IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2016CD00239

BETWEEN SGD CONSTRUCTION AND EQUIPMENT LIMITED CLAIMANT

AND CARIBBEAN CEMENT COMPANY LIMITED DEFENDANT

Contract – Terms of contract- Tender and successful bid - Duty of Defendant- Whether implied duty to certify suitability of Claimant's equipment - Claimant failed to meet targets- Whether failure due to inadequate equipment - Counter claim – Measure of Damages.

Alexander Williams and Topazia Brown instructed by Alexander Williams & Co for the Claimant

Emile Leiba and Jonathan Morgan instructed by Dunn Cox for the Defendant

HEARD: 3rd, 4th, 5th, 6th and 7th December, 2018 and 22nd February 2019.

IN OPEN COURT

COR: BATTS J

[1] On the 22nd day of February 2019 I announced my decision in this matter. As a result, the following Orders were made:

1. Judgment for the Defendant on the Claim and Counterclaim.
2. Damages on the Counterclaim assessed at $59,091,522.00.
3. Interest at 3% per annum from the date of judgment until payment.

4. Costs to the Defendant on the claim and counterclaim to be taxed if not agreed.

[2] This judgment is the fulfilment of my promise to put the reasons in writing. Its preparation has been delayed by the rather unhelpful manner in which the relevant bundles of documents were prepared. Although both counsel must be commended for agreeing three bundles of documents, which were admitted respectively as exhibits 1, 2 and 3, they were not all paginated. It has made the location and identification of documents referenced rather difficult. The profession is reminded that bundles ought to be properly paginated.

[3] The Claimant and Defendant entered into a contract for services after a tender and bidding process. The Claimant, by that contract, agreed to mine and process limestone and shale at the Defendant's limestone quarry. Specifically, the Claimant was to blend, load, screen, haul and crush shale, and to rip, load, haul, screen, blend and crush limestone. It was an agreed term of the contract that work was to be carried out during the period 1st March 2014 to 31st December 2016. Before entering into the contract Mr. Gibbon Berry, the Claimant's Managing Director, visited the site along with representatives of the Defendant Company. The Defendant's representatives, also prior to the contract, examined the equipment to be used in the performance of the contract. The Claimant alleges that the Defendant negligently approved the equipment as suitable when it was not. The Defendant, on the other hand, says that the appropriate equipment was said to be available when it was not but that which was shown to them appeared satisfactory.

[4] The Claimant says that it advised the Defendant that it was experiencing challenges obtaining the crusher which was to be used. Mr. Gibbon Berry stated that the Defendant, or its representatives, thereafter agreed to rent to it the relevant equipment. That equipment was already on the property of the Defendant. This, the Claimant states induced it to enter the contract and commence work. The Defendant counters that at no time did they assure the Claimant of the relevant equipment being available for rental from them. In this

regard the Defendant denies representing to the Claimant that suitable equipment would be made available. It was, they say, the Claimant who instead assured them that alternative equipment was being secured.

[5] In a letter dated 24th February 2014 from the Defendant to the Claimant, exhibit 1 item 4, the award of tender was confirmed and all the documents that contained the terms of the contract were outlined as follows:

> "*February 24, 2014*
>
> *Mr. Gibbon Berry*
> *Director*
> *SGD Construction & Equipment Limited*
> *P.O. Box 941, Constant Spring*
> *Kingston 8*
>
> *Dear Mr. Berry:*
>
> ***Re: T00785 – Raw Materials Processing – Limestone and Shale***
>
> *Caribbean Cement Company is pleased to inform you that further to our public invitation to tender, SGD Construction & Equipment Limited has been selected as the preferred supplier of services for the raw materials processing at the Limestone Quarry for the sum $1,120,066,708.63 and for the period March 1, 2014 to December 31, 2016.*
>
> *These works are to be performed in accordance with the described scope of works and in strict compliance with the "Caribbean Cement Company General Terms and Conditions of Contract – Revision 3" (which is a recently updated version). This document is available for download from our website – www.caribcement.com.*
>
> *The Scope of Works and the General Terms and Conditions of Contract will form part of a formal contract between SGD Construction Limited and Caribbean Cement Company Limited. We expect that the draft of this contract will be ready for review and execution within one month.*

We hereby request that you make the necessary preparations in order to commence these works by March 1, 2014.

If you require further information, please contact the undersigned at telephone numbers 928 6231-5 or via fax/email at 928-7507 or by email: aspencer@caribcement.com.

Yours truly,

Adrian Spencer
Material Manager/Secretary – Management Tenders Committee"

[6] The Scope of Works for "Raw materials Processing Limestone and Shale", exhibit 1 item 1, expressed the following contractual requirements:

Clause 1.02
"The Contractor shall furnish all labour, tools, equipment, handling, hauling, unloading, materials, insurance, taxes, and all other items necessary to complete the processing of limestone and shale in the Limestone Quarry."

Clause 1.03
"The Contractor is required to visit the site of the proposed works before tendering and to satisfy himself on matters or points which might affect his tender as no claim will be allowed in connection with any neglect or failure on the Contractor's part in this respect."

Clause 1.05
"Tenderers will be held to have satisfied themselves that they can obtain the materials specified and required for the works in such quantities at such date to enable them to complete the works within the time for completion stipulated."

Clause 5.01
"The Contractor shall supply at minimum the following equipment:

- *Two (2) loading equipment with one or both being excavators for loading in the field…*

- *One Loader (minimum size 950G or its equivalent) to clean around hopper and to load blended material into hopper*

- *One motor grader to maintain haul roads*

- *Water truck to wet haul roads*

- *Bulldozer for ripper limestone (D10 or its equivalent)*

To facilitate options two (2) and three (3) above, the following Equipment are required.

- *Crushing Plant(s) (see options under Brief Description of Works)*
- *Screening Plant(s) (see options under Brief Description of Works)*

These are the minimum equipment required to execute the job. Other suitable replacement will require the approval of the mining engineer."

The Caribbean Cement Company Limited General Conditions of Contract, exhibit 1 item 22 states:

Clause 2.2
"The clauses herein contain the general conditions of the contract and shall be deemed accepted by the Contractor by acceptance of the "Purchase Order" and the commencement of the Works apart from any statement clearly identified in the Purchase Order. The general conditions of the contract may be specifically supplemented by the "contract agreement" signed by both parties where deemed necessary by the employer."

Clause 10.1
"10.1 The Employer may but not unreasonably or vexatiously by notice by registered post or recorded delivery to the Contractor forthwith determine the employment of the Contractor under this Contract if the Contractor shall make the default in any one or more of the following respects: -
…

> *10.3 If the Contractor is not executing the Works in accordance with the Contract or is neglecting to perform his obligations."*

[7] As a result of numerous failures, to meet the production levels specified in the contract, the Defendant issued a letter terminating the contract between the parties, exhibit 1, item 19, letter dated 7th July, 2014 from Caribbean Cement Company Limited to Mr. Gibbon Berry. On the 24th August 2016, the Claimant commenced this action for loss of profit and/or bargain and for breach of an agreement. The Particulars of Claim were amended on 31st October 2018. The Defendant, on 3rd December 2018, filed a Further Amended Defence and a Counterclaim for misrepresentation and breach of contract. The Defendant seeks to recover $59,091,523.51, which it states represents the costs incurred as a result of the Claimant's failure to carry out its contractual obligations.

[8] Counsel for the Claimant and Defendant each presented written and oral submissions. Counsel for the Claimant's submission was brief and focused on two issues. He submitted firstly that the Defendant failed to properly inspect and satisfy itself of the suitability of equipment to be used by the Claimant. This, counsel stated, is the duty placed on the Defendant in keeping with the General Conditions of Contract, specifically clause 28.2 which states (see exhibit 1 item 22):

> *"All tools listed in section 28.1 as well as welding plant, **Lifting Equipment**, cutting torch set, electronic/electrical analyzers or measuring devices as well as all tools (Electrical or Mechanical) must be inspected and approved by CCCL. An up to date copy of the relevant certificate is to be held at CCCL for record purposes. Once provided, it can be used for future work on the premises as long as it is still applicable.*
>
> *All motor vehicles to be used at our facilities by the contractor must also be approved by CCCL. A copy of the Checklists is available from the Safety Department for these inspections."*

Counsel for the Claimant further submitted that the Defendant had prior knowledge that equipment, stipulated in the bid, was not readily available to the Claimant. It therefore knew that the Claimant had intended to rent the required equipment. Counsel submits that Mr. Berry stated in evidence that, after the trip to the man at Osbourne Store, he notified the Defendant that he was unable to obtain the equipment he had intended to use. Even with this knowledge the Defendant still wanted to, and proceeded, with the contract. This, argued counsel, means that the Defendant breached its obligation to ensure that suitable equipment was readily available to the Claimant to carry out the intended contract.

[9] Counsel for the Defendant in his response asserted that, pursuant to the terms of the contract, the Claimant was to supply the necessary equipment at its own expense. The Claimant, he submitted, had examined the scope of works and agreed to perform all the works and adhere to the terms set out in the General Terms and Conditions of Contract. Counsel stated that the Purchase Order for the contract, exhibit 1 item 8, was provided on 7th March 2014. This followed representations, by the Claimant, that it would be in a position to commence operations. The work began, on 13th March 2014, days after the originally scheduled commencement date.

[10] The Defendant's counsel further submitted that commercial contracts consist of representations made by parties, which carry contractual force. In support of this submission counsel relied on the principle outlined in ***Halsbury's Law of England, 5th edition Volume 22***, paragraph 352:

> *"During the course of the formation of a contract, one of the persons who are to become parties to the contract may make representations to another such person. A representation is a statement made by one party (the representor) to another party (the representee) which relates, by way of affirmation, denial, description or otherwise, to a matter of fact or present intention. If untrue, it may be termed a misrepresentation.*

> *A representation of fact may or may not be intended to have contractual force; if it is so intended, it will also amount to a contractual term; if it is not so intended, a positive statement is termed a mere representation. The possible legal effects of a mere representation are considered elsewhere in this work."*

[11] It was further submitted that when determining whether the alleged representation forms part of the contractual terms, one has to look to the formal written contract prepared by the parties after negotiations have taken place. If the formal contract does not contain the alleged represented terms, the presumption follows that the alleged representation was not intended to carry any contractual force. In support counsel cited ***Halsbury's Laws of England, 5th edition Volume 22***, paragraph 353, which states the following:

> *"The legal effect of a contractual term differs from that of a mere representation; accordingly, it is necessary to determine into which of these two categories fall statements made by the parties during negotiations leading to a binding contract…Because, however, the intention of the parties seldom clearly appears, the courts have had regard to any one or more of a number of factors for attributing an intention. These factors should be regarded as valuable, though not decisive, tests.*
>
> *The factors [include]…*
>
> *Where, subsequent to negotiations, the parties enter into a written contract and that contract does not contain the statement in question, that may point towards the statement being a mere representation, though there have been cases where it has been found that such a preliminary statement constitutes a collateral contract."*

[12] It was submitted that the Claimant represented that it was capable, of sourcing the required equipment, and even showed the Defendant's representatives the equipment that it intended to use. The failure by the Claimant to utilize the equipment shown to the Defendant amounts to misrepresentation. The Defendant's counsel also submitted that it did not represent at any time to the Claimant that it would provide it with the required equipment to rent; nor was it

obliged to do so. Therefore any tolerance or assistance on the part of the Defendant, as it concerned the Claimant's obligation to supply the equipment, did not and could not give rise to a contractual obligation. Counsel submits that the Defendant's case in this regard is unchallenged and that the Claimant was responsible for securing the necessary equipment.

[13] I agree with the submission of counsel for the Defendant that, under the contract, the Claimant was expressly obliged to provide all equipment necessary for the fulfilment of the contract. There exists no term, in the documents relied on before the court, which stipulates that equipment necessary for the carrying out of the contract was to be provided by the Defendant, see clause 1.02, 1.03, 1.05 and 5.01 of the Scope of Works regarding the contractual requirement for equipment (exhibit 1 item 1). I do not agree that the Defendant failed to satisfy itself of the equipment's suitability. I instead find that the Defendant's representatives examined the equipment shown and which was, stated by the Claimant to be, available. Even Mr. Berry's witness statement, which stood as his evidence in chief, in paragraph 8 stated that the Defendant's agents visited the man at Osbourne Store with him to look at the equipment that was promised. The equipment shown, in particular the crusher, never became available.

[14] The Claimant at all material times had a contractual duty to secure and have available all equipment necessary to carry out its contractual duty. In a bidding process it is the duty of the bidder to ensure its ability to fulfil the contract for which it tenders. The Defendant by stipulating a right to examine equipment is doing so for its own purposes. It is not aiding the Claimant in the performance of its contractual obligations. The Defendant may have other concerns such as equipment safety. The Defendant may also wish to satisfy itself that the bidder has the capacity to carry out the contract. It is not doing so because of any duty to the Claimant, nor can such a duty be implied without more. This is not a case where the Defendant was asked whether equipment was satisfactory and, by reason of the advice given, the Claimant tendered. In any event, and as admitted

by the Claimant, the equipment shown to and certified by the Defendant never was used.

[15] I have carefully considered the second point advanced in oral submissions by counsel for the Defendant. This is that the Claimant was induced, into the contract, by a promise of rental of equipment which proved inadequate. However, there has not been sufficient evidence put before this court to satisfy me of the truth of the allegation. Many receipts and agreements were put in evidence, including agreements for equipment rental from Sanmil Enterprises Ltd dated 28th February 2014 (exhibit 1 item 5); Ground Works Equipment Services dated 7th April 2014 (exhibit 1 item 10) and Conveyance & Konstruck'shon Limited dated 17th June 2014 (exhibit 1 item 35). There is no receipt to show that the Claimant paid, to any agent of the Defendant, any sum concerning rental of equipment at the commencement of the project. There is documentary evidence, in the form of a minute of meeting dated 13th May 2014 (exhibit 1 item 16) and invoices no. 1020490 dated 27th March 2014 (exhibit 1 item 9), 1021565 dated 30th May 2014 (exhibit 1, item 18), and 1022862 dated 31st July 2014 (exhibit 1 item 20) that the Claimant rented some equipment from the Defendant. This occurred after the contract commenced and was regarded as a temporary fix whilst the Claimant sorted out the issues it was having. It is clear that the Claimant was advised that the machine rented was old and unreliable, see minute dated 9th May 2014 (exhibit 1 item 32).

[16] During cross- examination Mr. Gibbon Berry admitted that the Claimant understood that it was its duty to secure the necessary equipment. The following evidence was given:

> *"Q: In witness statement you see para 4, you say that Latoya Thomas said you need to show that the equipment you had available. And in para 6 she asked you if you had someone to rent from*
>
> *A: Yes*

Q: Suggest that Carib Cement did not communicate to you that it would make equipment available to you for rental

A: Please repeat

Q: Repeated

A: I disagree

Q: Para 7 of witness statement was that man in Osborne Store employed to Carib Cement

A: No sir

Q: Was it your intention to rent the equipment from the man in Osborne

A: Yes

Q: You agree with man in Osborne for rates, rental and moving equipment

A: Yes

Q: Steps you took to secure equipment necessary to performance of the contract

A: Yes

Q: At all times SGD responsibility to have available to it the equipment necessary to perform the contract

A: Yes"

Following which Mr. Berry gave further evidence:

"Q: Go to page 4 scope of works clause 5 loading hauling, provide haul trucks

A: Yes

Q: Agree that was obligation

A: Yes

Q: Clause 6 crushing read

A: (Reads out loud)

Q: The crushing that SGD agreed to with Carib Cement was based on crushing with a mobile crusher. You agree SGD responsible to provide mobile crusher.

A: Yes sir

Q: Page 7 scope of works clause 5 specification and equipment

A: (Reads out loud)

Q: You agree that section are some options under clause 4

A: Yes sir

Q: Having tendered for option 3 SGD was required to supply the equipment listed and 5.01

A: Yes

Q: That included a crushing and screening plant

A: Yes sir"

[17] In support of my decision to accept the Defendant's evidence, that it was the Claimant's sole obligation to provide the necessary equipment, I refer also to exhibit 2, page 49 letter dated 25th February 2014, from the Claimant to the Defendant. It states as follows:

"Mr. Ken Whiltshire
Technical Operations Manager
Caribbean Cement Company Limited
Rockfort, Kingston

February 25, 2014

Dear Mr. Whiltshire,

Re: Mobilization for Mining Operations at Caribbean Cement Company

We acknowledge receipt of your letter dated Monday, February 24, 2014 on the said date informing us of the award of contract to carry out processing of raw materials on your quarry site at Rockfort, Kingston. We have completed

preparation of excavating, loading and ancillary equipment which we will mobilize by Friday, February 28, 2014.

We are however experiencing significant challenges with the crusher which we had secured for the project and as such are exploring alternative arrangements. We are presently in negotiations with a number of equipment suppliers for appropriate crushing plants necessary to adequately meet the production requirements. The unit in the equipment list which was submitted on February 20, 2014 is a Cedar Rapids 5048 Crusher. We are now in process of securing crushing plant with the following specifications:

Crusher

- *Two each 22 x 50 Telsmith Jaw with Grizzly Feeder (3'x20') set at 4 opening*
- *Crusher capacity-300tph*
    - *Screen*
- *6'x16' Double Deck Screen*
- *Capacity 1000tph*

The proposed layout of the plant will enable us to screen all material below 4" prior being fed to the crusher. The feed volume will ensure that approximately 300tph of material is fed to each crusher. The 4" minus material from the grizzly feeder would then be fed to the main screen to ensure that material below 1" is rejected. The material from the crusher will be fed directly to the screen to ensure that the desired product of 1"-4" be achieved. This will ensure product delivery of 500tph with excess capacity.

Based on the challenges which we are currently experiencing, we humbly request an additional 2 weeks to mobilize the crushing plant to the site.

We are committed to ensuring that all safety and production targets are met during the operations.

Yours truly,

Gibbon Berry
Managing Director"

[18] The Claimant thereby represented that it had made arrangements for the equipment to be mobilized. This to me does not depict a company that was

induced into a contract. It in fact shows one party to the contract acknowledging its responsibility to secure equipment for the project. In that letter the Claimant states that, but for one piece of equipment for which they were in the process of exploring alternative arrangements, they were ready to commence the carrying out of the contract.

[19] Clause 5.01 of the Scope of Works states that a minimum size CAT D10 bulldozer or its equivalent would be necessary to facilitate the ripping. Mr. Collymore Bulgin during cross-examination admitted that a D10 was required by the contract. He also stated that a D10 had more power to rip harder material than a D9 and continued:

> "*Q: Suggest issues of breakdowns with mobile crusher, difficulties with staff hired by contractor, breakdown of excavator and haul trucks, late delivery and assembly of the screening plant, incapacity of D9 bulldozer were observed throughout life of contract*
>
> *A: Yes*
>
> *Q: Suggest these issues were major reasons why contractor could not meet contract target*
>
> *A: Unrealistic expectations*
>
> *J: Answer the question*
>
> *Q: All these issues were major reasons why contractor was not able to meet production targets*
>
> *A: Yes"*

Mr Bulgin was the Claimant's expert, and had worked for the Claimant on the project.

[20] The minutes dated 14th March 2014 prove that, a D9 was used by the Claimant instead of the D10. The D 9 was of a lower capacity. I find that this impacted the Claimant's ability to perform the contract. The minutes also support the fact that

there was frequent equipment breakdown and breakdown of haul trucks, see for example minute dated 13th May 2014, exhibit 1 item 87.

[21] During cross-examination Ms Latoya Thomas, the Defendant's witness, said that the purchase order for the contract was given prior to the Defendant being notified of the equipment's unavailability. She stated that they were notified of the difficulties in securing the relevant equipment only after issuing the purchase order and, that the purchase order would not otherwise have been given to the Claimant. This is contrary to the documentary evidence. The purchase order no. 67635 is dated 7th March 2014 (see exhibit 1 item 8). This is after the Claimant's letter dated 25th February 2014 advising of its difficulties (see Para 17 above). In this regard, I do believe the witness was mistaken. I do not find that this mistake is fatal. That letter of the 25th February 2014 also assured the Defendant that the Claimant would be securing alternative equipment to carry out the contract. The Claimant even listed the equipment that it was in the process of securing and assured the Defendant that it would be able to carry out its contractual obligations. The Claimant requested, and was granted, an additional two weeks in order to mobilize the equipment listed. Nowhere in that letter did the Claimant state, or even suggest, that the equipment being secured was to be provided by the Defendant or an agent of the Defendant. The fact therefore, that the Defendant proceeded with the contract, on the faith of representations by the Claimant that the equipment would shortly be acquired, cannot be a basis of complaint by the Claimant.

[22] The Claimant has stated that the equipment rented from the Defendant was in constant need of repair. However, it is not the Defendant's duty to repair equipment used during the course of the contract, nor is there evidence of terms of rental which placed that onus on the Defendant. At all material times it was the Claimant's contractual duty to secure adequate equipment. A decision to rent some of that equipment from the Defendant does not displace that contractual obligation. The Claimant cannot, in these circumstances, rely on the breakdown

of equipment rented from the Defendant as a basis to excuse its inability to properly carry out its contractual obligation.

[23] The Claimant insisted that it was unable to secure funding, to get alternative equipment, because the Defendant had failed to provide it with a contract (see exhibit 1 item 30). However the Claimant did not, either before experiencing problems with the contract or at the time of tender, inform the Defendant of its intention to secure a loan in order to perform the contract. Therefore the Claimant is in no position now to argue that the Defendant's failure to provide it with a written contract was relevant. In any event the Claimant did send the draft contract for Claimant's review see, exhibit 2 item 87 minutes of 13th May 2014 and exhibit 2 items 128 and 129 email dated 16th May 2014. Mr. Berry's evidence was ambiguous, see the following:

> *"J: At the time of tender did you intend to borrow money to perform contract*
>
> *A: Yes, sir*
>
> *J: Was this disclosed to Carib Cement at time of tender*
>
> *A: No sir*
>
> *J: Which is true*
>
> *A: It was an error I did tell Carib Cement at time of tender*
>
> *Q: Was it oral or in writing*
>
> *A: It was oral"*

I do not accept that the Defendant was made aware, at the time of tender, that the Claimant was relying on loan funds to carry its contractual obligations.

[24] Counsel also argued that the witness statements of Mr. Berry and Mr. Bulgin, as well as emails, make it clear that sufficient lead time was not given to the Claimant and its staff to enable effective planning for carrying out the work

instructions. This, counsel submits, lead to delays, low productivity and excessive fuel usage and costs. These factors made it impossible for the Claimant to achieve the goals set. Claimant's counsel says that the Defendant acted unreasonably, capriciously or arbitrarily in enforcing the terms of the contract and that this was a breach of its implied duty to the Claimant

[25] The Defendant submitted that the reference to the preparation of general or periodic mining plans does not create an obligation on the Defendant. In this regard counsel submits that the scope of works contemplates that the mining plan would be utilized by the Defendant to provide the Claimant with operational directions. Counsel submits that the Claimant was provided with the General Plan for the Limestone Extraction and Shale processing on 26th February 2014, see exhibit 2 item 50. The periodic plans were given to the Claimant in the form of work instructions. The formal production plan was provided, to the Claimant, with sufficient lead time to facilitate the Claimant's ability to carry out its works. The contract did not contain any express provisions mandating the Defendant to provide variations to instruction within a specific timeline. It was also submitted that there was no obligation owed to the Claimant to provide a documented formal production plan. The Defendant provided documents that contained variations in instructions periodically to facilitate the Claimant's operations. The Defendant says it had no obligation to provide a gradation curve to the Claimant, nevertheless the Defendant provided the Claimant with specific measurement brackets with a lower and upper margin as contained in the scope of works. Any delay was therefore the result of the Claimant not having the required and suitable equipment for the execution of the contract and, not the lateness of any instructions provided by the Defendant.

[26] The evidence from Ms Latoya Thomas was, and I so find, that weekly work instructions were given the day that the work week began except on one occasion when it was provided days in advance, see exhibit 2 items 60 (Work Instructions to Contractors March 17, 2014 –March 23, 2014), 72 (Work Instructions to Contractors April 7, 2014 –April 13, 2014), 77 (Work Instructions

to Contractors April 14, 2014 –April 20, 2014), 81 (Work Instructions to Contractors April 28, 2014 –May 4, 2014), 86 (Work Instructions to Contractors May 12, 2014 –May 18, 2014) and 90 (Work Instructions to Contractors May 719, 2014 –May 25, 2014). Ms Thomas explained that the work instructions emailed on the same day were supplemental to instructions given on the ground.

[27] I do not find that the issuing of work instructions at the beginning of the work week amounted to a failure to give sufficient lead time or, that the Defendant acted unreasonably, capriciously or arbitrarily. I rely on exhibit 2 item 50 (General plan for the extraction of limestone and the processing of shale). The executive summary stated that "*Given the variations in the chemistry of the limestone, extraction and subsequent loading will be done from various sites at any given time.*" This should have put the Claimant on notice that the contract would entail ad hoc work instructions and some amount of mobility. Further, I do not find that insufficient lead time affected mobilization. The evidence of the Claimant's expert, during rather incisive cross examination, confirms that the major reasons for inadequate performance had to do with equipment inadequacies and, the Claimant's failure to acquire same from overseas rather than source it locally. The following evidence was extracted in this regard from Mr. Bulgin:

> *"Q: Your mobile crusher could not crush 500 tons per hour with a minus 3 scalper bar gap*
>
> *A: Correct*
>
> *Q: You just said that your mobile crusher was wrong crusher for this job*
>
> *A: I did not say that*
>
> *Q: You recall saying that for this job a crusher would need to be designed, constructed and mobilised*
>
> *A: Yes*
>
> *Q: That Telsmith Jaw crusher would not be able to handle job*
>
> *A: That one you described to me was not appropriate*

Q: Neither would 2 of them

A: Yes agree

Q: You said yours would not be the appropriate machine

A: No, mine was horizontal shift machine

Q: My question, is whether you remember saying the mobile crusher you provided was not the appropriate machine to handle the job

A: Yes

Q: So you agree SGD did not secure suitable equipment for the job they tendered.

A: Suitable equipment would require design etc, he did not secure suitable equipment for the job."

Later Mr. Bulgin said:

"Q: Within this plan provided to SGD two weeks before commencement, I suggest SGD was equipped to prepare a suitable work plan

A: No reason being to adequately supply the machine to carry out all these functions the machine would have to be designed specifically manufactured within two weeks. Machine available locally were used.

Q: If SGD had the right crusher the one that had to be costed they would have been equipped to carry out contract.

A: Yes, No. Even if had adequate equipment the plan two weeks before still not sufficient because the plan given was a general plan however the appropriate machine design would have taken into consideration the need to be extremely flexible in the quarry operation to meet the targets.

Q: Issue you now identify is that the local machines are not flexible enough.

A: Yes

Q: You agree it has nothing to do with Production Plan

A: Yes a lot to do with it.

Mr Bulgin later said:

"Q: When you removed yours in May 2014 it was because a replacement was secured by SGD.

A: I removed my machine when operations started to get counterproductive.

Q: It wasn't because SGD stopped paying rent for the machine.

A: They were behind on payment yes. That was one factor yes

Q: Was it one factor

A: It was a consideration yes

Q: Suggest issues of breakdowns with mobile crusher, difficulties with staff hired by contractor, breakdown of excavator and haul trucks, late delivery and accessibility of the screening plant incapacity of D9 bulldozer were observed throughout life of contract.

A: Yes"

[28] I do not accept the evidence of Ms. Latoya Thomas that work instructions were confirmed, during meetings with SGD, prior to the emails being sent confirming said instructions. This is because the minutes do not reflect this. There is nothing in any of the minutes that states that the work instructions were even discussed. I must note also that in relation to other issues, I find against the Claimant because the minutes similarly do not support these assertions. The Claimant says it did not raise the financing because of the Defendant's failure to provide a written contract. This was never complained about in the meetings. Secondly, the Claimant endeavours now to blame the Defendant's unreliable equipment and late provision of work instructions for its failure to meet targets. However neither of these issues were complained about in the minutes. The Claimant never sought to lay blame at the Defendant's feet or complain, at any rate, this was not reflected in the minutes. The point is underscored because each minute

commences with approval of previous meeting's minutes. Further there is one occasion when by an email dated 8th April, 2014 (exhibit 2 item 74) the Claimant asked that a minute be corrected. One would have thought that, had the Claimant's representatives been complaining about issues and had the complaints not been recorded, similar steps to correct the minutes would have been taken. The absence from the minutes of any reference to complaints, about provision of unreliable equipment or the late provision of work instructions, is therefore significant.

[29] As Managing Director of the Claimant Company Mr. Berry could have written, asking the Defendant to address its concern(s), at any time. There is no documentary evidence that the Claimant complained about the notice given to it concerning the work instructions or, the equipment supplied by the Defendant. Nor was there any allegation that the Defendant had a duty to repair the equipment. I find as a fact, and accept, that the time at which weekly instructions were provided had no significant impact on the Claimant's ability to perform the contract. Similarly although equipment, being a fixed crusher, was made available by the Defendant this was because of the Claimant's failure to secure its own. Its provision was unexpected assistance. The Claimant quite rightly did not, at the time, see its unreliability as a basis to excuse performance or for complaint.

[30] I find, on a balance of probabilities that the cause of the Claimant's failure to perform its contractual obligations related to its failure to source necessary and suitable equipment for the project. I have already referenced in detail the evidence of the Claimant's expert in that regard, see paragraphs 19 and 27 above. The Defendant's expert report provides further support for my conclusions. It is fair to say his conclusions were not successfully challenged. He stated, at page 9 of the Amended Expert Report of Gareth Gordon dated 9th November 2018 exhibit 3B, the following:

> 1. *"Late start up time: SGD was required to commence at the beginning of March, 2014. However, SGD's*

commencement date was March 17th, 2014 as a result of issues with securing the required equipment. This delay, pushed back production. (Minutes dated March 7th, 2014).

2. *Work schedule proposed: Carib Cements production hours are 6am to 2 pm and 2pm to 10pm for production which is a clear 16 hours per day, However SGD proposed 12 hrs daily which reduces the daily production hours by 4 hours.(Minutes dated March 7th 2014).*

3. *SGD proposed to use a D10 Dozer, for the purpose of ripping raw material. (See minutes dated February 28, 2014). However, SGD downsized to a D9 Dozer, which has lower capability. (Minutes dated March 14th, 2014).*

4. *The single Crusher introduced by SGD at the beginning of the Contract, seemed to be undersized or limited in its capacity, as it was only able to produce an estimated amount of 5000-6000 tons over three days (March 12-14, 2014). This indicates a production rate of between 1666.7 and 2000 tons daily. (Minutes dated March 14, 2014). SGD proposed adding a second mobile crusher, as would be a minimum requirement for raising the rate of production to near-contract levels. (Minutes dated March19, 2014).*

5. *Material had begun accumulating under the production belt, which required production to be stopped periodically for it to be cleared. SGD's operation therefore required additional equipment, to improve efficiency, whether it was stacker or loader to clear material away. (Minutes dated March 14th, 2014). The stacker was not added, as at March 25, 2014 or March 28, 2014 (Minutes dated March 25, 2014 and March 28, 2014).*

6. *The crusher employed was not able to produce accurately sized material to meet the particular size distribution (PSD) requirements of the Contract. This resulted in halted production, and the need for another unit to be mobilised and placed into operation. This was to be done by March 21st, 2014.*

7. *The Mobile Crusher provided by SGD, was also subject to frequent breakdown which interfered with*

SGD's ability to produce at a sufficient rate. (Minutes dated March 25, 2014 and March 21st, 2014). When further crushing machinery was provided, it could not be incorporated into the operation because it lacked ancillary equipment (pump) (Minutes dated March 28, 2014 and Minutes dated April 01, 2014).

8. *In assessing the tally sheets between the period May 13th to June 26th 2014 it was observed that at no time did SGD employ 15 trucks in the Quarry, as it proposed for the delivery of the limestone. From this data I have calculated an average figure for SGD's daily capacity to haul material to the Quarry. This figure shows that the fleet of trucks employed by SGD,on average, fell below the required amount in each of the categories contained in Appendix 4.[the appendix shows 7 trucks,78 trips,1988Tonnes and 25 Tonnes per trip].*

9. *Excavator breakdowns also contributed to slow feeds into the crusher, which resulted in lower capacity to produce. (Minutes dated March 14, 2014 and March 19, 2014)."*

He highlighted that malfunctioning and incorrect equipment were the main cause of the delay and the low production levels. It is worth noting, in this regard, that exhibit 2 item 50 (General plan for the extraction of limestone and the processing of shale) states in its executive summary that:

> "*The ability of the equipment to be mobilized accordingly is critical to the success of the operation. It is therefore important that the minimum requirement for mobile equipment as outlined in the scope of works is available at all times.*"

[31] The Claimant was aware that he had not secured all necessary equipment for the completion of the contract and should either, not have entered into the contract or, should have withdrawn before commencement of works. The Claimant did not even place itself in a position to swiftly repair equipment, or secure further equipment promptly, on equipment breakdown. In this matter the legal and evidential burden is on the Claimant to show that the Defendant was the cause of its loss. This, the Claimant has manifestly failed to do. I hold that the

Claimant failed to meet its contractual obligations because it never had or obtained the necessary equipment. This was quite likely due to inexperience in these matters see paragraph 5 of Mr. Berry's witness statement. The Claimant only retained an expert consultant in March 2014, see paragraph 14 of Mr. Berry's witness statement. It may have been prudent for the Claimant to have retained the consultant, and obtained his advice, prior to tender and not after contracting.

[32] Defence counsel submitted that the Claimant has failed to quantify its loss. Further, that as the Claimant is seeking to recover profit that it alleges would have been earned had the contract been performed, the measure of such damages is the benefit he would have received under the contract had it been performed (see ***Halsbury's Laws of England, 5th edition, Volume 29***, paragraph 502). Given my finding on liability, I do not find it necessary to decide the matter of damages or the appropriate measure.

[33] Having reached the conclusion that the Claimant was the party in breach of the contract, I find that the Defendant is therefore to be compensated for loss as a result of the Claimant's breach. Damages on the Counterclaim will therefore be considered.

[34] The Defendant particularized its losses namely additional cost of alternative operations, overtime, and costs to adjust hammers. Counsel submits that it is entitled to expectation or reliance loss, citing ***Addis v Gramophone [1909] AC 488 at 494***. He submitted that the law will compensate a party for the difference between the contract price of a terminated contract and the market price to which the innocent party is then subjected. The rationale, for this form of compensation, is to allow the innocent party to be placed in the position that it would have been in had the contract been performed. In other words, counsel for the Defendant submits, it is entitled to be compensated for the increased price it had to pay to alternative operators. The Defendant further submitted that an innocent party is entitled to recover expenses that would not have been incurred had the contract

been duly performed, in addition to those expenses which would have been incurred in any event but were wasted due to the Claimant's breach. I agree with these submissions.

[35] There is no dispute that the Defendant had to retain another contractor to carry out the work that the Claimant had contracted to do. The evidence of the Defendant's consequential loss is to be found in the witness statement of Latoya Thomas. She states that the Defendant incurred $12,746,071.55 for blending, loading and hauling shale (the difference between the costs incurred by Caribbean Cement Company and that which it would have paid under the contract). Costs amounting to $45,484,534.10 were incurred for loading and haulage of limestone, and $860,915.86 for adjust hammers. In total the Defendant's consequential loss is $59,091,522.00. The witness statement of Ms. Thomas was admitted as her evidence- in-chief. She was not cross-examined on this aspect of her evidence. This suggests acceptance of its truth. The evidence of consequential loss given by Ms. Thomas is accepted. The Defendant is entitled to the sum of $59,091,522.00 as claimed and proved.

[36] In the result judgment was entered for the Claimant against the Defendant in the amount of $59,091,522.00. Interest was awarded at 3% from the date of judgment until payment. Costs were awarded to the Defendant to be taxed if not agreed.

David Batts
Puisne Judge