IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

Claim No. CLE/gen/00069 of 2025

IN THE MATTER OF A Master Agreement for Desalinated Water Supply Dated 12th August, 2021

AND IN THE MATTER of A Sub-Agreement for Desalinated Water for the supply of desalinated water within The Bahamas at Waterford, Eleuthera; Cockburn Town, San Salvador; Georgetown, Exuma; Matthew Town, Inagua; Bogue, Eleuthera; Tarpum Bay, Eleuthera and Naval Base, Eleuthera.

AND IN THE MATTER OF A Notice of Termination of Desalinated Water Delivery period dated 30th January, 2025

BETWEEEN

WATER AND SEWERAGE CORPORATION

Claimant

AND

AQUA DESIGN BAHAMAS LTD.

Defendant

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: Tara Cooper-Burnside KC with Miguel Darling for the Claimant
Luther McDonald KC with Keri Sherman and Rashae Newbold for the Defendant

Hearing Date(s) 19 March 2025

RULING

WINDER, CJ

This is the Defendant's (Agua's) application to discharge the interim injunction granted in favor of the Water & Sewerage Corporation (WSC) and the Attorney-General on 29 January 2025.

Factual Background

[1.] Aqua and WSC entered into a Master Agreement on 12 August 2011 for the supply of desalinated water for use in various communities in the Family Islands. The parties later entered into several Sub-Agreements for the design, build, commission and operation of desalination plants by Aqua at the various locations within The Bahamas. One such Sub-Agreement related to the supply of desalinated water at a Distillation Plant (the Plant) at Cockburn Town, San Salvador.

[2.] On the 22 May, 2022, the Sub Agreement in respect of the Plant expired but was extended (by an amendment to the Sub-Agreement) to 17 December 2022. Following the expiration of the Sub-Agreement Aqua continued to supply (and receive payment for) the water produced at the Plant.

[3.] Aqua says that since 2022, it repeatedly advised WSC that the San Salvador Plant required essential facility upgrades to maintain operational safety. WSC have expressed concerns as to this fact considering that Aqua was obligated by the contractual arrangements to repair and maintain the Plant throughout the terms of the contract.

[4.] Aqua says that it had apprised WSC that the Plant needed upgrading but that it would only do so if the costs of the same could be financed by a long-term agreement.

[5.] Notwithstanding the expiry of the Sub-Agreement WSC continued to request and Aqua continued to supply water for which Aqua billed monthly and required payment on a monthly basis.

[6.] WSC says that on 20 November 2024, Aqua purported to give notice to it that unless it committed to addressing the safety and contract requirements by 30 November 2024, it would cease operations at the Plant.

[7.] The parties continued to negotiate an agreement for the determination of their arrangements. A meeting was held on the 17 December, 2024 at the Ministry of Finance and Aqua was advised that WSC and the Government were interested in reaching an agreement by the 31 January, 2025 for the operation of the Plant by Aqua until 30 June, 2025 and thereafter the purchase of Plant by WSC. Aqua was requested to present a further proposal in respect of the safety concerns at the Plant.

[8.] Aqua says that despite continued engagement with WSC, it became evident that no meaningful agreement could be reached. WSC was of the view that Aqua was obliged to bear the cost of ensuring that the Plant at San Salvador continued to be operable. WSC had taken upon itself measures to "repair" the Plant, however Aqua made it clear that, as long as it was responsible for Plant operations, it would not permit WSC to conduct welding work on the Plant's container because of the associated risks, which rendered replacement necessary.

[9.] On 27 January, 2025, Aqua formally notified WSC that the Plant was in such a condition as to cause a safety risk to the operators and that Aqua would no longer risk the safety of its workers. Aqua also attached a draft Sales Agreement offering to sell the Plant to WSC for $600,000.

[10.] WSC says that on 27 January 2025, Aqua served notice on WSC that it would cease operations at the Plant effective 30 January 2025 trigging the commencement of this action and the emergency application for injunctive relief.

[11.] This action was commenced by the Claimants (which at the commencement of the action included both the Attorney-General and the Water and Sewage Corporation (WSC) and related to 7 desalinated plants including the Plant) on 29 January 2025. The Claim filed by WSC sought relief at paragraph 14 as follows:

i) A Declaration that the rights and obligations of the parties, including the obligations under Clause 13 of the Master Agreement, are continuing in light of the parties' course of dealings since the expiration of the sub-agreements;

ii) A Declaration that, on proper construction of Clause 13 of the Master Agreement, WSC has the first right of refusal to purchase the equipment and/or facilities, i.e the desalination plants as an asset (and NOT as an ongoing business as postulated by Aqua Design), for a seamless transfer with no interruption in water supply as was contemplated by the parties at the time they entered into the agreement;

iii) An Order for specific performance to enforce the Defendant's obligation to enter into negotiations for the sale and purchase of the desalination plants/assets at L1-7[1] pursuant to Clause 13.4 of the Master Agreement.

iv) An Order for specific performance to enforce the Defendant's obligations to maintain and repair the defects and deficiencies at L1-2 pursuant to Clause 22 of the Master Agreement given the parties' course of conduct since expiration of the sub-agreements, including payment of the D-factor component and given the condition of the desalination plants prior to the expiration of the sub-agreements.

v) Alternatively, an Order requiring Defendant to reimburse/refund the Claimant for all D-factor component payments made since expiration of the sub-agreements;

[1] L2 is identified in the Master Agreement as Location 2 and refers to the Plant.

vi) Damages for Breach of Contract…

[12.] By Notice of Application dated 29 January 2025 the Claimants applied for and obtained emergency injunctive relief in the following terms:

(1) An Interim Injunction against the Defendant whether by themselves or by their agents or otherwise from shutting down operations at the Desalination Plants at Waterford Eleuthera; Cockburn Town, San Salvador; Georgetown, Exuma; Matthew Town, Inagua; Bogue, Eleuthera; Tarpum Bay, Eleuthera and Naval Base, Eleuthera so that the status quo is maintained at all times pending a hearing and determination of this action.
(2) An Order that the Defendant be at liberty to apply to this Court to discharge or vary this Order upon giving reasonable notice to the Claimants' attorneys of its intention to do so;
(3) An undertaking to file the Affidavit of Robert Deal Jr., on 30th January, 2025;
(4) Provision be made for the usual undertakings;
(5) Costs be made awarded to the Claimants in this Application;
(6) This Injunction shall be in effect until 5:00 pm on the 11th February, 2025 and
(7) Such further or other relief as the Court deems just.

[13.] By Notice of Application dated 11 February 2025, Aqua applied for the discharge of the interim injunction on the grounds that:

(i) There was a failure to make full and frank disclosure to the Court;
(ii) The Claimants deliberately mislead the Court in order to obtain the injunction in respect of the Aqua's operations of the seven Desalination Water Plants.
(iii)There was a misrepresentation or the Claimants were guilty of culpable material non-disclosure in that they failed to provide a full and accurate accounting of the facts surrounding the dispute between the parties to the Court.

[14.] Since the making of the application by Aqua, the Attorney-General has ceased to be party to the action and the parties. Additionally, by consent, the injunction was varied to relate only to the Plant, situated at Cockburn Town, San Salvador.

[15.] At the heart of the dispute is the interpretation of Clauses 13 and 22 of the Master Agreement which provides:

Clause 13

13.1 During the Contract Period, ownership of the Plant shall be vested 100% in the Contractor.
13.2 At the end of the Desalinated Water Delivery Period, the Contract will automatically extend for an additional period as set forth in Exhibit A, Table 1

unless either party shall notify the other party at least 120 days in advance of contract termination. All other provisions of the Contract would remain in force unless amended in writing by mutual agreement of the Corporation and Contractor. Ownership of the plant during the extended Contract Period would continue to be vested in the Contractor.

13.3 At the end of the Desalinated Water Delivery Period or at the end of the extended Contract Period, if the Contract is extended, the Contractor shall have a two month period in which to demobilize. The Contractor shall leave the Plant Site in a neat, clean and tidy condition to the satisfaction of the Corporation.

13.4 The Contractor shall submit a comprehensive list of materials, equipment, parts, chemicals and consumables, and facilities that the Contractor intends to remove from the site, to the Corporation for review and approval. The Corporation shall have 30 days to review the list for completeness and to indicate in writing any items which the Corporation would like to purchase. The Corporation shall be given the first right of refusal to purchase any equipment and/or facilities on the Contractor's list. The purchase for all items of equipment and facilities which the Corporation intends to purchase will be negotiated between the Corporation and the Contractor.

Clause 22

Defects and Deficiencies in the Plant and its operation, maintenance and repair shall be fully rectified by the Contractor. Catastrophic damage shall be rectified only upon agreement in writing between the Contractor and the Corporation regarding the effect of such rectification on the agreement.

[16.] The parties dispute the interpretation and application of Clause 13 which concerns the demobilization period and the subsequent process. Specifically there is a dispute as the effect of the right of first refusal and the obligation to leave the Plant site in a "neat and tidy" condition. Clause 22 is also in dispute as to the extent of the obligation to repair defects and deficiencies at the Plant and whether Aqua should assume responsibility for addressing safety concerns and structural repairs.

[17.] The issues identified for determination of this application by Aqua are the following:

(1) Whether the claim satisfied the test established for the grant of injunctive relief;

(2) Whether there has been full disclosure of material facts; and

(3) the Court should exercise its discretion to discharge the injunction due to the Claimants' misrepresentations and omissions in their without notice application.

Analysis and disposition

[18.] Rule 11.20 of the CPR provides:

> 11.20 Application to set aside order made in the absence of a party.
> (1) A party who was not present when an order was made may apply to set aside or vary the order.
> (2) The application must be made not more than fourteen days after the date on which the order was served on the applicant.
> (3) The application to set aside the order must be supported by evidence on affidavit showing —
> (a) a good reason for failing to attend the hearing; and
> (b) that it is likely that had the applicant attended some other order might have been made."

[19.] There is no dispute between the parties as to the legal principles to be employed in determining whether to grant injunctive relieve. Understandably they differ as to the application of these principles. Those principles are to be found in the celebrated case of **American Cyanamid C. Ltd. v Ethicon Ltd. 1976 AC 396**. Stated shortly, the court will grant interlocutory injunctive relief where it is established that there is a serious issue to be tried between the parties, damages would not be an adequate remedy to compensate the applicant for its loss (in the absence of an injunction) and the balance of convenience lies with the applicant.

[20.] Aqua says that there is no issue to be tried as the right of first refusal does not create an obligation to sell the Plant, nor does Section 13 contemplate a "seamless transfer". They say that the obligation for Aqua is to submit the required list and that it offers to sell any of the items to WSC before selling to anyone else. They also accept that the Plant must be left in a "neat and tidy" condition. Aqua says that their position is neither irrational nor unreasonable, as WSC alleges.

[21.] Aqua asserts that since 2022 it has consistently advised the WSC of the need for facility upgrade and has maintained that it would only be willing to invest in such upgrade if the contracts were renewed. Despite not receiving contract renewals, Aqua says that it has continued to make necessary repairs to the Plant when needed, as evidenced in periodic production reports, to ensure water quality and meet the water demand.

[22.] WSC says that it is evident that a significant contractual dispute persists between it and Aqua concerning the terms and interpretation of the Master Agreement and its impact on the current arrangement regarding the Plant. This dispute includes: (1) the proper construction of Clause 13 of the Master Agreement; (2) whether the Defendant remains bound by Clause 22 of the Master Agreement and is in breach thereof; and (3) the lawful manner in which either party may

terminate operations at the Plant. They say that the Standard Claim filed herein demonstrates an arguable case for the relief sought.

[23.] WSC's case therefore is that having regard to the conduct of the parties, the nature of the contract and the spirit of the agreements entered into, Aqua cannot simply walk away from the contractual arrangements, notwithstanding the formal expiry of the written documents. WSC's case is that Aqua must provide WSC with adequate notice of the cessation of the arrangements.

[24.] In determining the issue of whether there is a serious issue to be tried I bear in mind the relatively low bar established by the authorities. The applicant for the injunction must merely show that their case is not frivolous or vexatious and that there is a real (as opposed to fanciful) prospect of success at trial. I am not expected to resolve conflicts of evidence or difficult questions of law at this stage, as these are matters which must be left for the trial.

[25.] In the circumstances of this case I am satisfied that there is a serious issue to be tried. The formal contract may have ended in December 2022 but the parties continued the contractual arrangements. In these circumstances it is expected that, during the hold over period, all of the terms continued to operate as it did under the original contract, save for the duration of the contract. It is therefore indeed a real question of how, if Aqua was complying with its obligation under the contract to repair and maintain, how it would be handing over for purchase by WSC a Plant that is in such bad shape. Whether in 2022 or in 2025, these are matters to be ultimately resolved at the trial and not in this application.

[26.] WSC's case however cannot merit an open ended interlocutory injunction. Any injunction granted ought not to survive beyond an appropriate notice period which has been suggested at 6-9 months. Anything else would be unfair to Aqua.

[27.] Aqua says that damages will not be an adequate remedy as the injunction will force Aqua to continue operating the Plant against its will; open it up to liability in the event that a workman is injured due to the unsafe conditions at the Plant; and prevent it from exercising its right to terminate the supply to any of the four expired Plant; prevent it from exercising its right of terminating the supply under the remaining agreements should WSC breach the same.

[28.] The fact that the defects are remediable and that Aqua was/is prepared to continue the arrangement if satisfactory terms for a long term arrangement completely undermines the suggestion that damages are not an adequate remedy for it. The undertaking in damages, if the injunction in found to have been unwarranted, would give Aqua the assurance of compensation in the event it has to expend funds to ensure the maintenance of the safety of its workers at the Plant.

[29.] The balance of convenience clearly lies with the WSC who will be unable to carry out its statutory function to supply water to the community of San Salvador, the result of which could be the decimation of the business and residential community of San Salvador.

Disclosure

[30.] The duty of an applicant to be full and frank in an application for injunctive relief have been distilled into the following 7 principles which are to be found in the dicta of Ralph Gibson LJ in the English Court of Appeal case of **Brink's Mat Ltd v Elcombe [1988] 3 All ER 199, 192:**

(1) The duty of the applicant is to make "a full and fair disclosure of all the material facts:" see Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac [1917] 1 K.B. 486, 514, per Scrutton L.J.

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see Rex v. Kensington Income Tax Commissioners, per Lord Cozens-Hardy M.R., at p. 504, citing Dalglish v. Jarvie (1850) 2 Mac. & G. 231, 238, and Browne-Wilkinson J. in Thermax Ltd. v. Schott Industrial Glass Ltd. [1981] F.S.R. 289, 295.

(3) The applicant must make proper inquiries before making the application: see Bank Mellat v. Nikpour [1985] F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an *Anton Piller* order in*Columbia Picture Industries Inc. v. Robinson* [1987] Ch 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see *per* Slade L.J. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 92–93.

(5) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure … is deprived of any advantage he may have derived by that breach of duty:" see *per* Donaldson L.J. in *Bank Mellat v. Nikpour,* at p. 91, citing Warrington L.J. in the *Kensington Income Tax Commissioners'* case [1917] 1 K.B. 486, 509.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the nondisclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration

but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
(7) Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded:"*per* Lord Denning M.R. in*Bank Mellat v. Nikpour*[1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms."

Non disclosure

[31.] Aqua asserted that WSC failed to provide the following information when the injunction relief was sought:

(1) WSC neglected to mention the course of dealings between the parties from the expiration of the San Salvador Sub Agreement to November 2024.
(2) WSC omitted to inform the Court of the effect of WSC's purported exercise of Section 13, requesting a comprehensive list of material, equipment, parts, chemicals and consumables and facilities ADBL intended to move.
(3) WSC failed to alert the Court to the dangers associated with the continued operation of the San Salvador Plant.
(4) WSC misrepresented that Aqua did not acknowledge the applicability of Section 13 of the Master Agreement, despite knowing that Aqua, in fact, agreed that the section applied. The only dispute between the parties was the interpretation of the section.
(5) WSC failed to disclose to the Court that Aqua did not agree that the conclusions of the 17th December, 2024 meeting at the Ministry of Finance created contractual obligations on the part of Aqua.
(6) WSC failed to disclose the letter from Aqua's attorneys of the 27th January 2025 that communicated Aqua's position on the law relating to the interpretation of Section 13.
(7) WSC withheld information about Aqua's efforts to address safety concerns at San Salvador ever since 2022. Aqua submitted proposals, but WSC rejected the recommended approach and requested further proposals at the December 17, 2024, meeting.
(8) WSC failed to disclose to the Court that at the virtual meeting on January 15, 2025, Aqua addressed the safety concerns at San Salvador and gave WSC options for its continued operation.
(9) WSC misled the Court by referring in the Affidavit of Robert Deal to an offer made earlier by Aqua for the sale of the 4 Plants, when a seamless transition was sought, and did not disclose that Aqua offered to sell the San Salvador Plant for a price consistent with the valuations received by WSC.

[32.] Paragraph 9-15 of the Second Affidavit of Robert Deal answers the allegation of non-disclosure and provides:

9. First, although each and every letter passing between the parties prior to the commencement of these proceedings was not presented in evidence before the Court, the Court was fully apprised of the correspondence relating to the Expired Agreement Plants. In this regard, the Claim Form, which was verified by a Statement of Truth, expressly set out the position of the parties with respect to the Expired Agreement Plants and summarized the various correspondence between the parties as follows:

5) Despite the expiration of the sub-agreements at L1-4, the Defendant has continued to supply desalinated water and operate the desalination plants at all seven (7) of the locations.

...

7) Following expiration of the sub-agreements at L1-4, the Parties entered into negotiations for the sale and purchase of the desalination plants.

8) On 9 August 2024, the Claimant wrote and requested that the Defendant submit within fourteen (14) days a comprehensive list of the materials, equipment, parts, chemicals and consumables at L1-4 and their value in accordance with Clause 13.4 of the Master Agreement. The Defendant responded by letter dated 10 November 2024 stating:

> "the guidance under Clause 13.3 (60-day period to demobilize) and Clause 13.4 does not provide for a seamless transfer, nor does the current month to month operation. That is why Aqua Design offered to enter into an agreement for the sale of its businesses at all four Plants. Please note that the term "ongoing business" is associated with our proposed agreement of sale of Aqua Design's businesses at all four Plants, which offer is separate and apart from the guidance under Clauses 13.3 and 13.4"

9) The Defendant then extended an offer to the Claimant for the sale of its businesses at L1-4 for $18,767,314.16. However, the valuation range obtained by Claimant relating to the market value of the desalination plants at L1-4 is between $5,378,000.00 and $8,068,000.00.

10) The substantial difference between the Defendant's offer price and the Claimant's valuation is due to the fact that Aqua Design is purporting to sell an ongoing business for the continued production of water, while the Claimant is seeking the sale and purchase of the assets/facilities at L1-4, not an ongoing business.

11) The Claimant contends that at the end of the contract period, as per Clause 13.4 of the Master Agreement, "the Corporation shall be given the first right of refusal to purchase any equipment and/or facilities...' and "the Contractor shall submit a comprehensive list and facilities that the Contractor intends to remove from the site, to the Corporation for review and approval. The Corporation shall have 30 days to review the list for completeness and to indicate in writing any items which the Corporation would like to purchase."

...

12) However, the Defendant contends that: (i) since the sub-agreements at L1-4 have expired, neither party has any rights or obligations and therefore Clauses 13.3 and 13.4 are only a guide; (ii) as the Claimant wishes for a seamless transfer with no interruption in water supply, the Defendants will offer the sale of its business at L1-4 and not simply the assets; and (iii) in the circumstances, the Defendant is not required to offer a detailed listing of items with valuations as per the Master Agreement.

c) By letter dated 20 November 2024, the Defendant wrote to Claimant making a "final request" for WSC to address the unsafe conditions at Locations #1 and #2 (L1-2) and asking WSC to "agree to new contracts

for these and two other plants where Aqua Design provides water treatment equipment and service in the Bahamas." The letter further stated:

> "For the last 3 years we have been giving notice of the conditions of the plant and accommodating continued increased production request without a contract and can no longer safely accommodate this request. Unless W&SC commits to addressing the safely and contract requirements by 30 November 2024, Aqua Design will initiate a STOP WORK ORER on 30 January 2025 for both Waterford/South Eleuthera and Cockburn Town/San Salvador. These actions are required because there are no current agreements in place that allow Aqua Design to undertake the ugrades needed at these locations to ensure the safety of our staff and meet W&SC's demands for significantly increased water production."

d) On 17 December 2024 the Defendant promised to provide a proposal to the Claimant to address the safely issues. However, in a subsequent teleconference on 15 January 2025, the Defendant stated that it will no longer provide a proposal and that the Claimant must take full responsibility for the required corrective works. The Defendant also reiterated its threat to shutdown water production at L1-2 if substantial progress is not made to address the safety concerns by 30 January 2025.

e) By letter dated 21 January 2025, the Claimant highlighted: (i) the continuing obligation of the Defendant to repair any defects and deficiencies of L1-2 pursuant to Clause 22 of the Master Agreement notwithstanding expiration of the sub-agreements at L1-2 and given the parties continued performance of their respective obligations under the terms of the expired sub-agreements; (ii) the Claimant's continued payment of the "D" factor or capital cost factor pursuant to the sub-agreements 4 despite their expiration, which said "D" factor envisaged coverage of investment costs of capital works required to construct and maintain facilities during the operation (iii) the fact that the reported safety issues at L1-2 pre-dated expiration of the sub-agreements and continue to be under the remit of Aqua Design; and (iv) the steps being taken by Claimant to address the safety issues to ensure the continued supply of water to consumers in light of Defendant's abandonment of its responsibility for the upkeep and good maintenance of the facilities at L1-2.

f) Further on 22 January 2025, the Defendant informed the Claimant that the Defendant will not permit the Claimant to commence emergency repairs to address safety concerns at L1-2. The Defendant is no longer cooperating with the Claimant and has refused to provide the Claimant access to the desalination plants at L1-2.

g) By letter dated 27 January 2025, the Defendant indicated that it retains the option to discontinue operations as at 30 January, 2025. The Defendant further stated that it will allow repairs at Waterford, South Eleuthera but will not take responsibility for payment of the contractor used and that it is not prepared to continue the operation of the San Salvador Plant beyond 30 January 2025. Nor is it prepared to allow the Corporation to carry out welding or other works on the Plant."

10. Additionally, in my affidavit filed herein on 31 January 2025 (my "First Affidavit"), I referred to and exhibited the following correspondence between the parties:

By the Defendant

- letter dated 20 November 2024
- letter dated 23 November 2024
- email dated 6 January 2025
- letter dated 27 January 2025

By the Corporation

- Email dated 6 January 2025
- Letter dated 21 January 2025

11. I did not refer to or exhibit the opinion issued by the Defendant's counsel by letter dated 27 January 2025 because I thought that letter was privileged.
12. Second, I absolutely disclosed to the Court the Defendant's "warnings" of "the dangers in the continued operation of the San Salvador Plant". The Defendant's "final request" that the Corporation address the unsafe conditions at the Waterford Plant and the San Salvador Plant was marked "R.D.3" and exhibited to my First Affidavit. The Minutes of the Meeting between the parties and Government during which the Defendant reiterated its concerns about the safety of the San Salvador Plant were also exhibited to my First Affidavit and marked "R.D.5.".
13. Third, I did not misrepresent the Defendant's view of Clauses 13 and 22 of the Master Agreement. It is evident from paragraph 9 above that the Defendant's position in respect of Clause 13 was set out verbatim at paragraphs 8 of the Claim Form and also summarized at paragraphs 11-12 thereof.
14. Further, the Defendant's view of Clause 22 of the Master Agreement, which was expressed in its letter to the Corporation dated 27 January 2025, was set out at paragraph 20 of my First Affidavit, and marked as "R.D.10" and exhibited thereto. Paragraph 20 in this regard stated as follows:

    "By letter dated 27 January 2025, the Respondent repeated its intention to proceed with shutdown. They stated as follows:

    "We do not agree that ADBL is responsible for repairing any defects and deficiencies at the Plants, as the obligations under Clause 22 of the Master Agreement are not consistent with the terms of a month-to-month agreement. In this regard, ADBL retains the option to discontinue operations as at 30th January, 2025…"
15. Fourth, it is not true that I failed to disclose that the Defendant presented a proposal for the continued operation and sale of the Expired Agreement Plants. The letter by which the Defendant presented the proposal and enclosed a draft agreement for sale was marked as "R.D.10" and exhibited to my First Affidavit.

[33.] Mrs Cooper-Burnside KC for WSC asserts that "there is no evidence to support [Aqua's] claim that [WSC] "deliberately misled the Court" in order to obtain the Injunction and "was guilty of culpable material non-disclosure". Nonetheless, as the Brink's Principles establish, whether there has been non-disclosure of facts and if so, whether it is material and innocent are questions for the Court.

[34.] I am not satisfied that it can be said, on any of the evidence before me that WSC deliberately misled the Court in order to obtain the Injunction and "was guilty of culpable material non-disclosure". Where it could be said that WSC may have been fuller in its disclosure I am not satisfied that such omission was not innocent or that it was sufficiently material to warrant the

discharge of the injunction. WSC was forthright as to the information relative to the safety concerns expressed by Aqua and in fact the kernel of the dispute between the parties centers around which of the parties are responsible for correcting these issues.

[35.] In any event, even if I were to conclude that WSC may have fallen short in its duty to be full and frank, as such non-disclosure was innocent and not material, I would have continued the injunction in these circumstances.

[36.] In all the circumstances and for the reasons given above the injunction granted to the WSC will continue for a further period of seven months as I am satisfied that there are serious issues to be tried between the parties, damages to WSC would not be an adequate remedy and the balance of convenience lies with the WSC.

[37.] In will hear the parties by written submissions, within 14 days, as to the appropriate order for costs

Dated the 3rd day of April 2025

Sir Ian R. Winder
Chief Justice