IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2021CD00015

BETWEEN	**DALMA JAMES (Trustee of the Estate of West Indies Gypsum Company Limited, a Bankrupt)**	**CLAIMANT**
AND	**BERGER PAINTS JAMAICA LIMITED**	**DEFENDANT**

Contract- Sale of Goods - Purchase order subject to drawdown being requested - Schedule for delivery not agreed - Goods produced but not accepted - Whether breach of contract.

Glenroy Mellish for Claimant

Alexis Robinson and James Earl Kirkland instructed by Myers, Fletcher & Gordon for Defendant.

Heard: **13th, 14th and, 15th December 2021,11th February, 9th April and, 9th June 2022.**

In Open Court

Cor: Batts J

[1] On the first morning of this trial Mr. Jihnell King, representing the Supervisor of Insolvency, attended and indicated that the Claimant West Indies Gypsum Limited was in bankruptcy. He pointed to section 247 of the Insolvency Act and indicated the way a claim, by a bankrupt, should be entitled. Mr. King also said that the Trustee consented and wished the action to proceed. I rose to allow all counsel

in the matter to consult. On the resumption counsel for the Claimant orally applied to have the Claimant's name, and the Certificate of truth to the claim, amended. The Defendant's counsel made no objection as there had been a genuine mistake. She referred me to Rule 20.6 of the Civil Procedure Rules. I granted the amendments as prayed.

[2] This claim, as the Claimant's counsel indicated in his opening submission, concerns a contract for the supply of goods. The Claimant seeks damages allegedly caused by the failure of the Defendant to accept goods ordered. He says the contract is contained in a "*Manufacturing and Supply Agreement*" signed by the parties on the 25th May 2011, as well as a Purchase Order dated 22nd March 2011. The Defendant denies there was such an agreement and says further that, in any event, the Claimant failed to produce the goods in sufficient quantity when demanded.

[3] The Claimant's first witness was Mr. Brian Walks. His witness statement is dated 2nd March 2021. By Notice of Application, filed on the 21st June 2021, the Defendant applied inter alia to have several paragraphs of the statement struck out. Having heard the submissions of both parties I ruled as follows:

(i) In paragraph 4 the reference to the Scotiabank loan struck out as it was not pleaded;
(ii) The second sentence in paragraph 12 struck out as misrepresentation was not pleaded as a cause of action;
(iii) Paragraph 25 is struck out as the letter dated 9th February 2012 was not disclosed;
(iv) Paragraph 32 the words "*of which the Defendant was aware*" are struck out as no evidential basis was given for the opinion;
(v) In paragraph 31 the words "*for the second time*" are struck out as not pleaded;
(vi) Paragraphs 42-44 struck out as not consistent with the pleaded case;
(vii) Paragraphs 22 and 23 struck out as they related to breaches not pleaded;
(viii) Paragraph 26 struck out as it was not pleaded;

(ix) Paragraphs 27, 28 and all of 29, except the first sentence, struck out as related to damages not claimed.

[4] The Defendant's counsel then applied for an adjournment to take instructions on "*the new clarified scope of the case"*. I refused as the attorneys had had ample time to take instructions. The witness statement of Mr Brian Walks, with the offending portions struck out, was allowed to stand as his evidence in chief. A bundle of agreed documents was admitted into evidence as Exhibit 1. It is a cause for regret that several documents included in the agreed bundle were marked, had interlineations and, in some places obliterations. The profession is reminded that as far as possible clean and legible copies of documents are to be provided for the court. Permission was granted for amplification of Mr Walks' evidence in chief. Thereafter evidence was led and applications made to admit various documents into evidence. I will reference some of these documents, as the need arises, in the course of this judgment.

[5] Mr. Walks was extensively cross-examined. It was his evidence that the Defendant issued a purchase order for 20,000 bags of the product. This was expected to be only the first of many as the parties had projected sales of 80 to 100,000 bags per annum. He says they had been in a position, in June 2011, to manufacture and deliver the 20,000 bags ordered. This was not done until much later because the Defendant was late in providing the logo to be printed on the bags. Some 80,000 bags were printed with the Defendant's logo. The witness denied that there were any conditions attached to the Purchase Order # 017770 for 20,000 bags. He gave a rather extraordinary account for three letters dated 14th March 2011 which were each admitted into evidence as, exhibit 1 page 2, exhibit 1 page 25 and, exhibit 9. He stated that the letter at page 25 of exhibit 1 related to an order for 100 bags, which was intended for Belize but, which the Defendant never pursued, see paragraph 10 of his witness statement. Exhibit 9 was a copy of the same letter at page 25 of exhibit 1 but "*altered*", without his knowledge or agreement, to reference Purchase Order # 017770. He denied the conditions stated in that letter had

anything to do with his contract with the Defendant. When cross-examined, on this, there was an interesting exchange:

> *"Q: If Berger storage facility could not store 100 bags at a time it could not store 20,000 bags*
>
> *A: I did not author letter. I have no idea what was in mind of author*
>
> *Q: You do as it says in reference to 20,000 bags*
>
> *A: When I received this letter no reference to Purchase Order #017770.It was a blank letter. Mr Abrahams asked me to sign because he needed it to process the Purchase Order."*
>
> AND LATER,
>
> *"Q: So you asking court to believe that a small order of 100 bags could only be processed by Berger if subject to conditions but a much larger order of 20,000 bags was not subject to such conditions*
>
> *A: That is what was presented to me and he ask me to sign as receiving. I signed it on March 14th but Purchase Order reference number. He asked me to sign as agreed I did not and then he ask me to sign as received"*

[6] On the second morning of trial defense counsel urged, pursuant to the Notice of Application filed on the 21st June 2021, that the "Manufacturing and Supply Agreement dated 25th May 2011" (page 15 of Exhibit 1) ought not to be admitted into evidence. It was submitted that Section 36 of the Stamp Duty Act, which provides that, "*no instrument, not duly stamped according to law, shall be admitted in evidence as valid or effectual in any court or proceeding for the enforcement*

thereof", applied. Having heard the arguments, and having considered the document as well as the claim filed, I dismissed the application on the basis that the document is an agreement for the sale of goods to which section 36 does not apply.

[6] The Claimant's second witness was Mr. Archival Lee. He was the production supervisor at the Claimant's plant. His witness statement of the 21st April 2021 stood as his evidence in chief. I was impressed with this witness. The following exchange occurred during cross-examination:

> *"Q: Paragraph 19 of witness statement you suggested in June 2012 company had 15,000 bags in storage*
>
> *A: We produce 20,000. Started production November 2011 and finish February 2012*
>
> *Q: these were sold*
>
> *A: No, right after the 20,000 bags completed only certain amount moved. Mr. Walks told me problem with Berger. Did not question him about nature of the problem*
>
> *Q: So finished product in February and four months later told to dump*
>
> *A: Over fifteen thousand bags we had was to dispose of them bags of Tuff Rock*
>
> *Q: Did you ever see bags of Berger Veneer Plaster made*
>
> *A: Of course*
>
> *Q: When was Berger Veneer Plaster made*
>
> *A: 2011*
>
> *Q: Rain water spoils raw material*
>
> *A: Which*
>
> *Q: Raw material*
>
> *A: No rain water does not spoil it, plaster paris not friendly with water but Tuff Rock or veneer made to resist water*
>
> *Q: Shelf life would be shorter if exposed to water*

A: Plaster paris before process water won't affect it. After it is processed not friendly with water

Q: So if plaster paris sitting down for 1 year would it be possible to use it

A: No because lose life span

Q: If limestone sitting down for 1 year

A: Don't know much about limestone but as a raw material I don't know"

I have extracted this quote, not only because of its relevance but also, to demonstrate that the witness knew his craft. He appeared proud of his job and expertise. He also knew the limitations of his training and experience and was honest enough to admit to it.

[7] Upon the close of the Claimant's case defence counsel indicated a desire for a "new witness" to give evidence from a remote location. There was no objection so I directed that a witness summary be served and arrangements made, in consultation with the Claimant's counsel, for an independent attorney-at-law to be present at the remote location to administer the oath and see to the propriety of matters. The Defendant's first witness, Mr. Newton Abrahams, was then called. His witness statement, dated 12th April 2021, stood as his evidence in chief. Amplification was allowed. The witness made significant admissions and I quote the exchanges in full.

"Q: In paragraph 5 of witness statement you say not a large market. What is new market

A: Berger was not participating

Obj:

J: Do not agree

A: Berger is a paint company. So we supply paint. Veneer plaster you use to prepare a wall for painting. We were not in that market. It was a new market for us. Also in paragraph 5 I said

"larger quantity". We would buy in quantities we need. He explained he wanted financing. So he wanted a larger purchase order as long as it was understood that there were conditions. We know we could not take 20,000 bags at one time.To be honest all for an entrepreneur. We gave order but let it be understood we will take supplies as we had demand. We started to get supplies in December 2011 to January 2012. We had our tech representative on T.V. promoting the product. Take supplies as market developed.

Q: Is Veneer product a market you now participate in

A: No"

And later

"Q: Do you accept Mr. Walks version of events in paragraph 8

A: I completely refute this. Not true makes no common sense. Why all that for 100 bags. Mr. Walks ask for larger order so he could get financing. It had to be signed before a purchase number on it because of process. I make requisition which would lead to Purchase Order. My purchasing manager said would not generate purchase order unless see conditions since I was doing a favour. After letter done she O.K. purchase order.

Q: Who was purchasing manager

A: Gladys Miller

Q: At paragraph 10.12 reference to tripartite agreement, p. 3 Exhibit 1, reference to 70,000 to 100,000 in letter of 14th March 2011 form basis of tripartite agreement

A: I can't say. This agreement was made by EXIM'S lawyers. We agreed to the conditions of it. That letter specifically requested of me but give me a letter to secure funding, In retrospect, I did not exercise the diligence I should in terms of signing. It is

my fault I have done it as favour. I did it because I protected myself and company with conditions of contract

Q: Page 2 of Tripartite agreement where it refers to drawdown requirements pursuant to purchase order. What is it referring to?

A: It is a blanket purchase order, but we will give requirements as we need product and as market develops. So we send email for what we are asking for at the time. Our liability and your fulfilling them

Q: Is this same as conditions in March 14 letter with conditions

A: Essentially the same conditions

Q: Paragraph 34 of Mr. Walks witness statement was there an agreement for minimum volume of product 70-100,000 bags

A: Nowhere in such agreement. Nowhere a mention of a minimum volume of product. If this were the case, no purchase order would be signed. I got pushback from my management team."

[8] This witness, and Mr. Walks for the Claimant, impressed me as honest persons in a difficult situation. They both, in one respect or another, had recollections tailored (and I do not mean deliberately so) to explain their predicament. Mr. Abrahams admitted that he issued a letter and purchase order, exhibit 1 pages 1 and 2, for a quantity of product. There is no assertion that the order was not genuine. He, however, knew the Defendant would not need that quantity of product all at once. The purpose, of issuing the purchase order for 20,000 bags, was to assist the Claimant to get financing. The financing was to enable the Claimant to be in a position to produce the said product for sale to the Defendant.

[9] The cross-examination of Mr Abrahams was as efficient as it was effective. It clarified that "Tuff Rock" was the same thing as "Veneer Plaster". The latter being the name of the product when placed in bags printed with the Defendant's name. He admitted that in March 2011 the Defendant ordered 20,000 bags of veneer

plaster by purchase order numbered P017770. The witness maintained that, having placed the order in March 2011, it was not until October or November of that year that they received a delivery of some product and that by April 7th 2012 there was no product. It was suggested to the witness that the letter dated March 14th 2011, with conditions, had nothing to do with the purchase order but rather related to a sample order of 100 bags intended for Belize. This was vehemently denied. With reference to the purchase order of 20,000 bags, he stated that, there was no reference to a time for delivery. As to the letter at page 2 of Exhibit 1 the following exchange occurred:

> *"Q: That letter is based on your assessment of the market*
>
> *A: At request of Mr. Walks. I told him that we don't play in that market. I was not sure of these numbers. It was not based on my assessment of market. Written at his request and his guidance as to assessment of market*
>
> *Q: Berger never meant to deceive anyone*
>
> *A: No*
>
> *Q: You genuinely intended to buy 20,000 bags but draw them down as market allows*
>
> *A: Yes"*

And later,

> *"Q: Do you agree Mr. Walks relied on that letter by putting arrangements in place to produce Tuff Rock*
>
> *A: No, he said he can sell Tuff Rock. So I said when you get your financing, you can sell your Tuff Rock*

In re-examination there was a further significant admission:

> *"Q: The tripartite agreement is only in relation to 20,000 bags nothing between Berger and WIGO in relation to 70,000*
>
> *A: Tripartite agreement covered Exim getting back the money lent. Basis of how we would proceed."*

[10] Gladys Miller, the person at the Defendant's office who was responsible for purchasing at the time, was the Defendant's second witness. She indicated that when purchase order 017770 was first presented she refused to sign it because it was so large. The following exchange occurred:

> *"Q: But you signed it why*
>
> *A: Discussions with Mr. Newton Abrahams. My understanding that not really wanted to purchase that amount. He said supplier would provide a document that it would be supplied in portions. We were trying to help out and facilitate."*

She was referred to Exhibit 9 and identified it as the document establishing that the Purchase Order would be taken in small portions. The witness later expressed her doubt about the product's marketability. This resulted in her reluctance to sign the purchase order.

[11] The Defendant's third witness was to give evidence by video link so the matter was adjourned, to the 11th February 2022, to facilitate that process. On that date the Defendant's counsel advised that the intended witness could not be located. The Defendant's case was therefore closed. The Claimant applied to amend his claim and, over counsel's objection, the amendments were granted. They reduced the amount claimed and reflected the evidence lead. No new cause of action was introduced and there was no prejudice to the Defendant. Submissions were heard on the 9th April 2022. Written submissions were also filed by each party. They were of assistance, in the preparation of this judgment, notwithstanding the rather untidy nature of the Claimant's pleadings. I will not restate them here but counsel can rest assured they have all been read.

[12] The issues to be resolved are largely factual. In essence the question is whether the Defendant placed an order for the delivery of goods and then failed to accept them after the Claimant had produced and were ready to deliver. The Defendant

does not deny placing the order but says that the Claimant was unable to supply the product as and when it was required. The Claimant says the Defendant, in breach of contract, failed to agree a delivery schedule and this affected their ability to have product available when required. The viva voce evidence notwithstanding it is the documentation, in particular the contracts and the email exchanges at the time of the transaction, that I find most germane.

[13] My findings of fact, and explanations for them, are as follows:

(i) The parties entered into binding contractual arrangements for the sale of the Claimant's product to the Defendant. The product was to be packaged in the Defendant's labeled bags. The terms of the contracts are contained in the following documents:

a) A tripartite agreement dated the 25th May 2011 (Exhibit 1 page 3) (Tripartite Agreement)

b) A Manufacturing and Supply agreement dated 25th May 2011 (Exhibit 1 page 9) (The M & S Agreement)

(ii) The agreements contained the following relevant terms:

a) *"That WIGCO agrees to produce TuffRock and sell to Berger under Berger's Brand name; and Berger agrees to buy from WIGCO the proprietary product and pay the price for the product that has been agreed between the parties, plus transportation and taxes more particularly described herein as set out at Item 1 in Appendix C hereto" (Clause 2.4 M&S Agreement).*

b) *"That for the consideration set out in Item 1 of the Appendix C hereto, Berger has agreed to market, promote and advertise the product under the Berger name and will to the best of its ability, with*

the same effort applied to its own products BERGER will seek to establish and maintain market share for the product" (Clause 2.7, M & S Agreement)

c) "*That the parties agree that the product will be supplied to Berger by WIGCO for the prices agreed and outlined in Appendix C hereto" (Clause 2.8 M& S Agreement)*

d) Appendix C stated the price for TUFFROCK (as packaged under Berger brand name) at J$1410 per bag plus tax to Customer A and JMD 1510 per bag plus tax for Customer B. Customer A refers to large volume customers as well as export customers sold directly by BERGER (and as determined by BERGER). Customer B refers to other sales conducted via BERGER's dealer network. *(*Appendix C, Item 1a, Appendix C also stated it was 70lb per bag).

e) *"Berger shall issue to WIGCO a purchase order for product agreed between the parties and produced for delivery on a schedule"* (Clause 6.1, M & S Agreement)

f) "*Delivery shall be deemed to take place at WIGCO's plant when accepted and signed by Berger's Agent for transport"* (Clause 7.1 M & S Agreement)

g) "*WIGCO may without notice immediately terminate this Agreement and all WIGCO's obligation hereunder:*

If BERGER fails to order the minimum volume

of Product as stated in clause 2.4 at the annual consumption" (Clause 24.1.1 M & S Agreement)

h) "*Berger may, without notice immediately terminate this Agreement and all of Berger's obligations hereunder:*

…..

24.2.2 If WIGCO fails to produce and make available for pickup by Berger or its agents, the minimum volume of Product as stated in clause 2.4 at the annual consumption.

24.2.3 If WIGCO breaches any term or condition of this Agreement in relation to which Berger's rights to terminate are not otherwise herein specifically provided for and remain in breach of such terms and conditions for a period of 15 days of the receipt of notice to remedy such." (Clauses 24.2.2 and 24.2.3 M & S Agreement)

i) *"This Agreement constitutes the entire agreement among the Parties and except as herein stated and in the instruments and documents to be executed and delivered pursuant hereto, contains all of the representations and warranties of the respective Parties. There are no oral representations or warranties among the Parties of any kind. This Agreement may not be amended or modified in any respect except by written instrument signed by all Parties"* (Clause 25.1, M & S Agreement).

j) *"The Borrower has agreed to supply bags of Veneer Plaster (hereinafter referred to as "the said Goods") to Berger pursuant to an order placed with the Borrower, evidenced by the Purchase Order*

No. PO 017770 (hereinafter referred to as "the said Purchase Order), which is contained in the Schedule hereto." (Recital A to Tripartite Agreement, Exhibit 1, page 3).

k) *"The Borrower is indebted to the Lender arising from loan facilities made available to the Borrower by the Lender and the parties hereto have agreed that the Borrower shall repay its indebtedness out of the proceeds of the sale of said Goods"*. (Recital C to Tripartite Agreement, Exhibit 1, page 3).

l) "*In lieu of payment to the Borrower for the said Goods, Berger shall pay to the Lender an aggregate sum not exceeding TWENTY-EIGHT MILLION TWO HUNDRED THOUSAND DOLLARS ($28,200,000.00). Berger's payment shall go towards liquidating the debt owed by the Borrower to the Lender"* (Clause 1.1, Tripartite Agreement, Exhibit 1, page 4).

m) *"However it is agreed and understood that delivery of the said goods to Berger and payment by Berger to the lender shall be based on a draw- down request for the said Goods made by Berger of the Borrower. Payment by Berger shall be for and in respect of the quantity of goods, the subject of the said draw-down payment"* (Clause 1.3, Tripartite Agreement, Exhibit 1, page 4).

n) The schedule to the tripartite agreement reads *"Purchase Order No. PO 017770"*. (Exhibit 1 page 8)

iii) The parties entered into those agreements after the product TuffROCK caught the attention of the Defendant's

representatives at a National Expo in the year 2010. The Defendant tested and examined the product and even visited the Claimant's plant. The Defendant was satisfied with the quality of the Claimant's product and was very optimistic about its potential. I accept the whole of Archival Lee's evidence in this regard at paragraph 6 to 13 of his witness statement.

iv) It is in that context that Mr. Newton Abrahams wrote the letter dated 14th March 2011 (Exhibit 1 page 2). I find that Mr. Abrahams knew that this letter would be used to assist the Claimant's search for financing. He also knew the financing was necessary for the Claimant to produce the quantities required by the Defendant.

v) Another letter was also issued on the 14th March 2011 from the Defendant to the Claimant. That letter accompanied the Defendant's initial order being Purchase Order No. 017770 (see Exhibit 9). I reject the Claimant's account that the letter, which also appears at Exhibit 1 page 25 (without the purchase order number inserted), applied to an order of 100 bags to be sent to Belize. The letter is obviously with reference to a large order hence the explanation about the Defendant not carrying "high" stock levels. The letter is signed by Mr. Walks of the Claimant company to indicate his understanding that, although all 20,000 bags were ordered, the Defendant could not guarantee the time frame for taking delivery. This understanding was also reflected in the Tripartite agreement (see (ii) m above).

vi) The letters do not form a part of the two agreements. Both agreements have entire term clauses. The letters also predate the contracts and were not incorporated by reference. However, as indicated, the effect of the letter is reflected in the tripartite agreement insofar as it makes it clear that,

although the Defendant had ordered and had an obligation to purchase the 20,000 bags, there was no fixed time for delivery and payment for same.

vii) Pursuant to the contracts the Claimant obtained the necessary financing and produced the 20,000 bags. Production took place in late 2011 to early 2012. This was in part due to the Defendant's late delivery of the design necessary for the bags in which the product was to be packaged.

viii) The Defendant failed, notwithstanding requests made by the Claimant, to provide a delivery schedule as contemplated by the contract, (see (ii)e above).

ix) The Defendant only took delivery of 4,160 (paying $5,948,000.00) of the 20,000 bags ordered. The Defendant's explanation to the Court and at the time was that demand in December was low.

x) The Claimant had to dispose of some 15,000 bags of product as it could not be otherwise marketed having been packaged in the Defendant's bags.

xi) The failure of the Defendant, to take delivery of all 20,000 bags, severely affected the Claimant because expected payments to Exim Bank were not made. The failure to agree a delivery schedule also adversely affected the Claimant's ability to plan production. In consequence the Claimant eventually developed financing issues. This is reflected in contemporaneous correspondence, see exhibit 1 page 39.

xii) The contracts contemplated a time period of 7 years and the purchase order No.017770 was only the first of the anticipated orders. The tripartite agreement was not for 7 years but was until completion of that first order. The lenders were induced to lend by the stated expectation of sales of 100,000 bags

over a 7-year period. However, the only order on which the lender insisted was that for the initial 20,000 bags.

xiii) The Defendant rejected the Claimant's proposed delivery schedules for purchase order No.017770, see exhibit 2 (email dated 25th November 2011), exhibit 3 (email dated 2nd February 2012) and, exhibit 1 pages: 28 (email dated 27th October 2011) and 34 (email dated 1st May 2012).

xiv) The Claimant was late in supplying, or failed to supply, some drawdowns requested by the Defendant, see exhibit 3 (email dated 2nd February 2012), exhibit 1 pages: 30 (email dated 15th May 2012), 31 (email dated 14th May 2012 9:59 am), 34 (email dated 1st May 2012 1:03 pm),36 (email dated 30 April 2012 12:40pm), 37 (email dated 1st February 2013), 10 (email dated 6th September 2014) and, 14 (letter dated 27th April 2015). I accept that delivery of small supplies on such an ad hoc basis was impractical as the Claimant's staff and facilities would need to be mobilized. Hence the need for an agreed delivery schedule as contemplated in the contract.

[14] These being my findings of fact the result in law can be shortly stated. The Claimant is a victim of over confidence, and it may also be a case of desperation, which resulted in the entry into contracts which favoured unduly the Defendant. The Defendant, although ordering 20,000 bags, was given no date by which to pay for or take delivery of them. On the other hand, no delivery schedule was provided, or agreed to, by the Defendant. This notwithstanding the Claimant produced all 20,000 bags, of which approximately, 15,000 were dumped because they were not collected by the Defendant. The issue therefore is whether the "conditions" contained in the letters of 14th March 2011 are effective to preclude the Defendant being obliged to accept delivery of all 20,000 bags at the time they were produced. Although the letters as stated above do not form part of the contract, and were not incorporated, the Defendant's obligation to supply only when a "*drawdown*" was requested is clearly stated in the tripartite agreement in relation to the purchase

order for 20,000 bags, see (paragraph 14 (ii) (m) above). Delivery, based on a “schedule”, is stipulated in the M&S agreement, see paragraph 14 (i) (e) above. There is no evidential basis on which I can find that either, a particular time period for the drawdown request or, for a delivery schedule is or is not reasonable and/or that such a term should be implied. The agreement, to purchase 20,000 bags, cannot be said to have been breached as there is no time stipulated for delivery. It may be the Claimant would have been well advised not to produce 20,000 bags of product until and unless, a drawdown request for that amount had been received or, a delivery schedule agreed.

[15] In the result therefore the Claim is dismissed as the Defendant has not breached its contractual obligation to purchase. However, the Claimant breached its obligation to deliver when requested. Costs will go to the Defendant to be taxed or agreed.

David Batts
Puisne judge