COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2013/CLE/gen/01310

BETWEEN

SOLDIER CRAB LIMITED
t/a SANDY TOES

Plaintiff

AND

AQUA TOURS LIMITED

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Kevin Moree of McKinney Bancroft & Hughes for the Plaintiff
Mr. James M. Thompson Jr. for the Defendant

Hearing Dates: 20, 21 July 2016

Breach of Contract – Misnomer – Identity of a Company – Parties to a Contract – Was plaintiff a party to the contract –Whether mistake in name nullifies contract - Principles governing commercial contract

Illegality - Ex turpi causa non oritur actio – Effect of Non-Compliance with Companies Act – Effect of Non-Compliance with Business Licence Act – Evidential Presumption in Favour of the Plaintiff when Damages Uncertain

Estoppel – Conduct by Estoppel

On 14 December, 2011 a written contract was entered into by two parties which were named in that contract as “Aquatours Ltd.” and “Sandy Toes, Ltd.”. In the body of that contract the parties were also referred to as Aquatours and Sandy Toes, respectively. Aquatours Ltd. agreed to provide Sandy Toes, Ltd. with boat transportation services using the vessel M.V. “Island Time” at agreed times for an agreed price. That contract was signed by Jedison Knowles, a Director of the Defendant, on behalf of Aquatours Ltd. and Iola Knowles, a Director of the Plaintiff, on behalf of Sandy Toes, Ltd.. The initial contract period was from 1 January, 2012 until 31 December, 2012 and the parties performed that contract in its entirety.

On 31 December, 2012, a subsequent written contract was entered into which was almost identical to the previous contract. The parties named in that contract were “Aqua Tours Ltd.” and “Sandy Toes, Ltd.”. Again, in the body of the contract the parties were also referred to as Aquatours and Sandy Toes, respectively. Jeffrey Knowles, a Director of the Defendant, signed

on behalf of Aqua Tours Ltd. and Iola Knowles signed on behalf of Sandy Toes, Ltd.

Both parties acted in accordance with the contract for almost six (6) months until 21 June, 2013 when the boat was no longer made available.

The Plaintiff commenced an action seeking damages for breach of contract and the Defendant alleges that the 31 December, 2012 contract is a nullity because it is with a non-existent company. The Defendant further alleges that the contract is not enforceable because the Plaintiff has not acted in accordance with certain provisions of the Companies Act and Business Licence Act.

HELD:

1. A company, like a natural person, has characteristics other than its name by which it can be identified. Such characteristics include its trading name, type of business, place of business and agents/directors.

2. The Defendant knew that it was contracting with a company which operated using the name "Sandy Toes", had a tourist excursion business on Rose Island which required its customers to be transported by boat to and from Paradise Island and Ms. Iola Knowles acted as its agent. These characteristics are identical to that of the Plaintiff.

2. The Plaintiff is a party to the contract and the use of the name Sandy Toes, Ltd. rather than its corporate name, Soldier Crab Limited or its trading name, Sandy Toes was a misnomer.

3. Even if the Court was wrong to find that Sandy Toes, Ltd was a misnomer, based on the relevant background facts along with the pre-contractual negotiations, it is plain that there was a common mistake by the parties as the Plaintiff was intended to be the party to the contract and therefore the court will order the rectification.

4. The Defendant's performance of the contract for more than six (6) months prior to the breach estops it from claiming that the contract is unenforceable: **Taylors Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd. and Old & Campbell Ltd. v Liverpool Victoria Friendly Society** [1982] QB 133 relied upon.

5. Even if the Plaintiff contravened the law by not displaying or publishing its corporate name, that does not amount to illegality of the contract. In any event, illegality must be specifically pleaded.

6. As a result of the Defendant's breach of contract, the Plaintiff suffered damages. Due to the nature of the Plaintiff's business, it is difficult to calculate the exact amount of damages. In these circumstances, there is an evidential burden in favour of the Plaintiff and it is accepted that the best approach to calculate the damage suffered is to consider the loss of profits caused by the Defendant's breach of contract. The Plaintiff is only able to claim the damages suffered from the date of the breach until sixty (60) days later because of the termination clause in the contract: **Double G. Communications Ltd. v News Group International Ltd** [2011] EWHC 961 applied.

7. The Plaintiff is entitled to damages with interest and costs for breach of contract: **Hadley**

v Baxendale (1854) 9 Exch. 341 applies.

8. Costs are discretionary. However, the discretionary power to award costs must always be exercised judicially and not whimsically or capriciously. The Judge is required to exercise his discretion in accordance with established principles and in relation to the facts of the case and on relevant grounds connected with the case, which included any matter relating to the litigation; the parties' conduct in it and the circumstances leading to the litigation, but nothing else: see Buckley L.J. in **Scherer v Counting Instruments Ltd**.[1986] 2 All ER 529 at pages 536-537.

9. The Court does not consider that the circumstances warranted the imposition of indemnity costs. Costs are taxed at $25,000.

JUDGMENT

Introduction

[1] **Charles J:** The Plaintiff sued the Defendant for breach of contract arising out of its alleged failure to provide transportation to the Plaintiff's customers from Rose Island to Paradise Island. The Plaintiff alleged that its customers were left stranded on Rose Island and so, it was forced to source alternative transportation. As a result, it suffered loss and damage. For reasons which appear below, this court enters judgment for the Plaintiff and awards damages in the amount of $100,768.45, interest with costs taxed at $25,000.

The parties

[2] The Plaintiff is and was at all material times a company incorporated under the Laws of the Commonwealth of The Bahamas which owns and operates a day excursion business, restaurant and bar called "Sandy Toes" on Rose Island. On 27 August 2009, the Plaintiff was issued a Certificate of Incorporation under the name and style of Soldier Crab Limited. On 1 December 2009, the Plaintiff was issued a Certificate of Incorporation pursuant to the Registration of Business Names Act, 1989 which recognised its trading name as "Sandy Toes". At all material times, Iola Hildergard Valery Knowles ("Ms. Knowles") was the secretary and one of the directors of the Plaintiff.

[3] The Defendant is and was at all material times a company incorporated under the Law of the Commonwealth of The Bahamas which, among other things,

owned and operated a motor vessel called MV Island Time ("Island Time") which is licensed to carry a maximum of 200 passengers and used to provide boat transportation services. At all material times, the Defendant's directors were Jeffrey Knowles ("Mr. Knowles"), Lisa Knowles ("Mrs. Knowles"), Jedison Knowles and Jamieson Knowles.

Background facts

[4] The background facts are largely undisputed. To the extent that there is any departure from the agreed facts, then what is expressed must be taken as positive findings of fact made by me.

[5] Sandy Toes, Ltd and Aqua Tours Ltd initially entered into a written contract dated 14 December, 2011 for boat transportation services at specified times using Island Time to ferry the Plaintiff's customers from Paradise Island to Rose Island and back for an agreed price. The contract was signed by Jedison Knowles, a director of the Defendant and Ms. Knowles ("the initial contract'). In the body of the contract, Sandy Toes, Ltd is referred to as "Sandy Toes" and Aqua Tours Ltd as "Aquatours". The initial contract period was from 1 January, 2012 to 31 December 2012. It was performed in its entirety.

[6] On the expiration of the initial contract, the parties entered into a second contract on 31 December, 2012 for the same services. It was signed by Jeffrey Knowles, and Ms. Knowles ("the contract"). The Plaintiff and Defendant were named in the contract as "Sandy Toes, Ltd." and "Aqua Tours, Ltd." respectively. In the body of the contract the Plaintiff is also referred to as "Sandy Toes" and the Defendant as "Aqua Tours". The commencement date of the contract was from 2 January 2013 for two years; with an option to renew. Clause 3 of the contract provides in part for cancellation. It states:

> **"Should any party need to cancel this contract for any reason, a minimum of 60 days' notice in writing to the other party is required. If this contract is not cancelled prior to December 31, 2014, it will continue on January 1, 2015, unless either party wishes to review at such time."**

[7] It is not disputed that the Defendant prepared both contracts.

[8] In or about early June 2013, the Defendant contemplated selling Island Time but when a suitable replacement boat could not be found to satisfy its obligations under the contract it advised the Plaintiff that business was to "resume as usual."

[9] The Defendant performed the services and invoiced the Plaintiff and the Plaintiff paid the invoices of the Defendant in accordance with the contract for over six (6) months until 21 June 2013 when the Defendant failed to provide Island Time as required in the contract.

[10] On or about 24 June, 2013, the Defendant sold Island time for USD$867,500.00 to a third party ("the purchaser"). Since that date the Defendant has not provided Island Time or any other vessel to the Plaintiff.

[11] The Defendant represented to the purchaser of Island Time that there was a break clause in the contract with the Plaintiff whereby a fee of $80,000 would be incurred by the Defendant if the sixty (60) days termination notice in writing was not given to the Plaintiff. No such break clause exists in the contract. Notwithstanding, the Defendant received a sum of $67,500 from the purchaser as a contribution to the alleged break clause.

[12] On 25 June 2013, the Defendant sent a letter to the Plaintiff purporting to terminate the contract as of that date. The Defendant paid no money to the Plaintiff upon the termination of the contract despite receiving $67,500 from the purchaser of Island Time.

[13] As a result, the Plaintiff instituted these proceedings claiming loss and damage for breach of contract. The Plaintiff alleged that the contract embodied its full terms however there was a misnomer whereby the Plaintiff was named "Sandy Toes, Ltd" rather than Soldier Crab Limited, its corporate name or Sandy Toes, its trading name.

[14] In its Amended Defence filed on 19 March 2014, the Defendant denied that it ever had a contractual relationship with the Plaintiff since 1 January 2012 or at all. In a nutshell, the Defendant alleges that (i) the contract entered between itself and Sandy Toes, Ltd is null and void because Sandy Toes, Ltd is a non-existent entity; (ii) the doctrine of illegality prevents the Plaintiff from seeking any relief since it contravenes the penal and civil provisions of the Companies Act, 1992 Chapter 308 ("the Companies Act") and (iii) the Plaintiff is estopped by representation from asserting that "Sandy Toes" or "Sandy Toes, Ltd" was a misnomer.

The evidence

[15] At the trial, Ms. Knowles, the Secretary and a Director of the Plaintiff testified on behalf of the Plaintiff. Mr. Knowles, President and Director of the Defendant and his wife, Lisa Knowles ("Mrs. Knowles") gave evidence on behalf of the Defendant. All parties were cross-examined and the Court had the advantage of seeing, hearing and observing their demeanour.

[16] I found Ms. Knowles to be an honest and sincere young businesswoman and I accepted her evidence in its totality. I believed her when she stated that she never acted as an agent or, in any other capacity, for a company incorporated under the laws of The Bahamas called "Sandy Toes, Ltd" and to the best of her knowledge, no such company exists or existed. I also believed her when she stated that the name "Sandy Toes, Ltd" is a misnomer and that she referred to her company as "Sandy Toes, Ltd" because it is a limited liability company. I further accepted her evidence that she was not aware of the mistake until she received a letter from the Defendant's Attorney dated 2 July 2013. She also testified that at all material times all parties knew that the contract was between the Defendant and the Plaintiff.

[17] With respect to Mr. Knowles, I found him to be candid to a certain point. I accepted his evidence that he prepared the contract and signed it on behalf of the Defendant and that Ms. Knowles signed on behalf of the Plaintiff. I also found

him to be credible when he testified that he was not aware of the corporate name of the Plaintiff until the institution of the Writ of Summons on 26 July 2013. I believed him when he stated that the Defendant never had a business relationship with the Plaintiff but with "Sandy Toes Ltd" or "Sandy Toes". I did not believe him when it came to the sale of Island Time. He was evasive until he was confronted with documentary evidence showing that Island Time was sold and he received the sum of $67,500 from the purchaser of the boat.

[18] Mrs. Knowles is the Vice-President and a director of the Defendant. I found her to be an unimpressive and inherently unreliable witness. It appeared that her goal in this trial was to dissociate the Defendant from all dealings with Sandy Toes. As such, Learned Counsel for the Plaintiff Mr. Moree spent an incredibly significant length of time in an attempt to inquire whether the name "Sandy Toes, Ltd" was ever used in correspondence between her and Ms. Knowles. It was only upon the Court's intervention that she admitted that nowhere in the email thread dated 3 January 2013 was the name "Sandy Toes, Ltd" ever used: see Volume 2 of the Agreed Bundle of Documents at Tab 114. Another example of her equivocation was with respect to the alleged mechanical problems of Island time and its subsequent sale. On 24 June 2013 at 12.00 p.m., Ms. Knowles emailed Mrs. Knowles seeking an update as to whether the Defendant had "a boat lined up for tomorrow or is Island Time going to be back up and running?" Mrs. Knowles responded tersely at 4.04 p.m. "We are still down and tried to assist in finding another boat but to no avail." She was untruthful because on 24 June 2013, Island Time was sold and she must have had knowledge of the sale: see Volume 2 of the Agreed Bundle of Documents at Tab. 126. At the end of the day, I concluded that Mrs. Knowles was not a witness to be believed.

The issues

[19] There are two key issues to be determined namely:

1. Whether or not the Plaintiff was a party to the contract;
2. If the Plaintiff was a party to the contract, what is the quantum of damages?

Misnomer

[20] First, I shall address the issue of misnomer as it will assist me in identifying whether or not the Plaintiff was a party to the contract.

[21] Ms. Knowles testified that she was not aware that "Sandy Toes, Ltd." was a misnomer until it was drawn to the attention of her attorney in a letter from the Defendant's attorney dated 2 July 2013. During her testimony, she stated that she referred to her company as "Sandy Toes, Ltd." because it is a limited liability company and not being an attorney, she did not comprehend the enormity of such a reference. At paragraph 10 of its defence, the Defendant merely denied her allegation. As I said before, Ms. Knowles impressed me as a decent young entrepreneur who was forthright to the Court. In short, I preferred her evidence to that of the Defendant's witnesses.

[22] The law is when an incorrect name of a party is used in a contract the court must determine as a matter of construction whether it is a mere misnomer or a substantive point which affects the contract. If it is a misnomer which does not create any uncertainty about the intention of the parties, the contract will not be affected by the point and the court will enforce its terms.

[23] In **Nittan (U.K.) Ltd. v Solent Steel Fabrications Ltd. trading as Sargrove Automation Cornhill Insurance Co. Ltd.** 1981 WL 186556, the UK Court of Appeal specifically addressed the issue of a misnomer when considering an insurance policy in which the plaintiff was incorrectly named. Reviewing the law governing misnomer, Lord Denning MR stated the following under the sub-heading – **THE MISNOMER**

> "**In this court we are very used to dealing with misnomers. <u>We do not allow people to take advantage of a misnomer when everyone knows what was intended</u>. I will only refer to one authority, *Whittam v W.J. Daniel & Co. Ltd.* (1962) 1 Queen's Bench 271 at page 277, where Lord Justice Donovan cited the words of Lord Justice Devlin:**
>
> **'I think the test must be: <u>how would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: "Of course it must mean</u>**

> **me, but they have got my name wrong," then there is a case of mere misnomer'…**" (Emphasis added)

[24] Lord Denning's dictum in **Nitta** is particularly instructive as it mirrors the facts of the present case. The Defendant is seeking to do exactly what Lord Denning stated was not allowed: "….*to take advantage of a misnomer when everyone knows what was intended.*" To adopt the language of Lord Denning – "*of course [the name Sandy Toes Ltd. used in the contract] must mean [the Plaintiff], but they have got [its] name wrong…"*

[25] Justice Brightman L.J. in the same judgment had this to say:

> **"In my opinion, in construing a document, the court is at liberty, as a matter of construction, to correct a misnomer. A misnomer is not, in my view, necessarily a mistake which requires the equitable remedy of rectification. The misnomer may be a mere clerical error. A simple example would be the use in a conveyance of the expression "the vendor" where clearly "the purchaser" was intended. It is not necessary to rectify the conveyance to enable it to be read and take effect as the parties plainly intended. The words "Sargrove Electronic Controls Limited" are used three times in the endorsement of the 30th May. The words mean "Solent Steel trading as Sargrove Automation" …"** 'Emphasis added]

[26] **F. Goldsmith (Sicklesmere) Ltd. v Baxter** [1970] Ch. 85 is a case relied upon by both parties. The facts bear close resemblance to the facts of the present case. The plaintiff sold a piece of land to the defendant. The memorandum of agreement gave the name of the plaintiff company, inaccurately, as Goldsmith Coaches (Sicklesmere) Ltd. **There was, in fact, no such company by that name.** Then the defendant changed his mind and did not wish to complete. The question was whether, although the contract used the wrong name for the company, the agreement could nevertheless be enforced.

[27] Stamp J made an order for specific performance against the defendant. At page 91, the judge stated:

> **"Looking at the memorandum alone, and without regard to the surrounding circumstances, I find that the person - the *persona ficta* – said to be the vendor has the following characteristics: (1) it is named Goldsmith**

> **Coaches (Sicklesmere) Ltd.; (2) its registered office is said to be at Sicklesmere; (3) it has an agent called Brewster who claims to act for it; (4) it is the beneficial owner of 'Shelley.'**
>
> **Applying the rule that a contract is to be construed by reference to the surrounding circumstances, or in the light of the known facts, I find: (1) there is no limited company which in law has the name Goldsmith Coaches (Sicklesmere) Ltd., but the plaintiff company is often known as "Goldsmith Coaches" and carries on business as a bus and coach contractor, and does so at Sicklesmere; the plaintiff company's registered office is at Sicklesmere, in the very place at which carries on the bus and coach business; (3) the plaintiff company has an agent called Brewster; and (4) it is the beneficial owner of "Shelley." I find in addition that there is no other company having those characteristics."** [Emphasis added]

[28] According to him, looking at the surrounding circumstances, there could be only one company, which could be clearly identified, which was party to the contract, and reference to it by an inaccurate name did not render the contract void. It was **"no more nor less than an inaccurate description"** (at 91G) of the company, but it was still entirely clear from the surrounding factual circumstances that it was the company who was the other party to the contract.

[29] At page 92, the learned judge continued:

> **"In the absence of authority constraining me to do so – and none has been cited – I would find it impossible to hold that a company incorporated under the Companies Act has no identity but by reference to its correct name, or that, unless an agent acts on its behalf by that name, or a name so nearly resembling it that it is obviously an error for that name, he acts for nobody. A limited company has, in my judgment, characteristics other than its name by reference to which it can be identified: for example, a particular business, a particular place or places where it carries on business, particular shareholders and particular directors. If there are two limited companies having the same characteristics, then it is hardly to be supposed that each of them was incorporated on the same day, and owns the same property. Moreover, to accept the submission advanced on behalf of the defendant, would be to introduce a source of great confusion and uncertainty in respect of business transactions…."** (Emphasis added)

[30] Although **F Goldsmith (Sicklesmere) Ltd** is only a first instance decision, it has become a widely used precedent in situations where the name of a

company has been misspelled or otherwise misidentified in a contract or other undertaking. It was cited by the English Court of Appeal with approval in **Dumford Trading AG v OAO Atlantrybflot** [2005] EWCA Civ 24. This case is instructive as to what evidence should be considered in misnomer cases. After reciting a number of cases relating to misnomer the learned judge summarises what he believes is the current position in law at paragraph 32:

> "**It seems to me that the doctrine of misnomer is of uncertain width. It is clearly a doctrine of construction, but it is not plain to what extent it permits the reference to extrinsic evidence. Davies v Elsby Brothers Limited would suggest that where there are two possible entities, the rule is a strict one: unless one can say from the four corners of the document that the parties must have intended to refer to one rather than the other entity, then the doctrine does not apply. <u>If, however, there is only one possible entity, then it is possible to use extrinsic evidence to identify a misdescribed party</u>. It is arguable that *Nittan v Solent Steel* falls into this latter category. <u>Moreover, the cases, as does common sense, suggest that a case of mere misnomer is not easily (query ever) concluded to be such without the mistake being explicable.</u>"** (Emphasis added)

[31] Indeed, extrinsic evidence was considered in that summary judgment application. In the present case, it is plain from the evidence that the use of the name "Sandy Toes, Ltd." in the contract did not in any way affect or cause any doubt about the intention of the parties. The Plaintiff and the Defendant had a working contractual relationship for over eighteen months before the Defendant unilaterally breached the contract by failing to provide boat transportation to the Plaintiff.

[32] In applying the legal principles to the facts before me, I find that the use of the name "Sandy Toes, Ltd." is a mere misnomer. There is only one existing entity called Soldier Crab Limited t/a Sandy Toes. 'Sandy Toes, Ltd.' is not a separate legal entity.

Was the Plaintiff a party to the contract?

[33] The Defendant alleges that it entered into a contractual agreement with Sandy Toes, Ltd., a non-existent company and not with Soldier Crab Limited or Sandy Toes. The Defendant further states that it owes no contractual obligations to the

Plaintiff and any contract entered into is a nullity. The Defendant also submits that the Plaintiff cannot take the benefit of the contract which is a nullity.

[34] The Defendant next alleges that the Plaintiff never displayed or published its corporate name to the Defendant prior to the commencement of these proceedings thereby contravening section 21 of the Companies Act, 1992 ("the Companies Act") and section 23(1)(c) of the Business Licence Act, 2010 ("the Business Licence Act"). The Defendant implores the Court not to countenance the Plaintiff to benefit from its illegal conduct.

[35] Learned Counsel Mr. Thompson Jr. submits that where a contract was made, not with the plaintiff, whether as agent or as principal but with a fictitious limited company, which at the date of the making of the contract was non-existent, the said contract was, therefore a nullity: **Newborne V Sensolid (Great Britain), Ltd.** [1953] 1 All E.R. 708. In **Newborne**, the plaintiff was the promoter and prospective director of a limited company which at the material time had not been registered. It signed a contract for the supply of goods to the defendants. It was held that the contract was made, not with the plaintiff, whether as agent or as principal, but with a limited company which at the date of the making of the contract was non-existent, and, therefore, it was a nullity and the plaintiff could not adopt it or sue on it as his contract. Briefly put, the facts in **Newborne** are wholly distinguishable from the facts in the present case.

[36] The Plaintiff asserts that it was a party to the contract and the use of the name Sandy Toes, Ltd. rather than its corporate name, Soldier Crab Limited or its trading name, Sandy Toes was a misnomer. The Plaintiff further asserts that it was not aware of the misnomer until the Defendant breached the contract and upon the receipt of a letter from the Defendant's attorney dated 2 July 2013 referring to the misnomer.

[37] With regard to the parties to the contract, it is admitted that the Defendant was a party. The issue which falls to be determined is whether the Plaintiff was a party to the contract.

[38] The following factual findings may assist in determining whether the Plaintiff was a party to the contract namely:

(a) The Plaintiff owned and operated a business on Rose Island which offered tourist excursion services;

(b) The Defendant owned Island Time;

(c) Iola Knowles was an agent of the Plaintiff;

(d) Jeffrey, Lisa and Jedison Knowles were agents of the Defendant;

(e) The Defendant had previously included the Plaintiff in its insurance policy. See Tab. 9 where the correct name "Sandy Toes" is used by the Defendant as one of the 'Additional Indemnities';

(f) The Defendant permitted the Plaintiff's business logo, website address and telephone number to be decaled on Island Time. See Tab. 158;

(g) The parties had performed the initial contract in full;

(h) The Plaintiff was named as "Sandy Toes, Ltd." in the initial contract which was crafted by the Defendant;

(i) The Defendant's invoices were addressed to "Sandy Toes" and "Iola Knowles" and

(j) The Defendant received cheques from the Plaintiff signed by Iola Knowles and another Director.

[39] The question is: did the Defendant intend to contract with the Plaintiff through Iola Knowles? I start off with the basic principle that the interpretation of a contract is derived from the objective common intention of the parties to the contract. That objective common intention is an inference drawn from the word or phrase interpreted objectively in the light of its contractual context. That contractual context comprises the whole or every part of the contract and all relevant contractual surrounding circumstances which were known to and should

be presumed to have been within the contemplation of the parties at the time of the execution of the contract.

[40] A landmark case which expounded the principles governing the construction of a document is **Investors Compensation Scheme Limited v West Bromwich Building Society** [1998] 1 WLR 896**.** Lord Hoffman stated at pages 912 - 913:

> "**(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.**
>
> **(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.**
>
> **(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.**
>
> **(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see** Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] A.C. 749**.**
>
> **(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, <u>if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.</u> Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v. Salen***

Rederierna A.B. **[1985] A.C. 191** at page 201:

> **‘if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.’** ” (emphasis added)

[41] In addition, in **Prenn v Simmonds [1971] 3 All ER 237,** Lord Wilberforce (at pages 239-240) said:

> **“In order for the agreement …to be understood, it must be placed in its context. The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. There is no need to appeal here to any modern, anti-literal, tendencies, for Lord Blackburn’s well-known judgment in *River Wear Commissioners v Adamson (1877) 2 App. Cas 743* provides ample warrant for a literal approach. We must, as he said, inquire beyond the language and see what the circumstances were with reference to which the words are used, and the object, appearing from those circumstances, which the person using them had in view.”**

[42] Applying the legal principles to the factual matrix of this case, it is clear that both parties knew (at the time when the contract was executed and subsisting) that the Plaintiff and the Defendant were intended to be the parties to the contract. It is a fact that the Plaintiff and the Defendant had a working contractual relationship for about eighteen months before the breach. In addition, Mr. Knowles accepted that it would not make any common sense or business sense for either Ms. Knowles to sign on behalf of a non-existent company or conversely, for Aqua Tours to enter into a contract with a non-existent company.

[43] In my considered opinion, there were no issues or doubts between the parties relating to the identity of the contracting parties. In addition, both Mr. Knowles and Mrs. Knowles were familiar with Ms. Knowles, with whom they were doing business for almost eighteen months. The Defendant crafted the contract and they knew who they were dealing with. To now turn around to seek to avoid the contract on the ill-conceived notion that the Plaintiff was not a party to it is very disingenuous. Accordingly, I find that the Plaintiff was a party to the contract.

[44] The Plaintiff is therefore entitled to judgment on the breach of the contract by the Defendant. The breach is not contested or challenged on its merits by the Defendant. The evidence is uncontroverted that the Defendant reneged on the contract in order to sell its boat "Island Time" to the purchaser in what the Defendant regarded as a better deal than continuing with the contract.

[45] At this juncture of the discussion, it would be open to me to cease any further analysis and enter judgment for the Plaintiff but in the event that I am wrong to come to this finding, I shall carry on.

Rectification

[46] Learned Counsel Mr. Thompson Jr. submits that once the contract was executed by the Defendant and "Sandy Toes, Ltd.", the contract automatically become a nullity since "Sandy Toes, Ltd." was discovered to be a non-existent entity with no corporate structure – a fundamental error. He next submits that the Court cannot rectify a contract which is a nullity. In this regard, learned counsel relies on the case of **Frederick E. Rose (London) Ltd v WM. H. PIM, JUNR & Co. Ltd (1953) 2 All E.R. 739.** This is a case in which the court considered the circumstances under which it could order rectification of a contract. Lord Denning L.J. at page 747 stated:

> **"Rectification is concerned with contracts and documents, not with intentions. In order to get rectification, it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly. And in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties – into their intentions – any more than you do in the formation of any other contract. You look at their outward acts, that is, at what they said or wrote to one another in the coming to their agreement, and then compare it with the document that they have signed. If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document; but nothing less will suffice. It is not necessary that all the formalities of the contract should have been executed so as to make it enforceable at law… but, formalities apart, there must have been a concluded contract. There is a passage in *Crane v Hegeman-Harris Co. Inc.* [1939] 1 All ER 662, 664 which suggests that a continuing common intention alone will not suffice; but I am clearly of the opinion that a continuing common intention is not sufficient unless it has found expression in outward agreement. There**

> **could be no certainty at all in business transactions if a party who had entered into a firm contract could afterwards turn round and claim to have it rectified on the ground that the parties intended something different. He is allowed to prove, if he can, that they agreed something different… but not that they intended something different."**

[47] Mr. Thompson Jr. submits that this is not a case of construction but one concerning a contract entered into between the Defendant (an existing legal entity) and "Sandy Toes, Ltd." (a non-existing entity) with no corporate structure.

[48] According to Counsel, the Court cannot rectify a concluded contract. In the same breath, he submits that this is not a case of a concluded contract since the alleged contract was a nullity from the inception and therefore void.

[49] On the other hand, the Plaintiff urges the Court to find that based on the relevant background facts along with the pre-contractual negotiations, it is plain that there was a common mistake by the parties as the Plaintiff was intended to be the party to the contract and therefore the contract should be rectified to reflect this.

[50] I accept the very lucid submissions advanced by learned Counsel Mr. Moree that the court has the jurisdiction to rectify a contract in instances of common mistake or where there was a continuing common intention. See **Fowler v Fowler** (1859) 4 DeG & J 250. Lord Chelmsford LC said at page 265:

> **"It is clear that a party who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to shew exactly and precisely the form to which the deed ought to be brought."**

[51] In addition to all the relevant background information to be considered in cases of construction, the pre-contractual negotiations and subjective intent of the parties are to be considered in cases of rectification: see **Investors Compensation Scheme Limited v West Bromwich Building Society** [1998] 1 ELR 896 at pages 912-913.

[52] The emails from one of the Defendant's Directors to one of the Plaintiff's Directors are proof of the pre-contractual negotiations: Tab. 114. By email dated 3 January 2013, Mrs. Knowles wrote:

> "**… But I am glad we were able to reach a mutual agreement that we can all work with. And, I want to add personally, that we are very glad to be in partnership with you and the Sandy Toes Team – you are all professional and operate a fine product, for which we are pleased to be a part of it and hopefully add value to the overall Sandy Toes guest experience. I believe we are all on the same page with this, which is probably why we have been able to work well together. We look forward to an even better year with you and appreciate this business partnership. We will continue to strive to be the best we can be on our end!**" (Emphasis added)

[53] I have already found that "Sandy Toes, Ltd." is a mere misnomer but in the event that I was wrong to come to that conclusion, then based on the relevant background facts along with the pre-contractual negotiations, it is evident that there was a common mistake as the Plaintiff was intended to be the party to the contract and accordingly, I will rectify the contract to reflect same.

Estoppel

[54] The Plaintiff also submits that the Defendant's performance of the Contract for more than six (6) months prior to the breach estops it from claiming that the contract is unenforceable. In this regard, Mr. Moree relies on the case of **Taylors Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd. and Old & Campbell Ltd. v Liverpool Victoria Friendly Society** [1982] QB 133. It was held that where both parties had proceeded on the same mistaken assumption it was unconscionable for the defendants to seek to take advantage of the mistake which, at the material time, all parties shared.

[55] I agree with Mr. Moree that the Defendant performed under the contract and should not now be allowed to take advantage of that mistake.

Illegality

[56] In its Amended Defence, the Defendant avers in paragraph 5 that the Plaintiff company never displayed or published its corporate name to the Defendant

company or at all prior to the commencement of these court proceedings contrary to section 21 of the Companies Act and contrary to section 23 (1)(c) of the Business Licence Act. Section 21 of the Companies Act provides as follows:

> **"Every company incorporated or registered under this Act shall have its name-**
>
> **(a) painted or affixed and shall keep such name painted or affixed on the outside of every office or place in which the business of the company is carried on, or in any corridor, passage or hallway adjacent or proximate thereto, in a conspicuous position, in letters easily legible;**
>
> **(b) engraved in legible characters on its seal;**
>
> **(c) typed, printed or stamped in legible characters on all notices, advertisements and other official publications of the company;**
>
> **(d) typed, printed or stamped in all bills of exchange, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of such company; and**
>
> **(e) typed, printed or stamped on all bills of parcels, invoices, receipts and letters of credit of the company."**

[57] According to Mr. Thompson, there is a duty imposed on every licensee company to include its corporate name in all trade catalogues, trade circulars, show-cards and business letters on or in which the business name appears and which are issued or sent by the licensee to any person in the course of business. The failure to do so by any corporate entity will result in criminal prosecution under section 23 subsection (2) of the Business Licence Act.

[58] He further submits that where a plaintiff is proven to have contravened the law, the Court should not consider the claims and reliefs being sued for by the plaintiff since it would be indirectly assisting or encouraging the illegal conduct of the Plaintiff. In this regard, Mr. Thompson cited the case of **Vakante v. Addey & Stanhope School** [2004] 4 All ER 1056. At page 1065, Mummery L.J. stated:

> **". . . The defence of illegality is an appeal to a self-evident legal principle or policy that justice, and access to it, does not require courts and tribunals to assist litigants to benefit from their illegal conduct, if it is inextricably bound up in their claim."**

[59] If I understood Mr. Thompson well, he alleges that the Plaintiff contravened the law by not displaying or publishing its corporate name to the Defendant prior to the commencement of these court proceedings thereby exposing itself to criminal prosecution. This may be so but it is difficult to comprehend how that gives rise to illegality. Illegality, like fraud, is a well-known defence but it must be properly pleaded. The Amended Defence is devoid of any factual basis for making the averment and cannot in the circumstances be entertained.

[60] The allegation of illegality is misconceived and must fail.

Damages

[61] In his written submissions, Mr. Moree helpfully dealt with the issue of damages. I can do no better than to gratefully adopt them. In **Hadley v Baxendale** (1854) 9 Exch. 341, Alderson B. stated:

> "**Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as 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.**"

[62] It is well-established that damages for breach of contract must reflect the reasonably foreseeable losses caused by the breach. In certain circumstances, such as the present case, damages are difficult to assess with complete precision because of various uncertainties. This problem was considered in the UK case of **Double G Communications Ltd. v News Group International Ltd.** [2011] EWHC 961 where the court was tasked with assessing damages flowing from a breach of contract after summary judgment had been granted to the plaintiff. At paragraph 5 of his judgment, Eady J considers the applicable law and stated:

> "**… there is no doubt that the principle in** Armory v Delamirie (1772) 1 Stra 505 **is alive and well and counsel are agreed that it remains applicable in the right circumstances. There are to be found restatements of the same**

> **doctrine in modern authorities. It was described in** Browning v Brachers [2005] EWCA Civ 753, [2005] PNLR 44 **at 79 as raising an evidential (ie rebuttable) presumption in favour of the Claimant which gives him the benefit of any relevant doubt. As Jonathan Parker LJ put it: 'The practical effect of that is to give the Claimant a fair wind in establishing what he has lost.' Most recently, in** Fearns v Anglo-Dutch Paint & Chemical Co. Ltd. [2010] EWHC 1708 (Ch)**, it was said that the principle requires the court to resolve uncertainties by making assumptions generous to the Claimant where it is the Defendant's wrongdoing which has created those uncertainties.**" (Emphasis added)

[63] It is not refuted by the Defendant that it unilaterally terminated the contract. Therefore, the Plaintiff is entitled to damages resulting from the breach.

Loss of income/profit

[64] In **Victoria Laundry (Windsor) Ltd. v Newman Industries Ltd.** [1949] 2 KB 528, the plaintiffs purchased a large boiler for use in their dying and laundry business. The defendant was aware that they wished to put it to immediate use and knew the nature of their business. The delivery of the boiler was delayed in breach of contract and the plaintiffs brought an action for the loss of profit which the boiler would have made during the period in which the delivery was delayed. The claim contained a sum for a particularly lucrative contract which they lost due to the absence of the boiler. It was held that the plaintiffs could only recover losses which were in the reasonable contemplation of the parties which included the loss of profit that could be expected from the lack of use of the boiler, but the plaintiffs could not recover for the loss of the exceptionally lucrative contract since the defendant was unaware of this contract.

[65] Calculating loss of profits can be difficult when there is no fixed value or quantity. **Double G Communications Ltd. [supra]** is illuminating. At paragraph 7, the learned judge noted that both counsel in that case agreed as to the approach the court should take when assessing loss of profits:

> **"There was little divergence between counsel as to the legal principles to be applied. Reference was made to the need for the court to assess the loss of profits 'making the best attempt it can to evaluate the chances, great or small (unless those chances amount to no more than remote**

> **speculation), taking all significant factors into account':** Parabola Investments Ltd. v Browallia Cal Ltd. [2010] EWCA Civ 486, [2011] 1 All ER (Comm) 210, [2010] 3 WLR 1266 at 22-24."

[66] In the present case, the parties had been doing business together for over eighteen months. Therefore, not only was the Defendant aware of the usual "busy seasons" in the hospitality/tourism sector because of its own industry experience but it was specifically aware of the Plaintiff's busy season because of the parties' working history together. Additionally, the Defendant was aware that the profit earned by the Plaintiff went beyond the sale of tickets to its customers. Indeed, the Defendant's Directors had personally taken trips to the Plaintiff's business and therefore had actual knowledge at the time the contract was made of the various services and goods which were being sold beyond the initial ticket price. At the very least, the Defendant had imputed knowledge at the time the contract was entered into of the additional revenue stream the Plaintiff relied upon.

[67] As evidenced by the Plaintiff's profit and loss statements, March/April (Easter break) and June/July (summer break) are generally the Plaintiff's busiest times and this is when it makes the vast majority of the company's profit which later sustains the business during slow periods. The Plaintiff accepts that because the contract allowed for either party to terminate on 60 days' written notice that the Plaintiff can only claim damages suffered from 21 June 2013 (the date of the Defendant's breach) to 20 August 2013 (60 days later) ("**the Breach Period**"). One of the Plaintiff's busiest, most profitable times is within the Breach Period.

[68] Consequently, the Defendant had the knowledge necessary to establish that all of the Plaintiff's lost profits are recoverable as damages caused by the Defendant's breach.

[69] The Plaintiff claims an amount of $100,768.45. This has not been challenged by the Defendant. I therefore enter judgment for the Plaintiff in the amount of $100, 768.45 with interest accruing from the date of this judgment at the statutory rate

and costs.

Costs

[70] In accordance with case management directions, both parties submitted their respective Bill of Costs to the Court. The Plaintiff, the successful party, seeks costs on an indemnity basis. To my mind, this case does not warrant indemnity costs even though the conduct of the Defendant in prolonging this action was unreasonable.

[71] A convenient starting point is Order 59, rule 3(2) of the Rules of the Supreme Court ("**RSC**") which states:

> "**If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.**"

[72] In civil proceedings, costs are entirely discretionary. Section 30(1) of the Supreme Court Act provides:

> "**Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid.**"

[73] Order 59, rule 2(2) of the RSC similarly reads:

> "**The costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that Court shall have full power to determine by whom and to what extent the costs are to be paid, and such powers and discretion shall be exercised subject to and in accordance with this order.**"

[74] The discretionary power to award costs must always be exercised judicially and not whimsically or capriciously. The Judge is required to exercise his discretion in accordance with established principles and in relation to the facts of the case and on relevant grounds connected with the case, which included any matter relating to the litigation; the parties' conduct in it and the circumstances leading to the

litigation, but nothing else: see Buckley L.J. in **Scherer v Counting Instruments Ltd**.[1986] 2 All ER 529 at pages 536-537.

Reasonable costs

[75] In deciding what would be reasonable the court must take into account all the circumstances, including but not limited to:

a) any order that has already been made;

b) the care, speed and economy with which the case was prepared;

c) the conduct of the parties before as well as during the proceedings;

d) the degree of responsibility accepted by the legal practitioner;

e) the importance of the matter to the parties;

f) the novelty, weight and complexity of the case; and

g) the time reasonably spent on the case.

[76] Having considered these factors, a reasonable figure of costs is $25,000.

Conclusion

[77] The Order of the Court is that the Defendant is to pay the Plaintiff an amount of $100,768.45 as damages for breach of contract with interest accruing from the date of this Judgment at the statutory rate and costs taxed at 25,000.

Dated the 22nd day of December, A.D. 2016

Indra H. Charles

JUSTICE