COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2018/CLE/gen/00301

BETWEEN:

ROSCOE THOMPSON

(T/A THOMPSON'S HEAVY EQUIPMENT)

Plaintiff

AND

THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF THE BAHAMAS

Defendant

Before: The Honourable Mr. Justice Loren Klein

Appearances: Mr. Wayne Munroe QC, with Ms. Palincia Hunter for the Plaintiff

Kirk Mackey, with Raquel Whyms for the Defendant

Hearing date(s): 5 March 2020; closing submissions 13 May 2020.

RULING

KLEIN J

Contract – Termination – Express termination clause (ETC) – Agreement providing for either party to terminate on two weeks' notice – "Termination for Convenience" – Notice to terminate – Whether notice valid – Breach of contract – Principles of contractual interpretation – Damages – Whether damages for loss of bargain available

INTRODUCTION

[1] In November 2017 the Government of The Bahamas ("the defendant") purported to terminate by notice in writing seven contracts entered into with the plaintiff for the operation and maintenance of a corresponding number of waste disposal sites at different locations on the island of Eleuthera.

[2] The written contracts were executed on 14 February 2017, but the commencement dates were stated as the 1 October 2016 and they were to expire on 30 June 2018. The

termination at the election of the defendant was therefore to take place some seven months before the contracts were due to expire. No reason was given and none was required. Each of the contracts contained an express termination clause ("ETC") providing for either party to terminate the contracts at any time on two weeks' notice to the other party.

[3] In these proceedings the plaintiff does not dispute the defendant's right to terminate the contracts by notice. What he says is that the defendant's letter purporting to terminate the contracts ("the Notice") did not constitute a valid notice, in that it failed to comply with the notice period stipulated by the terms of the contracts. He therefore sued the defendant for breach of contract, claiming damages for loss of bargain said to be the consequence of the breach.

Factual Background

[4] The facts of this case are relatively simple and largely uncontroversial.

[5] The plaintiff operates the business of heavy-duty equipment and trucking services, including maintenance of landfills, trading as "Thompson's Heavy Equipment". On 14 February 2017, he entered into seven contracts with the Department of Environmental Health Services of the Ministry of the Environment and Housing (on behalf of the Government) ("the Ministry") for the operation and maintenance of waste disposal sites at the following settlements on the island of Eleuthera—Tarpum Bay, Whymms Bight, Bannerman Town, Green Castle, Rock Sound, Waterford and Deep Creek.

[6] The contracts are in materially similar terms, except for variations in the contract amounts for the designated sites. The value of the contracts for the Tarpum Bay and Rock Sound sites was $5,000 per month plus VAT of 7.5%; for the Green Castle, Waterford and Whymms Bight sites, $2,500 per month plus VAT of 7.5%; and for the Deep Creek and Bannerman Town sites, $2,333.33 plus VAT of 7.5% As indicated, they were to commence from 1 October 2016 and continue in force until 30 June 2018.

[7] The operative terms of the contracts are immaterial for the purposes of this claim. What is significant is the clause to be found at paragraph 2 of each of the contracts, which provides as follows:

> "***IT IS HEREBY MUTUALLY AGREED as follows***:
>
> **(1) […..]**
>
> **(2) This agreement may be terminated at any time by either party by giving two (2) weeks' notice of intention to terminate the agreement and the date of termination shall be the date stated in such notice of termination."**

[8] Clause 2 does not expressly provide for the manner or form in which the notice was to be given or communicated, although the requirement for the date of termination to be "stated" in the notice implies it is to be in writing. By contrast, cl. 4, which reserved a right to the Government to terminate in the event of breach by the contractor, provided for how notice was to be given for termination under that clause:

> **"(4) If at any time the Government is satisfied that the Contractor is in breach of the agreement by reason of its failure to comply with any of the terms and conditions herein contained the Government may without prejudice to any other remedy which may be available to it in respect of such breach terminate this Agreement by way of notice in writing to the Contractor either by fax, personally or by post and upon receipt of such notice by [*sic*] this Agreement shall forthwith determine and be of no effect without prejudice, however, to any rights which may have accrued to the Government prior to the determination."** [Emphasis supplied.]

[9] There appears to be a typographical error in cl. 4 (which is replicated in all of the contracts), and it seems that the words "the Contractor" are missing and should come immediately after the words "receipt of such notice by…". But it is reasonably clear even on the current wording that a notice under that clause is only to take effect on its receipt by the other party.

[10] By letter dated 13 November 2017, the defendant purported to terminate the said contracts with effect from 30 November 2017. The notice did not specifically refer to cl. 2 of the contracts, but there is no dispute that this was the provision being invoked. It appears that the defendant initially attempted to dispatch the letter by email to an account used by the plaintiff's company on 16 November 2017, but it is unclear on the evidence whether this email was ever received. The plaintiff's position is that he never received the letter until 27 November 2017, when he personally collected it from the defendant's office. Further, through his counsel Mr. Munroe, the plaintiff said that he accepted this "repudiation" of the contract, although no evidence was led as to whether this acceptance of repudiation was ever directly communicated to the defendant. Nothing turns on this, however, as acceptance of repudiation may be indicated by conduct which clearly shows that the aggrieved party is treating the contract as at an end (see **Vitol SA v. Norelf Ltd.** [1996] AC 800, at 810-11, per Lord Steyn).

[11] Some months later, on 16 March 2018, the plaintiff issued a Writ of Summons claiming that the defendant "failed to provide notice of the termination as specified by the agreement governing the Plaintiff's employment" and therefore breached the said agreement. He claimed loss of profits for the unexpired term of the contracts, along with interest and costs. As indicated, the timing of the dispatch and receipt of the Notice is a matter of some dispute between the parties, and this is critical to the resolution of this claim.

Evidence of Witnesses

[12] Ms. Delores Stubbs, Deputy Chief Inspector, Ministry of Health and Environment, stationed at the Eleuthera Office, was the sole witness for the Defendant. She testified that she received a call on 14 November 2017 from Ms. Melody McKenzie, Director of the Department of Environmental Health Services, Ministry of Environment and Housing, alerting her to an email that was sent to her that same day and instructing her to relay the email to Mr. Roscoe Thompson of Thompson's Heavy Equipment. In her original witness statement filed 22 November 2019, she indicated that she emailed Mr. Thompson on the 14 November 2017 a copy of the termination letter at the email address which the company used for the submission of invoices generated under the contracts. However, in a supplemental witness stated filed 4 March 2020, she qualified this by stating that "on

14 November I emailed Mr. Roscoe Thompson advising him to collect a letter from the ministry" at the email addressed used by the company. In oral testimony, she later corrected the date the email was sent as 16 November 2017.

[13] During cross-examination Ms. Delores Stubs was asked:

> **Q: Just for clarification, that email sent on 16th November does not have attachments?**
>
> **A: No.**

[14] It appears that Ms. Stubbs took vacation leave at some point shortly after 16 November 2017. When she returned from vacation on the 27 November 2017, she was informed by staff that Mr. Thompson had not attended the office to collect the hard copy of the letter. She then telephoned him and advised him to collect the letter and Mr. Thompson (apparently in Nassau at that point) requested to collect the letter from the Ministry's Nassau Office. She agreed to this and instructed Mr. Thompson to call the Director, Ms. McKenzie, to arrange collection of the letter.

[15] Mr. Thompson's evidence was that he attended the Ministry of Environment and Housing in Nassau on 27 November 2017, and Director McKenzie issued him with a letter dated 13 November 2017. He said he pointed out to the Director that the letter was addressed to "T&C Express Services", which is another of his companies and the Director reprinted the letter and had it addressed to Thompson's Heavy Equipment.

[16] The notice letter was to the point and without frills (formatting as in the original):

> "November 13, 2017
> Mr. Roscoe Thompson
> **THOMPSON HEAVY EQUIPMENT** Our Ref: DEHS/
> Eleuthera, The Bahamas
>
> Dear Mr. Thompson:
>
> **RE: TERMINATION OF CONTRACT FOR MAINTENANCE OF FAMILY ISLAND DUMPSITES**
>
> The Department of Environment Health Services hereby gives official notice of termination of your contract for the maintenance of the below listed Family Island Dumpsite(s) with effect from November 30th, 2017.
>
> - **WHYMMS BIGHT DUMPSITE**
> - **DEEP CREEK DUMPSITE**
> - **BANNERMAN TOWN DUMPSITE**
> - **WATERFORD DUMPSITE**
> - **GREEN CASTLE DUMPSITE**
> - **ROCK SOUND DUMPSITE**
> - **TARPUM BAY**
>
> The Department of Environmental Health Services thanks you for your service over the past years and wishes you success in your other endeavours.

Melody McKenzie
Director
Environmental Health Services."

[17] Mr. Thompson said he asked the Director what his company did wrong at the dumpsites and was informed that "there was nothing wrong with the work that my company, Thompson's Heavy Equipment did, but rather this is just how the government operates." Mr. Thompson indicated that he never collected the letter from the Eleuthera office until 16 September 2019. There was some dispute as to whether it was Ms. Stubbs who called Mr. Thompson on the 27 November 2017, which led to him collecting the letter in Nassau, or whether the call emanated from Mr. Thompson (as claimed in his witness statement), but this is immaterial.

[18] The other witness for the plaintiff was Ms. Rhonda Butler, who is resident in New Providence, and described herself as a family friend of Mr. Thompson. Her evidence is that she assisted him with generating invoices for waste disposal contracts and sometimes served as his liaison with the Department of Environment and Housing in Nassau. She would sometimes send the Ministry invoices on behalf of the plaintiff's company when they were not forwarded from the Eleuthera Office of the Ministry and collect payments from the Treasury for him. She was paid a stipend of $150.00 per week for assisting with generating the invoices. She also stated during cross-examination that she was a business partner with Mr. Thompson and part owner of T&C Express, whose official email she used on at least two occasions to send invoices to the Department of Environment & Housing with respect to the contracts. She denied ever receiving an email with any attachments or letter dated 13 November 2017 at the T&C Express Services official email addresses, which included both a Hotmail and a G-mail address.

[19] The defendant submitted as part of its evidence a copy of an email sent on Mail for Windows 10 to Rhonda Butler at "tandcbahamas@gmail.com" at 3:05 p.m. on 16 November 2017, the wording of which follows:

> **"Dear Ms. Butler, Kindly have a representative stop in at our office in the Bet's Plaza in Governor's Harbour to collect a correspondence."**

The sender was "Delores Stubbs, S.H.I."

Factual analysis

[20] As has been stated, it is unclear (and disputed) on the evidence whether or not the plaintiff and/or Ms. Butler received the email of 16 November 2017. What is clear, and conceded by the defendants, is that in any event the email of 16 November 2017 did not have the termination letter attached, or any attachment for that matter. Neither did it disclose the nature of the correspondence which was to be collected. So even if the email had been received (and the court makes no finding in this regard), it would not advance the defendant's case. Therefore, the first occasion on which it can conclusively be said that the Plaintiff had notice of the letter purporting to terminate the contracts was the 27 November 2017, when he collected it from the Ministry in Nassau.

Parties' Submissions

[21] Relying on Anson's Law of Contract (by J. Beatson), the plaintiff premised his case on two legal principles:

> **"A contract may contain within itself the elements of its own discharge, in the form of provisions, express on implied, for its determination or termination. " (pg. 527)**
>
> **"Any notice given must be clear and unambiguous in its terms, and if it is to be given in a certain form e.g. writing, or within a certain time, or if a specified period of notice must be given, these requirements must normally be strictly complied with, otherwise the notice will be of no effect." (pg. 529)**

[22] Based on the latter proposition, he submitted that the Notice did not comply with the contractual stipulations. As opposed to being given two weeks' notice as required, he was only given three days' notice, as the letter was received 27 November 2017 and it was stated to be effective 30 November 2017. This, it was contended, had the effect of rendering the Notice invalid, and the putting the defendant in breach of the notice clause in all the contracts.

[23] He submitted further that the remedial consequence of the alleged breach, relying on the principle in ***Robinson v. Harman*** [1848] 154 ER 363 (at 365 per Justice Alderson B), should be that of full restitution, and that the plaintiff should be put back in the position he would be in if the defendant had fully performed its contractual obligations. In other words, that he should be compensated for the loss of profits under the contracts. He also relied on the Australian case of **Commonwealth of Australia v Amman Aviation Pty. Ltd.** [1991] LRC (Comm.) 275, as a "persuasive authority" in support of the claim for damages. In that case, the High Court stated as follows (Mason CJ and Dawson J, at pp. 287, 288):

> **"The award of damages for breach of contract protects a plaintiff's expectation of receiving the defendant's performance. That expectation arises out of or is created by the contract. Hence, damages for breach of contract are often described as 'expectation damages'. The onus of proving damages sustained lies on a plaintiff and the amount of damages awarded will be commensurate with the plaintiff's expectation, objectively determined, rather than subjectively ascertained. That is to say, a plaintiff must prove, on the balance of probabilities, that his or her expectation of a certain outcome, as a result of performance of the contract, had a likelihood of attainment rather than being a mere expectation.**
>
> **In the ordinary course of commercial dealings, a party supplying goods or rendering services will enter into a contract with a view to securing a profit, that is to say, that party will expect a certain margin of gain to be achieved in addition to recouping of any expenses reasonably incurred by it in the discharge of its contractual obligations. It is for this reason that expectation damages are often described as damages for loss of profits. Damages recoverable as lost profits are constituted by the combination of expenses justifiably incurred by a plaintiff in the discharge of contractual obligations on any amount by which gross receipts would have exceeded those expenses. This second amount is the net receipts."**

[24] Following from this, he claims the plaintiff is entitled to damages representing the loss of net profits due as a result of the breach of the contracts, which the plaintiff estimated in his skeleton argument to be $167,413.28 (although these damages were not pleaded in the specially indorsed Writ). This amount was calculated by totalling the monthly payments under each contract, multiplying by the number of months said to be remaining under the contracts, and subtracting the aggregate expenditure for that period.

[25] It is also of some significance that the plaintiff at paragraph 9 of his witness statement indicates the following: "The Director, as per the contractual Agreement did not give me two weeks' notice of the Government's intention to terminate the contract as mentioned in paragraph 3, nor was I given any payment in lieu of notice." [Emphasis supplied.]

[26] For the defendant, Mr. Mackey argued two propositions. Firstly, he contended that the termination letter on its face complied with the requirements for notice: it was dated the 13 November 2017 and gave the effective date as two weeks following that date, the 30 November 2017. He added that Mr. Thompson was notified via email and therefore in a position to collect the letter at a point which would have provided him the requisite notice. In response to this, Mr. Munroe pointed out that even if the email of the 16 November 2017 had been received and the letter was attached (and it is common ground that it was not attached), that would still only be 13 days' notice and not in compliance with cl. 2.

[27] In the alternative, Mr. Mackey contended that, even assuming that receipt did not occur until the 27 of November 2017, the plaintiff would only be entitled to be paid for the two-week period following the receipt of the letter. In this regard, reliance was placed on the first limb of **Hadley & Anor. v. Baxendale & Ors.** [1854] 9 Exch. 341, that for breach of a contract damages should only be that which was the direct result of the breach and which was in the reasonable contemplation of the parties.

[28] Responding to a submission from Mr. Munroe that the plaintiff was entitled to be paid for the unexpired portion of the contract as they were fixed term contracts, Mr. Mackey cited a line of employment cases from this jurisdiction in which the courts held that a "fixed term contract" which provides for its earlier termination is not breached when terminated before its expiry date pursuant to a break clause: see for example, **King v. The National Museum of The Bahamas** [2013] 1 BHS J. No. 187, affirmed on appeal by the Court of Appeal (SCCiv No. 193 of 2013). In his riposte, Mr. Munroe accepted the ratio of these cases, but pointed out that the notices in those cases were procedurally compliant with the terms of the contract, or there was payment in lieu of notice, which distinguishes them from the case at bar. I agree.

THE LAW

[29] As illustrated by the first of Mr. Munroe's propositions, parties are free to incorporate whatever terms they wish to govern the termination of their agreement, and no issue can be taken at common law as to the reasonableness or otherwise of such provisions. Addressing the issue of the termination of contracts under expressed provisions, Diplock L.J. in **Financings Ltd. v. Baldock** [1963] 2 Q.B. 104 (120-122) said:

> **"As I ventured to point out in *Hong Kong Fir Shipping Ltd. v. Kawasaki Kisen Kaisha Ltd*., parties to a contract may incorporate in it provisions which**

> **expressly define the events, whether or not they amount to breaches of contract, which are to have this effect. But such a provision may do no more than define an event which of itself, or at the option of one or other of the parties, brings the contract to an end and thus relieves both parties from their undertakings further to perform their obligations thereunder. Whether it does more than this and confers any other rights or remedies on either party on the termination of the contract, depends on the true construction of the relevant provisions. If it does not, then each party is left with such causes of action, if any, as has already accrued to him at the date that the contract came to an end, but acquires no fresh cause of action as a result of the termination. If it does purport to confer on one of the parties a right to recover a sum of money from the other, a question may arise whether this right is unenforceable as constituting a penalty."**

[30] As previously noted, counsel for the plaintiff (relying on the passage in Anson's Law of Contract) submitted that strict compliance with the terms of the notice is required for there to be a valid determination.

[31] No doubt the passage from Anson is informed by case law, and it is true that many of the earlier cases on the point have favoured a strict, literal interpretation of notice requirements, particularly the line of cases dealing with contracts which reserve the right of one party to issue a unilateral notice, such as notices to quit under leases and in charterparty agreements (see, for example, **Reliance Car Facilities Ltd. v. Roding Motors** [1952] 2 Q.B. 844; **Afovos Shipping Co. v. Pagnan & Fratelli (The Afovos)** [1983] 1 WLR 195). In the latter case, a termination notice was issued at 16:40 p.m. for failure to provide "punctual payment" under the terms of a charter party agreement, as the ship owners thought it impractical for the charterers to pay the instalment after that time, although payment was not due until midnight on the same day. The House of Lords held that the notice purporting to terminate the contract was invalid, as the owner had issued the notice early.

[32] Similar statements as to the strict application of the contract's procedural requirements for termination pursuant to an ETC are also to be found in Chitty on Contracts, considered by many to be the pre-eminent textbook on the law of contract. For example, in the 27th ed. of the work (published 1994) is to be found the following statement [at 22:046]:

> **"The terms of the [termination] notice may provide that notice can only be given after a specified event. Prima facie the validity of the notice depends on the precise observance of the specified event."**

[33] I set out in fuller form the statement of the proposition as it appears in the 33rd ed. of Chitty (published 2018) [at 22-051]:

> **"Where the terms of a contract expressly or impliedly provide that the right of termination is to be exercised only upon notice given to the other party, it is clear that notice must be given for the contract to be terminated pursuant to that provision. Any notice must be sufficiently clear and unambiguous in its terms to constitute a valid notice; but it is a question of construction in each case whether the notice must actually be communicated to the other party and whether it takes effect at the time of dispatch or receipt. The terms of the notice my further provide that notice can be given only after the occurrence of a specified event; or that a specified period of notice be given;**

> **or that the notice is to be in a certain form (e.g., in writing); or that it should contain certain specified information; or that it should be given within a certain period of time. Prima facie the validity of the notice depends upon the precise observance of the specified conditions. However, a consideration of the relationship of the notice requirements to the contract as a whole and regard to general considerations of the law may show that a stipulated requirement, for example, that notice be given "without delay" was intended by the parties to be an intermediate term, the non-observance of which would not invalidate the notice (unless the other party was seriously prejudiced thereby), but would give rise to a claim for damages only."**

[34] However, at the end of the sentence "*Prima face the validity of the notice depends upon the precise observance of the specified conditions*", the learned editors of Chitty have appended the following caveat by way of a footnote: "*However, the prima face rule may have to give way on the facts of the case when regard is had to the underlying commercial purpose of the termination clause, and the modern approach would appear to place less emphasis on the need for precise compliance*: ***Ellis Tylin Ltd. v. Co-operative Retail Services Ltd.*** [1999] B.L.R. 205". [Emphasis supplied.] I shall return to this case.

General principles of contractual interpretation

[35] The modern approach to the interpretation of commercial contracts has been admirably summarized by the UK Supreme Court in **Arnold v Britton and ors.** [2015] UKSC 36 [14]-[15]:

> **"14. Over the past 45 years, the House of Lords and Supreme Court have discussed the correct approach to be adopted to the interpretation, or construction, of contracts in a number of cases starting with *Prenn v Simmonds* [1972] 1 WLR 1381 and culminating in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900.**
>
> **15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffman in *Chartbrook Ltd. v Persimmon Homes Ltd.* [2009] C 1101, para. 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) or each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in light of (i) the natural and ordinary meaning of the clauses, (ii) any other relevant provisions of the lease, (ii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intention."**

[36] Thus, when interpreting an ETC, the court will consider the factors outlined above, having particular regard to the commercial purpose of the termination clause and construe it in light of that purpose: **Investor's Compensation Scheme Ltd. v. West Bromwich**

Building Society [1998] 1 WLR 896, following **Mannai Investment Co. Ltd. v Eagle Star Life Assurance Co. Ltd.** [1997] AC 749.

[37] In **Manna**i the terms of the two leases under consideration by the court provided for the tenant to determine the lease by serving not less than six months' notice in writing, to expire "on the third anniversary of the term commencement date". The leases were for a term of 10 years and the commencement date was described as from and including the 13 January 1992. The notice described the termination date as the 12 January 1995, but the House of Lords held that an objective test had to be applied and a reasonable recipient, bearing in mind their context, would have not been left in any doubt that the tenant wished to determine the lease on the 13 January 1995 (which was the correct date) and that the notices were accordingly effective for that purpose. As explained in the analysis of Lord Steyn (at pg. 768):

> **"It is important not to lose sight of the purpose of a notice under the break clause. It serves one purpose only: to inform the landlord that the tenant has decided to determine the lease in accordance with the right reserved. That purpose must be relevant to the construction and validity of the notice. Prima facie one would expect that if a notice unambiguously conveys a decision to determine a court may nowadays ignore immaterial errors which would not have misled a reasonable recipient.**
>
> **There is no justification for placing notices under a break clause in leases in a unique category. Making due allowances for contextual differences, such notices belong to the general class of unilateral notices served under contractual rights reserved, e.g. notices to quit, notices to determine licences and notices to complete: *Delta Vale Properties Ltd. v. Mils [1990] 1 W.L.R*. 445, 454E. To those examples may be added notices under charterparties, contracts of affreightment, and so forth. Even if such notices under contractual rights reserved contain errors, they may be valid if they are "sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when they are intended to operate:" the Delta case, at p. 454E-G, per Slade L.J. and adopted by Stocker and Bingham L.JJ.; see also *Carradine Properties Ltd. v. Aslam* [1976] 1 WLR 442, 444. That test postulates that the reasonable recipient is left in no doubt that the right reserved is being exercised. It acknowledges the importance of such notices. The application of that test is principled and cannot cause any injustice to a recipient of the notice. I would gratefully adopt it."** [Emphasis supplied.]

[38] A very instructive case in which the ***Mannai*** principles were applied is ***Ellis Tylin Ltd. v Co-operative Retail Services Ltd.*** [1999] BLR 205. The Plaintiff ("ET") was engaged by the Defendant ("CRS") to provide repair and maintenance at the various stores and premises operated by it, under a contract which commenced February 1996. The contract was intended to be for 3 years, and provided a detailed mechanism at clause 1.8 of the contract (which it is not necessary to set out here) under which either party could propose a rate increase after 10 months from the date of commencement. If no agreement could be reached within two months following the proposal, then the agreement could be terminated by either party by giving not less than one month and no more than three months' notice. The plaintiff gave notice of a proposed increase in November 1996 and in February 1997 purported to give notice of termination. The parties later reached an

agreement on the level of fees to be paid for the second year of the contract, but in May of 1997 relations broke down and ET stopped work and brought proceedings. One of the issues on the trial of preliminary issues was whether the plaintiff validly terminated the contract in accordance with the provisions of clause 1.8.

[39] His Honour Judge Bowsher QC, in the Queen's Bench Division (Technology and Construction Court), after conducting a detailed analysis of the various passages from textbooks and cases which upheld the strict constructionist approach to interpreting the validity of notices (including the passage from the 27th Ed. of Chitty cited *supra*), dealt with the issue before him as follows:

> **"79. The commercial purpose shown by clause 1.8 of this contract is that the parties should be free to negotiate for variation of the fee effective from the first and second anniversaries of the contract, and if the negotiations are unsuccessful, ether party should be at liberty to terminate, in the case of Ellis Tylin by giving notice effective not earlier than three months after the anniversary.**
>
> **80. To be entitled to take the benefit of clause 1.8, Ellis Tylin had to give the notices required by that clause. Equally, Ellis Tylin were not entitled to give a notice at a date or in terms calculated to produce a termination of the contract earlier than allowed for by the clause or otherwise produce a result inconsistent with the purpose which I have just mentioned.**
>
> **81. The letter dated 26 November, 1996, was given less than 10 months after 5 February, 1996, but there could be no doubt of the intention of Ellis Tylin, namely that negotiations should take place for a revision of the fee from the beginning of the second year. Indeed that was the intention of both parties. There was some conflict of evidence as to whether the letter of 15 November, 1996 was written at the request of CRS, but the letter of 26 November certainly was so written. Both parties repeatedly referred to negotiation of the fee for the second year. There was no doubt in the mind of either party, and there was no attempt to shorten the period for negotiation, rather, it was lengthened. If CRS had not been willing to start negotiations until the end of the 10 month period, they could have said so. Instead, CRS tried to elicit the sort of details which they considered were necessary for the purposes of negotiation. It would be contrary to all business common sense and justice to allow CRS to say, a substantial time after the event, that the process of clause 1.8 never started because the notice under clause 1.8 was given too early."**
>
> **[…]**
>
> **83. Applying the principle of *Mannai Investment Co. Limited v. Eagle Star Life Assurance Co. Limited* I take the view that by both letters of 3 and 4 February, 1997, Ellis Tylin gave valid notice of determination of the agreement."**

The Court's analysis based on the applicable legal principles and facts of this case

[40] It seems to me that the case before the court does not turn so much on any mistake or defect in the form of the notice. As has been stated, the original notice had been addressed to T&C Express in error, as opposed to Thompson's Heavy Equipment. But this was corrected when the plaintiff personally collected the letter. Mr. Munroe stated in his oral submissions that no objection was being taken to the incorrect addressee appearing in the original notice. Further, the letter was dated 13 November 2017 and the date of effective termination was said to be 30 November 2017, which would have been consistent with the two-week notice provision if the plaintiff had received it contemporaneously with the date of the letter. The problem arises because of the delayed receipt.

[41] The commercial purpose evinced by cl. 2 of the contracts was that either party should be free to terminate the contracts, in the absence of any breach, by giving the other party two weeks' notice. These "termination for convenience" clauses, as they are sometimes called, may appear unreasonable and unfair, but they are legitimate contractual terms and have become more and more common in commercial contracts. In fact, they have become a standard feature in many government contracts, which can often be influenced by policy as well as commercial considerations, and in which governments might wish to retain some degree of flexibility. But the contractor would have known from the inception of the contract and agreed that the benefit he obtained thereunder was also subject to the risk that the Government could terminate on two weeks' notice without cause (and he could equally do the same).

[42] Applying a construction that takes into consideration the commercial purpose of the termination clause, and the other relevant factors set out in **Arnold v Britton et. al**., I find that the 13 November 2017 notice given by the defendant was effective to terminate the contracts. However, it is beyond argument that the contract could not be determined on the date stated in the letter (30 November 2017), and that the 14 days' notice could only begin to run from the date when the plaintiff actually received the notice (27 November 2017).

[43] That notice could only run from receipt of the letter would also be consistent with what the parties had agreed in another relevant clause of the Agreement (cl. 4), which has been set out above, and which provides for notice to take effect "*upon receipt*". Clause 2 is silent as to when the notice period is to begin to run. Therefore, to give it commercial effect, it is reasonable to construe it to require receipt of the notice before the notice period could begin to run. As the notice was not received until the 27 November, the first date on which the termination could validly take effect was 14 days following, i.e., the 12 December 2017.

[44] This interpretation is also supported by recent developments in the common law relating to the receipt of notice: see **Haywood v. Newcastle upon Tyne Hospitals NHS Foundation Trust** [2018] UKSC 22. In that case, following an exhaustive review of the common law on notice, a majority of the UK Supreme Court (affirming the decision of the Court of Appeal) held that in the absence of an express contractual term specifying when the notice period would begin for the purposes of a letter terminating employment, there was an implied term that notice would begin when the employee received the letter and

had a chance to read it, and that there was no universal common law rule that the notice started when the letter was delivered to the employee's address (which had been done while she was on vacation).

[45] Mr. Munroe contended in oral submissions that the Defendant was free at any point after the 27 November 2017 to rescind the Notice and issue a corrected one with a new termination date to take effect 14 days from its issuance, and ought to have done so. Indeed, it may well be wondered why the defendant, in correcting the addressee's name in the letter, did not also adjust the effective termination date. Out of an abundance of caution and in the interest of promoting certainty they could have done so, and perhaps the parties may not have ended up before the courts.

[46] But whatever the issues with the Notice and the delay in service, it seems to me that a reasonable recipient could not have been left with any doubt as at the 27 November 2017 that it was the unequivocal intention of the defendant to terminate the contracts on two weeks' notice, although the termination date stated in the letter was no longer viable because of the delay in receipt. It would be an affront to commercial purposefulness, common sense and justice to allow the plaintiff, some 4½ months after receiving notice, to assert (as he has in this claim) that the notice was invalid to terminate the contracts simply because the effective date of termination in the notice letter was never amended. This approach is out of alignment with the modern approach to contractual interpretation, rooted as it is commercial efficacy and common sense.

[47] Taken to its logical (or illogical) extreme, it would also mean that one party to a contract could incur significant commercial liability based simply on technical errors going to form and procedure—a "Gotcha" approach to contractual dealings. That is the outcome being sought in this case, as the plaintiff considers the non-compliance with the procedural requirements of the ETC to be a repudiatory breach, and is therefore seeking to recover damages for the expectation loss of the unperformed contracts.

[48] As I have found that the notice was valid in all the circumstances to terminate the contract, subject to the implied term that time only began to run from receipt, the issue of damages for future performance really falls away. But if I am wrong in that finding, and in any event for completeness, I say something about the claim for expectation loss.

[49] As indicated in the above extract from Chitty (para. 33, *supra*), it is a matter of construing the relationship of the notice to the contract as a whole and applying general considerations of law, to determine whether or not the notice terms are intermediate (or fundamental), such that non-observance would invalidate the notice in the absence of serious prejudice to the other party. Further, in the same textbook is to be found this statement [22-049]:

> **"[A] contractual right to terminate, of itself, says nothing about the remedial consequences of termination; that is to say, not every termination pursuant to an express term of the contract will entitle the party terminating the contract to loss of bargain damages. Thus, where a contracting party terminates further performance of the contract pursuant to a term of the contract, and the breach which has caused it to exercise that power is not a repudiatory breach, the party exercising the right to terminate may only be**

entitled to recover damages in respect of the loss which it has suffered at the date of termination and not for loss of bargain."

[50] A passing reference may be made to the leading English case cited in support of this passage (**Financings Ltd. v. Baldock** [1963] 2 Q.B. 104, 111-112). In that case, there had been no repudiation of the contract, which had been terminated pursuant to an express termination clause, and the Court of Appeal (the leading judgment was given by Lord Diplock) held that the accompanying express provision for the payment of damages was void as a penalty and that expectation damages were not recoverable. As explained by Lord Diplock (see passage cited at para. 29, *supra*), on the exercise of the express right "…each party is left with such causes of action, if any, as had already accrued to him at the date that the contract came to an end, but acquires no fresh cause of action as a result of the termination."

[51] In other words, where the termination is based solely on a termination for convenience clause, neither party is entitled to claim damages for loss of the remaining period of the contract, unless the facts disclose that there has been either a repudiation or breach of a condition or serious breach of an intermediate term which would otherwise give a right to terminate at common law (e.g., where the ETC is triggered by a breach of a condition or fundamental term, or subject to a condition-precedent which in itself would warrant termination at common law). There is nothing on the facts of this case, having regard to the principles of contractual interpretation set out, that would require me to construe the notice period in cl. 2 as a condition or fundamental term going to the root of the contract, such as to entitle the other party to treat non-compliance with that requirement as a repudiation of the contract. In fact, such a construction would be anathema to the very concept of a no-penalty cancellation clause, and the express intention of the parties.

(See, also, **Phones 4U Ltd. (in administration) v EE Ltd.** [2018] EWHC 49 (Comm)).

[52] I would similarly hold that the plaintiff's claim for loss of bargain are not recoverable. I add further to this that there is nothing in the **Commonwealth** case that would assist the plaintiff in his claim to recover loss of bargain damages. In that case, the termination clause by which the State purported to terminate the contract was triggered by Amann's (the respondent's) unreadiness to perform the contract (it failed to assemble the required number of aircraft to provide coastal aerial surveillance contracted for by the State) and the contract was purportedly terminated on the day it was to commence. But the State failed to follow the cancellation procedure which required them to serve a notice for Amann to show cause why the contract should not be cancelled, and *only then* to be able to invoke the cancellation clause if Annan failed to show cause within the specified time. This constituted a repudiation of the contract on common law grounds by the State which Annan accepted, and successfully sued for damages. In fact, the only question by the time the matter reached the High Court was the assessment of damages, as the Commonwealth accepted that the notice of termination was not valid.

[53] I do, find, however, that the defendant is liable to pay to the plaintiff the amounts that he would have been entitled to under the contract for the remaining 14-days' notice period until the contract could be validly terminated, which is the period from 1-11 of December 2017 (11 days), together with applicable interest. As has been mentioned, the plaintiff

accepted in his witness statement that he might have been paid the two-week value of the contract in lieu of notice.

[54] I have already mentioned that the plaintiff did not plead any special damages in his Writ, although he did claim "profit costs". He has, however, included in his witness statement a claim for net profits, calculated on the expected life of the contract. It is trite that the mere difficulty in estimating damages does not relieve a court from the responsibility of estimating them as best as can be done (see the case of **Commonwealth of Australia v Amann Aviation pty Ltd.** (*supra*) relied on by the Plaintiff for damages, which cited the English case of **Chaplin v Hicks** [1922] 2 KB 786). The Plaintiff estimates its gross profits (payments under the contract) for 8 months to be $177,333.28, which equates to a payment of $22,166.66 per month. Therefore, using 30 days as an average month, a pro-rated payment for 11 days under the contracts would be **$8,127.77** ($22,166.66÷30). I accordingly award damages to the plaintiff in that amount, plus interest at the rate of 6.25% from 30 November 2017 until the date of judgment.

DISPOSITION

[55] Having reviewed the evidence before the court and having considered the submissions of counsel and the applicable principles of law, for the reasons given above I dismiss the plaintiff's claim for breach of contract and the claim for damages for future profits under the unexpired term of the contracts. However, I do find that the plaintiff is entitled to be paid his contractual entitlements for the balance of the 14 days' notice period, as that period could only begin to run from the date he received the notice. In the circumstances of this case, and as the plaintiff has had some success, I would only award the defendant 70% of its costs, to be taxed if not agreed.

ORDERS

[56] I therefore make the following Orders:

(1) The Plaintiff's claim for breach of contract is dismissed.

(2) The Defendant is to pay to the Plaintiff the sum of $8,127.71 plus interest at the rate of 6.25% pursuant to the Civil Procedure (Award of Interest) Act, 1992, from 30 November 2017 until the date of judgment.

(3). The Plaintiff is to pay to the Defendant 70% of its costs of this action, such costs to be taxed if not agreed.

Dated the 8 December 2020

Klein, J.