IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011HCV04729

BETWEEN	**KC ENTERPRISES LIMITED T/A EL CARIBE DUTY FREE SHOP**	**CLAIMANT**
AND	**GUARDSMAN ALARMS LIMITED**	**DEFENDANT**

IN OPEN COURT

Mr. Sean Kinghorn and Mrs. Alia Leith Palmer, instructed by Kinghorn and Kinghorn, appeared on behalf of the Claimant.

Miss Elizabeth Salmon and Mr. Matthieu Beckford, formerly instructed by Rattray Patterson Rattray (now represented by Elizabeth L. Salmon by way of Notice of Change of Attorney filed on 11th July 2019), appeared on behalf of the Defendant

Heard: 7th and 9th July 2015

Delivered: 21st March 2023 in Chambers via Video Conference by way of consent of the Parties.

Breach of Contract – Negligence – Limitation of Liability – Exclusion Clauses – Special Damages

L. PUSEY J

[1] This matter came for hearing on the 7th and 9th of July 2015. At the trial, the court had embarked on a pilot project with audio recording equipment in which matters were tried without the usual note taking by the judge, as the parties would rely on an audio recording system. Aspects of the project did not live up to expectations

which contributed to the inordinate delay in the delivery of this judgment. Additional unforeseen circumstances such as the theft of my personal laptop created further challenges. The court would however wish to indicate that it had sufficient material to decide upon this matter and would like to thank Counsel for their filing of written submissions which aided in the completion of this judgment.

BACKGROUND

[2] On the 8th day of May 1999, the Claimant and Brinks Alarms Limited ("Brinks") entered into an Agreement whereby Brinks agreed to provide inter alia:

(a) Link Up Burglary and Panic Alarm System;

(b) Monitoring and Response Services; and

(c) Hold Up/Emergency Alarm System,

the particulars of which were set out in the Schedule of the Agreement which was assigned to the Defendant by Brinks.

[3] It is further agreed that the Claimant's jewellery store, El Caribe Duty Free Shop ("Caribe"), situated at Shop 5, Holiday Village Mall, Montego Bay, St. James was burgled on or about the 22nd day of June 2010 ("the burglary"). Subsequently, an incident report and an invoice to correct and upgrade the security system at Caribe was provided to the Claimant by the Defendant.

[4] The parties failed to settle this matter in Mediation and the Claimant brought a Claim to recover Damages for Breach of Contract and/or in the alternative Negligence, Special Damages in the sum of Three Million, Four Hundred Thousand, Five Hundred and Forty-Two Dollars ($3,400,542.00) for jewellery stolen and damage to a shelf, and interest pursuant to the **Law Reform (Miscellaneous and Provisions) Act**.

The Claimant's Evidence

[5] Mr. Govind Chulani, the Managing Director of Caribe, gave evidence of the nature of his business, his understanding of the Agreement, and the burglary. He averred

that it was implied in the Agreement that upon being notified of a disturbance at Caribe by the burglary alarm system, the Defendant would inter alia:

i. investigate thoroughly to detect whether there was in fact such a burglary in progress or whether one had taken place;

ii. take reasonable steps to deter or detain the perpetrators of such an act of burglary until the relevant authorities arrived;

iii. notify the relevant authorities of the fact of the burglary in progress or that one had occurred as soon as they received the burglary notification; and

iv. take reasonable steps to secure the Claimant's premises and contents from burglars and/or intruders.

[6] Mr. Chulani recalled that the Defendant's defence had indicated that notifying the relevant authorities was not an implied term in the Agreement. He stated that the understanding between Brinks and the Claimant, prior to the assignment of the Agreement, was that the Coral Gardens Police Station was five (5) minutes away from the store and that it would be nonsensical not to alert the Police of an incident since Brinks would pass the station when going to and leaving from Caribe. Mr. Chulani indicated that it was not the expectation nor the anticipation of Brinks nor the Claimant that after being alerted by the burglary system, the Response team would not alert the Police which was in such close proximity. He believed this was even more implied and justified if:

i. the Response team could not identify what caused the trigger; and/or

ii. could not get through to him or any appointed person to alert them of the alarm being triggered.

[7] Mr. Chulani explained that in performance of their obligations of the Agreement, Brinks provided the Claimant with what he considered to be an effective security

system that was established, set-up and approved by Brinks. He goes on to outline the way in which the system operates, how it is triggered and the system in place for when it is triggered. He further explained that there was no formality in how he was made aware that the Defendant was assigned the Agreement. He stated that an agent of the Defendant showed up to Caribe in 2003/2004 and changed out the stickers of Brinks to the Defendant's stickers. He noted that no further checks or examination of the security system that existed were done by the Defendant.

[8] Mr. Chulani averred that after the burglary he met with Mrs. Duhaney, a representative of the Defendant, who was introduced to him in 2003/2004 when the Defendant took over the Agreement, and that at or about 10:30am on the 28th day of June 2010, he and Mrs. Duhaney spoke about the burglary. He stated that the result of the conversation was such that the Defendant needed to have the system checked because there might be a fault with the system. On that same day, he remembers that a personnel from the Defendant came to Caribe and performed checks on the security system and confirmed that the system was fine.

[9] He further stated that a few days later Mrs. Duhaney reached out to him on behalf of the Defendant stating that the security system at Caribe was faulty and an invoice was subsequently sent to him regarding an upgrade. Having received the invoice, Mr. Chulani advised Mrs. Duhaney that he would not be going ahead with the upgrade as he knew the security system was working since it alerted the Defendant about the burglary. Subsequently, at his request to speak to someone more senior, he was referred to Mr. Richard Pitcher who told him that the series of robberies happening in the area was due to the "cash for gold thing" and that the Defendant is trying to tighten security around the shops.

[10] Mr. Chulani explains that he understood the "cash for gold thing" to be referring to the scheme by persons to get gold and resell them for very high prices as gold was scarce and there was a market for its sale at high prices. He further explained that this scheme has caused a string of robberies in the surrounding areas of his shop within the last two (2) weeks, but that he was not worried because he had an

effective and efficient security system as the Defendant had never told him anything to the contrary.

[11] Upon receipt of an incident report by the Defendant in relation to the burglary, Mr. Chulani said he expressed his dissatisfaction to Mr. Pitcher that it took the Defendant's response team seventeen (17) minutes to get to the store after the alarm triggered. He indicates that the base of operations of the Defendant was no more than half a mile from Caribe.

[12] The Claimant further relied on twenty (20) documents, including various invoices, a letter from the Defendant, the incident report, the technician schedules of the Defendant and a police report from the Montego Bay Police Station.

The Defendant's Evidence

[13] The evidence of Mr. Josef Kogle, an Armed Response Patroller ("ARP") of the Defendant, was relied upon by the Defendant. He spoke to his duties as an ARP and the Defendant's response to the burglary. Mr. Kogle recounts his recollection of the 22nd day of June 2010. He states that at about 3:17am he and his team member, Mr. Lloyd Medley, received a dispatch from the Central Monitoring Station ("CMS") that a signal was coming from Caribe's shutter. He further stated that he was the one who spoke with CMS and that he and his team member immediately went to Caribe.

[14] He admits that as several years have passed, he is unable to remember who drove to Caribe and where they were driving from. He further admits that he arrived at Caribe seventeen (17) minutes later at 3:34am and he and his team member went to inspect the shutter as well as the padlocks that were on it. Mr. Kogle averred that having made sure that Caribe was secure and seeing no sign of entry there, he and his team member checked the sides and the rear of the building, but they were unable to see inside the building or tell if anyone was inside the building.

[15] He further averred that he and his team member did what they were supposed to do when they checked the accessible areas. He indicated that since nothing suspicious was observed, they made a call to CMS and advised them of same and departed Caribe at 3:38am. He stated that he had only been told the particulars of the burglary when his shift ended at 7:00 am on the 22nd day of June 2010. Subsequently, he had to give a written report to the administration office in Montego Bay, as is the norm whenever there is an incident, but he does not know if his team member also gave a report.

[16] Evidence for the Defendant was also given by Mr. Garth Kitson, the then General Manager of the Defendant. His evidence spoke to his duties, the Agreement and the Defendant's response to the burglary. Mr. Kitson agreed that the Agreement existed and was entered into to provide those services which the Claimant outlines. He recites the duties that Brinks had under the Agreement specifically those at clause 10.3 which speaks to the response that should be taken when the signal is triggered. He further recites clauses 12.2 and 12.3 which proclaims that Brinks has no liability for any consequential loss in connection with the services provided pursuant to the Agreement and that if any such liability should exist, it is limited to Fifty Thousand Dollars ($50,000.00) as an exclusive remedy.

[17] Mr. Kitson further agreed that the contract was assigned to Defendant, save that he indicated that this was in the year 2002. He stated that the alarm system that was in place at Caribe, at the time that the Defendant assumed obligations under the contract, was in good working order. However, he further stated that even with a good working alarm system, alarm sensors can be triggered when there is no intrusion as the shutter can be triggered by any number of things.

[18] Mr. Kitson explained that on the 22nd day of June 2022 he received a verbal report from Mr. Pitcher, the Operations Manager, and CMS about the burglary and that several pieces of jewellery were missing. He further explains that as a part of the Defendant's standard procedures, an internal investigation is commenced whenever there is any incident or complaint. He indicates that an Alarm Activity

Report was generated for that purpose (the contents of which are relied upon by the Claimant).

[19] Mr. Kitson averred that he went over records which show a report from ARP Peter Perry and ARP Morrison to Mr. Pitcher advising him that they received a call at 11:06am on the 22nd of June 2010 from CMS that there had been a break in at Caribe. He further averred that the ARPs arrived at Caribe 11:17am and noticed that there was a hole in the roof and that some things were pointed out to them by Mr. Chulani. He stated that the report verified that a Detective came to the scene at 12:06pm and that the ARPs left Caribe at 1:30pm.

[20] Mr. Kitson also verified that it took the first team seventeen (17) minutes to respond to the call from CMS. However, he indicates that this is a reasonable response time as sometimes the team is doing routine checks for other clients and that other times they arrive almost immediately depending on their location at the time they are notified. Mr. Kitson went on to qualify the actions of the first team of ARPs. He explained that neither the Defendant nor its representatives were ever provided with keys to gain entry to Caribe. Therefore, it is unreasonable for the Claimant to have expected the ARPs to notice that there was a hole in the roof or whether any one was inside because the shutters prevented visual access. He further explained that the design of the roof was such that it would not enable the first team to identify whether persons were on it or that a hole was created in it without gaining access to the building.

[21] Mr. Kitson stated that, generally, the Defendant and/or its representatives will notify the Police of an incident when there is a visible sign of entry or when multiple signals have been triggered. In this instance however, Mr. Kitson stated that although the Police station is in close proximity to the Claimant, the ARPs would not have notified the Police because there was only one (1) alarm triggered and there were no visible signs of entry.

[22] Mr. Kitson closed his evidence by stating that he believes that the Defendant and its representatives followed proper procedure, performed and discharged their obligations under the Agreement, and that the Defendant has never been able to verify what if any items of jewellery went missing and the value of same because they were never provided with any proof of same.

CLAMAINT'S SUBMISSIONS

[23] Counsel for the Claimant submitted that the burglary of Caribe was as a result of negligence on the part of the Defendant in failing to properly carry out their security and response duties. Further, and/or in the alternative, the Defendant's actions in response to the triggered alarm system breached the Agreement. Counsel argued that the Defendant owed a duty of care to the Claimant to take all reasonable steps to provide the monitoring and response services in a manner which would not cause the Claimant foreseeable harm. Counsel relied on the case of **Lowel Morgan v Sentry Services Limited and SGB Maintenance Limited** [2015] JMSC Civ 12, where Batts J held that, where a contractual relationship exists there is a duty to take care in carrying out those duties to ensure that there is no foreseeable loss.

[24] Counsel further argued that the Defendant did not challenge the Claimant on its version of facts that it laid before the Court nor did the Defendant make any alternative suggestions to challenge the evidence of the relevant issues and facts before the Court. Counsel indicated that the Court should accept the Claimant's evidence on the implied terms of the Agreement and the procedure that was in place for the alarm system as these were not challenged in cross-examination of the Claimant's witness. Reliance was placed on **Phillip Grantson v The Attorney General of Jamaica** (unreported) Supreme Court of Jamaica, Claim No. 2003HCV1680, delivered on the 10th day of August 2009, in which Sykes J (as he then was) explained that it is very difficult for the Court to reject the witnesses' testimony on the unchallenged part of his evidence.

[25] Counsel averred that the Defendant acted outside the contract or below the reasonable standard in that there was an inordinate, unexplained time to get to Caribe and that the Defendant failed to report the matter to the Police. To this end, Counsel relied on clauses 10.3.1 and 10.3.2 of the Agreement which, as Counsel suggested, mandated that the Defendant:

i. ensure that one of its authorized representatives attend with reasonable dispatch to the customer's premises; and

ii. use all reasonable endeavours to verify with the customer that the alarm is not false and when unable to do so promptly/satisfactorily, the appropriate authority is to be notified promptly.

[26] Counsel further suggested that it was an implied term that "reasonable dispatch" meant five (5) to seven (7) minutes. Counsel argued that this representation was relied upon to enter into the Agreement. Further, that the evidence in relation to clause 10.3.1 was unchallenged by the Defendant and that this was evidence that the Defendant acted outside the contract or below the reasonable standard. This, Counsel argued, facilitated a breach of the Agreement and the duty of care owed to the Claimant resulting in foreseeable loss.

[27] Counsel submitted that Clause 12.3 of the Agreement does not apply to the breach of Clause 10.3, as the Clause speaks to loss arising only from the failure of the response service and/or apparatus. Counsel argued that the Claimant's loss arose due to negligence on the part of the Defendant which was separate and apart from any failure of its Response Team. Counsel further submitted that Clauses 10.3.1 and 10.3.2 spoke specifically to the Defendant's unique actions and behaviours in exercising its duties and responsibilities under the Agreement and should not be construed to mean anything else. Counsel relied on the principles of interpretation in relation to exclusion clauses from the **Halsbury Laws of England, 4th ed. Vol 9** paras 776, 797-803 and 806 and states:

> "Subject to the view taken as to the basic effect of exclusion clauses the underlying rule of construction is that, under the contra preferentem rule, exclusions clauses require clear words to exclude liability which would otherwise arise… Thus any ambiguity is to be construed against the party putting forward the clause for his protection"
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> "Where a contracting party would prima facie be liable for negligence but seeks to protect himself by relying upon a provision of the contract, then following the usual rule, the provision will be read contra preferentem. Thus where he may be subject to liability for negligence and to a stricter form of liability, the protection is that general words of exclusion will not ordinarily protect him from liability for negligence, but will prima facie be construed so as to protect him only from that stricter form of liability."

DEFENDANT'S SUBMISSIONS

[28] Counsel for the Defendant submitted that the Defendant exercised its duties under the Agreement with due care and rejected the Claimant's argument that the ARP's arrival time of seventeen (17) minutes was not reasonable in the circumstances.

[29] Counsel argued that the Defendant's representatives were unable to access the Claimant's premises. Therefore, they could only examine the external areas that were accessible and did so diligently without finding anything suspicious. Counsel further argued that the Defendant's representatives would be unable to detect the burglars on the roof, unless they went on the roof which was not a part of the Defendant's mandate. Further, that it could not be a reasonable expectation because the alarm was triggered once and anything including stray animals could have been the reason for it.

[30] Counsel further submitted that the Defendant utilized reasonable endeavours to promptly notify the designated representatives of the Claimant of the signal received. Counsel indicated that three (3) separate unsuccessful phone calls were made to more than one of the Claimant's representatives.

[31] Counsel argued that the obligation to notify the police at clause 10.3.2 of the Agreement is an expressed discretionary power afforded to the Defendant and therefore cannot be implied. Furthermore, Counsel placed emphasis on the fact

that it would only be triggered if, in the Defendant's opinion, the communication was deemed to be unsatisfactory. In this matter, the Defendant determined that this discretionary power was not triggered because there were no signs of entry, there was nothing suspicious and the alarm was triggered once.

[32] Counsel submitted that the Defendant did not breach its duty to the Claimant and is not liable for any loss which the Claimant alleges. Counsel relied on **Lochgelly Iron and Coal Co. v McMullan** [1934] AC 1. In that case, Lord Wright held that it must be proven strictly that the Defendant's conduct was more than heedless or careless and that, whether by omission or commission, the Defendant's conduct connoted the duty owed, the breach and the damage suffered. Counsel further relied on **Charlesworth and Percy on Negligence** at page 192, where it is established that the failure to prove any of the requirements for actionable negligence will act as a complete defence to the claim.

[33] Counsel submitted that the Claimant failed to demonstrate that had the Defendant acted in a different way that the Defendant's representatives could have prevented the burglary and the alleged damage. Further, that the Claimant has not proven the actual loss of the jewellery alleged to have been stolen. Counsel submitted that the Defendant's liability, if any, is limited to Fifty Thousand Dollars ($50,000.00) pursuant to the terms of the Agreement. Reliance is placed on **Alisa Craig Fishing Co. Ltd v Malvern Fishing Co. Ltd** [1983] 1 WLR 964. In that case, Lord Wilberforce made an important distinction with how the courts treat exclusion and limitation clauses by indicating that:

> "Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion: this is because they must be related to other contractual terms, in particular to the risks to which the defending party must be exposed, the remunerations which he receives, and possibly also the opportunity of the other party to insure."

[34] Counsel further relied on the case of **Fraser Jewellers (1982) Ltd. v Dominion Electric Protection Co. et al** [1997] 101 O.A.C. 56 (CA), where it was found that

limitation clauses in the security protection industry makes sound commercial sense and is manifestly reasonable. Robins JA stated that:

> "…the Defendant/Appellant has no control over the value of its customer's inventory and can hardly be expected to, in exchange for a relatively modest annual fee, insure a jeweller against negligent acts on the part of its employees up to the value of the entire jewellery stock whatever that value, from time to time, may be."

THE ISSUES

[35] The issues arising in this matter are: -

i. Whether the terms regarding reasonable dispatch being five (5) to seven (7) minutes and the Defendant reporting all incidents to the Police, should be accepted as being implied terms of the contract;

ii. Whether the Defendant was negligent in their response to the burglary and subsequently breached the contract.

iii. Whether the Defendant's liability, if any, is limited to $50,000.00 as prescribed by clause 12.3 of the Agreement.

iv. Whether the Claimant is entitled to special damages in the amount of Three Million, Four Hundred Thousand, Five Hundred and Forty-Two Dollars ($3,400,542.00) for jewellery stolen and damage to a shelf.

LAW AND ANALYSIS

Implied Terms

[36] The Claimant argued that the Court ought to accept their evidence surrounding the implied terms of the Agreement because the Defendant failed to discount this evidence in cross examination. While the court accepts the evidence in relation to the alleged implied terms of the contract, the court is unable to accept that the terms are implied on this basis. Particularly because the Defendant, while not

challenging the assertions in cross examination, have put forward evidence which discounts the existence of the alleged implied terms. Therefore, it is necessary to examine the law in relation to implied terms.

[37] Terms may be implied in a contract by legislation, common law, custom or usage, previous dealings between the parties, or in fact to reflect the intention of the parties. There was no evidence or submissions made on behalf of the Claimant which suggested that the terms were implied under any law, custom or previous dealings. However, the evidence and submissions on behalf of the Claimant suggests that the terms are implied in fact as a reflection of the intention of the parties. **The Moorcock Case** [1889] 14 P.D. 64 established that the courts will imply terms into a contract which is necessary, reasonable and obvious to give business efficacy to the contract. Bowden, LJ opined that:

> "This test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied- the bare minimum to achieve this goal. If the contract makes business sense without the term, the courts will not imply the same." (My emphasis)

[38] This was distinguished in the case of **Delroy Chandle v Downsound Records Limited** [2019] JMSC Civ 217 where the court stated:

> [*60] …*
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> "*As for the authorities Mr Sweeting cited a pertinent passage from the judgment of Kerr J in* ***The Karen Oltmann*** *[1976] 2 Lloyds Rep 708 at 712:*
>
> > *"I think that in such cases the principle can be stated as follows. If the contract contains words which , in their context, are fairly capable of bearing more than one meaning, and if it is alleged that the parties have in effect negotiated on an agreed basis that the words bore only one of the two possible meanings, then it is permissible for the Court to examine the extrinsic evidence relied upon to see whether the parties have in fact used the words in question in one sense only, so that they have in effect given their own dictionary meaning to the words as the result of their common intention. Such cases would not support a claim for rectification of the contract, because the choice of words in the contract would not result from any mistake. The words used in the contract would ex hypothesi reflect the meaning*

> *which both parties intended. Also, as stated in Chitty on Contracts para 12. 119, evidence of facts about which the parties were negotiating is admissible to explain what meaning was intended and evidence of what the parties said in negotiations is admissible to show that the parties negotiated on an agreed basis that the words used bore a particular meaning"*
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> [61] …. it is clear that the court can examine the evidence surrounding the negotiation for the contract in order to arrive at a determination as to what was intended by the parties. That is, whether it was negotiated on an agreed basis that the words used bore a particular meaning
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> [62]… it is my view that the necessity to imply such a terms as "commercial viability" or "business efficacy" only arises where the issue was not considered by the parties and the court finds that that would have been their intention had they considered it. It is not applicable to a situation where based on the conduct of the parties and the evidence it is clear that the issue was considered at the time of entering the contract and the parties agreed on a position, but one party later decides to change that position after the formation of the contract.

[39] Based on the evidence of the Claimant, the issues relating to reasonable dispatch and police reporting was considered by the parties at the time of the formation of the Agreement. Therefore, **The Moorcock Case** is relevant in dispensing with this issue. The Claimant suggested that at the time of the contract formation "reasonable dispatch" was understood to be five (5) to seven (7) minutes and that it was this representation which they relied upon to enter into the contract. However, the contract makes business sense without limiting reasonable dispatch to five (5) to seven (7) minutes.

[40] Furthermore, as the Defendant suggested, there are multiple reasons which affect the time at which the ARPs arrive at a scene including inter alia, their location from the premises at the time that they are alerted. The question is, what factors influenced the time ARPs arrived at the premises? At this juncture, we are unable to answer this question as neither party gave evidence which could assist the court in answering it. Therefore, the court is unable to conclude that the meaning of "reasonable dispatch" as advanced by the Claimant was an implied term of the Agreement and accepts the argument of the Defendant that this has to be determined on a case by case basis.

[41] In relation to the assertion that the Defendant ought to report each instance of a burglary in progress to the relevant authorities being an implied term of the Agreement, the court directs its attention to clause 10.3.2 of the Agreement. This clause is an expressed provision in the Agreement which gives a discretion to the Defendant to determine those instances when they may notify the relevant authorities. Therefore, the Claimant is suggesting that this implied term exists contrary to an expressed term. The court therefore must determine if a term contrary to an expressed term can be implied into an agreement.

[42] An implied term arising in fact to prove the intention of the parties which is contrary to an expressed term may exist in limited circumstances such as where the expressed term is a discretion under an agreement. Therefore, a term may be implied into the Agreement which restricts this discretion. Additionally, a term may be implied where it speaks to a consistent practice by the parties that contradicts the expressed terms. The court finds that an implied term may exist in the Agreement for the Defendant to notify the relevant authority of instances where a burglary is in progress, as it is a restriction of their discretion at clause 10.3.2 of the Agreement. Further, it is reasonable and prudent that they would do so, given that the Coral Gardens Police Station is en route to and from Caribe. Additionally, based on the principles established in **The Moorcock Case**, it is necessary, reasonable and obvious that if there is an actual burglary in progress that the police ought to be notified by the responding team.

Negligence and Breach of Contract

[43] The Claimant's pleadings suggested that the same actions or omissions of the Defendant resulted in the cause of action of negligence and breach of contract, arising concurrently or in the alternative. However, it is important that one (1) distinction be made. This is that, negligence arises when the Claimant has suffered consequential loss because of a breach of duty by the Defendant, and that there is a breach of contract once the Defendant is deemed to have breached the duty of care owed.

Breach of Duty

[44] **Clerk and Lindsell on Torts 19th edn** at page 541 notes that, a Defendant breaches their duty of care if their conduct falls below the standard required by law. Considering the contractual duty involved, a breach would also include acting outside of the Agreement itself. The case of **Nettleship v Watson** [1971] 3 WLR 370 established a general rule that Defendants are expected to act with a reasonable level of skill in the activity they are undertaking. In that case, the Defendant was an amateur driver taking lessons from her friend. The Defendant panicked and crashed into a lamppost fracturing her friend's knee and Counsel argued that as a learner driver she had a lower standard of care. The court rejected this argument and found that, someone who undertakes a task should be judged against the standard of a reasonably, qualified and competent person undertaking that task.

[45] Based on the skill of the Defendant in providing security services, it may be argued that a different standard is required. The resulting principle in the case of **Bolam v Friern Hospital Management Committee** [1957] 1 WLR 583, though about the medical profession, is relevant in these circumstances. The resulting principle, as modified in the case of **Bolitho v City and Hackney Health Authority** [1998] AC 232, explains that the standard of care for skilled professionals are based on a body of professional opinion that is logically defensible.

[46] It is not in contention as to whether a duty existed as both parties accepts that a duty arises on the part of the Defendant by virtue of their contractual relationship with the Claimant. The contention surrounds whether the Defendant breached the specific duty of care to take all reasonable steps to provide its monitoring and response service to the Claimant in such a manner so as not to cause the Claimant foreseeable loss and damage. In breaching this duty, the Claimant alleges that the Defendant breached implied terms of the contract to provide reasonable dispatch and to report incidents of burglaries in progress to the relevant authorities and further, that the Defendant failed to:

i. take reasonable steps to secure the said premises after arriving there at 3:24 a.m. so as to prevent and/or deter an impending burglary or attempted burglary;

ii. take reasonable steps to secure and safe guard the said premises having been alerted by the said Alarm System that there was an attempted break in or impending break in;

iii. take reasonable steps to steps to secure and safe guard the said premises having been alerted by the said Alarm System that there was an impending burglary or attempted break in;

iv. alert the Coral Gardens Police or any other Police of the fact that the said Alarm System had been triggered;

v. promptly notify the Coral Gardens Police or any other Police of the fact that the said Alarm System had been triggered and had therefore warned of an attempted burglary or an impending burglary;

vi. having been alerted to the fact of the Alarm System being triggered, to take reasonable care to do all that was necessary to secure and safeguard the Claimant's premises to prevent a possible burglary;

vii. immediately contact the relevant authorities after the first or second notification of the burglary;

viii. immediately notify the Claimant or their relevant contact of persons about the triggering of the burglary alarms;

ix. remain on the scene until the relevant authorities arrived to secure the Claimant's premises;

x. to take steps (i) to (ix) in circumstances where at least 2 other premises secured by the Defendant had been burgled in similar fashion to that of the

Claimant's premises, within close proximity of the place of business of the Defendant and within 5 weeks of the date of the burglary of the Claimant's premises and so the Defendant ought to have been put on notice of the spate of such robberies and in the circumstances, should have exercised even greater vigilance in the performance of their duties.

xi. take such reasonable steps as a prudent security services provider would to secure the Claimant's loss of items from the Claimant's premises due to burglary;

xii. correct or modify a security system which was defective and ill-suited for the purpose it was installed and maintained;

xiii. take reasonable care to maintain the said security system in an effective and efficient manner for the purpose it was needed;

xiv. failing to correct or modify the security system which existed prior to the said burglary to the standard the Defendant suggested subsequent to the said burglary; and

xv. take reasonable care to maintain the said security system in an effective, efficient and suitable condition for the purpose for which the burglary alarm system was installed.

[47] Due to the lack of evidence which would indicate the factors affecting the ARPs arrival time to the premises, the court agrees with the Claimant that an arrival time of seventeen (17) minutes was not reasonable in the circumstances. This conclusion is premised upon the Defendant's failure to provide a cogent reason as to why the ARPs took seventeen (17) minutes to arrive at Caribe after being alerted at 3:17 a.m. – at which time the road and journey to Caribe would be free of vehicular traffic. Consequently, the Defendant has breached the Agreement.

[48] However, the notion that the implied term to report in progress burglaries to the relevant authority imposes a duty on the Defendant and/or their agents to notify the relevant authorities in these circumstances must be rejected. A response team is required because they respond faster than the police. Therefore, they can secure a location and then, if necessary, inform the relevant authorities for their required assistance and support in further securing the premises and/or apprehending the culprits. In these circumstances, based upon the ARPs findings, the implied term to inform the police would not arise because their investigations yielded no findings of a burglary. Additionally, there is no evidence to indicate that even if the ARPs arrived in reasonable time they would have observed signs of a burglary.

[49] Further, the argument that a higher standard of care existed because of the Defendant's alleged knowledge of an increase in robberies in the area where Caribe is located is rejected. The required standard remains at that which is required of a competent and skilful security service provider. Notwithstanding, the court is not satisfied that four (4) minutes was enough time to investigate and ascertain whether there was a burglary at Caribe. However, it is not certain that the result would have been any different had they spent more time investigating as the ARPs had no key to enter the premises, they were not able to see inside the premises and it is not a part of their normal duties to climb to the roof of their client's buildings. Consequently, the court finds that the Defendant did not breach those duties reiterated at i to xi in paragraph 46 above, as alleged by the Claimant.

[50] The court finds, however, that the Defendant has breached those duties outlined at xii to xv of paragraph 46. This finding is premised upon the evidence in the case which suggested that the alarm system was recommended to be replaced and that since the Defendant was assigned the Agreement in 2002, no check or maintenance was done of the alarm equipment until after the incident.

Consequential Loss

[51] In order to find the Defendant liable for Negligence, the breach of those duties outlined in (xii) to (xv) and the Defendant's failure to arrive in a reasonable time must have resulted in foreseeable loss. In **Precious Bennett v Len Smith** [2016] JMSC Civ 5, Simmons J highlighted that the Claimant must establish but for the actions of the Defendant, the Claimant would not have suffered the loss. There is nothing to suggest that, on a balance of probabilities, the outcome would be different if the ARPs were to have arrived to Caribe within the five (5) to seven (7) minutes or if the Alarm System was changed out earlier. Furthermore, there was no evidence which suggested a correlation between the operation of the Alarm System and the burglary, especially since the Alarm System was triggered and did notify the Defendant. Therefore, the burglary and the changing out of the security system are independent of each other. Consequently, there was no evidence that the breach of duties resulted in any consequential loss for the Claimant. On this basis, the Claimant's case for negligence fails, however, the Claimant succeeds on their action for breach of contract.

Limitation of Liability

[52] In dispensing with this issue, it is useful to utilize and rely upon the authorities submitted by Counsel for the Parties. The following portion of the Defendant's submission is reiterated for emphasis:

> "Lord Wilberforce in **Alisa Craig Fishing Co. Ltd v Malvern Fishing Co. Ltd** opined that: "Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion: this is because they must be related to other contractual terms, in particular to the risks to which the defending party must be exposed, the remunerations which he receives, and possibly also the opportunity of the other party to insure."
>
> "In the case of **Fraser Jewellers Ltd v Dominion Electric Protection Co.** 1997 CarswellOnt 1894, from the Ontario Court of Appeal, it was found that a limitation of liability clause was common in the security protection industry, makes sound commercial sense and that limiting liability in such situations is manifestly reasonable. Robins JA who delivered the judgment of the court said (at paragraph 38) that the ADT, the Defendant/Appellant,

> has no control over the value of its customer's inventory and can hardly be expected to, in exchange for a relatively modest annual fee, insure a jeweller against negligent acts on the part of its employees up to the value of the entire jewellery stock whatever that value, from time to time, may be."

[53] Robins JA, in the case of **Fraser Jewellers Ltd v Dominion Electric Protection Co. supra,** opined that if the breach of the contract is fundamental so as to substantially deprive the Claimant of the whole benefit of the contract, then the limitation clause can be struck down. Robins JA went on to explain that the Defendant's failure to respond reasonably is not a fundamental breach of a securities contract.

[54] The limitation clause at clause 12 of the Agreement is stated as follows:

> 12.1 It is understood and agreed that Brinks Alarms is not an insurer, that insurance if any, shall be obtained by the Customer and that any amounts payable to Brinks Alarms under the Agreement are based upon the value of the goods and services to be provided herein and the scope of the liability as herein set forth and are unrelated to the value of the Customer's property or the property of any other persons located on the Customer's premises. Brinks Alarms makes no guarantee or warranty (including any implied warranty of merchantability of fitness) that the alarm system or alarm response service supplied will avert or prevent the occurrence or the consequences therefrom which the alarm system or alarm response service are designed to detect.
>
> 12.2 Brinks Alarms shall have no liability to the Customer for any consequential loss of the Customer arising out of or in connection with the provisions of any goods or services pursuant to the Agreement.
>
> 12.3 Notwithstanding the aforesaid clause 12.2, if any liability to the Customer shall arise on the part of Brinks Alarms, whether under the express or implied terms of these Conditions, or at common law or in any other way howsoever, for any loss or damage due to a failure of apparatus comprising the alarm system or transmission equipment or the alarm response service in any respect, howsoever caused, such liability shall be limited to $50,000.00 as the exclusive remedy.
>
> 12.4 The provisions of this clause 12 shall apply if loss or damage, irrespective of clause or origin, results directly or indirectly to persons or property due to performance or non-performance of obligations imposed by these Conditions.

[55] An examination of the Agreement highlights that clause 12.3 limits the Defendant's liability to an exclusive remedy of Fifty Thousand Dollars ($50,000.00) for any loss or damage due to a failure in apparatus or the alarm response service. However, clauses 12.1 and 12.2 excludes liability on the part of the Defendant for all other claims. In these circumstances, the Claimant would not be eligible for the Fifty Thousand Dollars ($50,000.00) under the contract since the breach of contract which gave rise to liability did not result in any loss or damage due to the failure of any apparatus or the response service. Therefore, the liability of the Defendant is excluded for the breach of the contract.

[56] The Claimant has addressed how exclusion clauses in contract are to be dealt with by the court by citing the **Halsbury Laws of England, 4th ed. Vol 9.** It explains that when the exclusion clause is ambiguous, it should be construed against the party who seeks to use it for its protections (the contra proferentem rule). However, exclusion clauses are inapplicable in instances of negligence. Therefore, the clause must be clear and does not apply for negligent cases. In the instant case, there has been no submission or evidence presented which suggests that clauses 12.1 and 12.2 are unclear. Additionally, the exclusion clauses would apply in these circumstances since the Claimant did not succeed on their action for negligence.

[57] Further, the law is settled on the use and operation of an exclusion clause in a signed contract. To this end the case of **Everoy Harris and Marcia Harris v Jamaica International Insurance Company Limited** [2016] JMSC Civ 123 is cited. In that case Lindo J opined on the law in relation to exclusion clauses and the court adopts and recites this discussion below:

> [41] The law as it relates to clauses of this nature, was discussed in the case of **L'estrange v F. Graucob, Limited** [1934] 2 KB 304. In this case, the buyer of an automatic slot machine signed and handed to the sellers who also signed the contract, an order form containing the essential terms of the contract. The contract contained certain special terms, one of which excluded warranties from the contract which was in small print. The machine did not work satisfactorily, and the buyer brought an action against the sellers for breach of an implied warranty that the machine was fit for the purpose for which it was sold. The sellers pleaded that the contract

> expressly provided for the exclusion of all implied warranties. The buyer replied that at the time when she signed the order form she had not read it and knew nothing of its contents.
>
> [42] In adjudicating this case, Scrutton and Maugham L.JJ. cited and reaffirmed Mellish L.J. in **Parker v South Eastern Railway. Co**. [1877] ...where he said:
>
> > "In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature and in the absence of fraud it is wholly immaterial that he has not read the agreement and does not know its contents. In cases in which the contract is contained in an unsigned document, it is necessary to prove that an alleged party was aware, or ought to have been aware, of its terms and conditions. These cases have no application when the document has been signed."
>
> [43] In the later case **of Spriggs v Sotheby Parke Bernet & Co Ltd** [1984] 2 EGLR 24, the court applied and cited the case **L'Estrange v F Graucob Ltd.,** *supra*. The court ruled that the claimant was bound by the contract she signed which stated that the defendant was not responsible for loss or damage of any kind whether caused by negligence or otherwise and that the property was being accepted at owner's risk. In reaching its decision the court said:
>
> > "However, it seems to be well established that, in the absence of fraud or misrepresentation, a party signing a document like this is bound by it and it is wholly immaterial whether he has read the document or not."

[58] In applying the principles established in the cases cited by Lindo J, the court finds that the Claimant is bound to the terms of clause 12.1 and 12.2, as there was no contention as to the contract being entered into by fraud or misrepresentation. Therefore, despite the Defendant being found to have breached the contract, they are excluded of liability by virtue of the operation of the aforesaid clauses.

Special Damages

[59] This issue can be quickly dispensed with as the Defendant has been excluded of liability and would therefore not be liable to pay neither general damages, special damages nor any interest. However, had this not been the case, the Defendant would not have been liable for special damages, as the Claimant failed to

specifically prove their actual loss of the jewellery i.e. by way of an audit and/or inventory report before and after the burglary.

CONCLUSION

[60] In light of the foregoing it is ordered as follows:

1. The Claimant's claim for negligence for those reasons set out in their Particulars of Negligence in the Particulars of Claim filed on the 27th of July 2011 fails;

2. The Claimant's concurrent or in the alternative claim for breach of contract on the basis that the Defendant breached their duty of reasonable dispatch succeeds. However, the Defendant is excluded of liability for the breach of contract by virtue of clause 12.1 and 12.2 of the Agreement;

3. The Claimant's claim for special damages in the amount of Three Million Four Hundred Thousand Five Hundred and Forty-Two Dollars ($3,400,542.00) for jewellery stolen and damage to a shelf fails;

4. The Claimant's concurrent claim for interest fails; and

5. Costs awarded to the Defendant to be agreed or taxed.