COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION

2017/CLE/gen/00863

BETWEEN

KT MACTECH LIMITED

Plaintiff

AND

THE BAHAMAS TELECOMMUNICATIONS COMPANY LIMITED

Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: **Wayne Munroe QC with Devard Francis and Joey Dean for the Plaintiff**
Raynard Rigby with Candice Ferguson for the Defendant

18 March 2019 and 15 July 2019

JUDGMENT

WINDER J.

This action was brought by the plaintiff for breach of contract and loss of opportunity arising out of an independent contractor agreement (the Agreement) terminated by the defendant. The defendant counterclaims for breach of contract and seeks rectification of the agreement. Both parties seek damages and costs in their respective causes.

1. This claim was brought by specially endorsed Writ of Summons filed on 26 July 2017. The Statement of Claim endorsed on the Writ of Summons provides, in part, as follows:

> 2. It was an express term, pursuant to clause 5 of the contract that the Defendant would provide the Plaintiff with a minimum of Two Hundred and Seventy-Six (276) job points per crew per day. The Defendant agreed to pay the Plaintiff the minimum number of points for the calendar month should the Defendant fail to provide the committed number of points.
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> 3. It was also an express term, pursuant to clause 4 of the contract that the Plaintiff was prohibited with competing against the Defendant, by undertaking work for other telecommunications companies, and in particular, not to sell, service, maintain or install any services, equipment or products, or those of the Defendant's affiliates. The Principal of the Plaintiff signed a Bonding & Non-Compete agreement on or about 4th December, 2015.
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> 4. It was further an express term, pursuant to clause 2 of the contract, that the Plaintiff provide a minimum of 6 crewmembers at all material times to carry out all responsibilities contracted to so do.
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> 5. It was further an express term, pursuant to clause 8e of the contract, that upon termination thereof, the Plaintiff would be entitled to any earned, but unpaid compensation due and owing as at the date of termination.
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> 6. It was further an express term pursuant to clause 11a of the contract, that failure of either party, to insist, on one or more instances, on performance by the other in strict accordance with the terms and conditions of this Agreement shall not be deemed a waiver or relinquishment of any right granted in the Agreement or the of future performance of any such term or condition or of any other term or condition of this Agreement, unless the waiver is contained in a writing signed by the party making the waiver.
>
> 7. It was further an express term, pursuant to clause 11d of the contract, that the Plaintiff and Defendant agree that the Agreement represents the entire

agreement between them as to the subject matter set forth therein and cannot be amended, changed or supplemented except in writing signed by both parties.

8. By March of 2016, the Defendant had defaulted in payment on the contract. Notwithstanding that the Plaintiff had completed work and earned the pay, whilst fully complying with the provisions of the contract. The Defendant further begged the Plaintiff's indulgence to allow them to pay 46 points of the 276 stated in clause 5 aforesaid, until they were able to subsidize the same with the balance of the payment.

9. The Defendant never paid the full balance of each month's commitment to the Plaintiff and alternatively, attempted to coerce the Plaintiff into waiving clause 5 of the contract, which bound them to the stated commitment. The Plaintiff refused to agree the change in writing as per the contract, and by November 2016, by way of invoice, and in-person meetings demanded that the entire commitment be paid.

10. The Defendant then sought to terminate the contractual relationship with the Plaintiff on or about December of 2016, but such termination has not complied with the provisions of clause 8c of the contract, whether with cause or without cause, as none of the causes in clause 8c apply to the Plaintiff. Consequently, the Contract up to the filing of this action has not yet been properly terminated, yet the Defendant has contracted third party to perform duties under the existing contract.

11. The matters complained of were caused by the Defendant's breach of contract in:-

PARTICULARS OF THE DEFENDANT'S BREACH OF CONTRACT

a) failing or refusing to pay the minimum commitment required by the contract;
b) allowing the Plaintiff to take out expenses to complete work without the agreed compensation;
c) failing or refusing to properly agree the contract;
d) failing or refusing to pay commitments in the time prescribed by the contract;
e) failing to properly terminate the contract;
f) failing or refusing to adequately compensate the Plaintiff post-termination of the relationship;
g) causing the Plaintiff to lose opportunities to make up the difference in the commitment by taking on jobs in addition to the contract

PARTICULARS OF LOSS AND DAMAGE

a) Loss of contractual commitment as follows:

Balance owed: Difference between $2,301,840.00 and $383,640.00 = $1,918,200.00

b) Loss of opportunity to be assessed.

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The plaintiff further seeks interest pursuant to the Civil Procedure (Awards of Interest) Act 1992, costs and such further and other relief the court deems fit.

2. An Amended Defence and Counterclaim was filed on 1 March 2019. It provides:

3. The Defendant admits that Clause 5 of the Agreement states that the Plaintiff would be paid a minimum commitment of "Two Hundred and Seventy-six (276) job points per crew per day", however the Defendant contends that such provision was an error and is regarded as a mutual and/or unilateral mistake between the Parties, which mistake the Plaintiff was well aware and accepted. The Defendant contends that the "mistake" was duly recognized and accepted by the Plaintiff as its invoices for services rendered requested payments on the correct amount based on 276 job points per day. The Defendant further contends that the invoices manifest the Plaintiff's conduct at the material time and amounted to a representation to the Defendant of the correct billing mechanism agreed between the parties. The Defendant avers that Clause 5 was intended to read as follows "Two Hundred and Seventy-six (276) job points per day.

4. Except that clause 4 of the Agreement prevented the Plaintiff from performing the same scope of work to the Defendants competitors and not the Defendants affiliates as alleged in paragraph 3 of the Statement of Claim, the Defendant admits to the exclusive nature of the Agreement. The Defendant denies that there was a Binding Non-compete Agreement between the parties dated 4 December 2015 or at all and puts the Plaintiff to strict proof thereof.

5. The Defendant admits Paragraph 4 of the Statement of Claim and contends that the Plaintiff failed to maintain the requisite number of crews which amounted to a fundamental breach of the Agreement.

6. The Defendant admit paragraphs 5, 6 and 7 of the Statement of Claim.

7. The Defendant denies paragraph 8 of the Statement of Claim and puts the Plaintiff to strict proof of the assertions made therein. The Defendant contends that despite the plaintiff performing no services for the Defendant during the months of January, February and March 2016, the Defendant paid the plaintiff pursuant to the minimum commitment set out at clause 5 of the Agreement. Such payments were based on invoices prepared and submitted by the plaintiff to the defendant and the defendant fully satisfied each and every invoice as if

the plaintiff had performed the services agreed. While the plaintiff's invoices referred to 46 points as opposed to 276 points, the sums paid to the plaintiff were based on the minimum commitment of 276 points per day for each working day of every month. The defendant contends that the invoices presented to the Defendant by the Plaintiff accurately calculated the minimum commitment due and owed under clauses 2 and 5 of the Agreement. The Defendant will rely at the trial on the plaintiff's invoices for their full effect and weight.

...

12. The Defendant contends that by the plaintiff's conduct and the issuance of the invoices for the various months and the plaintiff's receipt and acceptance of the payments from the defendant for the amounts set out in the invoices, such receipt by the plaintiff being without protest and unconditional, the plaintiff is estopped from asserting that clause 5 of the Agreement was intending to mean and did mean that the plaintiff would be paid 276 job points per crew per day. The plaintiff by its conduct represented to the plaintiff that clause 5 of the Agreement meant that it would charge as a minimum based on a formula of 276 job points per day.

13. The Defendant further contends that the acceptance by the plaintiff of the amounts paid in consideration of the invoices sent to the Defendant created and manifest the existence of a state of mind between the parties which estops the plaintiff from denying the payments were based on a minimum of 6 crews with 276 job points per day (and not per crew). The Defendant contends that the state of mind of the parties affords conclusive evidence of a waiver by the plaintiff to rely on the strict terms of clause 5 of the Agreement in respect of the payments tendered, such waiver which by the plaintiff's conduct is recognized was an error and an impossibility.

...

COUNTERCLAIM

(1)...

(2) An Order that the Agreement be rectified to reflect that clause 5 thereof was intended to provide for a minimum of Two Hundred and Seventy-six (276) job points per day.

(3)...

3. The contract, at the heart of the dispute, provided:
   (i.) Clause 1 of the Agreement:
   Nature of Services.
   Company hereby engages Contractor to provide services to Company as listed in Schedule A hereto upon the terms and conditions set forth herein.

Contractor shall be responsible for using his or her discretion, skill, experience, and knowledge to accomplish these tasks in a timely fashion and to the best of the Contractor's ability.

(ii.) Clause 5 of the Agreement:
Commitment.
The Company agrees to provide the Contractor with a minimum of Two Hundred and Seventy-Six (276) job points per crew per day. Should the Company fail to provide the committed number of points, the Company agrees to pay the Contractor for the minimum number of points for the calendar month.

(iii.) Clause 7a of the Agreement:
Compensation for Services.
In consideration for the services and obligations set forth herein, Company shall pay Contractor at the rate of BSD Five Dollars ($5) for every job point completed. Contractor will be entitled to a compensation of Five Dollars ($5) for any installs which the Contractor goes onsite, but is unable to complete due to service not being available. Contractor will submit a weekly invoice for services and Company will render payment within fifteen (15) days of receipt of said invoice

(iv.) Clause 11(a),(b) and (d) of the Agreement:
Miscellaneous
(a) Waiver. Failure of either Party to insist, on one or more instances, on performance by the other in strict accordance with the terms and conditions of this Agreement shall not be deemed a waiver or relinquishment of any right granted in this Agreement or of the future performance of any such term or condition or of any other term or condition of this Agreement, unless such waiver is contained in a writing signed by the party making the waiver.
(b) Entire Agreement. Except as provided herein, this Agreement contains the entire agreement between the Company and Contractor with respect to the subject matter hereof. There have been no offers or inducements regarding the making of this Agreement except as set out herein.
(c) ..
(d) Amendments and Modifications. The Parties agree that this Agreement represents the entire agreement between them as to the subject matter set forth herein and cannot be amended, changed or supplemented except in writing signed by the parties.

(v.) Schedule A contains a list of services and rates which contain both the points allotted to particular tasks and the dollar value upon conversion of those points.

4. At trial, Keith Mackey, the President of the plaintiff company along with Timone Mackey, the Vice President and Office Manager gave evidence in the plaintiff's case. The defendant's witnesses included: Kirkwood Ferguson, its Sr. Manager of Field Operations; Edris Elliott, its Director of Field Services; Edmund Deleveaux, a

former employee of the plaintiff; Leonardo Johnson, a former employee of the plaintiff; and Farrell Goff its former Technical Manager.

Evidence of Keith Mackey

5. Keith Mackey's ("Mackey") evidence was given in two witness statements filed on 29 January and 18 March 2019. He was cross examined on the witness statements. Mackey says that he is a Director, Vice-President and operator of the plaintiff. He states that in November of 2014 he was approached by the defendant who wanted to contract with the plaintiff to perform installs for its fiber to home project (FTH). During a second meeting in that same month with two executives of the defendant, he was offered a contract to perform the FTH. No agreement materialised at that time.

6. Mackey says that he was contacted again in summer 2015 and submitted a formal proposal in August or September 2015. After being contacted by the plaintiff concerning the written proposal, he was given a sample contract. He believed that the consideration proposed was too low and he rejected that contract. He says that a month later he was contacted again and they came to terms in November 2015. The execution of the agreement took place on 4 December 2015.

7. Mackey says that at the end of January 2016 he spoke with Nigel Brogdam, an executive of the plaintiff, who advised him to send partial invoices for 46 points per crew per day, instead of the agreed 276 points, until the defendant could provide more work. Mackey says he was hesitant but went along with this only because he had already invested about $60,000 of his own money at this juncture and he had employees to pay.

8. Mackey denies ever agreeing to accept the 276 points per day (or 46 points per crew per day) that the plaintiff says was the correct amount of points. He argues that he was merely being understanding of the defendant's claim that they were waiting for the business to take off in order to provide him with the agreed upon compensation.

9. In 22 December 2016 the plaintiff experienced some temporary labour issues. The plaintiff was obligated to provide 6 crews to carry out its obligations under the agreement, however some of the crews, dissatisfied with the Christmas bonus, quit the employment. The plaintiff requested that the defendant should not schedule any further work during the remaining days of December as a result. Two crews remained in the employ of the plaintiff.

10. Very shortly thereafter, the plaintiff sourced new employees and by 27 December he sought training from the defendant for the new crewmembers. Again, in correspondence to the defendant on 3 January 2017, the plaintiff sought to arrange training for the plaintiff's new crew. On 7 January 2017, however, the defendant terminated the Agreement claiming breach of clause 2 of the agreement.

Evidence of Timone Mackey.

11. Timone Mackey's evidence was given in a witness statement filed on 29 January 2019. She was cross examined on the witness statement. She is a Director and Vice-President of the plaintiff. Timone Mackey says that she is the Office Manager of the plaintiff and organized the day to day business of the plaintiff. Her evidence was no more than what she says Mackey told her concerning conversations with Brodgam.

Evidence of Kirkwood Ferguson

12. Kirkwood Ferguson's evidence was given in a witness statement filed on 20 February 2019. He was cross examined on the witness statement. According to Kirkwood Ferguson ("Ferguson"), the points system is also an estimate of how long it should take a technician to perform a task in the field. Ferguson, was employed as Senior Manager of Field Operation having been employed with BTC for 36 years.

13. According to Ferguson, one point is the equivalent of ten minutes of time in the field. For example, he stated, that "to perform the task of first outlet, which requires the installation of hooks, running drop cables, testing the connectors, testing the

services and educating the first time customer", would take roughly an hour and a half (90 minutes). He stated that nine (9) points would be allocated to that job.

14. Ferguson stated that using BTC's point system and scheduling (during the operational hours, 8 hour days including Saturdays) of his own technicians, he was only able to schedule between 42 to 48 points per day to his technicians.

Evidence of Edris Elliott

15. Edris Elliott's evidence was given in a witness statement filed on 20 February 2019. She was cross examined on the witness statement. Ms Edris Elliott ("Elliott") is employed with the defendant as Director of Service Delivery and Field Services. She claimed experience on what transpires throughout the Caribbean, Central America and South America.

16. The standard across the industry, Elliott says, is that one job point is the equivalent of 10 minutes. Her evidence was that the calculation of 276 points per crew per day would indicate 46 hours of work being performed or performable by each of the plaintiff's crews in a 24 hour time period. Her estimate was that crews were capable of 7.67 hours of work per day.

Evidence of Farrell Goff

17. Farrell Goff's evidence was given in a witness statement filed on 1 March 2019. He was cross examined on the witness statement. Goff says that the 276 job points per crew per day at Clause 5 was an error on the part of both the plaintiff and the defendant. Goff served as Technical Manager of BTC during the time that KTM's Agreement was made and said that it was impossible to carry out 27 installs per day as was being suggested in the clause. He gave evidence that a typical installation could take up to 90 minutes.

Evidence of Edmund Deleveaux

18. Edmund Deleveaux's evidence was given in a witness statement filed on 1 March 2019. He was cross examined on the witness statement. Edmund Deleveaux says

that he is a former employee of the plaintiff having worked with them for 12 months, whilst they held the BTC contract. He confirmed the evidence of the other witnesses for the defendant, (i.e.) Ferguson, Goff and Elliott, that it was not possible to carry out more than about 6 installations per day.

19. When he worked with the plaintiff he worked from 9:00am to 5:00pm and he carried out about 6 installation per day as it was not possible to do any more in the time period

Evidence of Leonardo Johnson

20. Leonardo Johnson's ("Johnson") evidence was given in a witness statement filed on 1 March 2019. He was cross examined on the witness statement. Johnson says that he is the owner of Splice & Connect Company Limited who is also a contractor of BTC. In his evidence Johnson concurred with the other witnesses that it was not possible to carry out more than about 6 installations per day. 276 points per day, as a minimum, required each crew to complete 27 installations per day. According to Johnson "to carry out 27 installations in one day will mean that he is working more than 24 hours per day" as each install takes approximately 90 minutes.

The issues

21. The defendant's case is that the terms of clause 5 of the Agreement was a mistake, in particular, it avers that the phrase 276 points per crew per day in Clause 5 was a "mistake". The plaintiff, it says, submitted invoices in keeping with the minimum of 276 points per day and not 276 points per crew per day as alleged.

22. The plaintiff claims that the Agreement had no mistake and that both parties had the opportunity to review the Agreement. The plaintiff claims that it submitted partial payment invoices to the defendant as the defendant requested that it bill for only 46 points per crew per day as the defendant was unable to pay the contract rate of 276 points per crew per day. The plaintiff avers at the defendant promised reimbursement at the contractual rate at a later date.

23. The defendant avers that it was impossible for the plaintiff to perform 276 points per crew per day with 6 crews.

Law & Discussion

24. According to the learned authors of **Halsbury's Laws of England Volume 77 (2016) Paragraph 33.**

> (6) MISTAKE IN THE EXRESSION OF INTENTION
> 33. Instrument in terms contrary to intention
> Where the intention of the parties to an otherwise valid transaction is recorded in terms which do not accurately reflect that intention, the court may correct the mistake in the record in order to give effect to the intention. Where the transaction is a unilaterial one (for example, a deed pole or a will) the intention concerned is that of the maker alone. Where it is a bilaterial or multilateral transaction, in order for the court to correct the document, the intention that must be accurately recorded is the common intention of the parties.
> However, the common intention concerned is not necessarily the genuine intention of all parties; the doctrine of estoppel has a role to play. Thus the court may intervene where one party mistakenly believes that the documents records his intention, and the other party realises the mistake but says nothing. On the other hand, if the other party does not realise the first party's mistake, the court will not assist. It does not matter whether the mistake involved is one of fact or of law. But must be proved to a high standard before the court will override what is recorded.
> The court intervenes in these cases in two main ways (1) applying the rules of construction to interpret the faulty document in the intended sense; and (2) rectifying the document so as to make it accord with the intended transaction. Usually, these are alternatives, in that, if the true meaning appears on the construction there is nothing to rectify, even if sometimes it is unclear which the appropriate remedy is. But rectification may sometimes be granted notwithstanding that the true meaning can be ascertained by construction.
> There is nothing to prevent a party to the same seeking rectification of an agreement and specific performance of the agreement as rectified.
> The high standard of proof required is attained by justification from evidence that is clear and unambiguous that a mistake was made in recording that parties intention.

25. Further, in the English Court of Appeal case of ***Britoil PLC v Hunt Overseas Oil, Hobhouse LJ*** approved 5 propositions as outlined by ***Mustill J*** in the case of The ***Olympic Pride [1980] 2 Lloyds Rep 67***. ***Hobhouse LJ*** stated:

In support of their argument the Defendants have relied in particular upon three authorities. It is convenient to start with The Olympic Pride [1980] 2 Lloyds Rep 67 and the summary of the law by Mustill J at pages 72-3. It is not necessary to refer to the facts. Mustill J cited the leading cases including Fowler v Fowler [1859] 4 De G & J 450, Rose v Pim [1953] 2 QB 450, [1953] 2 All ER 739 and Joscelyne v Nissen [1970] 2 QB 86, [1970] 1 All ER 1213. He summarised the law in five numbered paragraphs:

> "1. The remedy of rectification is available only for the putting right of a mistake in the terms of a document which purports to record a previous transaction. It is not an appropriate remedy where the mistake relates to the transaction itself rather than to the document which purports to record it.
>
> 2. Rectification may be granted in two situations:
>
> (a) where there is a mistake common to both parties, the mistake being the belief that the document accurately records the transaction. (The fact that the mistake must be shared does not necessarily mean that it must arise in the same way on each side. Very often the mistake of one party occurs in the writing and of the other in the signing of the document but the mistaken belief is common to both.);
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> (b) where one party is mistaken as to the compliance of the document with the transaction and the other party knows of this mistaken belief but does nothing to correct it. The person seeking rectification in this situation must, in effect establish that his opponent was guilty of sharp practice.
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> 3. The prior transaction may consist either of a concluded agreement or of a continuing common intention. In the latter event, the intention must be objectively manifested. It is the words and acts of the parties demonstrating their intention, not the inward thoughts of the parties, which matter.
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> 4. The Court must be satisfied not only that the document fails to reflect the prior agreement or intention but also that there was a prior or common agreement (or intention) in terms which the court can ascertain.
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> 5. The Court requires the mistake to be proved with a high degree of conviction before granting relief. There are sound policy reasons for this. The Court is reluctant to allow a party of full capacity who has signed a document with opportunity of inspection, to say afterwards that it is not what he meant. Otherwise, certainty and ready enforceability would be hindered by constant attempts to cloud the issue by reference to pre-contractual negotiations. These considerations apply with particular force in the field of commerce, where certainty is so important. Various expressions have been employed in the reported cases to describe the standard of proof required of the person who seeks rectification. Counsel in the present case were agreed that the standard can adequately be stated by saying that the court must be 'sure' of the mistake, and of the

existence of a prior agreement or common intention before granting the remedy."

26. In the Singapore case of ***Chwee Kin Keong v Digilandmall.com Pte Ltd*** **[2005] 1 SLR 502,** the defendant's employee inadvertently loaded contents of the training template onto the Digiland commerce website. As a result of the mistake the price of the laser printer 'HPC 9660A Color Laserjet 4600' was advertised at the wrong price of $66. The actual price was $3,854. All six plaintiffs were graduates conversant with the usage of the internet and its practices, and endowed with more than an adequate understanding of business and commercial practices. The six plaintiffs placed orders over the internet for 1,606 of the printers. Confirmation notes were automatically dispatched to the plaintiffs through e-mail. When the defendant learnt of the error the advertisement was promptly removed from the websites and the plaintiffs, as well as 778 other buyers of the printers, were informed that the price posting was an error and that the defendants would not be meeting the orders. The six plaintiffs sued. In deciding for the defendant, the Singapore Supreme Court stated at paragraphs [147] and [149] as follows:

> [147] It is improper for a party who knows, believes or ought, objectively speaking, to have known of a manifest error to seek commercial benefit from such an error. It is unequivocally unethical conduct tantamount to sharp practice.
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> ...
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> [149] It is clear from the authorities reviewed that such a contract, if entered into by a party with actual or presumed knowledge of an error, is void from the outset. It is not in dispute that the defendant made a genuine error. The fact that it may have been negligent is not a relevant factor in these proceedings. Mistakes are usually synonymous with the existence of carelessness on the part of the mistaken party. While commercial entities ought not to be given a licence to relax their vigilance, the policy considerations in refusing to enforce mistaken agreements militate against attaching undue weight to the carelessness involved in spawning the mistake. The rationale for this is that a court will not sanction a contract where there is no consensus ad idem and furthermore it will not allow, as in the case of unilateral mistake, a non-mistaken party to take advantage of an error which he is or ought to be conscious of. These considerations take precedence over the culpability associated with causing the mistake. There is therefore no precondition in law for a mistaken party to show an absence of carelessness to avail himself of this defence; the law precludes a person from seeking to gain an advantage improperly in such circumstances.

27. The plaintiff relies on the case ***Rock Advertising Limited v MWB Business Exchange Centres Limited*** **[2018] UKSC 24**, which they say is instructive having

regard to the "no oral modifications" and the "entire agreement" clause in Clause 11a, b and d of the Agreement. The plaintiff says that this 'holy trinity' of clauses binds the plaintiff to the Agreement as written. In ***Rock Advertising Limited v MWB Business Exchange Centres Limited*** **[2018] UKSC 24** ***Lord Sumption*** stated as follows:

> [7] At common law there are no formal requirements for the validity of a simple contract. The only exception was the rule that a corporation could bind itself only under seal, and what remained of that rule was abolished by the Corporate Bodies Contracts Act 1960. The other exceptions are all statutory, and none of them applies to the variation in issue here. The reasons which are almost invariably given for treating No Oral Modification clauses as ineffective are (i) that a variation of an existing contract is itself a contract; (ii) that precisely because the common law imposes no requirements of form on the making of contracts, the parties may agree informally to dispense with an existing clause which imposes requirements of form; and (iii) they must be taken to have intended to do this by the mere act of agreeing a variation informally when the principal agreement required writing. All of these points were made by Cardozo J in a well-known passage from his judgment in the New York Court of Appeals in Beatty v Guggenheim Exploration Co (1919) 225 NY 380, 387-388:
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> > "Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived. 'Every such agreement is ended by the new one which contradicts it' (Westchester F Ins Co v Earle 33 Mich 143, 153). What is excluded by one act, is restored by another. You may put it out by the door; it is back through the window. Whenever two men contract, no limitation self-imposed can destroy their power to contract again ..."
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> ...
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> [10] In my opinion the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation.
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> [11] The starting point is that the effect of the rule applied by the Court of Appeal in the present case is to override the parties' intentions. They cannot validly bind themselves as to the manner in which future changes in their legal relations are to be achieved, however clearly they express their intention to do so. In the Court of Appeal, Kitchin LJ observed that the most powerful consideration in favour of this view is "party autonomy": para 34. I think that this is a fallacy. Party autonomy operates up to the point when the contract is made, but thereafter only to the extent that the contract allows. Nearly all contracts bind the parties to some course of action, and to that extent restrict their autonomy. The real offence against party autonomy is the suggestion that they cannot bind themselves as to the form of any variation, even if that is what they have agreed. There are many cases in which a particular form of agreement is prescribed by statute: contracts for the sale of land, certain regulated consumer contracts, and so on. There is no principled reason why the parties should not adopt the same principle by agreement.
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> ...
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> [15] If, as I conclude, there is no conceptual inconsistency between a general rule allowing contracts to be made informally and a specific rule that effect will be given to a contract requiring writing for a variation, then what of the theory

> that parties who agree an oral variation in spite of a No Oral Modification clause must have intended to dispense with the clause? This does not seem to me to follow. What the parties to such a clause have agreed is not that oral variations are forbidden, but that they will be invalid. The mere fact of agreeing to an oral variation is not therefore a contravention of the clause. It is simply the situation to which the clause applies. It is not difficult to record a variation in writing, except perhaps in cases where the variation is so complex that no sensible businessman would do anything else. The natural inference from the parties' failure to observe the formal requirements of a No Oral Modification clause is not that they intended to dispense with it but that they overlooked it. If, on the other hand, they had it in mind, then they were courting invalidity with their eyes open.

28. Against this legal backdrop it is appropriate to begin by indicating that I have no hesitation in stating that I preferred the evidence of the defendant's witness on the question of mistake. Having examined him and his demeanour as he gave his evidence I did not find Mackey to be truthful as a witness on this issue. I did not accept his evidence that he was approached by the plaintiff's Vice President, seeking a forbearance. There is nothing to support this other than the plaintiff's oral evidence, which I do not accept. There is also nothing to suggest that the defendant, formally the nation's only telecommunications provider, was unable to settle its debts as suggested by the plaintiff.

29. I am satisfied that the plaintiff's presentation of the invoices in the sum representing the minimum commitment as 276 points per day (as opposed to 276 points per day per crew) on 11 consecutive occasions was no more than a recognition of the fact that the parties understood that these were the agreed terms relative to the minimum commitment, notwithstanding the written document. Not only is the alleged agreement to forbear not in writing, there is nothing as to when the *"correct"* payment was to be applied. It seems unusual that any reasonable businessman or business, would leave its money in limbo without an assurance as to when it would be paid. Instead the plaintiff rendered invoices as if the requested sums were complete and *"identified"* the amount as the minimum commitment. Even if there was to be a forbearance, what was the justification for omitting any indication that a balance was owed. If the plaintiff is to be believed, I would have to accept that it went half of the intended life of the Agreement without any idea as to when the balance of the monies, they say is owed, would be paid.

30. Further, there is not one piece of correspondence from the plaintiff, prior this dispute coming to a head, complaining or inquiring about this situation. I am not convinced that non-payment of such a large sum of money would not have caused at least one documented demand and/ or request for payment from the plaintiff to the defendant. This is in light of averments by the plaintiff that it was having financial challenges as a result of the defendant's actions. As it was done in the December invoice, delivered after the dispute, one would have expected the alleged balance of the payment could have been reflected at any time in a monthly invoice to BTC. One would have expected the invoice to reflect the arrears which the plaintiff says the defendant was accumulating from month to month. On the contrary, none of the invoices reflected that it was partial or that anything further was due from the defendant for the period billed.

31. Even more reflective of the fact that 276 points per crew per day was an error, and could not have been what was intended, is the fact that the overwhelming evidence advanced, which I accept, was that the performance of 276 points per crew per day was an impossibility with 6 crews in a 24 hour day, much less on an 8 hour work day. The evidence of Edris Elliott, Edmund Deleveaux, Leonardo Johnson, and Farrell Goff all spoke to this. The plaintiff's former staff members gave evidence that the work day was from 9:00am to 5:00pm each day. I also rejected the plaintiff's evidence attempting to show how this could have been possible.

32. A court will not sanction a contract, as in this case, where there is no consensus ad idem. The plaintiff cannot be permitted to take advantage of an error which he is or ought to be conscious of. In this case I am satisfied that the plaintiff was aware of the error. In any event, on principles of estoppel, it would be inappropriate to permit the plaintiff to benefit from the error, where, for almost half of the life of the contract, the contract was performed in accordance with the "mistaken" terms, without demur by the plaintiff.

33. I am not deterred in my view by the dicta expressed in the case of ***Rock Advertising Limited***. In that case, the question for consideration was the efficacy of the parties agreeing to modify the terms of the agreement. Here, however, notwithstanding the clauses against oral modification, a clear mistake was made

in the contractual document. In this case, on my finding, the parties never intended to make the contract on the terms which was executed, not that they agreed to vary it. Even in the case of ***Rock Advertising Limited***, ***Lord Sumption*** acknowledged that the existence of these clauses were not undefendable and equitable principles would still have the last word. At paragraph 16 of the judgment he states:

> [16] The enforcement of No Oral Modification clauses carries with it the risk that a party may act on the contract as varied, for example by performing it, and then find itself unable to enforce it. It will be recalled that both the Vienna Convention and the UNIDROIT model code qualify the principle that effect is given to No Oral Modification clauses, by stating that a party may be precluded by his conduct from relying on such a provision to the extent that the other party has relied (or reasonably relied) on that conduct. In some legal systems this result would follow from the concepts of contractual good faith or abuse of rights. In England, the safeguard against injustice lies in the various doctrines of estoppel. This is not the place to explore the circumstances in which a person can be estopped from relying on a contractual provision laying down conditions for the formal validity of a variation. The courts below rightly held that the minimal steps taken by Rock Advertising were not enough to support any estoppel defences. I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself: see *Actionstrength Ltd v International Glass Engineering In Gl En SpA* [2003] 2 AC 541, paras 9 (Lord Bingham), 51 (Lord Walker).
>
> (Emphasis added)

34. What is interesting about the plaintiff's reliance on ***Rock Advertising Limited*** is that it was the plaintiff, and not the defendant, suggesting that Mackey and Broghan, through oral communication, agreed to vary the arrangements and provide for partial payments for the work done by the plaintiff.

35. The additional question is whether this a suitable case for the court to exercise its discretion and grant the equitable remedy of rectification to the contract. I did not find this to be such an appropriate case as the Agreement between the parties has already been terminated by the defendant in January 2017. The Agreement at this point, in my view, is not capable of performance. I accept the law as outlined in ***Snell's Principles of Equity, 28th Ed.*** which states, at page 618:

'...it is too late to claim rectification of a contract if it is no longer capable of performance (*Borrowman v Rossell* (1864) 16 C.B.)'

Breach of the Agreement

36. Clause 8 of the Agreement provides:

> Termination of Agreement
>
> a) ...
>
> b)
>
> c) Termination by [the defendant] [The defendant] may terminate this Agreement without cause upon ninety (90) days written notice to the plaintiff. Additionally, the plaintiff may terminate this Agreement with cause effective immediately. For purposes of this agreement, "Cause" shall mean
>
> i. Any conduct by [the plaintiff] involving professional misconduct;
>
> ii. [The plaintiff's] commission or conviction of, or pleading guilty...;
>
> iii. Any dishonesty of [the plaintiff] in its provision of services...;
>
> iv. Any failure of the plaintiff to abide by laws.....
>
> v. Any failure or refusal on the part of [the plaintiff] to perform services under this Agreement to the best of its ability and resources or to obey lawful and reasonable directions from [the defendant] if not remedied within seven (7) business days after [the defendant] providing notice thereof;
>
> vi. [The plaintiff] knowing neglect of reasonably assigned duties, and/or where any of the defendant fails to notify the defendant that its technicians servants or agents have been found to be involved in the use of illegal drugs...; or
>
> vii. [The plaintiff's] refusal to enter into a separate Confidentiality and No Solicitation Agreement and or No Compete Agreement in terms of which are acceptable to [the defendant], if requested by [the defendant.]
>
> d) ...

37. The defendant argues that the plaintiff's fundamental breach and/ or frustration of the Agreement was evidenced through the staff shortage at the plaintiff and the consequential email in which the plaintiff requests that the defendant not schedule any work for the week due to the staff shortage. The defendant further complains that customers were affected by the plaintiff's inability to perform the contract.

38. The plaintiff argues that it had replacement crews available and ready for training as evidenced in their email on 3 January 2017. They complain that they were not provided with the training for its new crew members as required by Clause 7(h) of the Agreement. Clause 7(h) of the Agreement provides as follows:

"Training & Certification. It is a requirement of this Agreement that all resources used by the Contractor be trained and certified by the Company prior to being authorized to work on the Company's network. All resources will be required to complete a minimum of half (1/2) day training program and must pass a final certification review prior to being allowed to complete work on the Company's behalf. This training will be provided at no charge to the contractor for all of the resources of the Contractor being utilized by the Company at a value of Two Hundred Dollars each. The Contractor agrees to notify the Company prior to hiring any new resources, specifically to facilitate training.

The plaintiff states that the defendant did not respond to the request but instead proceeded to terminate the Agreement.

39. Not every breach of the agreement amounts to a breach sufficient to terminate an agreement. Such breach must be a fundamental breach, i.e. a breach that goes to the heart of the contract. A fundamental breach of the Agreement would amount to repudiation of the Agreement on the part of the plaintiff. It must be apparent on the balance of probabilities that the plaintiff could not perform its obligations per Lord Wilberforce in ***Wooden Investment Development Ltd v Wimpey Construction (UK) Ltd [1980] 1 WLR 277.*** The issue for determination is whether these circumstances amounted to a fundamental breach of the Agreement based on Clause 2, allowing the defendant to terminate.

40. I did not find that this was the case in this matter. Firstly, not all of the plaintiff's staff was unavailable, as on the evidence, 2 crews remained. Secondly, there is no evidence that work was scheduled in these several days, and not able to be performed, principally as a result of the time of year. Thirdly, the plaintiff required the defendant to provide training to its staff which it did not provide.

41. In an email to the plaintiff from Barry Field, an executive of the defendant, dated 6 January 2017, he indicated that the plaintiff had treated the Agreement between the parties as breached, pursuant to Clause 2. Field indicated that this was due to the plaintiff not presenting its crew for work since 21 December 2016. Clause 2 reads as follows:

Resources.

Contractor agrees to provide to the Company, Six crews, every Monday through Saturday, excluding public holidays, to complete the work assigned by the

Company. For the purpose of this Agreement, a crew is defined as one or more trained and certified technicians, along with a suitable vehicle, tools and installation materials.

42. This email of 6 January 2017 was the first sign of any complaint by the defendant with respect to the work of the plaintiff. This followed an email request by the plaintiff to restrict appointments and to arrange for training of the new staff of the plaintiff. Clause 8(c)(v.) required the defendant to give the plaintiff 7 days to remedy any shortfall which it perceived existed in the plaintiff's performance of the agreement. This was not done, in which case Clause 8(c)(v) did not afford the defendant with a cause to enable the termination of the agreement.

43. Further, under the agreement it was the obligation of the defendant to train the staff of the plaintiff. The plaintiff, in my view, could not refuse such training and use this as a means to say that the plaintiff was under performing.

44. Considering the time of year, between Christmas and the New Year, it is not surprising that there was no acceptable evidence of any outstanding request for services produced by the defendant, other than the defendant's say so. There was no evidence of any complaint by any customer or any written complaint to the plaintiff from the defendant prior to the request to provide training so that he could perform the contract. I did not find that work was scheduled for the plaintiff, during the time complained of, because of the Christmas Holidays and as such the crew shortage did not affect the plaintiff's ability to continue to perform under the Agreement.

45. In the circumstances of this case, I find that any interruption, which may have been occasion by the plaintiff's brief interruption of business, could not reasonably be said to have amounted to a fundamental breach of the contract. This is especially so, where: (1) the defendant has not given the plaintiff the agreed upon notice to remedy a default; the defendant was unable to demonstrate any appreciable impact on its business; and (2) the plaintiff required the defendant to fulfil its obligation to train its staff.

46. Having regard to my discussion, the defendant's allegation that the agreement was frustrated, in my view, is wholly without merit.

Conclusion

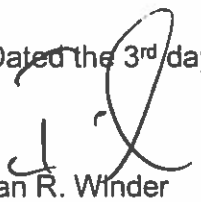
47. Since the defendant did not have cause to terminate the contract, it could not, in the circumstances, terminate the contract in the absence of the giving of 90 days' notice. In the circumstances therefore, I find that the measure of damages, for which the plaintiff is entitled, is payment during the 90 day notice period. The evidence was that the defendant's FTH program was not gaining significant momentum and the "monthly commitment" became the monthly payment due. This therefore ought to be the guide to the measure of damages to the plaintiff.

48. I find that the true agreement was for a total of 276 points per day. Alternatively, the agreement had been varied by the parties by conduct, such conduct which equity recognises estops the defendant from denying the terms at 276 points per day total. The plaintiff's December invoice reflects work for 18 days at 46 points per crew per day or 276 points per day. The plaintiff had not been paid for December 2016, I find therefore that in addition to December 2016, the plaintiff should receive the minimum payments for January, February and March as well.

49. I will leave it to the parties to agree the amount to be included in the final order, failing which the Court will make the assessment.

50. I formally dismiss the defendant's counterclaim. Having succeeded on only a portion of its claim I will award the plaintiff 60% of its reasonable costs in the action to be taxed if not agreed.

Dated the 3rd day of June AD 2020



Ian R. Winder

Justice