HASRAT TEGUH SDN BHD **....Appellant**

AND

WATI BINTI HAJI BUJANG **.....Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 9 of 2017)

Before: Mortimer P, Burrell and Seagroatt JJ A.
12th May 2018

Headnote: Joint Venture Agreement – Temporary Occupation Licence revocable without notice for breach of any condition or term – breach of Joint Venture condition replicating condition of Temporary Occupation licence justification for repudiation of contract – condition not a warranty. Temporary Occupation Licence cannot create any right or tenancy over land.

Mr. Mohd Noorsuhaimy bin Haji Kasmany (M/S Pengiran Izad & Lee) for Appellant
Mr. Hj Mansur bin DP Dr Hj Abdul Latif (M/S Lenny Rahman & Partners) for Respondent

Cases cited in the Judgment:

Photo Production v Semincor Limited HL(E) 1980
Hongkong fir Shipping Co. Limited v Kawasaki 1961 2QB (CA)

Seagroatt, JA.:

This is an appeal by the defendant company (Hasrat) against the judgment of the Chief Justice dated 30th November 2017, whereby he allowed the claim of the plaintiff (Bujang also known as Brucast) that the termination notice of the 1st September 2015 was lawful and valid to terminate the Joint Venture Agreement between the parties and made consequential orders including that the Defendant must vacate the site within 30 days.

The grounds of the Appeal are essentially that the Learned Judge erred in law and in fact in failing to consider the full effect of the terms and conditions of the Joint Venture Agreement, the Supplementary Deed and the Equipment Rental Agreement and in particular that the Equipment Rental Agreement constituted a breach of the Joint Venture Agreement.

There are other grounds set out in relation to findings of fact on the evidence which we do not need to consider since they are subsidiary to the principal and fundamental ground.

The starting point for this appeal is the Joint Venture Agreement of the 24th May 2012 and its Supplemental Deed dated the 7th August 2013, the latter being particularly material to the issues between the parties. The Chief Justice in his judgment proceeded with a consideration of these documents from the outset and we adopt the same approach.

The preamble to the Joint Venture Agreement recites the nature of the respective businesses of the parties. The Plaintiff is a construction business importing, exporting and supplying raw materials for construction purposes in Brunei. It held a Temporary Occupation Licence in respect of an Industrial / Storage site in Kg Lumpas, Mukim Lumapas, Brunei.

The defendant had the expertise in the production and supply of raw materials for construction.

The Joint Venture was formed to run and manage a plant on the said site to produce and supply designated materials.

The defendant was to finance the works with what was described as working capital of $200,000. In reality this was a payment to the plaintiff whose obligation was to obtain the necessary licences from the authorities and any other essential documentation, and to pay the annual land tax at that stage, $1,000. In the event of the tax being increased the parties were to agree as to which of them would pay the increase.

The defendant was to inject any necessary working capital to finance the works to provide and set up plant, equipment and machinery on site to enable the works to be carried out; and *"to manage the plant….and oversee the works…..and workers."* (Clauses 4.1.3 to 4.1.5).

From this it is clear that the plaintiff had a very limited though important role and that the defendant was the operator of and responsible for all the work and necessary equipment on the site. Clause 6 set out the mutual obligations of the parties:

6.1 Each party undertakes to procure and ensure that:

> *(c) All the work carried out by it in respect of this Joint Venture shall be conducted in accordance with the terms and conditions of this Agreement and each Party shall be responsible for the implementation of and compliance with all legislative requirements which apply to this Joint Venture.*
>
> *(d) ……*
>
> *(e) All information requested for this Joint Venture shall be duly provided and any document requested for in relation to this Joint Venture shall be duly prepared.*

In the event of any breach of the provisions or obligations by either party and failure to remedy the same within 30 days of receipt of written notice to do so then the non-defaulting party shall be entitled to serve a termination notice.

The duration of the agreement was fixed for 10 years subject to earlier agreed termination, or to agreed extension upon its expiry.

The Supplemental Deed of just over one year later, contains significant and fundamental terms of detail.

All the equipment, machinery etc. on site belongs to the defendant.

The capital injected for the purpose of the joint venture was contributed solely by the defendant.

2.1 Brucast (Plaintiff) acknowledges that all the equipment and machinery, including but not limited to those set out in Appendix A were paid by and belongs to HT solely.

This is an important clause in view of the plaintiff's argument about the defendant's renting of the equipment and its status in relation to the site.

2.2 Parties agree that as of the date of this Deed, the capital injected towards the working capital for the purposes of the joint venture was contributed solely by HT (the defendant).

The plaintiff having received $200,000 waives all rights to any profits arising out of the works for the remaining term of the agreement. No further payment in respect of working capital is due from the defendant save where the financing of the works requires it.

The land tax had increased to $4,800 and the defendant was to pay the increase of $3,800 and any further increase.

3. Parties agree that management decisions in relation to the Works shall be exercised in proportion to the capital contributed by each party.

This clause has some importance in the context of the broad nature of the dispute since the management decisions would be exercised by the defendant alone, it having contributed all the capital [$200,000].

The plaintiff consents to the defendant appointing Humemix Sdn Bhd to carry out works on its behalf (i.e. as Sub-contractor although that term is not used).

There was to be a separate agreement between the defendant and Humemix.

Under the heading of ASSIGNMENT is the following:

5.1 Brucast (plaintiff) expressly consents to and accepts the appointment of Humemix by HT (defendant) to carry out the works on its (defendant's) behalf for the duration of the Agreement or until such term as mutually agreed between HT and Humemix.

5.2 Pursuant to Clause 5.1 above, HT and Humemix shall enter into a separate agreement. In the event that the appointment Humemix is replaced or terminated uring the Joint Venture. HT shall inform Brucast within 2 weeks in writing……..

It is noteworthy that no specific reference is made to any term, provision or requirement of the plaintiff's Temporary Occupation Licence.

The import of this Deed can be summarised as follows:

1. No further payment is due to the plaintiff from the defendant.
2. The plaintiff is not entitled to any profit from the works carried out on the site.
3. The defendant has complete ownership and control over its equipment, plant etc. on the site and makes the management decisions.
4. The defendant is obliged to pay any increase on the annual land tax.
5. The appointment of Humemix by the defendant, as a subcontractor is approved, and is to be the subject of agreement between the defendant and sub-contractor. No terms for such an agreement are stipulated by the plaintiff.

Approximately six weeks later on the 23rd September 2013, the defendant and Humemix entered into an Equipment Rental Agreement. The preamble recites the parties to the Joint Venture, that the defendant (appellant) has purchased all the equipment (set out in an Appendix) for the purposes of the works, and that the plaintiff (respondent) has agreed that the defendant may subcontract the works to Humemix. The purpose of this agreement was to set out the terms and conditions on which the defendant was to rent out the specified equipment for 3 years.

This was the only written agreement between the defendant and Humemix and the respondent in this appeal has argued that there was no separate agreement between them which provided for the contractual work itself. This was not a valid argument and certainly not a material point because the preamble clearly covers the work subject to the sub-contract.

<u>WHEREAS</u>

A. Pursuant to a Joint Venture Agreement ….made between Brucast Company and Hasrat Teguh Sdn Bhd, it was agreed that parties therein would work together to run and manage the plant located at …..Mukim Lumapas ….(the "site") to produce and supply raw materials for construction purposes including but not limited to sand, stones, cement (the "works") in Brunei Darussalam.

B. [Hasrat] has purchased all the equipment set out in Appendix A for the purposes of the work. By a Supplemental Deed…….Brucast (plaintiff) agrees that [Hasrat] may subcontract the works to Humemix.

It is clear that those contents encompass all that is necessary to reflect the nature and extent of the subcontract and its obligations. There was no need for an agreement separate from the Equipment Rental Agreement.

The rental terms included payment of a deposit of $120,000 to the defendant by Humemix, and a monthly rental of $60,000 for the first 2 years, rising to $70,000 monthly for the third year.

There was (clause 11) provision for termination of the agreement in certain specified circumstances upon the giving of 4 months notice by either party.

Clause 18 stipulated that any assignment or transfer of rights and obligations required written consent of the other party.

On the 8th April 2015 solicitors for the plaintiff/respondent wrote to the defendant / appellant complaining that the defendant had not provided any proper report or financial account in respect of the operations under the joint venture and demanded a number of itemized documents. It also demanded an account and payment of profits. It threatened termination of the joint venture if the defendant defaulted in supplying the information. At that stage the joint venture had been in operation for about 18 months.

> *"We are instructed that there had been no proper report made by you as to the progress of the venture. You have not also provided…the necessary account and financial reports as to the operations of the joint venture.*
>
> *….We are instructed to request from you the following information and document in respect of the joint venture:-*
>
> 1. *Management accounts….*
> 2. *List of employees and workers working at the site.*
> 3. *Copy bank statements of the joint venture.*

There were other documents or lists requested but it is pertinent to note that the only payment due to the plaintiff under the joint venture was $200,000 which had been paid at the outset. Apart from payment of $1,000 per annum ground rent by the plaintiff all other financial payments had to be met by the defendant/appellant. It is difficult to see why the plaintiff should demand financial and management accounts. The list of workers was an obligation imposed on the plaintiff by the Temporary Occupation Licence and in the first instance was for Humemix to supply to the defendant. Humemix was the sole contractor, with the approval of the plaintiff, and therefore the employers of the workers on the site.

The threat of termination included *"our client will seek an account and payment of profits and dues from the venture"* which was clearly not sustainable as on payment of the $200,000 the plaintiff had waived *"all rights to profits (if any) arising out of the works for the remaining term of the Agreement."* All other financial obligations (save as to any excess over the $1,000 (land tax) devolved upon the defendants. The threat therefore was fundamentally misconceived on that score alone.

Solicitors for the defendant replied on the 7th May 2015 reminding the other side of the terms of the Supplemental Deed, and supplying some of the information requested. It also issued a counter threat of proceedings. It gave the essential information required.

The next letter from the plaintiff's solicitors (dated 2nd July 2015) re-iterated its complaint but went on to suggest that it had not agreed to the defendant sub-contracting all of the work to Humemix, or renting out equipment to the Humemix. The solicitors clearly failed to understand the straightforward wording of the Supplemental Deed and failed to appreciate that it had no right to interfere with the defendant reaching a rental equipment agreement with Humemix.

This was an entirely unreasonable reply essentially ignoring and misstating the position of Humemix. It objected to Humemix's advertising material displayed on site Humemix must have been on site for over one year and demanded the removal of all such material and signs, and crucially the cessation of *"all works conducted at the site by Humemix"* and the vacating of the site within 7 days by the defendant. This was an entirely unjustified demand and it is to be noted that the re-iterated request for the list of workers did not feature in that demand. Instead it was based on Clause 5.2 of the Supplemental Deed and the Equipment Rental Agreement, the latter being no legitimate concern of the plaintiff.

On the 10th July 2015 the defendant's solicitors pointed out the other side's error of understanding, and sensibly complied with its objection to the Humemix's signs on site by promising their removal. After a short hiccup all the signage of Humemix was removed.

By letter of the 1st September 2015 the plaintiff's solicitors shifted its attack against the defendant to a bizarre and erroneous allegation that it *"had rented out everything including the site to Humemix by way of the ERA which our client did not consent or approve."* This became the principal base of the plaintiff's allegations against the defendant extending it to a contention that the defendant had put in jeopardy the plaintiff's Temporary Occupation Licence and thus the joint venture. There were subsidiary complaints relating to requests for information, Humemix's use of logos and signs and the nature of the brand of products. The list of workers was again requested.

Notwithstanding the fact that the plaintiff had no continuing interest in the financial aspects of the Joint Venture and that all such obligations had been imposed on the defendant, the demand for all financial information was persisted in.

The Statement of Claim in essence alleged that the terms of the Equipment Rental Agreement breached the terms of the Joint Venture Agreement and the Supplemental Deed, by giving Humemix exclusive possession of and an interest as a tenant which was contrary to the nature of the plaintiff's Temporary Occupation Licence. The plaintiff was on risk of having its licence from the government revoked.

The Defence reflected the contents of the correspondence sent by its solicitor. There was rental only of equipment, which it was entitled to do and no rental of the site, being the subject of the licence from the government.

The Chief Justice heard evidence from the Manager of the Plaintiff which appears to be a repetition of the arguments raised in correspondence to the effect that the Equipment Rental Agreement was a breach of the Joint Venture Agreement and the SupplementalDeed and constituted a breach of the terms governing the plaintiff's Temporary Occupation Licence. As recited by the Chief Justice there was nothing new

in the contentions and no evidence which assisted the construction to be placed upon the documents and correspondence.

The evidence of the Managing Director of Humemix favouring the plaintiff's case, was essentially his construction of what Humemix obtained under the Equipment Rental Agreement, but was in conflict with the clear and proper construction to be put upon all three principal documents. There appears to have been some conflict between the defendant and Humemix leading to the defendant in mid-July 2014 stopping Humemix from doing any more work on the site.

The defendant's director similarly gave formal evidence about the agreements and his construction of them. This accorded with the contents of the letters sent by his solicitors to those acting for the plaintiff in answer to their contentions against the defendant.

The Chief Justice's findings were based upon his preference for the evidence of the plaintiff's manager and Humemix's Managing Director. The difficulty with that premise is that the evidence is wholly in conflict with the clear expressions and constructions of the principal agreements and inadmissible. These are contractual documents setting out in unequivocal terms the extent of the entitlements of the various parties.

The plaintiff consented to Humemix being employed by the defendant as subcontractor to carry out all such works as agreed between the defendant and Humemix.

As subcontractor Humemix had to occupy the site in order to carry out the works. The defendant remained in control of the works and the site and observed its obligations under the Joint Venture Agreement and Supplementary Deed.

Whether or not the defendant's director knew the full terms of the Temporary Occupation Licence is immaterial. The defendant did nothing which was in conflict with the plaintiff's obligations under the licence, or which could prejudice the plaintiff's tenure, save its omission to provide the list of workers on site.

The sub-contractor's occupation of the site under the agreement did not create a tenancy. There is no mention of any licence in favour of Humemix let alone of any right of tenancy. It held a mere licence to occupy under the contract for the purpose of carrying out the works for as long as the defendant required it to do so. The only rental provided for was in respect of the hire of the defendant's equipment at a fixed rate for a three year period subject, if appropriate, to earlier determination.

The Respondent's argument that the Appellant had created a tenancy of the site to Humemix is simply baseless. The Appellant could not give or grant what it did not itself have, it had a mere licence to occupy derived from the grant by the respondent in the Joint Venture Agreement. Furthermore the argument that the equipment, owned wholly by the Appellant, formed part of the site and that the Rental Agreement in respect of that equipment on the site somehow gave Humemix (or even the Appellant) an interest in the land forming the site is equally flawed.

Furthermore the Rental Agreement did not create an exclusive right of occupation. By implication no other sub-contractor could come on to the site to carry out any works

whilst Humemix was the appointed contractor and in any event the appellant did not surrender any right of occupation. The agreement clearly made Humemix answerable to the defendant for the work, equipment and any loss or damage during *"the course of the works on the site and use of equipment"* [Clause 10.1] That agreement was in no respect in conflict with the defendant's obligations under the Joint Venture Agreement.

The Equipment Rental Agreement was not inconsistent with either the Joint Venture Agreement or the Supplemental Deed.

The issues in this case are determined by the contractual documents. There is no extrinsic evidence which contradicts any term or provision in them and the oral evidence is, in fact, irrelevant in so far as it purports to add to or put forward an alternative construction on any of the terms.

However the contentious matter to be resolved is the plaintiff's demand for a list of the workers on site which the defendant failed to supply in response to the requests and on which the respondent relies as a ground for termination.

Such a list was within the possession and control of Humemix, and Humemix was under an obligation to provide it to the appellant on demand; it has been demanded and at trial the director of the appellant conceded that it had not supplied it to the respondent, but that the latter could obtain it from Humemix. Though a reasonable suggestion in all the circumstances, technically the appellant remained in breach of that requirement.

The requirement to provide a list of workers on site, imposed on the appellant by the respondent, finds its origin in what we have been told is the ninth condition attached to the Temporary Occupation Licence. Although we are far from satisfied on the documents disclosed that there was such a condition on the reverse of the written licence itself, all the parties have accepted that somewhere in the licence, such a provision existed, and that failure by the licensee (the respondent) to provide it, could lead to the government cancelling the licence without notice and the respondent would have to vacate the site.

In the Joint Venture Agreement this obligation was passed on to the appellant by clause 6.1(e) as follows:

> *"all information requested for this Joint Venture shall be duly provided and any document requested for in relation to this Joint Venture shall be duly prepared."*

It has been argued that clause 6.1(c) also covers this obligation by making *"each party responsible for the implementation of and compliance with all legislative requirements."*

The Supplemental Deed adds nothing but neither that nor the Joint Venture Agreement replicates the condition in the Temporary Occupation Licence either by reference to it or by straightforward repetition. That however may not matter since the parties are also agreed that the subsequent request made by the respondent to the appellant was in accordance with the obligation under clause 6.1(e) and/or 6.1(c) of the Joint Venture Agreement.

In the Equipment Rental Agreement the appellant and Humemix did not specifically provide for the same obligation. Under *"Termination" "either party may on giving 4 months notice .....terminate this Agreement if anyone or more of the following events shall occur…"*

The only one which could apply to meet the requirement to provide a list of the workers resident on site is *"(g) –if either party shall infringe or violate any law or regulation pertaining to the site and shall fail to remedy the infringement or violation within the time frame stipulated by the relevant authority"*, termination may follow.

However there is no reference to the Temporary Occupation Licence or to any of its provisions or conditions.

It is also common ground that the government's Lands Department had not requested the respondent to provide the list of employees in residence on the site, nor at any stage threatened termination of the licence for non-compliance. The date of the licence relied upon in this case is 1996. However the risk remained if the respondent was called upon to supply it and failed to do so. It was obvious, as a matter of practicality that the respondent would call upon the appellant to provide it and the appellant, as the other party to the joint venture, would have to call upon Humemix as the sole subcontractor of the works and provider of the work force, to provide such a list to it. The appellant, though the manager of the site, had no workforce on the site, though it owned all the equipment.

In April 2015, eighteen months into the Joint Venture, the respondent demanded that the appellant supply a list of documents and records, and a report which it alleged the appellant had failed to supply, by a letter from its solicitors dated 8 April. There had been no earlier request. Moreover by that time Humemix had ceased to carry out any work on the site since July 2014 having been told by the appellant to stop work and vacate the site. Only Humemix could provide a list of the workers who had been on site and resident in the prefabricated accommodation (owned by the appellant but rented to Humemix).

At this stage it is necessary to state that the non-contractual relations between the parties is somewhat of a mystery. Humemix, through its director, carried some resentment against the appellant's director, because earlier tentative agreements between them had not been formalized and it claimed to have negotiated the Joint Venture Agreement with the respondent on behalf of the appellant.

At one stage the appellant's director had been a director of Humemix. All this appears, albeit in a convoluted and somewhat confusing form, from the notes of evidence, the director of Humemix having given inadmissible and therefore irrelevant evidence at trial in support of the respondent as to what he thought the contractual documents meant. It was obvious that he had some animus against the appellant. It was on the basis of this evidence that the respondent developed spurious and fallacious arguments as to how the agreements should be construed – save as to the matter of the requests for a list of workers.

The first demand in the letter of 8 April 2015 was material only in respect of the list of workers. The other documents requested were arguably not relevant to the terms of

the Joint Venture Agreement. Apart from the requirement of the Temporary Occupation Licence the respondent had no interest in the subcontract financially or in its administration. It had been paid an out-and-out sum of $200,000 for its involvement. It had waived all entitlement to profits. The management of the site and works conducted were the exclusive responsibility of the appellant. It had only a licence to occupy the site derived from the respondent. It was obliged to pay any excess over $1,000 in respect of the land tax. The primary responsibility for payment of that tax was the respondent's. In fact the respondent was in default of his liability to pay the government that tax. It had not paid even the $1,000 as appears from a letter of the 30 June 2015 from the Lands Department.

Although the appellant supplied much of the information requested by the respondent it failed to deal with the requested list of workers. It did not even answer the point. The respondent's solicitors persisted with this and then added alleged breaches of the Joint Venture Agreement and Supplemental Deed as reflected in The Equipment Rental Agreement which were the product of a stretched imagination and were untenable.

The ultimatum came in their solicitors letter of the 1st August 2015 with the Notice of Termination being sent on the 1st September 2015. The first three breaches complained of as justifying termination were a repetition of the fallacious contentions. However the fourth relied upon was the failure to provide the list of workers. Throughout this period the appellant appears to have ignore this failure. There was no evidence that it had made any effort to obtain it from Humemix who, alone, was in a position to provide it. In evidence, at trial, the appellant's director took the view that the respondent could or should have obtained it from Humemix. However the primary obligation was upon the appellant.

It was clear that no party disputed the obligation to provide the list under the contract. In effect the appellant ignored the issue. Although it wrote to Humemix to insist upon the removal of its signage, it made no mention of the need for it to supply the list of workers and therefore seems to have made no effort to pursue the source of the information to enable it to meet its contractual obligation to the respondent. It was and remained unarguably in breach of that obligation.

What is the force or status of this obligation? Lord Diplock succinctly set out the position in *Photo Production v Semincor Limited HL(E) 1980* at page 848:

> *"A basic principle of the common law of contract, to which there are no exceptions that are relevant in the instant case, is that parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express words in the contract itself and, where they do, the statement is determinative; but in practice a commercial contract never states all the primary obligations in full. Many are left to be incorporated by implication of law from the legal nature of the contract into which the parties are entering."*

In our judgment the supply of a list of workers on site is a primary obligation even though it is not precisely expressed as a specific requirement of the appellant viz to supply a list of workers. It is covered by clause 6.1(e) of the Joint venture Agreement. There has been a breach of that obligation. Lord Diplock's speech (at page 849E) encapsulates the position:

> *"where the contracting parties have agreed whether by express words or by implication of law, that <u>any</u> failure by one party to perform a particular primary obligation, irrespective of the gravity of the event that has in fact resulted from the breach shall entitle the other party to elect to put an end to all primary obligations of both parties remaining ……..*

The wording of clause 6.1(e) *"all information requested for this Joint Venture <u>shall</u> be duly provided and <u>any</u> document requested for in relation to this Joint Venture <u>shall</u> be duly prepared"* [Emphasis added] is conclusive.

The list of workers is more than implied. It is clearly covered by *<u>"any</u> document requested."*

Part of the judgment of Upjohn L.J. in *Hongkong fir Shipping Limited v Kawasaki 1961 2QB (CA)* at page 65 would appear on the face of it to lend some support for the appellant's argument on this aspect.

> *"If one party by his conduct frustrates the contract, the law says that the other party may treat the contract as at an end. For breaches of stipulation which fall short of that, the innocent party can sue for damages. I do not see on principle how he can have some unilateral right to withdraw from the contract when the conduct of the other falls short of frustrating the contract."*

Again at page 69/70 is the following:

> *"No doubt there are many simple contractual undertakings, sometimes express but more often because of their very simplicity….to be implied, of which it can be predicated that every breach of such an undertaking must give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract. And such a stipulation, unless the parties have agreed that breach of it shall not entitle the non-defaulting party to treat the contract as repudiated, is a "condition". So there may be other simple contractual undertakings of which it can be predicated that <u>no</u> breach can give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and such a stipulation, unless the parties have agreed that breach of it shall entitle the non-defaulting party to treat the contract as repudiated, is a "warranty"."*

In this case the parties have agreed that such a breach entitles the non-defaulting party to terminate the contract therefore the condition is not a warranty. The non-defaulting party, the respondent, is presently in breach of its obligation under the Occupation Licence. The government department can at any time terminate the licence without notice even though it has not made a demand for the list. That obligation or condition finds its way into the Joint Venture Agreement and the appellant is in breach of its obligation. That is agreed. Even though there was a risk of the cancellation of the licence rather than the actual event, the obligation remained upon the appellant.

Accordingly we find that the termination of the contract in reliance upon the failure of the appellant to fulfill that term or condition is a valid termination.

It is apparent that it was never at the forefront of the respondent's demands, threats and reason for the Notice of Termination. If there was any threat to the Respondent in the terms of the Temporary Occupation Licence, the Respondent could accelerate matters by pursuing Humemix. However the breach remained and the appellant could not escape its obligation.

It is perhaps surprising that the appellant did not join Humemix in the action as a third party seeking an indemnity on the basis of its failure to supply the appellant with the necessary list. It may then have been possible to see the relationship between the respondent and Humemix and the full picture and the appellant may possibly have avoided the result which has been obtained. But that is not our concern.

The appeal is therefore dismissed on this single ground.

We make a costs order nisi that the appellant shall pay 50% of the respondent's costs. The order shall become absolute at 10a.m. on Monday 14th May 2018 unless either party files an application to make further representation as to the costs order which shall be heard at 2.30p.m. on Monday 14th May 2018.

Mortimer, P.

Burrell, J.A. **Seagroatt, J.A**