[2023] JMCC COMM 25

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2020CD00069

BETWEEN	**GEOTECHVISION ENTERPRISES LIMITED**	**CLAIMANT**
AND	**E-LEARNING JAMAICA COMPANY LIMITED**	**DEFENDANT**

IN OPEN COURT

Mrs. Denise Kitson K.C., Mr. Kevin Williams and Mr. Gordon McFarlane instructed by Grant, Stewart, Phillips & Co for and on behalf of the Claimant Company

Mr. Linton Gordon and Mr. Obika Gordon instructed by Frater, Ennis & Gordon for and on behalf of the Defendant Company

Dates Heard: July 5, 7, 9, 13, 14, 15 & 16, 2021, February 15, 17, 21, 22, 23 & 24, 2022 and October 10, 11, 12, 13, 18, 19, 20, 21 & 25, 2022, November 1, 2022 and June 8, 2023

Civil Practice & Procedure – Breach of Contract – Wrongful Termination of Contract – Repudiatory Breach of Contract – Interpreting Terms of a Contract – Implied Terms – Counterclaim for Breach of Contract –Damages – Interest – Costs

PALMER HAMILTON, J.

INTRODUCTION

[1] The Claimant Company by way of a Claim Form and Particulars of Claim filed on the 18th day of February, 2020 is seeking damages and loss arising from a breach of contract, failure to perform the contract as agreed and/or damages on a *quantum meruit* basis against the Defendant Company. The Claimant Company is

claiming that they entered into a contract with the Defendant Company on or about the 23rd day of November 2018 for the provision of "Tablets, Syncing and Services for the E-Learning Project in Schools" (hereafter referred to as "the Project"). The Defendant Company in breach of the said contract failed to perform the contract as agreed. The Claimant Company is also claiming that the Defendant Company wrongfully terminated the said contract on or about the 14th day of October, 2019 without adhering to the terms of the contract and/or in circumstances where they were in clear default of their obligations for performance.

[2] The Claimant Company is seeking the following reliefs:

> *(a) Damages in the sum of Five Hundred Thousand Jamaican Dollars (JMD $500,000.00) and One Hundred and Four Million Six Hundred and Fourteen Thousand and Sixty-Two United States of America Dollars and Ten Cents (USD $104,614,062.10)*
>
> *(b) In addition, and/or in the alternative damages for breach of contract and/or on a quantum meruit basis*
>
> *(c) Interest at the Bank of Jamaica commercial average, or Compounded annually or monthly at the rate of ten percent (10%)*
>
> *(d) Costs and Attorneys' costs*
>
> *(e) Such further and/or other relief as this Court shall think fit in the circumstances of this case.*

[3] The Defendant Company denied that they breached the contract and counterclaimed against the Claimant Company damages for breach of Contract. The Defendant Company is claiming that the Claimant Company failed and/or refused to perform and/or meet its obligations under the said contract.

BACKGROUND

[4] For the sake of facilitating an ease of understanding, I will set out what I consider to be the background of this matter.

[5] The Claimant Company was awarded a contract for the supply and delivery of tablets, syncing carts, software and services under the "Tablets in Schools Project

Rollout." The parties entered into a written contract on or about the 23rd of November, 2018 (hereinafter referred to as the "the Contract"). The total value of the Contract was Sixteen Million Three Hundred and Fifty-Nine Thousand Seven Hundred and Thirty-Five United States Dollars (USD $16,359,735.00), excluding taxes. At the time when the Contract was signed, Mr. Izett McCalla III was the then Acting Chief Executive Officer of the Defendant Company. The Contract required Purchase Orders to be issued by the Defendant Company to the Claimant Company whenever drawdowns of quantities of tablets and other items under the Contract were required with pre-determined schedules.

[6] The Contract required that the Claimant Company shall within twenty-eight (28) days of the notification of the award of the Contract provide a performance security for the performance of the Contract in the amount of ten percent (10%) of each Purchase Order. There was also a requirement under the Contract for the Defendant Company to pay to the Claimant Company a mobilization advance of ten percent (10%) of prorated contract sum based on each Purchase Order within ten (10) working days after placing said order.

[7] By way of letter dated the 7th day of December, 2018 addressed to the Claimant Company, Mr. McCalla III notified them that their bid was accepted and that they will be required to provide a performance bond for the appropriate amount to cover the specific period detailed in the Contract. Mr. McCalla III advised them of the initial quantities required for the first order and it was not to exceed Six Million One Hundred and Fifty-Eight Thousand Three Hundred and Eighty-Eight United States Dollars and Sixty Cents (USD $6,158,358.60) plus applicable General Consumption Tax (hereafter referred to as "GCT"). The quantities required were as follows:

> *(a) 3,000 Tablets for teachers (with Cases, Apps and Classroom Mgt. Software and Services)*
>
> *(b) 15,000 Tablets for Students (with Cases, Apps and Classroom Mgt. Software and services)*

(c) 460 Charging and Syncing Carts (with Syncing Software and Services)

[8] Shortly after this letter, the Chief Executive Officer of the Defendant Company was changed to Mr. Keith Smith who assumed office on the 3rd day of January, 2019. He met with Ms. Valerie Grant, the Managing Director of the Claimant Company, on the 11th day of January, 2019 where they had discussions regarding the Contract. The Performance Security dated the 13th day of February, 2019 was provided. The Claimant Company communicated to the Defendant Company that they were on track for the first delivery of teacher tablets by mid-March and student tablets by early April 2019.

[9] Mr. Smith wrote to Ms. Grant by way of a letter dated the 22nd day of February, 2019 and revised the initial Purchase Order without changing the dollar value so that the teacher tablets and the charging and syncing charts would be removed and replaced with student tablets. The revised order was for 19,305 student tablets with rubber cases, screen protectors, Classroom Management Software, loaded apps and delivery service. Mr. Smith also advised Ms. Grant that the Defendant Company will require five (5) student tablets for pre-testing. Ms. Grant wrote back advising that the order for the goods and services was already placed however, the Claimant Company would be able to accommodate some of the changes. The Claimant Company was able to remove the request for the provision of charging carts. However, the 3,000 teacher tablets had already been manufactured and would therefore be delivered but the remaining tablets could be supplied as student tablets. The Claimant Company also recommended that the Classroom Management Software should not be removed as the commitment has already been finalized and software licences have already been procured. Ms. Grant also gave a projected delivery timeline as on or before the 30th day of April, 2019 for the five (5) tablets for testing.

[10] The parties had a Project Meeting on or about the 11th day of March, 2019 and the Defendant Company provided updates on the plans for the first phase of the Project. They discussed timelines and it was agreed that the five (5) sample tablets

would be delivered on or before the 30th day of April, 2019. It was also discussed and agreed that the tablets and associated accessories will be in Jamaica no later than the 30th day of May, 2019 and warehouse inspection can be conducted by the Defendant Company at this point. On the Claimant Company's evidence, the Defendant Company proposed a shift in delivery to schools to September 2019. However, the Defendant Company on their evidence stated that at this meeting they indicated to the Claimant Company that the distribution of the tablets to schools was to take place in early September 2019 for the start of the school year.

[11] The Defendant Company did not receive the five (5) sample tablets on the 30th day of April, 2019 nor did it receive the tablets and associated accessories on the 30th day of May, 2019. The Claimant Company stated that they faced difficulties with shipping them to Jamaica and the Defendant Company was advised of this *via* email on the 1st day of May, 2019. The Defendant Company granted the Claimant Company an extension of ten (10) days to supply them with the five (5) sample tablets and reminded them that there was a deadline for implementing the Project. The Claimant Company met the extended deadline for delivery of the five (5) sample tablets on the 10th day of May, 2019. The Defendant Company however stated that these tablets were *"basically non-functional."*

[12] The Defendant Company was notified by way of a letter dated the 14th day of May, 2019 from the Claimant Company that the five (5) sample tablets represent the initial test tablets and since delivery they had optimised the product and will deliver "gold standard" tablets by the 30th day of May, 2019. The Claimant Company also stated that delivery of the 19,305 tablets was impacted by thirty (30) days as they were awaiting certification from Google and that the tablets and associated accessories will now be in Jamaica by the 30th day of June, 2019 and ready for warehouse inspection at that point. The Claimant Company also stated that this will not affect the critical timelines outlined by the Defendant Company, namely conducting teacher training in July 2019 and delivery to schools by September 2019.

[13] The parties had another Project Meeting on or about the 30th day of May, 2019. The Defendant Company by way of letter dated the 3rd day of June, 2019 outlined the agreed delivery dates from the said Project Meeting. It was agreed that five (5) "gold standard" tablets were to be delivered by the 3rd day of June, 2019, sample cases for student tablets were to be delivered by the 1st day of July, 2019 and one thousand (1000) tablets were to be delivered by the 15th day of July, 2019. The Defendant Company also stated that they will confirm the delivery dates for the remaining balance of tablets to be delivered by the 10th day of June, 2019.

[14] The Defendant Company received the "gold standard" tablets on the 3rd day of June, 2019. These tablets were tested by the Defendant Company's technical personnel and they were found to be non-functional and well below the required standards of the Contract. The Defendant Company stated that detailed tests were conducted against the specifications outlined in the Request for Proposal and the Contract. The results of the tests showed that they were a number of issues as they did not meet the specifications, competence and/or quality required. The results of these tests were sent *via* email to the Claimant Company on the 14th day of June, 2019.

[15] On the 27th day of June, 2019, the Defendant Company wrote to the Claimant Company regarding the *"consistent and continuous"* missed agreed dates and expressed concern regarding the July 15th deadline for the one thousand (1000) tablets. The Defendant Company told the Claimant Company that strict adherence and compliance with the contractually agreed deliverables, timelines and schedules are critical to the successful execution of the Project. They also stated that failure to adhere to same may be considered a breach of contract and may result in the application of remedies and procedure provided under the Contract such as liquidated damages and termination. The Defendant Company requested formal communication indicating the status of the one thousand (1000) tablets. The Claimant Company also wrote a letter to the Defendant Company on the 27th day of June, 2019 and confirmed that pursuant to the Project Meeting of May 12 they will deliver the cases to the Defendant Company for testing and observation no

later than the 8th day of July, 2019 and that they will provide an update regarding the Classroom Management Software. The Claimant Company reminded the Defendant Company that they were still awaiting some information in order to move forward and keep the timelines discussed, namely a list of APK's and the list of schools. The Claimant Company stated that this information was needed as it would facilitate with the importation of the said tablets.

[16] By way of letter dated the 5th day of July, 2019, the Claimant Company advised the Defendant Company that one thousand and one hundred (1,100) tablets were packed and ready for shipment and the deadline of July 15th can be met. However, the Claimant Company, who had sent a Deed of Assignment to the Defendant Company, was awaiting same from them so that their financiers can release payment to the manufacturer. The Claimant Company also attached proof that the tablets were ready to be shipped. The Claimant Company was confident that the deadline could be met if they received an update regarding the Deed of Assignment so that the matter could be finalized. By way of letter dated the 11th day of June ,2019 the Defendant Company advised the Claimant Company that they were unable to consent to and sign the Deed of Assignment.

[17] On the 15th day of July, 2019 the Claimant Company wrote to the Defendant Company advising them that in light of receiving their response on the 11th day of July, 2019 they were only on the 15th day of July able to make alternate arrangements for the shipping of the one thousand one hundred (1,100) tablets. In view of the forgoing, the Claimant Company would be able to get the said tablets to the Defendant Company on or before the 25th day of July, 2019. There were also 2 letters, both dated the 24th day of July, 2019, sent by the Claimant Company to the Defendant Company requesting outstanding information such as the list of APK's and the list of schools.

[18] On the 25th day of July, 2019 the Claimant Company wrote to the Defendant Company and advised them that the one thousand one hundred (1,100) tablets were at Jamaica Customs and waiting to be cleared. On that same date, the

Defendant Company wrote back to the Claimant Company and advised them that they required five (5) additional tablets for validating and upon having satisfactorily done so they will thereafter take delivery of the tablets. They further stated that two (2) batches of test tablets that were received have failed all their validation and acceptance tests and as such delivery of the tablets will not be accepted until their validation process is complete.

[19] The Claimant Company responded to that letter on the 26th day of July, 2019 and directed the Defendant Company to General Condition Clause 25.1 of the Contract which speaks to acceptance testing upon delivery of the tablets in the presence of the vendor and which is outlined at paragraph 31 of this judgment. The Claimant Company further stated that Appendix 5 of the Contract also clearly outlines the inspection test which is to be carried out by the parties. The Claimant Company further stated that, in order to get to that point the tablets would have to be cleared and delivered to the designated location and they again asked for the Defendant Company to confirm the delivery address. However, the Defendant Company maintained that they would not accept delivery of the tablets until they receive a further five (5) additional tablets for validating and upon having satisfactorily done so.

[20] On the 2nd day of August, 2019 the Claimant Company wrote to the Defendant Company stating that they were still awaiting the delivery address as the first batch of tablets are in the island and ready for delivery. They reminded the Defendant Company of the outstanding items to be provided by them and stated that this will affect the projected dates for arrival of student tablets and their delivery to schools. The Defendant Company in response to this wrote a letter to the Claimant Company on the 8th day of August, 2018 and reiterated that they needed an additional five (5) tablets for testing and validating. They indicated that this was not meant to replace the Contract provisions and if the additional tablets are in compliance with the specifications of the tender then inspection and acceptance testing should proceed in accordance with the said Contract provisions. The Defendant Company stated that they had issues with the “gold standard” tablets

and also addressed the issue of the outstanding items as requested by the Claimant Company. The Defendant Company also addressed the delivery address and stated that based on the delays in the performance of contractual obligations and delivery, they have been unable to predict delivery dates and quality which delayed the Project. The Defendant Company further stated that the list of schools will be provided subsequent to the receipt of the five (5) additional tablets for testing and upon the decision to accept the tablets.

[21] The Claimant Company requested a Project Meeting with the Defendant Company to clarify the issues the parties faced. However, no Project Meeting was held as the Claimant Company received no response from the Defendant Company. The Claimant Company by way of letter dated the 13th day of August, 2019 advised the Defendant Company that they see no point in providing a further five (5) tablets for testing especially since the Contract provides for a handover testing at the point of delivery of all the tablets. The Claimant Company attributed the delay in the Project to the Defendant Company. They asked for a Project Meeting to be convened in order for the Defendant Company to demonstrate the issues with the "gold standard" tablets. The Claimant Company sought to have these matters finalized by the 14th day of August, 2019.

[22] On the 6th day of September, 2019, the Defendant Company wrote to the Claimant Company stating, *inter alia,* that they will be sending further communication by the 13th day of September, 2019 on the matter of independent testing for tablets and accessories. The Defendant Company stated that it was the Claimant Company who consistently failed to comply with Project timelines which resulted in the Defendant Company not being able to predict delivery dates and to make definitive plans for the Project. Therefore, the matters concerning tablet case selection and provision of the list of schools are ancillary matters without there being the prerequisite availability of tablets and reliable delivery timelines.

[23] The Claimant Company again, in a letter dated the 12th day of September 2019, requested a Project Meeting to address the issues affecting the Project. On the

13th day of September, 2019 the Defendant Company wrote to the Claimant Company regarding the further communication they promised to send to them. The Defendant Company gave formal notice to the Claimant Company of its decision to invoke the Contract provisions for inspections and tests under General Condition Clause 25.5 of the Contract. Pursuant to that clause, the Defendant Company required the Claimant Company to carry out additional inspections and tests of the tablets, other than those already required by the Contract. The Defendant Company considered that there were limitations to the inspections and tests for acceptance which currently exist under the Contract and deemed the additional tests necessary for verification. The Defendant Company identified two (2) independent testing facilities, while being mindful of the need for independence, objectivity and transparency. The Defendant Company stated that they would bear all costs and expenses associated with same. The Defendant Company further stated that they are in the process of preparing an "Inspection and Testing Strategy" document to provide guidance and a Terms of Reference for the testers and same would be provided to the Claimant Company within two (2) weeks for review and comments. Once this is finalized, the Claimant Company would be required to provide ten (10) working tablets for testing to the independent testing facilities identified by the Defendant Company. The Defendant Company once again made it clear that acceptance and subsequent distribution to schools of any tablets will be dependent on the successful validation of the tablets by this inspection and testing process.

[24] On the 16th day of September, 2019 the Claimant Company responded to the Defendant Company and stated that any other testing that the Defendant Company wishes to conduct is outside of the Contract stipulations and has no bearing on acceptance of the tablets as it was not specified as a requirement. Therefore, there can be no further conditions for acceptance of the tablets outside of what has been specified in the Contract. The Contract specified the requirement for acceptance and any deviation would be a departure from the terms. The Claimant Company also blamed the Defendant Company for the delays in the

performance of the Contract, as they changed the scope of the deliverables, delayed in giving feedback, refused to sign the deed of assignment and their lack of responses for information required. The Claimant Company further stated that they are quite willing to facilitate testing of the contractually stipulated specifications done by a transparently selected testing entity. However, any testing outside of the scope of the specific arrangements in the Contract should not be done in such a way as to delay the Contract implementation and should not be utilized as a criterion for acceptance of the tablets.

[25] On the same day, the 16th day of September, 2019, the Defendant Company sent to the Claimant Company a letter titled "Notice of Termination". This was done pursuant to General Condition Clause 34.1(a) (i) of the Contract. The Defendant Company gave the Claimant Company twenty-eight (28) days' Notice of Termination of the Contract by reason of default due to:

> *"Failure of GeoTechVision Enterprises Limited to deliver the nineteen thousand, three hundred and five (19,305) tablets with rubber cases, screen protectors, Classroom Management Software and loaded apps ordered on February 22, 2019."*

ISSUES

[26] The following issues arise for determination:

(a) Whether the Defendant breached the contract entered into for the provision of "Tablets, Syncing and Services for the E-Learning Project in Schools";

(b) Whether the Claimant Company is entitled to loss and damages for breach of contract;

(c) Whether the Claimant Company breached the said contract; and

(d) Whether the Defendant Company is entitled to damages for breach of contract.

SUBMISSIONS

[27] I wish to thank Counsel for their submissions and supporting authorities which provided valuable assistance to the Court in deciding the issues. They were thoroughly considered. However, in light of the length of the submissions, the number of authorities, and in the interest of time, I do not find it necessary to address all the submissions and authorities relied on but I will refer to them to the extent that they affect my findings.

LAW & ANALYSIS

A. *Whether the Defendant breached the contract entered into for the provision of "Tablets, Syncing and Services for the e-Learning Project in Schools"*

[28] There is no dispute that the Contract is a valid contract and that it governs the relationship of the parties. The Claimant Company submitted a proposal in response to a Request for Proposal issued by the Defendant Company and the Claimant Company was notified by way of letter that their bid was successful. The Claimant Company is alleging that the Defendant Company breached Special Condition Clauses of the General Condition Clauses 11.1, 15.1, 25.1 and 32.4 of the Contract. Learned King's Counsel submitted that the Claimant Company was at all material times willing to perform its obligations under the Contract, even where the Defendant Company unilaterally sought to change the validation and acceptance procedure.

[29] The crux of the contention between the parties is whether the Contract was validly terminated by the Defendant Company. Learned King's Counsel has asked this Court to address several sub issues which must be dealt with before a determination can be made as to whether the Contract was validly terminated, namely:

> *(a) Whether, on a proper interpretation of Clause 25.5 of the General Conditions of the Contract, the Defendant was entitled to request an*

additional five (5) tablets for testing as a pre-condition to the acceptance of the tablets shipped to Jamaica;

(b) Whether in circumstances where the parties had expressly agreed a framework contract with a multi-year roll out, and in circumstances where the parties had expressly agreed to a delivery of 1,000 tablets on May 30, 2019, and confirmed by letter dated June 3, 2019, the Claimant could be held to be in breach of contract for failing to deliver 19,305 tablets and appurtenances; and

(c) Whether based on the Defendant's own testing result, as confirmed in Test Report dated June 11, 2019, it was reasonable for the Defendant to conclude that the tablets and rubber cases were either sub-standard and/or failed to meet the specifications in the Contract.

[30] Notwithstanding the Claimant Company's efforts to meet the Defendant Company's attempt to impose this new testing obligation, the Defendant Company issued a written notice of termination of the Contract pursuant to General Condition 34, which Learned King's Counsel submitted was inexplicable. On the other hand, the Defendant Company's position is that General Condition 34 of the Contract empowers them to terminate the Contract and that the provision is clear, unambiguous and gives them the broad power to terminate the Contract at any time due to the default of the Claimant Company. The Defendant Company was therefore entitled to terminate the Contract once the Claimant Company failed to deliver any or all of the goods within the period specified by the Contract.

[31] I think it is prudent to set out the relevant clauses abovementioned for ease of understanding:

General Conditions of Contract

Interpretation 4.4 *Amendment*

No amendment or other variation of the Contract shall be valid unless it is in writing, is dated, expressly refers to the Contract, and is signed by a duly authorized representative of each party hereto.

4.5 *Non waiver*

a. Subject to GCC Sub-Clause 4.5(b) below, no relaxation, forbearance,

delay or indulgence by either party in enforcing any of the terms and conditions of the Contract or the granting of time by either party to the other shall prejudice, affect or restrict the rights of that party under the Contract, neither shall any waiver by either party of any breach of Contract operate as waiver of any subsequent breach of Contract.

b. Any waiver of a party's rights, powers or remedies under the Contract must be in writing, dated, and signed by an authorized representative of the party granting such waiver, and must specify the right and the extent to which it is being waived.

Scope of Supply 11.1 *The Goods and Related Services to be supplied shall be as specified in the Schedule of Requirements.*

Terms of Payment 15.1 *The Contract Price, including any Advance Payments, if applicable, shall be paid as specified in the Special Condition Clauses.*

Inspections and Tests 25.1 *The Supplier shall at its own expense and at no cost to the Procuring Entity carry out all such tests and/or inspections of the Goods and Related Services as are specified in the Special Condition Clauses.*

25.5 *The Procuring Entity may require the Supplier to carry out any test and/or inspection not required by the Contract but deemed necessary to verify that the characteristics and performance of the Goods comply with the technical specifications codes and standards under the Contract, provided that the Supplier's reasonable costs and expenses incurred in the carrying out of such test and/or inspection shall be added to the Contract Price. Further, if such test and/or inspection impedes the progress of manufacturing and/or the Supplier's performance of its other obligations under the Contract, due allowance will be made in respect of the*

Delivery Dates and Completion Dates and the other obligations so affected.

Change Orders and Contract Amendments 32.4

Subject to the above, no variation in or modification of terms of the Contract shall be made except by written amendment signed by the parties.

Termination 34.1

Termination for Default

(a) The Procuring Entity, without prejudice to any other remedy for breach of Contract, by written notice of default sent to the Supplier, may terminated [sic] the Contract in whole or in part:

(i) if the Supplier fails to deliver any or all of the Goods within the period specified in the Contract, or within any extension thereof granted by the Procuring Entity pursuant to GCC Clause 33;

(ii) if the Supplier fails to perform any other obligation under the Contract; or

(iii) if the Supplier, in the judgment of the Procuring Entity has engaged in fraud and corruption, as defined in GCC Clause 3, in competing for or in executing the Contract.

(b) In the event the Procuring Entity terminates the Contract, in whole or in part pursuant to GCC Clause 34.1(a), the Procuring Entity may procure, upon such terms and in such manner as it deems appropriate, Goods or Related Services similar to those undelivered or not performed, and the Supplier shall be liable to the Procuring Entity for any additional costs for such similar Goods or Related Services However, the Supplier shall continue performance of the Contract to the extent not terminated.

Special Conditions of Contract

GCC 11.1 *The Goods and Related Services to be supplied shall be as specified in Appendix 1 – Description of Goods and Services/Technical Specifications…*

GCC 15.1 *The method and conditions of payment to be made to the Supplier under this Contract shall be as follows:*

Payments stated below are based on the quantities, and the lowest unit prices quoted in Appendix 6 or 7: Contractor's Proposal

Payments to the Contractor shall be made in accordance with the Schedule set forth below:

i. A mobilization advance of 10% if prorated contract sum based on each purchase order within 10 working days after placing said order.

ii. Second payment of 40% based on the purchase order amount for equipment being received and stored in the Contractor's warehouse verified by the Purchasers Project Manager.

iii. Pro-rated payments totalling 50% of purchase order based on number of Tablets, Accessories and Services delivered at each delivery point or project milestone, based on the agreed roll-out schedule, less 10% retention on all payments certified and advanced.

iv. Pursuant to Clause GC 3.3.3, 10% retained or portion remaining thereof.

v. Pursuant to Clause GC 3.3.4, Performance Security or portion remaining thereof.

GCC 25.1 *The inspections and tests shall be: as stipulated in Appendix 5 – Delivery Inspection*

GCC 32.4 *The "Change Control Process" is the process which shall govern changes to the scope of the Project during the life of the Project. The Change Control Process will apply to new components and to enhancements of existing components. The Change Control Process will commence at the start of the Project and will continue throughout the Project's duration. Additional procedures and responsibilities may be*

> *outlined by the Project Manager identified on the signature page to the Agreement and will be included in the baseline Project plan if mutually accepted by both the Purchaser and the Contractor.*
>
> *Under the Change Control Process, a written "Change Request" will be the vehicle for communicating any desired changes to the Project. It will describe*
>
> - *the proposed change;*
> - *the reason for the change; and*
> - *the effect the change may have on the Project.*
>
> *The Project Manager of the requesting party will submit a written Change Request to the Project Manager for the other party. The Project Manager for the Procuring Entity will supply the appropriate Change Management documents.*
>
> *Both the Supplier and the Procuring Entity will review the Change Request and approve it for further study or reject it. The study and any costs associated with the study will be as agreed upon in writing by the Supplier and the Procuring entity. This approves only the study and its relate costs. The results of the study will be used to determine the effect that the implementation of the Change Request will have on the cost and schedule of the Project.*
>
> *If both parties agree, after the completion of the study, to approve the implementation of the Change Request, then they will each sign the approval portion of the Change Request. Both parties must sign the approval portion of the Change Request to authorize the implementation of any change that affects the Project's scope, schedule or price.*

I.Interpretation of Clause 25.5 of the Contract

[32] Learned King's Counsel in her submissions, outlined her client's legal position. She contended that in order to determine the objective intention of the parties and whether the Defendant Company validly terminated the Contract for the alleged default, the terms of the Contract must be interpreted and the relevant obligations of each party as required by the said terms, must be ascertained. Learned King's Counsel directed the Court to the cases of **Investors Compensation Scheme Limited v West Bromwich Building Society and others** [1998] 1 ALL ER 98 and

John Thompson and Janet Thompson v Goblin Hill Hotels Limited [2011] UKPC 8.

[33] The principles emanating from those cases were succinctly set out in Learned King's Counsel's submission. Lord Hoffman in **Investors Compensation Scheme Limited v West Bromwich Building Society and others** *(supra)* laid out the contextual approach that the Courts should take into account when interpreting contracts:

> *"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> *(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
>
> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*
>
> *(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see **Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd** [1997] 3 All ER 352, [1997] 2 WLR 945.*

> *(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in **Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios** [1984] 3 All ER 229 at 233, [1985] AC 191 at 201*:
>
> > *'… if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.'"*

[34] This approach was adopted by Sykes J in **Aedan Earle v National Water Commission** [2014] JMSC Civ 69 who further went on to state that:

> *"[10] The interpreter should also be aware that where the document has been crafted by lawyers or it is obvious that care was taken in putting the document together, one does not lightly conclude the parties have made linguistic mistakes (**Jumbo King Ltd v Faithful Properties** [1999] 2 HKCFAR 279 (Lord Hoffman)). Of course, it is entirely possible that they did. Even though it is possible that linguistic, syntactical and grammatical errors were made, the court is to give effect to 'to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean' (my emphasis) (Lord Hoffman in **Jumbo King Ltd**).*
>
> *[11] Now to the refinements. It used to be said that before reference could be made to material outside the four corners of the contract there had to be an ambiguity. This view has fallen by the way side (**R (on the application of Westminster City Council) v National Asylum Support Services** [2002] 4 All ER 654). It is now equally, plain that the fact that a document is on the face of it clear does not preclude the court from examining the surrounding circumstances to whether see the prima facie meaning remains intact or is affected by the matrix of fact (**Static Control Components (Europe) v Egan** [2004] 2 Lloyd's Rep 429). The law has advanced now to the point where background information includes the law and proved common assumptions even if the assumptions were incorrect (**BCCI v Ali** [2002] 1 AC 251)."*

[35] I also found the words of Lord Pearson in **Trollope and Colls Limited v North West Metropolitan Regional Hospital Board** [1973] 2 All ER 260 to be of great assistance. Lord Pearson stated that -

> *"Faced with the conflict of judicial opinion in this case, I prefer the views of Donaldson J and Cairns LJ as being more orthodox and in conformity with the basic principle that the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves."*

[36] The position of the Claimant Company is that there is no evidence to support the Defendant Company in the manner in which it seeks to interpret General Condition Clause 25.5 of the Contract and by endeavouring to impose a new testing obligation unilaterally. Learned Counsel Mr. Gordon on the other hand, submitted that the Defendant Company could require the Claimant Company to carry out any test and/or inspection not required by the Contract but deemed necessary to verify that the characteristics and performance of the goods comply with the Contract. This, Learned Counsel further submitted, could be done pursuant to GCC 25.5. The Defendant Company could therefore request that the Claimant Company provide them with samples for testing and validating. Learned Counsel further submitted that this was a process which was established at the very early stage of the Contract. Learned Counsel directed this Court's attention to the letter dated the 22nd day of February, 2019. It was contended that the Claimant Company accepted the process and it must have been aware that the whole purpose of supplying the Defendant Company with sample tablets was for them to confirm whether or not they are satisfied with the product.

[37] It is clear from the provisions of the Contract and its accompanying documents that the parties agreed to the technical specifications of the tablets to be provided by the Claimant Company and the way in which the Project was to be carried out. The Contract outlined the way in which the goods were to be provided to the Defendant Company. The Contract also outlined the delivery, inspection and test procedures. The Defendant Company was to provide to the Claimant Company with a list of schools along with details on the quantity of tablets, charging carts and accessories to be delivered. Representatives from the school, the Defendant Company and the Claimant Company will conduct acceptance testing and sign off on all equipment delivered. Upon delivery to the school site, each device will be inspected for general functionality and any device not passing the general functionality test will not be accepted. The Contract further detailed what the test would include.

[38] In my view, General Condition 25.5 of the Contract is clear. The Defendant Company may require the Claimant Company to carry out any test not required by the Contract but deemed necessary. In the case of **Alex Duffy Realty Ltd v Eaglecrest Holdings Ltd** (1983) 44 A.R. 67 the Honourable Chief Justice McGillivray stated at paragraph 45 that the Court does not make contracts for the parties. The Court is not to impose its idea of fairness and interpret the plain wording of a contract to give it a meaning other than that which the language can bear because a Court thinks that this would be a fair method of handling this matter. The agents in that case introduced a purchaser who signed an agreement prepared by the agents to buy the property. The terms were satisfactory to the owner but before it was accepted by him, the prospective purchaser withdrew his offer and the agents claimed to be entitled to their commission as having introduced a person ready, able and willing to purchase.

[39] It is not for this Court in interpreting the plain wording of the Contract to give it a meaning other than that which the wording of the section in question can bear. Having examined all the surrounding circumstances, I am of the view that General Condition Clause 25.5 does not give the Defendant Company the power to request

five (5) tablets for testing as a precondition to the acceptance of the tablets in the Purchase Order. Even though the Defendant Company considered that there were limitations to the inspections and tests for acceptance which existed under the Contract, they could not change the acceptance and distribution aspect of the Contract without approval from the Claimant Company. On cross-examination, Mr. Smith maintained that pursuant to Clause 25.5 of the Contract, the request for the five (5) tablets was a requirement of the Defendant Company as they have a right to under the Contract. While, I am not in agreement with Mr. Smith's interpretation of Clause 25.5, I am mindful of the evidence given by Mr. McCalla III regarding the issue of the sample tablets.

[40] During cross-examination by Learned Counsel Mr. Gordon, Mr. McCalla III was asked if he agreed that the procedure under the Contract was that the Defendant Company would put in a Purchase Order and the Claimant Company would fulfil the order based on the terms of the Contract. Mr. McCalla's response was, *"…that GeoTechVision would proceed to manufacture sample tablets for presentation to e-Learning and subsequent to e-Learning's go ahead based on inspection of sample tablets proceed to manufacture said quantities."* Mr. McCalla III was called as a witness and gave evidence on behalf of the Claimant Company. I accept the evidence of Mr. McCalla III. He was the party who signed the Contract and would be able to speak to dealings between the parties before Mr. Smith assumed office as Chief Executive Officer of the Defendant Company. Mr. McCalla III was also the one who issued the first Purchase Order from the Defendant Company to the Claimant Company. Learned Counsel Mr. Gordon then asked if the Claimant Company would only go ahead with the manufacturing of the tablets after testing and acceptance by the Defendant Company, to which he responded that he cannot speak to what the Claimant Company would or would not do. Mr. McCalla III was then asked if the Defendant Company would only order the tablets in total after testing and accepting them as suitable. His response was that the Defendant Company would indicate its comfort level and satisfaction with the tablets as a go ahead to ship or as an indication that the Claimant Company should deliver the

tablets. I found the evidence of this witness to be compelling and as such I will accept his responses.

[41] It is clear that there have been agreements between the parties to the Contract that was not outlined in the Contract. This agreement regarding the sample tablets was something that the parties agreed to when Mr. McCalla III was the Acting Chief Executive Officer of the Defendant Company. I agree with Mr. Smith that the supplying of the sample tablets does not breach the terms of the Contract. Mr. Smith's evidence is that the Defendant Company is not constrained by the Contract to carry out all tests in the presence of the supplier. However, there is a test process as outlined by the Contract for testing to take place at the schools. The requirement for the sample tablets does not, in my view, operate as a change in the Contract, but it would assist the Defendant Company in determining whether the tablets met the requirements of the Contract. Since this does not operate as a change in the Contract, then it would not invoke Clause 4.4 or 32.4. The Claimant Company's own witness, Mr. McCalla III, admitted that the Claimant Company was to provide sample tablets to the Defendant Company so that they could indicate its comfort level and satisfaction with the tablets so that the quantities of the Purchase Order may be manufactured and then shipped or delivered.

[42] Even though my interpretation of Clause 25.5 of the Contract is different from that of the Defendant Company's, I agree with Mr. Smith that the portion of the Contract that deals with delivery and acceptance is a different test process from that of the requirement for the sample tablets. It therefore cannot be said that, the Defendant by requiring sample tablets tried to unilaterally change the delivery and acceptance procedure as outlined by the Contract. The parties had not reached that stage of the Contract. The manufacturing, shipping and delivery of the Purchase Order should have taken place after the successful validation of the sample tablets by the Defendant Company.

[43] While I can agree that on a proper interpretation of Clause 25.5 the Defendant Company was not entitled to request an additional five (5) tablets for testing as a

pre-condition to the acceptance of the tablets, I cannot agree that the Defendant Company was not entitled to make that request at all. The evidence before this Court shows that the Claimant Company was to manufacture tablets and upon the Defendant Company's satisfaction with the sample tablets they would then proceed to ship and deliver the tablets. Once the tablets are in Jamaica, then the portion of the Contract that deals with delivery and acceptance would have been applicable. The Defendant Company could therefore not be in breach of the Contract by requesting an additional five (5) sample tablets and stating that acceptance and subsequent distribution to schools of any tablets will be dependent on the successful validation of the tablets by this inspection and testing process.

II.Delivery Timelines

[44] Learned King's Counsel Mrs. Kitson, submitted that on the 30th day of May, 2019, as evidenced by the Defendant Company's letter of the 3rd day of June, 2019 to her client, the parties agreed to a specific deliverable of the Claimant Company's shipment of a first batch of one thousand (1,000) tablets by the 15th day of July, 2019. In that same letter, the Defendant Company agreed to provide a further delivery date for the remaining batches of tablets by the 10th day of June, 2019, which they had not done so to this date. Learned King's Counsel further submitted that her client cannot properly be said to be in default in the fulfilment of the Purchase Order given by the Defendant Company on the 22nd day of February, 2019.

[45] It was contended by Learned King's Counsel that it is evident from the Defendant Company's conduct throughout the period July 25, 2019 to September 16, 2019 that despite its obligations under the terms of the Contract, it was determined to only perform the Contract in a manner which was inconsistent with its obligations. The parties agreed that the revised Purchase Order of February 22, 2019 would be fulfilled in instalments, the first of which was agreed for the delivery of 1,000 tablets by the 15th day of July, 2019.

[46] Learned Counsel Mr. Gordon submitted that the letter of June 3rd could not operate as an amendment to the Contract as the Contract expressly stated that the only way that it can be amended is pursuant to General Condition Clause 4.4. The letter of June 3rd does not meet the requirements as laid down by the said Clause and therefore it cannot serve as an amendment to the Contract. Learned Counsel further submitted that General Condition Clause 4.5(a) is a clear and unambiguous non-waiver clause. Based on the requirements of General Condition Clause 4.5 (b), the June 3rd letter could not have operated as a waiver for any of the Claimant Company's previous or continuous breaches of contract. Notwithstanding that, the Claimant Company missed the deadline as outlined in the June 3rd letter and therefore failed to meet its obligations under the alleged amendment.

[47] I think the starting point ought to be what was the original timeline for delivery. It is not in dispute that the Claimant Company's proposal stated that the earliest delivery date is forty-five (45) business days after the signing of the Contract, the latest delivery date is sixty (60) business days and the delivery date as offered by the Claimant Company is fifty-five (55) business days. I agree with Learned Counsel Mr. Gordon that in accordance with the Contract, the parties agreed that the timeline for delivery was 45 to 60 business days from the date the Contract took effect. I should note that it is not in dispute that the Contract had deadlines for performance and that both parties were both aware of this when they signed the said Contract. The deadline given by the Claimant Company in relation to the revised Purchase Order of February 22, 2019 was in accordance with the Contract. Both Ms. Grant and Mr. McCalla III gave evidence in support of this as well. They were the signatories to the Contract and they both accepted that the Contract had timelines for delivery and/or deadlines.

[48] There are 2 matters for my determination in dealing with this sub-issue. Firstly, I must make a determination as to whether the parties had amended the delivery timeline of Contract by way of the June 3rd letter. Thereafter, I must determine whether the Claimant could be held to be in breach of contract for failing to deliver the 19,305 tablets and associated accessories by September, 2019.

[49] Learned Counsel Mr. Gordon urged the Court to find, in the absence of an express deadline, that there must have been an implied term that the Contract would be performed within a reasonable time, that time being September, 2019. The Contract entered into was one which dealt with the tablets in school project. There is evidence that the Defendant Company intended to roll out the said Project in time for the beginning of the school year in 2019. This is not in dispute. It is clear on the evidence that the first Purchase Order of 19,305 tablets was to facilitate teacher training in July, 2019 and rolled out to the students in September 2019.

[50] I am guided by the words of Morrison, J.A. in **Goblin Hill Hotels Ltd v John Thompson & Janet Thompson** Supreme Court Civil Appeal No. 57/2007 where he stated at paragraph 45 that: -

> *"…the court in implying a term in a contract is generally seeking to give effect to the presumed intention of these parties" as collected from the words of the Agreement and the surrounding circumstances" (Chitty on Contracts, 29th edition Volume 1, paragraph 13-003)."*

[51] Daye J in **Andrew Harbour v Palmyra Resorts & Spa Limited and Palmyra Properties Ltd** [2012] JMSC Civ. 44 accepted at paragraph 21 that

> *"…the modern law or test for implication of terms in a contract was formulated in the ex tem pare judgment of Bowen L.J. in the Moorcock [1889] 14 PD, 64, 68 C.H. who states (at page 68):-*
>
> > *"…the law in raising on implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by implication as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate from one side all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances."*

[52] I agree with Learned Counsel Mr. Gordon that there ought to be an implied term in the Contract, that it would be performed by September, 2019. The Contract entered into was one which dealt with a "Tablets In School's" project. In a letter

dated March 25, 2019 the Claimant Company mentioned that the date for delivery to the schools is September, 2019. The Defendant Company in a letter also reminded the Claimant Company of the strict adherence and compliance that ought to be taken in relation to the deadlines of the Contract. The May 14, 2019 letter written by the Claimant Company also made mention of the critical timeline relating to teacher training and delivery of the tablets to the schools. Ms. Grant and Mr McCalla III also gave evidence that the Contract was for the provision of tablets for the school year starting September, 2019. The presumed intention therefore must have been that the 19,305 tablets from the Purchase Order was to be delivered by September, 2019 for the roll out of the Project. Therefore, having regard to the purpose of the Contract and in light of the evidence from both parties to Contract, it can be implied that the Contract should have been performed by September, 2019. It is, in my view, reasonable and necessary to imply such a term into this Contract so as to give it business efficacy.

[53] Having found that such a term ought to be implied into the Contract, I must now determine whether by way of the June 3rd letter that that was amended. Ms. Grant while being cross-examined stated that the letter of June 3rd operated as an amendment to the Contract and the Claimant Company was to deliver 1,000 tablets instead of the 19,305 tablets. I find merit in Learned Counsel Mr. Gordon's submissions that the letter of June 3rd could not have operated as an amendment to the Contract. It has already been determined that any change to the Contract must be in accordance with General Condition Clause 4.4. The Defendant Company in the letter of June 3rd mentioned the agreed milestones and associated deliverables to them for the provision of tablets. I accept the evidence of Mr. Smith during cross-examination by Learned King's Counsel where he stated that the original timeline for the delivery of tablets was not varied repeatedly by the parties. What the Defendant Company sought to do was to ensure that the Claimant Company met the committed timelines and any accommodations given to the Claimant Company ought not to be seen as changing the commitments of the original Purchase Order.

[54] The Contract is clear in relation to how amendments are to be made. The Contract is also clear regarding the non-waiver clause given at General Condition Clause 4.5. The non-waiver clause operates in such a way as to prevent one from inadvertently abandoning their contractual rights through their actions. Fraser J relied on the judgment of Harrison JA who relied on the judgment of Lord Hailsham in **Banning v Wright** [1972] 2 All E R 987 where he said at page 998c that:

> *"In my view the primary meaning of the word 'waiver' in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted."*

[55] I am of the view that General Condition Clause 4.5 would therefore provide that the granting of time by either party to the other party shall not prejudice, affect or restrict the rights of that party under the Contract, neither shall any waiver of any breach operate as a waiver of any subsequent or continuing breach of contract. Learned King's Counsel Mrs. Kitson submitted that the parties agreed that the Purchase Order would be fulfilled in instalments. However, I see no evidence of this before me. Up until the 14th day of May, 2019, the Claimant Company always made reference to the tablets and associated accessories. It was not until June 3rd, that the evidence of instalments was seen. That in my view, ought not to be seen as a change in the timeline of September 2019.

[56] Having determined that there was no change to the September, 2019 timeline, it must be determined whether the Claimant Company breached the Contract by failing to deliver the 19,305 tablets by that deadline. The evidence shows that at the time when the Contract was terminated the Claimant Company had only 4,354 tablets in Jamaica. The remainder of the tablets were in Jamaica by the end of September 2019. This is evidence that is not in dispute. This would mean that at the start of the school year in 2019, the 19,305 tablets and associated accessories were not available for roll out. At this stage, I am minded to say that the Claimant Company could be held to be in breach of the Contract for failing to deliver the 19,305 tablets.

[57] However, I will briefly deal with the delays that plagued the performance of this Contract before a determination is made as to whether there was a breach of Contract. The initial projected delivery timeline given by the Claimant Company was on or before the 30th day of April, 2019. Following a Project Meeting held on the 25th day of March, 2019, the Claimant gave a delivery timeline of the 30th day of May, 2019. On the 14th day of May, 2019 the Claimant Company gave another deadline for the delivery of the tablets and associated accessories being the 30th day of June, 2019. The Claimant Company missed those deadlines and they also missed the deadlines given for the delivery of the sample tablets. The Claimant Company also missed the deadline of the 15th day of July, 2019 for the delivery of 1,000 tablets.

[58] The Claimant Company gave several reasons as to why these deadlines were not met. On the 5th day of July, 2019, the Claimant Company stated that they were constrained in getting the tablets to Jamaica as they were awaiting the Defendant Company to sign off on a Deed of Assignment. The Defendant Company did not consent to nor did they sign this Deed of Assignment and as such the Claimant Company stated that due to their late response to same, the delivery of the tablets would be delayed until the 25th day of July, 2019. However, I find that this argument is of no merit. The Contract was not subject to a Deed of Assignment and as such the Defendant Company by not consenting or singing the Deed of Assignment ought not to have delayed the delivery of the tablets. The Claimant Company therefore cannot say that they are not liable for the delayed shipment as they relied on the Defendant Company's cooperation.

[59] Another reason proffered for the deadlines not being met was shipping delays. However, I agree with the submission of Learned Counsel Mr. Gordon that there was evidence as to what the cause of these delays were. I am therefore unable to examine the said delays and make a finding. There was an issue regarding the waiving of the mobilization fund to be paid by the Defendant Company in light of the performance bond that was to be paid by the Claimant Company. Both sums were the same. I see no delay that was caused by the request and subsequent

payment of this fund. I accept Mr. Smith's evidence that in accordance with the Financial Administration and Audit Act, he could not pay out any monies to the Claimant Company until an invoice was provided and payment was made shortly after.

[60] As it relates to the other reasons given for the missed deadlines, I see no merit in the Claimant Company's submissions. The requirement for the list of APKs and the list of schools should not have hindered the manufacturing of the tablets. I accept the evidence of Mr. Smith that when the sample tablets were requested the Claimant Company did not require a list of APK's or list of schools in order for them to be manufactured and imported to Jamaica. I also accept the evidence of Ms. Grant that the list of schools would have made importation of the tablets easier as the list would assist the Claimant Company in deciding which port of entry should be used. However, I do not see how this would affect the tablets and the delay in the shipping of the tablets. It was Ms. Grant's evidence that the tablets would be stored at Marlie Technology Park before distribution to the schools. Therefore, the port of entry would not have been in issue. There is also evidence in the letters between the parties that the tablets would have been in the island and available for warehouse inspection. There was no requirement for a list of schools to be provided before that was done. I am also mindful of the fact that the first batch of tablets were imported without the list of schools and at the end of September the remainder of the tablets were also imported to Jamaica.

[61] Therefore, it must follow that if the Claimant Company failed to provide to the Defendant Company 19,305 tablets and associated accessories by the start of the school year, that is in September, 2019 then they can be held to be in breach of the Contract. Where a party fails to comply with the terms and conditions of a contract the innocent party is entitled to rescind the said contract. This is what the Defendant Company elected to do in this case.

III.Quality of the Tablets and their Cases

[62] The Defendant Company conducted tests on the 2 batches of tablets that were received and found them to be of sub-standard quality. I should note that it is not in dispute that the initial five (5) sample tablets that were received did not meet the specifications of the Contract. Therefore, there is no need for me to make any determination on the quality of the initial five (5) sample tablets that were sent to the Defendant Company. In fact, it was the Claimant Company who wrote to the Defendant Company advising them that since the initial sample tablets were delivered, they optimized the product and would deliver to them "gold standard" samples. Having regard to the evidence of Ms. Grant where she stated that the first five (5) sample tablets were standard tablets that had plush buttons instead of raised buttons, a lower screen resolution, or the ability to have Over The Air Installations and the minimum specifications of the tablets as outlined in the Contract, it is clear that these initial tablets did not meet the said minimum specifications.

[63] The "gold standard" tablets were sent to the Defendant Company, and after conducting tests they concluded that the tablets had significant shortcomings. The results of these tests were sent to the Claimant Company *via* email. The evidence of Mr. Ricardo Jones, who at all material times was the Project Manager and Regional Training Officer for Region 2 employed to the Defendant Company, was that after conducting tests on the first batch of five (5) sample tablets provided by the Claimant Company he found that there was a myriad of specifications that were not met. When the second batch of five (5) tablets were delivered to the Defendant Company, Mr. Jones along with four (4) other employees of the Defendant Company conducted tests and found that they had significant shortcomings. Mr. Jones further stated that neither of the two batches of sample tablets met the required minimum specifications nor were they of the quality as required under the Contract. A report was compiled and sent to the Defendant Company *via* email on the 14th day of June, 2019. The report that was compiled identified seven (7) issues

that they found with the “gold standard” tablets and these issues were all outlined as required minimum specifications for the tablets.

[64] The Claimant Company called Mr. Terrence Williams, who was at all material times employed to the Claimant Company as an Electrical Engineer. He stated that the sample tablets that were in the Defendant Company’s possession were in fact updated on the 10th day of July, 2019 and as such the report as complied by Mr. Jones does not accurately reflect the state of the tablets after the 7th day of June, 2019, which was the date that the report was compiled. Learned King’s Counsel Mrs. Kitson during cross-examination suggested to Mr. Jones that the tablets were updated by Mr. Williams on the 10th day of July, 2019 to which he responded he does not know. The Claimant Company tendered into evidence three (3) tablets which they state were the gold standard tablets that were sent to the Defendant Company.

[65] Learned Counsel Mr. Gordon submitted that the Claimant Company, by supplying goods that were not in accordance with the minimum specifications under the Contract, would have breached same. Learned Counsel outlined the applicable percentage of the failure rate of the tablets and contended that in dealing with a quantity of 19,000 tablets it would mean that a failure rate of 20% would be equivalent to 3,800 tablets, a failure rate of 40% would be 7,600 tablets and a failure rate of 1,000 tablets would be all of the tablets. It was also contended that the evidence of Mr. McCalla III, in relation to the quality and performance of the tablets that he personally tested, ought to be rejected by the Court. This is because the Claimant Company failed to establish any nexus between the tablets that Mr. McCalla III the tested and the sample tablets provided to the Defendant Company for testing. It was also contended that this Honourable Court cannot safely draw any conclusions on the sample tablets as on a balance of probabilities, as there is no credible evidence before the Court that these tablets formed part of the sample tablets that was sent to the Defendant Company.

[66] On the other hand, Learned King's Counsel submitted that the evidence of Mr. Williams was not shaken and he remained consistent that the tablets were in fact updated. It was further submitted that, in any event, the testing/evaluation categories used by the Defendant Company were not categories agreed with and/or notified to the Claimant and/or set out in the executed Contract. Learned King's Counsel contended that no reliance ought to be placed on the test results of the tablet cases as the Defendant Company was to select a case from the sample of cases sent and notify the Claimant of same, however, this was not done.

[67] In my view, in order to assist me in making a finding as to whether it was reasonable for the Defendant Company to conclude that the tablets and rubber cases were either sub-standard and/or failed to meet the specifications in the Contract, I must first decide on a balance of probabilities which witnesses evidence I would be more inclined to accept. Mr. Jones has a Diploma in Secondary Education the field of Mathematics and Computer, a Bachelor of Education in Computer Science and a Masters in Information Systems. He also stated that he received various certifications in computer repairs, data operations, computer network and other areas of computer technology from HEART. Mr. Williams, during evidence in chief stated that, *"my father had an electronics store and an opportunity came up where this training programme was coming to Jamaica from Nokia and Motorolla through Stanley Motors they provided the training. I sit the training and went ahead and got an opportunity at Best Buy Jamaica which I also had on the job training from their suppliers. I went ahead and swapped Best Buy for Konka Limited. I went there also as head of the electronics department where they were the repair center for Samsung and Digicel. That included training from Samsung Technicians. I also had training from Digicel where I led the department on that."* Mr. Williams also stated that he had been practicing in this area of electronics for over eighteen (18) years.

[68] I found Mr. Jones to be the more credible and competent witness. He was very detailed in answering the questions put to him. I also found him to be credible in the detailing of the findings of the test reports that were compiled by him. On the

other hand, I found Mr. Jones not to be forthcoming. While I can agree with Learned King's Counsel that Mr. Williams remained consistent that the tablets were in fact updated on the 10th day of July, 2019, the fact that they were updated does not discredit the test results prepared by Mr. Jones. There is no evidence before me where I can properly draw the conclusion that the tablets were in fact updated thereby making them Google Certified on that date. I find favour with the evidence of Mr. Jones that the "gold standard" tablets still did not meet the minimum specifications of the Contract. Respectfully, I do not agree with Learned King's Counsel Mrs. Kitson that the categories used by the Defendant Company were not set out in the Contract. Having examined Table 1 of the Contract which details the minimum specifications of the teacher and student tablets, I find that the categories are the same.

[69] As it relates to the three (3) tablets that were tendered into evidence, I agree with Learned Counsel Mr. Gordon's submission that the Court cannot safely make a finding in relation to them. These three (3) tablets were presented to the Court as being from the "gold standard" tablets that were given to the Defendant Company. The tablets were put into evidence through Mr. Williams who stated that all the tablets had the same serial number, however they had a unique mac identification number. However, he was unable to say what that unique mac identification number is. Mr. Williams demonstrated to the Court that these three (3) tablets were all Google Certified. The tablets were shown to Mr. Williams who stated that he was unable to say whether these were the same tablets. The tablets did not state when Google Certification was done nor is there evidence of the date the Claimant Company received Google Certification. Therefore, the Court has to place little to no reliance on these tablets. There is no evidence before me where I can definitively say that these tablets were in fact the ones that the Defendant Company received as part of the sample tablets.

[70] Mr. Williams showing the Court now that these tablets are Google Certified does not discredit the report of Mr. Williams. It would therefore have been reasonable

for the Defendant Company to come to conclude that the tablets did not meet the minimum specifications of the Contract.

IV. Notice of Termination

[71] I will now examine whether in light of the forgoing the Defendant Company wrongfully terminated the Contract and is in repudiatory breach of same. Learned King's Counsel submitted that it is clear that if the Claimant Company's delivery obligation is as set out in the June 3rd letter then at the date of the service of the Notice of Termination and the actual termination of the Contract, the Claimant Company was not in breach of the Contract. No delivery date was set out in the Purchase Order of February 22, 2019. However, the date in the June 3rd letter is clear in its delivery directive to the Claimant. I have already found that the June 3rd letter did not act as an amendment to the implied completion date of the Contract by the start of the school year in September 2019. I respectfully, therefore find no merit the submission advanced by Learned King's Counsel.

[72] I am guided by the words of Lord Hoffman in the English case of **Union Eagle Ltd v Golden Achievement Ltd** [1997] AC 514, where he stated that:

> *"An innocent party's right to terminate or rescind a contract for breach of a condition is an accrued right. There is no basis in principle for recognizing a power in the defaulting party to deprive the innocent party of that right by tendering late performance. Once the time for completion had passed performance of the contract by the purchaser was not possible. The vendor was thus entitled to rescind the contract."*

[73] The Contract expressly provides that the Contract may be terminated for default where the Claimant Company fails to deliver any or all of the Goods within the period specified in the Contract, or within any extension thereof. It has been agreed that the Contract had a delivery date of 45 to 60 business days from the date the Contract. Ms. Grant and McCalla both accepted that the Defendant Company can terminate the Contract for lack of performance.

[74] Therefore, even if I am wrong in finding that there was an implied term that the Contract was to be completed by September, 2019 in light of the purpose being

for the tablets in schools, the Claimant Company would have failed to deliver the tablets within the period specified in the Contract and even failed to deliver them by the extensions that they asked for. The Claimant Company was also not in a position to complete the Contract at that time as the 19,305 were not in Jamaica and the bulk of the delivery did not arrive on the island until the end of September, 2019.

[75] Therefore, the Claimant having not delivered the 19,305 tablets would have breached the Contract and entitled the Defendant Company to terminate same. General Condition Clause 34.1 gives the Defendant Company the power to terminate the Contract and that is what they elected to do. The school year started and the Defendant Company did not have the 19,305 tablets for the Project. Teacher training was not conducted in July and the tablets were not rolled out as they were not available. I agree with Learned Counsel Mr. Gordon that, the matters concerning the list of schools and the APKs are ancillary matters without there being the prerequisite availability of tablets and reliable delivery timelines.

[76] I wish to adopt the summary of the **Union Eagle Limited v. Golden Achievement Limited** (1997) 3 ALL E.R. 215 P.C. by Langrin J in **Park Traders (Jamaica) Limited v Bevad Limited and Transocean Shipping Limited** (unreported) Suit No. E.224/90 delivered on September 19, 1997 at page 12:

> *"…the appellant purchaser entered into a written contract from the respondent vendor and paid a deposit. The contract provided that time was of the essence in every respect of the contract. The purchaser was ten minutes late in tendering cheques for the purchase money and relevant documents for completion. It was held by the Privy Council that in the absence of conduct amounting to a waiver or estoppel, the Courts would not intervene to provide an equitable remedy such as specific performance in cases of rescission of an ordinary contract of sale of land for failure to comply with an essential condition as to time, since the purpose of the right to rescind was to free the property for resale and to enable the vendor to know with certainty that he was entitled to resell, which, in a rising market, could be both a valuable and a volatile right."*

[77] Even though that case dealt with an Agreement for Sale, I am of the view that the principle is applicable. The Contract, in my view, conferred on the parties an

express right to terminate in certain defined circumstances. The 19,305 tablets not being available for roll out in September, 2019 would constitute a defined circumstance and therefore the Defendant Company would have been entitled to terminate.

B. *Whether the Claimant Company is entitled to loss and damages for breach of contract*

[78] The innocent party ought to be restored, so far as he can, by money, to the position he would have been in, had a breach of duty not occurred. Learned King's Counsel directed this Court to the case of **Sagicor Bank Jamaica Ltd (Respondent) v YP Seaton and others (Appellants) (Jamaica)** [2022] UKPC 48. The issue on this appeal was to identify the remedy to which the Appellants are entitled to restore them to the position they would have been in if the Respondent had not breached its contracts with them by freezing and debiting the bank accounts. Lord Hodge stated at paragraphs 16 and 17 that:

> *"16. …It is trite law that the fundamental principle underlying the award of damages for breach of contract, which is a substitute for performance, is that the plaintiff or claimant is to be placed in the same position it would have been in, so far as can be achieved by a money award, as if the contract had been performed: Robinson v Harman (1848) 1 Ex 850, 855 per Parke B. More recent applications of that principle can be found in Golden Strait Corporation v Nippon Yusen Kubishika Kaisha [2007] UKHL 12; [2007] 2 AC 353, paras 9 per Lord Bingham of Cornhill, 29 per Lord Scott of Foscote, and 57 per Lord Carswell; Bunge SA v Nidera BV [2015] UKSC 43; [2015] 2 Lloyd's Rep 469, [2015] Bus LR 987, para 76 per Lord Toulson; and One Step (Support) Ltd v Morris-Garner [2018] UKSC 20; [2019] AC 649, paras 31-35 per Lord Reed. (In this judgment the Board refers to "the plaintiff" in the context of Jamaican law and "the claimant" in the context of English law.)"*
>
> *17. That principle is qualified by legal rules in relation to, for example, remoteness of damage classically stated in Hadley v Baxendale (1854) 9 Exch 341 as discussed more recently by the House of Lords in C Czarnikow Ltd v Koufos (The Heron II) [1969] 1 AC 350 and yet more recently by the Board in Attorney General of the Virgin Islands v Global Water Associates Ltd [2020] UKPC 18; [2021] AC 23…"*

[79] The author in the 16th edition of **McGregor on Damages** gave the following guidance when assessing damages:

> *"The starting point in resolving a problem as to the measure of damages for breach of contract is the rule that the Plaintiff is entitled to be placed so far as money can do it, in the same position as he would have been in had the contract been performed. The rule is limited first, but not substantially, by the principles as to causation; the second and much more far reaching limit is that the scope of protection is marked out what was in the contemplation of the Parties. When damages is said to be too remote in contract it is generally this latter factor that is in issue."*

[80] I am guided by the principle laid down by Alderson B in **Hadley v Baxendale** (1854) 9 Exchequer 341, [1843-60] All E.R. 461-

> *"Where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. If special circumstances under which the contract was made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But if the special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract."*

[81] Ms. Grant detailed a number of heads of losses suffered by the Claimant Company as a result of the Defendant Company's breach and wrongful termination of the Contract. However, having found that the Defendant Company did not breach the Contract, the Claimant Company would not be entitled to any damages arising from a breach. Therefore, I see no need to address Learned King's Counsel's submissions on damages.

C. *Whether the Claimant Company breached the said contract*

[82] Learned Counsel Mr. Gordon submitted that the Claimant Company breached several provisions of the Contract and he outlined eight (8) categories of breaches namely:

> *(a) Inordinate delay in the performance of contractual obligations;*
>
> *(b) Providing the applicable performance security outside of the contractual deadline;*
>
> *(c) Failing to provide sample tablets for testing and validating;*
>
> *(d) Failing to meet performance deadlines under the Contract;*
>
> *(e) Failing to deliver goods by the agreed date and/or dates;*
>
> *(f) Providing batches of test tablets that were substantially lacking in quality, specifications and overall conformity with what is required under the Contract;*
>
> *(g) Providing batches of test tablets that failed the Defendant's validation and acceptance tests; and*
>
> *(h) Failing to carry out its obligations under the Contract to the standard that is required under the Contract.*

[83] The breaches as submitted by Learned Counsel, overlap with the discussions and findings that were had earlier in this judgment. Nevertheless, for ease of reference and understanding I will briefly address them under this issue.

[84] Learned Counsel further submitted that the Claimant Company repeatedly failed to meet timelines, deadlines, and even extension of deadlines as provided for in the Contract. Having regard to the purpose of the Contract, there was an implied term that it would have been performed by the start of the school year, that is September 2019. Having examined the evidence before me, I also find that even though it was not expressly stated in the Contract, it was clear to the parties that sample tablets would be provided by the Claimant Company and upon satisfactory validation by the Defendant Company, the Claimant Company would then manufacture the quantities as required by the Purchase Order. The Defendant

Company stated that the sample tablets did not meet the specifications as required by the Contract and as such they demanded another batch of sample tablets. The Claimant Company continuously set timelines for the delivery of the tablets but failed to meet those timelines, even after the Defendant Company agreed to extend certain deadlines that they, the Claimant Company, set themselves.

[85] Having examined the test results, I agree with the submissions of Learned Counsel that the sample tablets received did not meet the specifications under the Contract. Having determined that the Claimant Company failed to deliver to the Defendant Company the 19,305 tablets and associated accessories, they would have been in breach of the Contract.

D. *Whether the Defendant Company is entitled to damages for breach of contract*

[86] Having found that the Claimant Company breached the Contract by failing to deliver the 19,305 tablets, the Defendant Company would therefore be entitled to damages. The Defendant Company has pleaded special damages in the sum of Twenty-Five Thousand and Fifty-Four United States Dollars and Twenty-Five Cents (USD$ 25,054.25) and One Hundred Fifty-Six Thousand and Thirty-Six Jamaican Dollars and Seventy Cents (JMD$ 156,036.70).

[87] However, the Defendant Company tendered into evidence, through Mr. Smith, two invoices. The first invoice was from Attorneys-at-Law Foga Daley for legal services which the Defendant Company is alleging that they incurred in relation to the Contract. The invoice was in relation to the Deed of Assignment and advice on the termination of the Contract. The Defendant Company is only claiming for the sums in relation to the termination of the Contract and submitted that it amounted to Four Thousand Two Hundred and Thirty-Four United States Dollars (USD $4,234.00). The second invoice was an invoice from the Jamaica Information Service which represented the cost of placing advertisements in the Observer and Gleaner. Mr. Smith gave evidence that due to the termination of the Contract, they had to re-advertise the tender.

[88] In my view, legal services of a different law firm are not recoverable. For a party to recover damages for breach of contract, there must be causation between the breach and the loss sustained, what is known as the 'but for' test. This should be applied in a common sense way to determine whether the damages suffered is attributable to the breach in question. Even though there may be a causal link between the seeking of legal services and the breach of the Contract, I am of the view that this item as claimed ought not to be recoverable by the Defendant Company.

[89] I am however satisfied that the Defendant Company had to re-advertise the bid and therefore had to pay to place the advertisement in the newspapers. I find that the sum claimed for the re-advertisement is one which naturally arises from the breach of the contract and they ought to be put in as good a position as they would have been in had the breach of contract not occurred. The total invoice amount was for $181,320.60 and the Defendant Company paid JMD $155,640.00.

INTEREST

[90] It is settled law that the purpose behind an award of interest on a judgment sum is to put the Claimant in the position in which he would have been had he not suffered this loss/deprivation as occasioned by the Defendant. Section 3 of **the Law Reform (Miscellaneous Provisions) Act** gives the Court the power to award interest on debts and damages. It gives the Court the discretion to award interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of the judgment. I have not been provided with evidence which would assist me in making an award, nevertheless I find that the circumstances of the case did not present any novel factor that would warrant the court awarding above the standard commercial rate.

[91] The general rule is that damages for breach of contract are assessed as at the date of the breach, however, this general rule is subject to exceptions. The authors

in the text Commonwealth Caribbean Contract Law, gave one such exception in the case of **Dodd Properties (Kent) Limited v Canterbury City Council** [1980] 1 All ER 928, where Megaw LJ explained that where there is serious structural damage it would be patently absurd and contrary to general principle on which damages fall to be assessed in that then damages are not required to be assessed as at the date of the breach. Another instance was seen in the case of **Harvey-Ellis v Jones** (1987) High Court Barbados, No. 931 of 1985 where Williams CJ following the ruling in Dodd Properties held that damages should not be assessed at the date when the breach was first discovered but at the date of the trial of the matter.

[92] I therefore exercise my discretion and I am prepared to grant an award of interest at 6% per annum from the date of the trial to the date of judgment. I am of the view that same is reasonable in the circumstances.

COSTS

[93] The general rule relating to costs is contained in Part 64 of the Civil Procedure Rule 2002, as amended (the CPR). Rule 64.6(1) states: *"If the Court decides to make an order about the cost of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party."* I see no need to depart from the general rule of costs in relation to both the originating claim and the counterclaim.

ORDERS & DISPOSITION

[94] Having regard to the forgoing these are my Orders:

(1) The Claimant's claim against the Defendant is dismissed.

(2) Judgment for the Defendant on the counterclaim.

(3) Judgment is entered for the Defendant on the counterclaim against the Claimant in the sum of JMD $155,640.00 with interest at a rate of 6% per annum from July 5, 2021 to June 8, 2023.

(4) Costs awarded to the Defendant to be paid by the Claimant, to be taxed if not agreed.

(5) Costs awarded to the Defendant to be paid by the Claimant on the counterclaim, to be taxed if not agreed.

(6) Orders are hereby stayed pending the filing of an appeal within six (6) weeks of today's date.

(7) Defendant's Attorneys-at-Law to prepare, file and serve Orders made herein.