[2016] JMSC Civ. 32

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV 03574

BETWEEN	**REWACHAND FREE ZONE N.V. t/a REWA'S ENTERPRISE**	**CLAIMANT**
AND	**BEVERLY RHODEN**	**DEFENDANT**

Mr. Gordon Robinson, Mrs. Winsome Marsh and Mrs. Yolande Magnus-Mullings for the Claimant.

Mrs. Marvalyn Taylor-Wright and Mr. Amwar Wright Instructed by Taylor-Wright & Co for the Defendant.

Heard: 25th, 26th, 27th January and 8th March 2016

Debt – Evidence of – Admissibility of recording – Weight to be attached to pre-claim admission – Whether the court can award interest at commercial rate where contractual interest was waived by the claimant.

LAING, J

[1] The Claimant is a limited liability company incorporated under the laws of Curacao (formerly a part of the Netherlands Antilles) and claims the sum of US$69,944.34 as the amount due and owing to it for goods it asserts were sold and delivered to the Defendant over the period 30th November 2006 to 28th August 2008 together with interest on the said sum.

[2] The Claimant has its principal place of business at Economische Zone Koningsplein (the Economic Zone) in Curacao. It imports, sells and exports goods including clothing, toys, cosmetics, perfumes and leather goods.

[3] The Claimant called 2 witnesses on its behalf Mr. Naresh Chugani ("**Naresh**") and Mr. Sunil Chugani ("**Sunil**"). The use of these and any other Christian names throughout this judgment is consistent with such usage during the trial by the witnesses and is used here for the sake of convenience and brevity. No disrespect is intended and no familiarity should be inferred.

[4] In or about 2002 the Defendant, (who is also called Debbie) and her then boyfriend Ronald St. Clair Thomas ("**Ronald**") were together trading as R & D Fashions ("**R & D**"). They commenced a business relationship with the Claimant pursuant to which goods were supplied to them over the period 2002 to 2006.

[5] In or around 31st August, 2006 there was an order placed with the Claimant for the shipment of a container of goods with an invoiced amount of US$140,180.00 ("**the First Container**"). There is an issue joined between the parties as to who made this order.

[6] In or around 28th November, 2006 the Claimant placed an order for goods with the Claimant for which the invoiced amount was USD$86,499.00 with associated shipping costs of USD$760.00 ("**the Second Container**").

The Claimant's case

[7] The Claimant asserted that it was the Defendant who placed the order for the First Container and that when it was ordered the Defendant agreed to a schedule of payments. This involved her firstly making a payment towards clearing the balance of USD$64,202.34 which was then owing by her and Mr. Ronald Thomas trading as R&D ("**the R & D Debt**"). Thereafter, subsequent payments would be applied to the balance then standing on the R & D Debt and to the amount owing for the First Container. Pursuant to this agreement, the first

payment of US$10,000.00 was to have been made on or before 3rd September, 2006 and the second payment in the amount of $50,000.00, was to have been before December 2006.

[8] The Claimant's case was that it was also agreed that the Defendant would liquidate the debt of US$140,180.00 associated with the First Container by commencing payments one (1) month after the arrival of the container in Jamaica which was expected to be on 15th September, 2006. A schedule of payments was also agreed whereby the Defendant would pay US$65,000.00 on or before 15th October, 2006 US$35,000.00 on or before 30th October, 2006 and US$35,000.00 on or before 15th November, 2006.

[9] Based on the schedule agreed, the Defendant should have paid US$195,000.00 before December 2006. The Defendant did not make the payments as per the schedule but between 14th September, 2006 and 28th November, 2006 made payments to the Claimant totalling US$68,705.00 which were applied to liquidating the R & D Debt.

[10] Between 2nd January, 2007 and 15th July, 2008 the Defendant continued to make payments by cash or wire transfer including a payment of US$20,000.00 cash on 15th July, 2008.

[11] On 18th July, 2008 the Defendant ordered goods valued at the invoiced amount of US$1,560.00 which were shipped to her in care of D-Bless Fashions her new trading name. The Claimant asserted that since the cash payment of US$20,000.00, the Defendant has made no further payments on the balance which was due and owing in the sum of US$69,944.34.

The Defendant's case

[12] The Defendants defence in summary is that in or about June or July of 2006 the relationship between herself and Ronald ended and so did her involvement in the

business which traded as R & D. She denied having placed an order for the First Container to be invoiced to R & D or at all.

[13] As it relates to the Second Container the Defendant said that after the Second Container was received in Jamaica, she telephoned Sunil and complained to him that some of the goods on the invoice for the Second Container were overpriced. She complained that some of the prices were more expensive than that which she had agreed in person and that the goods could not be sold for the invoiced prices. As a result of her complaints she asserted that Sunil agreed to reduce the price of the goods from US$86,474.00 to US$65,306.00.

[14] On the Defendants case she made payments towards liquidating her liability in the amount of $71,874.66. Her liability having been reduced by agreement to $65,306.00 means that the sum of $6,568.66 paid in excess of her liability amounts to a payment under a mistake which is recoverable and thus this forms the basis for the counterclaim.

The Hand written note

[15] The Claimant produced a handwritten note dated 31st August, 2006 prepared by Naresh which the Claimant asserted reflects the agreement reached with the Defendant as to a schedule of payments and which he said bears the signature of the Defendant. Counsel for the Defendant objected to its admission on a number of bases including that it had not been disclosed. The Court did not find that the objection as to its admissibility had any merit considering, *inter alia*, the fact that it was included as item 2 in Schedule 1 of the Claimant's list of documents. This note was admitted in evidence as exhibit 1.

[16] It was suggested to Naresh that the signature purporting to be that of the Defendant was not signed by her. This suggestion was not accepted by Naresh. In cross examination the Defendant strenuously denied that she signed the handwritten note admitted exhibit 1. The writing on the note which the Claimant's witnesses refer to as a signature is simply the word "Debbie". I doubt that this

represents the usual signature of the Defendant, however I accept the evidence of Naresh that she did acknowledge the document by signing in that manner and style, “Debbie” being the name she usually used and to which she was often referred during the trial.

[17] Tendered on behalf of the Defendant and admitted as exhibit 8 was a photocopy of the handwritten note with additional notation which was disclosed to the Defendant’s Counsel. Naresh explained that the additional notation represented notes comprising a part of the instructions to the Claimant’s counsel. I accept his explanation and it appears that this document was disclosed in error.

[18] Exhibit 8 has a notation which clearly shows that the Defendant was asserting that the Defendant signed that note indicating a schedule of payments in excess of the $86,474.00 which is the only amount for which she now claims that she had been liable. The Defence was therefore able to deduce that this would be asserted at trial.

Was there outstanding indebtedness of R & D?

[19] Counsel for the Defendant has submitted that there is no evidence whatsoever to support the existence of the alleged debt that was owing by R & D in the sum of US$64,202.34. The Defendant’s evidence as contained in her witness statement is that she discontinued her business relationship with R & D in or about June or July, 2006 and informed Naresh and Sunil that she was no longer a responsible party for R & D and would not be responsible for any debts incurred by that entity after July of 2006. She indicated that as far as she knew, at that time she owed no money to the Claimant in respect of R & D and neither did Ronald.

[20] During the Cross examination of Naresh, he conceded that the handwritten note did not contain the figure of US$64,202.34 as owing by R & D although the Claimant asserted that this was the amount of the R & D Debt as at the date of the note. His explanation was that the sums of $10,000.00 and $50,000.00 are referable to the R & D Debt but that $60,000.00 was a rounded off amount. He

also accepted that the note had no mention of R & D, or of D-Bless Fashions or of the sum of US$140,180.00.

[21] I accept the evidence of Naresh that there was an outstanding debt of US$64,202.34 owed in respect of the R & D account and that on the note this was rounded to a figure of $60,000.00 for the limited purpose of making up the agreed schedule of payments. Having listened to him in cross examination I do not accept that the figure of US$64,202.34 is a concoction. The Claimant appears to be a professionally run business and ought to have been able with precision to ascertain the debt owing on the R & D account. I find that they did so and arrived at US$64,202.34 it being an accurate representation of the R & D Debt.

Did the Defendant order the First Container and is she liable for the cost thereof?

[22] Counsel for the Defendant indicated in her submissions that Sunil told the Court that the Defendant told him that she was no longer in a business relationship with R & D. My actual note is that he said that she was no longer doing business with Ronald. This arguably does not affect Counsel's submission which was that it is more probable than not that the Defendant would not have placed subsequent orders on behalf of R & D Fashions, with which she had no further dealings. Therefore, Counsel argued, the evidence of her ordering US$140,180.00 worth of goods to be shipped to her c/o R & D is not credible. I do not accept this submission. The fact that the Defendant and Ronald had ceased to do business together as R & D Fashions or might have even ended their romantic relationship does not necessarily mean that she would not have been able to ship the container in her name, care of R & D, for the sake of convenience if for no other reasons.

[23] The evidence of the Defendant is that goods could not be shipped in the name of R & D only, there would have to be an individual's name associated with the shipment.

[24] In response to the Court the Defendant said that she did not have the documents such as the Tax Compliance Certificate to clear the goods shipped in the name of R & D.

[25] As it relates to the First Container, there are 3 possibilities. The first is that the Claimant did not export goods valued at US$140,180.00 to Jamaica at all and invoice number 3320 which was admitted as exhibit 2 is a bold fabrication. The second, is that the First Container was shipped to Jamaica to Ronald the other principal of R & D, on his instructions, with the Defendant playing no part in it and the Claimant is now seeking to saddle the Defendant with that liability. The third, is that it was shipped to Jamaica to the Defendant c/o R & D on the Defendant's expressed instructions after she had chosen the relevant goods to be shipped. Having heard all the witnesses I have no hesitation in finding on a balance of probabilities that the third scenario reflects what actually happened as the Claimant's witnesses have asserted.

[26] In cross examination the Defendant agreed that D-Bless Fashions was not registered until 3rd May, 2008. It may be that in August 2006 the Defendant for convenience needed to have the use of the R & D Business name for purposes of importing the First container, but it is not necessary for me to satisfy myself as to the reason for the shipment c/o R & D. It is sufficient that on the evidence I accept the evidence of the Claimant's witnesses that it was the Defendant who made the order on her own behalf and I find that she is therefore liable for the debt associated with that shipment.

[27] The fact that for accounting purposes invoice number 3320 was billed to R & D with no mention of the name of the Defendant in care of R & D does not affect my finding. The Claimant and its principals would have been well aware that it was the Defendant's liability, since it was the Defendant who had made the order.

[28] The Claimant's witnesses have sufficiently explained the Claimant's accounting procedures including the difference between the "Excel" generated invoices and the "MYOB" versions, the Excel version being the initial one sent to the Defendant to assist her with her preparation for the clearing of the items. The US$25.00 difference as well as the difference in the descriptive terms utilised on the excel document (admitted exhibit 3) as compared to the comparable MYOB document (admitted exhibit 9) was explained to the Court and I did not find that those minor differences suggested a weakness in the Claimant's accounting system such as would cause me to question the accuracy of the invoices exhibited.

[29] I do not accept that the Claimant, managed by persons who appear to be sensible commercial men, would have made a shipment of goods valued at US$140,180.00 to the Defendant or Ronald Thomas both being principals of R & D without there being some agreement in place as how the sum of $64,202.34 which was then due and owing by R & D would be liquidated.

[30] I have already stated that I accept that this sum was outstanding and I do not accept that reasonable commercial men would have allowed the Defendant to absolve herself of any liability for that debt by simply say she is not responsible, and to then facilitate her further trading by opening a fresh line of credit to her through a new D-Bless account. I accept the evidence on behalf of the Claimant that there was an agreement with the Defendant in respect of the payment for the First Container and the then outstanding liability of R & D and that this is reflected in the handwritten note (notwithstanding the difference between US$64,202.34 the actual R & D Debt and the $60,000.00 used for the schedule).

[31] I do not accept that the Claimant is trying to unfairly impose a liability of $140,180.00 on the Defendant in respect of a shipment of which she knows nothing and to that end has devised this elaborate scheme, bolstered by the production of a false document in the form of the handwritten note, complete with forged acknowledgment by the Defendant.

The Payments

[32] The Claimant is asserting that the Defendant made total payments of US$223,257.00 leaving a balance of $69,944.34. It is also asserted that of this US$223,257.00 only US$18,874.66 was paid on behalf of the D-Bless account.

[33] The Defendant's position as reflected in paragraph 12 of her with witness statement is that she paid US$71,874.66 between January 2007 to July 2008 on invoice number 4233. Her Counsel submits that this evidence has not been challenged nor denied. I do not accept this. The evidence of the Claimant's witnesses is clear on this point and it is equally clear that an issue is joined between the parties as to the amount of payment and the application of the payments.

[34] I do not find it credible that the Claimant in order to manufacture or concoct a claim for US$69,944.34, as a part of that exercise would acknowledge payments of US$223,257.00 which is US$151,382.34 in excess of what the Defendant is acknowledging that she paid. To describe such a strategy as extremely risky would be a gross understatement since it could possibly open up the Claimant to a counterclaim or to claims by other persons on the basis that these sums were paid on their behalf for which they have not been credited. Both Naresh and Sunil rejected the suggestion that the Defendant made payments through her account for her brother. I accept their evidence as true and I do not find that any of this US$223,257.00 was paid to the Claimant on behalf of the Defendant's brother or any of the Claimant's other customers.

[35] The Defendant has complained in her counterclaim that on or about the 15th July, 2008 she paid the Claimant $20,000.00 cash and the Claimant only acknowledged receipt of US$18,874.66. The Claimant in response averred that the Defendant gave specific instructions that US$1,125.34 was to be applied to the B & D account so that account would have a zero balance. The Claimant

then applied the $18,874.66 to the D-Bless account on the basis of these instructions.

[36] Having found that the Defendant made payments of US$233,257.00, I draw the reasonable inference that US$203,257.00 would have been apportioned between the accounts as per the Defendants instructions. On a balance of probabilities I accept the evidence on behalf of the Claimant which I find to be credible that the Defendant gave instructions for the apportionment of the $20,000.00.

[37] As it relates to the receipts admitted in evidence in support of the Defendant's assertion that it received US$223,257.00, there is an inconsistency between the evidence of Naresh and Sunil. Naresh said that they were sent to the Defendant but Sunil in cross examination said that Naresh usually wrote those receipts and that they were kept at the offices of the Claimant on the Defendant's file. I do not accept the submission of Counsel for the Claimant that Sunil's response is in respect of file copies but that the originals were indeed sent as Naresh testified.

[38] I am therefore not convinced on a balance of probabilities that these receipts were sent to the Defendant. As a consequence I will treat these receipts as of limited value in the absence of any evidence that the Defendant received them and did not previously challenge their accuracy. I will consider them to be merely internally generated records for the Claimant's own accounting purposes. However that does not make a significant difference since I do accept that they accurately reflect the payments that the Defendant made and were not improperly created or fabricated to support an assertion of a greater payment than was actually made.

Was the debt reduced by agreement after a renegotiation of some of the prices?

[39] Sunil denied that there was any agreement reducing the price of the goods from US$86,476.00 to US$65,306.00. His evidence on cross examination was that he could not recall if there was a discount but that if there was one, it would have been reflected in the production of a discount receipt and there is no discount

receipt. He said the fact that an agreement for a discount is reached over the telephone would not affect there being a discount receipt if there was a firm agreement reached for such a discount.

[40] I do not accept that the Claimant would have discounted the Defendant's order from US$86,476.00 to US$65,306.00. Such a level of discount does not appear to be commercially sensible and the explanation for the discount given by the Defendant is not credible. As will be evident from my findings below, if there was such a discount granted I would have expected the Defendant to place a greater reliance on it in her exchanges with Naresh during the recorded conversation.

The amendment to the Defendant's statement of case

[41] Counsel for the Claimant has submitted that the Defence to the claim is incredible and unsustainable. One point made is that the Defendant initially defended the claim on the ground that she only owed approximately US$16,000.00 based on payments of approximately US$71,000 on the D-Bless invoice of US$86,499.00. Counsel further submitted that this position was maintained for two years and was then amended to say that the Defendant and the Claimant had renegotiated the prices after the goods arrived in Jamaica.

[42] The Amended Defence has superseded the original and I will not draw any adverse inferences solely from the fact that the Defendant has changed her position by amending her statement of case.

The Recording

[43] Naresh Produced a compact disc ("**CD**") containing a recording of a conversation between himself and the Defendant which he said took place on the 28th May, 2009 when he went to the Defendant's store. An objection was made to its admissibility on the bases that it was hearsay, irrelevant and self serving. The Court admitted the recording after accepting the evidence of Naresh that he had himself recorded the conversation on his cellular phone, then transferred it to a

computer and from the computer transferred or "burned" it to the CD. There was no suggestion that there was anything false, implausible or unreliable about the methodology employed by Naresh in producing the portable recording in the form of a CD.

[44] The Defendant admitted that it was her voice that is on the CD but said she thought the conversation took place about October 2009. During the recorded conversation there was an exchange between Naresh and the Defendant about the Debt of $69,000.00 and the interest payable thereon. The Defendant is not at any point heard denying that the debt is $69,000.00 but she spent a considerable amount of time denying her liability to pay the interest. In fact, the Defendant expressly admitted that the amount owed is $69,000.00.

What is the evidential value of the Recording?

[45] Counsel for the Defendant has submitted that the events of the recording took place before the claim was filed. Counsel submitted that the Defendant's statement as to amounts owed do not amount to an admission of liability, that they were informal only and clearly made in highly emotional circumstances. She further submitted that when those utterances were made the Claimant's case had not yet been formulated and legal proceedings had not commenced hence there can be no admission of liability worth considering by a Court of law.

[46] Counsel commended the case of **Sowerby v Charlton [2006] 1WLR 568** for the Court's consideration and relies on it for the proposition that the rules of civil procedure are concerned with the regulation of cases after an action had started and the new regime does not apply to pre action admissions. As Counsel stated in her written submissions:

> *"...Accordingly even if the defendant's utterances could amount to an admission of liability, which is denied by the Defendant, this court's permission was not required for her to withdraw them.* ***In the circumstances the utterances of the Defendant on the electronic recording are highly prejudicial and without any probative value whatsoever****. In any event these pre-claim utterances can in no way*

> *relieve the Claimant of the burden and standard of proving to the court that on a balance of probabilities the amount claimed is owed by the Defendant for goods sold and delivered to her during the relevant period." (emphasis replicated)*

[47] In **Sowerby** the Court took the opportunity to clarify the ambit of the UK CPR rule 14 which is in similar terms to our CPR part 14. I have reproduced an extract of the Court's instructive analysis as follows:

> *"...Needless to say an admission, depending on its content, may open the way for judgment to be entered on the admission under **CPR Pt 14**.*
>
> ***18** This new regulatory scheme has been so carefully crafted that in our judgment the rule-makers cannot have intended a pre-action admission of liability to be embraced by the words "A party may admit the truth of the whole or any part of another party's case" in **CPR r 14.1.** In the same way as an admission of guilt to a police officer cannot in itself be equated with an admission of guilt when a charge is brought in court (so as to dispense with the need for the charge to be put formally to the defendant in court), an admission of liability before an action is brought cannot be equated with an admission of "the truth of the whole or any part of another party's case". That party's "case" will not have been formulated until the claim form or the particulars of claim are prepared (see para 11 above), and it would not ordinarily be meaningful to describe someone as a party until legal proceedings have been commenced. It would have been very easy for the rule-makers to have made it clear that admissions of liability made before an action was started were also included in the language of **CPR r 14.1**, and the simplicity of the procedures for admissions leading to judgments on money claims that are set out in **CPR rr 14.4** to **14.7** would be made very much more complicated if an admission that might give rise to a judgment being entered as of right could also be gleaned from possibly fast-moving pre-action correspondence about an accumulating debt."*

[48] Following the reasoning in **Sowerby**, with which I wholeheartedly agree and adopt, the declarations of the Defendant that are captured on the Recordings do not amount to an admission in the sense used in CPR rule14 that would have provided the basis for an application for judgment on admission by the Claimant. I also agree with Counsel for the Defendant that, that being so, there was no need for the Defendant to seek this Court's permission to withdraw them. However I do not agree with the submission that the utterances are *"highly prejudicial and without any probative value whatsoever*" The utterances constitute evidence which is admissible and to which the Court can attach such

weight as it thinks fit. The fact that it is capable of supporting the Claimant's case, per se, does not make it prejudicial.

[49] The fact that the Court can rely on the pre-action admission for purposes of assessing liability is clearly demonstrated in **Sowerby** where the Court did exactly that. In **Sowerby**, the Claimant was injured after falling from a platform outside the door of residential property which was owned by the Defendant. Her solicitors wrote a pre-action letter which started an exchange of correspondence. After responding that their insurance clients were awaiting their reinsurers' view on primary liability, the Defendants' solicitors admitted a breach of duty under the occupier's liability act 1957 and sought to settle the issue of liability at 50%. The Defendant then subsequently denied primary liability in its defence and an application was made to strike out those paragraphs as offensive since permission had not been sought to withdraw the admission under CPR Part 14 (UK). The Master granted the application and directed that judgment be entered for the Claimant on the issue of liability, holding that CPR Part 14 applied to pre-litigation admissions. A judge dismissed the Defendant's appeal, a finding with which the court of appeal disagreed.

[50] However in assessing the Defendant's prospects of resisting a finding of primary liability, the Court of Appeal considered the fact that when confronted with the claim by pre-trial correspondence the Defendant's "*insurers reinsurers, and their very experienced solicitors accepted liability after having had plenty of opportunity to investigate the circumstances of the accident*. This fact, (along with other considerations), led the Court of Appeal to find that in all the circumstances there was no real prospect of the Defendant resisting a finding of primary liability.

[51] I accept that because the recording does not reflect the entire conversation between Naresh and the Defendant which lasted a number of hours, I must take care in determining how much weight I place on it. Notwithstanding that warning

to myself, I find that the recording gives an accurate and valuable snapshot of the issues that were discussed between Naresh and the Defendant that day.

[52] The Defendant conceded that on the recording she admitted owing the debt of US$69,000.00, but that the admission was out of context. When I asked the Defendant to explain what she meant by that, she said that it was out of context because Naresh was accusing her of owing the US$69,000.00, she was frustrated and upset and at the time she did not get a chance to calculate how much money she had sent to them [the Claimant]. She explained that at the first part of the "tape" she was saying she did not owe any money.

[53] US$69,000.00 is a significant sum of money except perhaps for the wealthiest of individuals. Considering the economic reality currently being faced by Jamaicans (which was not significantly different in our recent past), I would expect that a businesswoman such as the Defendant would at any point in time, have in her mind, an approximation of the amount which she owed to the Claimant. It is a big leap from asserting that one does not owe any money, to admitting owing $69,000 which is what the Defendant said occurred during the conversation with Naresh, of which only a portion was recorded.

[54] The Defendant in cross examination said that on the occasion of the recording she had mentioned the re-negotiation done with Sunil both before and after the portions of the conversation that are captured on the recording.

[55] In cross examination the Defendant said that she initially did not give instructions in respect of the re-negotiation to her lawyer for the drafting of her Defence because she was of the view that it was inadmissible being oral and only captured in her handwritten note.

[56] Whether the Defendant believed it was inadmissible or not, on her evidence she mentioned it during the conversation with Naresh. If she did find it worthy of mentioning early in the conversation, I do not accept that she would have abandoned that issue which resulted in it not being heard on the portions of the

recording where she is heard strenuously resisting the claim for interest. One would have expected that if she had earlier deployed the renegotiation as a point in support of her denial of the debt that she would continue to advance both planks. Firstly that the interest is not payable and secondly, that Sunil had agreed to reduce the order from US$86,476.00 to US$65,306.00 and therefore the debt could not be US$69,000.00 as Naresh was demanding.

[57] The Defendant is not a shrinking violet. She conducts business in downtown Kingston and this presents certain challenges relating to security and other issues. I do not think it can be said that operating a retail clothing store in downtown Kingston requires the type of strong personality displayed by the Defendant. The recording gave a candid indication of what the Defendant was like in the natural environment of her business place. In the recording she was insistent and forceful but was never rude or boorish. In cross examination the Defendant gave a further insight into her personality and what she could be like when she was really upset and refused to be restrained by the shackles of decorum expected in a courtroom. At one point in recounting what she said was a threat on life of her son, she launched into a long rant and refused to stop notwithstanding my repeated requests for her to cease and to control herself.

[58] I appreciate that the recording is not of the entire conversation between Naresh and the Defendant. Notwithstanding this, I do not accept that the Defendant asserted in a portion of the conversation that was not recorded, that she did not owe the Claimant any money or asserted that the figure of $69,000.00 was incorrect because Sunil during their telephone discussion had re-negotiated the debt and had offered her a discount from US$86,476.00 to US$65,306.00 on her order. I do not accept that these assertions, or either of them, were made outside the recorded portions of the conversation and I find that the Defendant did not make these assertions because they do not represent the truth.

[59] As I have indicated earlier, I accept the evidence of Sunil that there was no such renegotiation during a conversation with the Defendant. I do not find as

suggested by Counsel for the Defendant that he was being less than forthright when he said he did not recall such a re-negotiation.

[60] Counsel for the Defendant submitted that the recording contains evidence that the Defendant did not receive all of the goods which she ordered and that one half (½) of the goods were left in Curacao. Counsel submitted that the Court cannot ignore this evidence. Counsel argues that since the claim is for goods sold and delivered, that is, the value of the full invoice, this evidence is fatal to the claim since the Claimant has failed to discharge the burden and standard of proof.

[61] The Court notes that it is not contained in the statement of case of the Defendant or in her witness statement that she did not receive half of the goods ordered. The Claimant was therefore not afforded the opportunity to respond to this issue which appears to be an afterthought. That pleading point aside, the portion of the conversation to which reference is made when taken in context appears to be suggesting that the Defendant only took half of the goods she wanted, not that Naresh was saying she got half of the goods she actually ordered. Were it otherwise I would have expected that this would have been a major source of complaint and there would be some evidence of this issue having reared its head in a conversation at some point between the Defendant and Sunil and/or Naresh. Even as it relates to the purported re-negotiation, receipt of less goods than ordered was not advanced as a reason for the re-negotiation.

[62] The Defendant has also presented as a plinth of her defence, the averment that the agreement was for her to pay for the goods ordered "*within a reasonable time of the sale of the goods*". As Sunil put it in his witness statement that does not make good business sense and would be business suicide on the part of the Claimant. I quite agree. I cannot see how sensible businessmen would agree to such an arrangement. What happens if the goods are not sold? Are they to be returned to Curacao? Who would be responsible for the associated shipping costs? What would be the value of those unsold goods to the Claimant if returned

after many years? (especially since clothing would be subject to the vagaries of the fashion industry and what is considered to be trendy and "in style" each year).

[63] This case turns largely on the Court's assessment of the credibility of the witnesses. I have preferred the evidence of Naresh and Sunil as being more credible, not just because of their demeanour, but because their evidence when viewed in reference to the facts assessed objectively, in the context of commercial dealings between reasonable businesspersons is more cogent, logical and persuasive. The Documentary evidence (including the recording) is also is more supportive of the Claimants case and has bolstered the evidence from the mouths of Naresh and Sunil.

[64] Analysing all the evidence in the round, I find on a balance of probabilities that the Claimant has satisfied this court that it is owed US$69,944.34 by the Defendant.

Should there be an award of Interest?

[65] Counsel for the Defendant submitted that no basis was stated upon which interest was claimed and no evidence was given of the basis on which the alleged interest sought, accordingly the claim for interest would be still-born. Counsel submitted that furthermore, Sunil in his witness statement states that "we have however not sued for that interest".

[66] It should be noted that rule 8.7 (3) of the CPR provides as follows:

> *"A claimant who is seeking interest must-*
>
> (a)*Say so in the claim form, and*
>
> (b)*Include in the claim form or particulars of claim details of –*
>
> (i) *The basis of entitlement;*
>
> (ii) *The rate;*

(iii) *The date from which it is being claimed;*

(iv) *The date to which it is being claimed; and*

(v) *Where the claim is for a specified sum of money,*

-The total amount of interest claimed to the date of the claim; and

-the daily rate at which interest will accrue after the date of the claim."

[67] Counsel for the Claimant relies on the Court of Appeal decision of **British Caribbean Insurance Company Limited v Delbert Perrier SCCA No. 114/94** in support of his submission that it is open to the Court to award interest to a successful Claimant in matters of commerce. In the **Perrier** case, Carey JA expressed the view that the issue was not subject to debate and said at page 16 of the Judgment :

> *"I do not think it can be doubted that where a person has been found to have failed to pay money which he should have, it is only right that he should pay interest to cover the period the money has been withheld".*

[68] Carey JA referred to the statement of Forbes J in **Tate & Lyle Food Distribution Ltd. V Greater London Council & Anor** [**1981] 3 All ER 716** as to the basis for awarding interest at pag 722 as follows:

> *"Despite the way in which Lord Herschell LC in London, Chatham and Dover Railway Co v. South Eastern Railway Co. [1893] AC 429 at 437 stated the principle governing the award of interest on damages, I do not think the modern law is that interest is awarded against the defendant as a punitive measure for having kept the plaintiff out of his money. I think the principle now recognised is that it is all part of the attempt to achieve restitution in integrum. One looks, therefore, not at the profit which the defendant wrongfully made out of the money he withheld (this would indeed involve a scrutiny of the defendant's financial position) but at the cost to the plaintiff of being deprived of the money which he should have had. I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the plaintiff would have had to borrow money to supply the place of that which was withheld. I am also satisfied that one should not look at any special position in which the plaintiff may have been; one should disregard, for instance, the fact that a particular plaintiff, because of his personal situation, could only borrow money at a very high rate or, on the other hand, was able to borrow at specially favourable rates, the correct thing to do is to take the rate at which plaintiffs in general could borrow money."*

[69] As it relates to the pleading point raised by Counsel for the Defendant, in the witness statement of Sunil he states that they have not sued for interest. The witness statement refers to the contractual interest which was being pursued by Naresh which is distinct from the discretionary judgment which can be awarded by this Court as confirmed by **Perrier** *supra*.

[70] Where there is a claim for interest, [especially not being a claim for contractual interest] a Claimant is generally not required to set out the details of the contractual provision on which it is relying.

[71] Support for this is proposition can be found in the Privy Council case of **Carlton Greer v Alstons Engineering Sales and Services Limited Appeal No 61 of 2001** on appeal from the Court of Appeal of Trinidad and Tobago. In **Greer** the Privy Council examined section 13 of the Supreme Court of Judicature Act 1962 (Laws of Trinidad and Tobago, (1980 edition) Chapter 4:01) and made the following observations:

> *"13 Section 25 of the Supreme Court of Judicature Act 1962 (Laws of Trinidad and Tobago, (1980 edition) Chapter 4:01) provides, as did its precursor, section 26 of an earlier edition of the same Act, that –*
>
> *"In any proceedings tried in any court of record for any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment, .."*
>
> *14 Mr. Prescott contended that a claim for interest must be specifically pleaded. This requirement reflects the fundamental principle that the pleading should give fair notice to the opposite party of the nature of the claim being made against him, with the relevant facts relied upon, so as to enable him to meet such claim and to prevent surprise at the trial. The argument, however, disregards the decision of Mr. Justice Hassanali in De souza v. Trinidad Transport Enterprises Ltd and Nanan (No 2) (1971) 18 WIR 150, in which he said at page 152A –*
>
> *"A claim for interest need not be pleaded. The discretionary power of the court under the provisions of s. 26 of the Supreme Court of Judicature Act*

1962 is exercisable whether or not there is a claim for interest in the pleadings (Riches v. Westminster Bank Ltd [1943] 2 AII ER 725). Further as Lord Denning, MR said in Jefford v Gee 9[1970] 1 AII ER at p 1211):

'A claim for interest is not itself a cause of action. It is no part of the debt or damages claimed but something apart on its own. It is more like an award of costs than anything else. It is an added benefit awarded to a plaintiff when he wins a case ...'"

The Court of Appeal (sub tit Trinidad Transport Enterprises Ltd and another v De Souza (1973) 25 WIR 511) upheld the judge's decision without commenting on the pleading point.

15 The same practice prevails in Trinidad and Tobago as in England: neither a claim for interest nor the facts and matters relied on in support of such a claim need be pleaded. The respondents' argument on this score therefore fails."

[72] **Section 25 of the Supreme Court of Judicature Act 1962** (Laws of Trinidad and Tobago, (1980 edition) Chapter 4:01) mirrors Section 3 of the Law Reform Miscellaneous Provisions) Act of Jamaica ("LRMPA"). Section 3 of LRMPA is in the following terms:

"3. In any proceedings tried in any Court of Record for Power of the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:

Provided that nothing in this section-

(a) shall authorize the giving of interest upon interest; or

(b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

(c) shall affect the damages recoverable for the dishonour of a bill of exchange."

[73] In **Goblin Hill Hotels Limited v John and Janet Thompson SCCA Appeal no. 57/2007** Counsel had submitted "*that in the absence of any claim for interest in its statement of case the Appellant is not entitled to an award of interest*." The Court of appeal reviewed a number of cases including **Greer** and acknowledged

that Greer was decided before the CPR came into effect in Trinidad and Tobago. Nevertheless the Court concluded at paragraph 15 of the judgment that:

> *"...But despite the fact that Greer is silent on the impact if any, of the new rules in England on the broad proposition for which it is cited as authority by the editors of the White Book Service 2006, it does provide support for what in my view must be the position in the light of the clear and unrestricted provision of section 3 of the LRMPA. That is, that while a claim for interest must generally be pleaded as required by the rules, there is no need to plead a claim for interest pursuant to the LRMPA, on the continuing authority of cases like* ***Riches v Westminster Bank Ltd., DeSouza v Trinidad and Tobago Enterprises, Long Yong****, and now* ***Greer****."*

[74] One can envision examples in which the failure to plead a claim for interest will not pose a difficulty, but it appears to me that where the claim is for contractual interest the position can become complicated if there is no compliance with CPR 8.7(3).

[75] Where parties have not applied their minds as to the payment of interest before they formed the agreement, there is no agreement as to interest and if one party thereafter unilaterally seeks to impose such a term as to interest, then that term would be unenforceable for, *inter alia*, lack of consideration.

[76] If there is no express agreement for the payment of interest contained in a written contract, the Court may be able in certain circumstances to infer such a term for example, from a course of conduct or from an acknowledgment by the Defendant subsequent to the contract being entered into. In such a case where there is no written contract providing for the payment of interest, the question as to whether there is the existence of such a term would fall for the Court's determination based on the pleading and on the evidence.

[77] In this case the witnesses for the Claimant seemed to have been convinced that they were entitled to claim contractual interest as is demonstrated by the assertion of that claim on the recording. In the absence of adequate pleading or evidence by the Claimant on this point, (presumably because Sunil was of the view that it was not to be pursued), the Court is not in a position to make a

finding of fact as to whether contractual interest is payable by the Defendant and if so at what rate. The Court also notes that the Defendant made no acknowledgment or admission on the recording that such interest was agreed or is payable.

[78] Having not sufficiently pleaded as to the basis for an award of contractual interest, or having abandoned such a claim on Sunil's evidence, I am of the view that it is not open to the Claimant to simply seek to instead avail itself of the Court's power to award interest for which no pleading would be required. Section 3(b) of LRMPA in my view prohibits this, since the evidence of Sunil is that the interest was payable by virtue of the agreement but that it was not being claimed.

[79] It appears to me that section 3(b) was intended to prevent a party who was perhaps contractually entitled to receive a low rate of interest seeking to circumvent that contractual provision by abandoning the claim for contractual interest and instead claiming interest at a higher commercial rate.

[80] Unfortunately the **Goblin Hill Hotels** case or none of the cases referred to therein, addressed the possible impact of section 3(b) of LRMPA and for that reason are of limited assistance given the facts of this case. In **Greer**, for example the claim arose from the repairs to a JCB Backhoe and there was no issue of contractual interest. Nevertheless, notwithstanding the absence of any clear case law authority, on the strength of my analysis in the preceding paragraphs, I am therefore of the view that the Claimant is not entitled to an award of interest.

[81] For the reasons outlined herein I make the following orders:

1. Judgment for the Claimant in the sum of US$69,944.34.

2. Cost to the Claimant to be taxed if not agreed.