THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 302 of 2004

BETWEEN:

GREGORY FERRARI

(Trading as Waste Master)

Claimant

V

THE CENTRAL WATER AND SEWERAGE AUTHORITY

Defendant

Appearances:

Mr. Joseph Delves for the Claimant.
Ms. Anique Cummings for the Defendant.

2012: July 16
2013: January 18

JUDGMENT

[1] **THOM J.:** On January 1, 1992 the Claimant entered into a written contract with the Government of Saint Vincent and the Grenadines (The Government) for the removal of solid waste in Kingstown and its environs. The Government was represented by the Ministry of Health. The duration of the contract was for two years. The contract included an option to renew on terms and conditions agreed by the parties. The contract was renewed on several occasions for varying periods.

[2] In 1999 the Government decided that the Defendant should be responsible for the management of solid waste. The Claimant and Senior Officials of the Defendant held

discussions and the Claimant continued to remove solid waste from Kingstown and its environs after the Defendant assumed responsibility for the management of solid waste. The parties dispute the terms of the arrangement.

[3] During 2001, the Defendant wrote several letters to the Clamant in which they expressed their disapproval of the Claimant's performance. Meetings were held between the Claimant and the management of the Defendant.

[4] By letter dated January 17, 2012, the Defendant notified the Claimant that his service would not be required after February 28, 2012. The Claimant being dissatisfied with the action of the Defendant instituted these proceedings in which he seeks damages for breach of contract.

[5] The Defendant in its defence contended that the Claimant had breached the contract. The allegations are outlined in paragraph 5 to 7 of the Defence and read as follows:

> "5. On the 13th November 2001, the Defendant wrote to the Claimant again indicating that the Claimant had failed to empty skips at the Arnos Vale and Kingstown Park areas, which are cited on the schedule to the original contract as "designated areas". The result was that these said skips were "found to be overflowing" with garbage. The Defendant also cited that the Claimant had failed to place skips at the Belair and Fountain Road areas, which were designated areas on the schedule of the original contract. The Defendant also expressed concern about the state of most of the Defendant's skips, which were found to be in disrepair. This correspondence is exhibited and marked "G.S. 3".
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> 6. The Claimant, by his failure to empty the said skips to avoid pilation of garbage, breached the oral contract with the Defendant, which was based on the terms of the original contract, and which was therefore within the direct contemplation of the Claimant at the material time mentioned. The Claimant also failed to place skips in the areas mentioned which were

areas cited on the original contract as "designated areas." On each occasion mentioned, the Defendant brought these concerns to the Claimant's attention. The Claimant failed to adequately address the concerns or in any way alleviate the problems.

7. By the aforesaid, the Claimant failed to perform the work contracted in a workmanlike and efficient manner and failed to provide skips in the areas mentioned. By reason of the aforesaid, the Claimant has breached the said terms of the contract.

Particulars of Breach of Contract

- Failure to empty skips with sufficient regularity (at least two trips per week to the garbage site) as a term of the contract, thereby causing an overflow of garbage.

- Failure to place skips at designated areas as a term of the contract specifically the areas of Belair and the Villa-Fountain Road.

- Failure to keep skips in good repair, so as not to "pose any hazard or danger whatsoever to the public's health and safety", as a term of the contract which was based on clause 1 (e) of the original contract."

[6] The Defendant also contended that the notice given to the Claimant was reasonable notice. The Defendant in its counterclaim alleged that as a result of the Claimant's breach of contract they incurred expenditure in the sum of $31,000.00 in payment to other persons to collect and dispose of garbage during the period October 2001 to February 2002.

[7] The Claimant in his reply to the defence denied that he was in breach of the contract and alleged that any pile up was due to indiscriminate use of the skips by members of the public. The relevant paragraphs are paragraphs 4, 5 and 6. They read as follows:

> "4. The Claimant denies paragraph 4 of the Defence and states that any pile up of garbage in the Sion Hill area or elsewhere was due to the indiscriminate and senseless use of the skips by villagers who literally placed any and every piece of garbage, filth, dead animals, old stoves and refrigerators and chattels of that kind in them. These unusual practices taxed the capacity of the Claimant to move the garbage as rapidly as he would like, but the alleged pile, though occasional, was of a very temporary nature and did not in the circumstances amount to a breach of contract.
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> 5. With regard to paragraphs 4, 5 and 6 of the Defence the Claimant repeats paragraph 5 hereof and states that the letters referred to in paragraph 5 of the Defence were mischievous and sought to highlight occasional situations when the persons misused the skips. Indeed, the Claimant had also indicated the need to increase the contract priced to provide more facilities to perform the contract. The Defendant asked for a respite to consider that request at the end of which It ignored the request and cancelled the contract.
>
> 6. The Claimant therefore denies paragraph 7 of the Defence and says that he worked assiduously and well to perform his contract with the Defendant, and denies in toto the particulars of breach alleged in paragraph 7 of the Defence."

EVIDENCE

[8] The Claimant testified and called no witnesses. Mr. Daniel Cummings, the then Manager of the Defendant, Mr. Gregg Francois the Collections Superintendent of the Defendant, and Ms. Kavern Ferril, Supervisor of the Landfill testified on behalf of the Defendant.

Claimant's Evidence

[9] The evidence of the Claimant is that in 1989 he discussed a project of garbage collection with the then Prime Minister and Officials of the Ministry of Health. He informed them that to do the project he would need to purchase capital equipment. This would require him to borrow money from a commercial bank. Both the then Prime Minister and the Officials of the Ministry of Health agreed that a contract should be entered into for the collection and disposal of garbage. On the 1st January 1992 he entered into a written contract with the Government. The contract with the Government was renewed and extended on several occasions until 1999 when there was a change in policy by the Government and the Defendant assumed the responsibility of garbage collection. It was on the basis of the contract that he was able to get a loan from the Bank of Nova Scotia in the sum of $285,000.00.

[10] His contract with the Government was due to end in September 1999. In August 1999 he had discussions with the Senior Officers of the Defendant who indicated to him that they were moving the landfill from Arnos Vale to Diamond. The move would take approximately six months. Hence, they wanted to suspend the contract with the Government and have contracts for a period of two months. When the Diamond landfill was ready they would enter into a contract for two years. It was on this basis that he agreed to suspend the one month remaining on the contract with the Government. The area from which he was required to collect garbage after the Defendant took over the responsibility for garbage collection was a larger area and the distance to the landfill was further so it was necessary for him to get new equipment.

[11] In early 2000 the Defendant's Manager Mr. Daniel Cummings instructed him to relocate 33 of the 45 skips and told him he would advise him at a later date where to position the other twelve skips. Mr. Cummings never told him where to position the other twelve skips. The thirty-three skips were inadequate to accommodate the volume of garbage and this resulted in spillage of the garbage. Between the period 1992 and 1999 there were few complaints about the service that he provided. Members of the public constantly abused the system by dumping items such as old stoves and refrigerators, used motor vehicle tyres and dead animals into the skips. This resulted in the skips being filled very quickly and in some instances garbage spilled over into the streets.

[12] The Defendant complained about spillage of garbage and he informed the Defendant of the abuse of the skips by members of the public. The Defendant terminated the contract by letter dated January 17, 2002 with effect from February 28, 2002, thereby giving him only one month's notice, since the letter was only received by post on January 28, 2002.

[13] Under cross-examination the Claimant agreed that it was also a term of the contract that the skips would be emptied with sufficient regularity to avoid pilation. He agreed that there were situations where the skips overflowed. The Defendant wrote to him on August 15, 2000, September 25, 2000, and November 13, 2001 about his performance and by letter dated October 2, 2000 the Defendant invited him to a meeting to discuss solid waste matters. He did not respond in writing. However, he insisted that he responded verbally and attended meetings with officials of the Defendant and explained the problems with the abuse of the skips by members of the public. He was not aware that the Defendant had to hire other persons to collect garbage. The Claimant insisted that he was to be given two years notice, two years being the contract period.

Defendant's Evidence

[14] The evidence on behalf of the Defendant is that in 2000 the Defendant took over the responsibility of solid waste management from the Ministry of Health. The Defendant had discussions with the Claimant who had a contract with the Ministry of Health for the

disposal of solid waste. Under the contract with the Government he was required to place 45 skips around Kingstown. When the skips were full the Claimant was required to dispose of the garbage at the landfill site at Arnos Vale. The skips were to be emptied with sufficient regularity to avoid pilation of garbage, sufficient regularity meaning at least twice per week. The Defendant agreed to contract the Claimant's services on the same terms except the number of skips was reduced. The monthly sum to be paid to the Defendant was agreed at $25,000.00. A monthly payment was proposed to allow the Defendant to assess the performance of the Claimant.

[15] Around mid-2000, the Defendant found that in some areas the skips were overflowing, and some skips were in disrepair. In some designated areas skips were missing and garbage was dropped off at the side of the road thereby causing a health hazard.

[16] Mr. Cummings wrote to the Claimant on the 15th day of August 2000 about the overflowing skips and the Claimant did not respond verbally or in writing. Mr. Cummings again wrote to the Claimant on 25th September 2000 about the large number of skips that were overflowing and urged him to empty the skips regularly, and specifically requested him to place a skip at the Sion Hill/Walvaroo area which was a designated area. Again the Claimant failed to respond. The Claimant was also written to on November 13, 2001 about the overflowing skips and designated areas where skips were missing. The services of the Claimant deteriorated. There were fewer trips to the landfill. In November and December 2001, his service fell drastically to about 118 trips in November and 39 trips in December which was far below the average number of trips made monthly. These trips also included trips the Claimant made in relation to disposal of garbage for the Saint Vincent and the Grenadines Port Authority, a private client of the Claimant. Many of the skips were in a state of disrepair. They had large cracks and gaping holes. His trucks had mechanical problems and were often not functional.

UNDER CROSS-EXAMINATION

[17] Under cross-examination the Defendant's witness Ms. Ferril admitted that she was not aware of the terms of the contract. Mr. Gregg Francois admitted that the skip system was abused by members of the public. He testified that abut one-half of the skips were damaged. The cracks in the skips prevented them from storing the garbage properly. Mr. Cummings testified that the contract with the Claimant was a month-to-month contract. He agreed that the Defendant had reduced the skips from 45 which was the number of skips positioned in designated areas to 33. Mr. Cummings denied that he told the Claimant that he would notify him where to locate the twelve (12) skips at a later date. There was an increased in other forms of garbage collection so the reduction in the number of skips did not put pressure on the thirty-three skips. This was a management decision to make the system more effective. Skips were removed from some areas because there were other arrangements in place to collect garbage from these areas. The Defendant at that time was revamping the system of garbage collection. The Defendant was to invest in a fleet of garbage collection vehicles. This was part of the OECS/World Bank Solid Waste Management Project. Mr. Cummings further testified that he was not aware of the Claimant borrowing money to invest in business. He was not aware of any investment in equipment by the Claimant.

ISSUES

[18] The issues to be determined are:

(1) What were the terms of the contract between the Claimant and the Defendant?

(2) Whether the Claimant breached the contract. If yes, was the Defendant entitled to terminate the contract?

(3) If the Claimant was not in breach of the contract what remedy is the Claimant entitled to?

(4) Was the month's notice reasonable to terminate the contract?

SUBMISSIONS

[19] Learned Counsel for the Claimant submitted that in view of the admissions set out in paragraphs 10 and 11 of the defence, the Defendant cannot argue that the terms of the contract were not the same as the original 1992 contract except for the changes regarding consideration to be paid. The contract was therefore permanent and irrevocable. Learned Counsel referred to the case of ***Islwyn Borough Council et al v Newport Borough Council*** (1993) EWCA Civ 28 where Lord Justice Roch referred to ***Llanelly Railway and Dock Company v London North Western Railway Company*** and stated:

> "I start with this presumption that every contract is permanent and irrevocable and it lies upon a person who say that it is revocable or determinable to show either something special in the contract itself or something in the nature of the contract which is reasonably to be implied that it was not intended to be permanent and perpetual, but was to be in some way or other subject to termination."

[20] Learned Counsel submitted that in this case the presumption has not been rebutted for the following reasons:

(a) The Ministry of Health knew of the banking arrangement and knew the Claimant was relying on the contract to pay his loan, by extension, the Defendant knew this. Further, the Claimant's evidence is that after he had discussions with the Defendant in 1999 he got the mortgage. This is confirmed by the letter of Mr. Brenton Bailey, the Permanent Secretary in the Ministry of Health to the Bank of Nova Scotia.

(b) The Claimant testified that he understood that he would be given two years' notice before the contract was terminated.

(c) The skips and the trucks were specialized equipment that cannot be used for any other purpose. A large capital investment was required to purchase them.

[21] Learned Counsel submitted that alternatively there is an implication that the contract was permanent. Learned Counsel referred to the following statement of Lord Uthwatt in ***Winter Garden Theatre v Millennium Productions Ltd.*** 1948 A.C. 173:

> "In my opinion a right to continue without more does not mean anything except a right to continue for a period which is left at large. The language of the letter is consistent with the implication of the term for which the licenses contend, namely that the licence was to continue forever subject only to the right of determination given to them."

Learned Counsel further submitted that should the court find that the contract was not irrevocable or perpetual then the one month notice was not reasonable in the circumstances. Learned Counsel referred to the statement of Lord Develin in a decision of the Privy Council in ***Australia Blue Metals v Hughes*** No. 12 of 1962 at p. 5:

> "It is true that it does not require very much to induce a court to read into an agreement of a commercial character, either by construction or implication, a provision that the arrangements between the parties whatever they may be shall be determinable only upon reasonable notice."

And at p. 6:

> "The question whether a requirement for reasonableness is to be implied in a contract is to be answered in light of the circumstances existing when the contract was made. The length of the notice if any is the time that is deemed to be reasonable in light of the circumstances in which the notice is given. That does not mean that the reasonable time is the time during which the party or the order could reasonably wish for the contract to continue. It is unlikely that when notice was given the parties could agree on that. The reasons which make one party to desire a long notice would make the other party to desire a short one. The implication of reasonable notice is intended to give only the common purpose of the parties. Whether the need be any notice at all, and if so, the common purpose for which it is required are matters to be determined as at the date of the contract, the reasonable time for the fulfillment of the purpose is a matter to be determined as at the date of the notice. The common purpose is frequently derived from the desire that both parties may be expected to have to cushion themselves against sudden change, giving themselves time to make alternative arrangements of a sort similar to those which are being terminated."

[22] Learned Counsel also submitted that the party issuing the notice of termination should ensure he knows of the other party's particular circumstances, including his commitments as these are critical factors in determining whether the notice is reasonable. See ***Winter Green Theatre***.

[23] Learned Counsel submitted that having regard to the legal principles one month's notice is unreasonable for the following reasons:

(a) The contract was always for two years, with the contract price payable in monthly installments.

(b) The capital sum required for equipment and operation of the business was large.

(c) The equipment was specialized equipment.

(d) The Claimant borrowed money in 1992 and 1999 based on expectation and promise of more two-year contracts.

(e) The Defendant and its predecessor knew of the financial arrangement of the Claimant, if not they ought to have enquired of the commitments of the Claimant.

(f) The Defendant never informed the Claimant that it was implementing a one-month contract.

(g) The Defendant never testified that the contract was terminable on one month's notice or they had so informed the Claimant.

(h) The Claimant never agreed and would never have agreed to a one-month contract with one month's notice.

(i) Mr. Cummings admitted it was not reasonable for the Claimant to have gone from a two-year contract to a month-to-month contract.

(j) The Claimant stated in evidence in paragraph 21.3 of his witness statement he was working under temporary arrangement.

[24] Learned Counsel submitted that in the circumstances, the proper period of notice was two years. The Claimant is entitled to damages representing a period of two years being $600,000.00.

[25] Learned Counsel further submitted that breach of a term of a contract does not automatically discharge a contract. Breach of a warranty only enables an injured party to sue for damages. Only breach of a condition will allow the injured party the option of either continuing performance and sue for damages or treat the contract as discharged.

[26] Learned Counsel urged the court not to find that clause 1 (c) was a condition since there were no express words making the clause a condition. The Court ought not to construe the clause as a condition since it would not have been within the contemplation of the parties that any breach would allow the Defendant to put an end to the contract. This is extremely unreasonable. There is no evidence that the Defendant's predecessor ever considered any of the terms to be conditions. Further, if the term was a condition it was waived by the Defendant's predecessor and the Defendant. Also it would not have been in the contemplation of the parties that the skips would be used in the manner in which they were used by the public. The Defendant reduced the number of skips to be used in the performance of the contract by twelve. Therefore, if clause 1 (c) is deemed a condition then Clause 1 (a) should also be a condition. The Defendant ought not to be allowed to reduce the number of skips and be permitted to end the contract if the more onerous condition is allegedly not met. The Defendant's evidence in relation to the conditions of the skips was greatly exaggerated. There is no complaint in the Defendant's letters to the Claimant that the skips were in such a poor condition that they could not hold garbage.

[27] Learned Counsel also submitted that the documents exhibited by the Defendant only showed five entities being paid for one trip in October 2001, November 2001, two trips in January 2002, and four trips in February 2002. There was no hire between April 2000 and September 2001, or in December 2001, when the volume of garbage was largest. The documentary evidence does not support the Defendant's contention that the Claimant's performance was such that the contract ought to be terminated.

SUBMISSIONS OF THE DEFENDANT

[28] Learned Counsel for the Defendant submitted that an oral contract was entered into on or about April 2000 between the parties. The contract was a month-to-month contract on the same terms as existed with the Ministry of Health. The Claimant did not perform his obligations under the contract being to empty the skips with sufficient regularity. The number of trips the Claimant made showed that he was in breach of the contract. The Defendant wrote the Claimant on several occasions about his performance and the Claimant refused to acknowledge the letters or to remedy the breach.

[29] There were no terms of termination in the contract. In the circumstances, a period of one month's notice was reasonable and sufficient. Indeed, the Claimant was not entitled to any notice due to his breach of the terms of the contract. In relation to the counterclaim, Learned Counsel submitted that the Defendant is entitled to recover from the Claimant the sums paid being $31,000.00 for the removal of garbage which the Claimant was required to remove pursuant to the contract.

COURT'S ANALYSIS

[30] There is not much dispute in relation to the facts of this case. It is not disputed that the Claimant entered into a written contract with the Government through the Ministry of Health. That contract is dated 1st January 1992. Under the terms of the contract the Government agreed to pay the Claimant a yearly sum of $240,000.00 payable in twenty four installments. The period of the contract was for two years.

[31] The obligations of the Claimant included the following:

(a) Place forty-five (45) skips at the places designated by the Ministry of Health and the Environment.

(b) Clean the area of overflow waste around each skip provided that the area is public property and does not exceed twenty-five (25) feet.

(c) Remove the skips and dispose of the contents at the refuse disposal site at Arnos Vale or any other site designated by the Ministry of Healthy and the Environment. Removal and disposal to take place within sufficient regularity to avoid pilation, the undertaking being that sufficient regularity means at least twice per week.

[32] The Government undertook to do the following:

(a) To ensure that the designated sites are suitably prepared for the reception of the skips by performing such leveling and clearing of the designated places as may be necessary and as requested by the Contractor.

(b) To ensure that there is no burning of refuse in and around the skip by the servants and or agents of the Environmental Health Division of the Ministry of Health and the Environment.

(c) To ensure that the servants and or agents of the Environmental Health Division place refuse into and not around the skips.

(d) To take all reasonable steps to protect the skips from vandalism.

(e) To undertake to educate the public as to the safe and proper use of the skips.

[33] It is not disputed that this arrangement between the Claimant and the Government was renewed on several occasions. The Claimant exhibited the following contracts between himself and the Government:

1. No. 523 of 1992 dated 1st January 1992, contract being for a period of two (2) years at remuneration of $240,000.00 per annum.
2. No. 1938 of 1994 dated 1st May 1994, contract being for a period of two (2) months.

3. No. 3421 of 1994 dated 1st September 1994, contract being for a period of two (2) months.
4. No. 3701 of 1994 dated 1st day of November 1994, contract being for a period of two (2) months.
5. No. 268 of 1995 dated 15th January 1995 for a period of two (2) years, commencing September 1st, 1994. The remuneration increased to $300,000.00 per annum.
6. By letter dated 13th September 1994, the Ministry of Health indicated that the contract ended August 31, 1994 and offered to renew the contract for a period of two years.
7. No. 3836 of 1996 dated 14th October 1996 extended the duration of the contract period in contract No. 268 of 1995 from two (2) years to twenty-eight (28) months.
8. No. 390 of 1999 dated 2nd February 1999 for a period of nine months commencing from 1st January 1999.

[34] In April 2000 the Defendant a Statutory Corporation established by the Central Water and Sewerage Authority Act Cap 403, took over responsibility for the management of solid waste from the Ministry of Health. It is not disputed that there was no written contract between the Claimant and the Defendant. At the time when the Defendant took over the responsibility of solid waste management in April 2000 there is no evidence that there was a written contract between the Claimant and the Ministry of Health. Based on the documents exhibited, the last written contract between the Claimant and the Ministry of Health was for a period of nine months commencing on 1st January 1999. This contract had no provision for renewal. This is in keeping with the evidence that the Government decided in 1999 to have the Defendant be responsible for solid waste management.

[35] It is not disputed hat the Claimant and the Defendant held discussions in relation to the Claimant continuing to provide the service of collection and disposal of solid waste. The terms of what was agreed is disputed.

TERMS OF THE CONTRACT

[36] The Claimant's evidence on this issue is set out at paragraphs 10, 11 and 21.3 of his witness statement. They read as follows:

> "10. By another letter dated 13th September 1996, Exhibit G.F. 8, the Defendant again wrote to me in which it offered a contract for a further term of two (2) years at a cost of $300,000.00 payable by monthly installments of $25,000.00 commencing from 1st January 1999. I accepted that contract.
>
> 11. In 1999 there was a change in official policy whereby the collection and disposal of garbage was to be transferred from the Government of Saint Vincent and the Grenadines to the Central Water Authority, the Defendant. It was in these circumstances that the Defendant agreed to adopt the contract the Government had with me under the same contractual arrangements, including the existing financial arrangements for the payment of the contract work.
>
> 21.3 In August 1999 my 2-year contract was almost about to end (September 1999) and a new one put in place. But the Defendant's Senior Officials and I discussed this new contract and this is what they told me. They said that they were hoping to move the landfill at Arnos Vale to Diamond and they wanted the next six months (August 1999 to January 2000) to complete the work. With one month to go in the current 2-year contract they asked me if I would agree to suspend the contract with the Defendant for those six months until the Diamond landfill had been cornpleted. In the meanwhile they asked me if I would agree to take short contracts, two months at a time, because it was still necessary to clear the garbage from the streets of Kingstown and its environs. Once the Diamond landfill was

ready I would be allowed to complete my existing two-year contract and then enter into another two-year contract in early 2000. The officials of the Defendant at the meeting when this arrangement was made were O'Reilly Lewis, Daniel Cummings, Valerie Beach-Murphy and my accountant, Brian Glasgow. Daniel Cummings actually told me that this was a very temporary arrangement and that they would definitely need my services. It was on these conditions that I agreed to suspend my then current two-year contract."

[37] The Defendant's evidence on this issue is the evidence of Mr. Daniel Cummings in paragraphs 3 to 9 of his witness statement. They read as follows:

"3. The Authority assumed control of solid waste management in March 2000 from the Ministry of Health and Environment (The Ministry).

4. As part of the business of solid waste management, the Authority entered into discussions with Mr. Gregory Ferrari, of "Waste Master" who had previously had a contract with the said Ministry for solid waste disposal.

5. Mr. Ferrari had been contracted by the Ministry to place garbage skips in 45 areas around Saint Vincent. He was further contracted to replace skips in these areas when full, and dispose of the garbage by means of trucks, which would transport the full skips to the land fill site at Amos Vale for disposal. Mr. Ferrari was contracted to supply his own trucks and skips.

6. Pursuant to this contract, Mr. Ferrari was mandated to empty the skips with sufficient regularity to avoid pilation of garbage, the undertaking being that "sufficiently" means trips to the landfill at least twice per week. He was also to ensure that any skip which is subject to the agreement, was

placed so as not to obstruct traffic or to pose any hazard or danger whatsoever to the public's health and safety.

7. These terms formed part of discussions between the Authority and Mr. Ferrari and were adopted and agreed upon as part of a new arrangement on or about April 2000. The contract was varied in that the number of skips had been reduced. The Authority agreed to pay Mr. Ferrari the monthly sum of E.C. $25,000.00 representing an average number of trips to the landfill that he was contracted to make per month.

8. The Authority proceeded to conduct the business of waste disposal through its solid waste unit which was headed by Mr. O'Reilly Lewis.

9. Mr. Ferrari had requested an increase in pay from the previous contract with the Ministry. The increase was refused because the Authority had reduced the workload by decreasing the number of skips. Mr. Ferrari agreed to the terms of monthly payment as specified. The Authority proposed the payment on a monthly basis because it was necessary to monitor Mr. Ferrari's services. The Authority was also concerned that Mr. Ferrari's fleet of skips had been depleted. The Authority had also received reports that Mr. Ferrari's service under the previous arrangement was inadequately performed and therefore needed to assess Mr. Ferrari's service while he worked under the new arrangement and ensure that he kept an average number of trips to the landfill."

[38] Having reviewed the evidence of both witnesses, I believe the evidence of Mr. Daniel Cummings. I found the Claimant to be an unreliable witness. The Claimant's testimony in paragraph 10 of his witness statement that the Defendant wrote to him on 13th September 1996 is not accurate. The letter was written by the Permanent Secretary in the Ministry of Health. At this time the Ministry of Health was responsible for solid waste management and not the Defendant. Further, the letter makes no mention of the contract commencing

on January 1, 1999. It makes no mention of a commencement date. The body of the letter reads:

> "Your contract with the Ministry for the abovementioned services ended on 31st August 1996. We wish to engage your services for a further period of two (2) years, at a cost of Three hundred thousand dollars ($300,000.00) per annum, payable by monthly installments of Twenty-five thousand dollars ($25,000.00).
>
> We would appreciate your urgent response on this matter.
>
> With best regards.
>
> Yours faithfully,
> Permanent Secretary
> Ministry of Health and the
> Environment

The Claimant's testimony is also not accurate when he said in several instances in paragraph 21.3 that he had a two-year contract with the Government in 1999, which was due to end in September 1999. The documentary evidence which was exhibited by the Claimant shows that on the 2nd day of February 1999 he entered into a contract registered as No. 390 of 1999 with the Government for a period of nine (9) months, effective 1st January 1999.

[39] I do not believe the testimony of the Claimant that he agreed with the Defendant to suspend one month of his contract with the Government being the month of September 1999 and accept contracts for two-months periods until 2000 because the Defendant needed six months, August 1999 to January 2000, to move the landfill from Arnos Vale to Diamond. The Defendant did not take over the management of solid waste until about April 2000. This was not contradicted by the Claimant. Indeed, in the Claimant's submissions at paragraph 10, it states inter alia:

> "The Defendant assumed the responsibility of garbage collection from the Ministry of Health in or about April 2000."

During this period the Ministry of Health was still responsible for the management of solid waste.

[40] The various contracts with the Government show that on occasions when the contract period had ended, the Claimant and the Government entered into contracts for two months periods before entering into another contract for two years. There would have been no reason to suspend the one month remaining in the contract since the parties were continuing in a contracted arrangement for the removal of solid waste on the same terms. Further, unlike the earlier two-year contracts with the Ministry of Health, the final written contract written between the Claimant and the Ministry of Health, No. 390 of 1999, was for nine months commencing from 1st January 1999, this contract had no provision for renewal.

[41] I believe the testimony of Mr. Daniel Cummings that when the Defendant took over the solid waste management the Defendant's officials reviewed the terms of the contract that the Claimant had with the Ministry of Health and they entered into discussions with the Claimant and in April 2000 the Defendant entered into an agreement with the Claimant on a month-to-month basis. The terms were similar to the contract with the Ministry of Health. The number of skips to be posted was reduced.

[42] I also believe Mr. Cummings' evidence that at no time did he tell the Claimant that the Defendant would enter into a two-year contract with him when the landfill was moved to Diamond. The arrangement between the Claimant and the Defendant lasted from April 2000 until February 2002. There is no evidence that during this period there was any discussion of the parties entering into a two-year contract. Indeed, all of the discussions centered around complaints by the Defendant of the poor performance of the Claimant. The Defendant's written complaint commenced from as early as August 15, 2000. Mr. Cummings explained that when the Defendant took over the garbage collection system it was to revamp the management of garbage disposal. One project being undertaken by the Defendant was to invest in a fleet of garbage disposal vehicles. This project was part of the World Bank project for the OECS region. The project was made public.

[43] Having regard to the evidence I find that the contract between the Claimant and the Defendant was on a month-to-month basis and not for two-month periods as alleged by the Claimant. Also there was no agreement for a two-year contract when the landfill had moved to Diamond. The terms were the same as the original 1992 contract except for the number of skips.

BREACH OF THE CONTRACT

[44] The evidence on behalf of the Defendant in relation to this issue is outlined in the witness statement of Mr. Daniel Cummings, Mr. Gregg Francois and Ms. Kavern Ferril. Mr. Daniel Cummings testified at paragraphs 10, 11, 13, 14, 16 and 17 as follows:

"10. ... I personally saw some of these deficient skips while traveling to and from home in Redemption Sharpes, where a skip had been placed. I also witnessed personally an absence of skips in some areas that I knew to be designated areas under our arrangement.

11. These problems caused a health hazard in these communities. Deficient skips caused garbage to overflow and spill into the open, creating an unsightly and an unhealthy mess, and a haven for vermin and stray animals. People in these communities had no skip to dump their garbage and would dump them unto roadsides or next to the overflowing skip.

13. Based on these reports I advised that letters of complaint be formally sent to Mr. Ferrari highlighting these concerns. A letter was sent on the 15th of August 2000, a copy of which is exhibited herewith and marked "D.C.1". There was no response to this letter either verbal or otherwise.

14. A second letter of complaint was sent to Mr. Ferrari on the 25th of September 2000, actually requesting a skip to be placed in the Sion Hill/Walvaroo area, which was an area designated under the contract with

Ferrari. A request was also made to contact the Authority for the exact location to place such a skip. This letter also went unanswered and the service continued to deteriorate. This letter is exhibited and marked "D.C. 2".

16. During this period Mr. Ferrari never afforded the Authority by way of its agents or otherwise the courtesy of an explanation of the fall in the standard of the work or any response to our requests to meet and discuss the issues.

17. In November of 2001, after consultations with Mr. O'Reilly, Mr. Ferrari was again written to with respect to the poor service provided by Waste Master. There was again no response to either the correspondence or an improvement of the service, nor did he give any indication that he no longer wished to continue under the contract with the Authority.

19. In the months of November and December 2001, Mr. Ferrari's service deteriorated so drastically that there were very few trips made to the landfill ..."

[45] Mr. Gregg Francois testified at paragraphs 10, 12, 14, 15 and 16 of his witness statement as follows:

"10. From the inception of the contract with the Authority, there had been similar problems with Mr. Ferrari's service. The skips were often not emptied regularly and many had overflowed with garbage. As Landfill Supervisor I was concerned primarily with the state and number of the skips and trucks.

12. Having regard to these complaints, I began making inquiries about the state of skips from concerned persons. Further, I made personal checks around several communities to observe the skips. I noticed firsthand that

the complaints had been well-founded. Skips had been overflowing with garbage in some areas, due to disrepair or failure to empty. The disrepair I observed was well beyond normal wear and tear, but substantial deterioration such as large cracks and rusts. These skips were unsuitable for containment of garbage.

14. Due to the pilation of garbage, a health hazard had ensued in these areas. The garbage was open to dangerous disease-spreading pests and stray animals. This introduced the danger of disease, as well as foul smells. Where skips had been absent for a considerable time, persons began dumping garbage in the open causing greater hazard.

15. During the months of August to November 2001, I made several calls to Mr. Ferrari to raise these concerns with him. I recall that he once indicated that he had problems with his trucks. The service never improved and deteriorated significantly during the months of November and December 2001. The Authority was faced with a serious problem as these months generated the most solid waste, given the holiday festivities.

16. I also noticed that the skips found near the landfill at the gate had often piled up with garbage. I strenuously complained to Mr. Ferrari about the need to empty these skips near the landfill. I became frustrated when these skips remained within ten feet of the landfill and were not emptied. These were skips Mr. Ferrari was required to empty.

[46] The evidence of Ms. Kavern Ferril is contained in paragraphs 5, 6, 8 and 11. They read as follows:

"5. From my records, Mr. Ferrari was required to make an average number of trips to the landfill per month. In November and December of that year, his service fell drastically to about 178 trips in November and about 39

trips in December, which was far below the average number of trips made monthly.

6. This presented a problem for the Authority because apart from the Carnival season these months generate the most solid waste by the public. November and December 2001, represented a significant drop in the average number of trips he made during the time I worked as Landfill Clerk. These trips that were made in November and December also included trips made by Ferrari on behalf of his private clients such as the Saint Vincent Port Authority and not on behalf of the Authority itself.

8. Mr. Ferrari also had deficient skips, which were unsuitable, for waste disposal. Many skips had large cracks and rust, which were beyond usual wear and tear and became huge gaping holes. Mesh wire was often used to seal these cracks because they could not properly hold garbage.

11. I also recall that the two skips at the landfill were not often emptied regularly. The garbage in these skips would pile up despite close proximity to the landfill. They began to produce a foul stench and the overflow caused a health hazard because it left the waste open to pests and stray animals. This was unacceptable even for an area close to the landfill because the area was kept under high levels of safety with respect to health conditions."

[47] The Claimant's evidence on this issue is contained in paragraphs 12, 13, 18 (1), 22.1 and 22.2 of his witness statement. They read as follows:

"12. Thus far the service I had provided was quite good and few if any complaints were made. At all times during the course of the contract the people for whom the use of the skips was intended had constantly abused the service. In certain areas like Sion Hill, Lower Kingstown and around the Kingstown Vegetable Market people would dump old stoves, old

refrigerators, motor vehicle tyres and dead animals into the skips, a use for which they were never intended. My response was to complain and protest to Government. But at the end of the day it was I who had to deal with this kind of garbage. It got worse when people began to dump filth and dead animals more frequently into the skips.

13. The Defendant was less tolerant to consequences of the misuse of the skips than Government had been. As a result of their misuse they filled more rapidly, especially around the holiday season, and sometimes garbage would spill over onto the street as it in fact did at the time when the Ministry of Health was the contracting party. By letter dated 25th September 2000 the Defendant wrote to me in terms of its letter exhibited herewith as Ex. G.F. 9 in which It complained of overflowing skips sitting in their location for a very long time and requested the skips to be emptied on a regular basis. The very problem which the public at large had been in the habit of creating for me by throwing large old utilities and dead animals in the skips now began to cause a problem for the Defendant although I was performing this contract with the same degree of efficiency for the Government. This misuse of the skips sometimes caused me to empty them in some locations more than once per day. The Defendant did see how quickly I responded to the replacement of the overflowing skips.

18(1) ...There was nothing the Defendant and myself could have done to prevent the members of the public from abusing the skips. I have had the experience of removing skips from the Sion Hill and Kingstown areas at least twice in one day around the Christmas season when citizens there were disposing of their old mattresses, and grass and shrubs from their yard.

22(1) And the allegation that my disposal service broke down in November and December of 2001 has already been adequately answered in my letter of 10th February 2002 (G.F. 12) and 9th April 2002 (G.F. 13) embellished by Mr. Mounsey's letters of 7th May 2000 (G.F. 14) and 2nd July 2002 (G.F. 15).

22(2) The Defendant alleges that the number of skips I continued to use were too few and as a result the garbage was piling up on the street as the skips overflowed. There is no substance in that allegation. This too is utterly false. The Defendant will remember that in early 2000 Daniel Cummings told me he wanted me to relocate some of the skips. He asked me to keep about 12 of them and he would tell me where to put them. He kept me waiting for a long time and never did get back to me. Valerie Beach-Murphy had indicated to me that she had reminded Daniel Cummings about his statement to me. She said that when she reminded him he told her that that was not her business or words to that effect.

22(3) ...He knew that I had a total of 45 skips. When he asked me to withhold 12 from use he was aware that the remaining 33 would be inadequate for the collection of garbage. He knew that it was important to let me know quickly where the 12 skips were to be relocated; but he never did. Yet he and others at the Defendant Company continued to complain of over-spillage of garbage into the streets and overfull skips.

[48] Having reviewed the evidence it is not disputed that there was an overflow of garbage in several instances, and that the use of the skips were abused by members of the public in that items which should not have been placed in the skips were indeed placed in the skips. This would have contributed to the skips being filled quicker. However, under the terms of the contract in particular Clause 1(c), for ease of reference I will repeat this clause, it reads:

"Remove skips and dispose of contents therein at the refuse disposal site at Arnos Vale or any other site designated by the Ministry of Health and the Environment (hereinafter referred to as "the designated sites") such removal and disposal to take place with sufficient regularity to avoid pilation, the undertaking being that sufficient regularity means at least twice per week."

Pursuant to this clause, the Claimant was required to empty the skips at least twice per week. There is no evidence from the Claimant that he did so and in spite of him doing so there was overflow of garbage because of abuse by the public. In fact, the Claimant denied under cross-examination that he was required to empty the skips twice per day. Also, in the Claimant's letter of February 10, 2002 to Mr. O'Reilly Lewis in response to Mr. Lewis' letter of January 17, 2002 which gave notice of termination the Claimant stated at paragraph 4:

"My contract clearly states that I should empty skips when necessary. In this contract it says nothing to do with the actual number of trips to the landfill..."

The evidence on behalf of the Defendant shows that the skips were not being emptied with sufficient regularity as described in the contract. The Officers who worked at the landfill site testified that not even the skips at the landfill site were emptied twice weekly. The Defendant wrote to the Claimant about the unsatisfactory situation on more than one occasion but the problem was not resolved by the Claimant. The Claimant did testify that in some instances he made more than one trip on the same day from the same area. I believe his testimony. It confirms the evidence on behalf of the Defendant that due to the irregularity with which the Claimant was emptying the skips on occasions he had to make more than one trip in relation to the same area.

[49] The Claimant's contention that the pilation was due to the reduced number of skips has no merit. The evidence of the Claimant which is not disputed is that there was pilation of the garbage when 45 skips were placed in the designated areas under the contract with the Government. I believe the testimony of Mr. Cummings that the number of skips was reduced but this was because there were other arrangements with private individuals put

in place in areas for the garbage to be collected. The evidence on behalf of the Defendant that there were no skips in some areas that were designated was not contradicted.

[50] In view of the evidence I find that the Claimant was in breach of contract. The Claimant failed to empty the skips with sufficient regularity and he failed to place skips in the area designated by the Defendant.

WAS THE DEFENDANT ENTITLED TO TERMINATE THE CONTRACT?

[51] I agree with the submission of Learned Counsel for the Claimant and it is settled law that not every breach of a term of a contract will give rise to termination of contract. The Learned Authors of Halsbury Laws in Volume 16 at paragraph 994 after dealing with some specific situations none of which are applicable to this case stated:

> "Where the status of a term cannot be classified under the above rules, the question whether a term is a condition or a warranty depends upon the intention of the parties as revealed by the construction of the contract. Where the contract contains no indication on its face of the status of the terms, the court must look at the contract in the light of surrounding circumstances in order to decide the intention of the parties. Important facts to be taken into consideration are the extent to which the fulfillment of the term would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out, and whether the obligation arising from the term goes so directly to the substance of the contract that its non-performance may fairly be considered as a substantial failure to perform the contract at all. If a term is then classified as a condition, it is unnecessary for the innocent party rescinding in a particular case to show that the consequences of the breach go substantially to the root of the contract or even cause him any damage at all."

In this case, there was no indication of the status of the terms. The contract was for the removal of solid waste from designated areas in Kingstown. The purpose of the contract was to have an environment that did not pose a health hazard to the residents and members of the public. Hence, the contract specifically provided for the skips to be emptied at least twice per week to prevent a build-up of garbage thereby posing a health hazard. It cannot be disputed that the failure to dispose of the garbage in a timely manner would result in such a health hazard. Also, a failure to place skips in the designated areas particularly in a highly populated area like Sion Hill. As stated earlier, it is not disputed that

there was pilation of garbage in a number of the designated areas, thereby posing a health hazard to residents and members of the public. The failure to empty the skips twice per week as agreed in the contract was a substantial failure to perform the contract. In view of these circumstances, I find that the Defendants were entitled to terminate the contract.

NOTICE

[52] I agree with the submission of Learned Counsel for the Claimant that what is reasonable notice depends on the circumstances of the particular case. As indicated earlier I find that the contractual arrangement between the Claimant and the Defendant was on a month-to month basis. The Defendant's letter which gave notice of termination effective February 28, 2002 is dated January 17, 2002. The Claimant testified that he only received this letter in the post on January 28, 2002. This evidence of the Claimant was not contradicted.

[53] When the reasons advanced by Learned Counsel for the Claimant that one months' notice was not reasonable are examined it appears that Learned Counsel has not made a distinction between the contractual arrangement between the Claimant and the Ministry of Health and the contractual arrangement between the Claimant and the Defendant. In the very first reason adduced by Learned Counsel he submits that the contract was always for two years at a time, at a yearly price payable monthly. The Claimant himself testified that the contract with the Defendant was for two-month periods and Mr. Cummings promised him when the landfill was moved to Diamond he would be given a two year contract.

[54] I agree with the submission of Learned Counsel for the Claimant that there is no evidence that the parties agreed to termination by one month's notice or the Defendant ever informed the Claimant that the arrangement would be terminable by one month's notice. However, the fact that a contract does not contain a provision for termination by notice does not mean that the contract cannot be determined by notice. As I found earlier this was a contract from month-to-month. At the time when the Claimant entered into the contract with the Defendant, the Defendant was reviewing the system of management of solid waste disposal. The Claimant in his testimony, while insisting that he was promised a

two-year contract, agreed that the Defendant was not required to award him a two-year contract if his performance was not satisfactory. Having regard to the circumstances of this case, the contract being on a month-to-month basis, I find that notice of one month was reasonable.

[55] Learned Counsel for the Claimant also placed much emphasis on the fact that the Claimant had borrowed money from a commercial bank to invest in skips and equipment to discharge his obligations under the contract. It is not disputed that the Claimant borrowed money in 1992 via an unsecured overdraft to finance his operation. The Claimant also borrowed by way of mortgage, as evidenced by Mortgage Deed No. 3233 of 1999 and dated 15th September 1999. But it must be remembered that at this time the contract was with the Ministry of Health and not the Defendant. The letter to the commercial bank exhibited by the Claimant was a letter under the hand of the Permanent Secretary in the Ministry of Health not by an officer of the Defendant. The letter is dated May 19, 1999 and simply confirms to the Bank that the contract between the Ministry of Health and the Claimant was renewable. The letter in its entirety reads:

"Ministry of Health and the
Environment
Ministerial Building
Kingstown
St. Vincent and the Grenadines

May 19, 1999

The Manager
Bank of Nova Scotia
Kingstown
St. Vincent

Dear Sir,

REFERENCE CONTRACT BETWEEN THE GOVERNMENT OF ST. VINCENT AND THE GRENADINES AND MR. GREGORY ANGELO FERRARI OF WASTE MASTER LTD.

As regards item 1 on page 2 of the contract which commenced from 1991, it is hereby confirmed that the contract is renewable

/s/ Brenton Bailey
Permanent Secretary
Ministry of Health and the
Environment"

This was several months before the Claimant and the Defendant had any discussions about removal of solid waste. The Defendant is a Statutory Corporation, a separate and distinct legal entity from the Ministry of Health and the Government. The Claimant himself testified that in August 1999 he had discussions with the Defendant as the management of solid waste was being transferred to the Defendant. The letter of May 19, 1999 shows that the negotiations between the Claimant and the Bank for the mortgage dated September 15, 1999 took place before August 1999. I believe the testimony on behalf of the Defendant that its officers had no knowledge of the Claimant's arrangement with the bank. This is in keeping with the fact that the Defendant had not yet taken over the management of solid waste. The Claimant has not adduced any evidence to show that prior to September 1999 his contractual arrangement with the Defendant commenced. There is no evidence that the Claimant was paid from September 1999 by the Defendant for his services or at any time during the year 1999.

ESTOPPEL

[56] The Claimant in his statement of case also raised the issue of estoppel by representation. Paragraph 5 of the statement of case reads as follows:

"To the knowledge of the Government of Saint Vincent and the Grenadines and by extension the Defendant, the Claimant was encouraged to borrow money from the Bank of Nova Scotia in order to purchase the infrastructural equipment (skips) and trucks to move the garbage, and it was clearly understood, agreed and accepted by the Government and by extension the Defendant, that the Claimant would not be able to enter into the said contract with the Defendant without borrowing the money to finance his purchase of capital equipment to perform the contract. In reliance on the assurance of the Government that it would enter into and continue the contract with the Claimant, the Claimant borrowed a substantial sum of money from the Bank of Nova Scotia for no other purpose than to fulfill his obligations under the contract with the Government and by extension with the Defendant. The Claimant therefore states that the Defendant is estopped from terminating the said contract until the Claimant had discharged his obligation to the Bank of Nova Scotia."

[57] The doctrine of estoppel by representation is explained in Halsbury's Laws of England Volume 16(2) at paragraph 957 in the following terms:

> "Where a person has by words or conduct made to another a clear and unequivocal representation of fact, either with knowledge of its falsehood, or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable man, understand that a certain representation of fact was intended to be acted on, and the other has acted on the representation and thereby altered his position to his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be."

[58] The elements of estoppel by representation are:

> "(a) There must be a clear and unequivocal representation of fact by the person or some person on his behalf against whom the estoppel is being relied.
>
> (b) The person who made the representation intended the other person to whom the representation was made to act on it, or so conducted himself that a reasonable person would understand it as intended to be acted on.
>
> (c) The person to whom the representation was made did act on it to his detriment."

[59] Having regard to the evidence in this case I find that there was no representation made to the Claimant by the Defendant in relation to the financial arrangement with the Bank. As stated earlier, while the Mortgage Deed is dated September 15, 1999, the letter from the Permanent Secretary which is dated May 19, 1999, clearly shows that the negotiations for the loan was several months before the Claimant had discussions with the Defendant. This arrangement for the loan was during the period when the Ministry of Health was responsible for solid waste management and the Claimant had a contract with the Government for the removal of solid waste.

[60] Further, the Claimant said in his witness statement at paragraphs 4 and 5 as follows:

> "(4) My one concern was to obtain enough money to purchase the capital equipment I would need, i.e. trucks, skips, brooms, shovels and an adequate supply of labour to do the job. I told the Prime Minister then and the Ministry of Health that I would have to borrow enough money from one of the commercial banks to purchase the needed equipment, and to repay it with the money I would get from the garbage business. I discussed my business proposals with the Ministry. They liked it and entered into a contract with me to collect and dispose of the garbage as planned. If they had not given me the contract I could not have got the money to borrow from the Bank of Nova Scotia, and the Defendant was aware of that.
>
> (5) It was a direct result of that representation that I borrowed $285,000.00 from the Bank of Nova Scotia to finance my project..."

[61] It must be noted that the loan was taken almost seven years after the Claimant first entered into contract with the Government. The discussions the Claimant had with the Prime Minister and Ministry of Health were during 1991. The bare allegation that the Defendant was aware, which I do not believe, is of no moment. There is no evidence which shows that the representation was made by the Defendant or on behalf of the Defendant. The evidence shows that the Defendant only became responsible for solid waste management in 2000.

[62] Also there is no evidence from the Claimant which shows that the loan of $285,000.00 the subject of the Mortgage Deed dated September 15, 1999 was in relation to the Claimant's contractual obligation to remove solid waste. There is no evidence of any skips purchased, or trucks or shovels or even a broomstick from the loan. The evidence of the Defendant is that the Claimant's trucks were old and often non-functional. The Claimant agreed that on occasions his trucks had mechanical problems and he had to hire other trucks to remove the skips.

COUNTERCLAIM

[63] I will deal with the Claimant's claim for the payment of $27,000.00 at the same time as the Defendant's counterclaim for $31,000.00.

[64] The Claimant alleges that he was not paid the full contract price of $25,000.00 for the months of November and December 2001. The total shortfall was $27,000.00. The Defendant does not deny the short payment to the Claimant but contends that the Claimant did not discharge his obligations under the contract and his payment was reduced in proportion to the number of trips that he made to the landfill site to dispose of garbage. The Defendant further contends that it had to pay other persons to provide the services which the Claimant was contracted to provide. The total sum paid was $31,000.00. This sum was paid for removal of garbage during the period October 2001 to February 2002.

[65] The Claimant in his reply to the Defence and Counterclaim alleged that the use of other waste collectors was a deliberate ploy to embarrass him and eventually terminate the contract. He made no admission of the payment of $31,000.00. However, in his testimony under cross-examination the Claimant stated that he was not aware that as a result of the pilation of garbage the Defendant used other persons to remove the garbage.

[66] Having seen the witnesses and having reviewed the evidence, I believe the evidence on behalf of the Defendant that the Claimant's services having deteriorated and posed a

health hazard to members of the public, it was necessary for the Defendant to pay persons to remove the garbage which it had contracted the Claimant to remove. In so doing, they incurred expenditure of $31,000.00. This evidence of the expenditure incurred was not contradicted. Receipts evidencing payment to several persons were exhibited. I find that the Defendant has proved on a balance of probability that it did incur expenditure in the sum of $31,000.00 to remove garbage during the period October 2001 to February 2002. However, while the Defendant did pay a total of $31,000.00 to have the garbage removed, the Defendant did not pay the Claimant a total of $27,000.00 over the period November to December 2001. The total loss suffered by the Defendant is a sum of $4,000.00. I will therefore award the Defendant the sum of $4,000.00 as special damages.

[67] Before I conclude this judgment I wish to deal with an issue which arose during the trial. During the cross-examination of the Claimant, Learned Counsel for the Defendant sought to put to the Claimant a letter from the Defendant to the Claimant dated 15th August 2000 which was attached to Mr. Cummings' witness statement dated 7th March 2006 and which was filed on the same day, and which was disclosed in the Defendant's list of documents filed on 6th March 2006. Learned Counsel for the Claimant also objected to the documents filed in the Defendant's list of documents filed on October 5, 2005. The ground of Learned Counsel's objection is that the lists of documents were filed out of time. The Case Management Order dated July 14, 2005 required that standard disclosure be made by the 30th September 2005. Learned Counsel relied on Part 28.13 (1) (a) of CPR 2000, which reads as follows:

> "A party who fails to give disclosure by the date ordered, or to permit inspection, may not rely on or produce at the trial any document not so disclosed or made available for inspection."

[68] In ***St. Kitts Development Ltd v Golfview Development Ltd and Michael Simanic*** Alleyne JA (as he then was) stated that the Respondents who had ample notice of the irregularity being failure to file witness statements within the time stipulated in the Case Management Order could and should have raised the issue ahead of the date of trial but sought instead to resort to the technique of trial by ambush which CPR 2000 seeks to discharge, and that they should not be allowed to benefit from their behavior.

[69] While ***St. Kitts Development Ltd*** dealt with late filing of written statements, the same principles apply in relation to late filing of list of documents. In this case the list of documents was filed in the first instance five (5) days late, and the second list of documents five months and six days late. The Claimant was well aware that the Defendant was relying on the documents more than five years prior to the trial. In his submission Learned Counsel did not refer the court to any prejudice that the Claimant would suffer if the Defendant was permitted to use the documents and I find none. It was in view of the above circumstances that I permitted the Defendant to rely on the documents at trial.

[70] In conclusion, I find that the Claimant has failed to prove on a balance of probability that the Defendant breached the contract between the Claimant and the Defendant. I also find that the Claimant was in breach of the contract and the Defendant was entitled to terminate the contract. I also find that in the circumstances, the period of one month's notice given to terminate the contract was reasonable notice. I find further that the Defendant is entitled to recover $4,000.00 as special damages being sums paid to provide the services which the Claimant was contracted to provide.

[71] It is ordered:

(1) The Claim is dismissed.

(2) Judgment is entered for the Defendant on the counterclaim.

(3) The Claimant shall pay the Defendant special damages in the sum of $4,000.00.

(4) The Claimant shall pay the Defendant costs, such costs to be prescribed costs.

.....

Gertel Thom
HIGH COURT JUDGE