COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2016/CLE/gen/01667

BETWEEN

AJ TELECOM BAHAMAS LIMITED

Plaintiff

-AND-

THE BAHAMAS TELECOMMUNICATIONS COMPANY LTD

Defendant

Before: The Honourable Madam Senior Justice Indra H. Charles

Appearances: Mr. Phillip McKenzie KC and Ms. Glenda Roker of Davis & Co. for the Plaintiff
Mr. Raynard Rigby KC and Mr. Christopher Francis of Baycourt Chambers for the Defendant

Hearing Dates: 4, 5 March 2021, 30 September 2021, 6 December 2021

Contract – Terms and conditions – Plaintiff's terms and conditions accompanied quotes to Defendant for various products and services – Terms of Plaintiff's contracts charge expedite fees, late fees and interest – Purchase Orders issued by Defendant absent language of Plaintiff's terms in the contract – Whether contracts concluded on Plaintiff's terms and conditions or Defendant's – 'First shot' or 'Last shot' – Battle of the forms -– Whether terms sufficiently brought to attention of Defendant – Whether Defendant obligated to pay sums sought by Plaintiff – Whether Defendant has proven special damages sought in Counterclaim

By a Generally Indorsed Writ of Summons filed on 19 December 2016 and an Amended Writ with Amended Statement of Claim filed on 29 July 2017, the Plaintiff sued the Defendant for breach of contract and claims special damages in the sum of $1,255,172.50 (plus ongoing interest at 1.5% per month or part thereof), general damages, interest and costs. On 13 July 2017, the Defendant filed a Defence and Counterclaim denying that it breached any contract and counterclaiming for loss and damages in the sum of $31,477.60 for AJ's negligence in erecting a monopole at a slant as opposed to straight up position thereby not conforming to industry standards and posing a danger to the public.

The principal dispute between the parties is: what were the terms of the contract(s) made between them. Or alternatively, whether the Plaintiff's terms and conditions were incorporated into the contract(s) or were the agreed terms those set out in the Defendant's Purchase Orders? Each party seeks to rely on its own terms and conditions to the exclusion of the other party's terms and conditions. The Defendant urged the Court to apply the 'last shot' doctrine because it says that its Purchase Orders were the 'decisive' document which formulated the contract (s) between the parties. On the other hand, the Plaintiff argued that the Defendant never fired the 'last shot' and that its terms and conditions which were received and never disputed by the Defendant form the terms and conditions of the contract(s).

Held: (i) dismissing the Plaintiff's action and dismissing the Defendant's Counterclaim and finding that the Defendant owes the Plaintiff the sum of $53,800.00 as at 25 December 2014 together with interest at the bank rate from 26 December 2014 to the date of judgment and, thereafter, at the statutory rate of 6.25 per cent from the date of judgment to the date of payment. The parties are to further address the Court on costs.

1. The general rule has long been that the 'battle of the forms' will often be won by the party who had the 'last shot' in the contractual negotiations; i.e. the party who put forward their terms and conditions which were not expressly rejected by the recipient. However, the recent case of **TRW Ltd v Panasonic Industry Europe GmbH and another company** [2021] EWCA Civ 1558 has thrown some doubt on the situation because the Court concluded that even though the 'last shot' was fired by TRW, the manner in which Panasonic had fired the 'first shot' (and the subsequent actions of TRW) meant that the parties have effectively concluded the contract after the 'first shot' was fired. As it stands, the courts are more interested in the substance of any agreement, looking to the evidence of a party actually accepting the terms and conditions of another, to determine which shot (whether the 'first' or 'last') shall prevail.

2. The Defendant's Purchase Orders made no reference to the Plaintiff's terms and conditions in respect of discounts, expedite fees or late fees. The single reference on the Purchase Orders is a 30 day net and total amount to be paid to the Plaintiff, which corresponds to the sums on the quotes. The Defendant's Purchase Orders ('last shot') were the 'decisive' document which formulated the contract(s) between the parties so its terms and conditions form the terms of the contract(s). Also, there was no course of dealings between the parties to displace the 'last shot' doctrine: **Tekdata Interconnections Ltd v Amphenol Ltd** (2010) 2 All ER (Comm) 302.

3. The parties were not *ad idem* on the Plaintiff's terms and conditions and the Plaintiff's failure to bring them to the Defendant's attention further clarifies the position that the Defendant did not have them in contemplation when the bargain was struck. At its highest, the terms and conditions are the unilateral terms of the Plaintiff.

4. As it relates to reasonable sufficiency of notice, notice has been held to be deficient where the terms and conditions are merely attached without any reference to it, as in the present case: **Chitty on Contracts, Vol. 1 (28th Ed)** at para.12-014**; Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd** [1988] 1 All ER 348; **J. Spurling Ltd v Bradshaw** [1956] 2 All ER 121,125 and **Thornton v Shoe Lane Parking** [1971] 1 All ER 686 applied.

5. The Defendant did not breach its obligations under the contract(s) as the Plaintiff's terms and conditions were inapplicable. The contract(s) between the parties were codified by the terms of the Defendant's Purchase Orders.

6. The Defendant's Counterclaim for damages fails as special damages must not only be specifically pleaded and particularized but also proved by cogent evidence. The Defendant has failed to produce any invoices and/or receipts to substantiate the cost of materials and labour. Mere word of mouth cannot suffice: **Ilkiw v Samuels** [1963] 2 All ER 879: per Lord Diplock at 890 and **Michelle Russell v Ethylyn Simms and Darren Smith** [2008/CLE/gen/00400], per Sir Michael Barnett CJ at para 43.

JUDGMENT

Charles Snr. J:

Introductory

[1] This is an action for breach of contract. At the heart of the dispute is: what were the terms of the contract(s) between the parties? Or alternatively, whether the Plaintiff's Terms and Conditions for Sale of Products and Services ("AJ's terms and conditions") were incorporated into the contract(s) or whether the agreed terms were those set out in the Defendant's ("BTC") Purchase Orders?

The parties

[2] AJ is a Bahamian owned telecom infrastructure company duly incorporated in the Commonwealth of The Bahamas. It represents AJ Ingenieros of Panama and AJ Telecom Group in the Caribbean and carries on business within the Commonwealth focusing mainly on the provision and repair of telecommunications services.

[3] BTC is also a Company duly incorporated in this country and carries on business which includes the supply, sale and installation of telecommunication equipment and related services within the Commonwealth, primarily on the Island of New Providence.

The pleadings

[4] By a Generally Indorsed Writ of Summons filed on 19 December 2016 and an Amended Writ of Summons with Amended Statement of Claim filed on 29 July 2017 ("the Statement of Claim"), AJ sued BTC for breach of contract and claims special damages in the sum of $1,255,172.50 (plus ongoing interest at the rate of 1.5% per month or part thereof), general damages, interest and costs. On 13 July 2017, BTC filed a Defence and Counterclaim denying that it breached any contract

and counterclaiming for loss and damages in the sum of $31,477.60 for AJ's negligence in erecting a monopole at a slant as opposed to straight up position thereby falling below industry standards and posing a danger to the public.

[5] In paragraph 3 of the Statement of Claim, AJ asserts that:

> **"Between March 2013 and September 2014, the Plaintiff and the Defendant entered into a series of written contracts (Quotes and Purchase Orders) by which the Plaintiff agreed to provide goods and services to the Defendant in exchange for monetary payment within 30 days after the completion of each purchase order. The Plaintiff and the Defendant agreed by these contracts that any outstanding payment after 30 days of receipt of the corresponding invoice will result in the Defendant accruing interest and late fee charges on the outstanding amount until satisfied. The Plaintiff and Defendant further agreed that any discount granted by the Plaintiff to the Defendant on the overall invoice amount will be forfeited if the corresponding invoice was not satisfied by the Defendant within the 30 day period. The Plaintiff and the Defendant further agreed that any purchase order issued on an expedite basis would be subjected to an additional cost of 25% of the quote amount of the contract."**

[6] AJ then alleges that BTC is in breach of these contracts by failing to satisfy the invoices and/or satisfying the invoices outside the 30 day period thereby losing discounts and incurring late fee charges, expedite fees and interest. AJ also alleges that BTC is in further breach of these contracts by failing to satisfy the loss discounts and expedite fees. As such, AJ has suffered financial loss and damage.

[7] In its Defence, BTC states that:

> **"Except that the Plaintiff provided services to the Defendant in exchange for monetary payment, paragraph 3 is denied. The Plaintiff provided quotes to the Defendant for services required by the Defendant. Purchase Orders were thereafter generated by the Defendant for the purposes of providing payment to the Plaintiff. <u>The Defendant denied the alleged terms as set out in paragraph 3 as the same was never raised, discussed or agreed between the Parties and contends that the Defendant's Purchase Orders do not contain any terms or conditions of contract save for the dollar values and the descriptions of work</u>. The Plaintiff is put to strict proof of the existence of a written contract outside of the Purchase Orders or at all"**. [Emphasis added]

[8] Based on the pleadings, AJ's terms and conditions are disputed to have formed part of the contract(s) between the parties. Indeed, this is a critical issue to be resolved in this case.

The evidence

[9] Wesley Lambert testified on behalf of his Company, AJ of which he is the Managing Director. His evidence in chief is contained in his witness statement filed on 19 February 2021. He was vigorously and extensively cross-examined by learned King's Counsel Mr. Rigby, who appeared as Counsel for BTC.

[10] The evidence on behalf of BTC came from Michael O'Brien, its Project Manager in the Project Management Department, Nicole Watkins, Vice-President of Legal and Regulatory, Terea Pyfrom, Senior Manager in the Procurement Department and Kirkwood Ferguson, Manager in the OSP Network Maintenance Department. These witnesses were not cross-examined. Their evidence therefore stood unchallenged and uncontroverted.

The Terms and Conditions for Sale of Products and Services ("AJ's terms and conditions)

[11] AJ's terms and conditions which accompanied the quotes issued by AJ are similar in terms and provide, selectively, the following:

> "**(i)** **NOTICE: <u>Sale of any Products or Services is expressly conditioned on Buyer's assent to these Terms and Conditions. Any acceptance of Seller's offer is expressly limited to acceptance of these Terms and Conditions and Seller expressly objects to any additional or different terms proposed by Buyer</u>. ... Any order to perform work and Seller's performance of work shall constitute Buyer's assent to these Terms and Conditions...**
>
> **(i)** **<u>"Contract" means either the contract agreement signed by both parties, or the purchase order signed by Buyer and accepted by Seller in writing for the sale of the Products and Services, together with these Terms and Conditions .... In the event of any conflict, the Terms and Conditions shall take precedence over other documents included in the Contract</u>.**
>
> **(ii)** **"Contract Price" means the agreed price stated in the Contract for the sale of the Products and Services, including adjustments (if any) in accordance with the Contract.**

(iii) Clause 2. Payment

2.1 Buyer shall pay Seller for the Products and Services by paying all invoiced amounts in U.S. dollars, without set-off for any payment from Seller not due under this Contract, within thirty (30) days from the invoice date. .... For each calendar month, or fraction thereof, that payment is late, Buyer shall pay a late payment charge computed at the rate of 1.5% per month on the overdue balance, or the maximum rate permitted by law, whichever is less.

2.3 ... If at any time Seller reasonably determines that Buyer's financial condition or payment history does not justify continuation of Seller's performance, Seller shall be entitled to require full or partial payment in advance or otherwise restructure payments, request additional forms of Payment Security, suspend its performance ort terminate the Contract.

(iv) Clause 11. Termination and Suspension

11.5 Buyer may reschedule for late delivery an accepted order for Products and Services.... Buyer may request in writing that an accepted order for Products be rescheduled for shipment on a date earlier than the assigned shipment date. Seller shall make reasonable efforts to effect an early shipment but has no liability to Buyer if it cannot accommodate Buyer's request. Buyer shall pay Seller an expedite fee equal to twenty-five percent (25%) of the purchase price for the Products subject to early shipment or Seller's actual costs, whichever is greater. If Seller agrees to an early shipment date, such date will become the new assigned shipment date for the order of portion thereof subject to early shipment.

(v) Clause 16. Governing Law and Dispute Resolution

16.1 This Contract shall be governed by and construed in accordance with the laws of (i) the State of New York if Buyer's place of business is in the U.S. or (ii) England if the Buyer's place of business is outside the U.S. ... If the Contract includes the sale of Products and the Buyer is outside the Seller's country, the United Nations Convention on Contracts for the International Sale of Goods shall apply.

(v) 19. General Clauses

19.6 The Contract represents the entire agreement between the parties. No oral or written representation or warranty not contained in this Contract shall be binding on either party.

19.8 This Contract may be signed in multiple counterparts that together shall constitute one agreement.[Emphasis added]

[12] The quotes provided by AJ were absent any language of its terms and conditions in the contract. For example, quote FPQ#:20218 issued by letter dated 31 March 2014 from Mr. Lambert to Mr. Kendal King of BTC, states, in part:

> **"… The enclosed information includes a detailed job outline and pricing addressing your power needs:**
>
> **The total price associated with this power quote for the BTC Poinciana – Central Office is $614,681.72.**
>
> **The summarized price breakdown is as follows:**
>
> | | |
> |---|---|
> | **Engineering** | **$5,796.00** |
> | **Material GE WHSE:** | **$567,491.22** |
> | **Removal** | **$6,352.50** |
> | **Installation** | **$35,042.00** |
> | **Total** | **$614,681.72** |
>
> **** The transportation and long-haul freight charges of material will be billed as incurred (if applicable). Material quoted EXDOCK GE WHSE. Transportation, Duty, Stamp Tax not included.**
>
> **The prices associated with this FPQ will remain in effect for a period of sixty (60) days from the date of this letter.**
>
> **These prices are considered confidential by AJ Telecom Bahamas, Ltd and GE and shall not be disclosed outside of BTC."**

[13] BTC's Purchase Order dated 1 April 2014, in addition to the "Total PO Amount" reflected currency of BSD and Payment Terms of "Net 30". The Due Date is reflected as 4/29/2014 and an issue date of 04/01/2014.

[14] Another example is contained in the letter dated 8 April 2014 referable to FPQ#2021808558, Revision 1, where Mr. Lambert wrote to Mr. King stating:

> **"…The price associated with this power quote for the BTC Poinciana –Central Office is $232,297.77.**
>
> **The summarized price breakdown is as follows:**
>
> | | |
> |---|---|
> | **Engineering** | **$5,365.44** |
> | **Material Ex Dock GE WHSE:** | **$172,992.00** |
> | **Enhanced Service Plan** | **(Not included)** |

Installation	**$ 64,493.28**
Training (5 days)	**$5,400.00**
Removal	**$2,630.00**
Less Discount of	**$18,582.95**
Total	**$232,297.77**

**** The transportation and long-haul freight charges of material will be billed as incurred (if applicable). Material quoted EXDOCK GE WHSE. Transportation, Duty, Stamp Tax not included.**

The prices associated with this FPQ will remain in effect for a period of sixty (60) days from the date of this letter.

These prices are considered confidential by AJ Telecom Bahamas, Ltd and GE and shall not be disclosed outside of BTC."

[15] Like AJ's quotes, BTC's Purchase Orders also did not make any reference to AJ's terms and conditions.

The issues

[16] The parties have agreed that the following issues arise for determination:

1. What were the terms of the contract(s) entered into between the parties?

2. Whether or not AJ's terms and conditions attached to AJ's price quotes were accepted by BTC as a part of the contractual agreement(s) between the parties?

3. What terms in AJ's terms and conditions are applicable to BTC?

4. Whether BTC breached its obligations under the contract by failing to pay the contracted sums by certain dates?

5. Whether BTC is obligated to pay AJ any of the sums it seeks in the action?

6. Whether BTC has proven its claim to special damages in its Counterclaim?

Discussion

Issues 1 – 3: Terms of the contract(s) between the parties

[17] The key issue between the parties is: what were the terms of the contract(s) between them? Or alternatively, whether AJ's terms and conditions were incorporated into the contract(s) or, were the agreed terms those that were set out in BTC's Purchase Orders?

[18] Mr. Lambert stated that between March 2013 and September 2014, AJ and BTC entered into a series of written contracts (Offers/Quotes and Purchase Orders) by which it was agreed between both parties that AJ would provide goods and services to BTC in exchange for monetary payment within 30 days after the delivery of AJ's invoice to BTC.

[19] He further alleged that AJ's offer stipulated that any outstanding payment made after 30 days of receipt of the corresponding invoice would result in BTC incurring interest and late fee charges on the outstanding amount until satisfied. Further, AJ's offer stipulated that any discount which it offered to BTC on the overall invoice amount would be forfeited if the corresponding invoice were not satisfied by BTC within the 30 day payment term period. There was a further offer which stipulated that any purchase order issued on an expedited basis would be subject to an additional cost (expedite fee) of 25% of the value quoted on the contract.

[20] Mr. Lambert alleged that BTC breached these contracts by failing to satisfy the invoices after the expiration of the 30 day period thereby losing the discounts offered and incurring late fee charges, expedite fees and interest.

[21] During cross examination, Mr. Lambert confirmed that the term "Firm Price Quotation" ("FPQ") was standard language in AJ's power quotes and that BTC expected to be billed an expedite fee and the forfeiture of any discount if payment was not made within 30 days of being invoiced. Mr. Lambert further testified that the waiver of the expedite fee, which amounted to twenty-five percent (25%) of the purchase price, as set out in Clause 11.5 of AJ's terms and conditions, was not

permanent, and also related to the stipulated 30 day payment period. Mr. Lambert also asserted that GE engineers determined the installation assumptions, prepared the scopes of work and provided the material lists and AJ authored the quotes.

[22] Under further cross-examination, Mr. Lambert stated that all of his quotes were offers to BTC and BTC would communicate acceptance of his quotes by Purchase Orders. When asked whether there was any written contract between AJ and BTC with respect to AJ providing goods and service, he said "*It's in the offer*."

[23] With respect to invoicing and payment, under cross-examination, Mr. Lambert stated that the general purpose for AJ's issuing invoices was to "*get paid after the work was completed*" and that the invoices were issued in tandem and reflected the amounts in the corresponding purchase orders. It was also his testimony that the invoices referenced the relevant Purchase Order numbers in the normal course of business to ensure the application of that payment to the relevant purchase order.

[24] Further, Mr. Lambert asserted that AJ was entitled to partial payment based on Clause 2.1 of the terms and conditions which stated, "*If the contract price is more than $250,000 seller shall issue invoices upon shipment of products and services."* On re-examination, Mr. Lambert stated that invoices were issued to BTC in the contractual process at the stage when goods were delivered to ports in the US for direct shipments to Tropical Shipping. An invoice might reference multiple Purchase Orders for the reason that Tropical Shipping would have consolidated the materials before shipping and a packing list was produced by AJ from which it generated the invoice. In every quote which encompassed twelve of twenty pages was a bill of materials and as materials were shipped the materials were applied against the purchase order and the invoice was generated in respect of the goods shipped in the container. Under the terms of the contracts, title in the goods passed to BTC immediately upon the items' departure from the territorial land and seas of the place from which the goods were shipped, which involved a bill of lading being

generated to BTC in its capacity as consignee when the items were loaded into the ocean-going container.

[25] Learned King's Counsel Mr. McKenzie, who appeared as Counsel for AJ, urged the Court to find that AJ's FPQs and quotes were not invitations to treat but were offers made to BTC. He submitted that BTC issued Purchase Orders which corresponded to AJ's twelve FPQs and that AJ was also issued notices to proceed by BTC to supply the goods and services in relation to the said Purchase Orders, and that constituted acceptance of AJ's offer in each case. He further submitted that the parties' exchange of documents, namely AJ's FPQs and BTC's Purchase Orders constituted an offer and acceptance by the parties.

[26] Learned King's Counsel relied on the case of **Rust v Abbey Life Assurance Co. Ltd** (1979) 2 Lloyd's Rep. 334 to support his contention. In that case, dealing with insurance bonds, the Court was asked whether a binding contract had been concluded between an applicant for an investment in property bonds and the insurance company offering such bonds when, in response to an application form submitted by the applicant, accompanied by a cheque in the appropriate amount, the insurance company allocated units in the relevant fund to her and sent her a policy of insurance. The Court held that a binding contract had been made in such circumstances. The failure by the proposed insured to reject the insurance policy offered to her for seven months, was enough to justify an inference that he had accepted the policy. Brandon LJ said:

> **"If I am wrong about that, however, it seems to me that the learned Deputy Judge's decision should in the alternative be upheld on the second basis relied on by him. The plaintiff held the policy in her possession at the end of October 1973. She raised no objection to it of any kind until some seven months later. While it may well be that in many cases silence or inactivity is not evidence of acceptance, having regard to the facts of this case and the history of the transaction between the parties as previously set out, it seems to me to be an inevitable inference from the conduct of the plaintiff in doing and saying nothing for seven months that she accepted the policy as a valid contract between herself and the first defendant."**

[27] Mr. Mckenzie submitted that, in the present case, the circumstances were that BTC, in every instance, did not exercise its right to reject the quotes or any part of such quotes. Instead, it issued several Purchase Orders which corresponded to the AJ's quotes. Those Purchase Orders which corresponded to AJ's ten quotes were submitted to BTC in April and May 2014 but were not issued to AJ until June 2014. According to Mr. Mckenzie, those ten quotes underwent rigorous examination by the BTC's Capital Review Board before the relevant Purchase Orders were issued to AJ. AJ delivered the goods and services which BTC accepted and in turn AJ generated invoices which it issued to BTC for payment.

[28] Mr. Mckenzie argued that, further and alternatively, applying the principles enunciated in **Rust**, in such circumstances, a binding contract was formed between the parties. He contended that BTC had ample opportunities to contemplate the ramifications of AJ's quotes and ask questions relative to the terms and conditions stipulated by AJ. According to Mr. Mckenzie, BTC did not indicate that it did not accept AJ's terms and conditions and, having regard to the facts of the case and the history of the transactions between the parties, the court may draw an inference from the conduct of BTC in doing and saying nothing for periods of up to six weeks after the receipt of the quotes that it (BTC) accepted the quotes. In other words, valid contracts were formed between the parties.

[29] In my judgment, the issue is not whether there was a valid contract rather, whether AJ's terms and conditions were incorporated into the contract(s) or were the agreed terms those that were set out in BTC's Purchase Orders.

[30] In order to determine the question of what were the agreed terms of the contract(s) between the parties, I have to consider the nature of the negotiations together with the terms of the offer/acceptance.

[31] BTC urged the Court to apply the 'last shot'/'battle of the forms' doctrine.

[32] On its application, Mr. McKenzie submitted that BTC's reply to AJ's quotes is found in its Purchase Orders which contains no terms and conditions other than a

reference to the 30 day payment and a billing address for payments. According to Mr. Mckenzie, the only other item that one could surmise might constitute a term or condition would be that the purchase price is stated in Bahamian currency. However, other than that, each of BTC's Purchase Orders was simply a description of the items being purchased or the services being agreed to. Mr. Mckenzie contended that BTC never fired the last shot and that AJ's terms and conditions were the only terms and conditions which were received and never disputed by BTC.

[33] He relied on an excerpt from **Chitty on Contracts, Vol.1 (28th Ed)** where the learned authors, on dealing with the issue of notice at para.12-013 stated:

> **"It is not necessary that the conditions contained in the standard form document should have been read by the person receiving it, or that he should have been made subjectively aware of their import or effect. The rules which have been laid down by the courts regarding notice in such circumstances are three in number:**
>
> **(1) If person receiving the document did not know that there was writing or printing on it, he is not bound.**
>
> **(2) If he knew the writing or printing contained or referred to conditions, he is bound.**
>
> (3) **If the party tendering the document did what was reasonably sufficient to give the other party notice of the conditions and if the other party knew there was writing or printing on the document, but did not know contained conditions, then the conditions will become the terms of the conditions for a term to be considered incorporated into a contract, notice of that term must be given before or during the time of contracting".** [Emphasis added]

[34] Mr. McKenzie also referred to Lord Wilberforce in **Reardon Smith Line Ltd. v Yngvar Hansen-Tangen** (1976)1 WLR 989 and a number of other cases, which in my judgment, are not applicable because the Court is primarily concerned with, whether AJ's terms and conditions form the terms of BTC's Purchase Orders as AJ postulated.

[35] As previously stated, BTC submitted that the Court should apply the 'last shot'/'battle of the forms' doctrine because BTC's Purchase Orders were the "decisive" document which formulated the contract between the parties.

[36] Mr. Rigby referred to the recent UK Court of Appeal case of **TRW Ltd v Panasonic Industry Europe GmbH and another company** [2021] EWCA Civ 1558 where the *"*last shot*"* doctrine in a "battle of the forms*"* dispute was addressed. Coulson LJ stated the following:

> **5.4 'Battle of the Forms'**
>
> **29. Disputes where each party is seeking to rely on its own terms and conditions, to the exclusion of the other side's terms and conditions, have long been known as the 'battle of the forms'. In such cases the courts have endeavoured to apply the traditional concepts of offer and acceptance. This has led to what is sometimes called the 'last shot' doctrine: in other words, the party whose terms and conditions are in play and unanswered at the time that the work is done or the goods delivered is often said to have fired the last shot, with its terms and conditions found to have been accepted by the fulfilment of the substantive contract.**
>
> **30. An example of this traditional approach can be seen in *B.R.S. v Arthur Crutchley Limited* [1968] 1 All ER 811. The claimants delivered a consignment of whisky for storage by the defendant. When the whisky was delivered, the claimant's driver handed over a delivery note purporting to incorporate the claimant's conditions of carriage into the contract. However the note was stamped by the defendant: 'received under [the defendant's] conditions'. The stamp was found to amount to a counter-offer by the defendant, which the claimants had accepted by conduct when they handed over the whisky. The defendant therefore fired the last shot and its terms were incorporated.**
>
> **31. A more recent example of the 'last shot' doctrine is *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209. There the buyer sent a purchase order on its terms and conditions and the seller sent an acknowledgment on its own terms to the buyer, who then received the goods. The judge at first instance had found that the contract was on the buyer's terms and conditions because of the commercial history between the parties. The Court of Appeal rejected that analysis and found that the contract was on the seller's terms. The evidence of commercial history was not strong enough to displace the traditional analysis that the seller's acknowledgment incorporating its own terms (and the subsequent receipt of goods by the buyer thereafter) was the last shot.**

> **32. However the Court of Appeal recognised that, although the last shot doctrine had been successful in that case, it could be displaced by evidence of the parties' objective intention that the last shot should *not* prevail. Thus Longmore LJ said at [1] that "if, however, it is clear that neither party ever intended the seller's terms to apply and always intended the purchaser's terms to apply, it is conceptually possible to arrive at the conclusion that the purchaser's terms are to apply." He also said at [11] that "the traditional offer and acceptance analysis must be adopted unless the documents passing between the parties and their conduct show that their common intention was that some other terms were intended to prevail".**
>
> **33. In the same case, Dyson LJ summarised the legal position as follows:**
>
> > **"25. In my judgment, it is not possible to lay down a general rule that will apply in all cases where there is a battle of the forms. It always depends on an assessment of what the parties must objectively be taken to have intended. But where the facts are no more complicated than that A makes an offer on its conditions and B accepts that offer on its conditions and, without more, performance follows, it seems to me that the correct analysis is what Longmore LJ has described as the "traditional offer and acceptance analysis", ie that there is a contract on B's conditions. I accept that this analysis is not without its difficulties in circumstances of the kind to which Professor Treitel refers in the passage quoted at [20] above. But in the next sentence of that passage, Professor Treitel adds: "For this reason the cases described above are best regarded as exceptions to a general requirement of offer and acceptance". I also accept the force of the criticisms made in *Anson*. But the rules which govern the formation of contracts have been long established and they are grounded in the concepts of offer and acceptance. So long as that continues to be the case, it seems to me that the general rule should be that the traditional offer and acceptance analysis is to be applied in battle of the forms cases. That has the great merit of providing a degree of certainty which is both desirable and necessary in order to promote effective commercial relationships."** [Emphasis added]

[37] The general rule has long been that the battle of the forms will often be won by the party who had the "last shot" in the contractual negotiations. That is the party who put forward their terms and conditions which were not expressly rejected by the recipient. Usually, a party that was the last to submit their terms and conditions could rely on some degree of comfort knowing that their terms and conditions are likely to be the ones that would apply. However, **Panasonic** has thrown some

uncertainty on the situation because the court disagreed with TRW and concluded that even though it had fired the 'last shot', the manner in which Panasonic had fired the 'first shot' (and the subsequent actions of TRW) meant that the parties have effectively concluded the contract after the 'first shot' was fired, thereby creating a barrier against any further shots being fired by TRW. In setting aside the application and declaring that the German courts had exclusive jurisdiction over the dispute, the court found that the signing of the Document by TRW was a determining factor. Coulson LJ put it this way:

> **"[TRW's] signature was the only time that one party expressly signed something which referred to the other side's terms and conditions. It was the only overt sign of an agreement. To continue the warfare analogy commonly used in these cases, it was the only occasion when one side walked across no-man's land, and fraternised with the enemy."**

[38] So, it was the signing by TRW of Panasonic's terms and conditions that indicated acceptance and the conclusion of a contract. Any purchase order terms submitted subsequently did not create a counteroffer to the offer made by Panasonic, as the contract had already been concluded upon the signing of the Document by TRW.

[39] What **Panasonic** demonstrates is that the courts are more interested in the substance of any agreement, looking to the evidence of a party actually accepting the terms and conditions of another to determine which shot (whether the 'last' or 'first') shall prevail. In my view, if TRW had not signed the Document, the result might have been different.

[40] In the present case, Mr. Lambert acknowledged that there was no written contract between the parties. In AJ's quotes, there is a space allocated for BTC to sign and date its acceptance which was not completed by BTC.

[41] The unchallenged evidence of Nicole Watkins, Vice President of Legal and Regulatory at BTC, was that AJ's terms and conditions attached to FPQ dated 8 April 2014 which were issued by AJ were not treated as contracts by BTC. At paragraphs 4 to 6 and 9 of her witness statement, she stated:

"4. I am duly informed by the current team in the Defendant's Purchasing Department that in its dealings with the Plaintiff that the various FPQs issued by the Plaintiff were treated as quotes and were not automatically accepted by the Defendant. In fact, the FPQ referenced above clearly states that "the prices associated with this FPQ will remain in effect for a period of sixty(60) days from the date of this letter"; which mirrors the usual language that the Defendant will receive in relation to quotes for services to be rendered by its potential suppliers. The Defendant always treated the FPQs issued by the Plaintiff as quotes and not as binding contracts. In fact, the Defendant was free to not agree to the services to be supplied by the Plaintiff as described in the FPQs or to disagree with the proposed price quoted therein.

5. The Plaintiff's use of the "net 30 days" payment language in the FPQs was not agreed to by the Defendant. The Defendant never executed a contract with the Plaintiff to agree to such a term. The course of dealings between the Plaintiff and the Defendant was such that the Defendant never paid any of the FPQs on a 30 day payment arrangement and there was never any penalty imposed on the Defendant when payment did not occur in that period. The Defendant paid the FPQs on its standard terms which is 90 days or thereafter.

6. Additionally, at no time did the Defendant agree to the jurisdiction and dispute resolution clause set out in the Plaintiff's Terms and Conditions. It is a standard approach of the Defendant to have all disputes with its local (Bahamian) vendors/suppliers heard and determined in The Bahamas…..

7. …..

8. Having regard to the Defendant's business approach and policies, I am confident that the Terms and Conditions for Sale of Products and Services set out in the Plaintiff's FPQs were not agreed contractual terms between the parties to this action and at the highest, they may be terms of the Plaintiff. The Defendant never expressly or by implication of its conduct or actions agreed to such terms and conditions in its dealings with the Plaintiff". [Emphasis added]

[42] Also, Mr. O'Brien, the Project Manager at BTC, stated that the FPQ's were always treated by BTC as quotes. This is what he said in paragraph 6:

"I am familiar with the Firm Price Quotations issued by the Plaintiff. They were always treated as quotes. In fact, that is exactly what they

> **represented: quotes or bids for work to be done or goods to be purchased by the Plaintiff on behalf of BTC. The quotes would usually be issued to the Project Manager and they will review it internally and thereafter the Manager of the Procurement Department would agree to the sum and this would be communicated to the Plaintiff. "**[Emphasis added]

[43] At paragraph 7, Mr. O'Brien continued:

> **"As far as I am aware the Terms and Conditions for Sale of Products and Services which accompanied AJ's quotes were never signed by BTC and as far as I am aware the terms did not apply to BTC."**

[44] Mr. O'Brien was not cross-examined so his evidence remains unchallenged and uncontradicted.

[45] BTC also relied on the evidence of Ms. Terea Pyfrom, the Senior Manager in the Procurement Department. In her capacity, she has the responsibility to review, analyse and benchmark quotes submitted to BTC by third party contractors/vendors or suppliers seeking to provide services to BTC. Her role is essentially to ensure that the vendors/suppliers are quoting reasonable prices for work to be undertaken.

[46] She asserted that it is standard policy of BTC to request that all of its suppliers and vendors submit quotes for services to be rendered prior to BTC entering into any contract or agreement to their engagement. All works or goods to be supplied must be first approved before any action is taken on a quote. She stated that, in her discussions with Mr. Lambert, he was fully aware that his quotes were subject to review and could be rejected by BTC for any reason.

[47] Her evidence also stood unchallenged and uncontradicted.

[48] In his evidence, Mr. Lambert stated that from 31 March 2014 to 10 September 2014, AJ made a series of offers to supply goods and services to BTC and, in each case, BTC issued Purchase Orders accepting the offers: see paragraphs 25 to 38 of his witness statement.

[49] Mr. Mckenzie invited the Court to find that AJ's terms and conditions that provided (in part) "*Sale of any Products or Services is expressly conditioned on Buyer's assent to these Terms and Conditions. Any acceptance of Seller's offer is expressly limited to acceptance of these Terms and Conditions and Seller expressly objects to any additional or different terms proposed by Buyer. ... Any order to perform work and Seller's performance of work shall constitute Buyer's assent to these Terms and Conditions...*" constituted unequivocal acceptance of the same.

[50] I do not accept this assertion since, in my opinion, BTC's Purchase Orders were the 'decisive' document which formulated the contract between the parties.

[51] It is undisputed that BTC did not sign AJ"s terms and conditions. It did not even sign the Purchase Orders. As Ms. Watkins stated and I accept her uncontroverted evidence, BTC always treated AJ's FPQ's as quotes and not as binding contracts. BTC was free to not agree on the services to be supplied by AJ.

[52] BTC's Purchase Orders made no reference to AJ's terms and conditions in respect of discounts, expedite fees or late fees. The single reference on the Purchase Orders is a 30 day net and total amount to be paid to AJ, which corresponds to the sums on the quotes. As such, it is submitted that there was no course of dealings between the parties to displace the last shot doctrine (see **Tekdata Interconnections Ltd v Amphenol Ltd** [2010] 2 All ER (Comm) 302) and similarly, no "agreement" between the parties for the terms & conditions to form the basis of the bargain struck.

[53] The general rule was that the traditional offer and acceptance analysis applied in 'the battle of the forms' cases, unless the documents passing between the parties and their conduct showed that their common intention was that some other terms and conditions were intended to prevail. In applying the traditional concepts of offer and acceptance to the facts of the present case, it is my firm view that BTC fired

the ‘last shot’. BTC’s terms and conditions were in play and unanswered at the time that the goods were delivered.

[54] Further, Mr. Lambert acknowledged that he did not bring AJ’s terms & conditions to BTC’s attention. Mr. Rigby indicated that AJ was content to seek to “sneak” the terms into a contract with BTC when there was ambiguity between the terms and what was written in bold on the various quotes.

[55] Mr. Rigby further correctly stated that the parties were not *ad idem* on AJ’s terms & conditions and AJ’s failure to bring its terms & conditions to BTC’s attention further clarifies the position that BTC did not have them in contemplation when the bargain was struck between them. That is, at the highest, the terms & conditions are the unilateral terms of AJ. I agree.

[56] Additionally, as it relates to reasonable sufficiency of notice, notice has been held to be deficient where the terms and conditions are merely attached without any reference to it. **Chitty on Contracts, Vol.1 (28th Ed)** at para. 12-014 stated:

> **“…The question whether the party tendering the document has done all that was reasonable sufficient to give the other notice of the conditions is a question of fact in each case, in answering which the tribunal must look at all the circumstances and the situation of the parties. <u>But it is for the court, as a matter of law, to decide whether there is evidence for holding that the notice is reasonably sufficient. Cases in which the notice has been held to be insufficient have been those where the conditions were printed on the back of the document, without any reference, or any adequate reference, on its face, such as, “For conditions, see back, *White v Blackmore* [1972] 2 QB 651, 664, where, on documents sent by fax, reference was made to conditions stated on back or otherwise communicated, *Poseidon Freight Forwarding Co. Ltd v Davies Turner Southern Ltd* [1996] 2 Lloyd’s Rep. 388</u> or where the conditions were obliterated by a printed stamp….”**[Emphasis added].

[57] There was nothing to state “see terms and conditions attached.”

[58] In **Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd** [1988] 1 All ER 348, it was held that:

> **"Where a condition in a contract was particularly onerous or unusual and would not be generally known to the other party the party seeking to enforce that condition had to show that it had been fairly and reasonably brought to the other party's attention."**

[59] In **J. Spurling Ltd v Bradshaw** [1956] 2 All ER 121 at 125, Denning LJ stated:

> **"Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient."**

[60] Then, in **Thornton v Shoe Lane Parking** [1971] 1 All ER 686, Lord Denning LJ restated and applied what he said in **Spurling** and held that the court should not hold any man bound by such a condition unless it was drawn to his attention in the most explicit way.

[61] In the present case, BTC argued the AJ's terms and conditions were never raised, discussed or agreed between the parties. The terms and conditions were merely forwarded with each Purchase Order without any reference to it. To use BTC's vernacular, AJ's terms and conditions were being "sneaked in."

[62] I also agree with BTC that the words on AJ's FPQ's left very little doubt as to their meaning and thereby they were fundamental terms of the contracts. They too had the effect of inducing BTC to enter into the bargain on the premise that no expedite fee will apply and AJ offered the discounted price. These were express and fundamental terms of the contract. AJ's conduct in seeking to rely on the terms & conditions and representing that the discount applied and that the expedite fee was waived violated the duty on AJ to act in good faith in its contractual relations and dealings with BTC.

[63] For all of these reasons, I find that the contract(s) between the parties were codified by the terms of BTC's Purchase Orders and **not** by AJ's terms & conditions.

Issues 4 – 5: Whether BTC breached its obligations?

[64] Given the findings (above), there is no need to consider these additional issues. In essence, BTC did not breach its obligations under the contract as AJ's terms and

conditions were inapplicable to BTC's Purchase Orders. BTC is therefore not obligated to pay AJ any sums which it seeks in this action.

Issue 6: Whether BTC is entitled to damages on its Counterclaim

[65] BTC counterclaimed against AJ for special damages of $31,477.60. It also seeks interest and costs.

[66] In its Defence and Counterclaim, BTC acknowledged that it issued Purchase Order No. 107624 for services to be carried out by AJ at Man-O-War Cay but insisted that AJ's services were performed incorrectly and below industry standards resulting in the monopole being installed at a leaned to one side as opposed to straight up and down position. BTC averred that it requested AJ to correct the problem but AJ failed and/or refused to do so. BTC further alleged that, at its own expense, it corrected the defect and reinstalled the monopole. As such, BTC alleged that it suffered loss and damage.

[67] In its Defence to Counterclaim, AJ denied the allegation contained therein and stated that the monopole was erected in accordance with industry standards and was not a danger to the public.

[68] BTC relied on the evidence of Kirkwood Ferguson, the Manager, OSP Network Maintenance Department. In his witness statement filed on 15 January 2021, Mr. Ferguson stated that he is aware that AJ was engaged to install a monopole at Man-O-War Cay. He further stated that, on 2 January 2015, the monopole was found to be leaning to the northwest. Based on the discovery, it was determined that an antennae or cables could not be installed on the monopole. AJ was notified of the defects to the monopole and was asked to correct them. Based on AJ's refusal to do so, BTC corrected the monopole. He stated that BTC expended the total sum of $31,477.60 which was made up of $26,101.60 in materials and $5,376.00 in labour.

[69] In his witness statement, Mr. Lambert stated that, on 20 December 2013, AJ offered Quote Number AJTBL0038 to BTC to supply and construct a monopole on

Man-O-War Cay. By Purchase Order No. 107624, BTC accepted the offer on 7 March 2014. AJ agreed to deliver and install it.

[70] Mr. Lambert further stated that, on 28 March 2014, AJ delivered the monopole and started to construct the site chosen by BTC on Man-O-War Cay. The local Town Planning in Abaco shut down the project since BTC had not acquired all the proper approvals for the site. On 14 November 2014, BTC notified AJ to dispatch its team to resume the installation of the monopole. When AJ's team arrived at the site on that day, AJ's team was again prevented by the local Town Planning. Finally, on 24 November 2014, AJ's team was permitted to resume the installation of the monopole. Mr. Lambert alleged that the project was completed two days later on 26 November 2014.

[71] He testified that the Hand-Over report along with corresponding invoice No. CI.BS.BTC.111 were submitted to BTC on 26 November 2014 for payment. BTC agreed to satisfy the invoice on a 30 day payment basis upon receipt of AJ's invoice. BTC has failed to satisfy the invoice and owes AJ the balance of $53,800.00.

[72] Mr. Lambert alleged that the Hand-Over report included a survey report which confirmed that the monopole met the industry standard and that it was not leaning. However, AJ agreed to immediately dispatch a team back to Man-O-War to have the pole surveyed by a registered third-party surveyor and make any adjustments, if necessary. No one from BTC came despite an email invite on 4 December 2014. The monopole, once again, passed the third-party survey. AJ's Project Manager emailed BTC's team on 5 December 2014 informing them of the survey results and that the pole was ready for them to install the cable feeders and antennas.

[73] On 25 November 2015, AJ emailed all the supporting documents to BTC"s Chief Technical Officer Nigel Broghan to find out about the payment status of this unpaid invoice.

[74] Mr. Lambert testified that, as late as 4 April 2016, BTC still had not paid the invoice which prompted him to send another email on that day. On the same day, Mr. Broghan responded to that email stating:

> **"I have instructed Nigel Smith to work with Accounts Payable to get the MOW [Man O' War] payment to you this week".**

[75] BTC says it expended $31,477.60 to rectify the monopole defect. Special damages are quantified damages which an applicant has already spent as a result of loss and damage. Special damages must be specifically pleaded, particularized and proved. This was made clear by Lord Diplock in **Ilkiw v Samuels and others** [1963] 2 All ER 879 at 890:

> **"Special damage in the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularized…it is plain law…that one can recover in an action only special damage which has been pleaded, and of course, proved."**

[76] The principle was also stated by Sir Michael Barnett CJ in **Michelle Russell v Ethylyn Simms and Darren Smith** [2008/CLE/gen/00440] at paragraph 43:

> **"It is settled law that special damages must be pleaded and proven. The Court of Appeal in Lubin v Major [No. 6 of 1990] said:**
>
> > **43. "From the above reasoning, it is clear that what the learned Registrar is saying, correctly in our view is that a person who alleges special damage must prove the same…."**

[77] In my judgment, BTC has not proven, by any cogent evidence, that it spent $31,477.60 to correct the alleged defective monopole. Mere word of mouth coming from Mr. Ferguson without invoices and/or receipts cannot suffice.

[78] On the other hand, I accept Mr. Lambert's evidence that the monopole conformed to industry standards and it was not leaning. In addition, AJ has proven, by documentary evidence in the form of a quote (an offer) and BTC's Purchase Order (an acceptance) that AJ will deliver and install the monopole on Man O' War Cay. BTC agreed to satisfy the invoice on a net 30 day payment basis on receipt of AJ's

invoice which was delivered on 26 November 2014. BTC ought to have settled this invoice in full by 25 December 2014. To date, this invoice remains outstanding.

[79] In the circumstances, I will enter Judgment for AJ in the sum of $53,800.00 with interest at the bank rate from 25 December 2014 to the date of judgment. AJ is also entitled to interest at the statutory rate of 6.25% from the date of judgment to the date of payment.

Costs

[80] Both parties have been successful on different issues. BTC is the successful party in the action and AJ is the successful party on the Counterclaim. The parties will further address me on costs on 13 December 2022 at 12.00 noon.

Dated this 28th day of October, 2022

Indra H. Charles
Senior Justice