[2021] JMCC COMM. 26

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU2019CD00052

BETWEEN	**EQUILIBRIO SOLUTIONS (JAMAICA) LIMITED**	**CLAIMANT**
AND	**PETER JERVIS & ASSOCIATES LIMITED**	**DEFENDANT**

IN OPEN COURT

Mr Kevin Williams and Mr David Ellis instructed by Grant, Stewart, Phillips & Co Attorneys-at-Law for the Claimant

Mrs Daniella Gentles-Silvera, Ms Katherine Williams and Mr Aon Stewart, instructed by Knight Junior Samuels, Attorneys-at-Law for the Defendant

Heard: 10th, 11th, 12th, 13th, 14th, 17th, 21st May and 30th July 2021

Contract for services – No single written document containing the terms – determining scope of agreement –

General Consumption Tax- Whether payable- Whether Defendant agreed to pay

LAING, J

BACKGROUND

[1] The Claimant is a company registered under the Companies Act of Jamaica and having its place of business at Suite #3, 29 Munro Road, Kingston 6 in the parish of St. Andrew. Mr John-Paul White ("Mr White"), is its Managing Director.

[2] The Defendant is a company registered under the Companies Act of Jamaica and having its place of business at 49½ Upper Waterloo Road, Kingston 10 in the parish of Saint Andrew. Mr Peter Jervis ("Mr Jervis") is the Manager of the Defendant.

[3] On or about 10th June 2011 the Defendant entered into a contract with the National Works Agency ("the NWA") for the restoration of the drainage system in Kingston and Saint Andrew ("the NWA Contract"). Subsequently, in or around July 2011 the Defendant requested the Claimant to perform services of project management and quantity surveying. This was in relation to the drainage system repairs ("the Project") pursuant to the NWA Contract. Mr. White asserted that by letter dated the 7th of July 2011 the Claimant outlined its initial fee structure of $29,000,000.00 to undertake the work for which the Claimant's services was then being contemplated, thus advising Mr. Jervis that:

i. the original completion date is at the end of September 2011 for the completion of the works;

ii. the Claimant was nonetheless prepared to include in the original contract sum of $29,000,000.00 any additional time/work required for completion up to 30th November 2011; and

iii. the original contract sum of $29 million included projected payment requirements for a final payment on 20th October 2011 of $5,500,000.00 to complete the payment of total fees.

[4] The NWA contract extended beyond the six (6) month period the Claimant had initially contemplated. Consequently, the services provided by the Claimant to the Defendant were also extended.

The Claim

[5] The Claimant admitted that the Defendant has made payments in the sum of $40,475,198.55 for the work done by them. However, the Claimant asserted that

Defendant failed to pay the balance of $24,313,601.51 on the adjusted contract sum. It is further asserted that the Defendant failed to pay General Consumption Tax (GCT) on the final adjusted contract sum of $64,583,528.06 which amounts to $12,740,238.48. Accordingly, this has formed the basis of this claim in the amount of $37,953,839.99 which the Claimant is asserting is due to it.

[6] The Defendant has asserted that the Claimant has been paid in full for the work performed. Its defence is that on or about June 2011 the Defendant sought a proposal from the Claimant for some of the services required under its contract with the NWA. They provided the Claimant with a copy of the NWA Terms of Reference and a sample of the contract document from the NWA. The Defendant's case is that the fees proposed by the Claimant were agreed. However, the payment schedule was not agreed and the Claimant was made aware that any intended agreement to be entered into was subject to the NWA Contract. Therefore, the Claimant was aware that all outstanding issues in the contract between the Defendant and the NWA would affect the proposed subcontract between the Claimant and the Defendant.

[7] The evidence of Mr Jervis is that in late August 2011 the Defendant received a document from the Claimant entitled "Terms of Agreement", dated July 2011. He said he reviewed the document and indicated to the Claimant that he could not sign such a tight and binding agreement as the Defendant had yet to settle the terms with the NWA including the position in respect of GCT. However, he agreed to Appendix A which set out the agreed sum of $38,168,000.00 and the breakdown of same.

[8] The Defendant's position is that it has paid all the sums due under the contract between it and the Claimant. As it relates to GCT, the Defendant maintains that its contract with the Claimant was subject to the terms of the NWA Contract and that the NWA Contract made no provision for the payment of GCT. Furthermore, the services provided by the Claimant are exempt from GCT pursuant to ***Schedule 3 Part 2 items 1 (b) and (e) of the General Consumption Tax Act.***

The law relating to the formation of a contract – a brief summary

[9] The law of contract provides that for there to be a valid contract there needs to be an intention to create legal relations, an offer, and by the acceptance of that offer an agreement and consideration. Contracts may be formed by the parties signing a written document which embodies all its terms. However, a contract can also be entirely oral or it may be partly oral and partly in writing.

[10] The determination of whether an agreement has been reached by the parties is usually relatively straightforward where there is a well-written contract. It sometimes proves to be problematic where there is an oral component and this is one such case. The parties did not execute a written document embodying all the terms of their agreement. The Court is not required to practice alchemy and conjure a contract from thin air. What is necessary is for the Court to examine the evidence as to the terms which the parties have asserted form a part of the contract, based on oral agreement and/or conduct. For this reason, it is necessary for me to assess the interaction between the parties and deconstruct the agreement between them into distinct component parts, in order to determine what constitutes the legal agreement. I will thereafter make findings using this template.

[11] Chitty on Contracts, 23rd edition, chapter 2 paragraph 43 defines an offer as:

> *…a definite undertaking made with the intention (which may often be objectively ascertained) that it shall become binding on the person making it as soon it is accepted by the person to whom it is addressed.*

It is distinguishable from an invitation to treat which is not made with that intention.

[12] A letter of intent is a document which, when utilized, usually precedes the entry into a formal contract. It can constitute an offer. In the case of ***Cunningham v Collettt and Farmer*** *[2006] All ER (D) 233 (Jul)*, Justice Peter Coulson made a number of observations which are apt.

> *90. Thus, so it seems to me, a letter of intent can be appropriate in circumstances where:*

> *i) the contract workscope and the price are either agreed or there is a clear mechanism in place for such workscope and price to be agreed;*
>
> *ii) the contract terms are (or are very likely to be) agreed;*
>
> *iii) the start and finish dates and the contract programme are broadly agreed;*
>
> *iv) there are good reasons to start work in advance of the finalisation of all the contract documents.*
>
> *In those circumstances I consider that, if the employer wants the work to start on site promptly and the contractor is also keen to commence work, then a careful letter of intent can be appropriate.*
>
> *91. It is important to stress, however, that, if the parties enter into a letter of intent of this type, there is a clear risk that agreement will not be possible on all the matters necessary to give rise to the full building contract and that, if there is no such agreement, no principal contract will ever be entered into. It seems to me that that is an inevitable risk of any letter of intent which creates respective rights and obligations, no matter how carefully it is drafted. The point of the careful drafting, however, is to minimise the risk, to both sides, if no contract eventuates. After all if, pursuant to a letter of intent, the contractor carries out a fixed amount of work, or an amount of work limited by a particular sum, but no final contract can be agreed, then the contractor is paid for the work that he has carried out in accordance with the letter, and the employer looks elsewhere for another contractor to carry out the bulk of the work. In such circumstances, there should be no significant loss to either side.*

The background to the 7th July 2011 Letter

[13] The evidence of Mr. White is that he had discussions with Mr. Jervis about the possibility of the Claimant providing services to the Defendant in general. When the Project came up Mr. Jervis reached out to him based on the Claimant's expertise and experience which was in alignment with the needs of this Project. This was sometime in February or March 2011. Mr. White explained that at this time they spoke about the nature and scope of the Project and Mr. Jervis asked him to put a price/cost proposal together because the majority of services required would have been performed by the Claimant. The smaller portion, being engineering works, would be done by the Defendant. Mr. White admitted that he was provided with a document entitled Engineers Proposal for Consultant Services. He stated that this was one of the documents which he looked at in order to arrive at his fees in early February 2011. He said the other document he looked at was a listing of various locations to be worked on.

[14] Mr. White stated that he and Mr. Jervis met again in June 2011 to discuss the Project and at that stage he went through a document entitled "Terms of Reference" and the same list of various sites to be worked on. He agreed that the Terms of Reference set out the scope of the works which was to be done on the Project. He also agreed that the Terms of Reference captured the scope of the works which the NWA wanted the Defendant to carry out on the Project.

[15] Mr. White was directed to the list of the locations and the type of damage at each location that had to be repaired. There were 41 locations in total. He explained that when he and Mr. Jervis met in June 2011 they went through the documents, and among other things, they discussed the scope in terms of locations. They also discussed the timelines within which that work had to be done, since it was an emergency and the expectation of the NWA was that all the locations would be completed within 3 to 4 months. He said it was on that basis that he discussed with Mr. Jervis an approach and put together the Claimant's fee structure to the Defendant, in order to match the scope required of the works.

[16] He stated that there were 19 items on the Terms of Reference but denied that he went through the 19 items and put a cost for each item. He asserted that what he did after noting the 19 items, was to give the Defendant a lump sum fee structure which is contained in the Claimant's proposal in the amount of $29 million.

[17] The 7th July 2011 Letter features prominently in this case. It indicated that the Claimant's fees to provide the subject services (which the caption describes as Program Management & Quantity Surveying Services) will be in the amount of JA$29,000,000.00. It is helpful to reproduce the material portions thereof as follows:

> *We refer to our letter on the subject dated July 7, 2011 which is attached for easy reference.*
>
> *Our services commenced on Monday 18th July 2011. Our efforts will be spearheaded by our three Program Managers namely,*
>
> *Mr. Laurence Crighton*

Mr. Ewart Campbell

Mr. Nicholas Zaidie

Since the commencement of our services, we have visited forty (40 no.) of the forty-one (41 no.) locations as defined in the Terms of Reference. These visits were conducted with Mr. Sherwin Dennis of the NWA.

As a matter of interest, we have also commenced the creation of the (sic) As a result of our discussions on the above, we hereby confirm that our fee to provide the subject services for the forty-one (41 no.) locations will be in the amount of Twenty-Nine Million Dollars) JA$29,000,00.00)

We further acknowledge your 'desire' to have the subject works completed by the end of September 2011. We have taken into account the risks associated with the nature and magnitude of the works, as well as the possible impact of unforeseen weather conditions that may affect the desired completion date. As such our fee will cover any additional time required for completion up to a date of November 30th, 2011.

We are presently mobilizing our resources in order to officially commence our services on Monday 11th July 2011. As a priority, we will be reviewing the projects which are about to commence in an effort to validate the established contractual sums. We will also supply the additional required documents and data (i.e., specifications, conditions of contract, etc.) to enable the associated contracts to be duly executed.

In accordance with the overall Terms of Reference (as supplied by you) upon which our fee is based, we hereby submit our projected payment requirements:

Deposit/Retainer upon commencement	*$9,700, 000.00*
Interim Payment #1 (August 19th 2011)	*$7,800,000.00*
Interim Payment #2 (September 20th 2011)	*$6,000,000.00*
Final Payment (October 20th 2011)	*$5,500,000.00*
TOTAL FEES	*$29,000,000.00*

The deposit will cover our mobilization costs (equipment, utilities, personnel, etc.)

We look forward to your favorable response on the matter.

Sincerely,

EQUILIBRIO SOLUTIONS (JA) LIMITED

Was the 7th July 2011 Letter an offer?

[18] I find on the evidence that the 7th July 2011 Letter was an offer. It was made by Mr. White on behalf of the Claimant with the intention that it would become binding on the Claimant if accepted by the Defendant.

[19] Chitty on Contracts 23rd edition, chapter 2 at paragraph 48 states the following:

> ***In general.*** *Two main rules govern the acceptance of an offer. The first is that there must be positive evidence from which the court may infer an acceptance: this may consist in words, in writing or in conduct; it may not consist simply in intention, for the mere mental acceptance is not enough. The second rule is that the acceptance must be communicated to the offeror…."*

In support of this statement of principle, Counsel for the Claimant referred to the case of ***CRS GT Limited v McLaren Automotive Limited and Others*** *2018 EWHC 3209 Comm* in which Phillips J sitting in the Queen's Bench Division identified and outlined the relevant legal principles which are equally applicable to this case as follow:

> ***The relevant legal principles***
>
> *125. In* ***RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG (UK Production)*** *[2010] 1 WLR 753 SC the Supreme Court, at 45, set out the general principle as follows:*
>
> > *"Whether there is a binding contract between the parties and, if so, on what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."*
>
> *126. As appears from that summary of the approach, there is a distinction, which will often be easier to state than to apply in practice, between (i) an agreement in principle, which remains incomplete and not binding because important terms have not been agreed, and (ii) a complete binding agreement, notwithstanding that points of detail remain to be settled. Chitty on Contracts 33rd ed. explains the distinction as follows:*

> *"2-120* ***Agreement in principle only.*** *Parties may reach agreement on essential matters of principle, but leave important points unsettled so that their agreement is incomplete. It has, for example been held that there was no contract where an agreement for a lease failed to specify the date on which the term was to commence; that an agreement 'in principle' for the redevelopment and disposal of residential property, which specified core terms but left important matters, such as the timing of the project, for future discussion was an 'incomplete agreement and so did not amount to a binding contract… That an oral contract for an estate agent to find a buyer was incomplete where the parties had failed to specify the event which would trigger the agent's entitlement to commission since such contracts do not follow a single pattern… In such cases, moreover, '[i]t is not legitimate under the guise of implying terms, to make a contract for the parties' since the court can only imply a term into an otherwise concluded contract….*
>
> *2-121* ***Agreement complete despite lack of detail.*** *On the other hand, an oral agreement may be complete though it is not worked out in meticulous detail. Thus an agreement for the sale of goods may be complete as soon as the parties have agreed to buy and sell, where the remaining details can be determined by the standard of reasonableness or by law… An even more striking illustration of this approach is provided by a case* ***[Bear Stearns Bank Plc v Forum Global Equity Ltd [2007] EWHC 1576]*** *in which parties had reached an all agreement by telephone for the sale of notes … The agreement identified the subject matter and specified the price; and it was held to be contractually binding even though it did not specify the settlement date and left many other important points to be resolved by further agreement. In all these cases, the courts took the view that the parties intended to be bound at once in spite of the fact that further significant terms were to be agreed later and that even their failure to reach such an agreement would not invalidate the contract unless without such further agreement it was unworkable or too uncertain to be enforced."*

[20] In **CRS** (supra) the court noted that where the issue for determination is whether a legally binding agreement came into existence on the basis of the correspondence passing between the parties, the correspondence must be viewed in its entirety. The court referred to ***Pagnan Feed Products*** *[1987] Lloyd's Rep 601*, in which the principles governing such an assessment were examined in detail. In this case before me, at the beginning of the engagement of the Claimant there was not a significant exchange of correspondence. There were two main items. These were the Claimant's 7th July 2011 Letter and the Defendant's response by letter dated 28th September 2011.

Were the terms of the 7th July 2011 letter accepted and therefore constitute the terms of a contract?

[21] Mr. White's evidence was that he did not see any of the contract documents between NWA and the Defendant apart from the Terms of Reference and list of sites until about the end of June to August 2011 but was aware that it was a lump sum contract for $69,000,000.00. He was also aware that the $69,000,000.00 would be allocated for the 19 items of work detailed in the Terms of Reference. He admitted that coming out of the June 2011 meeting it was agreed that the Claimant and the Defendant would both be working on the Project together but said that there was no agreement that they would split the scope of the work. There was no agreement to split the 19 items in the Terms of Reference 50:50 neither was it agreed that they would split the fees 50:50. However, it was agreed that the Claimant's fees would be $29,000,000.00.

[22] Mr White agreed that the Terms of Reference and the list of sites is what formed the basis of the agreement between the Claimant and the Defendant. He stated that the Claimant started to work on the Project sometime in July 2011. This assertion was supported by the 7th July 2011 Letter.

[23] Mr. White said he did not know definitively whether the NWA contract fixed a time for the Project to be completed. He was directed to the NWA Contract and to clause 12.3 thereof bearing the side note, "*Expiration of Contract*" which reads as follows:

> *Unless terminated earlier pursuant to clause GC 2 .9 hereof, this Contract shall terminate at the end such period as the parties may agree in writing.*

He conceded that it does not provide a date.

The importance of the Claimant's term stating a fixed time for completion

[24] Mr. White initially asserted that Mr. Jervis agreed to a time period for the Claimant's involvement and relied on the 7th July 2011 Letter. Mr. White denied that the referenced period was more of a desire or wish and stated that the time period was three months which would extend up to five or six months. He was directed by Mrs.

Gentles-Silvera to paragraph 2 of the letter. He agreed that completion by September 2011 was a wish or hope but that this was on the part of Mr. Jervis. He stated that he did not think it would have been possible to have completion by September 2011 based on his experience and the usual weather at that time of the year.

[25] The Impracticability of a three-month period was also supported by the evidence of Mr. Jervis on cross examination. He stated that he knew the NWA wanted forty one sites to all start within three months and there was an urgency to prepare them for starting. However, with eighteen sites without a construction contract and twenty two sites with a construction contract, that desire was ambitious. He further stated that given the time for tendering eighteen sites, completion in less than one year would be impossible to contemplate.

[26] Mr. White appears to have conceded that it was never agreed between himself and Mr. Jervis that the Project would be completed in six months. This is because he based his assertion of a time being fixed on the wording of the 7th July 2011 Letter. Mr. White said that initially, that is, prior to July 2011, the Project was an emergency procurement by NWA and was to proceed on the basis that all projects (sites) would be working at the same time frame of three months. That is the reason why he included the caveat that the Claimant's fee would be valid up to November/December of 2011 which would be approximately five to six months. He said that any conversation about six months would have been subsequent to the Claimant's proposal because if the original discussion was in respect of six months, then the Claimant's proposal would not have stated that it would extend the period to six months. He admitted that between the time he started in July to November 2011 was not six months, but five. However, he said three months but gave until November which would have been five months.

[27] It was common ground between the parties that at the point when the Claimant commenced its services to the Defendant on or about 18th July 2011, the physical works on the Project had started one month before on ten sites only. Counsel for

the Claimant highlighted a number of the contracts for these physical works and the fact that the time for completion for these contracts was six months. Mr. Jervis asserted that the duration of the construction contracts being for six months was the general starting point for NWA construction contracts and that this was an expectation.

[28] It was suggested to Mr Jervis that because when the Claimant started working one month had already elapsed since the start of the physical works this was the fact which informed the discussion between the Claimant and the Defendant. It was this fact which led to the 7th July 2011 Letter and the five-month period stated therein, being one month less than the six months provided for in the NWA contracts for physical works. Mr Jervis denied the suggestion.

The importance of the term requiring payments according to a schedule

[29] Mr. White admitted that the issue of reservations about payment from the NWA came up with Mr. Jervis and also the issue of the NWA only paying on certain deliverables being achieved. He also admitted that during the discussions Mr. Jervis advised him that the NWA would not be paying the deposit/retainer as raised in the 7th July 2011 Letter. Mr. White in his response to Counsel continued to assert the Claimant's position that its business was not with the NWA but with the Defendant. Mr. White was directed by Counsel to the Defendant's letter dated 28 September 2011 in response to the 7th July 2011 Letter which contains the following:

> *… Further, as you will appreciate, in light of the fact that the main contract has not been finalized, we are not in a position to agree that Scope of Works or your company's remuneration for this project until the final terms of the agreement between our firm and the NWA have been settled.*
>
> *…*
>
> *In respect of your letter of July 7, 2011, we acknowledge its contents as representing "proposed contract terms" which will be subject to review. Please be very clear that the final terms of any sub- contract between your company and this Firm will be subject to the terms of the final Agreement reached between our Firm and the NWA.*

> *Please be advised that no further work is to be done on this project until further notified by our Firm in writing.*
>
> *Kindly sign the enclosed copy of this letter in acknowledgment of the safe receipt of payments in the amount of Five million, one hundred ($5,100,000.00).*

Mr. White stated that this was two months after the fact that is, two months after the Claimant started provision of services.

[30] Mr. White was directed to the Claimant's letter dated 5th October 2011 in response to the Defendant's letter of 8th September 2011. He admitted that there was no insistence by the Claimant on the payment of $9,700,000.004 Deposit/Retainer upon commencement which was required in the 7th July 2011 Letter. He also admitted that nowhere in that letter of 5th October 2011 was it stated by the Claimant that the contract should be finished by September or November 2011 the latest. He stated that the 7th July 2011 Letter was the Claimant's proposed terms of financial reimbursement and that the Claimant's formal conditions of contract for services followed after. He was asked by Mrs. Gentles-Silvera if he agreed that the 7th July 2011 was not a firm proposal and his response was that it was an offer.

[31] Mr. White asserted that he signed a contract in relation to the Project and sent it to Mr. Jervis after the fact, maybe in August. It was sent after the proposal in July 2011. He conceded that that draft contract was not signed by the Defendant.

[32] It should be noted that there was no evidence that the draft had been signed by Mr. White either and the terms of that document is of no importance for the purposes of this judgment.

Was the Claimant's contract with the Defendant subject to the NWA Contract?

[33] Mr. Jervis confirmed during cross examination the Defendant's position that for the approximately two and a half months from 18th July 2011 to 28th September 2011, there was no contract in existence between the Claimant and the Defendant because there were no finalized terms between the Defendant and the NWA. He asserted that there were items which remained to be agreed between the

Defendant and the NWA caused by the absence of a schedule which would address issues such as whether NWA would pay the GCT associated with the Project.

[34] I find that this position of the Defendant on this point is without any merit. The issues which were alleged to be outstanding, including the issue of the payment of GCT were not issues which went to the heart of the NWA Contract and without which a valid contract between the Claimant and the Defendant would not be possible. Furthermore, other than this assertion in the Defendant's letter dated 28th September 2011 that there was no contract with the Claimant, the conduct of the parties does not support such a finding by the Court. I find that there is insufficient evidence to support a conclusion that there was agreement between the parties that any contract they entered into as between themselves would be subject to the terms of the NWA Contract for all purposes. For example that the payment of the Claimant's fees for services was subject to a corresponding payment of those fees by the NWA. As it relates to the issue of payment of GCT, I will address that subsequently.

Is the NWA Contract of any relevance in determining whether there was a contract between the Claimant and the Defendant?

[35] The intention of the parties was for the Claimant to have a sub-contract related to the NWA Contract. I have found that there was no agreement that any contract between the Claimant and Defendant was strictly subject to the NWA Contract. However, that notwithstanding, for reasons of practical necessity, any sub-contract would have had to be dependent on one element of the NWA Contract. This is so particularly in respect of the scope of the works to be performed by the Defendant under the NWA Contract. The NWA contract contemplated the need for subcontractors and defined "Sub-Consultant" to mean:

> *"… Any person or entity to whom/which the Consultants subcontract any part of the Services in accordance with the provisions of Clauses 3.5 and 4;"*

There are a number of terms of the NWA contract which clearly demonstrate the influence it was anticipated that it would have had on any subcontract which would have been made by the Defendant. These were highlighted by Mrs. Gentles-Silvera in her cross-examination of Mr. White and included the following:

> ***3.6 Consultants Actions Requiring Client's prior Approval***
>
> *The Consultants shall obtain the Client's prior approval in writing before taking any of the following actions:*
>
> *(a) appointing such members of the Personnel not listed by name in Appendix;*
>
> *(b) entering into a subcontract for the performance of any part of the Services, it being understood (i) that the selection of the Sub- consultant and the terms and conditions of the subcontract shall have been approved in writing by the Client prior to the execution of the subcontract, and (ii) that the Consultants shall remain fully liable for the performance of the Services by the Sub-consultant and its Personnel pursuant to this Contract.*
>
> *…*

Mr. White was also directed to clause 4.3 of the NWA Contract which requires that key personnel and Sub-consultants be approved by the NWA.

[36] The terms of the NWA contract are therefore of relevance to the extent that they may have had and in all likelihood, did influence the needs of the Defendant and by extension, the terms which it may have agreed with the Claimant.

[37] It is in this context that one has to analyse the reason given by Mr. Jervis for not having agreed to the time specified in the 7th July 2011 Letter. He explained that the issue of duration was not agreed because he had no power over the duration since this was within the exclusive control of the NWA. If the Defendant did not accept this term of the 7th July 2011 Letter as to duration, one must identify whether there were any agreed terms which constituted a legally valid contract, pursuant to which the Claimant commenced working on Monday 18th July 2011.

[38] I have noted the point on which Mr. Jervis was cross-examined extensively that prior to the 28th September 2011 the Defendant had not in writing asserted that there was no contract in existence between the parties. In particular Mr. Jervis'

admission that after the 7th July 2011 Letter he did not send a written response to the Claimant asking how it could have commenced providing services when there was no contract with the Defendant. This is a potentially important point, because it identifies conduct on the part of the Defendant which is capable of supporting a finding by the Court that the Defendant accepted all the terms of the 7th July 2011 Letter. However, notwithstanding the delay in advising the Claimant of that position, I do accept Mr. Jervis' evidence that he, on behalf of the Defendant, did not agree to the duration stated in the 7th July 2011 Letter for the reasons he gave. On that basis I have concluded that there was no agreement between the Claimant and the Defendant on a critical component being that of duration of the contract.

[39] There were also other assertions made in the 28th September 2011 letter which were challenged in the Claimant's letter of 5th October 2011. However, those challenges have not caused me to reject Mr. Jervis' evidence about the absence of a clear duration under the NWA Contract and as a consequence the impact of that on the Defendant's non-agreement to the duration initially proposed by the Claimant.

[40] The contract as asserted by the Claimant to be contained in the 7th July 2011 Letter, viewed objectively, would not make commercial sense from the standpoint of the Defendant. This is because, it purported to fix a time for completion which was wholly independent of the time which may have been contemplated by the NWA which is the ultimate client. I have noted the evidence of Mr. White, in which he stated repeatedly, that because of the urgency of the situation it was stated that the Project would have been completed in three months. However, his own evidence is that such an expectation would have been unreasonable having regard to, among other things, the hurricane season. Notwithstanding the views that might have been expressed by the NWA initially, the evidence, to which I have already referred, is that the NWA Contract did not state a definite period for completion.

[41] Therefore, on the evidence, at the point the Claimant commenced working on or about 18th July 2011 there was no contract between the Claimant and the

Defendant. At that point, there was no agreement between the parties as to a period for the performance of the Claimant's obligations. This was an essential component of any contract by which the Claimant was to provide services to the Defendant because as Mr. White explained, the fees charged by the Claimant would be influenced, in part, by the amount of time spent providing those services. That is one reason he gave as to why in the 7th July 2011 Letter, a specific time period was stated. The lump sum fees of $29,000,000.00 was based on the conclusion of the Claimant's services within the specified timeframe ending 30th November 2011. In fact, the essence of the Claimant's Claim herein, is for an additional sum of money based in part on additional services provided, but also based on the additional time which the Claimant asserts that it had to utilize in providing the services.

The Court's conclusion that there was no agreed contract at the initial stage

[42] The Claimant's offer of the sum of $29,000,000.00 was therefore expressly subject to and conditional on a specified time frame. The Defendant did not at the point of the Claimant's commencement of work on 18th July 2011 agree with the specified timeframe, (notwithstanding that it found the sum of $29 million to have been acceptable in principle having regard to the Terms of Reference work related to the forty one sites). Consequently, the acceptance by the Defendant of that sum for the anticipated works without a concomitant agreement on the duration for the works, would not have been sufficient to constitute a valid and enforceable contract between the Defendant and the Claimant.

The effect of there having been no contract at the initial stage

[43] The situation where a professional may commence working without there having been a contract is not that unusual. It is addressed in Wilmot-Smith on Construction Contracts, 3rd edition follows:

> ***What happens when work is done and there is no contract***
>
> *1.64 Every request for work done (be it for work and materials or professional work by an architect or an engineer) will normally have implied within it a promise to pay for the work. So if an architect is asked to draw up plans and no agreement is made but the architect does so, then the request carries within it the implied promise to pay for the work, and the law will therefore require payment to be made if the work is done.*
>
> *1.65 This is a very common situation. If a builder is asked to do work in an emergency and no agreement is made, for example, then the builder will be entitled to payment. With professionals, like architects, engineers, or surveyors, the legal solution is the same. However, the situation is normally less likely to be prompted by an emergency and more likely to be brought about by inattention to the formalities of an agreement or indeed their essentials (particularly price). A surveyor may be asked to carry out work with no price mentioned in situations where the employer is not focused on the essentials of an agreement because the project is still in its infancy. In that situation the professional is entitled to be paid for the work done.*
>
> *1.66 Given that there is no contract price agreed, the law implies or infers that there is an obligation to pay a reasonable price for the work. This is frequently referred to (even know that Latin is unfashionable) as quantum meruit.*

[44] For the reasons previously stated, I have found that up to the point at which the Claimant started working, no contract was agreed between the parties because of the absence of agreement as to time necessary as an ancillary condition to be attached to the proposed fee. Mr. Jervis stated in the Defendant's 28th September 2011 Letter that the Claimant was not authorised to start the Project. I unhesitatingly reject that assertion. I find that based on the preliminary meetings which led up to the 7th July 2011 Letter and the conduct of the Defendant up to the 28th September 2011 Letter, the Defendant consented to the provision of those services by the Claimant. The Defendant must have reasonably understood that the work would have been started by the Claimant unless it was given clear and express instructions not to proceed. In the absence of any clear instructions not to proceed, the inference is that the Defendant consented and agreed to the provision of those services.

[45] The fact that the Claimant proceeded in those circumstances before the formal written contract was executed in accordance with the parties' common understanding does not, by itself, create an insurmountable difficulty in analysing the Claimant's Claim. This is so because of the manner in which the parties

addressed this issue of the work already performed and the fact that the parties eventually progressed to the entry into a contract, which would have subsumed the issue of performance of services and the fees earned up to the date of the contract.

What was the effect of the NWA Variation?

[46] Mr. White agreed that after the Project commenced he was advised in late July 2011 by Mr. Jervis that the NWA was having budgetary constraints due to the International Monetary Fund ("IMF") program. Therefore, they did not have the money to pay for all forty one sites at that time and that they could not complete all the sites for the 2011 to 2012 fiscal year. Mr. White said he considered this a postponement or temporary cancellation of the NWA Contract which could have passed for termination. Mr. White's assessment does at first blush appear to be legally sound. However, the Defendant and the NWA treated the NWA Contract as having been varied in terms of its duration and not terminated. It is noteworthy that no new contract was executed between the NWA and the Defendant.

[47] Mr. White admitted that he was requested to produce a termination cost to date and was directed to that document which is Invoice PJAN 01, dated 12th August 2011. The first sentence of that document reads as follows:

> *As per the terms of our agreement as outlined in our letter dated July 7th 2011, and your instructions to terminate our services as of August 12th 2011, we hereby bill as follows:*

The document also contains an item labelled "*Termination Costs*" in the amount of JA$1,550,000.00 and was for a total sum of $6,653,296.50 including a sum of $990,916.50 for GCT at 17.5%. This claim was forwarded un-amended to the NWA by the Defendant under cover of a letter dated 15th August 2011. Mr. Jervis explained that typically, the invoice submitted by a subcontractor such as the Claimant, the Defendant would prepare a composite bill including the Defendant's fees but this was not done in respect of this first invoice. The issue of the format and content of this first submission and its inclusion of GCT has implications for

the GCT issue based on the Defendant's reaction to it and I will address this in greater detail subsequently.

[48] Based on the Court's earlier finding, that there was no agreed contract between the parties, the issue of quantum meruit (which literally translated means a claim for as much as is deserved) could be raised, at least in the context of strict academic legal analysis. If the issue is purely one of quantum meruit, this would not have posed any difficulty because Invoice PGAN 01 would have served to fix (within limits), the value of the Claimant's services in the absence of a contract. This analysis would have become necessary, if for example, the parties terminated their relationship at that point. As a practical matter, it did not become necessary because from the evidence the services already performed were considered by the parties as a part of the terms of the contract as agreed between the parties going forward.

[49] Mr. White said that not long after the request to submit the termination cost, the Claimant was asked indirectly to continue the work and so that claim *"pretty much became null and void".* Mr. White's characterisation of that claim, may not accurately describe what occurred as a matter of law, because the Court has determined that there was no contract in existence to be terminated when the Claimant was requested to cease work. What is important is that the Court has found that from the point the Claimant was asked to continue work, there is sufficient evidence from which the Court can find new terms which constituted a contract between the Claimant and Defendant. In ascertaining these terms, it is again necessary to further examine the influence and impact of the NWA contract, albeit the parties' contract was not "*subject*" to it.

What were the revised terms under which NWA required the Defendant to continue?

[50] Mr. White admitted that he and Mr. Jervis had a discussion about the work continuing in phases but said the discussion was in relation to two phases only at

that time, but admitted that the third phase came up for discussion eventually. He said what was discussed initially was that nine or ten sites would be done in phase one. He did not agree that it was raised that phases two and three would be started at the end of the 2012 hurricane season. Mr. White stated that the issue of concern was when the government would find the fiscal space to be able to spend as per the IMF agreement. That would be the following year, post April 2012.

[51] He agreed that after the NWA purported to cancel the NWA Contract there were still thirty locations on which work was to be done, and one of the items in the scope of work which remained outstanding was preparing monthly reports for the NWA, which was to be done by the Claimant on behalf of the Defendant.

[52] Mr. White was directed to a Report which he admitted having prepared. He admitted that as of 5th August 2011 the NWA had split up the Project in phases and in the first phase ten locations are listed. He conceded that at this stage there was no time limit for the remaining items.

What was the effect of the Claimant continuing after 5th August 2011

[53] The Project being split in phases had the effect of setting broad parameters for the duration of the contract between the Claimant and the Defendant. Having been advised that the Project was now being split into phases, it would have been patently clear to Mr. White that the Project would not be completed by 30th November 2011. This was the operative end date which was used by the Claimant to calculate the $29,000,000.00 which had been proposed as the original contract sum.

[54] At the point when the Claimant and the Defendant became aware that the NWA Contract would be done in phases, the Defendant had the option of not continuing the NWA Contract. The Claimant, did not at that point have a contract with the Defendant. It then had the option of deciding whether to provide services to the Defendant over the new anticipated time period as a result of the phasing of the Project to which the Defendant would have been subject and if so, at what fee.

What was the new time period for the Contract as at August 2011?

[55] It was suggested to Mr. Jervis that the NWA at some point subsequent to the 7th July 2011 Letter did agree the duration at eleven to twelve months with the Defendant. He said he could not recall any such agreement between the NWA and the Defendant.

[56] Mr. Jervis was directed to the Interim Payment Certificate of the NWA, Certificate 1 and agreed that the certificate stated a start date of 27th May 2011 and a completion date of 27th April 2012 which were identical to the dates used in the Extension of Time Claim.

[57] It is noted by the Court that the Certificate 1 states that it is "as at 12th August 2011" and two signatures represented thereon have an accompanying date of 22nd September 2011 with the third having 23rd September 2011. On the face of this document the duly authorised officers appear to have accepted the period stated as the duration of the NWA Contract as revised. I appreciate the observations of Mr. Everton G Hunter, the Chief Executive Officer of the NWA, that this is only a payment certificate and not a contract, but I have nevertheless placed weight on this document. I expect that the NWA officers would be mindful of the period represented as being the duration of the contract, on all relevant documents such as the Certificate. This is because there are obvious implications, including the possibility of disputes arising in respect of claims for services provided outside the contract duration as reflected in the certificate.

[58] In responding to a question posed by the Court, Mr. Jervis stated that the 12 month period was never stated or highlighted to him by the NWA. He said it was only in recent examination of the dates for the contract that the period on the 1st payment certificate was brought to his attention. He admitted that he was only just then made aware that the NWA contemplated a 12 month contract. He noted that a subsequent certificate showed a contract from June 2012 to June 2013 which he only personally identified during the trial.

[59] It was further suggested to Mr. Jervis that the Defendant's Extension of Time Claim in the amount of $18,874,810.33, which was submitted by a letter from the Defendant dated 4th November 2013 addressed to Mr. Sherwin Dennis, stated a start date of 27th May 2011 and a completion date of 27th April 2012. He explained that this was a claim made at the behest of the Claimant with the expectation that the NWA would give consideration to it and the structure and time were dictated to him by the Mr White. However, he emphasized that the Defendant's co-operation should not be viewed as agreement. It was suggested to him that this document was his exclusive creation which he denied. It was also suggested to him that Mr. White had not seen this document on until he was shown it while he was in the witness box and his response was that this was unlikely.

[60] Mr. Jervis was cross examined in respect of a letter dated 13th December 2013 from the Defendant addressed to Mr. Everton G Hunter of the NWA with the caption "*Re-The Extension of Contract for the Contract Administration Support Services CDB Funded-Tropical Storm Nichole Drainage Network Rehabilitation 2011"* which enclosed a document entitled "*Engineers Fees for Consultant Services*". The enclosure contains the following statement:

> ***Extension to Contract***
>
> *Original Contract.-12 Months to complete 41 sites. Actual Period of Engagement July 2011 to December 2013 Period of Inactivity August 2012 to December 2012. Active additional time 12 months.*

Mr. Jervis explained that in his view based on this letter and the document attached thereto, there was an extension of the NWA contract of twelve months and that it was that same twelve months extension for which the Claimant provided services to the Defendant. Mr. Jervis accepted the suggestion that on the basis of this letter and the mathematical calculations, the Claimant is similarly placed to make a claim for extended services but said that this would only be to the extent that the NWA accepted this proposal. He explained that it was the Claimant that had requested the Defendant to submit this claim and admitted that it had no supporting documents. It was suggested to Mr. Jervis that this claim was also his exclusive

creation to which he denied. It was also suggested to him that Mr. White only saw this claim after it had been submitted to the NWA and they had rejected it, but Mr. Jervis's response was that Mr. White would have seen it before it was submitted.

[61] It was further suggested to Mr. Jervis that implicit in the claim for $17,087,500.00 (that he exclusively created and forwarded to the NWA), was an admission by the Defendant that there is a proper basis for a claim by the Claimant for added and extended services. Mr. Jervis reiterated that he did not exclusively create the claim and that it was exploratory in its first submission since he was relying on an accommodation from NWA and not an entitlement. He explained that by the terms of the NWA Contract he was unaware of a proper basis for a claim and this was exploratory to ascertain what the NWA would agree to and what the Defendant would be eligible for on a formal claim. In response to the Court's question as to whether this was a mere experiment Mr. Jervis said that was a simplified explanation.

[62] Mr. Williams submitted that the absence of a GCT component on the two claims that were submitted to the NWA is evidence from which the Court can conclude that Mr. White had no input in their production. This is because, as was admitted by Mr. Jervis, Mr. White's position had consistently been that GCT was payable on the Defendant's invoices. Counsel submitted that it was unlikely that the Claimant would have resiled from that position in the final claims to the NWA.

[63] Even if Mr. Jervis was not the exclusive author of the 4th November 2013 claim for $18,874,810.33 or the 13th of December 2013 claim for $17,087,500.00, I do not accept that he would have been complicit in the use of a contractual period which had no basis in fact.

[64] Accordingly, I find that Mr. Jervis' use of (or at the very least acquiescence in the use of) the period of eleven months as representing the duration of the contract in the 4th November 2013 claim, and twelve months in the 13th December 2013 claim,

is further evidence supportive of a finding by this Court, that the parties were of the view that duration of the NWA contract was eleven to twelve months.

Conclusion on the issue of the parties' view of the duration of the NWA Contract

[65] On the totality of the evidence examined before, including the Certificate 1, I find that at some point prior to 12th August 2011 both the Claimant and the Defendant would have been of the view that the duration of the NWA contract had been fixed at eleven to twelve months. I have arrived at this conclusion even if, (and I make no such finding on this point), this was not so as a matter of law, since such a duration was absent from the NWA contract. A definitive finding could be made by a Court or other tribunal in other proceedings if called upon to do so.

Was there an agreed contract for the Claimant to provide services for twelve months?

[66] The implication of the Claimant continuing to work after it was disclosed that the duration of the NWA contract was going to be eleven to twelve months is that it expressly or tacitly accepted this as the duration of the contract between the Claimant and the Defendant. There is no evidence that at this point the Claimant indicated to the Defendant that his initially proposed fees of $29,000,000.00 would have to be increased if the Defendant was to provide services over this extended contract period. The scope of works over the period was already indicated by the NWA Contract and known to the parties. The Claimant and the Defendant having continued their relationship after these new parameters were fixed, leads to the reasonable inference that they were proceeding on the basis that these terms had been agreed. At this point a valid contract would have been concluded. This will hereafter be referred to as "the Sub-Contract", a term which will also encompass the subsequent variations.

[67] The fact that the Claimant had already provided some services would not be deemed to be past consideration and accordingly would not be a barrier to a contract being formed which would take account of those services. This has long

been settled as a matter of contract law by cases such as **Re Casey's Patents** [1982] 1 Ch. 104

[68] The fact that those services were already billed would have also reduced the room for dispute for the reason that if the parties could not agree on the terms, and especially fees, considering this increased duration, they could reassess their willingness to proceed with the contract to the new anticipated date of completion.

The September 28th 2011 Letter

[69] To the extent that the Defendant's September 28th 2011 letter stated that at the time the 7th July 2011 Letter represented "proposed contract terms" it was accurate. I have previously found that it did not constitute the terms of an agreed contract. However, I have also found that as at the latest date of 28th September 2011, there would have been the Sub-Contract on the terms as I have indicated.

[70] To the extent that the 28th September 2011 Letter issued instructions to the Claimant that no further work was to be done on the Project until further notified by the Defendant in writing, it did not constitute a termination of the Sub-Contract. Mr. Jervis admitted that his intention in issuing the 28th September 2011 Letter was to halt the work being done by the Claimant. Mr. Jervis agreed to the suggestion that despite the 28th September 2011 Letter to terminate services, the services of the Claimant were never terminated and continued down to the end of the Sub-Contract. As it turned out, those instructions were short-lived because as the letter from the Claimant to the Defendant dated 20th October 2011 demonstrates, twenty-two days later, the Claimant had done work in reviewing three payment applications and had recommended that these requests be accepted and processed as payments "on account". Mr. Jervis stated that this work was done on the strength of a new fee arrangement but there was no document evidencing this new fee structure.

[71] Mr. Jervis was questioned as to why the Defendant did not respond to the 20th October 2011 letter of the Claimant to remind it that its contract is terminated, by

asking why the Claimant was still doing work and indicating that the Defendant would not be paying. His response was that there was no need for that type of communication since the parties were operating on a new basis and were doing eleven sites and not forty-one. This is evidence which supports the Court's finding that there was the Sub-Contract which was in existence on the 28th September 2011 and which was not terminated by the Defendant's letter of that date.

Was there an agreement initially for a 50:50 split and was there a new arrangement agreed for the proportion of the phased works to be done by the Claimant and the Defendant?

[72] The point at which the NWA determined that the Project was going to be done in phases is a material juncture for purposes of the Court's analysis. Counsel on both sides spent a considerable amount of time in cross examination exploring the methodology employed in arriving at the Claimant's fees. Counsel also explored whether this was influenced at the outset by the proportion of work to be done by the Claimant and whether the fee was increased because of a corresponding increase in the proportion of work to be done following the decision by the NWA to complete the project on a phased basis. I have reviewed that evidence but I do not find it necessary to reproduce it in detail.

[73] By way of summary, Mr. White did not accept the suggestion made to him that because the work was going to be divided into three phases, he and Mr. Jervis agreed that rather than a 50:50 split of the work between the Claimant and the Defendant, the Claimant would be doing sixty five percent of the scope of work in phase one. His response was that there was never a 50:50 split to begin with. He agreed that there were nineteen Terms of Reference items and it was agreed between himself and Mr. Jervis which ones the Claimant would handle and which ones would be handled by the Defendant. Of the nineteen, he said that the Claimant had the majority.

[74] Mr. White stated that the reason for the fees being increased as time went by was not because the Claimant was given or took on more responsibilities but it was adjusted so that more funds could be made available to pay the Claimant on the Project. He admitted that the fee structure was increased from $29,000,000.00 to $38,000,000.00 but did not admit that this was because the Claimant was now going to be doing sixty-five percent of the scope of works.

[75] Mr. Jervis accepted that since the Claimant's offer contained in the 7th July 2011 Letter of $29,000,000.00 was based on: (1) the nineteen items in the Terms of Reference, (2) forty one the sites, and (3) a duration of five months, a positive change in any of these three variables would, as a matter of mathematics, result in an increase in that sum.

[76] The key fact as far as this Court is concerned, which is not in dispute is that the Claimant's initially proposed fee of $29,000,000.00 was increased to $38,168,680.00, then $38,863,540.00 (inclusive of items for $1,363,900.00), then to $42,833,540.00 (inclusive of items for $1,363,900.00). The total payments to the Claimant consisted of twenty eight payments totalling $40,475,198.55 which was $11,475,198.55 above the sum of $29,000,000.00 that was proposed originally.

The Increases

[77] It is noteworthy that the Claimant's 2nd invoice dated 12 October 2011 PJAN 02 repeats the following words as contained in invoice PGAN 1:

> *As per the terms of our agreement as outlined in our letter dated July 7th 2011, and your instructions to terminate our services as of August 12th 2011, we hereby bill as follows:*

However, the Total Fees and Equipment Costs is stated to be $38,168,680.00 which demonstrates that at this date the contract sum had been increased from the initially proposed sum of $29,000,000.00.

[78] By invoice PGAN 03 dated January 12, 2012 this figure had increased to $38,863,540.00 which was the same figure quoted in PJAN 06 dated 15th April 2012.

[79] Mr. Williams highlighted the letter from the NWA to Mr. Jervis dated the 11th July 2012 giving instructions to have all tender documents finalized and available for prospective tenderers within one week of the date of this letter. This letter was forwarded to Mr. White by e-mail on 12th July 2012 to which Mr. White responded by letter of the same date indicating that the process of procurement as a "selective tender" proposed by the NWA was not prudent and that the use of a "limited tender" procurement method should be adopted. Mr. Jervis agreed that these instructions were from the NWA revenue and were complied with. Mr. Jervis conceded that this additional work would involve changes to the bill of quantities which had already been prepared and also changes to the engineer's estimates. Mr. Jervis accepted the suggestion that up to 12th October 2012 the Claimant was still requesting documents from the Defendant by e-mail which demonstrated that the Claimant was still working up to that time.

[80] Mr. Jervis asserted that at this point the parties were still operating on a revised fee structure arrived at on 9th July 2012 which he took as having been agreed and therefore was of the view that the parties had reached a finalized position.

The crux of the Claim - Were the agreed terms of 9th July 2012 final?

[81] The Claimant's document entitled "*Billing as of November 27th 2012*" (Pg 202 bundle 2), There is a heading "*Proposed Value of Fees for Services for Completion (as of July 9th 2012)*". (This document will be referred to hereafter as "the 9th July 2012 Completion Budget") The total fees and equipment costs is stated therein to be $42,833,540.00 with fees being $41,469,640.00.

[82] Mr. White did not accept the suggestion that the increase in the Claimant's fees to $41,469,640.00 was the fee agreed with the Defendant to the end of the Project. He stated that the $41,469,640.00 was on paper but there was always a

conversation that there would have to be additional payment for "*extended and additional services*". The question then is this, was this sum of $42,833,540.00, being comprised of fees of $41,469,640.00, agreed to be the total amount payable for completion of the Project? Alternatively, was it contemplated that the Claimant would nevertheless have been entitled to bill for additional services? This is at the heart of the Claim.

[83] It is noteworthy that the Claimant's Invoice PJAN14 dated 19th November 2013, after the caption, commences with the words:

> *As per the terms of our agreement as outlined in our letter dated July 7th 2011 along with our revised completion budget of July 9th 2012, we hereby bill as follows:*

This acknowledges that the 9th July 2012 Completion Budget document did on its face purport to be a revised completion budget. It is noteworthy that this invoice shows that as at 29th March 2013 the Claimant's billable fees (excluding GCT) was already $40,375,408.55, just short of the projected total to completion.

The Claim for extras

[84] Mr. White's position was that the Project lasted for thirty months ending in December 2013 and the scope of works initially agreed by the NWA and the Defendant was extended and increased since the contract was first executed. Mr. White explained that by virtue of the extensions and increase in the scope of works, the contract period and scope of works initially agreed between the Claimant and the Defendant in the Sub-Contract also had to be increased and extended.

[85] Mr. White was asked:

> *Q: Do you want us to believe that throughout this period Mr. Jervis and yourself agreed for the contract sum with Equilibrium to be varied as time went on and notwithstanding all those variations the agreement was you would be entitled to 2 more fees?*

Mr. White's response was:

> *A: It wasn't put in that manner.*

It was suggested to him that the understanding was that the $41,469,640.00 was to carry the Claimant to the end of the Project and his response was that this was within the context that there was always going to be an additional claim for extended and additional services. He rejected the suggestion that he and Mr. Jervis had no conversation that sums were to be paid outside of the $41,469,640.00 which had been agreed.

[86] Mr. White accepted that during the relevant period, he was not writing to Mr. Jervis telling him that notwithstanding the increases the Claimant would be expecting more. He said he was not writing him during this period, but they had conversation hence the resulting claim at the end of the Project or at the end of their association. He was asked by Mrs. Gentles-Silvera whether that was normal and whether this was not something that should have been put in writing. His response to Counsel was that based on the relationship between himself and Mr. Jervis, there were many things that they did not put in writing but which were agreed based on their relationship.

[87] Mr. White rejected the suggestion that all of the work which was done by the Claimant was contained in the Terms of Reference for which the Claimant was compensated. He asserted that this was incorrect in light of the cardinal changes with the manner in which the Project was eventually executed.

[88] Mr. White denied that it was at the end of the Project that he discussed with Mr. Jervis that they should both try to get more money from NWA for the Project. He asserted that discussions had been going on between the Claimant and the Defendant for the better part of the year: that they were entitled to compensation for extended and additional services based on the manner in which the Project was executed. This he said was not a new conversation that started in 2013 between himself and Mr. Jervis.

[89] Mr. White asserted that it was subsequent to Mr. Jervis' submission of a claim that he prepared a wholesome claim with Mr. Jervis' knowledge and understanding. He

denied having prepared a claim in the amount of $18,874,810.33 entitled "*Extension of Time Claim Peter Jervis and Associates*" for submission by the Defendant.

[90] Although there was a disagreement as to whether both the Claimant and the Defendant collaborated in the preparation of the two claims which were submitted to the NWA, it was agreed that the claims consist of two parts. The first is for re-measurement of eighteen sites which was not a time-based activity, and the other part relates to supervision, that is to say the extension of the time to supervise which covers six items, namely items 6, 7, 8, 9, 10 and 11 of the Terms of Reference. Mr. Jervis explained that it was based on the Claimant's desire to be so compensated based on the view that the Claimant held. However, he was secure in the Defendant having paid the Claimant all that had been agreed between them.

[91] The Defendant's claims which were submitted to the NWA were rejected. Evidence of this is contained in a letter dated 21st October 2020 signed by E G Hunter, Chief Executive Officer of the NWA addressed to Peter Jervis and Associates Consulting Engineers. The letter provides as follows:

> ***Re: Tropical Storm Nicole Drainage Network Rehabilitation-Extension of Contract and Associated Fee Claim***
>
> *The National Works Agency (NWA) has completed its review of your claim for additional and extended services and no respond accordingly.*
>
> *The Government of Jamaica through the NWA entered into a fixed price contract with Peter Jervis and Associates (the Consultant) for Consultancy Services for Tropical Storm Nicole Drainage Network Rehabilitation Project dated May 27, 2011 and executed on June 10, 2011 (the Consultancy Contract). Sub- clause 2.3 of the Consultancy Contract provides that unless terminated earlier the contract shall terminate at the end of such period as the parties may agree in writing. There is no evidence, written or otherwise to substantiate your claim that the contract was for a duration of six months. Consequently, all claims predicated on this timeline are unsubstantiated.*
>
> *Further, a claim for extension of time can only be brought on the basis of a parties (sic) inability to perform its obligation due to an event of force majeure, pursuant to Sub-clause 2.6.4 of the Consultancy Contract. Therefore, a claim for extension of time and associated costs cannot be supported where no evidence is presented of instances of force Majeure during the execution of the contract.*

> *The NWA has also examined the Consultant's claim for increase in the scope of services. However, upon perusal of the Terms of Reference of the Consultancy Contract we see no evidence of addition or increase to the obligations of the consultant as outlined therein.*
>
> *We must also highlight that by our records the contract determined in December 2013 and therefore all claims made thereunder are now statute barred in accordance with the Limitation of Actions Act*
>
> *…*

Is it important to determine whether it was a cost-plus contract?

[92] Mr. White said he cannot recall a conversation in which Mr. Jervis told him that if he needed to make any additional claim on the NWA he needed documentary proof to support. What Mr White said he remembers, is saying to Mr Jervis that firstly, the Defendant never had a cost-plus contract arrangement with the NWA and neither did the Claimant have a cost plus contract in the Sub-Contract. Mr White's evidence was that it was a lump sum agreement based on the scope of works and the time duration. Secondly, this claim being proposed could not be contained on two pages, that is, a cover sheet and a spreadsheet. It would need to be properly expressed and ventilated over a number of pages and this was represented by the document which he subsequently produced albeit two years later but still within the statutory period.

[93] Mr. White maintained that whereas the first claim for $18,874,810.33 was sent out at his request it was not prepared by him. In fact, he said he could not recall seeing that document until a short while before and speaking from memory it looked familiar but he could not say with certainty. He admitted that he recognized the claim entitled Engineers Fees for Consultant Services in the sum of $17,087,500.00 and that this is the claim he was speaking of when he said he knew it was rejected. When asked if he knew why it was rejected he explained that one of the reasons (if his memory served him correctly) was that the NWA's response was that the work was not changed so they saw no reason for the claim to have merit because no additional conditions were added or physical work done, but that is not how claims work. He said he was sure that the conversation took

place between himself and Mr. Jervis in which Mr. Jervis told him that the NWA wanted documents to substantiate the claim. However, he did not provide these documents and was not prepared to do so, notwithstanding the request by the NWA, because they would only be applicable in the first instance if the Defendant had a cost-plus contract agreement.

[94] Mr White explained to the Court that a cost-plus contract is an agreement in which the Contractor is paid a percentage over and above what his costs are. So that percentage is agreed beforehand and at the end of the contract the total fee would be the total costs incurred plus the agreed percentage. However, he was adamant that he gave no input in the preparation of this claim. He found out about it after the fact and to that extent he said to Mr. Jervis "*how could you prepare a claim like this when I was the one facing the financial liability and the stress*". Mr. White said this was what gave birth to the Claimant obtaining permission from the Defendant to meet with the appropriate Government Minister and to develop proper claim.

[95] Mr. Jervis agreed that in a cost-plus contract there is a pre-determined and agreed profit margin which constitutes the "plus" component. The cost comprises all the inputs that the contractor utilizes to do the services and he is reimbursed his cost and consequently needs to demonstrate his full costs.

[96] I do not find it necessary to determine whether the NWA Contract or the Sub-Contract was a cost-plus contract. The important fact is that the NWA rejected the claim for extras. Whether the Claimant contributed to that by not providing the additional information as requested is not critical because based on the letter from Mr. EG Hunter that was not the overriding consideration. As far as the Defendant's position is concerned, its defence to the claim for extras is not based primarily on the absence of supporting documentation. I appreciate that during cross examination the credibility of Mr. White was tested in relation to some of these items comprising the claim for extra services. However, the foundation of the Defendant's defence was based on its position that there was no agreement for extra payment for these services as a matter of contract law.

What comprises the Claimant's claim above $42,833,440.00?

[97] Mr. White explained that the Claimant was claiming additional funds on the bases outlined in the document which he subsequently prepared. There are seven areas including head office overheads, inflation, and retaining a staff. He admitted that the Claimant's claim did not have any substantiating documents such as the documents requested by the NWA such as timesheets or payroll documents since in his original fee of $29,000,000.00 he did not provide any substantiating documents because it is not a cost-plus contract.

[98] As it relates to the claim for head office overheads, Mr. White stated that he calculated this not based on any substantiating documents but on a formula he used to arrive at a figure of $3.8 million.

[99] Mr. White explained that he had to retain staff during the downtime in 2012 which was the period leading up to when phase two officially commenced: that is April 2012 to October 2012 a period of seven months. He agreed that during this period no fieldwork was required because much of the work of re-measurement had been completed by March 2012. He did not agree that no one was really working on the Project during this period. He said quantity surveying was in full flow and effect, in order to finalize the quantities based on re-measurement work and he put the packages in place for the next phase. Consequently, he retained the three engineers. Had he not done so they would not have been available when the Project restarted. They were not active but to ensure that they would be around later in the year he had to retain them. They were later re-engaged in terms of being taken off retainer and given full-time compensation. He also had other staff in the office during the downtime to finalize documents and other tasks. Mr. Jervis agreed that he was told that the retainer of staff was a burden to the Claimant when they renegotiated their fees in July 2012.

[100] Mr. White admitted that he did not know if the Defendant had forwarded his formal 2016 claim to the NWA. Mr. White admitted that the first time he indicated to the

Defendant that the Claimant would be making a claim was by a letter dated the 15th September 2016 (which he said was also sent by email) which purported to enclose six copies of a finalized claim for the Defendant's use and which provided as follows:

> *Please be aware that we will be submitting our claim to you in due order for the recovery of our costs of services, and the basis of our claim will be in accordance with the principles and narrative of the claim documents which we are delivering to you.*
>
> *Please note that our claim to you for payment of our services is independent and exclusive of your arrangements with your Client, the NWA. PJA is the sole Client of ESJL in this matter.*

[101] In paragraph 14 of the Amended Defence, the Defendant stated that it will contend that no requests or demands were received by them until the letter of demand from the Claimant's Attorneys-at-Law to the Defendant on or about 19th December 2018. It was suggested to Mr. Jervis that the Claimant's letter dated the 17th August 2012 constituted such a demand for outstanding fees of $3,136,216.15 plus a claim for total outstanding GCT in the sum of $3,892,199.25. Mr. Jervis' response was that he did not recognize that this document was anything more than a cover letter from a bill with demands placed in the letter covering the invoice and did not see anything more than what had been told to him orally. Save and except for the deadline, he stated that the Defendant paid $200,000.00 but the funds were some time in coming from the NWA.

The Court's finding on the issue of whether there was an agreement for the payment of a sum above $42 million

[102] Mrs. Gentles-Silvera in her written submissions and in her oral presentation traced the increases in the Claimant's fees from the original proposed sum of $39,000,000.00. Counsel highlighted the fact that the increases were in respect of certain items which are contained in the Terms of Reference. She submitted that the Claimant was given opportunities to increase its fees and it took those opportunities to do so.

[103] I have noted a letter dated the 3rd December 2012 from the NWA to the Defendant notifying it that six construction contracts representing phase three of the Project had been awarded with the scheduled commencement date recorded as 13th October 2012. It is not entirely clear to me whether the Claimant knew of this letter and if so when.

[104] However, I have considered the Claimant's letter to the Defendant dated the 28th September 2012 and I have noted in particular the following paragraphs:

> *The phasing of the program that was instituted by the NWA in September 2011 (after commencement of our services), has essentially caused us to retain overhead charges for a much longer period than was envisioned. To date we have been working on this project and expending resources for a 10 month period (July 2011 to April 2012 and August to early September 2012), and the majority of the program is yet to commence.*
>
> *In good faith we have endured, with the assurance that the remainder of the program would be implemented during the last and first quarters of 2012 and 2013 respectively. This was the basis upon which we submitted our most recent revised fee proposal (prepared on July 9th, 2012), to which we have not received any objection from you.*

[105] Having regard to these assertions by the Claimant as to the assumptions on which the 9th July 2012 Completion Budget was based, I would have expected Mr White to have made a further revision of the 9th July 2012 Completion Budget by increasing it if he had formed the view, after 29th March 2013, that the amount of $42,833,540.00 contained therein would have been exceeded as a result of an extension of the duration of the contract and the additional time-cost to the Claimant. I have used the 29th March 2013, as a reference point because this is the date to which fees were billed on invoice PJAN 14 when the Claimant's billable fees (excluding GCT) was already $40,375,408.55.

[106] I find that if Mr. Jervis had agreed that the Claimant's fees would have been increased as a result of an extension of time and or scope of works there would be some documentation evidencing this. There would have been an amended Completion Budget. I find the absence of any supporting document to be quite odd in such circumstances, especially having regard to the course adopted by the parties in documenting previous increases. I do not accept the explanation by Mr.

White that documents were absent because of the relationship between the parties. I do not agree that the parties in the critical final stages would simply have left such an important issue unresolved and open ended. Accordingly, I find on a balance of probabilities that there was no agreement between the parties for an increased sum to be paid over and above the amount of $42,833,540.00 contained in the 9th July 2012 Completion Budget.

[107] This is not to say I do not accept Mr. White's evidence to the extent that he said himself and Mr. Jervis had a discussion about additional fees. However, I accept Mr. Jervis' evidence that whereas there was such a discussion and an agreement to pursue NWA for additional fees, there was no agreement on the part of the Defendant that it would be paying the Claimant such additional fees in any event irrespective of the NWA's position. I accept the evidence of Mr Jervis that the submission to the NWA was born out of hope rather than a realistic expectation of success even though there was the possibility of the Claimant also benefitting if there was a positive result.

[108] The Court's view is that by agreeing to the terms of the 9th July 2012 Completion Budget, the parties agreed that the Claimant would complete the items contained in the Terms of Reference for the amount of $42,833,540.00 (including $1,363,900.00 for the supply of computers etc.) stated in the 9th July 2012 Completion Budget. However, implicit in this finding is the recognition that if there were items which were totally outside the scope of the Terms of Reference, these would not be captured by such an agreement.

[109] Based on my finding on this issue, component number 5 of 7 of the Claimant's claim in the sum of $27,833,575.00 which is based primarily on the cost related to an extended period of supervision services over and above the Claimant's contractual tenure fails.

[110] I also find that component 3 of 7 in the sum of $3,220,000.00 must also fail. This was the cost to retain in-house technical staff during the period of construction

down-time due to uncertainty of the restart date of construction activities. Accordingly, this was a cost risk which the Claimant undertook based on my finding of the effect of the 9th July 2012 Completion Budget as representing the agreement between the parties.

[111] Counsel for the Claimant also conceded that component 6 of 7 for inflationary costs related to outstanding payments as of December 2013 would also amount to a duplication of the claim for interest and could not be maintained.

Were there items outside the scope of the Terms of Reference?

[112] Component 2 of 7 of the Claimant's claim in the amount of $6,526,800.00 provides the following details, Increase in scope: Re-measurement of works, definition of construction scope, Preparation of Bills of Quantities & Tender packages & Engineers Estimate for contracts totalling $1.4 Billion JAD.

[113] I have earlier referred to the letter by Mr. E G Hunter indicating that the NWA had examined the Consultant's claim for increase in the scope of services but that upon perusal of the Terms of Reference of the Consultancy Contract they did not see any evidence of addition or increase to the obligations of the consultant as outlined therein.

[114] The evidence of Mr. Hunter is not determinative of this issue, but is evidence on which I have placed reliance. Having regard to the evidence of Mr. EG Hunter and more importantly, the evidence of Mr. Jervis, I find that there were no works performed by the Claimant which were outside the scope of services contained in the Terms of Reference of the NWA Contract and which the Claimant was expected to undertake. As a consequence, I do not find that the Claimant performed any services for which it would be entitled to compensation by virtue of an application of the principle of quantum meruit.

Quantum Meruit - the pleading point

[115] It was submitted by Mrs. Gentles-Silvera that the quantum meruit claim has not been properly established by the Claimant because it has failed to correctly plead and prove all the elements of the claim for unjust enrichment. In particular, Counsel has submitted that the Defendant has received no enrichment from the Claimant nor anything that can be described as unjust and there is no such pleading. Counsel has relied on the case of ***Samsoondar v Capital Insurance Co Ltd*** *[2020] UKPC 33* which provides as follows:

> *18. It has now become conventional to recognise (see, eg,* ***Benedetti v Sawiris*** *[2013] UKSC 50; [2014] AC 938, para 10 and* ***Investment Trust Companies v Revenue and Customs Comrs*** *[2017] UKSC 29; [2018] AC 275, paras 24, 39-42) that a claim in the law of unjust enrichment has three central elements which the claimant must prove: that the defendant has been enriched, that the enrichment was at the claimant's expense, and that the enrichment at the claimant's expense was unjust. If those three elements are established by the claimant, it is then for the defendant to prove that there is a defence. The ideal pleading of a statement of case by the claimant should indicate that the claim is for restitution of unjust enrichment and should identify facts that satisfy each of those three elements. While it may be desirable, it is not essential, that the words "unjust enrichment" are used but the claimant must identify sufficient facts to show how those three elements are satisfied: see Goff and Jones, The Law of Unjust Enrichment (eds Mitchell, Mitchell and Watterson, 9th ed (2016), para 1-38). The important purpose of a statement of case is to ensure, as a matter of fairness, that the defendant knows the case it has to meet.*

[116] The interplay between the law of unjust enrichment and the quantum meruit principle and the evolution of the law in this area is the subject of much academic discussion which is beyond the scope of this judgment. Nevertheless, it is useful to note the United Kingdom Supreme Court case of ***Benedetti and another v Sawiris and others*** *[2014] AC 938* where Lord Clarke in his judgment at page 954 expressed the following opinion:

> ***9.*** *It is common ground that the correct approach to the amount to be paid by way of a quantum meruit where there is no valid and subsisting contract between the parties is to ask whether the defendant has been unjustly enriched and, if so, to what extent. The position is different if there is a contract between the parties. Thus, if A consults, say, a private doctor or a lawyer for advice there will ordinarily be a contract between them. Often the amount of his or her remuneration is not spelled out. In those circumstances, assuming there is a contract at all, the law will normally imply a term into the agreement that the remuneration will be reasonable in all the circumstances. A claim for such remuneration has sometimes been referred to as a claim for a quantum meruit. In such a case, while it is no doubt*

> *relevant to have regard to the benefit to the defendant, the focus is not on the benefit to the defendant in the way in which it is where there is no such contract.*

[117] In the case before me, there is the Sub-Contract and the Claimant is asserting (in the alternative) that the remuneration of the Claimant for the extra services was not adequately spelled out thereunder. The Claimant did not in its pleadings address the enrichment element of its claim nor was this explored in any great detail during the trial. As a consequence, questions as to whether the Defendant was enriched by the receipt of the services, at the expense of the Claimant, and whether that was unjust were not fully ventilated. It is arguable that the Defendant was enriched by the benefit it received by way of the Claimant's services which enabled it to fulfil the NWA Contract even beyond what was originally envisaged. However, on the other hand it is undisputed that the Defendant did not receive any additional funds from the NWA for extra work done by the Claimant.

[118] I am not prepared to find against the Claimant on the quantum meruit claim issue solely or primarily on the basis of what might be an inadequacy of the pleading of the related unjust enrichment element of that issue. I will instead analyse that element of the claim for quantum meruit in the context of the other principles which are generally applicable.

[119] It was submitted on behalf of the Defendant that during the course of the contract there was no communication of the claim currently before the Court, to the Defendant or any communication in which it was asserted that the work which was required to be done did not come within the scope of work or the sums agreed. Counsel relied on the House of Lords case of ***Davis Contractors Limited v Fareham Urban District Council*** *[1956] 2 All ER 145* to support her submission that in the circumstances of the case before this Court the Defendant is not liable on the claim.

[120] In ***Davis Contractors*** (supra), the Appellants, a firm of building contractors had entered into a building contract after tender whereby they agreed to build houses for the Respondents within a period of 8 months for the sum of £85, 836.00. For

various reasons, primarily the lack of skilled labour, the work took 22 months. The appellants were paid the contract price together with stipulated increases and adjustments amounting to £94, 425.00. The Appellants contended that owing to the long delay the contract price had seized to be applicable and they were entitled to an additional sum.

[121] The Appellants tender was accompanied by a letter which stated that the tender was "*as and when required to carry out the work within the time specified*". The Appellants argued that the contract price was not binding because it was subject to the express overriding condition contained in that letter. However, the court found that that condition was not accepted by the Respondent and was not incorporated into the final contract which was the result of negotiations following the tender.

[122] The appellants argued in the alternative, that the contract had been entered into on the basis that adequate supplies of labour and material would have been available to enable them to complete the work within the 8 months. This unavailability amounted to a frustration of the contract. It was not disputed that if the contract was indeed frustrated then the Appellants were entitled to an additional sum on the basis of quantum meruit. The Court reiterated the position that the doctrine of frustration has been, and must be kept within very narrow limits and noted that no case had been cited in which it had been applied to circumstances in any way comparable to those of the case under consideration. Justice Simonds at paragraphs 50-51 concluded that the case of ***Bush v Whitehaven Port & Town Trustees*** *[1888], 52JP392:*

> *"… cannot, in the light of later authority, be used to support the proposition that where without the default of either party, there has been an unexpected turn of events which renders the contract more onerous than the parties had contemplated that is by itself a ground for relieving a party of the obligation he has undertaken..."*

[123] I do not find the **Davis Contractors** case to be of much assistance because of the specific grounds on which the claim was made by the appellant and rejected by the House of Lords. However, there are some interesting observations which were

made by Viscount Simonds which are applicable to the case before this Court. At page 150 he notes the comments of Lord Sumner in **Bank Line Ltd v A Capel** [1919] AC 435 at p 454 where he said:

> *"Rights… ought not to be left in suspense or to hang on the chances of subsequent events".*

Lord Sumner continued as follows:

> *"It is wholly inconsistent with this, as I think, fundamental condition that a building contractor should without intermission, work on his contract over a period which by much or little exceeds the contract time and at the end of it say, as the Appellants say here, "A twenty-two month project is not an eight month project" or, less formidably, "An expenditure of £111,000 is not an expenditure of £94,000, therefore the original contract must be regarded as frustrated and for all the work that has been done we must be paid not the contract price but upon the basis of a quantum meruit". My Lords, I say it with all respect to the arguments of learned Counsel but it appears to me that that is to make nonsense of a doctrine which, used within its proper limits, serves a valuable purpose."*
>
> *"*

I will address these observations and their relevance to the case before me in greater detail below.

[124] As it relates to the claim on the basis of a quantum meruit, Counsel for the Defendant relied on the case of ***Gilbert & Partners (a firm) v Knight*** *[1968] 2 All ER 248*. In that case a surveyor agreed with the owner of a house to do certain preparatory works for proposed alterations and to supervise the work for a fee of £30. After the builder started working, the owner ordered additional work to be done by the builder. The surveyor supervised the additional work but did not discuss additional fees for doing so with the owner, nor did the owner raise the issue with him. When the work was finished the surveyor submitted an account for an additional sum of £100 which was a scale fee.

[125] Harman LJ at page 250 H referred to the statement of Lord Dunedin in ***The Olanda*** *[1919] 2 KB 728 at 730* where he said:

> *"As regards quantum meruit where there are two parties who are under contract quantum meruit must be a new contract, and in order to have a new contract you must get rid of the old contract."*

Harman LJ held that the old contract was still outstanding not having been discharged and the Defendant was entitled to assume that it was still operating between them and that she would not have been asked for a different sum on a different basis. The fact that the additional sum required was being charged on a scale was mentioned by the learned Judge. However, the essence of the case is that a quantum meruit cannot arise if there is an existing contract between the parties to pay an agreed sum.

[126] The analysis by Davies LJ on the facts of that case is of assistance and is worth reproducing as follows:

> *In order to make a person liable on a quantum meruit there has to be a necessary implication that the person liable is agreeing to pay. In the ordinary way if one employs a professional man to give professional services it is a necessary implication, unless anything to the contrary is expressly said, that the employer (to use that word) will pay a reasonable remuneration for those services. But in this case the cardinal point is that there had been this previous agreement to do some work for a lump sum of £30, and I for myself cannot see that there is any necessary implication that, when the work was going to be extended, or increased, in the absence of any express mention of it the defendant should be liable to make any further payment to the plaintiffs. If Mr Tyrrell had said, in 1966, that he had only agreed to do the other work for £30, and that if the defendant wanted him to do the extra work he would have to have a further figure or scale fees, the defendant (this is pure speculation) might have done one of two things. She might have said that if that was going to be added to the cost of it she was not going on. Alternatively, she might have said that there was the builder, who, no doubt would be very pleased to do this extra work, and that she would carry on with the builder without Mr Tyrrell's intervention at all. What she would in fact have said we do not know.*

[127] Whereas, it is important to note that in ***Gilbert*** (supra), there was no dispute as to whether the parties had discussed pricing for the extra work. In the case before me, there is such a dispute because Mr. White asserted that he had discussed with Mr. Jervis the issue of an extra amount being charged over and above the agreed figure of $42,833,540.00 reflected on 9th July 2012 Completion Budget. In the case before me, what is in need of resolution is the extent of those discussions and whether any agreement flowed therefrom.

[128] I have earlier found that whereas the issue of the possibility of additional fees was raised, there was no definitive statement by Mr. White at any point that once the $42,833,540.00 he had agreed in the 9th July 2012 Completion Budget, was

exhausted the Claimant would not be not be proceeding any further unless there was agreement for additional compensation from that point going forward. Had this occurred, the Defendant would have had the option of deciding whether it wished to have the Claimant proceed and agree an additional fixed sum for the work to be undertaken or formula for the calculation of such sum in the future. I find that there was no conclusive statement on this position and there was no agreement by the Defendant for additional payments.

[129] I should add that a quantum meruit payment would also be applicable if the Defendant had agreed to make a payment for services after the services had been rendered, even if there was no prior discussion or agreement before the services were rendered. However, I have not found that there was any such agreement.

[130] I find that the 9th July 2012 Completion Budget was still operative and still governed the relationship between the parties. Accordingly, there is no basis in law for the application of the quantum meruit principle in order to provide additional compensation for the Claimant, above the sum fixed in that document.

[131] This case provides a poignant reminder of the danger of parties orally agreeing to vary works or fees under a contract. In ***Gilbert*** (supra), Davies LJ at page 252 commented that *"Sympathy no doubt one may have for the plaintiffs; but, after all, they have only themselves to blame for undertaking this extra work without specifically mentioning that they proposed to charge, if they wanted to do so".* Similarly, in this case, I find that the Claimant assumed the risk of non-payment above $42 million.

THE GCT ISSUE

[132] Mr. White's evidence is that at no point in July 2011 when the contract was entered into between the Claimant and the Defendant did he or any other representative of the Claimant have any discussion and/or agreement with the Defendant or any of its representatives that the Sub-Contract was to be subject to the main NWA Contract.

[133] He stated that the Defendant never asserted this until its letter dated the 28th September 2011 that the final terms of the sub-contract between the Claimant and the Defendant will be subject to the final Agreement reached between NWA and the Defendant.

[134] Mr. White explained that up to December 2013 there were two substantive aspects of the contract which remained unsettled between NWA and the Defendant. The first was the final adjusted contract sum which was to reflect the adjustments in the scope of works and the contract duration. The second was the question of whether General Consumption Tax (GCT) was in fact payable by the NWA on the invoices submitted by the Defendant. He asserted that he was aware of these matters because the Claimant through him, was in charge of the performance of the NWA Contract. He asserted that none of these issues had anything to do with the Claimant and in fact, whereas the Claimant was aware of these issues the Claimant did not accept and/or agree with the Defendant and/or any other party that those outstanding issues affected its contract with the Defendant. Accordingly, the Claimant included an item GCT on all the invoices tendered to the Defendant. He confirmed that the claimant is a registered entity under the General Consumption Tax Act and is therefore under an obligation to add to its invoices, to file its GCT Returns and to collect and pay the invoiced GCT amounts over to the tax authority. He also confirmed that the services provided to the Defendant by the Claimant were services which attracted GCT.

[135] Mr. White said that in the case of the services provided to the Defendant, the Claimant issued invoices PJAN 01 to PJAN 14 outlining its GCT registration number, the amount of the consideration and the GCT rate and the amount payable. All the invoices were sent prior to June 15th 2012. The Claimant is obligated to keep a record of taxable supplies thus while acting in good faith the invoices were issued to the Defendant.

[136] Mr. White stated that the Defendant failed to pay the GCT which accrued on their taxable supply for the period of February to May 2012. The Claimant is entitled to

pay $2,324,006.17 to the Commissioner of Inland Revenue for their services to the Defendant. The Defendant's failure to make the GCT payments have put the Claimant in a financially undesirable position. Consequently, the Collector of Taxes commenced Court action against the Claimant to recover the outstanding GCT as well as interest, penalties and charges in the sum $11,767,882.69).

[137] Due to the Defendant's actions, the Claimant is indebted to the Collector of Taxes for the sum of $14,091,888.86 in addition to the penalties and interest that continue to accrue on a monthly basis.

Did the Defendant agree to pay GCT

[138] It is at this point necessary to revisit the Court's analysis of the formation of the contract between the parties. By way of re-cap, the Court found that from the point the Claimant was asked to continue work after having been asked to cease, the parties embarked on a contract in which the critical components were agreed. It is important to note that when the Claimant produced its termination cost to date as requested by the Defendant as reflected in Invoice PJAN 01 dated 12th August 2011, it was for a total sum of $6,653,296.50 including a sum of $990,916.50 for GCT at 17.5%. This claim was forwarded un-amended to the NWA by the Defendant under cover of a letter dated 15th August 2011. Mr. Jervis explained that typically, where the invoice is submitted by a subcontractor such as the Claimant, the Defendant would prepare a composite bill including the Defendant's fees but this was not done in respect of this first invoice.

[139] What was clear from this first invoice was that the Claimant was indicating that it expected that GCT was to be paid by the Defendant. 17.5 percent of an invoice in the context of the contract between the parties is a significant amount. One would expect that it could heavily influence the viability of the contract for one party or the other. When it became clear to the Defendant that the proposed fees of the Claimant were on condition that the Defendant would be paying GCT on those amounts, the Defendant would have had to decide whether the sub-contract was

commercially feasible. If the Defendant was of the firm view that it would not in any event be paying GCT on top of the Claimant's proposed fees, then I would have expected that such a position would have forcefully been made clear. Mr. Williams in his submissions emphasised the point that whereas the Claimant consistently asserted its claim to GCT, there was no repeated assertion of a position by the Defendant that it was not liable to pay GCT.

[140] In the absence of clearly expressed evidence of the Defendant asserting that it would not be paying GCT for the Claimant's services in the face of its repeated demands for such payments from the first invoice, I find that the Defendant accepted that it would pay GCT on such services if they were in fact due. However, I find that the Defendant obtained comfort in what Mr. Jervis said was indicated to him in terms of the Project not being subject to GCT. This reliance was notwithstanding the fact that up to the conclusion of the trial he was unable to obtain such a confirmation from Tax Administration Jamaica, the NWA or any other appropriate body. I am fortified in my finding in this regard by Mr. Jervis' response to the suggestion put to him in the closing stages of the cross examination. It was suggested that the Defendant is obliged to pay the Claimant the GCT as reflected on the Claimant's invoices and his answer was "*subject to guidance from the Commissioner or directions*". Presumably the Commissioner referenced there is the Commissioner of Taxes.

[141] The Court has been placed by the parties in the less than ideal position of having to decide whether the Project attracts GCT without any input from the tax authorities by way of an expert witness or by submissions on the law. It would have been beneficial if either of the parties had assisted the Court in this manner. Nevertheless, it is an issue which has fallen for determination giving the nature of the Claim. It is worth noting at this juncture that although the Claimant has asserted that the tax authorities have brought proceedings against him in the Parish Court in respect of outstanding GCT, there is an insufficient nexus demonstrated between those proceedings in the Parish Court and any liability which might have arisen as a result of the Claimant's participation in the Project. Accordingly, this

evidence is of no assistance to this Court in resolving the GCT element of the Claim. The issue is essentially one of statutory interpretation which the Court is sufficiently equipped to determine.

The Claimant's submissions

[142] Mr. Williams referred to *section 3 (1) (a) of* ***the General Consumption Tax Act*** (hereinafter "**the GCT Act**") to state that there is an obligation to pay GCT. He also referred to *section 6(1) of* ***the GCT Act*** which states that for the purpose of GCT imposition, a taxable supply occurs when:

> *(a) "an invoice for the supply is issued by the supplier; or*
>
> *(b) payment is made for the supply; or*
>
> *(c) …or the services are rendered, as the case may be, to the recipient,*

whichever first occurs."

[143] He submitted that the abovementioned sections of the ***GCT Act*** make it clear that the Defendant is liable to pay GCT to the Claimant for the services rendered to the Defendant pursuant to the contract between them arising from the NWA Contract. Counsel also highlighted the fact that there was no evidence presented to the Court of any acknowledgment by the NWA or anyone from the tax authorities which support an automatic exemption of the type being claimed by the Defendant. Furthermore, there is no evidence that the Caribbean Development Bank is a multilateral lending agency for purposes of item 14 of Part ll of Schedule 3 of the GCT Act.

[144] Counsel further submitted that *Section 20 of* ***the GCT Act*** states that the amount of the GCT is to be calculated and the returns are to be filed and the amount is to be paid over pursuant to the GCT Regulations. In addition, *22 of* ***the GCT Act*** illustrates that an invoice ought to be issued by a registered tax payer to another

registered tax payer for the services provided. He submitted that based on *Section 33 of* ***the GCT Act*** the tax payer cannot be permitted to opt out of the tax obligations.

[145] On the foundation of these provisions of the ***GCT Act***, Counsel submits that the Defendant is under an express statutory duty to pay GCT to the Claimant. In addition, he argued that the Defendant cannot rely on an exemption that NWA may have had to support their non-payment of GCT in relation to the Claimant and the services it performed. This is because the Claimant is under statutory obligation to collect and file returns and pay over the GCT.

The Defendant's submissions

[146] Mrs. Gentles-Silvera submitted that the obligation to pay GCT is imposed on the supplier of goods or services by the provisions of the ***GCT Act***. Counsel submitted that this obligation can only be passed to the customer by operation of a contract between the customer and the supplier. In the absence of such a contract the customer has no obligation to pay GCT. In support of this submission counsel relied on a number of cases (decided in the context of the English Value Added Tax (VAT) but which Counsel submitted is analogous to GCT) including ***Investment Trust Companies v Revenue and Customs Commissioner*** *[2018] AC 275*. At paragraph 5 Lord Reed made the following statement:

> *It is relevant to note that the obligation to account for tax arises whether or not tax is charged on the supply or paid by the customer: it is the supplier, rather than the customer, who is under a liability to the commissioners, and it is the supply, rather than payment by the customer, which triggers the supplier's liability. The customer's liability to pay an amount in respect of the tax rests upon contract.*

Counsel also cited the cases of **Lancaster v Bird** [1978] EWCA Civ [1973] and **CLP Holdings v Singh** [2014] EWCA Civ 1103 in support of this point.

[147] Counsel relied on items *1(b) & 1(e) of Part II of the Third Schedule to* ***the GCT Act*** in support of her assertion that the Project was not subject to GCT. Part II of the Third Schedule identifies the services exempted from the payment of GCT. I will

reproduce those items and others currently contained in Part ll of the Third Schedule for reasons which will shortly become apparent.

> ***PART ll – Services***
>
> *1. The following operations, that is to say-*
>
> *(a) the construction, alteration, repair, extension, demolition or dismantling of any building or structure, including offshore installation, that is to say, installations which are maintained or are intended to be established for underwater exploitation;*
>
> *(b) the construction, alteration, repair extension, demolition of any works forming or intended to form, part of the land, including (without prejudice to the generality of the foregoing) walls, road works, power lines, telegraphic lines, aircraft run-ways, docs and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, irrigation works, sewers, industrial plant and installation for purposes of drainage, coast protection or defence;*
>
> *(c) [Deleted by L.N. 19C/2009]; (d) [Deleted by L.N. 19C/2009]*
>
> *(e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are described in paragraphs (a) and (b), including site clearance, earth moving excavation, tunnelling or boring, laying of foundations, erections of scaffolding, site restoration, landscaping and the provision of roadways and other access works,* ***so however, that the foregoing operations shall not include-***
>
> ***(i) the installation in any building or structure of systems of heating, lighting, ventilation, power supply, drainage, sanitation, water supply, fire protection, air conditioning, elevators or escalators;***
>
> ***(ii) the internal cleaning of buildings and structures so far as carried out in the course of their construction, alteration, extension, repair or restoration;***
>
> ***(iii) painting the internal or external surface of any building or structure; and***
>
> ***(iv) tillage operations.***
>
> *(f) [Deleted by L.N. 19C/2009]*
>
> *(My emphasis)*

[148] ***The General Consumption Tax (Amendment) Act, 2014***, which was assented to by the Governor General on 30th September 2014 with an effective date of 1st October 2014 in amending Part ll of the Third Schedule deleted the full stop appearing at the end of item (e) (at the end of the word “works”) and substituted therefore the proviso which I have highlighted in bold type.

[149] Mrs. Gentles-Silvera submitted that the Project was exempt from GCT for another reason. That is, the services that were provided to the NWA under the Project was funded by the Caribbean Development Bank and was therefore exempt by virtue of the provisions of item *14 of Part II of the Third Schedule to* ***the GCT Act*** which was in force at the material time and which exempted services performed under a contract the payment for which was funded by a foreign government or multilateral lending agency. The paragraph was deleted by the ***General Consumption Tax (Amendment) Act, 2014***. The exact wording of that item prior to its deletion was as follows:

> *14. Services performed under a contract the payment of which is by a foreign government or a multilateral lending agency.*

The Court's analysis of whether GCT is payable

[150] It was not in dispute that the services which the Claimant and the Defendant provided were not in respect of physical works described in items 1(a) and (b) of Part ll. The Defendant argued that the services were "*operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are described in paragraphs (a) and (b)*". Mr. Williams submitted that these words must be interpreted "*ejusdem generis*" with the class or genus of things forming an integral part of or which are preparatory to the physical works. This class he argued, includes "*site clearance, earth moving excavation, tunnelling or boring, laying of foundations, erections of scaffolding, site restoration, landscaping and the provision of roadways and other access works*". Mr. Williams further submitted that having regard to this class or genus, the items falling within the Terms of Reference and the services provided by the Claimant to the Defendant cannot fall within this class or genus of things and accordingly the exemption does not appear to cover the Defendant (and I would add the Claimant as well).

[151] Mr. Williams relied on the case of ***Winston Leiba & Others v Beverly Warren*** *[2020] JMCA Civ 19* in which Morrison P made the following observations in relation to the principle of ejusdem generis:

> *[63] The ejusdem generis principle is well known. This is how Bennion [Bennion Bailey and Norbury Statutory Interpretation] explains it:*
>
> > *"The Latin words ejusdem generis (of the same kind or nature) have been attached to a principle of construction whereby wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character. The principal may apply whatever the form of the association, but the most usual form is a list or string of genus-describing terms followed by wider residuary or sweeping-up words"*
>
> *[64] As an example of the principle in action, Mr. Leiba referred us to* ***Eton Rural District Council v River Thames Conservators*** *[1950] Ch 540. In that case, it was held that the words "or otherwise", following the words, "tenure, custom, prescription", did not include purely contractual obligations: the genus was obligations imposed by law on land and ejusdem generis therefore applied. So the case is a clear example of the words "or otherwise" attracting the principle.*

[152] It is important to note that although the most usual form in which the principle is evident is where there is the list of things comprising the class followed by the "sweeping-up words" like "or otherwise" the principle does not apply in the reverse. **Bennion, Bailey and Norbury on Statutory Interpretation** Chapter 23 Section 23.7 provides as follows:

> *Section 23.7 Ejusdem generis principle: general term followed by specific terms*
>
> *The ejusdem generis principle is presumed not to apply where apparently general words are followed by narrower words suggesting a genus more limited than the initial general words, if taken by themselves would indicate.*

One of the cases learned authors of **Bennion** used to conclude that this statement was accurate is the House of Lords case of ***Ambatielos v Anton Jurgens Margarine Works*** *[1922] All ER Rep 543*. The case concerned the following clause in a charter party:

> *"Should the vessel be detained by causes over which the charterers have no control, viz, quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo has been taken over, etc, no demurrage is to be charged and lay-days not to count."*

[153] The issue was raised as to whether the detention of the chartered vessel for a number of days beyond the lay-days by a strike of dock labourers at the port of discharge was covered since it was a cause over which the charterers had no control. The Court held (Lord Sumner dissenting),

> *"… the whole clause was governed by the initial general words and must be read as referring to all causes over which the charterers had no control - in particular, to the five causes specified, but also to all other cases which fell within the general words, and, therefore, the shipowner was not entitled to succeed."*

[154] In my opinion, this case did not turn exclusively on the fact that the general words preceded the limiting words. This is illustrated in the judgment of Viscount Cave LC at 546-547 where he said:

> *Then it is said that the added words, as I have called them, are limiting and not explanatory words. I have dealt with that. Further it is said that, assuming that they be such limiting words, they cut down the clause to the five cases specified with other cases of a similar kind, and we have to say whether for that purpose the well-known rule of ejusdem generis applies. I know of no authority for applying that rule to a case of this kind, a case where, to begin with, the whole clause is governed by the initial general words; secondly, where the expression to be so construed is the expression "etc"; thirdly, where, as in this case, there in (sic) no genus to which anyone can point which comprises* ***all*** *the five cases specified. With great respect to the learned judge who heard the case I cannot think that he was successful in finding such a genus.*

Viscount Cave, LC, Viscount Finlay and Lord Atkinson in construing the word "etcetera" in the clause, each found that the ejusdem generis rule did not apply.

[155] Nevertheless, in the absence of any authority which suggests the contrary, I am prepared to accept that ***Bennion*** has correctly stated a limitation to be placed on the application of the principle. In the ***GCT Act*** the following words are clearly general in scope:

> *…operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are described in paragraphs (a) and (b),..*

I find that the words which follow do not invoke the operation of the ejusdem generis principle even though they appear to constitute a genus which is physical works, namely:

> *..including site clearance, earth moving excavation, tunnelling or boring, laying of foundations, erections of scaffolding, site restoration, landscaping and the provision of roadways and other access works….*

However, this does not put the issue to rest. The ejusdem generis rule is an aid to the construction or interpretation of documents including statutes.

[156] The Court's primary task remains of interpreting the ***GCT Act*** and determining what was the legislative intention. Where revenue statutes are concerned, the Court does not have the latitude it possesses when interpreting other statutes. ***Stair Memorial Encyclopaedia*** /Revenue (Reissue)/2. /5. Interpretation of tax statutes expresses the position as follows:

> *5. Interpretation of tax statutes.*
>
> *In the interpretation of revenue legislation, the court must adhere closely to the actual words of the statute and as a result of this, equitable interpretations or statutory constructions are not permissible.*
>
> *"It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used' [***Cape Brandy Syndicate v Inland Revenue Comrs*** [1921] 1 KB 64, 90 LJKB 113*, per Rowlatt J (affd* [1921] 2 KB 403, 12 TC 358,CA *)]..'*
>
> *Thus it is futile for a taxpayer to argue that the strict application of a revenue statute will result in injustice[3]. Equally it is of no consequence that adopting a construction in favour of the taxpayer will open up an easy loophole for avoiding tax. The courts have stressed on numerous occasions that the resolution of such anomalies is a matter for Parliament, although it has been held that if the natural meaning of a provision gives rise to an undoubted anomaly, fairly identified as an injustice, that meaning can be discarded in favour of a construction that avoids the anomaly.*
>
> *(reproduced without footnotes)*

[157] Bearing this in mind, I find that the words "…*operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are described in paragraphs (a) and (b),.."* are clear. If the legislature intended for the exemption not to apply to quantity surveying works then I would have thought it would have simply said so. I am further fortified in my conclusion by the fact that the excluded works appear to be more geared towards aesthetics and enjoyment of the end product and are not "*operations which form an integral part of, or are*

preparatory to, or are for rendering complete, such operations as are described in paragraphs (a) and (b)" in the same way in which the other identified works are. The evidence led during the trial demonstrated that the services provided by the Claimant and the Defendant clearly satisfied this definition of integral preparatory services. Accordingly, I find that those services are not subject to GCT.

[158] The second limb on which Mrs. Gentles-Silvera relied was item 14, that is, that these were services performed under a contract, the payment of which is by a foreign government or a multilateral lending agency. Mr. Williams submitted that there was no evidence before the Court that the Caribbean Development Bank ("CDB") satisfied this definition. I am of the view that this is a notorious fact of which this Court can take judicial notice.

[159] Nevertheless, I have noted that the evidence of Mr. Everton G Hunter was that the Project was funded by a loan from the CDB. It is not in dispute that the Defendant (and by extension the Claimant) were paid for services under the NWA Contract directly by the NWA and not by the CDB. The fact that the CDB provided the loan from which the Claimant and the Defendant were paid does not mean that the "payment" of the NWA Contract was by the CDB. On these facts I find that item *14 of Part ll of Schedule 3* is of no relevance to the NWA Contract and cannot form the basis for an exemption from GCT of the services provided by the Claimant.

The Court's conclusion on the claim for GCT

[160] Having regard to my finding that the services performed by the Claimant to the Defendant in respect of the Project do not attract GCT, the Claim for GCT fails.

[161] Invoice PGAN #14 shows that as of 29th March 2013 the Claimant invoiced the Defendant total billable fees of $47,244,364.90 which included GCT. The GCT amounted to $6,868,956.35. The Court having disallowed the Claim for GCT results in the total fees amounting to $40,355,408.55. The evidence is not disputed that as at 10th March 2014 the Defendant paid the Claimant the sum of

$40,475,198.55. Based on the finding of the Court, this was a marginal overpayment of $119,790.00 in respect of that invoice.

[162] However, the Court has found that the Completion Budget has framed the upper limit of what the Claimant is entitled to charge. Therefore, although the Claimant is not entitled to recover the additional charges contained in PJAN 15 on the basis of quantum meruit, it is entitled to recover what I have found to be the contractually agreed sum up to the maximum stated on the 9th July 2012 Completion Budget for services which is $41,469,640.00. It is undisputed that the Claimant was paid $40,475,198.55 and is therefore owed $994,441.45 for its services.

[163] As it relates to the provision of equipment, Invoice PJAN 01 provided for two computers and cameras and memory card to a value of $360,500.00. PJAN14 claims $1,363,900.00 for six desktop computers, 3 laptop computers, 3 scanners, 5 digital cameras and 1 LaserJet printer. This was not challenged by the Defendant and I will award the sum claimed. The total award in the Claimant's favour is therefore $2,358,341.45 comprised of the award of $994,441.45 for services plus $1,363,900.00 for the equipment.

Should commercial interest be awarded?

[164] Mr. Williams has submitted that the basis of an award of commercial interest is reflected in a number of local decisions including ***British Caribbean Insurance Company Limited v Delbert Perrier*** *[1996] 33 JLR 111*. In that case it was held that it is open to the Court to award interest to a successful claimant in matters of commerce. This Court has previously adopted this approach in a number of decisions.

[165] Counsel also relied on the judgment in ***Goblin Hills Hotels Limited v Thompson*** *(unreported), Court of Appeal, Jamaica, SCCA 57 of 2007*, judgment delivered 5 June 2009, in which the calculations regarding the appropriate interest to be awarded was on the basis of the Bank of Jamaica's data in submissions without evidence of the same being actually adduced to the Court. Counsel indicated that

an affidavit has been filed adducing the Bank of Jamaica data which shows that during the period January 2014 to February 2021 the overall weighted average commercial interest rate is 14.89 percent per annum with a current rate of 11.75 percent per annum as at February 2021. Nevertheless, I am of the view that an award of interest of 14 per annum will adequately compensate the Claimant.

Conclusion and disposition

[166] For the reason herein the Court makes the following orders:

1. Judgment for the Claimant in the sum of $2,358,341.45 at the rate of interest of 14 percent per annum from 1st January 2014 until the judgment is satisfied.

2. The Claimant is awarded 80% of the cost of the claim to be taxed if not agreed.