

ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. AXAHCV 0041/2009

BETWEEN:

DEVCON LTD

Claimant

And

CAP JULUCA PROPERTIES LTD

(Doing business as Cap Juluca Resort)

Defendant

Appearances:

Mrs. Cora Richardson Hodge and Ms. Sherma Blaize for the Claimant
Mrs. Tara Ruan and Mr. Jonell Powell for the Defendant

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2010: October 4, 5

November 17, 29, 30

2011: October 20

2012: March 1

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JUDGMENT

[1] **BLENMAN, J:** This is a claim by Devcon Ltd (Devcon) against Cap Juluca Properties Ltd (Cap Juluca) for special damages in the sum of US\$1,201,308.82 together with general damages in relation to alleged breaches of contract.

[2] Cap Juluca defends the claim and counterclaims against Devcon for alleged breaches of contract and seeks compensation in the sum of US\$2,477,494 together with general damages and costs.

Issues

- [3] The parties have quite helpfully identified the issues that arise to be resolved and the Court, with great respect for counsel, has crystallised them as follows:
- (a) Was the contract a daily contract or a fixed rate contract?
 - (b) Who is responsible for paying the handling fees?
 - (c) Whether Devcon breached the contract.
 - (d) Who is responsible for the payment of the restoration fees?
 - (e) Who or what caused the damage to the barge?
 - (f) Whether, in the circumstances, the contract was frustrated.
 - (g) Alternatively, whether Cap Juluca breached the terms of the contract.
 - (h) Whether Cap Juluca breached the terms of the further contract.
 - (i) Quantum of damages, if any.

Background

- [4] Cap Juluca sits on Maundays Bay beach which is one of the finest beaches in Anguilla. However, hurricanes usually cause serious damage to the beach. In 2008, Hurricane Omar had seriously eroded the beach causing great inconvenience to Cap Juluca.
- [5] Years earlier, Devcon, as then constituted, had done work for Cap Juluca in very similar circumstances. On this occasion, Cap Juluca needed to have its beach replenished in the shortest possible time. Cap Juluca, acting through its agent DCK, therefore contacted Devcon and invited a proposal for the beach replenishment. Devcon submitted a proposal which was ultimately accepted by Cap Juluca and formed the basis of the agreement between the parties. The proposal indicated that Devcon was to have undertaken the work

for thirty (30) days utilizing the fixed daily rate. The proposal will be addressed in greater detail since it comes into sharp focus.

- [6] On the previous occasion when the parties had dealt with each other the circumstances were different. On that occasion, there was a total meeting of minds in relation to Devcon's importation of the equipment with which it had to work. As a result, all of the requisite permissions and approvals had been obtained from the relevant officials. Importantly, the equipment was not seized on the basis that they had entered Anguilla through an unlawful port. On the prior occasion, Devcon's equipment had arrived at Maunday's Bay beach where it cleared customs at that very site.
- [7] In the case at bar, the proposal that was accepted by Cap Juluca indicated that the mobilization fee was US\$195,000; fuel and operated rental for thirty (30) days at a cost of US\$275,000 and demobilization fee of US\$100,000. The agreed proposal indicates that Devcon would not be responsible for any charges for importation custom duties, stamp duties, local taxes or bond fees. All construction related permits were to be secured by Cap Juluca. All customs duties, taxes and fees were agreed between the parties to be billable biweekly. In order to fulfill the terms of the Agreement, Devcon arranged for its equipment and barge to leave from Turks and Caicos en route to Anguilla in order to commence the replenishment of Maundays Bay beach.
- [8] During discussions between DCK's representatives and Devcon's officials, Devcon was advised that the equipment and barge, upon entering Anguilla, should go straight to the Cap Juluca site; this is not an official port of entry in Anguilla. There was no discussion between the parties about the prior clearance of the barge and equipment. Devcon's barge entered Anguilla and went straight to Maundays Bay beach without stopping at the official port of entry. A few hours after its illegal entry into Anguilla, the Customs authorities went to Cap Juluca and immediately seized the barge and equipment. The Customs authorities took away a truck and other equipment from the site but ordered Devcon's officials to leave its barge and other equipment exactly where they were. The barge remained in the rough seas for three (3) days.

- [9] Devcon, as was previously constituted in its previous dealing with Cap Juluca, left matters of the Custom clearance to be dealt with by Cap Juluca. In the case at bar, Devcon took it for granted that Cap Juluca or its agents, DCK, had obtained all of the necessary permissions or clearances from the Customs authorities in Anguilla. As a result, Devcon thought that it could simply have come into Anguilla as they had done before and thereafter seek to have their barge and equipment cleared. Cap Juluca officials told Devcon's officials that they could have gone straight to the site.
- [10] The barge was seized and after three days of negotiations between Customs authorities, DCK and Cap Juluca, the equipment was released and a fine was imposed by the Customs authorities. Cap Juluca gave the Customs authorities the assurance that the fine would have been paid and on that basis, the Customs authorities released the equipment and barge to Devcon. In addition, handling fees were incurred in processing the Customs clearance. It is noteworthy that the Customs authorities took the view that Devcon's officials could not participate in the negotiations once they had entered Anguilla illegally.
- [11] Also, despite the best efforts of Devcon to have its equipment and barge arrive in a timely manner, this was not to be. The reasons for this include the fact that Cap Juluca was late in forwarding to Devcon the mobilization fee; and also, the inclement weather prevented the barge from arriving sooner.
- [12] After the seizure by the Customs authorities and in spite of pleas from Devcon's officials and in the face of the inclement weather, the barge was forced to remain in the rough seas for approximately three (3) days while negotiations ensued with the Customs authorities. Meanwhile and unbeknownst to Devcon's officials, its equipment was damaged as a result of being kept in the rough seas and choppy waters.
- [13] Having had the barge released, Devcon commenced working and after a period of three (3) days its barge got damaged. It nevertheless persisted and its barge became so severely damaged that Devcon had to discontinue the work altogether.

- [14] Before the damage had been sustained to the barge, Cap Juluca had contracted with Barbuda to purchase sand for the replenishment project. However, as a consequence of Devcon's discontinuance, Cap Juluca says that it was forced to purchase more sand and hire other equipment at greater expense.
- [15] Cap Juluca and Devcon thereafter agreed that Devcon would nonetheless remain with its truck to assist in offloading the sand that Cap Juluca had purchased from other sources. The parties agreed that Cap Juluca would pay Devcon \$350 per hour for the use of its dump truck. Cap Juluca purchased additional sand from another source and Devcon assisted with the offloading of the sand and its placement on trucks.
- [16] Eventually, Devcon wanted to move its barge and other equipment out of Anguilla but the Customs authorities refused to permit this until the outstanding monies were paid. Several months passed and there remained a stalemate between Cap Juluca and Devcon as to who was responsible for paying the customs duties and fees. Devcon was finally able to remove the barge after it had paid the monies that were imposed by the Customs authorities. In the meantime, there were several disputes between the parties in relation to the payment of invoices that were submitted by Devcon to Cap Juluca for the demobilization fee, the handling fees and the work that Devcon did for six (6) days. In addition, Devcon was concerned that it had undertaken additional work for Cap Juluca after its barge and equipment became inoperable and had not received any remuneration for this additional work. Most of these invoices remained unpaid at the time of trial.
- [17] The replenishment of Maunday's Bay beach continued for a few days after the reopening of the Resort. Cap Juluca's guests were inconvenienced since they had arrived at the Resort and the replenishment of the eroded Maunday's Bay beach had not been completed. In addition, Cap Juluca incurred costs in completing the replenishment of the beach.
- [18] Meanwhile, Devcon has not been reimbursed for the payments of the charges that the Customs authorities had imposed.

- [19] It is in those general circumstances that Devcon claims special damages in the sum of US\$1,201,308.82 together with general damages. As stated earlier, Cap Juluca has counterclaimed for special damages in the sum of US\$2,477,494 together with general damages.

Evidence

- [20] On behalf of Devcon, Mr. Jon Chellgren, Mr. Donald Smith III and Mr. Conley Browne provided witness statements and were cross-examined at length. On behalf of Cap Juluca, Mr. Gary Thulander and Mr. Gregory Togel filed witness statements and they too were cross-examined.

- [21] Mr. Dennis Dronett provided a witness statement on behalf of Devcon but was not called as a witness to be cross-examined. Mr. Chad Meldrum provided a witness statement on behalf of Cap Juluca but he too was not called as a witness.

Defendant's Submissions

- [22] Learned counsel Mrs. Tara Ruan urged the Court to find the following facts:

Devcon entered into an Agreement with Cap Juluca to provide services for the replenishment of Maundays Bay beach immediately following the passage of Hurricane Omar on 16th October 2008. Devcon represented that it could complete the job within thirty (30) days. Devcon knew that time was of the essence for the Resort reopening. Mrs. Ruan stated that Devcon was late on arrival and because of its delays, Devcon did not turn its mind to clearing Customs and Immigration properly. Devcon's employees say that they have years of experience in the field so they ought to have known that if Cap Juluca was to take care of clearance, they would at least have had to send to Cap Juluca a list of equipment and passenger information. They did not do so. There is no dispute that

upon arrival Devcon's equipment was seized. Mrs. Ruan said that this was because of Devcon's negligence.

[23] Learned counsel Mrs. Ruan reminded the Court that Devcon alleges that its barge was damaged because of the three-day seizure. Cap Juluca says that it did not advise Devcon to dock at Maundays Bay and that the damage to Devcon's barge was not Cap Juluca's fault. In fact, Cap Juluca never represented nor agreed to provide customs clearance, nor did they represent or agree to provide immigration clearance and, in any event, could not have provided these services because they were never given the information by Devcon.

[24] The barge and equipment, having been seized, Customs authorities imposed a fine on Devcon. Mrs. Ruan said that having been fined, Devcon represented to Cap Juluca that it would pay the fine and solicited any help they could get from Cap Juluca in order to get their equipment back. Cap Juluca, in reliance on this, wrote a letter indicating that they would be responsible for the fine. Devcon knew why this letter was written. It was not because Cap Juluca would actually pay the fine; it was because Cap Juluca had a more familiar working relationship with the Government of Anguilla and asserted itself to assist Devcon.

[25] Learned counsel Mrs. Ruan said that with regard to the damage to Devcon's barge, Devcon must establish causation of the alleged damage to the barge. It has not done so. Mrs. Ruan asked the Court to prefer Cap Juluca's evidence that the barge was damaged from improper use and Devcon's negligence. Devcon admits to have broken a spud on November 25th and continued to work past that event. Learned counsel Mrs. Ruan said that due to Devcon's negligence it was unable to complete the replenishment project. Because time was of the essence, Cap Juluca had no choice but to source alternative services immediately. These services came at a much higher price.

[26] Devcon had offered to assist in sourcing alternate services but failed to follow through on their agreement. Cap Juluca had limited time because guests were due to arrive and there was no beach. Devcon had only completed 21 percent of the work. Cap Juluca did what

was necessary to complete the job in the circumstances. As a consequence, Cap Juluca suffered severe losses as were indicated by Mr. Gary Thulander.

Was the Contract a Daily Contract or Fixed Rate Contract?

- [27] Learned counsel Mrs. Ruan urged the Court to accept that the contract was a fixed rate contract. Mr. Smith agreed that he was involved in the pricing of the work but not the drafting of the proposal. Mr. Dennis Dronett had handled the discussions; he does not know what Mr. Dennis Dronett would have discussed with Cap Juluca. He says that he was expecting Devcon to work for thirty (30) days. He knew that Cap Juluca Resort needed its beach back for reopening in December. Mrs. Ruan maintained that the contract was not a daily rate contract.
- [28] Learned Counsel Mrs. Ruan said that the Agreement was for a specific time period (being 30 days) and for a specified purpose which was to replenish the beach with sand at Maundays Bay. In fact, Mr. Smith agreed that he had expected to work for thirty (30) days. The consideration was calculated at a daily rate. Devcon's agent represented that it would replenish 1000 cubic yards per day. Notwithstanding the fact that the contract price was calculated at a daily rate, the parties had agreed that it would take a period of 30 days to restore the beach in time for the December resort reopening. Both Mr. Smith and Mr. Chellgren referred to the job as a beach replenishment project.
- [29] As regards to whether this is a daily contract or a fixed term contract, Mrs. Ruan indicated that Cap Juluca relies on the legal position that is set out in **Chitty on Contracts**, 29th Edition, Volume 1, at pages 1250–1252. Even though the Original Agreement gives a breakdown of the method of calculation, it cannot be said to be a divisible contract. It is an "entire contract". At paragraph 21-028 it is said that:

"Where a contract makes provisions for payment upon the completion of distinct stages of a construction contract, the completion of each stage being a condition precedent to the obligation to make a stage payment,

the obligation to complete each stage may be said to be entire even though the contract itself is clearly not entire."

- [30] Mrs. Ruan said that the Original Agreement contained an "entire obligation" on Devcon to replenish the beach at Maundays Bay which they failed to perform. Paragraph 21-030 of **Chitty** further states that:

"Where a party has performed only part of an entire obligation he can normally recover nothing, neither the agreed price, since it is not due under the terms of the contract, nor any smaller sum for the value of his partial performance since the Court has no power to apportion the consideration."

- [31] Mrs. Ruan said that in addition, Devcon breached the Agreement. Devcon was fully aware of the urgency of completing the work for the arrival of guests due in December. Devcon was due for arrival on 13th November 2008 but did not arrive until 18th November 2008.

Who or What caused the Damage to the Barge?

- [32] Regarding the damage to the barge, Mrs. Ruan said that the barge was damaged due to Devcon's own negligence. Mrs. Ruan said that Mr. Smith agreed that in 1995 when he came on island with Devcon that they had used a hydraulic method of dredging. In 2008, he used the mechanical method of dredging. He agreed that a mechanical method is not an appropriate method for rough seas. He agreed with counsel on Cap Juluca's suggestion that the seas at Maundays Bay beach were typically rough during that time of year. On re-examination he stated that the hydraulic dredging equipment was at that time in the Bahamas and it would have taken 45 days to mobilize it to Anguilla.

- [33] Learned counsel Mrs. Ruan said that since Mr. Smith was not present when the barge arrived in Anguilla, he could not say the condition that the barge arrived in, but what he did know is that it broke its first spud on 25th November 2008 and continued to work until 28th November 2008. He admitted that there were signs of damage from as early as 22nd

November 2008 when the barge was released by Customs. He inspected the spud wells at 6:00 a.m. before they began work on 22nd November 2008. He admitted that Devcon could not complete the contract and left the project because the barge had broken its spuds.

- [34] Regarding the condition of the barge, Mr. Smith said that the barge that arrived in Anguilla had been the same barge used in Turks and Caicos earlier that year. However, he was not in a position to confirm or verify the report in Devcon's supplemental bundle of documents and was not able to say whether an inspection had been done on the barge in Turks and Caicos. Mrs. Ruan argued that the report has no evidential value and cannot be deemed a record of the company if Mr. Smith, who was at the time the Management Representative in Turks and Caicos, did not know of the inspection. He said he never met the inspector; neither could he identify the report. Mrs. Ruan maintained that the damage to the barge was all Devcon's fault.

Conley Browne

- [35] Learned counsel Mrs. Ruan reminded the Court that Mr. Conley Browne was not involved in the negotiation of the Agreement and that this was done by head office. He does not know what was discussed or what was agreed to. Mr. Browne told the Court in his oral evidence that upon arrival in Anguilla he presented passports to Mr. Jack Bell of DCK. He never gave this evidence in his written statement of April 2010.
- [36] Mrs. Ruan said that Mr. Browne told the Court that he worked with Devcon about six and a half (6½) days and that he did not keep log sheets but sent emails to head office every day. He did not present those emails into evidence. Neither of Devcon's witnesses presented any evidence of the days they worked.

Whether Devcon is Entitled to be Compensated

- [37] Learned counsel Mrs. Ruan said that Devcon breached the Agreement and is not entitled to be compensated. Turning her attention next to the evidence adduced on behalf of Cap Juluca, Mrs. Ruan asserted that Mr. Togel was involved intimately in the transaction.

Quantum of Damages

- [38] Mrs. Ruan opined that while Mr. Thulander was at that time responsible for running the Resort, he had involvement in the material events insofar as they affected the Resort's inability to open on schedule and insofar as it caused the Resort to incur additional expenses. Learned counsel Mrs. Ruan urged the Court to accept the exhibits to Mr. Thulander's witness statement along with the record of documents that were tendered. Mrs. Ruan submitted that the record of these documents fall within the scope of the *Civil Evidence Act, 1995 c. 38*, as records of a business and are therefore admissible. Section 13 of the *Evidence Act, R.S.A. c E65* provides that:

"Every document which by any law in force on or after 25th April, 1876 is admissible in evidence in any Court of Justice in England, shall be admissible in evidence in like manner, to the same extent, and for the same purpose, in any Court in Anguilla, or before any person having by law, or by consent of parties, authority to hear, receive and examine evidence. Mrs. Ruan relied on sections 8 and 9 of the Civil Evidence Act, 1995 c. 38."

- [39] Learned counsel Mrs. Ruan asked the Court to accept Mr. Thulander's evidence of the loss in accommodation revenue. His evidence was not challenged by Devcon. These losses were as a result of delays in the project's completion and the Resort having to give concessions to guests in consideration for the inconvenience of heavy equipment operations at the Resort upon their arrival.

Who is responsible for the Payment of Restoration Fees

- [40] Learned counsel Mrs. Ruan posited that it is clear from the terms and conditions of the Agreement that Cap Juluca would provide assistance in obtaining work permit waivers, but there is no condition of the Agreement that Cap Juluca would obtain Customs and Immigration clearance on Devcon's behalf. The Court is not in a position to read into the Agreement any additional terms which did not exist at the time the parties entered into the

Agreement. Mrs. Ruan said that it is clear from the evidence that neither of Devcon's witnesses had been privy to the negotiations between Mr. Dronett and Cap Juluca's agents. Devcon's witnesses do not know what was discussed.

[41] Mrs. Ruan said that it could never have been in the contemplation of the parties at the time of the signing of the Agreement that Cap Juluca would clear Customs and Immigration on Devcon's behalf. Neither Cap Juluca nor its agents knew the specific date and time of arrival, the port of arrival, the particulars of the contents of the barge, the nationalities and particulars of arriving persons.

[42] Learned counsel Mrs. Ruan said that the Customs duties were to be billed to Cap Juluca. However, Mrs. Ruan said that the Agreement did not provide that Cap Juluca would clear Customs. The Agreement provided that Devcon was to bill Cap Juluca at cost on a biweekly basis for importation customs duties, stamp taxes, local taxes or bond fees as applicable to: construction equipment, fuel and lubricants, equipment maintenance parts, equipment repair parts and consumables. The Agreement provided that Cap Juluca would be responsible for securing construction related permits and charges for importation custom duties. The parties did not expressly nor implicitly agree that Cap Juluca would secure Customs and Immigration clearance. Learned counsel Mrs. Ruan said the starting position is that the restoration fees have resulted from Devcon's unlawful entry into Anguilla without complying with Anguilla's Customs and Immigration laws. It is Cap Juluca's position that had Devcon arrived in Anguilla legally there would have been no fines or restoration fees levied. As stated in Devcon's own evidence, the figure of US\$156,912.50 was a fine; it was not the duty. It was a penalty for the unlawful entry by Devcon.

[43] Regarding the Immigration requirements for entry into Anguilla, Cap Juluca at no time agreed with Devcon to apply for the Immigration clearance for persons arriving on Devcon's barge on 18th November 2008. Learned counsel Mrs. Ruan said that at no time were there any discussions between Devcon's agents and Cap Juluca's agents regarding Immigration clearance.

[44] Next, learned counsel Mrs. Ruan said that in relation to the clearance of Devcon's equipment arriving on the barge on 18th November 2008, Cap Juluca at no time agreed or undertook to obtain Customs clearance from the Government of Anguilla. Furthermore, Cap Juluca at no time provided Devcon with a list of equipment and goods expected to arrive in Anguilla. Cap Juluca could not have reasonably been in a position to declare and obtain clearance for Devcon's equipment on board the vessel.

[45] Mrs. Ruan advocated that Cap Juluca is fortified in its position by the laws of Anguilla, particularly the following section of the Immigration and Passport Regulations, R.R.A. 15-2: Section 2 of the above Act declares the official legal ports of entry to be Wallblake Airport, Blowing Point, and Sandy Ground.

[46] It is Cap Juluca's position that the agents for Devcon had arrived in Anguilla on November 4, 2008 to arrange affairs for the arrival of Devcon's barge (among other reasons). Devcon knew at all times that there were specific legal ports of entry. Devcon had done work in Anguilla before. Section 3 of the Immigration Act specifies that:

" The master of every vessel that carries passengers to a port in Anguilla from a place outside Anguilla or that carries passengers from a port in Anguilla to a place outside Anguilla shall without delay give to an immigration officer at the port of entry after the vessel's arrival or before the vessel's departure, as the case may be, a complete and correct –

(a) list of the passengers and crew on the vessel in Form 1, in the case of a ship; and

(b) declaration in Form 2, in the case of an aircraft."

[47] Mrs. Ruan said that the law places the legal obligation on the master of the vessel to provide to the Immigration authorities of Anguilla, a list of all passengers and crew. At no time was this information provided to Cap Juluca or its agents.

- [48] Section 4 of the Immigration Act requires that each person arriving in Anguilla, if required, should complete the embarkation card as set out in the schedule to the regulations.
- [49] Mrs. Ruan said that in relation to the arrival of vessels, the Customs Act also applies as it relates to the clearance of any equipment and the procedure for vessels to follow upon arrival in Anguilla. Mrs. Ruan said it is Cap Juluca's position that it was incumbent upon Devcon to take all action necessary to comply with the laws of Anguilla.
- [50] Furthermore, as to the specific duty under the *Customs Act*, the master of the vessel was legally obligated to notify the Comptroller of Customs of the expected arrival not less than one working day before the arrival of that vessel (pursuant to *Section 22, Customs Act*).
- [51] As it relates to the consequential seizure of Devcon's equipment by the Customs Department for illegally landing at Maundays Bay rather than at an authorized port, section 24 of the Act states that:
- (l) *The importer of any goods, other than goods that are exempt from the requirements of this section, shall—*
 - (a) *in the case of goods imported by air, within 7 days of their importation;*
 - or*
 - (b) *in the case of goods imported by sea, within 7 days of their importation;*
- deliver to the proper officer an entry of those goods in such form and manner and containing such particulars as the Comptroller may direct.*
- [52] Mrs. Ruan said that Cap Juluca maintains that the seizure of Devcon's equipment was a direct result of Devcon and its agents' failure to comply with the laws of Anguilla. The Customs Act clearly provides the penalties to be imposed by the Customs Department for failure to comply. The penalties are set out in Sections 26, 30 and 31 of the Customs Act.
- [53] Learned counsel Mrs. Ruan maintained that but for Devcon's failure to adhere to the laws of Anguilla, there would have never been the levy of any fine or restoration fee and therefore Devcon is liable for payment of the fine.

[54] Neither Cap Juluca nor its agents represented to Devcon that Cap Juluca would pay the fine. At all material times, it was the mutual understanding of all the parties involved that Devcon would be liable for the fine. Furthermore, in accordance with the law, there are no provisions whereby Cap Juluca could legally assume the responsibility to obtain Customs and Immigration clearance on Devcon's behalf. The law states specifically that the master of any vessel has certain legal obligations to the authorities of Anguilla which included (but not limited to): informing the Comptroller of Customs about the intended arrival; and to deliver a list of particulars of goods and equipment to be imported into Anguilla for the purpose of the project.

[55] Cap Juluca relied on the representations made by Devcon's agents that it (Devcon) was liable to pay the fine to the Government of Anguilla and that it was its error that caused the seizure of the equipment.

[56] Learned counsel Mrs. Ruan said the Court should accept the evidence of Mr. Smith that in the meeting following the seizure he said "we screwed up". He agreed that Cap Juluca had done all it could to prevent Devcon from being prosecuted and to assist in getting the equipment back. He said that he knew Mr. Aron, the owner of Cap Juluca, simply wanted the beach back for opening and did all he could to assist. Mrs. Ruan urged the Court to infer that the letter written by Mr. Aron dated 21st November 2010 was a strong effort by Cap Juluca to mitigate any damages or further delays to the project and it was to assist Devcon.

Whether Cap Juluca is liable for the damage occasioned to the barge?

[57] Learned counsel Mrs. Ruan submitted that Cap Juluca is not liable for the damage to the barge. Mrs. Ruan said that the barge was damaged by Devcon's own negligence and for which it is solely responsible.

[58] Learned counsel Mrs. Ruan said that Devcon's barge broke because of Devcon's improper use of the barge and, in any event, it was a defective barge. It was Devcon and its agents that broke its barge during the first days of work. It abandoned the work within four days. Learned Counsel Mrs. Ruan was adamant that it was Devcon's own negligence that caused the damage and such losses could not be attributed to Cap Juluca. Learned counsel Mrs. Ruan further said that when the first spud broke, Devcon continued to work the barge. Mr. Smith and Mr. Conley agreed that in 1995 when they had done the replenishment project at Maundays Bay beach that the hydraulic method had been used. The Court can safely infer that the only reason Devcon did not use this method was because the hydraulic equipment was otherwise engaged in the Bahamas, as stated by Mr. Smith. It was Devcon who chose an inappropriate method of dredging. This is what caused the damage to the barge.

[59] Learned counsel Mrs. Ruan urged the Court to accept the evidence of Mr. Togel on causation of damage to the barge which remains unchallenged by learned counsel for Devcon.

Who is Responsible for Paying the Handling Fees?

[60] Learned Counsel Mrs. Ruan said that the handling fees were to be paid by Devcon. Mr. Smith admitted that it was Customs that caused Devcon to hire Safe Cargo Services; it was not Cap Juluca that made the recommendation. That cost was to be borne by Devcon. Cap Juluca is not responsible for the payment of those fees.

What are the Terms of the Further Agreement?

[61] Mrs. Ruan did not take issue with Devcon's contention that there was a further Agreement. The terms of the further Agreement are no longer in dispute.

Whether there was a Breach of that Further Agreement either by Devcon or Cap Juluca?

- [62] Mrs. Ruan adverted the Court's attention to the fact that on 29th November 2008 after Devcon admitted that it was unable to complete the Agreement, its agent, Mr. Smith, agreed to source another barge and agreed to allow Cap Juluca to use the T-Rex dump truck at the contracted rate. He offered to operate Devcon's excavation equipment together with another barge; however, Devcon did not follow through on this offer. The parties agreed that the truck would be rented at a rate of US\$350 per hour per day. Mrs. Ruan said that Devcon abandoned the project and took no further action to assist in sourcing a barge or completing the agreed work.

Whether Devcon Breached the Terms of the Contract?

- [63] Learned counsel Mrs. Ruan said that the essential term of the Agreement was for the completion of the sand replenishment program within thirty (30) days of the Agreement, with the anticipation that the Resort would reopen in December. Cap Juluca had expected guests as early as December 8th. Devcon, by entering Maundays Bay beach, breached the Agreement. Also, when Devcon's agent informed Cap Juluca that the barge had broken down and the work could not continue, Cap Juluca was entitled to treat the contract at an end and consequently took mitigating steps.
- [64] The delays by Devcon, including delays caused by its breach of the laws, the seizure of their equipment and the ultimate breakdown of their barge, all cumulatively caused serious prejudice to Cap Juluca and Cap Juluca's ability to reopen the Resort to accommodate arriving guests. As a direct result of Devcon's breach, Cap Juluca was forced to mitigate its losses by hiring an alternative company and barge to complete the beach replenishment program that Devcon failed to complete, thereby incurring additional costs. Cap Juluca therefore claims damages for these losses incurred as a result of Devcon's breach.

[65] Learned counsel Mrs. Ruan said that during the period when Customs seized Devcon's equipment, Cap Juluca could not be liable for any payments during that period as the seizure flowed from the negligence of Devcon and its disregard for the laws of Anguilla.

The Quantum of Damages, if any, to be Awarded

[66] Mrs. Ruan indicated that Cap Juluca is relying on documentary evidence to support its counterclaim for the costs incurred to complete the sand replenishment and other damages incurred as a result of Devcon's breach. It is Cap Juluca's position that the damages incurred by it to complete the project would *"fairly and reasonably be considered either arising naturally i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it"*. This was the finding in *Shipping Co. Ltd. v. Progress Bulk Carriers Ltd.*, [2010] EWHC 542 (Comm).

[67] Learned counsel Mrs. Ruan said that Cap Juluca is entitled to recover damages for the reasonable costs of completing the beach replenishment program less the contracted price. In this regard, Cap Juluca relies on the case of *Mertens v. Home Freeholds Co.*, [1921] 2 K.B. 526 C.A.

[68] Cap Juluca is entitled to damages to put it in the position it would have been in had the breach not occurred. This would have meant that the sand replenishment program would have been completed for the total price of US\$670,000 and completed by the December 8th reopening. Instead, Cap Juluca ended up paying US\$1,983,107 and had the job delayed until about 18th December 2010, three days after guests had already arrived at the resort. Cap Juluca is also entitled to recover the initial mobilization fee. Mrs. Ruan referred the Court to *Chitty* *ibid* at paragraph 24-050, where it states as follows:-

"Where the innocent party is entitled to, and does treat himself as discharged by the other's breach, he is thereby released from future

performance of his obligations under the contract. If he has paid money under the contract to the party in default, he will be entitled to recover it by an action for money had and received. A deposit paid by him to secure performance is, however recoverable."

Whether Cap Juluca Breached the Terms of the Contract.

[69] As it relates to Devcon's claim, Mrs. Ruan submitted that Cap Juluca is not liable to pay US\$217,186.32 for unpaid invoices, US\$156,912.50 for the fine, nor US\$9,500 for Safe Cargo handling fees. Furthermore, Mrs. Ruan submitted that Devcon has not produced evidence in support of its claims for the costs of repairing the barge and loss of revenue. Mrs. Ruan therefore submitted that these items ought to be struck from Devcon's claim. There has been no breach of contract by Cap Juluca and therefore Devcon is not entitled to any general damages.

[70] On the other hand, Cap Juluca has had to incur expenses to mitigate its damages. Cap Juluca has also lost room revenue from the delayed opening of the resort. Learned counsel Mrs. Ruan submitted that Cap Juluca ought to be compensated based on its claims in the Counterclaim.

Whether the Contract was Frustrated

[71] The Court had reason to invite additional submissions from learned counsel for Devcon and learned counsel for Cap Juluca. Learned counsel Mrs. Ruan submitted further that the Agreement between Devcon and Cap Juluca was not frustrated but rather was breached by Devcon as a result of Devcon's actions and/or inactions.

[72] Learned counsel Mrs. Ruan referred the Court to **Chitty on Contracts**, 29th Edition, Volume 1, at page 1311, which states that:

"A contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it

physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract.”

[73] The case of *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] 2 All ER 145, establishes that:

“Frustration occurs whenever the law recognises that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is being called for would render it a thing radically different from that which was undertaken by the contract.”

[74] Learned counsel Mrs. Ruan said that in the case at bar, something(s) occurred after the formation of the Contract and the Agreement could not be completed by Devcon. However, Mrs. Ruan submitted that Devcon’s inability to complete its contractual obligations was in fact its own fault. Hence, Devcon cannot rely on the doctrine of frustration.

[75] Learned counsel Mrs. Ruan referred the Court to **Chitty on Contracts**, 29th Edition, Volume 1, at pages 1314–1315, which sets out five (5) propositions describing the essence of the doctrine of Frustration. It states that frustration acts:

- (a) To mitigate the rigour of the common law’s insistence on literal performance of absolute promises and its object was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after significant change in circumstances;
- (b) Frustration operates to kill the contract and discharge the parties from further liability under it and therefore it cannot be lightly invoked but must be kept within very narrow limits and ought not to be extended;

- (c) Frustration brings a contract to an end forthwith, without more and automatically;
- (d) It should not be due to the act or election of the party seeking to rely on it and it must be some outside event or extraneous change of situation;
- (e) A frustrating event must take place "without blame or fault on the side of the party seeking to rely on it."

[76] With regards to the propositions set out above, learned counsel Mrs. Ruan submitted that Devcon fails on the two latter guidelines and Mrs. Ruan places much emphasis on point two of the guidelines which suggests that frustration ought not to be invoked lightly. Mrs. Ruan said that there were three (3) circumstances that perhaps it could have been argued to be frustrating events:

- (a) Delay;
- (b) Seizure of the equipment by Customs Department of Anguilla;
- (c) Damage to the barge.

[77] Further delay was caused when Devcon's equipment was seized by the Customs Department after arrival in Anguilla. However, Mrs. Ruan maintained that it was because of the Devcon's negligence that the equipment was seized by Customs Department. As such, the barge was not available for a further two (2) days.

[78] **Chitty on Contracts** at page 1343 indicates that "*Frustration is concerned with unforeseen, supervening events, not events which could have been anticipated and provided for in the contract itself.*" For this reason, Mrs. Ruan submitted that delay in itself would not have frustrated the contract as Devcon anticipated delay, as evidenced by the Agreement. However, when the Agreement was entered into there was no anticipation of the equipment being seized and further, being damaged. Nonetheless, Mrs. Ruan submitted that due to Devcon's experience and the nature of its services, Devcon should have foreseen that illegal entry into Anguilla would have resulted in seizure of the

equipment; that damage would occur to the barge if it remained in rough waters; and/or if the barge had already been damaged, would be further damaged if used when not in good condition.

[79] Mrs. Ruan submitted that the damage to the barge should not frustrate the contract as the damage to the barge occurred as a result of Devcon's own negligence. Learned counsel Mrs. Ruan submitted that Devcon cannot rely on the doctrine of frustration but rather, Devcon had breached the Agreement and made it impossible for the Agreement to be fulfilled by itself and this resulted in the inability of the Resort to open as scheduled. Learned counsel Mrs. Ruan said that when Devcon's agent informed Cap Juluca that the barge had broken down and the work could not continue, Cap Juluca was entitled to treat the contract as at an end and consequently took mitigating steps.

[80] In *D & B Trucking and Trailer Hauler Service LTD v. Caribbean Insurers Ltd.*, HCVAP 2008/025, Eastern Caribbean Supreme Court decision, at paragraphs 8 and 9 the Court relied on statements from *Halsbury's Laws* paragraph 538:

"General Rule. Where one party to a contract has committed a serious breach by a defective performance or by repudiating his obligations under the contract, the innocent party will have the right to rescind the contract; that is to treat himself as discharged from the obligation to tender further performance, and to sue for damages for any loss he may have suffered as a result of the breach.

In a case where it is alleged that a party has a right to rescind for breach, it must be determined (1) whether there has been a breach of a term of the contract or a mere misrepresentation; and (2) whether the breach is sufficiently serious to justify rescission as opposed to a claim for damages."

[81] Also **Chitty on Contracts**, 29th Edition, Volume 1 at paragraph 24-050 states that:

“Where the innocent party is entitled to, and does, treat himself as discharged by the other’s breach, he is thereby released from future performance of his obligations under the contract.”

[82] Learned counsel Mrs. Ruan told the Court that Devcon admitted that it was unable to complete the contract on 29th November 2008; its agent, Mr. Smith, agreed to source another barge and agreed to allow Cap Juluca to use the T-Rex dump truck at the contracted rate. He offered to operate Devcon’s excavation equipment and equipment from another barge; however, Devcon did not follow through on this offer. The parties agreed that the truck would have been rented at a rate of US\$350 per hour, per day. However, Devcon abandoned the project and took no further action to assist in sourcing a barge or completing the agreed work. Devcon is therefore not entitled to receive any compensation.

Whether Cap Juluca Breached the Original Agreement

[83] Learned counsel Mrs. Ruan submitted that the delays by Devcon, including delays caused by its breach of the laws, the seizure of their equipment and the ultimate breakdown of their barge, all cumulatively caused serious prejudice to Cap Juluca and its ability to reopen the resort to accommodate arriving guests. Learned counsel Mrs. Ruan said that during the period when Customs seized Devcon’s equipment, Cap Juluca could not be liable for any payments during that period as the seizure flowed from the negligence of Devcon and its disregard for the laws of Anguilla. Learned counsel Mrs. Ruan stated that the damages incurred by Cap Juluca to complete the project would *“fairly and reasonably be considered either arising naturally i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it”*. See **Sylvia Shipping Co. Ltd. v. Progress Bulk Carriers Ltd.** [2010] EWHC 542 (Comm). The case further referred to **The Heron II**, [1969] 1 AC 350, paragraph 23, which refined the test to state as follows:

“In light of the authorities, the generally accepted test for remoteness has been whether the loss claimed was of a kind or type which it would have been within the reasonable contemplation of the parties at the time that the contract was made as being not unlikely to result.”

Mrs. Ruan therefore argued that Cap Juluca is entitled to be compensated for the losses suffered since they are not remote.

Claimant’s Submissions

[84] Learned counsel Mrs. Richardson Hodge reviewed the evidence. She said that Mr. Togel’s evidence is that DCK’s role, at the material time, was that of Construction Manager and Owner’s Representative at the Cap Juluca site. DCK’s job included procuring contractors and materials to perform needed work at the Resort and acting as a liaison between the contractors and Cap Juluca. Mr. Togel’s role, in particular, was that of the official Project Manager.

[85] Mr. Togel and others on the conference call with Devcon on 28th October 2008 expressed the need for emergency assistance and asked Devcon to submit a bid proposal to assist with beach replenishment, which Devcon did on 29th October 2008. It should be noted that there is no evidence that Mr. Thulander, the General Manager of Cap Juluca (and the only other witness for Cap Juluca), was a party to the initial communications between Cap Juluca’s agent and Devcon. In addition, Mr. Thulander was not a party to the discussions between Mr. Bell or other DCK employees and Devcon, prior to Devcon’s arrival in Anguilla on 19th November 2010.

[86] Learned counsel Mrs. Richardson Hodge said that the evidence before the Court is that Mr. Togel and other persons on behalf of Cap Juluca contacted Devcon on 28th October 2008 to assist with the replenishment of Maunday’s Bay beach, which was eroded by Hurricane Omar on 16th October 2008. Mr. Togel’s oral evidence was that Cap Juluca

Resort was scheduled to open on 1st November 2008, (although his witness statement stated that the resort was scheduled to open on 8th December 2008). Nevertheless, it is not disputed that as a result of the eroded beach the opening date had to be postponed.

Was the Contract a Daily Rate or Fixed Rate Contract?

- [87] Learned counsel Mrs. Richardson Hodge maintained that the contract was a daily rate contract and not a fixed term contract. As a result, Devcon is entitled to payment for the days on which it did perform the work.
- [88] Mrs. Richardson Hodge was adamant that the contract was a daily rental contract. In the case at bar, there was not a total failure of consideration as Devcon performed several days of work. The parties contracted that the work would be done at a daily rate of US\$12,500 for an anticipated period of thirty (30) days. This period was not conclusive, therefore the cost of completion, based on the length of time it would have taken to complete the job, could have increased or decreased. Devcon worked for six (6) days. In addition, invoices in the amounts of US\$195,000 and US\$100,000 representing the mobilization and the demobilization fees were submitted to Cap Juluca. These amounts had been incurred from the time Devcon mobilized to Anguilla in furtherance of the contract. By mobilization, Devcon had brought the labour and materials necessary to perform the work to Anguilla. Invoice TAN8024-2 in the amount of US\$107,386.32 was submitted to Cap Juluca by Devcon. It represented three (3) days of work at the standby rate pursuant to paragraph 13 of the proposal, six (6) days worked at the agreed daily rate and twelve extra hours worked after 11-hour shifts. Devcon is therefore entitled to compensation for the work completed prior to the frustration of the contract; this is because Mrs. Richardson Hodge said the Agreement between the parties was a divisible contract. Learned counsel Mrs. Richardson Hodge submitted that the obligation to pay the invoices subsists and Cap Juluca is liable for payment of these invoices to Devcon.

Who is Responsible for Paying the Handling Fees?

[89] Learned counsel Mrs. Richardson Hodge reminded the Court that Mr. Togel gave evidence that he gave the contact information for Safe Cargo to Devcon. When put Mr. Browne, however, he stated that he first became aware of Safe Cargo when Mr. Lanville Harrigan of Safe Cargo arrived and introduced himself to (him), Mr. Browne, at approximately 12:30 p.m. on 19th November 2008, and stated that DCK had contacted him and told him to come quickly to the Cap Juluca site as there was a problem on the site. In Devcon's view, however, whether Mr. Togel gave the contact information for Safe Cargo to Devcon or whether DCK contacted Safe Cargo directly is of no significance. What is of significance, however, is that Cap Juluca and/or its agent, who were the persons on the ground and were familiar with Anguilla's Customs procedures and brokers, had to assist Devcon in retaining the services of a broker, as Devcon itself had no established relationships in Anguilla.

[90] For services rendered, Safe Cargo initially charged 1% of the total value of US\$1,658,000 as stated in the Insurance List, but after negotiations with Devcon, discounted its fees down to US\$9,500. It is of relevance to note that the date of the invoice is 20th November 2008, one day after Devcon's barge arrived in Anguilla. Mrs. Richardson Hodge argued that the services rendered by Safe Cargo were in relation to clearing the items through Customs, specifically for the purpose of the beach replenishment work. The evidence is that Devcon also paid for these services which Cap Juluca was again contractually obligated to pay. Mrs. Richardson Hodge insisted that Cap Juluca should reimburse Devcon for these costs.

Who is Liable for the Payment of the Restoration Fees?

[91] Learned counsel Mrs. Richardson Hodge said the first sentence of the bid proposal stated that Devcon was to assist Cap Juluca with the emergency beach replenishment for Cap Juluca. Mr. Browne was very specific on cross-examination when he explained the scope of work that was to take place which was that Devcon was to dredge sand and put it onto another company's truck. This scope of work was in contrast to a previous job in 1995 at

the Cap Juluca site where Devcon International's scope of work was to dredge the sand and offload it directly onto the beach.

Also in the bid proposal, Cap Juluca was to provide survey layout and benchmarks, housing for Devcon's employees, assistance in waiving work permit requirements and obtaining all construction related permits. The bid proposal further provided that Devcon would not be responsible for any charges for importation customs duties, stamp taxes, local taxes, or bond fees, and it sets out the five (5) items to which this exclusion related. Further, paragraph 8 stated that customs duties, taxes and fees would be billable at cost to the owner on a biweekly basis.

Learned counsel Mrs. Richardson Hodge said that all of this showed that no financial responsibility in relation to costs, fees, expenses in relation to the above would be taken up by Devcon. The total bid price for Devcon to complete its work was therefore US\$670,000. It was spelt out in the bid proposal that any customs duties or other fees would ultimately be paid for by Cap Juluca. At paragraph 13 of the Proposal, Devcon included a contingency clause which provided that in the event there were "Non Devcon related delays", if Devcon was on standby or if there was a force majeure event, then Cap Juluca would pay to Devcon the daily rate of US\$6,250. This was, in essence, a simple, "bare bones" bid proposal which Devcon prepared and forwarded to Cap Juluca.

Learned counsel Mrs. Richardson Hodge said that the terms of their bid proposal was for a daily rental contract. Devcon estimated that the work would take thirty (30) days, but they could have taken more days, or they could have taken less. Had the amount of work exceeded thirty (30) days, then Cap Juluca would be obligated to pay the daily rate of US\$12,500 per day (based on a 10-12 hour work day) until the work was completed. Likewise, if the work lasted less than thirty (30) days, then Cap Juluca would be obligated to pay for those days worked and not the entire 30-day sum. Mr. Togel told the Court that Devcon did not provide Cap Juluca or its agents with documentation as to the contents and valuation of the barge. Learned counsel Mrs. Richardson Hodge said that this

assertion is untrue and, in fact, the bid proposal set out the list of equipment that would be used by Devcon in doing the work.

Learned counsel Mrs. Richardson Hodge referred the Court to chapter 12, section 3(a) of *Chitty on Contracts* which sets out the general rules of construction whereby the Court determines the meaning and legal effect of a contract. Paragraph 12-042 provides that:

“The object of all construction of the terms of a written Agreement is to discover therefrom the intention of the parties to the Agreement. The rules which govern the construction of contracts are the same at law and in equity, for simple contracts and for specialties.”

Learned counsel Mrs. Richardson Hodge submitted that the provisions of the Agreement when read together, clearly contemplated that Cap Juluca would bear the costs involved for Devcon to arrive in Anguilla and assist with the beach replenishment. Mrs. Richardson Hodge submitted that the Agreement clearly contemplated that Cap Juluca would be responsible for obtaining the necessary Customs clearances for Devcon from the Customs Department and for paying the necessary Customs duties and fines (i.e. the restoration fees).

Mrs. Richardson Hodge said that Cap Juluca had been dilatory in advising Devcon that their bid proposal had been accepted as well as in wiring the demobilization fee. This is confirmed by the evidence of Mr. Chellgren. Mr. Togel admitted on cross-examination that it would not have been reasonable for Devcon to arrive in Anguilla without being paid. Given the cost of mobilization and work involved to mobilize, Mrs. Richardson Hodge said that it was certainly reasonable on Devcon's part to await receipt of payment of mobilization fee prior to commencing actual mobilization. In fact, it would be commercially unreasonable for Cap Juluca to have expected that Devcon would have retained the services of a tug boat and commence mobilization to Anguilla without having received the mobilization monies. In such circumstances, Mrs. Richardson Hodge submitted that it would have been unreasonable and unfair for Cap Juluca to allege that Devcon arrived

late when Cap Juluca itself did not do what it was supposed to do in a timely manner which would have allowed Devcon to arrive within the estimated time of arrival as set out in the Agreement.

More importantly, Cap Juluca knew from the various communications with Devcon that Devcon was awaiting payment of the mobilization fees before commencing the actual mobilization process. It was therefore anticipated by Devcon, as stated in the oral evidence of Mr. Chellgren, that the mobilization fee would be paid immediately after receipt of the bid proposal and the mobilization period of fifteen (15) days would start to run from the date on which Devcon received the mobilization fee. Furthermore, Mr. Browne in his evidence stated that the tug was delayed as a result of a tropical system that was in the area. It is Devcon's contention that these circumstances were outside of their control and they cannot now be found liable for damages in relation to them.

Learned counsel Mrs. Richardson Hodge was adamant that on cross-examination, Cap Juluca's witness, Mr. Chellgren, identified the list as an Insurance Value List. He further stated that the said Insurance List was sent to Cap Juluca upon its request and he was not sure what Cap Juluca intended to do with the said "List". However, on cross-examination, Mr. Togel was taken to the Insurance List as well as the restoration calculations presented by Customs to Ricardo Perez. Based on both documents, Mr. Togel agreed that the figures used to arrive at the Customs duty of 25% and the Restoration Formula were taken from the Insurance List.

- [92] Mrs. Richardson Hodge pointed out that for the first time on cross-examination Mr. Togel raised the fact that Cap Juluca benefits from a Customs duty exemption. He claimed that he "believed" that this Customs duty exemption was raised in a telephone conversation on 29th October 2008, but there is no written evidence of this nor is there any evidence of this in the witness statements by either Devcon's witnesses or the Cap Juluca's witnesses. The reason why this Customs duty exemption becomes relevant, in the case at bar, is because Mr. Togel claims that the Customs duty being charged by Customs was a fine and he refers to discussions between Cap Juluca/DCK and Customs wherein Cap Juluca/DCK

requested that the Customs duty exemption apply to Devcon as well. The request was denied by Customs. Based on Mr. Togel's evidence, the standard Customs duty would be 25%, but because of Cap Juluca's special exemption, Cap Juluca would only be exposed to a vessel charge and a 1% clearance charge.

[93] Mrs. Richardson Hodge said that this evidence is unfortunate because what it shows is that in the ordinary course there would be a 25% Customs duty but Cap Juluca enjoyed a special exemption and if the Agreement between Devcon and Cap Juluca was that Cap Juluca was to pay for all importation Customs duties, then there was an affirmative obligation on DCK (as Construction Manager) to ensure that Devcon benefitted from the special exemption such that Cap Juluca would not have to pay the standard 25% Customs duty.

[94] Although Devcon was able to negotiate the original restoration figure down to US\$156,912.50 (which Devcon ultimately paid as a result of Cap Juluca's refusal to do so) the 25% Customs Duty was calculated at US\$94,147.50, which is included as part of the restoration figure of US\$156,912.50. Mrs. Richardson Hodge submitted that the difference between the two figures, US\$62,765 is the fine. Mrs. Richardson Hodge submitted that Cap Juluca is contractually obligated to pay the US\$94,147.50 and required to pay the fine of US\$62,765 for it and/or its representative's failure to clear Customs as they were required to do.

[95] Learned counsel Mrs. Richardson Hodge submitted that in its line of work, it is common practice for the owner, (i.e. Cap Juluca) who is employing Devcon, to secure all the necessary permits for the project that the owner wishes to be carried out and Cap Juluca would have been aware of this. Furthermore, in its letter of 21st November 2008 to the Comptroller of Customs, Cap Juluca advised Mr. Richardson at the Customs Department that it (Cap Juluca) *"acknowledges and will be held responsible for the appropriate payments for the duties and fines for the equipment seized by Customs on 21st November 2008 and will be paid no later than 7th December 2008."* This further confirmed Devcon's

understanding and expectation that Cap Juluca would pay the Customs duties and fines (or restoration fees).

- [96] By this time, Cap Juluca well knew the position of Devcon in relation to payment of the fines and duties, yet Cap Juluca continued to represent to Customs that it would pay the fines and duties. Cap Juluca also allowed Devcon to continue to work diligently on the beach replenishment and at no material time (based on the evidence before the Court) did Cap Juluca advise Devcon that it would not be paying the duties and fines. Mrs. Richardson Hodge submitted that Cap Juluca operated in bad faith in allowing Devcon to work until it could no longer work without entering into serious discussions in order to resolve the duties and fines issue.
- [97] On cross-examination, Mr. Smith stated that he recalled speaking with DCK representatives and asking for their assistance. Learned counsel Mrs. Richardson Hodge said that it was entirely reasonable for Mr. Smith to ask for assistance. Moreover, the release of the equipment would, by and large, have been for the benefit of not only Devcon but Cap Juluca as well, as Cap Juluca had very little time to have the beach replenished before its opening and therefore required the services of Devcon and their equipment.
- [98] Cap Juluca's evidence is that it wrote to Customs at the request of Devcon on 21st November 2008 and stated the following: *"Cap Juluca hereby acknowledges and will be held responsible for the appropriate payments for the fines and duties for the equipment seized by Customs on November 21st, 2008 which will be paid no later than December 7th, 2008 and in advance of Devcon Ltd. equipment leaving the island of Anguilla."* Mr. Thulander at paragraph 6 of his witness statement states that Cap Juluca had been reassured by Devcon that Devcon would be responsible for the fines and penalties imposed by Customs. Both Mr. Chellgren and Mr. Smith, however, denied this allegation in their oral evidence. Mrs. Richardson Hodge said that it is instructive to note that the letter was not copied to Mr. Smith (although Mr. Smith on cross-examination said that he knew that a letter would have been written) or to Devcon at all, but was copied to Mr. Perez and

Mr. Thulander of Cap Juluca and Mr. C Meldrum of DCK. There is also no written evidence that Devcon undertook to pay the fines and duties.

[99] Mrs. Richardson Hodge said that even if Cap Juluca and its representatives misunderstood what Mr. Smith meant when he used the term “we screwed up” or that he agreed that Devcon would be responsible for the fines and duties (which Mr. Smith has denied), they could not have misunderstood the letter from Mr. Smith to Derek Meyer of DCK dated 25th November 2008. That letter came a mere four (4) days after Cap Juluca wrote to Customs undertaking to pay the fines and duties and it made clear that Devcon was of the view that it was not at fault nor had committed any wrong in relation to the situation. There is no evidence that Cap Juluca responded to this letter. At the very least, therefore, Cap Juluca knew as early as 25th November 2008 that Devcon was denying any liability. Notwithstanding this, on 4th December 2008 Cap Juluca again wrote to Customs requesting an extension of time for the payment of the fines and duties that Cap Juluca had previously undertaken to pay. Again, this letter was not copied to Devcon.

Who or What caused the Damage to the Barge?

[100] Mrs. Richardson Hodge reminded the Court that Mr. Browne gave evidence that he inspected the barge on the afternoon of 18th November 2008 when the barge arrived in St. Maarten, prior to its arrival in Anguilla. He stated that when he inspected the barge, the spuds were in perfect condition. Mr. Browne’s role at that time was not only to inspect the spuds but he was also required to use a crane to lift the spuds into the spud sleeves prior to the barge leaving St. Maarten for Anguilla. Learned counsel Mrs. Richardson Hodge said that the case for Devcon is that the barge was in good condition when it arrived into Anguilla. Mr. Browne stated in his witness statement that Customs had taped off the area around the barge and insisted that it not be moved. The seas were choppy and the spuds on the barge had to be lowered into the seabed in order for the barge to be stabilized and not run aground due to the rough seas. Mr. Browne further stated that Devcon had requested permission to relocate the barge to safer waters, but Customs denied the request.

- [101] Learned counsel Mrs. Richardson Hodge said that Cap Juluca was aware of its obligations to Customs, yet it failed to fulfill them. It is the policy of the Customs Department that items imported without proper Customs clearance may be subject to forfeiture as per Section 19 of the Customs Act. Cap Juluca should therefore have foreseen that the seizure of the barge could have resulted and such seizure could lead to the loss of business for Devcon, which it did. Cap Juluca was aware that as a result of the detention of the barge, the spuds had to be lowered into the seabed in order for the barge to be stabilized and not run aground by the rough seas. It was known to Cap Juluca that this state of affairs could have resulted in damage to the barge, as it did. In fact, in his evidence, Mr. Browne specifically stated that Devcon had requested permission from Customs to relocate the barge to safer waters. Mrs. Richardson Hodge submitted that this request was made because of the sea conditions; it was foreseeable that the barge could well be damaged by the rough seas if it remained in the location where it was seized by Customs.
- [102] Learned counsel Mrs. Richardson Hodge submitted that the damages suffered by Devcon were as a result of Cap Juluca's breach of the contract and not too remote. As such, Devcon is entitled to be compensated for the losses.
- [103] Mr. Browne gave oral evidence that the barge was damaged as a result of sitting for three days in the rough seas. Mr. Browne stated that he went onto the barge at 6:00 a.m. on 21st November 2008 in order to inspect the barge, as during the night he could hear the barge making sounds of distress. He stated that he, at that time, noticed that there were cracks around the spud wells. Learned counsel Mrs. Richardson Hodge said that it is clear that the damage to the barge was occasioned by it having to remain in the rough seas for three days.
- [104] In the event, however, that the Court deems that the contract was a fixed term contract, then Mrs. Richardson Hodge submitted that the fixed term contract was frustrated, thereby discharging Devcon from further liability for failure to perform.

Whether the Contract was Frustrated

- [105] Mr. Browne's evidence was that Devcon commenced work on 22nd November 2008 when they were given the approval to do so, but by 28th November 2008 the work had to stop because the spuds had completely broken. Learned counsel Mrs. Richardson Hodge submitted that this frustrated Devcon's ability to continue to render beach replenishment services to Cap Juluca in the manner originally contracted for between the parties. The continued existence or availability of the barge to conduct the beach replenishment was essential to the performance of the Agreement.
- [106] Mrs. Richardson Hodge referred the Court to paragraph 23-001 of **Chitty on Contracts** which states that:
- "[A] contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfill the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract."*
- [107] The type of frustration which applies to the case at bar is frustration of the adventure which occurs where the commercial venture envisaged by the parties is no longer capable of performance. The essential conduit to determining whether the contract is frustrated is to ascertain whether the contract made is, on its true construction, wide enough to apply to the new situation created by the supervening event. If it is not, then the original commercial adventure envisaged by the parties is considered frustrated and thereby incapable of performance.
- [108] Mrs. Richardson Hodge reminded the Court that the barge along with other equipment were seized when it entered into Anguilla waters due to Cap Juluca's failure to clear the barge's arrival with Customs. The barge was seized and restricted to the rough seas for three days. The damage to the barge resulting from compliance with this Customs order led to the barge being incapable of use. The only thing Devcon could do then to assist with

the beach replenishment was to lease the truck it had in its possession to Cap Juluca. Mrs. Richardson Hodge submitted that without the use of the barge, the contract had undergone a fundamental change, one which struck at the root of the contract, as the barge was the primary instrument by which the sand replenishment was to be completed. The commercial venture (beach replenishment through use of the barge) envisaged by the parties was no longer possible and the original contractual terms could no longer apply to this new set of circumstances.

- [109] Mrs. Richardson Hodge admitted that any claim of frustration, however, is subject to several limitations which may serve as a bar to a party's reliance on the doctrine. These are inclusive of, but not limited to whether the frustration was self-induced or whether the supervening/frustrating event was foreseeable.
- [110] Mrs. Richardson Hodge urged the Court to accept Devcon's evidence that the barge was seized by Customs and the spuds on the barge had to be placed in the seabed in rough waters at the Cap Juluca site. The spuds broke and the barge became inoperable. The Agreement entered into between Devcon and Cap Juluca was based on the use of the spud barge. It was unforeseeable that the spuds would break and the barge become inoperable. In the circumstances, Mrs. Richardson Hodge submitted that foreseeability does not operate as a bar to Devcon's reliance on the doctrine of frustration. Mrs. Richardson Hodge said that it is essential to note that as per paragraph 23-069 of **Chitty**, frustration does not rescind the contract *ab initio*, but it brings it to an end forthwith, without more and automatically. It releases both parties from any further performance of the contract and may even allow recovery of monies which were paid on a basis which had wholly failed (total failure of consideration), but it does not affect obligations undertaken by the parties before the contract was frustrated in some instances.
- [111] **Chitty** in paragraph 21-037 further states that contained within a divisible contract is an express or implied Agreement that payment will be made in proportion to the extent of performance. If the contract is held to be divisible, the obligation to pay for a divisible part of performance is independent of the performance of other parts of the contract.

- [112] In the case of *Appleby v. Myers*, the contract was frustrated but because the payment obligation was not due to be performed by the time of the frustrating event, the plaintiff was not entitled to any payment for the work done. Mrs. Richardson Hodge contrasted those facts with the facts in the case at bar and posited that Devcon is entitled to be compensated for the work it did before the contract was frustrated.
- [113] According to G. H. Treitel in **Frustration and Force Majeure** at pages 147-148, a contract may be discharged where a thing is destroyed which is not the subject-matter of the contract but the continued existence or availability of which is essential for the performance of the contract. Thus, if one took the view that the subject matter of a voyage charter under which a specific cargo were to be carried was the ship (and the ship alone), the contract would nevertheless be frustrated by the unavailability of the specific cargo on the ground that the availability of that cargo was essential for the performance of the contract. The same point can be made in relation to a situation where a seaman's contract of service could be discharged by loss or capture of the ship: here again it seems that the subject matter of the contract is the service to be rendered and the ship is a thing essential for its performance.
- [114] Mrs Richardson Hodge opined that where the ground on which frustration is claimed is the destruction or unavailability of a thing which is not itself the subject matter of the contract, the question arises whether that thing is indeed essential for performance. In *Appleby v. Myers*, a contract to install machinery in a factory and to maintain the machinery for two years was held to be discharged when the factory was destroyed before the work of installing the machinery had been completed. In that case, the services under the contract were to be rendered by the supplier in the factory which was destroyed; thus, the availability of the factory to install and maintain the machinery therein was essential to the performance of the contract.
- [115] Mrs. Richardson Hodge maintained that in the case at bar, the Agreement was not a fixed term contract for thirty (30) days as alleged by Cap Juluca. Even if the Agreement was for a fixed term as alleged by Cap Juluca, and which is denied by Devcon, Devcon contends that the Agreement for Devcon to assist Cap Juluca with emergency beach replenishment

was frustrated when the spuds on the barge broke and the barge began to take in water. The continued existence or availability of the barge to conduct the beach replenishment was essential to the performance of the Agreement. Learned counsel Mrs. Richardson Hodge emphasized that were it not for DCK's failure to obtain Customs clearance for Devcon and the subsequent seizure of the barge in rough waters which caused the spuds to break, Devcon's barge would not have been damaged and the work would have been completed.

Work Performed and Unpaid Invoices for Services Rendered by Devcon

[116] Mrs. Richardson Hodge told the Court that there are four (4) Invoices before the Court:

- (a) Invoice TAN8024-1 in the amount of US\$195,000 representing the mobilization fee;
- (b) Invoice TAN8024-2 in the amount of US\$107,386.32 representing three (3) days at the standby rate pursuant to Paragraph 13 of the Contract; six (6) days worked at the rate of US\$12,500 per day and twelve (12) extra hours worked after 11-hour shifts;
- (c) Invoice TAI8024-3 in the amount of US\$100,000 representing the demobilization fee; and
- (d) Invoice TAI8024-5 in the sum of US\$9,800 representing work performed under the Further Agreement.

[117] There is no dispute that Invoices TAN8024-2 and TAI8024-3 have not been paid. In relation to TAN8024-2, Cap Juluca alleges that Devcon is not entitled to the standby rate for three (3) days because the seizure was as a result of Devcon's illegal entry. Devcon's position, however, is that it was Cap Juluca whose duty it was to have ensured that all Customs related matters had been dealt with and therefore denies any liability. In relation to the days worked, Cap Juluca alleges that Devcon only worked for three (3) full days and two (2) half days. On cross-examination, however, Mr. Smith affirmatively stated that

Devcon worked for six (6) days and that during that time Devcon produced 8,600 cubic yards per day, which was far more than was estimated in the Contract (which was 500-1,000 cubic yards per day). It is noteworthy that Cap Juluca has not denied that Devcon produced 8,600 cubic yards per day.

[118] Mr. Browne was more specific and stated in his oral evidence that Devcon had worked for six (6) whole days and one half (1/2) day. His evidence was that he was keeping track of the time and dates and he recorded that Devcon worked on 22nd, 24th, 25th, 26th, 27th and on the 28th of November 2008 when Devcon ceased work as a result of the damage to the barge. When asked how the records were kept, Mr. Browne explained that he kept time sheets/log sheets of days worked which are normally kept at Devcon's head office and to which he would communicate the time worked via electronic mail every night.

[119] Learned counsel Mrs. Richardson Hodge submitted that the Court ought to accept the evidence of Mr. Browne in relation to the amount of time Devcon worked as he was Devcon's lead person on the ground. He kept the daily records and he was in a prime position to advise as to the extent of work done by Devcon at the Cap Juluca site. Learned counsel Mrs. Richardson Hodge submitted that Devcon is entitled to the monies from Invoice number 2 and number 5, reimbursement of the sum of US\$156,912.50 and general damages.

Whether Cap Juluca Breached the Terms of the Contract

[120] Learned counsel Mrs. Richardson Hodge argued that Cap Juluca is the one in breach of contract, due to its failure to secure the necessary Customs clearances and caused Customs duties and fines to be imposed which resulted in loss to Devcon. As such, it is Cap Juluca who is liable for pecuniary compensation to Devcon in the form of special and general damages. In such circumstances, it would be unjust to Devcon if the Court were to grant Cap Juluca an award of damages as requested in Cap Juluca's Counterclaim.

[121] Mrs. Richardson Hodge said that Mr. Thulander said that Cap Juluca incurred loss as a result of Devcon's non-completion of the contract. He said that Cap Juluca lost revenue because it could not be opened. He further stated that he was forced to source sand and equipment from other sources. What he failed to state, however, is that the late arrival of Devcon was in part as a result of Cap Juluca failing to pay the mobilization fee within the anticipated time. He also failed to state that Devcon's work involved dredging the sand from the beach and offloading it onto another company's trucks. There were, therefore, other contractors employed by Cap Juluca prior to Devcon's arrival which played a role in the beach replenishment. Devcon had no role to play on the landside aspect of the replenishment. Moreover, the evidence shows that sand from Barbuda had already been purchased prior to Devcon even receiving notice that the Contract had been signed by Cap Juluca. More importantly, Mr. Thulander, on cross-examination, acknowledged that he did not have any knowledge as to the following: the scope of Devcon's contract; the scope of the work of the contractors that came to the site after Devcon's barge became inoperable; whether the scope of work of these contractors was in relation to the same scope of work that Devcon was contracted to do. Learned counsel Mrs. Richardson Hodge therefore submitted that the documents relied on by Cap Juluca ought not to be accepted at all or, in the alternative, very little weight ought to be attached to them, as Mr. Thulander could not properly assert that the sums claimed in Cap Juluca's documents were in relation to Devcon's failure to perform and complete its scope of work.

[122] Accordingly, Mrs. Richardson Hodge submitted that the counterclaim put forth by Cap Juluca has no merit and the evidence does not support the claims being made.

Whether Devcon Breached the Contract

[123] Learned counsel Mrs. Richardson Hodge reiterated that it was as a result of Cap Juluca's failure to clear the barge with Customs that resulted in the barge being seized and detained in the waters and a fine ultimately imposed. As a result of that detention, significant delay was experienced and the barge received severe damage. This delay and the damage were consequences of the breach of the contract by Cap Juluca and, as such,

Cap Juluca is liable for the losses suffered by Devcon. Mrs. Richardson Hodge was adamant that Devcon did not breach the contract.

Quantum of Damages

[124] The principle of quantum meruit is relevant to the case at bar, opined Mrs. Richardson Hodge.

[125] According to **Halsbury Laws of England**, Vol 40 (2), Fourth Edition at paragraph 1413:

"A Claimant who has performed services to the defendant prior to his decision to terminate the contract on the ground of the defendant's repudiatory breach of contract may either bring a claim in contract against the Defendant for loss for which he has suffered as a result of the defendant's breach of contract or he may bring a restitutionary claim against the defendant to recover the value of any benefit which he has conferred upon the defendant prior to the termination of the contract. The claimant cannot bring both claims, he must elect between them."

[126] In **D & B Trucking & Trailer Hauling Service Limited v. Caribbean Insurers Limited** at paragraph 17, it was stated that in a contract where a party commences work under a contract and is prevented by the other party from completing it, he would be able to claim payment on quantum meruit basis. Her Ladyship George-Creque J.A. stated in that case that the party who has done the work is entitled to be paid on a quantum meruit basis precisely because there was a term of the contract providing for what was to happen if the work was only partially completed as a result of the other party's breach.

[127] Mrs. Richardson Hodge said that in order to establish its claim, Devcon must prove that Cap Juluca was enriched as a result of the work done in performance of the contract. It can do this either by demonstrating that Cap Juluca requested that the work be done or that Cap Juluca has incontrovertibly benefited as a result of the work done. Where Devcon has performed only part of the work requested prior to the termination of the

contract, the defendant will not generally be entitled to maintain that he was not enriched by the part performance, given that it was his breach of contract which prevented the completion of the work.

[128] Mrs. Richardson Hodge posited that the parties contracted that the work would be done at a daily rate of US\$12,500 for an anticipated period of thirty (30) days. Devcon worked for six (6) days. Invoices in the amounts of US\$195,000 and US\$100,000 representing the mobilization and the demobilization fees were submitted to Cap Juluca. These amounts had been incurred from the time Devcon mobilized to Anguilla in furtherance of the contract and without which Cap Juluca would not have had the benefit of the days of work performed by Devcon or the use of Devcon's truck thereafter. Invoice TAN8024-2 in the amount of US\$107,386.32 was submitted to Cap Juluca by Devcon. This represented three (3) days of work at the standby rate pursuant to paragraph 13 of the Agreement, six days worked at the agreed daily rate and twelve extra hours worked after 11-hour shifts. This work performed was the work requested by Cap Juluca and, as such, served a benefit to Cap Juluca. Later, the barge sustained severe damage and the parties entered into a further contract for the use of a truck. An invoice was submitted by Devcon to Cap Juluca in the sum of US\$9,800 in relation to this work which was completed.

[129] Learned counsel Mrs. Richardson Hodge said that by virtue of the principle of quantum meruit, Devcon would be entitled to recover the value of the benefit of the work done for Cap Juluca under the original Agreement as well as the further contract. Mrs. Richardson Hodge submitted that Cap Juluca has received a windfall in relation to the work conducted without compensating Devcon for the work (including the demobilization fee which was to be paid irrespective of the particular circumstances). It should further be noted that Devcon exhibited good faith in remaining on the job site after the barge became inoperable and assisted Cap Juluca in the beach replenishment by using the remaining equipment and machinery that it did have available.

Mitigation

- [130] Learned counsel Mrs. Richardson Hodge submitted that Devcon took all necessary and available steps in order to mitigate its losses in these circumstances. In relation to Cap Juluca's Counterclaim, however, Mrs. Richardson Hodge submitted that Cap Juluca had a duty to mitigate its losses once the barge became inoperable and it failed to do so.
- [131] In the event, however, that the Court deems that the Agreement was not a daily rate contract but a fixed term contract, Devcon recognizes that Cap Juluca was obliged to continue the beach replenishment after Devcon's barge became inoperable. The difficulty with Cap Juluca's counterclaim in this respect, however, is that the main witness for Cap Juluca, Mr. Thulander, could give no evidence in relation to which work (from all of the invoices submitted in support of Cap Juluca's counterclaim) constituted work that was to have been conducted by Devcon but which was conducted by other parties. The Court cannot properly act on that quality of evidence.

Whether Devcon Breached the Agreement by entering at Maundays Bay

- [132] Mrs. Richardson Hodge said that both Mr. Smith and Mr. Browne gave evidence that they were involved in 1995 with the beach replenishment job at Cap Juluca while they were working with Devcon International. At that time, the barge came in directly to Maunday's Bay beach without stopping at any of the Customs ports in Anguilla. Mrs. Richardson Hodge submitted that there was an expectation on Devcon's part that similar arrangements had been made in relation to this occasion. Mr. Togel identified Mr. Bell as an Assistant Site Supervisor whose role was to liaise with the contractors doing the hurricane restoration work on a daily basis on the site. Mr. Togel confirmed that Mr. Bell was the main contact person at DCK who was in communication with Mr. Browne regarding Devcon's arrival to the site.

Learned counsel Mrs. Richardson Hodge said that it is interesting to note that Mr. Bell, the main employee of DCK who was in constant communication with Mr. Browne with respect to Devcon's arrival directly at the Cap Juluca site, was not a witness in the case. Learned

counsel Mrs. Richardson Hodge submitted that none of the other witnesses for Cap Juluca has any first-hand knowledge as to the extent and content of the discussions between Mr. Browne and Mr. Bell. There is also no evidence before the Court that can refute the evidence of Mr. Browne in relation to these discussions between himself and Mr. Jack Bell.

[133] On cross-examination, Mr. Browne was asked about the practice in relation to the arrival of a barge and issuing notice to a port ahead of arrival. In his response, Mr. Browne stated that he was unsure because the procedure is different in each island. He cited St. Martin/St. Maarten as an example and stated that one does not have to let Immigration and Customs know that the barge is coming in; one just has to go to the Immigration and Customs offices with the relevant papers and check in. Learned counsel Mrs. Richardson Hodge said that it is for this reason that Devcon was relying on the representations made to it by Mr. Bell of DCK, as Devcon did not know of the particular requirements for clearing Immigration and Customs in Anguilla.

[134] In support of her contention that Cap Juluca is liable for Devcon's illegal entry into Anguilla, learned counsel Mrs. Richardson Hodge referred the Court to *British Crane Hire Corp Ltd. v. Ipswich Plant Hire Ltd.* The Claimants and Defendants were companies engaged in the business of hiring out heavy earth-moving equipment and soon after the crane had been delivered, the Defendants, in accordance with their normal practice, sent the Claimants a printed form to be signed by them which set out the conditions of hire. Before the Defendants signed the form, an accident occurred which resulted in the crane sinking into marshy ground. Under the printed conditions, the Defendants were liable to indemnify the owner against all expenses in connection with the use of the crane. The Claimants' conditions were in similar terms to those used by all firms in the plant-hiring business including the Defendants themselves. In an action by the Claimants for the cost of recovering the crane the Defendants claimed that they were not liable under the Claimant's conditions since they had not been incorporated into the oral contract of hire. Lord Denning said at pages 5 and 6:

“From that evidence it is clear that both parties knew quite well that conditions habitually imposed by the supplier of these machines: and both parties knew the substance of those conditions. In particular that, if the crane sank in soft ground, it was the hirer’s job to recover it; and that there was an indemnity clause. In these circumstances, I think that the conditions on the form should be regarded as incorporated into the contract. I would not put it so much on the course of dealing but rather on the common understanding which is to be derived from the conduct of the parties, namely, that the hiring was to be on the terms of the claimants usual conditions.

[135] As Lord Reid said in *McCutcheon v. David MacBrayne Ltd* (at page 3) quoting from the *Scottish textbook Glog on Contract*:

“The judicial task is not to discover the actual intentions of each party: it is to decide what each was reasonably entitled to conclude from the attitude of the other.” It seems to me that, in view of the relationship of the parties, when the defendants requested this crane urgently and it was supplied at once, before the usual form was received, the claimants’ were entitled to conclude that the defendants were accepting it on the terms of the claimants’ own printed conditions, which would follow in a day or two. It is just as if the claimants had said, ‘We will supply it on our usual conditions’, and the defendants said. ‘Of course, that is quite understood’.

[136] In *Hutton v. Warren*, [1836] 1M & W466, Parke B. stated:

“It has long been settled that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed. This has been done on the principle of presumption that, in such transactions, the parties did not mean to express in

writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages."

Court's Analysis and Findings

[137] I have given careful consideration to the evidence adduced in the case at bar and the very helpful and lucid submissions of both learned counsel. The following reflects the Court's findings of fact or those facts that are otherwise agreed:

Assessment of the Evidence

[138] The Court is satisfied that Devcon's witness Mr. Dronett, had direct knowledge of the negotiations that ensued and which led to the agreed proposal. Mr. Smith III, Mr. Browne and Mr. Chellgren had very little, if any, personal knowledge of the negotiations. Mr. Togel who testified on behalf of Cap Juluca had some knowledge of the negotiations. Mr. Thulander, who testified on behalf of Cap Juluca, did not have much personal knowledge of any of the relevant matters.

[139] Be that as it may, the following are my findings of facts. Devcon Ltd (Devcon) is a company that is registered in the Turks and Caicos and is involved in heavy and marine construction business. Cap Juluca Properties Ltd (Cap Juluca) is the owner/operator of the resort in Anguilla. The resort is located on Maundays Bay beach. It is one of the finest resorts in Anguilla. Unfortunately, nature tends to affect its lovely beaches. In fact, with the passage of Hurricane Omar, the weather system damaged the beach and caused serious erosion. The resort had been booked for visitors' arrival. The resort was expecting guests and therefore needed to have the beach replenished urgently. Through its agent DCK, it approached Devcon to assist with the restoration efforts. Much of the negotiations were done by Mr. Togel on behalf of Cap Juluca as the Chief Engineer and Mr. Dronett on behalf of Devcon. Even though Mr. Dronett provided a witness statement, it is noteworthy that he was not called as a witness. Indeed, discussions were had between Cap Juluca,

its agent DCK and Devcon in relation to the replenishment of the beach. Mr. Jack Bell of DCK played an important role in the negotiations.

[140] Cap Juluca was eager to reach an agreement since it was facing a situation of the impending reopening of the Resort with the concomitant tourist arrivals. Cap Juluca did not want to be faced with the situation of having its guests inconvenienced.

[141] The Court is also satisfied that when Devcon, as differently constituted, had done some work in years gone by for Cap Juluca, the parties had made arrangements for the equipment to be cleared by the Customs officials at the site. On this occasion, due to inadvertence, there was miscommunication between the parties in relation to the importation of the equipment and barge. This was due to the great haste in which the parties were seeking to mobilize the equipment. There was no discussion about the Customs clearance; both sides simply forgot to make the requisite arrangements for the Customs clearance of Devcon's equipment.

[142] The Court has no doubt that it was a genuine error that caused Devcon's barge and equipment to be brought into Anguilla at a site that is not legally recognized as a port of entry. It is clear to the Court that the parties in their haste to commence the work and given the very short period of time before the scheduled arrival of guests, simply forgot to address their minds to the clearance of the equipment. The fault must be placed at the footsteps of both parties.

[143] There is dispute between the parties as to whether the Agreement that was reached was one for the replenishment of the beach or whether it was for the provision of specified services. It is clear that the Agreement was specific in nature and spoke to three precise areas: mobilization, demobilization and the daily utilization of fuel and rental for thirty (30) days.

[144] In the events that unfolded, Devcon submitted a proposal to Cap Juluca and it was accepted. There was an oversight by the parties and the issue of the Customs clearance of the barge and equipment was not addressed. In order to get its equipment to Anguilla,

Devcon was required to move its barge and equipment from Turks and Caicos and then to St. Martin and finally to its destination in Anguilla. The movement of the barge and equipment from Turks and Caicos to St. Martin appeared to have been uneventful. Devcon's barge and equipment were eventually brought into Anguilla and were in the process of being offloaded at a point that is not an official port of entry, namely, Maundays Bay beach. The Customs authorities got wind of this and seized the barge and equipment on site. The equipment and barge were impounded for three days and charges were levied by the Customs authorities. The barge and equipment were released after three days and Devcon commenced its work. The release was primarily as a result of Cap Juluca's negotiations with the Customs authorities, since the Customs authorities refused to interact directly with Devcon's representatives.

- [145] During its detention, the barge remained in the waters which were rough. There seemed to be a dispute as to who was responsible for paying the fines and duties. There was communication from Cap Juluca's representatives to Customs authorities in relation to the undertaking to pay the fines and duties. As a consequence, the Customs authorities released the barge and equipment and Devcon's employees commenced its work of dredging sand from offshore. The barge had suffered some damage as a result of having to remain in the rough seas for three days.

Within a few days of the commencement of the work the barge sustained some further damage. In an effort to assist Cap Juluca, Devcon's employees nevertheless continued to excavate sand from offshore. The barge was further damaged and became inoperable which resulted in Devcon having no alternative than to abort all work and to take its equipment to safety. Subsequently, Devcon sought to demobilize its barge and equipment and to take them out of Anguilla but was prevented from doing so since the fines and duties that were levied had remained unpaid.

- [146] Previously, Cap Juluca had purchased some sand from Barbuda. As a consequence of Devcon's inability to continue to excavate, Cap Juluca purchased more sand from Barbuda and requested Devcon to assist in the offloading of the sand with the use of its landslide or

shore equipment, to which Devcon agreed. It was determined that Devcon's barge was in need of repairs but that the landslide equipment would remain to assist with the offloading of the sand from Barbuda.

[147] Meanwhile, Devcon had forwarded several invoices to Cap Juluca for payment, some of which were paid while Cap Juluca refused to pay others.

[148] With several months having passed and the fines and duties (restoration fee) not having been paid, Cap Juluca entered into further discussions with the Customs authorities which resulted in substantial reduction in the (restoration fees) fines and duties that were levied. Another dispute developed between the parties in relation to whose responsibility it was to pay the fine and duties that the Customs Department had levied. Eventually, Devcon paid the fines and duties and was able to take its equipment out of Anguilla.

[149] In those circumstances, Devcon has filed the claim against Cap Juluca in which it alleges that Cap Juluca has breached the contract by failing or neglecting to obtain the requisite Customs clearance which ultimately resulted in damage to the barge and equipment. Devcon says that the cost of repairing the equipment was US\$208,710 and seeks to be reimbursed for this sum which it says was expended.

[150] Devcon also seeks reimbursement from Cap Juluca for the fines and duties (restoration fees) in the sum of US\$156,912 that it paid to the Customs Department. Also, Devcon claims for the cost of the work that it alleged it did prior to damage to the barge and for which it had not received payment. Also, Devcon seeks compensation from Cap Juluca for the assistance it rendered to Cap Juluca in relation to the replenishment of the beach using sand from Barbados. The total sum for the unpaid invoices is US\$217,183.20. In addition, Devcon seeks to be reimbursed the handling fees that it paid in the sum of US\$9,500.

[151] In total, Devcon claims special damages in the sum of US\$1,201,308.82 against Cap Juluca together with general damages, interest and costs.

- [152] Cap Juluca has filed a defence and counterclaim against Devcon. Cap Juluca says that the contract was for the provision of emergency beach replenishment services and equipment rental for a period of thirty (30) days. It says that while it was responsible for paying the Customs duties incurred as a result of Devcon's barge and equipment's lawful entry into Anguilla, it was neither responsible nor liable to pay the fines that the Customs Department had imposed due to Devcon's illegal entry into Anguilla. Cap Juluca says that all of the restoration fees were fines.
- [153] Cap Juluca denies that it has breached the Agreement. It says that instead it is Devcon that is in breach of the Agreement. Also, Devcon's barge and equipment arrived much later than the date that was agreed. Devcon unlawfully entered Anguilla at a place that was not an authorized port of entry. As a consequence of the illegal entry, its barge and equipment were seized on site. Cap Juluca and its agents intervened on behalf of Devcon and after days of negotiation, the Customs authorities permitted Devcon to utilize its equipment. Cap Juluca says that neither it nor its agents gave permission to Devcon to enter an unlawful port; in fact, it did not have authority to do so. Cap Juluca says that the Comptroller of Customs seized some of Devcon's equipment. He had ordered that the barge should remain in place. A broker was requested to be used to liaise between Devcon, Cap Juluca and the Customs Department. Safe Cargo services were used as the broker.
- [154] Cap Juluca maintains that it has not breached the Agreement. Devcon agreed to provide replenishment services for thirty (30) days and it failed to do so. Accordingly, it is Devcon that is in breach of the Agreement. In addition, Devcon improperly put its spuds down and even after they were damaged in the rough seas, Devcon negligently continued to utilize the barge with the damaged spuds, thereby causing it further damage.
- [155] Cap Juluca says that it is not responsible for the payment of the handling fees which Devcon incurred as a result of the illegal entry of the barge and equipment into Anguilla. Cap Juluca says that after Devcon's equipment were seized by Customs Department and there were ensuing discussions between itself (Cap Juluca), Customs and DCK. In fact, Cap Juluca intervened on Devcon's behalf since the Comptroller of Customs was

unprepared to have negotiations with Devcon. It was in that context that it wrote the letter to the Customs Department requesting the release of Devcon's equipment and indicating that the fines and duties would have been paid. Cap Juluca strenuously denies that it was in any way liable to pay the fines or duties that were charged by the Comptroller of Customs.

- [156] Cap Juluca denies that it requested Devcon to have the equipment on standby for three (3) days while it sorted out the Customs difficulties. Instead, during the intervening period, Devcon was able to prepare and provide the list of equipment that it had imported into Anguilla illegally in order to provide the information to the Customs authorities. In any event, the equipment was seized for the three (3) days. Cap Juluca denies that it owes Devcon the mobilization fees since the payment of these fees was contingent on Devcon successfully completing the contract services.
- [157] Cap Juluca says that due to Devcon's breach of the Agreement it was forced to purchase sand from Barbuda. As a consequence, it suffered severe losses. Indeed, it was unable to bill some of the Resort guests during the protracted period of the replenishment of the beach. The completion of the project was delayed and Cap Juluca says that this was as a consequence of Devcon's breach. The Resort was unable to bill the guests who had arrived during those three (3) days.
- [158] Cap Juluca has also counterclaimed for loss of revenue for the three (3) days at a total cost of US\$125,000. Also, it says that due to Devcon's negligence, it was forced to contract an alternative barge and incurred substantial expenses. It says that it had to import sand from Barbuda and hire trucks and heavy equipment from other persons. The total costs that it incurred was US\$1,983,107 and this was directly as a consequence of Devcon's breach of the Agreement. It has also counterclaimed for the future costs of completing the project in the sum of US\$369,367. Devcon disputes the counterclaim in its entirety.

I come now to address the issues that are raised.

Issue No. 1: Was the Contract a Daily Rate Contract or a Fixed Rate Contract?

[159] In seeking to answer this question, the Court is required to examine the entire terms of the contract. No single provision of the proposal should be construed in isolation. There is no dispute that the terms of the agreement were reduced into writing in the proposal dated the 29th of October 2008, which was submitted by Devcon and accepted by Mr. Adam Aron on behalf of Cap Juluca. The Court is guided by the very helpful judicial pronouncements of Sir Vincent Flossiac CJ, as he then was, in *Donald Halstead v. Attorney General of Antigua and Barbuda*, [1995] 55 WIR 98. The Court must give effect to the common intention of the parties. Indeed, in seeking to determine the nature of the contract, the Court must construe the entire agreement and all of the relevant surrounding circumstances which are known and should be within the contemplation of the parties at the time of execution of the contract. A close review of the entire contract confirms the Court's view that the common intention of the parties was that the contract was one for a fixed period of thirty (30) days. Even though there was a daily rate stated in the proposal, this was clearly in addition to the fixed sum. The Court is fortified in the above view, having looked at the other aspects of the contract such as the fact that the total cost of the project was stated as US\$670,000. In addition, paragraph 29 of the proposal clearly supports the view that the parties' common intention was that the proposal was in relation to the fixed contract for a period of thirty (30) days. This does not negate the fact that the parties estimated the production rate of 500-1,000 cubic yards per day.

[160] In view of the above conclusion, the Court does not share the view expressed by learned counsel, Mrs. Richardson Hodge, that even though the parties' common intention was that the contract was for the replenishment of the beach by Devcon for a period of thirty (30) days; it was nevertheless a daily contract. Beyond that conclusion, the Court is unable to share the view articulated by learned counsel Mrs. Ruan that unless the entire contract was completed, Devcon is not entitled to be paid for the days on which it actually worked. Indeed, the Court is in respectful disagreement with learned counsel Mrs. Ruan that since the contract was for a period of thirty (30) days, Devcon is debarred from receiving payment for the completion of work on the days it worked. It seems to me that on the basis of quantum meruit that Devcon would clearly be entitled to receive compensation for

the six (6) days and eleven hours on which it provided service to Cap Juluca. Any other view would have the effect of enabling Cap Juluca to be unjustly enriched at the expense of Devcon.

Issue No. 2: Who is Responsible for Paying the Handling Fees?

[161] In addressing this issue, here again the Court is required to turn to the terms of the contract in order to find the answer to this question. The oral evidence of the witnesses who testified on behalf of Devcon and Cap Juluca on this issue was very unhelpful. With the greatest of respect, in seeking to resolve this issue, it is immaterial or irrelevant as to who recommended that the brokers, Safe Cargo, be utilized in order to process the customs documents. It would have been helpful if both sides had presented evidence of the practice in the industry. No such evidence was presented. The written agreement has clearly spelt out that the contractor will not be responsible for any charges for importation customs duties, stamp taxes, local taxes or bond fees applicable to equipment, fuel and lubricants. It therefore calls for the Court to determine whether the handling fees properly fall within any of the above categories. Handling fees are typically referred to as brokerage fees.

[162] It seems to me that charges for importation customs duties refer to official charges that are levied by the Customs Department of Anguilla as distinct from charges which are payable to brokers. In addition, the handling fees are not compulsory since, in the appropriate case, an importer is not obliged to incur these costs but can properly process the importation documentation on its own. Accordingly, I do not share the view that the handling fees were covered in the importation customs duties and are therefore payable by Cap Juluca. The handling fees are expenses that were not covered by the agreed letter of proposal. These fees are expenses which Devcon incurred and for which they are responsible. To put it another way, the handling fees cannot be properly categorized as charges for importation or customs duties. These are separate and distinct expenses from importation customs duties.

Issue No. 3: Whether the Arrival of the Barge at Maundays Bay was in Breach of Contract

[163] In view of the Court's findings of fact above that Devcon's arrival at Maundays Bay beach was occasioned by a genuine miscommunication between the parties, the Court is of the view that this is no longer a live issue to be determined. By way of comment, the Court reiterates that the parties in their haste to have the beach replenished in the shortest possible time, failed to address their minds to the clearance of the equipment, fuel and lubrications. I do not accept that Devcon is solely responsible for its equipment and barge entering Maundays Bay beach. Both Devcon and Cap Juluca are responsible for the breaches of the law. There is no doubt that they both made the error of not discussing this aspect of the matter, even though DCK's employees told Devcon that they could have arrived at Maundays Bay beach.

[164] Equally, and for the reasons stated above, the Court is satisfied that the case of *British Crane Hire Corp v. Ipswich Plant Hire Ltd*, [1975] QB 303, that was referred to by learned counsel Mrs. Richardson Hodge, is clearly distinguishable from the case at bar; so too is the case of *Hilton v. Warren*. The Court is fortified in this view, bearing in mind that Devcon's witness, Mr. Browne, in cross-examination stated that the practice and procedure in relation to the arrival and clearance of goods varies from jurisdiction to jurisdiction. There is no evidential basis upon which the Court can conclude that there is a convention in the industry which mandates Cap Juluca to clear Devcon's equipment and barge.

Issue No. 4: Who is Responsible for Paying the Restoration Fees?

[165] Here again, in order to properly determine this issue, the Court must examine the contract and the circumstances under which the restoration fees became payable. It is indisputable that Cap Juluca is liable to pay the customs duties that were affixed to the equipment, lubricants and fuels that Devcon imported in Anguilla. There is, however, another matter that must first be ascertained, namely, whether the sum of US\$156,912.50 that was levied

against the equipment, fuel and lubricants was exclusively customs duties or whether it was a fine combined with customs duties. These are collectively referred to as restoration fees.

[166] In passing, it is important for the Court to state that having listened to Mr. Togel's evidence insofar as it relates to the Customs exemption which Cap Juluca is alleged to benefit from, the Court is convinced that there was no communication of this kind to Devcon's officials. In any event, it is clear that Cap Juluca is responsible for paying customs duties that were levied against the items that Devcon imported. It is passing strange that at all material times the officials of Cap Juluca were aware that the Customs authorities had imposed substantial duties and fines against Devcon and they never apprised Devcon of the exemption. The Court does not believe that Cap Juluca attracted the exemption as its witness Mr. Togel sought to have the Court believe. In the Court's view, Cap Juluca did not intend to pay any customs charges. The Court is in total agreement with learned counsel Mrs. Richardson Hodge that the sum of US\$156,912.50 that Devcon was required to pay the Customs authorities comprise duties and a fine in the sum of US\$62,786. It is also clear that Cap Juluca's officials did not act in good faith. It merely concerned itself with getting the services of Devcon and was not concerned with the payment of customs duties and fines. It must however be borne in mind that the customs duties were to be billable weekly. Be that as it may, eventually when Cap Juluca sent the letter to Customs it did not intend to make the payments; it was only a holding measure. It is very clear that Cap Juluca is liable to reimburse Devcon the sum of money that was paid for Customs duties, namely, US\$94,147.50.

[167] The Court is not of the view that Cap Juluca is liable for the fine that Customs imposed on Devcon for illegally entering into Anguilla in the sum of US\$62,756. It could not have been in the contemplation of either of the parties that Devcon would have entered Anguilla illegally. Neither could it have been anticipated that Devcon would have been fined. In any event, the customs duties and taxes that Cap Juluca agreed to pay for in the proposal were those ordinarily associated with the importation of the items by Devcon. In a word,

the Court has no doubt that Cap Juluca is liable to reimburse Devcon the sum of US\$94,147.50.

[168] I am fortified in the above view, bearing in mind that the relevant Customs legislation places the onus on the master of the vessel to ensure that there is a declaration of the equipment and fuel to be imported into Anguilla. Failure to comply with the law can result in that person being fined substantially. Cap Juluca cannot properly be saddled with the payment of the fine. Also, the legislation imposes the duty on the importer to pay the duties. However, in the case at bar, Cap Juluca clearly agreed to pay the customs duties in accordance with the agreed proposal and cannot properly resile from that commitment.

[169] Accordingly and by way of emphasis, the part of the monies that represent customs duties are to be paid by Cap Juluca while Devcon must pay that part which represents the fine.

[170] For the sake of completeness, it is worth stating that I have no doubt that Cap Juluca had written to Customs indicating that it would have been responsible for the payment of the fines and charges for the sole purpose of having Customs release the detained equipment. I am convinced that at no time did Cap Juluca ever intend to pay the fines and charges but only wrote that letter in order to have Devcon's equipment released so that the work on the replenishment of the beach would commence.

Issue No. 5: Who or What caused damage to the barge?

[171] On this issue, by and large, the Court accepts the evidence of the witnesses who testified on behalf of Devcon in preference to those who testified on behalf of Cap Juluca. There is no basis for which the Court can properly conclude that the barge was either damaged on its way to Anguilla or from its use in the Turks and Caicos; to do so would require me to speculate.

[172] Based on the cogent and overwhelming evidence that was led by Devcon, I have no doubt that the damage to the barge was initially caused by the fact that it was forced to remain in rough seas for several days during the period it was impounded. This damage was exacerbated when only three days into its use during the excavation process it broke its first spud. The barge suffered severe damage when Devcon continued to work. I believe Mr. Smith's evidence in preference to Mr. Togel's.

Issue No. 6: Whether in the Circumstances that obtained the Contract was Frustrated.

[173] In view of the above conclusions, the Court is not of the view that Devcon breached the contract which it had with Cap Juluca. Both learned counsel, Mrs. Richardson Hodge and Mrs. Ruan, at the Court's invitation, have very helpfully furnished the Court with additional submissions on the frustration of the contract. Bearing in mind that the Court has already concluded that the damage to the barge was initially caused as a consequence of its detention in the rough seas, Devcon could not have foreseen that there was the possibility of this occurring. Some years ago when Devcon was required to do work for Cap Juluca, their barge and equipment entered Anguilla and went straight to Maundays Bay beach. As stated earlier, I believe Devcon when they were told that on that occasion the parties had arranged beforehand for the equipment to be cleared by Customs authorities at the site of work, namely, Maundays Bay beach. Equally, the Court is of the considered view that on the previous occasion after full discussions between the parties, Cap Juluca had organized for all of the equipment to be imported into Anguilla.

[174] It bears stating that even though the barge and equipment were inadvertently brought into Anguilla at an illegal port, perhaps the better course was for Customs not to have ordered that the detained barge remain in the rough seas. The Court reiterates that it was the detention of the barge in the rough seas for three (3) days that caused its initial damage. The contract was clearly frustrated. The occurrence of the frustrating event brings the contract to an end forthwith, without more and automatically. See *Hirji Malji v. Chang Yue SS Co*, [1926] AC 497 at 505. The case in *Apple v Meyers* is clearly distinguishable from the case at bar.

Issue No. 7: Whether Cap Juluca is Liable for the Damage that was caused to the Barge

[175] I reiterate that the damage to the barge cannot be attributed in any way to Cap Juluca. The Court believes Cap Juluca's witness who says that they did not encourage Devcon to work the barge after it had already broken its first spud. Devcon was obviously well-intentioned and the Court accepts as true that given the efforts that they had put into mobilizing to commence the replenishment of the beach, coupled with the fast approaching date of the reopening of Cap Juluca, Devon wanted to assist and fulfill its obligations to Cap Juluca. It is appropriate for me to state that it was quite unwise for the Devcon's officials to have continued to work, thereby damaging the spuds further. The Court must hasten to add that all of this may well have been done with the best intentions in the world and, in any event, the service after the barge was damaged was never rejected by Cap Juluca.

[176] In the circumstances, there is no way in which Cap Juluca could be held responsible or liable for the damage which the barge sustained. Devcon must therefore bear the loss occasioned by the damage to the barge, exclusively.

[177] In view of the totality of circumstances, the Court is not of the view that Cap Juluca is liable to pay any monies that Devcon has expended in repairing the barge. Neither is Devcon entitled to be compensated by Cap Juluca for any loss of revenue that Devcon may have suffered.

Issue No. 8: Whether Cap Juluca is in Breach of the Further Agreement

[178] It is disputable that after Devcon was forced to discontinue its excavation exercise after the barge broke its second spud, the parties entered into a second contract. The terms of the second contract through which Devcon was to have utilized its landside excavation equipment and, in particular, are that Devcon agreed to use its truck at a daily rate of US\$350 per hour. Devcon has claimed the sum of US\$9,800 for work it provided to Cap Juluca by way of the use of dump truck for three (30) days. The very cogent evidence that

is before the Court, Cap Juluca has benefited from the work and is obligated to compensate Devcon in the sum of US\$9,800. I simply do not believe that Devcon abandoned the work as Cap Juluca sought to impress upon me. Mr. Browne who gave evidence on behalf of Devcon just gave the impression of being very honest and straight forward and I believe him. The Court is therefore of the view that Cap Juluca breached the contract that existed between itself and Devcon.

Issue No. 9: What is the Quantum of Damages, if any, which Devcon is Entitled?

[179] I accept and apply the helpful principles that were enunciated *in D & B Trucking and Trailing Handling Service Ltd v. Caribbean Insurers Ltd* *ibid*.

Six Days Work

[180] Having reviewed the evidence, the Court is satisfied that Devcon worked for six days and eleven hours in providing replenishment services to Cap Juluca before the barge became inoperable. The accepted daily rate is US\$12,500. Accordingly, Devcon is entitled to be paid the sum of US\$75,000 which represents the sum earned over the period of six days on the basis of the principle of quantum meruit. The Court also believes Mr. Smith that Devcon worked the extra hours as claimed and is therefore entitled to be compensated by Cap Juluca in the sum of US\$13,676. It bears stating that Cap Juluca has clearly evinced an intention not to pay Devcon for any of the services from which it benefitted.

Customs Duties

[181] As stated above, equally, Cap Juluca is liable to reimburse Devcon the sum of US\$94,147.50 which it paid as Customs duties. This is entirely in accordance with the Agreement between the parties.

Standby Rate

[182] Devcon has claimed payment from Cap Juluca for the three (3) days during which the barge and equipment had been seized. The Court is persuaded by the arguments

advanced by learned counsel Mrs. Ruan that Cap Juluca cannot be held liable to pay Devcon for the three (3) days when the equipment was under seizure by the Customs Department. This delayed the time during which Devcon was able to work and which the Court accepts was occasioned by the intervention of the Customs authorities for which Cap Juluca cannot properly be held accountable

Demobilization Fee

[183] Devcon submitted to Cap Juluca invoices for demobilization fee which has remained unpaid. Devcon complains that Cap Juluca has refused to reimburse it in the sum of US\$100,000 demobilization fee as agreed in the contract. Insofar as the Court has ruled that the original agreement has been frustrated, the Court is not of the view that Cap Juluca is liable to pay Devcon the demobilization fee of US\$100,000. The Court reiterates and holds the view that by virtue of the frustration of the contract, both sides are discharged from the obligation to further perform under the contract. In contradistinction, however, any rights that have accrued before the discharge of the contract must be honoured. Accordingly, there was no breach of the contract and Devcon is not entitled to receive general damages.

Issue No. 10: Whether Devcon is Liable to Compensate Cap Juluca for its Losses

[184] Cap Juluca has counterclaimed for damages against Devcon on the basis that Devcon had breached the contract. The Court is not of the view that Devcon breached the contract. The main witness who testified in support of the counterclaim was Mr. Thulander. Let me say straight away that the Court is of the view that most of the evidence that he provided was not credible. He did not paint a very good picture and, in fact, he knew very little, if anything, about the replenishment project. Under intense cross-examination by learned counsel Mrs. Richardson Hodge, it became very apparent that much of what Mr. Thulander said was inadmissible and exaggerated. Mr. Thulander knew nothing about the work for which Devcon was contracted nor did he know about the scope of work of the substantive contractors. When he was further pressed by learned counsel

Mrs. Richardson Hodge during cross-examination, it became obvious that he was a witness of convenience.

[185] It is clear from the evidence that several factors contributed to the late commencement of Devcon's input in the dredging exercise, including Cap Juluca not having forwarded the mobilization fee in a timely manner. My assessment of Mr. Thulander is that he is not a forthright gentleman. Several things that he told the Court could not withstand scrutiny. The fact that no other witness was called to contradict what Mr. Thulander told the Court, without more, does not mean that the Court is obliged to accept his evidence.

[186] For the sake of completeness, it should be stated that much of the losses that Cap Juluca claimed to have suffered were not proven. Where there was any proof of losses, it was very unclear that the losses were occasioned as a result of the frustration of the contract. As if not enough, Cap Juluca clearly has given the impression that it intends to gain a windfall based on the very dubious and unreliable evidence. Also, much of Mr. Togel's evidence was self-serving and unreliable.

[187] In view of the totality of the circumstances, Cap Juluca has failed to establish its counterclaim against Devcon. Most of the special damages that have been claimed by Cap Juluca are highly inflated and fanciful. In view of the fact that the frustration of the contract has been established, Cap Juluca is not entitled to claim losses for anything that flows thereafter.

[188] In view of the circumstances, the contract between Devcon and Cap Juluca was frustrated by the intervening circumstances. Devcon was thereby discharged from further performance of the obligations under the contract. Cap Juluca is thereby not entitled to be compensated for any expenses it had incurred in order to complete the replenishment of the beach.

Conclusion

[189] In view of the premises, there shall be judgment for Devcon Ltd against Cap Juluca Properties Ltd (Doing business as Cap Juluca Resort). Cap Juluca Properties Ltd's counterclaim against Devcon Ltd is dismissed.

[190] The Court therefore orders that:

1. Cap Juluca Properties Limited (Doing business as Cap Juluca Resort) is to pay Devcon Ltd the total sum of US\$192,583 as compensation.
2. Prescribed costs are awarded to Devcon Ltd, unless otherwise agreed.

[191] I commend learned counsel for their industry.

Louise Esther Blenman
Resident High Court Judge
Anguilla