COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2020/CLE/gen/01047

IN THE MATTER OF A MASTER AGREEMENT FOR DESALINATED WATER SUPPLY DATED 12TH AUGUST, 2011

AND IN THE MATTER OF A SUB-AGREEMENT FOR DESALINATED WATER SUPPLY AT NAVAL BASE, CENTRAL ELEUTHERA DATED 12TH AUGUST, 2011

AND IN THE MATTER OF A NOTICE OF TERMINATION OF THE DESALINATED WATER DELIVERY PERIOD DATED 19TH OCTOBER 2020

BETWEEN:

WATER AND SEWERAGE CORPORATION

Applicant

And

AQUA DESIGN (BAHAMAS) LTD

Respondent

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Ferron Bethell QC and Ms. Camille Cleare of Harry B. Sands for the Applicant
Mr. Luther McDonald and Ms. Keri Sherman of Alexiou Knowles for the Respondent

Hearing Date: 17 December 2020

Practice - Interim Injunction – Declaratory Remedy- Breach of Contract – Proper construction of Master Agreement and Sub-Agreement - Validity of termination of Sub-Agreement- Post Termination Right's Obligations and Liabilities of Parties - Whether Contractor acted unreasonably and/or irrationally in the *Wednesbury* sense – Whether time was of the essence

This matter concerns the proper construction of the Master Agreement and the Sub-Agreement for Central Eleuthera for the supply of desalinated water. During the peak of the Covid-19 pandemic, the Respondent terminated the Sub-Agreement and cut off the water supply in Central Eleuthera after its many demands for arrears of payment were not met. The Applicant seeks, inter alia, Declarations and Orders that the Respondent wrongfully terminated the Sub-Agreement and that the cessation of water supply was a repudiatory breach of that agreement. The Applicant also contends that since the Sub-Agreement was terminated, it now owns the Plant since one of the clauses provides that "During the contract period, ownership of the Plant shall be vested 100% in the Contractor".

On the other hand, the Respondent seeks a declaration that the termination of the Sub-Agreement was properly executed and that it is entitled to a reasonable period of two (2) months to demobilize its "materials, equipment, parts, chemicals and consumables and facilities" and leave the site.

Held: Finding that the Respondent properly terminated the Sub-Agreement for Central Eleuthera on 19 October 2020, it is therefore entitled to a reasonable period of two months to demobilize its "materials, equipment, fixtures, chemicals and consumables and facilities" and to leave the Plant Site in a neat, clean and tidy condition to the satisfaction of the Applicant

1. The failure to comply with the requirements in Clause 12.2 to pay the billings within 30 days is not a repudiatory or material breach. However, failure to pay on time is a default. Although a breach of contract does not automatically give the non-defaulting party the right to terminate the contract, Clause 27.2 provides a mechanism with strict notice provisions whereby a default becomes a material breach. Clause 27.2 therefore gives the Respondent the election to choose whether to terminate the Agreement which it exercised. The Sub-Agreement for Central Eleuthera was therefore properly terminated.

2. Time is of the essence where the parties have expressly stipulated in their contract that the time fixed for performance must be exactly complied with (as in this Agreement) or that time is to be "of the essence." In the present case, Clause 12.2 mandates that upon the receipt of the billings from the Contractor, the Corporation has 30 days to pay it making time of the essence. Even if this interpretation is erroneous, the law further states that where time was not originally of the essence of the contract, but one party has been guilty of undue delay, the other party may give notice requiring the contract to be performed within a reasonable time. What is reasonable will depend upon the facts and circumstances of the case: **North Eastern Properties v Coleman** [2010] 1 WLR 2715. If, by notice, a party has made time of the essence, but later allows a further extension to another fixed date, (as in this case), time remains of the essence: **Etzin v Reece** [2002]

All ER (D) 405 (Jul). When the Corporation did not pay within 30 days as stipulated in Clause 12.2, the Contractor, pursuant to Clause 27.2, issued a Notice of default dated 19 August 2020 giving the Corporation 30 days to pay. It subsequently extended the time to 16 October 2020 for the Corporation to cure the default. It failed to do so. On both occasions, time was of the essence.

3. WSC could, with reasonable diligence, have cured the default but it appears that not much was done to address the habitual delinquency by WSC in making timely payments to Aqua.

4. Aqua did not act unreasonably or irrationally in the *Wednesbury* sense when it cut off the supply of water and terminated the Sub-Agreement. The time given to settle the arrears was reasonable in the circumstances and accord with the terms of the Master Agreement: **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** (1948) 1 K.B. 223, per Lord Greene MR at 230.

5. The Agreement makes no provision for post obligations in the event of a material breach. Common law principles will apply namely (a) a party cannot benefit from its own breach and (b) the innocent party is entitled to termination to be put in a position he would have been in had the contract been performed.

6. A proper construction of Clauses 2, 5,13 and 27 of the Master Agreement, since the Sub-Agreement was terminated on 19 October 2020, the Contractor has two months to demobilize “its materials, equipment, parts, chemicals and consumables and ‘facilities’” and leave the Plant Site in a neat, clean and tidy condition to the satisfaction of the Corporation.

7. Clause 13.1 which states that “During the Contract Period, ownership of the Plant shall be vested 100% in the Contractor”. It does not follow that after the Contract Period has ended, ownership of the Plant is vested in the Corporation. The contract has to be read as a whole to effect the mutual intention of these commercial parties: Lord Hoffmann in **Investors Compensation Scheme Ltd v Wesr Bromwich Building Society** [1998] 1 All ER 98; [1998] 1 WLR 896. The Plant is not the property of the Corporation.

JUDGMENT

Charles J:

Introduction

[1] By an Amended Originating Summons filed on 10 November 2020 ("the Application"), the Applicant ("WSC") alleged that the Respondent ("Aqua") breached its obligations when, on 19 October 2020, it switched off the supply of water and threatened to dismantle the Plant at the Naval Base, Central Eleuthera during the peak of the global Covid-19 pandemic. WSC alleges that the action of Aqua amounts to a repudiatory breach of the Sub-Agreement which it (WSC) has decided to accept. Consequently, WSC seeks the following declarations and orders against Aqua:

1. A declaration that, on a proper construction of both the Master Agreement and the Sub-Agreement, Aqua was not entitled, on 19 October 2020, to cease the supply of water at the Plant in the exercise of its purported discretion to terminate the Sub-Agreement pursuant to Clause 27.2 of the Master Agreement;

2. A declaration that the cessation of water supply at the Plant on 19 October 2020 and continuing thereafter was a repudiatory breach of the Sub-Agreement;

3. A declaration that the Sub-Agreement has been determined as a result of the acceptance of the aforementioned repudiatory breach by WSC;

4. A declaration that, on the true construction of both the Master Agreement and the Sub-Agreement, the Contract Period having ended (alternatively after the Demobilization Period) the Plant is (or will become) the property of WSC;

5. A declaration that the licence granted to Aqua to use, occupy and have access to the Plant Site has expired;

6. An order for delivery up of possession of the Site, including the Plant, as defined in the Master Agreement, to WSC;

7. In the alternative, an order that a receiver be appointed pending the determination of these proceedings or further order on terms that the Plant shall be managed by the Receiver on behalf of the Party found by the Court to be entitled to the Plant;

8. A declaration that, on a proper construction of the Master Agreement, WSC's failure to make timely payments in accordance with Clause 12.2 is not a default event and/or material breach of its obligations under the Master Agreement;

9. In the alternative, if WSC can be held in default and/or material breach for failing to make timely payments, a declaration that Aqua acted arbitrarily, irrationally and/or unreasonably in the *Wednesbury* sense in purporting to exercise its discretion to terminate the Sub-Agreement pursuant to Clause 27.2 of the Master Agreement;

10. A declaration that, in the events which have happened, Aqua was not contractually entitled to terminate the Sub-Agreement and demobilize the facility;

11. Costs and other relief.

[2] On the other hand, Aqua seeks a declaration that the termination of the Sub-Agreement for Central Eleuthera on 19 October 2020 was properly executed and that it is entitled to a reasonable period of two months to demobilize its "materials, equipment, parts, chemicals and consumables and facilities" and leave the site.

[3] WSC relies on four affidavits of Elwood Donaldson ("Mr. Donaldson), its General Manager, filed on 23, 29, 30 October and 4 November 2020 respectively in support of its Application. Aqua relies on two affidavits of Robert Gorgol ("Mr.

Gorgol"), its General Manager and Director who is based in Texas, USA. Mr. Gorgol's affidavits are contained in two affidavits of Wynsome Carey filed on 29 October and 9 December 2020 respectively each exhibiting an affidavit sworn by Mr. Gorgol on 29 October ("WDC.1") and 8 December 2020 ("WDC.2") respectively. Ms. Carey gave an undertaking to have the duly authenticated affidavits filed when they have been received.

Background facts

[4] WSC is and was a body corporate established pursuant to the Water and Sewerage Corporation Act, Ch. 196 ("the Act"). It is responsible for the provision, regulation and supply of water and the disposal of sewerage for the Commonwealth of The Bahamas.

[5] Aqua is, and was at all material times, a company duly incorporated and registered under the laws of the Commonwealth of The Bahamas and has been carrying on the business of designing, building and operating water desalination plants. It is a subsidiary of Suez Water Technologies & Solutions ("SUEZ"). Aqua has had a relationship with WSC in building and operating desalination plants in The Bahamas since at least 2001.

[6] By a Master Agreement dated 12 August 2012, WSC and Aqua entered into an agreement for the supply of desalinated water within The Bahamas. The parties entered into a further agreement ("the Sub-Agreement") on the same date for the supply of desalinated water to Central Eleuthera at a desalination plant to be designed, built, commissioned and operated by Aqua at the Naval Base, Central Eleuthera ("the Plant").

[7] The Sub-Agreement for the Central Eleuthera Plant was subject to all the terms and conditions contained in the Master Agreement. The Sub-Agreement was due to expire on 13 August 2031 or upon reaching a maximum delivery of 2,190 MM gallons, whichever comes first.

[8] Both Agreements specified that WSC will provide no capital investment other than the land on which the plant shall be sited. Aqua "*agreed to design, in accordance with WSC's specifications, and construct the plant and to properly commission, operate and maintain the Desalination Plant all at its own expense and to operate continuously during the Desalination Water Period, and to sell the Desalinated Water thus produced to WSC on terms and prices and conditions as set forth in the Agreement*".

[9] Over the years, the relationship between WSC and Aqua had always been one of cooperation but recently, Aqua alleges, WSC has refused any direct dialogue with Aqua with respect to the timely payment of its invoices.

[10] In or about May 2020, Aqua brought it to the attention of WSC that the arrears were growing at a disturbing rate. WSC was unresponsive on the issue of providing a concrete schedule of payments to address the arrears.

[11] On or about 19 August 2020, Aqua issued Notices of Default to six of its plants including Central Eleuthera demanding payment within 30 days. This was in accordance with Clause 12.2 of the Master Agreement. The default for the Central Eleuthera Plant was said to be arrears in the amount of $644,010.12. WSC failed to settle the arrears by 20 September 2020 as demanded although during the month of September 2020, it settled arrears with some of the plants excluding the plants at Exuma and Central Eleuthera.

[12] The Notice of Default for the Central Eleuthera Plant was followed by two further letters on 24 September and 9 October 2020 respectively demanding payment of arrears. Aqua notified WSC that if, the default was not cured by 16 October 2020, (i) production would be immediately reduced at the Plant; (ii) the Sub-Agreement would be immediately terminated and (iii) Aqua would immediately cease production and begin dismantling the facility.

[13] In addition to service of the notices, Aqua made fruitless efforts to contact those in authority at WSC to address the pressing issue of increasing arrears without

meaningful response. Cognizant of the backlash that the termination of the Sub-Agreement would have on the local communities, Aqua wrote to the Prime Minister on 29 September 2020 ("Exhibit RG 5").

[14] Aqua received an acknowledgment that a response was forthcoming. By 9 October 2020, no response came from the Prime Minister. Fearing that their demands were being ignored by WSC, Aqua notified WSC that, if the default is not cured by 16 October 2020, the Sub-Agreement would be immediately terminated.

[15] According to Aqua, this approach was taken with the expectation that WSC would take the necessary steps to cure the default.

[16] On Friday 16 October 2020, a representative of Aqua spoke with the Permanent Secretary in the Prime Minister's Office, David Davis who confirmed that the letter had been received but it had been passed on to the Minister and the Chairman of WSC without the Prime Minister having seen it. He said that he would inform the Prime Minister over the weekend and Aqua would hear from them on Monday.

[17] On the morning of 19 October 2020, Aqua also wrote to the Permanent Secretary, Prime Minister's Office setting out the full accounting of the balances to Aqua in the amount of $644,010.12. Aqua alleges that its efforts to have dialogues with the proper personnel were fruitless. At the close of business on 19 October 2020, Aqua emailed the General Manager of WSC, Elwood Donaldson ("Mr. Donaldson") notifying him of its intention to terminate the Sub-Agreement and cease production at Central Eleuthera immediately. That same evening, Aqua cut off the supply of water to the residents of Central Eleuthera during the peak of a deadly Covid-19 pandemic.

[18] On that same evening, the Executive Chairman of WSC made an urgent and direct plea to the Office of the Prime Minister, the Minister of Finance and the Minister of Works to provide funding so that Aqua could be paid the arrears. The letter states that WSC does not have the financial capacity to make the payments demanded by Aqua.

[19] It is alleged that the Prime Minister directed the Treasurer to transfer the sum of $644,010.12 to Aqua by electronic bank transfer. On the day following the termination of the Sub-Agreement for Central Eleuthera, Aqua was paid the sum of $644,010.12.

[20] Late in the evening of 22 October 2020, an urgent *ex parte* application for an injunction came before me as the duty judge. I ordered Aqua to immediately reinstate production and supply of water to Central Eleuthera and to cease and desist the Demobilization Process ("the Injunction") until Friday, 30 October 2020 at 12 o'clock noon ("the return date).

[21] On 30 October 2020, at an *inter partes* hearing, the Court continued the Injunction until the determination of the Amended Originating Summons filed by WSC. The Court also ordered that WSC settles all invoices as they become due.

[22] Aqua continued to be owed for the supply of water. On 26 October 2020, Aqua issued another letter to WSC advising that the sum of $516,440.54 continued to be owed: Exhibit "RG.8".

Case for each party in a nutshell

[23] WSC admits that it has been delinquent in making payments. WSC however argues that Aqua was not entitled to terminate the Sub-Agreement and the cutting off of the supply of water was a repudiatory breach of the Agreement. Further, the decision by Aqua to cut off the water supply amidst the Covid-19 pandemic was unashamedly disgraceful and the conduct was a serious criminal offence under section 37 of the Act.

[24] WSC further argues that the Agreements did not permit the termination or disconnection of the water supply but required that the supply be continued for a period. WSC also argues that Aqua has repudiated the Sub-Agreement and WSC has decided to accept the repudiation and Aqua must now treat the Sub-Agreement as discharged. More importantly, WSC next asserts that, at the termination of the Sub-Agreement, the Plant is its property and not Aqua's.

Accordingly, says WSC, Aqua has no further right of access to the Plant Site as its contractual licence has ended. WSC relies on Clause 13 of the Master Agreement as well as the provisions of the Act.

[25] On the other hand, Aqua asserts that because of the delinquency of WSC to pay its invoices on time and, despite frequent requests together with the issuance of Notices of Default, it had no other option but to exercise its right to terminate the Sub-Agreement which ended on 19 October 2020. Aqua further asserts that it was entitled to cease supplying desalinated water to WSC and to dismantle the Plant. Aqua relies on Clause 27.2 of the Master Agreement.

[26] It is not in dispute that the issues which are before the Court concern the proper construction of the Master Agreement as well as the Sub-Agreement for Central Eleuthera. It is also not in dispute that the question of the construction of a document is a question of law for the courts.

[27] My task therefore is to construe the Master Agreement and the Sub-Agreement in a manner which effects the mutual intention of these commercial parties, against the background of the transaction as a whole, looking for the meaning which the language used, 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: per Lord Hoffmann in **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 All ER 98; [1998] 1 WLR 896.

The Issues

[28] The key issues which arise for determination are as follows:

1. Whether nonpayment of the invoices within 30 days is a breach of Clause 12.3 notwithstanding Clause 12.4 which provides that, if unpaid, it accrues interest at the current prime interest rate?

2. Whether such breach (if any) by WSC entitled Aqua to issue a letter of demand pursuant to Clause 27.2 of the Master Agreement?

3. Whether, having issued the demand for payment within 30 days and WSC has subsequently failed for 60 days thereafter to pay, was Aqua entitled to terminate the Sub-Agreement?

4. Whether Aqua acted arbitrarily, irrationally and/or unreasonably in the *Wednesbury* sense in purporting to exercise its discretion to terminate the Sub-Agreement?

5. Whether Aqua should have revoked the termination after receiving payment of the overdue amount the next day?

6. Who now owns the Plant at the Naval Base, Central Eleuthera?

Discussion, analysis and findings
Issue 1

[29] Issue 1 deals with payment obligations. This is provided for in Clause 12 of the Master Agreement which provides:

> **"12.1 For the purposes of payment with respect to monthly billings for desalinated water delivered, payment shall be made in Bahamian Dollars.**
>
> **12.2 Payments due to the Contractor, from the Corporation as per the terms and conditions of the Agreement, shall be made by the Corporation to the Contractor, not later than 30 days following the date of receipt by the Corporation of the corresponding billing.**
>
> **12.3 Any payments due to the Corporation from the Contractor as per the terms and conditions of the Agreement shall be made by the Contractor to the Corporation, not later than 30 days following the date of receipt by the Contractor of the corresponding billing.**
>
> **12.4 Payments due to the Contractor from the Corporation, and vice versa, if not paid by the due date, shall, until paid, accrue interest at the current prime interest rate as advised by the Central Bank of The Bahamas.**

12.5 The Contractor must satisfy the Corporation that sub-contractors have been or will be paid within 15 days of the date of the Contractor's monthly billing."[Emphasis added]

[30] Both parties acknowledge that the failure to comply with the requirements in Clause 12.2 to pay the billings within 30 days is not a repudiatory or material breach. Both parties also acknowledge that failure to pay on time is a default.

[31] Clause 12.2 mandates that, upon receipt of the billing from Aqua, WSC has 30 days to pay it.

[32] However, learned Queen's Counsel Mr. Bethell, who appeared for WSC, seems to be arguing that, by reason of Clause 12.4, which provides for payment of interest, WSC, at its option, is not obliged to make monthly payments but can pay interest instead. As learned Counsel Mr. McDonald, appearing for Aqua, correctly submits, this is a preposterous argument. Were this the position, then WSC could continue *ad infinitum* or at least until the contractual date for termination to just pay interest on the overdue amounts without Aqua being able to demand full payment. According to Mr. McDonald, not only would WSC's interpretation allow it to pay only interest on the outstanding amounts but the obligation of Aqua to pay sub-contractors within 15 days would require Aqua to further expend monies without reimbursement from WSC. Mr. McDonald proffers an example of a merchant who renders an invoice containing a statement that interest will be charged on overdue amounts. Payment of the interest only by the customer does not preclude the right of the merchant to sue the customer for breach of the covenant to pay. I agree. Further, nowhere in the Master Agreement or the Sub-Agreement is it stated, whether expressly or by necessary implication, that if WSC pays interest, there is no breach.

[33] That said, it is accepted that a breach of contract does not automatically give the non-defaulting party the right to terminate the contract. However, it gives the non-defaulting party the right to sue for damages. Clause 12.3 is not a penalty but a genuine pre-estimate of the damage. The non-defaulting party is entitled to sue for

damages for breach of contract for the monies owed including interest on the overdue monies owed.

[34] I therefore find that the non-payment of the invoices within 30 days was a breach of Clause 12.2 and is a default notwithstanding Clause 12.4.

Issues 2 and 3: Demand/default and termination

[35] Issues 2 and 3 are subsumed under this head. Clause 27.2 provides:

> **"If either party defaults under this Agreement, then the non-defaulting party shall give the defaulting party written notice describing such default. For all defaults the defaulting party shall be given 30 days from the receipt of such notice to cure such default. However, if the default cannot be cured within 30 days, with the exercise of reasonable diligence, the non-defaulting party *may* grant a reasonable additional period of time in which to cure such default. If the defaulting party fails to cure such default within the prescribed period, then, in addition to any other rights or remedies available at law or in equity, the non-defaulting party may consider the defaulting party in material breach of its obligations under this Agreement and immediately terminate the Agreement."** [Emphasis added]

[36] It is not disputed that nowhere in the Master Agreement or the Sub-Agreement is the word "default" defined. Therefore, the word "default" should be given its natural and ordinary dictionary meaning. This is not necessarily the dictionary meaning of the word but that in which it is generally understood. Lord Hoffmann in **Investors Compensation Scheme Ltd** [supra] puts it this way: *"[T]he 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 grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean"*.

[37] According to the Cambridge English Dictionary, the word "default" is defined as "*to fail to do something, such as pay a debt that you legally have to do*."

[38] Therefore, the obligation to pay invoices not later than 30 days following its receipt by WSC is a default when the word is given its natural and ordinary meaning.

[39] Aqua however concedes that not every default in a contract would give rise to a right to terminate even if the contract expressly states so. Thus, the failure to comply with the requirements in Clause 12.2 to pay within 30 days is not a repudiatory or material breach. It is, however, a default.

[40] WSC notes that Aqua relies on Clause 27.2 which provides that *the non-defaulting party may consider the defaulting party in material breach of its obligations under this Agreement and immediately terminate the Agreement.* According to WSC, if that is the case, then Aqua faces a basket of hurdles. Firstly, says WSC, if the Sub-Agreement was immediately terminated, it is necessary to examine which provisions survive the termination. WSC says that even the termination notice assumes that Clause 13.4 survives as does the provision relating to the Demobilisation Period. Of more immediate interest is in respect to the ownership of the Plant (which I will come to momentarily).

[41] Secondly, WSC contends that Clause 27.5 contains another consequential termination provision which provides a miscellany of additional rights to WSC if the Sub-Agreement was terminated during the Desalinated Water Delivery Period. The material right, says WSC, is that it may operate the Plant with its own personnel at its own expense and risk for a period not to exceed eighteen (18) months.

[42] Thirdly, WSC contends that Aqua had an obligation to continue to supply water despite the termination of the Sub-Agreement according to Clause 13.2 which provides:

> **"At the end of the Desalinated Water Delivery Period, the Contract (Master Agreement] will automatically extend for an additional period as set forth in Exhibit A, Table 1 <u>unless</u> either party shall notify the other party at least 120 days in advance of the contract termination."**[Emphasis added]

[43] According to WSC, it did not receive a notice of Aqua's intention to terminate the contract after the end of the Desalinated Water Delivery Period. Thus, in the absence of the 120 days' notice of the contract's termination, the automatic extension would be activated to avoid disruption of the water supply to consumers. The Agreement expressly included a clause for the continuity of water supply by Aqua. The Master Agreement would extend for an additional period as set forth in Exhibit A, Table 1. However, the Sub-Agreement provided that the Desalinated Water Delivery Period would automatically extend for one 5 year period. This provision demonstrates the need for continuity of supply.

[44] In summary, WSC contends that no material breach has occurred so that Aqua's purported termination was wrongful as was the cessation of the water supply and the commencement of dismantling of the Plant.

[45] A careful examination of Clause 27.2 of the Master Agreement stipulates that, in the event of a default, then:

i. The non-defaulting party shall give written notice to the defaulting party describing the default;

ii. The defaulting party shall be given 30 days from the receipt of notice to cure the default.

iii. If the default cannot be cured within 30 days, the non-defaulting party *may* grant a reasonable additional period of time to cure the default and;

iv. If the defaulting party fails to cure the default within the prescribed period, the non-defaulting party *may* consider the defaulting party in material breach and immediately terminate the Agreement."

[46] Aqua submits that WSC admits that it has complied with the steps identified in (i) to (iii) above. Aqua then submits that the word "may" in (iv) above gives the non-defaulting party the election to consider whether the defaulting party has committed a material breach of the agreement warranting its termination. The position is different at common law where the non-defaulting party has the "right"

to terminate the contract. In this case, Clause 27.2 obviates the need to determine whether the breach is of a material obligation. I agree with this interpretation.

[47] Furthermore, in my opinion, WSC could, with reasonable diligence, have cured the default but from the facts as stated, it appears that not much was done to address the habitual delinquency by WSC in making timely payments to Aqua. The clarion calls from Aqua fell on deaf ears. It was not until the evening of 19 October 2020 after Aqua turned off the water supply that WSC made an urgent and direct plea to the Office of the Prime Minister and the Minister of Finance to pay the arrears which were due and owing. It appears that communications had become increasingly difficult, if not impossible, between these parties.

[48] In my opinion, Cause 27.2 is applicable to this case and provides a mechanism with strict notice provisions whereby a default becomes a material breach.

[49] Further, Clause 27.2 gives Aqua the right to choose whether to terminate the Agreement. The exercise of the right to terminate is a right arising from a breach of the material obligations to which the non-defaulting party is entitled to terminate. Therefore, the Sub-Agreement relating to the Central Eleuthera Plant was validly terminated on 19 October 2020. There was no repudiatory breach by Aqua, as alleged by WSC.

[50] Another issue raised by WSC is that time was not of the essence in terms of the payment obligations. This is difficult to comprehend in light of the express provision of Clause 27.2 which stipulates that payment **shall** be made within 30 days of receipt of the invoices failing which Aqua has a right to immediately terminate. Aqua, at its option, may grant a reasonable additional period of time. Clause 27.2 is specific. It provides for 30 days and an additional 30 days. More than 60 days was granted to WSC. In fact, Aqua gave WSC up to 16 October 2020 to cure the default. WSC failed to do so.

[51] The law is that time is of the essence where the parties have expressly stipulated in their contract that the time fixed for performance must be exactly complied with

(as in this Agreement) or that time is to be "of the essence." In the present case, Clause 12.2 mandates that upon the receipt of the billings from the Contractor, the Corporation has 30 days to pay it making time of the essence.

[52] Even if my understanding of the law is erroneous, then the law goes on further to state that where time was not originally of the essence of the contract, but one party has been guilty of undue delay, the other party may give notice requiring the contract to be performed within a reasonable time. What is reasonable will depend upon the facts and circumstances of the case: **North Eastern Properties v Coleman** [2010] 1 WLR 2715. If, by notice, a party has made time of the essence, but later allows a further extension to another fixed date, (as in this case), time remains of the essence: **Etzin v Reece** [2002] All ER (D) 405 (Jul). When WSC did not pay within 30 days as stipulated in Clause 12.2, Aqua, pursuant to Clause 27.2, issued a Notice of Default dated 19 August 2020 giving WSC 30 days to pay. It subsequently extended the time 16 October 2020 for WSC to cure the default. It failed to do so. On both occasions, time was of the essence.

Issue 4:

[53] The next issue which arises for consideration is whether Aqua acted arbitrarily, irrationally and/or unreasonably in the *Wednesbury* sense in purporting to exercise its discretion to terminate the Sub-Agreement?

[54] This issue attracts an impassioned plea from WSC throughout the proceedings particularly at the stage of the *ex parte* application for an injunction. Mr. Donaldson alleges that Aqua was heartless to cut off the supply of water to the people of Central Eleuthera during a pandemic. In both written as well as oral submissions, WSC did not mince words in denouncing the reprehensible conduct of Aqua. WSC has even threatened prosecution of Aqua and/or its employees.

[55] WSC asserts that although Aqua used its discretion, the period of additional time was unreasonably short and did not take into account the extraordinary circumstances of the Covid-19 pandemic, its impact on WSC as well as The

Bahamas, the impact on the population of Eleuthera, the statutory duties of WSC and the offence which would be committed by Aqua.

[56] WSC also asserts that, one day after the purported cutting off of the water supply, the Government issued a payment to Aqua. Also, Aqua ought to take into account its request to the government to provide funds which it indicated would be and were actually provided. WSC says that "*the pistol to the head approach of Aqua with the trigger pulled before further enquiry as to whether the government had sent the funds speaks for itself"*. According to WSC, this seems to be a less onerous threshold than unconscionability shown in the case of **Braganza** [2015] 1 WLR 1661. WSC asserts that the discretion which was exercised by Aqua must not be irrational in the ***Wednesbury*** sense.

[57] All in all, WSC argues that the discretion to terminate the Agreement was not properly exercised.

[58] Although this is not a case of judicial review, WSC has asked the Court to find that the decision of Aqua was so unreasonable/irrational in which case, the Court can interfere. I am careful not to tread too far into the realm of judicial review, but since WSC brought up the issue of the ***Wednesbury*** unreasonableness, I am afraid that I will have to say a bit on it.

[59] It cannot be disputed that WSC has the onus of proving that the decision taken by Aqua fell in the category of the ***Wednesbury*** unreasonableness. In the seminal decision of **Associated Provincial Picture Houses Ltd. v Wednesbury Corporation** ("the **Wednesbury** case) (1948) 1 K.B. 223, Lord Greene MR stated (at page 230):

> **"It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but <u>to prove a case of that kind would require something over-whelming,</u> and, in this case the facts do not come anywhere near anything of that kind…**

> **It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high policy of this kind…**
>
> **The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that is set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere."**[Emphasis added]

[60] In **Nottinghamshire County Council v Secretary of State for the Environment** (1986) Law Reports, HOL, 240, the House of Lords held (at 241):

> **"That in the absence of some exceptional circumstance such as bad faith or improper motive on the part of the Secretary of State [emphasis added] it was inappropriate for the courts to intervene on the ground of 'unreasonableness' in a matter of public financial administration that had been one for the political judgment of the Secretary of State and the House of Commons".**

[61] Simply put, Aqua took the action to cut off the supply of water during a pandemic when the other party had been delinquent in paying its bills. WSC blames the Covid-19 pandemic and argues that Aqua should have extended time to the end of the pandemic. It is plain that the delinquency of WSC started before Covid-19 and, in any event, WSC has failed to demonstrate any legal basis either in law or in the Master Agreement to bolster its submission that Aqua should have extended time to the end of the pandemic. The only concepts absolving a party from performing its obligations would be (a) frustration (which is not alleged) or (b) force majeure (not a common law concept and would be applicable if it were a term of the contract). Clause 2.3 of the Master Agreement expressly provides for that. It states "Force Majeure will not exclude a party from meeting its obligations under the Agreement".

[62] The facts of this case are that Aqua sent Notices of default on three occasions pleading with WSC to pay the arrears. In its letter of 9 October 2020, Aqua wrote that "*if the default for Sub-Agreement Naval Base, Central Eleuthera is not cured by October 16, 2020, the Sub-Agreement will be immediately terminated and Aqua*

Design Bahamas will cease production and begin dismantling the facility". It could only be assumed that WSC did not seriously consider the impact of this letter. WSC should have moved quickly at this stage or better yet, call Aqua to agree on a settlement regime. Instead, it refused and/or failed to respond to Aqua. It was only after Aqua turned off the water supply on the evening of 19 October 2020 that the Chairman wrote the Prime Minister, Minister of Finance and Minister of Works. It seems to me that if Aqua did not take such a drastic step, the arrears would have continued to burgeon. Aqua has its employees and sub-contractors to pay also. But, I believe that WSC's silence and/or evasiveness in dealing with this issue broke the camel's back. This is reflected in an email sent to Mr. Davis in the Prime Minister's Office where Mr. Gorgol asked for "***A point of contact with WSC who will communicate with us. So our communications have been limited to letters which is (sic) not workable.*"**

[63] In summary, this case is premised on what is a simple contractual agreement whereby Aqua contracted with WSC to provide desalinated water to the people of Central Eleuthera and WSC contracted to pay its invoices when they are received as contemplated by Clause 12 of the Master Agreement. If the invoices are not paid within the time stipulated under Clause 12, then Clause 27.2 kicks in. As Mr. McDonald correctly asserts, when ordinary citizens are unable to pay their bills, they discuss the matter with the lender. They do not refuse to sit down and discuss how they intend to pay. In my judgment, WSC was the author of its own demise. WSC could have cured the default with reasonable diligence. Mr. McDonald argues that WSC cannot be heard to speak of reduced cash flow and that it had to wait on the Government for assistance. He correctly maintains that nowhere in the Agreement is the liability of WSC to pay made subject to its cash flow or to it receiving help from the Government.

[64] Even as the parties await the delivery of this Judgment, WSC continues to be delinquent necessitating Aqua to file a Notice of Motion on 8 April 2021 seeking payment of arrears. On 15 April 2021, the Court ordered that WSC shall pay the sum of $454,194.61 on or before 21 April 2021 and the matter was adjourned to

the following day for a status report. It was brought to my attention that WSC had settled the arrears. While I am fully cognizant of the financial strains that Covid-19 and prior to that, Hurricane Dorian, have caused to this fragile economy, priority must be given to an essential commodity, such as water, even if consumers are not paying their bills on time. In fact, many of us may be delinquent in paying our bills or loan repayments as they fall due, but we sit down with the lender and enter into some form of settlement discussion.

[65] In my judgment, Aqua did not act unreasonably or irrationally when it cut off the supply of water and terminated the Sub-Agreement. The time given to settle the arrears was reasonable in the circumstances and accords with the terms of the Master Agreement.

Issue 5 - Revocation of termination

[66] This issue focuses on whether Aqua should have revoked the termination after it received the payment of the overdue arrears the next day. This issue can be shortly answered.

[67] The first letter of demand was issued on 19 August 2020 and was in respect of arrears owed for more than 30 days as at that date. The last of these invoices was rendered on 6 June 2020. The letter of 26 October 2020 from Mr. Gorgol to Mr. Donaldson (which was sent via FedEx and email) shows that, at that date, a further sum of $516,440.54 was owing for three invoices dated 23 July, 27 August and 17 September 2020 respectively which were all due and for which Aqua was again entitled to issue a demand Notice pursuant to Clause 27.2. As Mr. McDonald correctly asserts, for Mr. Donaldson to maintain that the payment on 20 October 2020 made the account ‘current’ is indeed a gross misrepresentation of the true position. The amount of $644,010.12 which was paid on 20 October 2020 was associated with outstanding invoices for February 2020 to June 2020 and not for July, August and September 2020.

[68] Learned Counsel Mr. McDonald stressed that Aqua was also legitimately concerned that its receivables in respect of all the Plants were ballooning. He contends that, by letter dated 3 November 2020, Aqua sought to extend an olive branch to WSC but WSC refused to sit and discuss or even respond to the proposal contained in that letter. Mr. McDonald asserts that, "*in pique of moral self-righteousness, WSC now turns around and says that the Plant is their property*".

[69] In my opinion, Aqua had the discretion to determine whether it would revoke the termination of the Sub-Agreement after acceptance of some of the arrears. Aqua chose not to. That is its legal right. Aqua cannot be compelled to revoke the Sub-Agreement.

Issue 6: Ownership of the Plant

[70] The last issue concerns the ownership of the Plant at the Naval Base, Central Eleuthera. WSC confidently argues that the Plant is now its property and seeks an order for delivery up of the Plant. WSC relies on Clause 13.1 which states that *"During the Contract Period, ownership of the Plant shall be vested 100% in the Contractor (Aqua)*". WSC says that it logically follows that, at the end of the Contract Period, ownership of the Plant is then vested in WSC.

[71] Aqua argues that WSC's argument demonstrates a flawed understanding of the Master Agreement and the Court has to look at Clause 13 as a whole including Clauses 13.3 and 13.4.

[72] The starting point is the Master Agreement. In this regard, I shall refer somewhat extensively to some clauses in that Agreement vis-à-vis the Sub-Agreement. Clause 2 of the Master Agreement defines "Site" and "Plant" as:

> **"Site means the property on which the Desalinated Water facility will be located." (Clause 2.14) and;**
>
> **"Plant means the building, equipment and fixtures used to produce the Desalinated Water." (Clause 2.15)**

[73] Now, it is not in dispute that the site on which the Plant is located belongs to WSC. Neither should it be in dispute that Aqua, at its own expense, design, engineer and construct the Plant in accordance with Clause 3.1.

[74] Further, by Clause 4.1 of the Master Agreement, WSC granted to Aqua "*an irrevocable licence to use, occupy and have access to the Plant Site at no cost to [Aqua] during the period that the Agreement is in force for the purpose of performing the Contract and meeting its obligations under the agreement…."*

[75] By Clause 5 of the Master Agreement, the term and duration refer to three periods namely (1) the Construction Period; (2) The Desalination Water Delivery Period and (3) The Demobilisation Period. Together, these are the Contract Period. The Demobilisation Period (which remains a part of the contract) gives Aqua two months in which to dismantle the Plant (which remains in its ownership). Mr. McDonald exemplifies this point by referring to the course of a contract which is not prematurely terminated and runs through the Construction Period and the Water Delivery Period and is terminated or extended in accordance with Clause 13.2 which provides that:

> **"At the end of the Desalinated Water Delivery Period, the Contract will automatically extend for an additional period as set forth in Exhibit A, Table 1 unless either party shall notify the other party at least 120 days in advance of contract termination….Ownership of the plant during the extended Contract Period would continue to be vested in the Contractor".** [Emphasis added]

[76] Clause 13.3 provides:

> **"At the end of the Desalinated Water Delivery Period or at the end of the extended Contract Period, if the Contract is extended, the Contractor [Aqua] shall have a two month period in which to demobilize. The Contractor shall leave the Plant Site in a neat, clean and tidy condition to the satisfaction of the Corporation."**

[77] Therefore, by virtue of Clause 13.3, the Contractor (Aqua) has two months to demobilize and "shall leave the ***Plant Site*** in a neat, clean and tidy condition to the

satisfaction of WSC. Clause 13.3 does not state that the Contractor shall leave the **Plant** but the **Plant Site.**

[78] Learned Queen's Counsel Mr. Bethell fought hard to demonstrate that the Plant belongs to WSC based on the legal principle regarding fixtures. He submits that whatever is annexed to the land becomes a fixture. As such, the other party loses its rights to it and cannot remove it or in this case dismantle it unless permission is given by the landowner. Further, although Aqua constructed the Plant and purchased the fixtures and equipment which were needed to carry out its obligation to WSC, the Plant and brine wells are affixed to the land and become fixtures.

[79] Succinctly put, in property law, the law of fixtures is founded on the maxim '*quicquid plantatur solo cedit'*. That is, whatever is attached to the land becomes a part thereof. However, in commercial leases and licences, this is usually excluded. In fact, in the instant case, the Master Agreement does just that. It provides that notwithstanding the Plant being fixed to the land during the Contract Period, it belongs to Aqua and at the end of the Desalinated Water Delivery Period or at the end of the extended Contract Period, if the Contract is extended, Aqua shall have a two month period in which to demobilize and leave the **Plant Site** in a neat, clean and tidy condition to the satisfaction of WSC.

[80] Both parties now contend that the *Desalinated Water Delivery Period* has ended. WSC submits that the period has been shortened by its acceptance of Aqua's repudiation and Aqua argues the period has been shortened because it terminated the Sub-Agreement as a result of WSC's failure to make timely payments. Since Aqua claims that the Sub-Agreement has been terminated, it can be reasonably inferred that the licence to use, occupy etc. the Plant Site must also have been terminated. That said, although the Sub-Agreement has ended, there is still a procedure to guide the behaviour of both parties for a clean severance of the contractual relationship. The procedure is provided for in Clause 13.3 and 13.4 of the Master Agreement.

[81] Clause 13.3 provides that "…*the Contractor shall have a two month period in which to demobilize. The Contractor shall leave the* ***Plant Site*** *in a neat, clean and tidy condition to the satisfaction of the Corporation.*"

[82] Then, Clause 13.4 provides that:

> **"The Contractor shall submit a comprehensive list of materials, equipment, parts, chemicals and consumables, and facilities that the Contractor intends to remove from the site, to the Corporation (WSC) for review and approval. The Corporation shall have 30 days to review the list for completeness and to indicate in writing any items which the Corporation would like to purchase. The Corporation shall be given the first right of refusal to purchase any equipment and/or facilities on the Contractor's list. The purchase for all items of equipment and facilities which the Corporation intends to purchase will be negotiated between the Corporation and the Contractor."** [Emphasis added]

[83] Dissecting this clause, it means that Aqua *shall* submit a comprehensive list of materials, equipment, parts, chemicals and consumables, and **facilities** that it intends to remove from the site to WSC for review and approval. WSC *shall* have 30 days to review the list and **indicate in writing any items which it would like to purchase**. WSC *shall* have the first right of refusal but **if WSC wishes to purchase "all items of equipment and facilities,"** the price will be negotiated.

[84] The word "*facilities*" is an ordinary dictionary word. According to the Cambridge English Dictionary, it means *"the buildings, equipment and services provided for a particular purpose"*: Collins Law Dictionary also ascribes a similar meaning to "facilities". It says "*facilities*" are *"buildings, pieces of equipment, or services that are provided for a particular purpose*".

[85] The Agreements between WSC and Aqua are commercial agreements. In **Bailey (C.H. Ltd v Memorial Enterprises Ltd.** [1974] 1 W.L.R. 728 at 733, Megaw L.J. said this of commercial contracts:

> **"This is a commercial contract and should be construed as far as possible to give effect to commercial good sense."**

[86] Construing the Agreements as a whole, Aqua is obliged to leave the *Plant Site* in a neat, clean and tidy condition to the satisfaction of WSC and can remove all materials, equipment, parts, chemicals and consumables and also, the facilities (building). At that stage, WSC is only entitled to what is left behind.

[87] Aqua acknowledges that most of the items which were imported have already been consigned to WSC in accordance with Clauses 7.6 and 7.7 which allow for importation of them duty free. Since they are "consigned" they are still owned by Aqua which will have the option at the end of the Contract to sell to WSC or remove them. In any event, this is not a matter for the consideration of this Court but the Department of Customs and the parties.

[88] Mr. Bethell QC also referred to Clause 27.5 of the Agreement which provides that WSC "*may operate the plant with their own personnel at their own expense and risk for a period not to exceed eighteen (18) months."* Counsel asserts that this is a right given to WSC if Aqua terminates the Agreement during the Desalinated Water Delivery period. However, it must be pointed out that the clause begins with the words *"In the event the Corporation terminates this Agreement after Substantial Completion of construction of the Plant, i.e. during the Desalinated Water Delivery Period as a result of the Contractor defaulting…"*

[89] In the present case, Aqua did not default. WSC was the party in default by being delinquent in payments for water which was supplied to the residents of Central Eleuthera. Aqua terminated the contract, not WSC so it cannot claim the right attached to Clause 27.5 to operate the plant at its own expense and risk for a period not exceeding eighteen months.

[90] However, it is only at Clause 27.6 that the contract speaks to the transfer of the 'plant, materials and all interest in the Site' being given to WSC. Clause 27.6 states:

> **"In the event this Agreement is terminated by the Contractor *before Substantial Completion of the construction of the Plant* due to the Corporation's default, or due to the order of the Government of The Bahamas the Contractor will be entitled to all expenses for the**

> **construction of the Plant arising before the date of termination and for all reasonable and unavoidable expenses incurred before and after the date of termination. The said expenses shall be duly proved and supported by official documentation. After payment of the above expenses by the Corporation to the Contractor, the Plant as it is constructed, materials and all interest in the site shall be transferred to the Corporation upon payment by the Corporation of one Bahamian dollar."**[Emphasis added]

[91] Clause 27.6 clearly demonstrates that WSC is aware that the '*Plant as it is constructed, materials and interest in the site*' is not its property as this clause plainly states that all interest in the site will be "*transferred to the Corporation upon* ***payment*** *by the Corporation of one Bahamian dollar."*

[92] In my judgment, neither party can rely on Clauses 27.5 and 27.6 as no provisions of the Agreement survive termination by Aqua for material breach by WSC. The Agreement makes no provision for post obligations in the event of a material breach. Therefore, common law principles will apply, specifically, that (1) a party cannot benefit from its own breach and (2) the innocent party is entitled to termination to be put in a position he would have been in had the contract been performed.

Conclusion

[93] All matters considered, I find that WSC defaulted in the timely payments of its invoices and Aqua was entitled to terminate the agreement in accordance with Clause 27.2. Aqua's termination was properly executed. The Order of this Court will be:

1. The declarations and orders sought by WSC in the Amended Originating Summons filed on 10 November 2020 are without merit and must fail.

2. Aqua is entitled to a reasonable period of two months to demobilize its materials, equipment, parts, chemicals and consumables and facilities and leave the "Plant Site" in a neat, clean and tidy condition to the satisfaction of WSC.

3. Should WSC wish to purchase any of the above materials, equipment, parts, chemicals and consumables and facilities, then the provisions of Clause 13.4 shall apply.

4. Aqua, being the successful party in these proceedings is entitled to reasonable costs. Costs are to be taxed if not agreed. Both parties have submitted their respective Bill of Costs ahead of the delivery of this Judgment. Aqua claims costs in the sum of $84,218.50 and WSC in the sum of $137,046.00. If the parties cannot agree on costs, WSC will provide any opposing submissions to Aqua's Bill of Costs by 27 August and Aqua will respond (if necessary) by 3 September 2021. The Court will then consider the issue on written submissions and give a short Ruling on Friday 10 September 2021 at 2.30 p.m.

[94] Last but not least, it is unfortunate that a once cordial and cooperative relationship between these two parties appears irreconcilable. However, nothing prevents them from going back to the drawing board and to negotiate a new Sub-Agreement on such terms and conditions which are beneficial to both parties.

[95] Lastly, by virtue of the Act, WSC was established to fulfil the mandate of the Government of The Bahamas to provide potable water to its citizens and, by extension, the residents of Central Eleuthera. Aqua does not have such an obligation. Aqua is in the business of supplying water. There is no legal basis to prevent Aqua from switching off its supply of water if the arrears are not paid within a reasonable time frame. There is also no legal basis for Aqua to give WSC sufficient time to secure another supplier. Communication is key to a healthy relationship. Communication cannot be a one-way street.

[96] Both Counsel agree for the execution of this Judgment to be stayed to 10 September 2021 at 2.30 p.m. to give them an opportunity to work out their differences. The Court endorses this approach.

Dated this 6th day of August, 2021

Indra H. Charles
Justice