IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012 CD 00043

BETWEEN	**FREIGHT MANAGEMENT LIMITED**	**CLAIMANT**
AND	**CARIBBEAN CEMENT COMPANY LIMITED**	**DEFENDANT**

Mrs. Trudy Ann Dixon Frith and Mrs. Kimberley Mc Dowell instructed by Messrs. Grant, Stewart, Phillips and Company for the claimant.

Mr. Emile Leiba and Miss Gillian Pottinger instructed by Messrs. Dunn Cox for the defendant.

WHETHER TENDER WAS ACCEPTED-WHETHER THERE IS A CONCLUDED CONTRACT – WHETHER DEFENDANT IS ESTOPPED BY ITS CONDUCT FROM RELYING ON CERTAIN CLAUSES – WHETHER CLAIMANT ENTITLED TO DAMAGES – WHETHER THE FACT THAT VESSEL IS NOT OWNED BY CLAIMANT PRECLUDES A CLAIM FOR DAMAGES – WHETHER CLAIM FOR INTEREST PURSUANT TO THE LAW REFORM (MISCELLANEOUS PROVISIONS) ACT MUST BE PLEADED – WHETHER COURT HAS JURISDICTION TO ENTERTAIN CLAIM FOR INTEREST AFTER JUDGMENT DELIVERED

Heard – 24, 25 & 27 September 2012; 26 November 2012; 14 December, 2012 & 16 & 24 January 2013

SINCLAIR-HAYNES J

[1] In or about August 2002, the Caribbean Cement Company Limited (CCCL) (defendant) issued an invitation for tenders which were to be submitted for the transportation of cement by way of sea from its Rockfort plant in Kingston to its Montego Bay depot. Tenders were submitted by Freight Management Limited (FML) (claimant) and five other companies. The claimant's tender was accepted and so it was verbally advised. A contract document was attached to the Tender Document which was signed by the claimant's representative but not by the defendant.

[2] On the 3 October 2003, however, the defendant informed the claimant that it no longer intended to pursue haulage by sea as haulage by road was more feasible because of the devaluation of the Jamaican dollar. Consequently, the claimant has instituted these proceeding against the defendant for breach of contract and/ or promissory estoppel. It claims the following:

(1) US $330,000.00 as mobilization costs of vessel under the contract sixty (60) days at US $5,500 per day. (This claim was amended at the trial to US$396,000.00 for loss of use for 72 days);

(2) General Damages for loss of contract; and

(3) $25,000.00 as Attorney's Costs.

THE CLAIMANT CASE

[3] It is the claimant's claim that it was verbally advised by the defendant that its tender was successful. It was asked by the defendant to adjust its tender price per metric ton. The claimant, by way of letter dated 17 January 2003, adjusted its price. The parties conducted themselves on the understanding that there was a binding contract in force. They engaged in discussions pertaining to the logistics and details for performance of the contract.

[4] It was agreed that the claimant would commence the transportation of the cement on the 7 July 2003. On 17 February 2003, the claimant notified the defendant that in order to make its vessel, the "Island Trader," available to the defendant by the 7 July 2003, it would reduce or curtail its charter contract. With the knowledge of the defendant, it incurred expenses in its preparation to transport the cement. On the 7 July 2003, the vessel, pursuant to the agreement between the parties, was moored at the defendant's pier facility at Rockfort.

[5] The defendant advised the claimant that as a result of difficulties it had experienced, it was unable to commence on the agreed date. On 3 October 2003, it was informed by the defendant that it was no longer interested in pursuing haulage by sea.

THE DEFENDANT'S VERSION

[6] The defendant stridently resists the claim that there was a concluded contract. It insists that its Board of Directors approved the claimant merely as the "preferred supplier" of the haulage services which would have been required, on the 22 November 2003. Mr. Lake, the claimant's managing director, was verbally informed although its practice was to advise the bidder in writing that its bid was preferred and that it would be contacted to enter a formal written contract. The claimant was not so advised because the defendant was concerned about the claimant's pricing, which was tied to the United States' exchange rate.

[7] It is the defendant's case that subsequent to notifying the claimant that its bid was accepted, Mr. Richard Lake, the claimant's managing director, Mr. Derrick Isaacs, the defendant's materials manager and Adrian Spencer (CCCL's material manager and then marketing manager) met. Mr. Lake was questioned as to the impact the movement of the exchange rate would have on his proposal. He (Mr. Lake) voluntarily adjusted the price which had been submitted. No request was made by the defendant. The revised figures required the approval of the Board of Directors. The said prices were never approved by the Board of Directors.

[8] The defendant contends that the verbal notification did not constitute a contract as it was subject to the execution of a formal contract. According to the defendant, it had no experience in haulage of that nature hence the discussions with the claimant regarding logistics and methodology. It indicated to the claimant its desire for a trial shipment, however, it lacked sufficient quantities of cement and pallets for such a shipment. It denies instructing the claimant to mobilize its vessel and equipment and is adamant that there was no agreement between the parties for the commencement of the contract.

[9] The defendant also contends that the claimant's vessel was not in a condition to commence the haulage of the cement because it lacked the required trucks and was in need of repairs. The claimant sought its permission and was allowed to moor at its pier

for the purpose of carrying out repairs. It is also the defendant's case that it regularly provides the owners of vessels with permission to moor at its pier to effect repairs to their vessels.

THE CLAIMANT'S EVIDENCE

MR. RICHARD LAKE

[10] Mr. Richard Lake's evidence is that the claimant was awarded the tender. He was then advised that the purpose of the tender was to provide an alternative mode of transporting the defendant's cement to its warehouse in Montego Bay. Discussions ensued between the defendant's representatives and him. There were several discussions about the logistics for the execution and performance of the contract, particularly the transportation details as to cost build up; foreign exchange content and the commencement date for the haulage service.

[11] It is his evidence that he was asked, during the course of the discussions, if a test run with the vessel could be arranged. He explained to the defendant's representatives that the vessel could not be made available for one day as it was not the same as renting a car and returning it the following day. They were advised that the vessel was under charter and would not be available until June or July 2003 to commence the service. He further informed them that, in the circumstances, he would not renew that charter in order to make the vessel available to them by the first week of May 2003. Mr. Derrick Isaacs, the defendant's then materials manager, agreed to that arrangement and requested that the vessel be brought to Jamaica. The said vessel was operating at a market rate of US$5, 500.00 per day.

[12] Mr. Isaacs told him that the defendant wished to limit the effects of the fluctuations in the US dollar on the price quoted. The matter was discussed on the premise of an awarded contract with an awarded price that was tied to the exchange rate and oil prices. Consequently, on the 17 January, 2003, by way of letter, the claimant adjusted its price as requested.

[13] On the 17 February 2003, the claimant wrote to the defendant for Mr. Isaac's attention regarding developments in the services it was to provide. In that letter, the claimant also responded to Mr. Isaac's query about the possibility of obtaining a substitute vessel in order to commence its services earlier. He (Mr. Lake) informed him (Mr. Isaac) that it would be impossible. He however advised him that the claimant would not renew the contract with its charterers so as to make the vessel available to the defendant by the 10 May 2003.

[14] In response to the letter, Mr. Isaacs informed him that the defendant was not in a state of readiness and requested that they delay the arrival of the vessel. Consequently the claimant took a short-term charter. On the 27 June 2003, the claimant wrote to the defendant and advised that the vessel would arrive in Kingston on the 29 June 2003 to begin its service with the defendant in or about July 2003. The defendant was informed that in order to prepare for service, maintenance would be carried out on the vessel during that period. The letter reminded the defendant of the agreement that the vessel would berth at the wharf without charge.

[15] The vessel arrived at the defendant's wharf on the 7 July 2003 ready to embark on the contract. The claimant was however informed by Mr. Isaacs that there was further delay on its part for the following reasons: lack of warehouse space as a result of the filling of export quotas, insufficient pallets and cement, and the opening of a depot in Spanish Town. During the period, the claimant awaited the defendant's readiness, with the consent of the defendant, it embarked on two charter voyages to the Dominican Republic and to Honduras. Each trip lasted eight (8) days.

[16] On the 3 October 2003, Mr. Anthony Haynes, the defendant's then general manager advised him that the defendant no longer intended to transport its cement by sea. Mr. Isaac further informed him that the reason for the termination of the contract was that, upon the arrival of the vessel at the defendant's berth, the haulage contractors had reduced their claims for an increase. CCCL therefore did not anticipate any further problems with the road contractors.

YANIQUE FORBES

[17] The evidence of Ms. Yanique Forbes, (a former employee of the claimant) is that after the tender was submitted, they were invited to a meeting at which it was discussed that the claimant would end its charter contracts to make the vessel available for the defendant's service. It is her evidence that she attended two meetings at which the parties' behavior was consistent with proceeding with the contract. She testified that the defendant later requested an update on the price which was presented in the claimant's bid to reflect the changes on the exchange rate and the price of oil. On the 17 January the claimant informed the defendant that it had complied with its request.

THE DEFENDANT'S EVIDENCE

[18] Mr. Derrick Isaac's evidence is that the defendant desired an efficient and cheaper means of transporting its cement from Kingston to its depot in Montego Bay. In furtherance of its desire, it submitted tender documents with an unsigned contract agreement which was to be executed by the offeror upon making its offer. FML submitted its offer on the 29 August 2002. The tender closed at 3:00pm the following day. The Board of Directors approved the claimant's tender on 22 November 2002.

[19] It is his further evidence that the defendant's practice and custom was to inform in writing the "successful supplier" to whom it intended to award the relevant contract that it was the "preferred bidder" and advise that they would be contacted to enter into a formal written contract at a later date. The claimant's managing director, Mr. Lake, was however verbally and informally advised that FML was the preferred bidder. It is his evidence that it was the defendant's normal policy to identify a company as a preferred supplier pending a formal contract arrangement.

[20] It is also his evidence that he and Adrian Spencer, (CCCL's then projects manager) held discussions with Mr. Lake. During those discussions he inquired of Mr. Lake about the impact the movement of the foreign exchange rate and other factors would have on the tender price. He did not ask the claimant to adjust its price. The claimant, of its own volition, submitted a revised price by way of letter dated 17

February 2002. According to him, the contents of the letter make it plain that the claimant was aware of the necessity for a formal contract.

WAS THERE A CONCLUDED CONTRACT?

[21] The central issue is whether there was a concluded contract. The principles governing the contractual obligations which may arise consequent on an invitation to tender were enunciated by Estey J in the Canadian Supreme Court case of **Regina et al v Ron Engineering & Construction (Eastern) Ltd** [1981] 1 SCR 111. Although not binding on this court they are persuasive. Estey J clarified the contractual obligations by separating the obligations which arise on the submission of the tender, "Contract A", from those which arise on the acceptance of the tender, "Contract B".

[22] Bingham LJ in the English Court of Appeal case of **Blackpool Areo Club v Blackpool BC** (CA) 1990 WLR 1202 shared a similar view, He considered the labour and expense involved in the preparation of a tender, among other things, and at page 1202 he expressed the view that:

> "…*the invitee is in my judgment protected at least to this extent: if he submits a conforming tender before the deadline he is entitled, not as a matter of mere expectation but of contractual right, to be sure that his tender will after the deadline be opened and considered in conjunction with all other conforming tenders or at least that his tender will be considered if others are."*

[23] Gallen J, in the New Zealand case of **Pratt Contractors Ltd v Palmerston North City Council** 1 NZLR 469, agreeing with the posture taken by Bingham LJ 479 said at page 479:

> *"As Bingham LJ pointed out, the commercial reality is that a tenderer is obliged to expend substantial amounts of time and money in preparing a complex tender and is frequently required also to deposit substantial… of money in order to establish bona fides. Tenderers will normally be prepared to accept such obligations where they do so in light of obligations which the body seeking the tender indicated it accepts and which relate to the consideration which ultimately is to be given to the tender submitted. To such circumstances it is at least possible to formulate the relationship in terms of other offer and acceptance and it is*

in commercial and practical terms, appropriate to be categorized as contractual in nature."

The question to be asked in this case then is in the words of Bingham LJ, did the parties intend to create contractual relations with respect to the submission of the tender, i.e. that part of the transaction which is referred to in the ***Ron Engineering*** *case, as the "(a) contract"?"*

SUBMISSIONS BY MR. LEIBA REGARDING THE EXISTENCE OF A CONTRACT A

[24] Mr. Leiba contends that a "Contract A" was never formed. The claimant's tender was in the circumstances, merely an offer. It is his submission that if the court finds that the mere submission of the tender created a "Contract A", the defendant's only obligation under contract A was to act fairly by considering the claimant's tender once it was submitted within the time specified, and complied with the requirements. According to him, on the Defendant's evidence, the claimant's tender was extensively considered.

RULING

[25] This court embraces the views espoused by the aforementioned judges. CCCL invited tenders. FML submitted its offer. The evidence is that FML's tender was a conforming one. It is Mr. Lake's evidence that considerable time, effort and expense were required to submit the tender in a timely manner. The tender was submitted the afternoon before the deadline. This court unhesitatingly finds that a "Contract A" existed. I will return to this aspect later.

(A) WAS THE TENDER ACCEPTED?

THE GOVERNING LAW

[26] I now turn to the issue of whether the parties had moved to a "Contract B" position or whether the parties intended not to be bound until a formal written contract was signed by both parties. Bingham LJ in **Blackpool Areo Club v Blackpool BC** (CA) 1990 WLR 1202 said:

"*I readily accept that contracts are not to be lightly implied. Having examined what the parties said and did, the court must be able to conclude with confidence both that the parties intended to create contractual relations and that the agreement was to the effect contended for. It must be able to answer the question posed by Mustill LJ, in*

> **Hispanica de Petroleos SA v Vencedora Oceanica Navegacion SA (No 2) (Note**) *[1987] 2Lloyd's Rep. 321, 33:*
> *"What was the mechanism for offer and acceptance?" In all the circumstances of this case, and I say nothing about any other, I have no doubt that the parties did intend to create contractual relations to the limited extent contended for. Since it has never been the law that a person is only entitled to enforce his contractual rights in a reasonable way. (**White and Carter (Councils) Ltd v McGregor** [1962] AC 413, 430 A, per Lord Reid), Mr. Shorrock was in my view right to contend for no more than a contractual duty to consider. I think it plain that the council's invitation to tender was, to this limited extent, an offer, and the club's submission of a timely and conforming tender, an acceptance."*

[27] Are the circumstances of the instant case such as to produce the conclusion that the parties intended to create contractual relations?

Lord Blackburn's speech in **Rossiter v Miller** (1878) 3 App Case 1124 at p 1151 is instructive. He said:

> "*I quite agree with the Lord Justices that it is a necessary part of the Plaintiff's case to shew that the two parties had come to final and complete agreement, for, if not, there is no contract. So long as they are only in negotiation either party may retract; and though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remain to be settled afterwards, there is no contract. The parties, in such a case, are still only in negotiation."*

MR. LEIBA'S SUBMISSIONS REGARDING CONTRACT B

[28] It is Mr. Leiba's submission that there was no Contract A; consequently, Contract B could not arise. There was never any written agreement, that is, a "Contract B", between the parties as stipulated in the tender document. The agreement affixed to the tender was not the official agreement which would have been signed by the parties. It was a generic document which was issued with all tender documents to provide the tenderers with a general idea of the terms of the contract they would be entering into with the Defendant if their bids were accepted. The parties would be bound by a detailed contract agreeable to both parties and signed by both parties.

[29] He submits that, in the circumstances, no formal agreement was entered into as there were no agreed terms between the parties. On the claimant's evidence, all

agreements between the parties were verbal. There is no evidence that the defendant had waived its right to sign the document. The claimant has failed to outline the essential terms of the contract. The essential terms of a contract of this nature should at least include the commencement date from which the vessel was to be utilized and the price for providing the service. The result, according to him, is that there are no clearly defined terms on which the parties could have proceeded.

[30] The Claimant has not put forward the date upon which its tender was accepted, which would then indicate the commencement date if only in an effort to inform the Court of the time from which any damages should be calculated. The fact that the claimant was unable to state the date of commencement is evidence that tender was never accepted. The Tender Form clearly stated that the commencement date of the works should have been no longer than 14 days after receipt of written acceptance of the tender.

[31] He submits that Mr. Lake's admission that maintenance was necessary to the M/V Island Trader and that the vessel was out on charter thus requiring an alternate vessel meant that the Defendant would be uncertain as which vessel was to be utilized. The defendant would therefore be unsure of the capacity of the vessel and exactly how much cement could be transported. He also submits that although Mr. Isaac's stated in his witness statement that the claimant's tender was approved by the Board in or around November 2002, his oral evidence clarified the issue. He explained that the approval he was referring to was the local (MTC) Board approval. The parent Board's approval was still outstanding because of the value of the tender as the local Board was not authorized to give approval for the tender in issue. The tender, he submits, was never accepted by the Board as it did not comply with the requirements.

[32] FML was the preferred bidder. He submits that, a preferred bidder is different from a bidder whose tender is accepted which would then result in the contract (Contract B) being awarded to it, subject to the terms of Contract B being agreed between the parties. It is stipulated in the tender form that Mr. Isaac would have written

the letter of acceptance if the claimant's bid was accepted and no such letter was written contrary to the stipulation in the tender document.

[33] The agreement affixed to the tender was not an official contract which the parties would have signed. It was merely a draft agreement which the claimant signed. There is no evidence that the defendant waived the requirement that the agreement affixed to the tender should be signed by both parties. In the absence of a signed agreement, no formal agreement was ever entered into as there were no agreed terms between the parties.

[34] Further, he submits that by signing the document entitled "Tender Form" the Claimant accepted that there would be no contract with the Defendant unless the Defendant provided the Claimant with written acceptance of the Claimant's tender. This was the basis on which the Claimant's tender was put forward and considered by the Defendant. Having signed the tender form, the Claimant acknowledged this condition precedent. Based on the construction of the tender, the final step required was CCCL's written acceptance, which was never obtained.

SUBMISSIONS BY MRS. TRUDY DIXON-FRITH ON BEHALF OF THE CLAIMANT

[35] Mrs. Frith submits that there is a concluded contract. She relies on the inclusion in the tender document of the tender form and contract agreement. She submits that the tender document does not distinguish between oral acceptance and written acceptance. She places strong reliance on the fact that the Tender Form stated that the tender was open for acceptance within ninety (90) days of the date of the tender form. It is her conclusion that acceptance could, in the circumstances, be made orally or in writing. She however concedes that regarding the commencement of the work, written acceptance would determine that date.

[36] She contends that the document does not indicate that the acceptance of the tender should be in writing; neither does it state that the validity of the acceptance is conditional on it being in writing. Mr. Isaac admitted that he had the responsibility of

writing the letter advising the Claimant that its bid was accepted, but he failed to do so. In light of Mr. Isaac's evidence that the Claimant's tender was accepted, the Defendant ought not to be permitted to rely on its own omission to advance its defence and contention that acceptance of the tender was never communicated in writing.

[37] According to her, a perusal of the contract agreement dated the 29th August 2002 demonstrates a contract between FML and CCCL. This assertion, according to her, is supported by the inclusion of the statement that the documents *"should be deemed to form and be read and construed as part of this agreement: the Instruction to Tenders*; *Scope of Work and General Conditions of Contract together with the terms which provide for termination inter alia."*

[38] She submits that although the document was not executed, the word 'draft' which would indicate that the document was subject to confirmation, corrections and or amendments did not appear on any of the documents. Mr. Isaac as Secretary of the Management Tenders Committee (MTC) would have been the person to execute the contract. The Tender Documents also contained a termination clause which reserved to CCCL the right to terminate the agreement by giving three (3) months' notice. In the event that the contractor failed to perform his obligation under the agreement, CCCL reserved the right to terminate the agreement by giving twenty four (24) hours' notice.

[39] The contract expressly incorporated the invitation to tender and the scope of work. It provided the terms of the full and complete contract between the parties. There was no necessity for any additional "formal" contract as the contract provided the full extent and only framework which guided the obligations, duties and responsibilities of both the claimant and the defendant in relation to the transportation of cement by sea. The contractual terms in the contract were drafted and included by the defendant. It would therefore have no issue with its contents. Upon acceptance of the tender, the claimant, having executed same, rendered execution by the Defendant unnecessary since the terms were prepared and approved by it.

[40] The tender documents, she submits, were prepared by CCCL. Mr. Isaac confirmed that the tender documents were subject to various approval processes, including approval by the Marketing Department, the Management Tenders Committee and the final approval process required was the approval by the Defendant's Board of Directors. On Mr. Isaac's evidence, the tender was approved by the Defendant's Board of Directors on November 22, 2002 which was within the 90 days specified for acceptance of the tender by the contract document.

[41] If the defendant intended to execute another contract, such a contract would have had to be disclosed in the tender documents to all tenderers, as was the customary practice. There was no such contract among the tender documents. The tender submitted by Freight Management contained several terms and conditions confirmed by CCCL for example, that there would be no charges of any kind for utilizing Caribbean Cement's Port and that the quotation was based on the existing exchange rate of J$48.63 to US$1.00.

[42] She argues that evidence demonstrates that the parties' behaviour was consistent with the contract. In light of the contents of the tender documents and the conduct of the parties, the use of the term "formal contract" in its letter to the Defendant dated January 17, 2003 was unfortunate. Accordingly, the letter from the Claimant to the Defendant dated January 17, 2003 (exhibit 1), must be interpreted in this context. Consequently, reference in the said letter to "formal" contract, can only mean that the contract existed, and that a formal document could be executed relative to the commencement date.

ASSESSMENT OF THE EVIDENCE

[43] The question is whether Mr. Lake was informed by Mr. Isaac that FML's bid was successful and whether the parties conducted themselves in a manner that could lead to that conclusion. Mr. Lake asserts that he was informed by Mr. Isaac that the claimant's tender was successful. He is adamant that there was never any understanding that FML would receive a written acceptance of the tender from CCCL

and that Mr. Isaacs did not indicate that there was any problem. Mr. Isaac informed him that the tender was accepted and approved by the Board. He testified that it is customary for acceptance to be verbal but the date of commencement is usually in writing. He however had been informed verbally of the date of commencement. It is also his evidence that all the terms of the contract became applicable at the point the tender was accepted within a 90 day period.

[44] It is his evidence that there were several discussions regarding the logistics of transporting cement. There was, however, one discussion in which he was asked to amend the price as it was affected by the exchange rate. He obliged and the price was accepted. He asserts that the fact that the defendant complied with the claimant's request that wharf fees should not apply is also evidence that the defendant accepted that which was stated in the letter and that the contract had commenced.

[45] Mr. Adrian Spencer's evidence is that he did not inform FML that its tender was approved, he was aware that FML was informed that its tender was accepted but he did not know who informed FML. His evidence is that, the secretary, that is Mr. Isaac has the responsibility of informing the bidder that its tender was accepted. It is also his evidence that the bidder is told that the bid is accepted and the price stated accepted. CCCL does not inform bidders by way of letter that tenders have been accepted.

[46] Mr. Isaac however denies that he informed Mr. Lake that he was awarded the contract. It is his evidence that he told him he was the preferred bidder. He is insistent that he never told Mr. Lake that FML was the successful bidder or that the tender was accepted and was approved by the Board. He agreed that upon approval by the Board, he was the person charged with the responsibility of contacting Mr. Lake and informing him that his bid was successful. He also agreed that he contacted Mr. Lake about the bid but he never told him his bid was successful. His evidence is that he does not know who informed the claimant that its bid was successful.

[47] He steadfastly insisted that he never told Mr. Lake that FML's bid was successful. He never knew who informed him that his bid was successful. When confronted by his witness statement he altered his position and stated that he informed him that he was the preferred bidder. He further stated that the information was conveyed at a meeting with Mr. Lake and Mr. Adrian Spencer. He did not tell Mr. Lake at the meeting that the tender was accepted. He informed him that he was the preferred bidder. Prior to the one meeting he had with Mr. Lake, his only contact with him was to invite him to the meeting but he never made the call himself.

[48] He denied there was a meeting at which logistics regarding the carrying out of the contract were discussed. He admitted discussing:

(a) whether the cement would be transported on the deck or below the ship;

(b) the loading and off-loading of cement; and

(c) who would give instructions to the captain, among other things.

He insists that he had one meeting with Mr. Lake and at that meeting the issue of price was raised. The meeting was arranged by telephone call but he was not the person who contacted Mr. Lake.. He also denied being present at all the meetings. He denied that the issue of the logistics regarding the carrying out of the contract was discussed at more than one meeting. It is also his evidence that prior to the meeting; he contacted Mr. Lake to invite him to the meeting.

[49] He denied that there was any discussion regarding the commencement of the contract. He denied that the entire discussions were concerned with the time FML would start the shipment of cement to Montego Bay and how it would be done. According to Mr. Isaac, apart from awaiting the Board's decision, there was a further delay in finalizing the contract as discussions concerning the logistics and methodology for carrying out the haulage were necessary because CCCL had never carried out haulage of that nature. There was no request by CCCL that FML should mobilize its vessel and equipment in order to perform a trial run or to commence the actual contract.

[50] It was Mr. Isaac's evidence that he was the main person who dealt with tenders and the documentation for this tender. The contracts were signed by him. He played a major role in the tender process. He can safely be described as a chief player, if not the chief player. He was the secretary of the Management Tenders Committee. As secretary, all requests for tenders went to him. The MTC was responsible for reviewing the tenders which were lower than $6 million but exceeded $3 million. It is his evidence that if the tender amount exceeded $3 million, the initial approval of MTC was still required. MTC comprised the senior managers committee, that is, the general manager, the operations manager, production manager, human resource manager and the project manager which reviewed tenders. It was his earlier evidence that approval by the Board of Directors was obtained on the 22 November 2002.

[51] His role was to go to the preferred supplier or issue public advertisement for the service. The tender box was opened by two managers and him. The tenders are, however, evaluated by the department which required the service he was only able to sign if approval was obtained from the various levels of the approval process, which included the Board. He explained that upon receipt of the approval of the Board of Directors, the price stated is also approved. Once the Board's approval was obtained, no further approval was necessary. Some days after he commenced his cross-examination and shortly before his re-examination, he testified that no time frame was given for the commencement of the contract.

[52] It was only in re-examination he mentioned the three levels of approval which were necessary dependent on the value of the service. It was only then he testified that amounts over $6 million required the approval of the Parent Board. Thus the Parent Board's approval was necessary in the instant case because the tender figure exceeded $6 million. Indeed it was only on the 25 September 2012 shortly before his re-examination, that the words 'Parent Board' were mentioned by him. In his examination in chief, he introduced the various levels of approval. The omission to mention the Parent Board is odd. He later testified that there was no time frame given for the commencement of the contract because the Parent Board's approval was still to be had.

[53] The defence filed on behalf of the CCCL stated that there was no concluded contract as the defendant's Board of Directors still had not approved the revised price proposed by the claimant nor did it have sufficient supplies of cement and pallets to constitute a shipment. There was no mention of approval being sought from the Parent Board. Implicit in the defence is that the Board of Directors (local) was the final determining body and it had agreed to the price quoted in the tender document but did not agree to the adjusted price. Apart from price, insufficient material on the part of the CCCL also prevented the conclusion of the contract and was also an issue.

[54] Mr. Isaac's witness statement is helpful in attempting to ferret out the truth as to whether the belated mention of the necessity for the Parent Board's approval is a recent concoction as Mrs. Frith submits. There was no mention of the need for approval from a Parent Board. The crux of his witness statement is "*that both parties were to agree to further terms in order to finalize a contract to be executed by both parties…Carib Cement still had concerns about FML's pricing which was tied to the US $ exchange rate*. *Cement Cement would therefore not be in a position to have agreed or to have awarded any contract, as this would represent a major variation in the sum that was originally submitted to the Board of Directors, and this would have to be re-submitted for approval."*

[55] There was no mention in his witness statement of the necessity to obtain any approval from the Parent Board. Indeed, he admitted he did not mention in his witness statement the need for any further approval. Regarding the need for further approval consequent upon the revised price, he said:

> *"Although FML had been notified that it was the preferred bidder, approval from Carib Cement Board of Directors was still required, especially in view of the adjusted tender price. There was a delay in finalizing and operating the contract also due to certain difficulties being experienced by Carib Cement in addition to waiting on approval from the Board of Directors… there remained no approval from the Carib Cement Board of Directors regarding the revised price."*

[56] The averments made by Mr. Isaac in his witness statement are at variance with his testimony under cross-examination. Under cross-examination he testified that approval of FML's tender was subsequently obtained from the Board of Directors on November 22, 2002. Perhaps as a result of a Freudian slip, in attempting to recall the date of the meeting he, however, told the court that it was after August 2002 and after the Board had granted its approval.

[57] Mr. Spencer's evidence is that he never knew that the local Board of Directors had approved the tender on the 22 November 2002. In fact, according to him, it surprised him. Mr. Spencer, in his witness statement speaks of the need to obtain the approval of the parent company. He says:

> "*If the value exceeded J$5 million, then it would be awarded by the MTC. If it exceeded J$10milion, then the contract would be awarded by the parent company Trinidad Cement Limited (TCL) Group Board."*

Significantly, this was the first mention of the need for TCL's permission. Mr. Isaac, at the material time was the materials manager and secretary.

[58] The defence which was filed on behalf of the defendant did not mention the need for TCL's approval, nor did Mr. Isaac in his witness statement. It is certainly curious that such an important aspect of the defence was omitted from the defence and Mr. Isaac's witness statement, he being the major player at the material time. Mr. Isaac averred in his witness statement that, "*It was CCCL's usual custom and practice to advise successful suppliers to whom it intended to award the relevant contract of the fact that their bid was the preferred bid in writing and to advise them that they would be contacted to enter into a formal written contract at a later date."*

[59] He acknowledged that the term "preferred bidder" is not mentioned in the Tender Document. The use of the word 'successful' in his witness statement is interesting in light of the controversy as to whether Mr. Lake was informed that FML's bid was successful. The logical construction of that statement is that the "preferred bidder" is regarded by CCCL as the successful bidder.

[60] Was Mr. Lake indeed informed by Mr. Isaac that FML's bid was successful? It is significant that Mr. Spencer's evidence is that he knew that Mr. Lake was told that FML's bid was successful but he was unable to say by whom. Mr. Spencer's evidence therefore provides support for Mr. Lake contention that he was indeed informed that FML's bid was successful although the question arises as to how he acquired that knowledge as both Messrs. Isaac and Spencer are unable to assist.

[61] As to how Mr. Lake received the information that FML was preferred bidder is irrelevant in the circumstances, in light of Mr. Spencer's admission that he knew that he was so informed. Even if Mr. Lake was informed that FML was the preferred bidder, by Mr. Isaac, (the person who was authorized to provide that information) FML would have expected that it would have been awarded the contract.

[62] On both versions, FML, having expended the time and expense of preparing the tender and ensuring that it was delivered in a timely manner would reasonably have expected to be awarded the contract. In any event, I accept Mr. Lake's evidence that Mr. Isaac informed him that FML's bid was successful and approved.

[63] It is Mr. Spencer's evidence that at the time the invitation to tender was made, the truck drivers were restive. I accept Mr. Lake's evidence that he was told by Mr. Isaac that the arrival of the vessel resulted in the truck drivers' acceptance of CCCL's offer. Surely the principles of fairness would dictate that FML's tender would not be discarded flippantly. It would not expect that its tender would be capriciously discarded in favour of the truck drivers. There was no indication in the tender document that it was competing with truck drivers. Section 1 of the Tender document which is entitled "Invitation to Tender" outlined the background to the tenderer. It is helpful to quote from the document:

> "*Caribbean Cement Company Limited (CCCL) operates a Cement Manufacturing plant at Rockfort in Kingston and a depot in Montego Bay. At present cement is dispatched via trucks to its Montego Bay location and to various other locations island-wide.*

It is CCCL's intention to continue the transportation of cement by sea. CCCL is therefore inviting proposals from qualified marine freight operators."

[64] It is true that the said Invitation to tender reserves:" *the right to CCCL to reject any tender and the claimant in signing the Tender form understood that CCCL was not bound to accept any tender and disavowed any liability for any expenses incurred*." Nevertheless, it had reached the stage at which Mr. Lake was informed that he was the" preferred" "accepted" "successful" bidder. It would make a mockery of commerce and undermine the tender process if CCCL is able to induce bidders to incur expenses and then abandon the project they were invited to bid for.

[65] It is quite understandable if bids are submitted but all fail the requirements being sought, certainly in those circumstances CCCL is not bound to accept any tender. It cannot, in the view of the court be interpreted that CCCL is able to reject tenders arbitrarily because the truck drivers refractory behaviour was quelled by the presence of the tenderer's ship. If the claimant had been advised that it was competing with truck drivers it might not have put itself through the time and expense. It cannot be fair for CCCL to deprive the claimant of the contract because the truck drivers decided to accept the defendant's offer upon realizing that CCCL had an alternative. FML competed with the other tenderers who were marine freight operators and prevailed over them. FML would certainly have had a reasonable expectation that its tender would have been accepted.

[66] In **Pratt Contractors**, at page 480, Gallen J said:

"Accordingly then it is necessary to proceed to the next issue, that is whether or not there has been any breach of that contract in the circumstances of this case. In the Hertz case Heald J. indicated that the terms of any such contract are to be derived from the policy and specifications upon which the tender is submitted (see p. 149). At p150 indicated that included:
"…the promise to evaluate the bids in accordance with the terms of the tender specifications and to accord an offer to enter into a…contract to the successful bidders in accordance with those specification."

> …*The comment in the Hertz case must be considered in context. I can understand the concern expressed by the Judge in the Hertz case that a Council could not be permitted to use the general power to reject tenders to make an arbitrary choice. In selecting a particular tenderer, the Council is in view bound by the terms it has itself imposed, as well as the requirements of fairness and equity which may well have been an application.*"

Having examined a number of decisions of judges from a number of Commonwealth countries, (in the interest of brevity some have not been included) whose decisions are persuasive, I am of the opinion that the law is fairly well settled. It is the court's finding that the parties had proceeded to a 'Contract A' position.

WHETHER THE PARTIES CONDUCTED THEMSELVES IN A MANNER CONSISTENT WITH A CONCLUDED CONTRACT

[67] It is Mr. Isaac's evidence that a letter would be written by him advising that the bid was accepted but he did not do so in the instant case. As the person with the responsibility for informing the successful suppliers, the question is why he failed to do the usual? Is it as he testified that he was still awaiting the approval of the Parent Board? Or, is it that he simply omitted to do his duty whether negligently or otherwise while he led the claimant to believe that CCCL had approved its bid and had embarked on a contract?

[68] Credibility is a major issue. It is troubling that although FML purported to respond to CCCL's queries regarding the furtherance of the contract, registered its plans and concerns in writing, CCCL remained verbal almost throughout. Mr. Isaac's testimony was that he had written a letter advising FML that CCCL no longer intended to pursue the contract. He however retracted that statement and testified that he was unable to recall whether he or anyone else did. Several months elapsed before CCCL communicated with the claimant in writing.

[69] It is important to quote the letters which FML wrote to CCCL to which there was no response correcting the allegedly erroneous averments. Curiously CCCL continued "negotiations" in the face of such letters. At the point it wrote to the defendant, it, the

defendant, quite strangely did not register any displeasure at what would have been the claimant's seemingly glaring misrepresentation of the facts. Indeed, it was only on the October 3, 2003 CCCL's Mr. Haynes informed the claimant of its intention not to pursue transportation by sea. This was the juncture at which the drivers realized that CCCL had an alternative to haulage by road and settled their differences with CCCL. Mr. Spencer's evidence is that at that point CCCL was engaged in negotiations with the truck drivers. It is Mr. Isaac's evidence that there were regular disputes with the truck drivers. It is uncanny that the letter coincided with the period of the truck drivers' change of heart.

EFFECT OF THE ABSENCE CCCL'S SIGNATURE ON THE AGREEMENT?

[70] Mr. Isaac maintains that the contract attached to the tender document was not a formal contract. It was only included to familiarize the bidder with some of the terms which would be incorporated in the final contract. A formal contract would have been prepared. He however agrees that the contract forms part of the Tender Document. He accepts that it was not a requirement that acceptance of the tender should have been in writing. Of what purpose was the inclusion of the contract document? Is it that bidders entered the bidding process blindly? Would bidders incur the expense, time and trouble without full disclosure by CCCL as to the terms of the intended contract? Or, is it that the contract document attached was indeed the contract document?

[71] It is Mr. Isaac's evidence that in the usual course of dealing, the intended agreement is disclosed to the potential tenderer. He also agrees that a person who submitted a tender knew the terms of the contract he is entering and that the tenderer would be bound by terms agreeable to the parties. It is instructive that Mr. Isaac's evidence is that a person who submits a price for a tender knows the terms of the contract he is entering. How would such a person discover the terms of the contract if a formal agreement containing all the terms was to be prepared? The tenderer would only become aware of the terms by seeing the contract. Why the departure from the norm in this case? On a preponderance of possibilities, this court is of the view that such a

discovery would be made by the reading of the agreement attached to the Tender Form and the General Conditions of Contract.

[72] The Tender Document is a very detailed and substantial document. It consists of three sections. The contract is included in section II of the Tender Document. Section 111 speaks to the General Conditions of Contract. This section is very substantial. It defines the contract as:

> *"The agreement entered into between the employer and the contractor as recorded in the contract form signed by the parties, including all the attachments and appendices thereto and all documents incorporated by reference therein.*"

Section III speaks to the terms of the contract in great detail.

WHETHER VESSEL WAS PERMITTED TO DOCK

MR. LEIBA'S SUBMISSION REGARDING THE DOCKING OF THE ISLAND TRADER

[73] It is Mr. Leiba's submission that the fact that the claimant's vessel was allowed moor at the claimant's pier without charge is not evidence of a concluded contract because it was usual for ships not associated with the defendant to dock at its pier. He submits that merely allowing the Claimant to dock the Island Trader at its pier without charging a fee cannot amount to unequivocal evidence of a promise that the parties would enter into a written agreement in respect of the transportation of cement.

[74] He submits that the local Board had no authority to give final approval for this tender. It therefore could not have allowed the vessel to dock in order to commence the transportation of cement. He relies on the enunciations of Crane C in case of **American Life Insurance Co. v Sumintra** (1983) 37 WIR 242 at page 265) that *"no corporate body…can be bound by estoppel to do something beyond its powers"*. He further submits that CCCL facilitated the vessel at its pier because it was in need of repairs and/or maintenance. He points out that Mr. Lake admitted that after the Island Trader was sold, repair work was necessary.

MR. LAKE'S EVIDENCE ON/ REGARDING THE ISSUE

[75] Mr. Lake's evidence is that there was no need for the vessel to be moored for any extended period for repairs to be effected. He asserts that at the meeting which was held in January 2003 between CCCL and FML he was asked to amend the price in accordance with the exchange rate clause. FML complied and CCCL accepted. Consequently, the vessel was delivered to CCCL.

[76] He also accepts that at no time, either prior or subsequent to the arrival of the vessel at the defendant's pier, did FML receive any written agreement for the vessel to dock. He is however steadfast in his assertion that the matter was discussed in meetings and agreement was verbally made. Concerning delivery to new owners, he disagrees that it was not immediately delivered to the new owners although he was unable to say when it was removed.

CCCL'S VERSION OF THE FACTS

[77] Mr. Isaac's evidence is that FML docked at CCCL's pier in July 2003. He categorically denies that he had any communication or discussion with Mr. Lake or made any arrangement with Mr. Lake for the vessel to come to Jamaica. It is his evidence that he had one meeting with him, which was about the tender. It is his further evidence that arrangements for the wharf falls under the purview of another department. He was not authorized to give permission for its use. His evidence is that there was no contract with Mr. Lake therefore no date was contemplated for the commencement of shipping.

ANALYSIS OF THE EVIDENCE

[78] Mr. Isaac disagrees that there was to be no charge because there was a contractual arrangement. It is peculiar that although FML, by way of letter, informed CCCL of its intention to reduce its charter and that it was bringing the vessel, CCCL did not stop it from doing either; did not object to the contents of the letter; nor did it forbid FML from docking at CCCL's pier.He never responded to the claimant's letter which contained the allegation. Although the claimant made those false claims and

presumptuously docked at its wharf, it was never charged any wharf fees or any charge of any kind.

[79] It is enlightening to quote the letter of 17 February 2003 which reads:

> *17th February, 2003*
>
> *Re: Provision of Marine Transportation Service*
>
> *Further to our discussion regarding chartering a vessel to provide marine transportation for your product, we would like to report the following developments.*
>
> *We have utilized the services of a broker to source a suitable vessel for the service. However, this has been extremely difficult as roll-on roll-off are in high demand.*
>
> *We have asked the charterers for our vessel, the Island Trade, to reduce our charter contract, and the vessel will be available on or before 10th May 2003. We expect to begin our service to you at that time. During our meetings, we also indicated that we would like to offer 10,000 ft. – 20,000 ft. (preferably 10,000) of warehouse space for rental. Our rates would approximately (US$467.50 per square foot per annum which is 15% below market rates (using L.O.J warehouse as a benchmark).*
>
> *Please do not hesitate to call us to discuss this matter further.*

[80] Mr. Isaac disagrees that there was any discussion with Mr. Lake about the arrival date for the vessel. He categorically denies that there was any discussion that the vessel was to arrive at the pier on the 29 June 2003 as stated in the letter or that service was to commence in July 2003. He denies telling FML to bring the vessel by the 10 May 2003.

[81] The letter of 17 February 2003, from FML to CCCL, in the absence of any discussion between the parties regarding FML chartering a vessel to commence the service, would amount to an outrageous and presumptuous misrepresentation. CCCL would have engaged a dangerously dishonest tenderer in further discussions without registering its disapproval. It is significant to note that CCCL has in-house attorneys that could certainly have advised it. Is that by CCCL's silence it can be presumed to have acquiesced?

[82] Mr. Isaac's evidence is also at variance with his witness statement regarding FML obtaining permission to moor. He testified that he could not recall stating that Island Trader was allowed to moor at the pier. Upon being shown his witness statement in which he stated, "*The Island Trader was allowed to moor at the Carib Cement pier"* he recanted. He however states that he does not know who gave the claimant permission to moor its vessel. His testimony is that the marketing department would usually grant permission. It is curious that he avers in his witness statement that Island Trader was allowed to moor, yet he does not know who gave permission in spite of being so integrally involved in the tender process.

[83] He agreed that for the most part of July 2003 to October 2003 it was docked at the pier. His evidence is that the vessel was not docked at CCCL's pier awaiting the commencement date for the shipping services. According to him, it was not docked for any business related to CCCL. He was however informed that the vessel was undergoing repairs.

[84] He is adamant that between the months of July and October 2003 he had no conversation with Mr. Lake that there was a delay on the part of CCCL to start shipping cement. He however agrees that having accepted the tender, there was a delay in starting the shipping service. He disagrees that the delay was due to:

(a) export quotas being filled which minimized space;

(b) the opening of the Spanish Town depot;

(c) insufficient cement and pallets.

[85] He denies conveying those reasons to Mr. Lake. He also denies that he conveyed the impression to Mr. Lake that shipment would commence as soon as the difficulties were dealt with. In his witness statement, he avers that there was no contract to pursue. He disagrees that having accepted the tender and FML having signed the contract, there was a contract in place**.** Under cross- examination however, he agreed that having accepted the tender for FML, there was, in fact, a contract to pursue.

Although he was materials manager and was integrally involved in the tender process, he was unaware that there were insufficient quantities of cement. It is CCCL's defence that it did not have sufficient cement in order to substantiate shipment by sea or sufficient pallets to move the cement. Mr. Isaac's evidence is that he was one of three persons who gave the attorney instructions as to the contents of the defence, because he was the main person who dealt with the documentation for the tender. He nevertheless maintains that was not aware that there were insufficient cement and pallets**.**

[86] Mr. Adrian Spencer, CCCL's then the senior marketing officer and present material manager testifies that Island Trader was permitted to dock at one of CCCL's piers without charge. His testimony is that he does not know who gave FML the permission to dock its vessel. At the time the vessel was allowed to dock, CCCL accommodated reasonable requests for vessels to dock for example, to receive water. Permission was limited to ships' operation for charitable purposes, for example, the Logos boat (a floating library, and a missionary vessel) and charitable medical vessels have been allowed to dock. The only request to carry out repairs was from FML. The defence filed on behalf of CCCL, however stated that CCCL regularly allowed vessels to moor at its pier to carry out repairs. His evidence is that CCCL's piers are sufferance wharfs which operate under a licence given by the Minister of Finance.

[87] On the 27 June 2003, CCCL was informed by FML by way of letter which reads:

> "…..*In keeping with our Agreement, we will berth at Caribbean Cement Companies wharf. There should be no applicable wharf charges. In preparation to begin service on 7 July we will be conducting some maintenance to the vessel. If during this time it becomes necessary to shift the vessel, we will of course cover any related expenses. We look forward to commencing our service."*

CCCL's silence in the face of this statement raises the issue of acquiescence. The vessel, in fact, arrived at the defendant's berth on the 7 July 2003. In light of the above statement it would have been reasonably expected that CCCL would have registered its displeasure at being ascribed a statement it never made. Instead, it allowed the vessel

to berth until the 3 October 2003 without any objection or cost to the claimant. On the 3 October 2003, its then general manager Mr. Haynes informed the claimant that CCCL was no longer interested in pursuing transportation by sea.

[88] Can it be said, in light of CCCL's behavior, that its conduct, prior to Mr. Haynes letter, that the parties were operating on the premise that there was an acceptance and FML was awarded the tender and was merely awaiting CCCL's date of commencement as alleged.? This court, on a balance of probabilities, finds that there was in fact an agreement for the vessel to be brought to CCCL's pier as stated in the letter.

WHETHER CCCL'S VERBAL ACCEPTANCE OF FML'S TENDER CONSTITUTED A BINDING AGREEMENT

THE LAW

[89] The learned authors of **Chitty on Contracts** Thirtieth Edition Volume 1 at page 204 expressed the view that, although the meticulous details of an agreement are not worked out, an agreement may be complete. It was also their view that a claim for payment for work done in circumstances where it was believed that there was a contract or the parties expected that there was a concluded contract because of the negotiations between them could constitute a completed agreement**..** At pages 205 and 206 they stated:

> *"The effect of a stipulation that an agreement is to be embodied in a formal written document depends on its purpose*. *One possibility is that the agreement is regarded by the parties as incomplete, or as not intended to be legally binding, until the terms of the formal document are agreed and the document is duly executed in accordance with the terms of the preliminary agreement (e.g. by signature). This is generally the position where solicitors are involved on both sides, formal written agreements are to be produced and arrangements are made for their execution: The normal inference will then be that the parties are not bound unless and until both of them sign the agreement. A second possibility is that such a document is intended only as a solemn record of an already complete and binding agreement. Yet, a third possibility is that the main agreement lacks contractual force for want of execution of the formal document but that nevertheless a separate preliminary contract comes into existence at an earlier stage, e.g. when one party begins to render services requested by the other, so that under this contract the former party will be entitled to a reasonable remuneration for those services."*

[90] The defendant relies on the case of **Okura v Navara** [1982] 2 LLR 537 in support of its contention that there was no concluded contract. In that case, the claimant Okura and Co. Ltd had contracted the defendant for the construction and sale of a ship which was to be delivered in September 1977. The contract contained *inter alia* a force majeure clause. The defendant was not able to fulfill its contractual obligations and **Navara** cancelled the contract in accordance with the contract. The parties commenced negotiations almost immediately after **Okura** made an offer to purchase the ship.

[91] The negotiations proceeded on the understanding that a written contract would be signed by the parties. On the 4 May 1978, a telex was sent which contained the terms agreed by the parties. The conditions which were contained in the first contract were to apply, however there were additional conditions, for example: the time for delivery, the fact that acceptance or rejection was to be made within a specified time after the parties signed the agreement. The telex required that the items enumerated in the telex were to be "incorporated in a memorandum of agreement in mutually acceptable manner." Significantly, it was a term the first contract that its effective date was conditional upon the signing of the agreement by the buyer and the contractor.

[92] **Okura** caused a draft memorandum of the proposals outlined in the telex to be prepared. It however contained an additional clause which was not included in the telex. The clause sought to deprive the **Okura,** the seller of any extension of time as a result /due to force majeure. It, in fact, excluded clause 10 of the original contract which allowed for an extension of time as a result of force majeure.

[93] The parties were unable to agree. **Okura** objected to the inclusion of the clause. There was no agreement on the issue. The negotiations broke down and **Okura** informed **Navara** by way of telex that the builder did not agree to the draft agreement and refunded **Navara's** down payment and sold the ship. **Navara** threatened to institute proceedings for specific performance. **Okura** issued a writ which sought a declaration that a contract had not been reached.

[94] On appeal, Lord Denning MR, in determining whether the telex was intended merely as the 'basis for a future agreement', that is 'subject to contract' or whether it was a binding agreement, relied upon the rule expounded by Mr. Justice Parker in the case of **Von Hatzfeldt-Willdenburg v Alexander** [1912] 1 Ch 284 at page 288. Lord Parker enunciated thus:

> "*It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a binding contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."*

[95] Lord Denning, disagreed with the court of first instance and was of the opinion that there was no binding contract. At page 541 he said:

> "*Everything was provisional only. The parties were not to be bound unless and until they signed an agreement. Item 3 of the telex said, "within 15 consecutive days a …signing of this agreement". Article X1X of the original contract said that it would become effective when the agreement was signed. Item 11 of the telex clearly contemplated that there should be a memorandum of agreement in mutually acceptable terms. It is a matter simply of the construction of the document. The telex itself was not binding. It was a preliminary to a future document which was to be binding when signed. The future document was drafted but it was never signed. It was never agreed by the parties.*
>
> *There is also the conduct of the parties. It seems to me that they did not treat the telex of May 4, 1978, as a binding agreement. All sorts of matters had to be arranged. Eventually the buyers asked for a refund of their money in accordance with their ultimatum. That refund was accordingly made by the sellers without a query at all. The conduct of the parties throughout seems to me to show that there was no binding agreement on May 4. It was contemplated that there should be a binding agreement, but it was never made."*

[96] The circumstances of **Okura** differ from the instant case. The parties in the **Okura** case palpably intended that they would be bound by a formal and signed

agreement. The conduct of the parties demonstrated that the telex was not regarded by them as binding.

[97] The defendant also relies on the case of **Pagnan v Feed Products Ltd** [1987] Vol 2 LLR 601. In that case, Pagnan was the purchaser and Feed Products, the seller. The parties negotiated the sale of corn gluten feed pellets. The sale was conducted between the buyer and seller by broker, ADM (Mr. Pagnossin). The negotiations were conducted by way of telex. On the 1 February 1982, Mr. Pagnossin, the broker, advised the parties via telex that an agreement had been reached and he stated the terms of the agreement.

[98] The following day the defendant received a telex from its supplier which contained several additional terms. The defendant amended the telex and sent it to the plaintiff. The plaintiff found certain amendments to be unacceptable and Mr. Pagnossin, the broker, was so advised on the 3 February. By 8 February the broker and the defendant were under the impression that they had resolved the issues because the parties had exchanged several telexes and the claimant had not raised any objection.

[99] The sellers prepared a formal contract. The document omitted the amendments to which the purchaser had agreed. It however included the terms which were agreed with the broker, Mr. Pagnossin. The seller received the said contract on the 26 February and returned it to the broker who gave it to the claimant on 9 March. The following day the claimant, by way of telex pointed out the omissions to the sellers. Telexes were exchanged as a result. The claimant insisted that there was no concluded contract as a consequence of the omission.

[100] Mr. Justice Bingham with whose decision the Court of Appeal agreed, dismissed the buyer's appeal and found that there was a concluded contract. At that juncture the parties were not negotiating terms which were considered pre-condition of the contract but were settling the details of a concluded contract. At page 610 Bingham J enunciated the law thus:

"The general principles to be applied in deciding the issues in this case are not, I think, open to much doubt. The Court's task is to review what the parties said and did and from that material to infer whether the parties' objective intentions as expressed to each other were to enter into a mutually binding contract. The Court is not of course concerned with what the parties may subjectively have intended. As Lord Denning MR put in in ***Storer v Manchester City Council*** *[1974] 1 WLR 1403 at p 1408H:*

In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed where there is, to all outward appearances, a contract. A man cannot get out of a contract by saying "I did not intend to contract" if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract, that is enough.

It is furthermore clear that where exchanges between parties have continued over a period the court must consider all these exchanges in context and not seize upon one episode in isolation in order to conclude that a contract has been made. There will be some cases where continued negotiations after a contract has allegedly been made will lead to the inference that the parties never in truth intended to bind themselves, as in ***Hussey v Horne-Payne****, (1879) Ld wR 4 App Cas 311.This will the more obviously be so where a term raised by one or other party early in the negotiation had not been the subject of agreement at the time of the alleged contract.* ***Love and Stewart Ltd. vs. S. Instone & Co. Ltd*** *(1917) 33 T.L.R. 475 is an example of such a case: there, although the parties had agreed that there should be a strike and lock-out clause, they had never agreed what the terms of the clause were to be.*

Where the parties have not reached agreement on terms which they regard as essential to a binding agreement, it naturally follows that there can be no binding agreement until they do agree on those terms."

[101] In the absence of an agreement signed by representatives both parties, examination of the correspondence from FML and the parties' conduct are revealing. The letter of 27 June 2003 which was sent to CCCL for Mr. Isaac's attention referred to a discussion which occurred between the parties the week before. It sought to confirm the arrival of the vessel and stated a date for the commencement of service. CCCL did not respond to this letter. Is it reasonable that CCCL would have remained silent in the face of what should have been considered blatant lies? Can its silence be regarded as, acceptance of the statements and therefore constituted ratification? Is it reasonable to

infer that the parties operated on the understanding of a concluded contract? Although contracts are not to be lightly implied, in light of:

(a) the clear statement of an agreement between the parties for the vessel to be to arrive;

(b) a stated period for service to commence; and

(c) CCCL's silence in the face of those statements,

this court finds on a balance of probabilities that there was indeed an agreement between the parties as stated.

WHETHER FML WAS READY AND ABLE TO COMMENCE SERVICE

WAS THE ISLAND TRADER SEAWORTHY?

[102] It is Mr. Leiba's firm submission that even if certain representations were made, the claimant was not in a position to perform the contract as its vessel was not seaworthy. Mr. Isaac, in his witness statement avers that the defendant's vessel was allowed to moor at CCCL's pier for over a month to effect repairs. It is his evidence that repairs were being effected to as late as 6 October 2003. At 7 July 2003, according to Mr. Isaac FML was not ready or able to begin the service as the vessel required repairs and it had not obtained the trucks which were needed to carry out the service. He is insistent that FML did not curtail or reduce its charter as a result of any request of CCCL.

[103] FML made it quite plain in that letter that it intended to conduct maintenance to the vessel. Does that mean that the vessel was not seaworthy? Could maintenance have been effected at sea or was it necessary to for them to be effected while docked? Whether they were or were not, it is again concerning that the letter contained clear statements that the parties were in agreement with no rebuttal from CCCL.

[104] Mr. Lake's evidence however is that there was no need for the vessel to be in port for any extended period because the vessel is equipped with a complete machine shop. There is nothing additional in port which is required to maintain the vessel that is not available to maintain the ship at sea. It is his evidence that vessels do not need to

be in port for extended periods for maintenance because they are equipped with redundancy. A ship, he testifies, has two of everything, for example two generators, two propellers.

[105] Maintenance work is carried out continuously whether the ship is in port or at sea. The vessel, the Island Trader, carried a crew of twenty persons. In the event there is a fault with a part which is not on board, the required part is flown to the destination while the ship continues its journey. It is Mr. Lake's further evidence that there was no need for repairs to the vessel. The vessel undertook two voyages whilst it awaited CCCL's readiness. Mr. Lake by way of letter dated 27 June 2003 advised Mr. Isaac that FML would conduct maintenance on the vessel in preparation to begin service.

[106] Mr. Isaac's evidence is that he is unable to say, while the vessel was docked at the pier, whether it was undergoing maintenance as opposed to repairs. He agrees that he was unable to support the averment in his witness statement that the vessel was being repaired. Further, he testified that until he saw the documentation, he was unaware that Island Trader had carried out two charters whilst it was docked at CC's pier. The vessel's ability to carry out two charters whilst it was docked, controverts the defendant's claim that it was not seaworthy. Mr. Spencer's evidence is that he does not know whether FML sought permission for its vessel to dock in order to effect repairs. Nor can he say whether repairs were effected.

[107] The defendant also contends that the claimant was not ready or able to execute the shipment as the necessary trucks were not provided. It is Mr. Lake's evidence that the trailers were readily available. FML required two tractor heads in Kingston and in Montego Bay. FML owned five trailers and would have rented the additional forty-five from Zookie and Zars Trucking. His evidence is that the trucks would/could have been available overnight. The charges for the trucking company were included in the bid.

[108] Mr. Leiba's concern regarding the Island Trader's capacity to accommodate its shipment is without foundation. Further, it was not pleaded. Mr. Lake's evidence is that

there were several discussions about the logistics of transporting cement. In any event the tender document spoke of the capacity required. The concern is therefore without merit. The Invitation to Tender also stated the quantity CCCL intended to transport. Moreover, CCCL on its defence and admission by its witnesses under cross-examination is that it was unable to provide sufficient cement. Paragraph 7 of its defence reads:

> "*The defendant also admits indicating to the claimant that it was desirous of attempting a trial shipment using the claimant's vessel but it did not have the required quantities of cement in stock for this trial run."*

[109] Regarding the availability of the vessel, it is Mr. Lake's evidence that if the defendant had announced its date of commencement whilst the vessel was on charter he would have chartered another vessel. It is the view of this court that the issue is not significant. The vessel had docked pursuant to an agreement. The defendant would not have been in a state of readiness at the material time and the claimant quite properly mitigated its loss by carrying out charters. The charters would have inured to the benefit of the defendant.

FINDING

[110] I accept Mr. Lakes evidence which has been supported by documentary evidence, that the vessel undertook two charters while it awaited CCCL's readiness. The fact of Messrs. Isaac's and Spencer's inability to testify that the ship was undergoing repairs; Mr. Spencer's ignorance as to whether permission was granted for the ship to carry out repairs and his consequent inability to testify about the vessel's seaworthiness) and the fact that it undertook two journeys, this court finds that CCCL has failed to substantiate its claim that vessel was in need of major repairs which affected its seaworthiness. The letter of 27 June 2003 upon which the defendant relies to impugn Mr. Lake's credit regarding the need for repairs speaks to maintenance, not repairs.

WAS THERE A VARIATION OF THE AGREEMENT?

IF SO WHETHER PRICE WAS ACCEPTED BY CCCL

[111] Mr. Lake's evidence is that under the contract, the awarded rate was subject to fluctuation in the exchange rate and oil prices as the rates under the tender/contract was subject to fluctuation in the exchange rate and oil prices. Mr. Isaac informed him of the defendant's concerns regarding the fluctuation in the rate which was based on the United States dollar rate and oil prices. Consequently, by way of letter dated the 17 January 2003, the claimant informed the defendant that it would adjust the rate to JA $460.00 per ton.

[112] According to him, FML adjusted its rate to accommodate the exchange rate and oil price change. The negotiations were predicated on the understanding that the claimant was awarded the contract. Under cross-examination Mr. Lake accepted that under the contract, price was not subject to change in the oil price, only to change in the exchange rate. He admitted that his letter of 17 January 2003 amounted to an amendment of the price in the tender document but states that it was amended in accordance with the tender document.

[113] He rejects the suggestion that FML's letter of 17 January 2003 was a unilateral attempt by FM to amend the tender document. According to him it was sent pursuant to the defendant's request. He also accepts that FM did not receive a written response to the letter. According to Mr. Lake, price was accepted by CCCL twice that is the price quoted in the tender document and the adjusted price.

[114] Mr. Isaac however averred that CCCL had concerns about FML's pricing because it was a significant variation from the sum which was originally submitted to the Board of Directors. The Board was therefore not in a position to award a contract as the new price would have had to be resubmitted to the Board for approval. It is his evidence that approval was never obtained from the Board of Directors.

[115] He disagreed that the letter of the 17 January 2003 was in response to the query he raised regarding the exchange rate. He acknowledged that although he saw the letter dated 17 January 2003, he did not respond to say that CCCL had not requested a price adjustment. He denied that CCCL failed to respond to the letter because it had made the request. It is important to quote the salient portion of the letter of 17 January 2003.

> "*Re: Quotation for tender-Provision of Marine Transportation Services*
>
> *Pursuant to your request on 16 January 2003, we have adjusted our price for provision of services in regards to the above captioned tender. The price is now J$460.00 based on the rate of exchange to the US$ and the price of oil as at today's date.*
>
> *If this offer is acceptable, we expect to enter into a formal contract for the provision of the service."*

[116] It is Mr. Leiba's submission that to date it is unclear what the price to transport the cement pursuant to the Claimant's tender was at the material time, because the price submitted was a variable one, dependent on the exchange rate. This, he submits, is contrary clause 11.1 of the General Conditions of Contract that the prices charged should not vary from the prices quoted in its bid with the exception of any price adjustment authorized. It is his submission that the letter of 17 January 2003, amounted to an offer.

[117] He submits that if the court holds that a contract existed based on the oral indication to the Claimant that it was the preferred bidder, the subsequent price adjustment by the Claimant amounted to a cancellation of the original contract and a fresh tender being submitted, at the revised price, which, even on the Claimant's case, was never accepted orally or otherwise. The pricing scheme submitted by the Claimant was therefore contrary to express terms of the Invitation to Tender (page 13 of the Agreed Bundle) which never contemplated a variable pricing mechanism. It is his contention that the bid-as it stood was not capable of acceptance.

RULING

[118] Under the heading **General Conditions of Contract**, clause 11.1 states:

"*Prices charged by the contractor for services performed under the Contract shall not, with the exception of any price adjustments authorized, vary from the price quoted by it in its bid."* The tendered price was therefore not subject to change except sanctioned by the CCCL. Any attempt to vary the price based on a change in the oil price would have been outside of what was stipulated Tender price.

In FML's Tender Document, which was accepted by CCCL, clause …regarding price, reads:

> "*The cost per Metric Tonne for the complete service is J$432.81 inclusive of Marine Insurance. Please note this price is based on an exchange rate of US$1-J$48.68*.

[119] It is impalpable, in my view, whether FML intended to capture future changes in the US dollar. Both Messrs. Isaac and Spencer however agree that price was tied to the US dollar. By virtue of the Tender document, price was not subject to any change in the oil price. In the circumstances, did the revised price constitute a fresh offer? Assuming that FML's amendment of the price amounted to a variation of the contract, was the said variation accepted by CCCL?

[120] It is strange that CCCL remained silent in the face FML's seemingly audacious misrepresentation that it was requested by CCCL to adjust its price. CCCL, in the face of such a position, continued discussion with FML. There is no evidence that it expressed shock at the statement. Is it that CCCL had indeed on the 16 January made the request? CCCL apparently accepted the change in light of its silence in the face of the letter and its conduct. In fact this court accepts Mr. Lake's evidence that he was asked to adjust the price.

OTHER PERTINENT ISSUES

WHO ATTENDED THE MEETING HELD WITH FML'S REPRESENTATIVE

[121] It is Mr. Spencer's evidence that while CCCL was speaking with FML, it was not also speaking with other bidders. At the point that FML was informed that it was the

preferred bidder it ceased speaking to the other bidders**.** Yet it is also his evidence that other bidders were present at the meetings with Mr. Lake. At what point therefore were the meetings held with the other bidders? His testimony is that before a bidder is selected as the preferred bidder, meetings are held with the bidders to clarify their bids. Upon being shown paragraph 12 of his witness statement, he stated that he was not sure whether the meetings were held before or after FML was told it was the preferred bidder. It is also his evidence that the clarification meetings were held before CCCL selected the preferred bidder. According to Mr. Spencer, the meetings were held with all the bidders. He however, conceded that he did not state in his witness statement that clarification meetings were held with FML and other bidders.

[122] He had previously testified that the meetings were attended by other bidders. He had earlier insisted that after FML was informed that the tender was accepted, the meetings which were held with FML's representative included the other bidders to clarify the bids. It is also his testimony that CCCL accepts tenders and then seeks clarification from all tenderers**.** Assuming that Mr. Lake was informed that FML was the preferred bidder, what would have been the need to meet with all the bidders?

WAS MR. ISAAC PRESENT?

[123] Mr. Spencer was unable to recall whether Mr. Isaac was present at the meetings which were held to clarify the bid. He could not recall whether Mr. Isaac was present at the meeting at which Mr. Lake was informed that FML was the preferred bidder. He denied that Mr. Isaac was present at the meeting to clarify the bid with FML's representative. Under cross examination he testified that Mr. Isaac attended only one meeting. He was unable to say which meeting Mr. Isaac attended nor could he recall whether the discussions were held before or after Mr. Lake was informed that he was the preferred bidder. His witness statement however is at variance with his evidence. He averred in his witness statement as follows:

> "*I was present at various meetings with Derrick Isaac, who was Carib Cement's Materials Manager at the time and Richard Lake of Freight Management when Derrick Isaac asked what impact the movement in the exchange rate would have on Freight Management's proposal…"*

[124] Upon being confronted with his witness statement that Mr. Isaac was present at the various meetings, he stated that the various meetings at which the discussions occurred were held before FML was told it was the preferred bidder. CCCL was still evaluating the bid. At those meetings CCCL had no idea when it intended to commence shipment because it did not know if the method was feasible.

[125] Mr. Isaac was the secretary of the MTC. It is improbable that he, being the chief person involved, would have had only one meeting with the preferred tender, while Mr. Spencer had several. I am fortified in this conclusion by Mr. Spencer's relative lack of knowledge concerning important matters relating to the tender process. He could not recall if FML was informed in writing that CCCL did not intend to pursue the contract; nor could he recall if he had looked at all the documents in the case. He was ignorant as to the reason for the inclusion of the contract agreement among the Tender documents. He does not know if FML sought permission to repair the vessel. Indeed Mr. Spencer is an unreliable witness whose veracity is in question. He insisted that quantity of cement was not an issue, yet, when shown the witness statement he was immediately able to provide an explanation as to why it was an issue.

WHY WAS TRANSPORTATION BY SEA NOT PURSUED?

[126] Both Messrs Isaac's and Spencer's credibility has been impugned. It is Mr. Spencer's evidence that transportation of the cement was solely by trucks at the time the tender was issued. The drivers of those trucks were demanding more money to transport the cement. CCCL had concluded discussions with the drivers and had arrived at a new rate. CCCL was therefore seeking a cheaper and more efficient means of transportation. Mr. Isaac disagreed with the suggestion that CCCL desired a cheaper alternative to transportation by road. He was shown his witness statement in which he stated:

> " …Carib Cement…invited tenders for transportation by sea …This was because Carib *Cement was seeking a cheaper and more efficient method of transferring cement to the Montego Bay Depot*."

He denied knowing that at the material time transportation of cement by trucks had become expensive. He also denied that CCCL desired a cheaper alternative to trucks.

He later agreed that CCCL did not pursue the contract because transportation by road had become more feasible because of the depreciation of the Jamaican dollar. Transportation by sea was no longer viable.

[127] Under cross-examination however, he denied that the contract was not pursued because it became apparent that transportation by sea would be more expensive. He was shown his witness statement which reads:

> *"…Carib Cement advised Freight Management that it no longer intended to pursue the transportation of cement by sea, this was because haulage by road became more feasible to Carib Cement following the depreciation in the value of the Jamaican dollar."*

He then admitted that was a reason but not the main reason. He also admitted that transport by sea had become more expensive because of the movement in exchange rate and price of oil. He testified that quantity of cement was not an issue. Only when CCCL's defence (in which he had an input) was presented to him that he was forced to admit that CCCL did not have the requisite amount of cement to load the vessel. In re-examination, he explained that CCCL was accustomed to loading trucks, so it did not have large amounts of cement necessary for transportation by sea.

[128] Mr. Isaac is unaware that there was a delay as a result of insufficient cement and pallets. Although he was the materials manager and the main person who dealt with the documentation for the defence, he steadfastly maintains his ignorance in the face of CCCL's defence which states that it lacked sufficient cement and pallets to constitute a shipment. He was adamant that he did not indicate to the claimant that CCCL required a trial run. Only upon being presented with CCCL's defence did he concede that he was unable to maintain that assertion. He was unable to recall matters of importance such as the date the Spanish Town branch was opened and

[129] Mr. Spencer disagreed that the contract with FML was not pursued because it became apparent that transportation by sea had become more costly than by road. In his witness statement he avers that:

> *"The main reason however was that the service did not seem as if it would remain feasible given the movements in oil prices and exchange rates. Carib Cement could not be bound to accept a higher cost for transporting cement nor could it be bound to accepting a volatile price."*

Upon being presented with his witness statement he stated that there were multiple reasons for not pursuing the contract and cost was not the main reason.

[130] Upon being pressed under further cross-examination, he stated that the main reason was that service by sea would not remain feasible given the movement in oil price and the exchange rate. He also agreed that service by sea had become more expensive because of the movement in the oil price and exchange rate. Further FML could not provide the assurance "that its price would remain more competitive than the current method of transport which was by road."

[131] His evidence is that during the discussions, CCCL did not indicate that there were insufficient pallets. Paragraph 8 of the defence however reads:

> "…*nor did it have sufficient supplies of cement and pallets to constitute a shipment."*

He admitted that he was one of the persons who provided information contained in the defence. Again upon being confronted by the defence he admitted that there were several discussions and at some point FML was informed that CCCL was unable to commence shipment based on the logistics which was insufficient pallets therefore more time was required for preparation.

[132] He was insistent that cement was not an issue, only pallets. He had to be confronted with his witness statement in which he stated that there were insufficient quantities of cement, for him to accept that there was indeed insufficient cement to load a vessel such as Island Trader. During re-examination he stated that CCCL was accustomed to loading trucks so it did not have the quantity of cement. As a result, there was a logistical challenge with transportation by sea. Mr. Spencer's evidence is that FML was told that CCCL would not pursue the contract at more than one meeting.

THE ISSUE OF PROMISSORY ESTOPPEL

[133] The claimant relies in the alternative on the principle of promissory estoppel. It contends that CCCL's conduct and representations that it accepted its tender caused it to act to its detriment.

MR. EMILE LEIBA'S SUBMISSION REGARDING PROMISSORY ESTOPPEL

[134] He submits that promissory estoppel is a shield and not a sword and does not give rise to a cause of action from which damages can flow. He places reliance on the case of **Combe v Combe** [1951] 2 K.B. 215 at 218 and 224). It is his submission that the claimant cannot successfully rely on the principle as the promise or representation must be "clea**r**" or "unequivocal" or "precise" or "unambiguous".

[135] The evidence presented is unclear as to when the contract and/or service and/or transportation of the cement was to begin. The price for providing this service was also imprecise. It is therefore not apparent, he submits, that any promise was made by the defendant which it did not satisfy. It is also his submission that it was unclear from the claimant's evidence that the parties proceeded on the basis of an underlying assumption on which neither of them would then be allowed to renege.

[136] According to him, on the evidence of Mr. Isaacs and Mr. Spencer various Boards were yet to give their respective approval as the tenders exceeded a certain value. Further, the approval of the parent Board was required. The claimant ought to have known based on the tender form it signed that written approval was necessary before it could be certain that its tender was accepted.

RULING ON THE ISSUE OF ESTOPPEL

[137] Having accepted as true the contents of the unanswered letters dated 17th January 2003 in which FML claimed to have adjusted its price at the request of CCCL and letter dated 17th February 2003 in which FML informed CCCL that it had reduced its charter to make the vessel available, CCCL by its conduct would have led FML to believe that its signature was not required and it had accepted the altered price. By its

conduct, CCCL is estopped both at common law and in equity from resiling from that position.

[138] Smith JA in the Court of Appeal case of **Huntley Manhertz & Yvonne Manhertz v Island Life insurance Company Ltd** Civ. App 24 2006 delivered June 27th 2008 said at page 14

> "*The principle of promissory estoppel usually arises where one party to a contract grants to another party a concession not supported by consideration that he will not enforce his rights or a result of a particular right under the contract."*

At page 16 he continued

> *"The question as to whether or not detriment is require for the operation of promissory estoppel has been judicially described as controversial. However, what is clear is that the long list of cases on this point establishes that in order for promissory estoppel to arise it must be unconscionable for the promisor to resile from his promise…*
> *In case Peter Gibson LJ said at paragraph 27:*
>
> *"A promissory estoppel in my judgment, arises where:*
>
> 1. *There is a clear and unequivocal promise that strict legal rights will not be insisted upon;*
> 2. *The promisee has acted in reliance on the promise;*
> 3. *It would be inequitable for the promisor to go back on his promise."*

[139] The statements contained in the aforementioned letters regarding the adjustment in price and the agreement to commence shipment is clear and unequivocal. FML, by taking the vessel off its charter and making it available to CCCL acted in reliance on CCCL's agreement to accept the price and the agreement that the vessel would be utilized to transport the cement although the contract was not signed by CCCL. Having discontinued the charter and providing CCCL with the vessel would most certainly be unconscionable for CCCL to resile from its promise to utilize the services of FML. Further FML would have acted to its detriment as it would have given up charters. CCCL cannot now seek to assert its right to a signed contract or place reliance on clause 11.1 of the General Condition of Contract. "*Having regard to the dealings which have taken place between the parties*" (see Smith JA in **Manhertz & Manhertz**)

WHETHER CLAIMANT IS ENTITLED TO DAMAGES

(a) EFFECT OF OWNERSHIP OF VESSEL

[140] It is Mr. Leiba's submission that FML has failed to show its entitlement to recover damages as it is not the owner of the vessel but simply the agent of the owner because the Maritime Authority of Jamaica certificate of registry states that it is owned by Caribbean Resources Ltd. He submits that the right to recover damages for loss of use or any other loss in respect of the Motor Vessel Island Trader belongs to the owners and not the agents of the vessel. He relies on the proposition that an agent acts on behalf of and for the benefit of a principal. Further, he submits that any income earned by an asset owned by the principal, but collected by the agent, must be for the benefit of the principal.

[141] It is his further submission that in order for the claimant to establish beneficial entitlement to the income from the vessel, it is necessary for the claimant to provide the court with evidence of a charter or lease agreement or a document which would reflect that the claimant is properly entitled to the income from the vessel and responsible for its costs. In the absence of same, the proper claimant is Caribbean Resources Limited, as the owner of the vessel.

[142] No argument has been made by the Claimant that it is suing as the agent of Caribbean Resources Limited. Further, it has not been pleaded. The Claimant is suing as the entity which is beneficially entitled to the vessel. The vessel is registered in the name of Caribbean Resources which contradicts the evidence of Richard Lake, that the Motor Vessel Island Trader has been owned by the FML for seven years. This inconsistency, he submits, has not been explained by the Claimant or its witnesses and amounts to a conflict in the evidence on this point.

[143] He submits that the title of the subject vessel is to be preferred over the oral evidence of the claimant's witness. The bringing of the action in the claimant's name is therefore akin to an agent of a landlord suing for rent in his own name, without any reference to the fact that he is not the owner of the property. On that basis alone, the

Claimant should not be awarded any damages by this Court, in respect of the use or loss of use of the vessel M/V Island Trader.

RULING

[144] Mr. Leiba did not suggest to the witness in cross-examination that the FML was not the owner of the vessel. It was only in his submissions that he raised the issue of the vessel's ownership. Mr. Lake was therefore deprived of the opportunity to proffer any explanation. The principles of fairness dictate that a witness ought to be given an opportunity to explain. In cases in which the witness' evidence contradicts other evidence whether his own evidence, the witness ought to be alerted that his evidence will be challenged. In the Welsh Supreme Court case of **Allied Pastoral Holdings PTY Ltd v Federal Commissioner of Taxation** 70 FLR 447, David Hunt J said:

> *"Firstly, it gives the witness the opportunity to deny the challenge on oath, to show his mettle under attack (so to speak) although this may often be of little value. Secondly, and far more significantly it gives the party calling the witness the opportunity to call corroborative evidence which in the absence of such a challenge is unlikely to have been called. Thirdly, it gives the witness the opportunity both to explain or qualify his own evidence in light of the contradiction in which warning has been given and also if he can he can explain or qualify the other evidence upon which the challenge is based it is this third reason for the application."*

[145] It is true that the title of the vessel reveals that it is owned by Caribbean Resources Limited, whereas Mr. Lake's evidence is that it is owned by him. Although a defendant, in some circumstances in which there is a conflict in the evidence, might not be required to cross-examine the witness, and rely on the contradictory evidence this, to my mind is not such a case.

[146] In **Allied Pastoral Holdings PTY Ltd** David Hunt J made the following further enunciations:

> *"It has in my experience always been a rule of professional practice that unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put an opponent's witness in cross-examination, the nature of the case upon which it is proposed to rely on in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the*

proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference the sought to be drawn. That rule of practice follows from what I have always believed to be rules of conduct which are essential to fair play at the trial and which are generally regarded as being established by the decision of the House of Lords in ***Browne v. Dunn*** *(1893) 6 R. 67."*

Lord Herschell L.C., said (at 70-71):

"Now, me Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that the imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but essential to fair play and fair dealing with witnesses."

His Lordship conceded that there was no obligation to raise such a matter in cross-examination in circumstances where it is "perfectly clear that (the witness) has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling". His speech continued (at 71):

"All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted."

Lord Halsbury said (at 76-77):

"My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which trial should be conducted. To my mind, nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having been given them

such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to."

Lord Morris (at 78-79) said that he entirely concurred with the two speeches which preceded his, although he wished (at 79) to guard himself with respect to laying down any hard-and-fast rule as regards cross-examining a witness as a necessary preliminary to impeaching his credit."

IS THE CLAIMANT IS ENTITLED TO DAMAGES?

[147] It is Mr. Leiba's alternative submission that, if the court finds that the claimant is beneficially entitled to an award of damages, the claimant has failed to put forward sufficient evidence upon which this court could properly estimate the damages suffered by the claimant, if any. Further, he submits that the claimant has produced no evidence of potential charters during the period the vessel was docked. The letter dated 27 May 2002 from Interline to Mr. Lake regarding the charter party, preceded the tender. There is no evidence that invoice dated 9 October, 2002 produced by Ms. Forbes which she alleges is in relation to its charter of the M/V Island Trader by Inter Trade for one hundred and thirty (130) days. The said document cannot be relied upon as proof of any damages. He submits that the claimant has not provided any evidence as to the basis on which it arrived at the sum claimed. The evidence regarding the several charters which the claimant referred to is merely hearsay as it has failed to provide the proof.

[148] According to him, Miss Forbes is not a witness of truth and her evidence should not be relied upon as there were several instances under cross-examination where Miss Forbes stated that she did not recall. She was not able to recall without being shown a document bearing her handwriting and signature. According to him, she was unable to respond to the issues between the parties. She recalled discussions with Mr. Lake regarding taking the Island Trader off charter but could not recall having any such discussion with the defendant. On the claimant's evidence, if the vessel was in fact taken off charter it was a unilateral decision of the claimant. Miss Forbes' evidence, he submits, does not add to the written documentary evidence.

[149] It is his submission that Mr. Richard Lake has put himself forward as having significant experience in the areas of submission of tenders and shipping. It should therefore have been quite simple for him to put forward estimated sums as to the net profit from a charter and provide accounts from previous years reflecting the profit earned from the operation of the vessel. Reference was repeatedly made throughout the case to the cost of oil. If the vessel is not in operation it would not burn fuel/bunker oil and therefore if this court were simply to award damages based on charter income, it would be giving a windfall to the claimant.

RULING

[150] FML submitted a conforming tender which was approved. Surely CCCL could not expect to have put the claimant to the trouble and expense of preparing its tender and then change its mind about the venture without compensating the "preferred," "accepted" conforming tenderer. It would be unreasonable not to proceed with transportation by sea without compensating it.

[151] In fact this court finds on the evidence, that the parties have superseded that position and accepts that there was an agreement that the vessel would arrive at its port to commence service. FML claims the sum of US$396,000 at US$5500 per day for loss of use whilst the vessel was moored at the defendant's pier for seventy two (72) days, as per their amended claim. The evidence which is accepted is that FML withdrew the vessel from the charter market at CCCL's request. The daily rate obtained from those charters (which documentary evidence I accept) exceeded US$5500 per day. The vessel was moored at the defendant's pier for 72 days. FML mitigated its loss by sending the vessel on two charters which lasted eight (8) days each.

[152] Whilst the vessel was moored it certainly would not have utilized the same quantity of oil and fuel as it would, had it embarked on a voyage. I received no assistance from either party as to what would be the expenses incurred had the vessel undertaken a voyage for that period. The court is therefore forced to do its best in the circumstances. I consider reducing the figure claimed by one sixth as reasonable to

allow for expenses had the vessel undertaken its voyage. The figure of US$396,000.00 is therefore reduced by one sixth which equals the sum of US$330,000.00. The claimant in my view is unable to justify its claim for loss of contract.

[153] Subsequent to the delivery of my decision on the 14 December 2012 and the receipt of my written reasons on the 7 January 2013, the claimant requested that I revisit the matter to consider the grant of interest. Interest was neither pleaded nor addressed in the submissions. There is no challenge by Mr. Leiba regarding the court's jurisdiction to revisit the matter.

SUBMISSIONS BY MR. LEIBA

[154] Mr. Leiba argues that the circumstances of this case are not amenable to an award of interest for the following reasons:

(a) Interest was not pleaded;
(b) The claim was amended to include a claim for loss of use at the commencement of the case;
(c) No evidence was led to justify an award for interest, for example, if there was a bank loan and the bank's interest rate.

SUBMISSIONS BY MRS. TRUDY DIXON-FRITH

ON THE ISSUE OF INTEREST NOT PLEADED

[155] Mrs. Dixon- Frith submits that the Law Reform (Miscellaneous Provisions) Act) (LRMPA) does not require a claim for interest to be pleaded. In further support of her proposition, she relies on the cases of **Goblin Hill Hotels Ltd v John Thompson and Janet Thompson;** an unreported Court of Appeal case which was delivered on the 5 June 2009; **Long Yong (Pte) Ltd. v Forbes Manufacturing and Marketing Ltd,** (1986) 40 WIR 229; and the Trinidadian Privy Council case of **Greer v Alston's Engineering Sales and Services Ltd, [2003] 5 LRC 580.**

THE LAW

[156] Section 3 of the (LRMPA) reads:

> *"In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the*

sum for which judgment is given interest at such rates as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period when the cause of action arose and the date of judgment:

Provided that nothing in this section:

a) shall authorize the giving of interest upon interest; or

b) shall apply to any debt upon which interest is payable as of right whether by virtue of an agreement or otherwise; or

c) shall affect the damages recoverable for the dishonour of a bill of exchange."

[157] Sykes J, in the matter of **Peter Salmon v Master Blends Feeds Ltd.** unreported decision of the Supreme Court which was delivered on the 26 October 2007, at paragraph 28 posed the question: *What is the nature of interest on damages?* In answering, in his usual thorough style, he examined the pertinent statutes and authorities. He enunciated thus:

> *"Let me begin by pointing out that the legislature through section 3 of the Law Reform (Miscellaneous Provisions) Act conferred a discretionary power on all courts of record to award interest on the judgment or debt or any part thereof. This provision is identical to section 25 of the* ***Supreme Court of Judicature Act 1962 (Law of Trinidad and Tobago, (1980 edition)*** *Chapter 4:01). Section 25 of the Trinidad statute was referred to by the Judicial Committee of the Privy Council in* ***Carlton Greer v. Alstons Engineering Sales and Services Limited*** *(Appeal No. 61 of 2001) (delivered June 19, 2003). In that case the defendant's counsel submitted that interest must be specifically pleaded because it was important for the claimant to know the nature of the claim he had to meet. That submission was rejected. The Committee approved the decision of Hassalani J. in* ***DeSouza v. Trinidad Transport Enterprises Ltd. and Nanan*** *(No. 2) (1971) 18 WIR 150 who took the view that interest is not a cause of action. He accepted that interest was like costs – awarded if the claimant wins the case. I now state the purpose of interest. It is now accepted that the purpose of interest on general damages is to compensate the claimant for being out of capital sum since the date of service of the claim (see* ***Pickett v. British Rail Engineering Ltd.*** *[1980] A.C. 136;* ***Wentworth v. Wiltshire County Council*** *[1993] QB 654, 668 – 669 per Stuart-Smith L.J.)…"*

[158] In the case **Goblin Hill Hotels Ltd.,** an unreported Court of Appeal case which was delivered on 2 March 2009, Morrison JA, having examined the authorities, encapsulated with clarity, the settled position in the following statement:

> *"However the Court was careful to distinguish this situation from one in which a plaintiff sought interest pursuant to section 3 of the LRMPA, in*

which case, as Carey JA put it (at page 234), "[It is]…plain that an award of interest under the Act does not depend on a claim therefore in the writ." Neither Rowe JA nor Carey JA disputed the authorities of ***Riches vs. West Minister Bank Ltd.*** *[1943] 2 All England Law Report 725, a case decided a mere seven years after the enactment of the LRMPA in England in 1934, in which it was held that section 3 did not require that a claim for interest should be pleaded, or that the statement of claim must say that the plaintiff, if successful, will ask the court to exercise its discretion pursuant to the Act. Indeed, Carey JA said this at page 235:*

"So far as we are concerned in this jurisdiction, ***Riches vs. Westminster Bank Ltd****. is of persuasive authority and consequently, I would incline to the view that in point of law, a claim for an award of interest under the Law Reform (Miscellaneous Provisions) Act 1955 need not be pleaded."*

[159] Morrison JA examined the **White Book Service 2006**, which considered the impact of Rule 16.4(2) of the English Civil Procedure Rules, which is similar to rule 8.7(3) of our Civil Procedure Rules. The learned editors expressed that:

"If a claimant is seeking interest he must provide in his particulars of claim the detailed information stated in r. 16. 4 (2)… But in ***Greer v Alstons Engineering Sales and Services Ltd****. [2003] UK PC46 it was held that the power to award interest is exercisable whether or not there is a claim for interest in the claim form/ statement of case."*

[160] Morrison JA said:

…Greer *is a decision of the Privy Council in which a question arose as to whether a claim for interest under a section identical to section 3 of the LRMPA (Section 5 of the Supreme Court of the Judicature Act, 1962 had to be specifically pleaded. In the judgment of the Board reference was made with apparent approval to a judgment at first instance of Hassanali J in* ***De Souza v Trinidad and Tobago Enterprises Ltd. and Nanan*** *(No. 2) (1971) 18 WIR 150, 152, in which the learned judge had said that the discretionary power of the court under the provisions of the Supreme Court of Judicature 1962 is exercisable whether or not there is a claim for interest in the pleadings (****Riches v Westminster Bank Ltd*** *[1943] 2 All ER 725." Sir Legatt, who delivered the judgment of the Board, accordingly concluded …that*

"the same practice prevails in Trinidad and Tobago as in England: neither a claim for interest nor the facts and matters relied on in support of such a claim need be pleaded."

[161] He concluded thus:

> " *But despite the fact that Greer is silent on the impact, if any, of the new rules in England on the broad proposition for which it is cited as authority by the editors of the White Book Service 2006*, *it does provide support for what in my view must be the position in the light of the clear and unrestricted provision of section 3 of the LRMPA that is, while a claim of interest must generally be pleaded as required by the rules there is no need to plead a claim for interest pursuant to the LRMPA on the continuing authority of cases like* ***Riches v Westminster Bank Ltd., De Souza v Trinidad and Tobago Enterprises Ltd., Long Yong,*** *and now* ***Greer****."*

FAILURE TO PROVIDE EVIDENCE TO JUSTIFY AWARD FOR INTEREST

[162] The headnote of **Pickett v British Rail Engineering Ltd. (H.L.E.)** stated the purpose of an award of interest on general damages as being "…*for the purpose of compensating a plaintiff for being kept out of the capital sum between the date of the service of the writ and judgment.."* On the facts accepted by this court, the claimant, as a consequence of the defendant's request to dock the vessel in order to commence service, was kept out of "*the capital sum*" to which this court has found that it was entitled.

[163] This application is made pursuant to the LR(MP)A. The requirements enumerated in the Civil Procedure Rules at rule 8.7 (2) and (3) are therefore inapplicable. The authorities make it manifest that that there is no need to plead a claim for interest pursuant to the LR (MP) A. Section 3 of the LR (MP)A confers upon the court the discretion to award interest and to determine the rate. The court is required to exercise its discretion judiciously. There is before the court, on the facts accepted, ample evidence which would enable it to so exercise its discretion. Mrs. Dixon-Frith submits that interest ought to be awarded at a rate of 12% from the date the cause of action accrued to June 21, 2006 and thereafter at 3% to the date of judgment.

[164] By virtue of **The (Supreme Court) (Rate of Interest on Judgment Debts) Order, 2006**, interest on judgment debts denominated in foreign currency as at 21 June 2006 is 3% and 6% on Jamaican dollars.. Prior to 21 June 2006, the rate of interest on judgment debts was 12% (see **The Judicature (Supreme Court) Rate of interest on**

Judgment Debts Order which was gazetted on 14 July 1999). There was no difference in the rates. It is however that apparent that the legislators are now mindful of the value of the Jamaican dollar *vis vis* the foreign currency, and have consequently made a distinction between the currencies.

[165] Rowe P, in **Central Soya of Jamaica Ltd. v Junior Freeman** makes it plain that a judge's discretion to award of interest is unfettered. He said:

> *"On the literal interpretation of this statutory provision a trial judge has an unfettered discretion to determine whether or not to grant any interest at all, and if he decides to grant interest to decide at what rate the interest should be, and on what part of the judgment, and within the parameters of the section from what time the interest should run."*

[166] In the circumstances,

1. Judgment for the claimant in the sum of US $330,000.00 for loss of use.

2. Interest at the rate of 6% per annum awarded from the date of the service of the Claim Form to the 21 June, 2006; and thereafter at the rate of 3% per annum to the 14 December 2012.

3. Stay of execution of judgment granted for 42 days from the 14th day of December 2012.

4. Stay of execution of judgment extended and granted for a further period of 20 days from the 24th day of January 2013.

5. Cost to be agreed or taxed.