terms and conditions were such that they were in a position of economic dependence on the CCC. Properly they fell within the classification of dependent contractors as defined in the Labour Act. In the absence of the new nomenclature I would have had no difficulty classifying them as employees.

Were the contracts lawfully terminated

- [105] The CCC's evidence on this issue is that in 2011 there was a change of Government and subsequently a change in the legislation which governed the operations of CCC. As a result the boundaries of the areas over which CCC was responsible increased. Because of these changes and the substantial costs involved in carrying out its functions under the Act a review of all existing contracts were undertaken.
- [106] An extensive review of the claimants' contracts, revealed that they were not sufficiently certain for continuity and difficult to perform. Site visits were conducted with Mr Nelson. Restructuring was necessary to ensure all areas were covered within the budget available

³⁴ Supra n

to the CCC. The contracts were at a cost of approximately \$300,000.00 monthly which was inflated and unsustainable.

- [107] Sanitation workers were offered new contracts, some accepted but the claimants did not. Accordingly the board took a decision to terminate the contracts. The intention was not to keep the claimants out of work but to have their contracts regularized so that CCC could meet its obligations under the Act.
- [108] Counsels submitted that where an independent contractor relationship exists, the decision to terminate does not require reasonable or any notice. The contracts did not conform to the legal requirements for employment contracts; therefore CCC was entitled to terminate the contracts without any notice. In the circumstances the claimants are not entitled to damages or if any it should be minimal.
- [109] It was also stated in written submissions that the Labour Act is the authority on the law in relation to lawful dismissal and if the claimants are not employees that Act will not be applicable to them.
- [110] The claimants submit that the contracts were for a fixed term of five years and contained no termination clause. Where the parties to a contract stipulate that the contract is for a definite period and make no provision for early termination the contract cannot be terminated before the expiry date, except for gross misconduct or by mutual agreement. The CCC unilaterally terminated the contracts without the claimants' agreement and they were never involved in the review process. They had performed fully under the contracts and the letters contained no allegation of gross misconduct or just cause for termination.
- [111] That the change in governing legislation which took effect during the subsistence of the contracts could not negate or reduce the claimants' position or make it more onerous on CCC because section 32³⁵ of the Act transferred all rights obligations and liabilities of the former Council to the CCC.

³⁵ Transitional clause

[112] In addition the claimants say that clause 33³⁶ of the Act protects the rights or claims of any person engaged under the repealed Acts.

[113] In conclusion Counsels submitted that the reason given for termination is not justifiable as it does not amount to mutual agreement or gross misconduct, which are the only grounds for terminating a fixed term contract.

[114] I believe Article 954 of the Code is paramount to this issue and it provides:-

*"Contracts produce obligations.....**They can be set aside only by the mutual consent of the parties, or for causes established by law.**" (Emphasis added)*

[115] Mr Nelson's evidence was that when he left CCC in 2012 there was no intention to terminate the claimants' contracts, as they were proficient in their work. Any concern which CCC had was addressed as soon as it was brought to the attention of the claimants.

[116] Both Mrs Lewis and Mr Brown testified that it was after conducting the review and upon finding that the contracts were financially onerous a decision was taken collectively by council members, to terminate the contracts. Mr Brown's evidence was that CCC approached the 1st claimant to offer her a reduced sum, with a designated area and a new contract.

[117] The reason given in the termination letter was that under the new Council an initiative was taken to review existing contracts and a policy to restructuring the operations of the Castries City Council had been adopted. No mention was made of the contract being onerous to fulfill or that the claimants had rejected an offer to revisit the contracts to address any areas of difficulty.

[118] I accept that the boundaries and areas of responsibility for maintenance and janitorial services increased under the Act and CCC was responsible for managing this change. I

³⁶ Savings Clause

am not persuaded that the information required to administer the contracts could not have been sufficiently ascertained from the administrative office of the CCC. It is common knowledge that most statutory bodies maintain a complement of support staff for day to day operations and do not shut down when legislation or governing boards change. No evidence was provided to substantiate the budgetary constraints which CCC claims was one of the reasons which led to termination.

[119] There is nothing in the evidence to suggest that the claimants were not performing according to the standards set by the CCC or were engaging in misconduct of any kind. They had performed under the contracts for several months without objection.

[120] In the circumstances I accept the claimants' arguments and conclude that the contracts were not terminated by mutual consent or lawful cause.

Is the CCC liable for damages for breach of contract

[121] Having determined that the claimants were dependent contractors under a fixed term contract and that their contracts were not terminated for lawful cause I considered the ruling in the **Sydney Fletcher Case**³⁷ to be applicable. It is that where an employer terminates a fixed term contract in a manner that does not comply with the contract, damages awarded to the employee are generally assessed for the remaining duration of the contract.

[122] As stated earlier the Labour Act categorizes dependent contractors as employees. The law is that there is no duty to mitigate losses where the arrangement is for a fixed term and make no provision for early termination.

[123] The claims were in respect of net monthly earnings derived under the contracts.

³⁷ At para 19

[124] In the circumstances the claimants are entitled to the measure of damages equivalent to the respective net earnings claimed in the amended statement of claim, for the unexpired term of the contract.

CONCLUSION

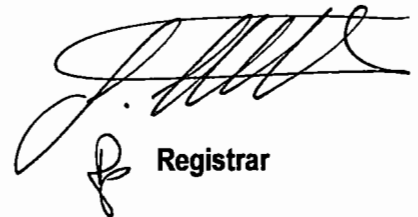
[125] For the foregoing reasons I order as follows:-

1. The claimants are employees within the classification of dependent contractor and were engaged under fixed term contracts for 5 years.
2. The contracts were not terminated for lawful cause.
3. The claimants are entitled to the sum equal to the total net earnings respectively for the unexpired term of the contracts, as outlined in the particulars of the Amended Statement of Claim filed on February 12, 2015 with post judgment interest at the rate of 6 percent per annum to date of payment.
4. The claimants shall have their costs to be assessed, unless agreed within 21 days.

Justice Cadie St Rose-Albertini
Commercial Court Judge

[SEAL]

By the Court



Registrar