REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2016-01758

Between

ISLAND ROOFING AND HARDWARE SOLUTIONS LIMITED Claimant

And

FAZARD ALI
whether in his personal capacity
or in his personal capacity Trading as
CLOCKWORK CONSTRUCTION & HARDWARE SUPPLIES First Defendant

CLOCKWORK HARDWARE LIMITED Second Defendant

Before The Honorable Justice David C. Harris

Appearances:

Mr. Ravi Heffes-Doon instructed by Ms. Savitri Sookraj-Beharry **for the** Claimant

Mr. Ronald Dowlath **for the** Defendants

JUDGMENT

INTRODUCTION

1. This claim is for monies owed by the First and/or Second Defendant for goods supplied, pursuant to certain purchase orders made by the Defendant during the period August 2012 to January 2013.

THE CLAIMANTS' CASE[1]

2. The Claimant contends that during the period August 2012 to January 2013 the First Defendant trading as Clockwork Construction and Hardware Supplies placed official orders for various items of hardware supplies and equipment. Pursuant to these orders, the Claimant supplied the goods to the First Defendant on credit.

3. The First Defendant made payments towards his indebtedness on several invoices, to the Claimant from October 2012 until December 2013, after which all payments ceased. The Claimant then had cause to demand payment on the outstanding balances in March 2014 and after subsequent letters requesting payment were ignored by the Defendant, the Claimant issued a pre-action letter in April 2016. No substantive response was received prior to issuing the claim.

4. The Claimant submits that there was no contract for purchase of the goods with the Second Defendant. Further, any reference by the Claimant to *Clockwork Construction* and *Clockwork Construction Ltd.* on the invoices relate the First Defendant *Clockwork Construction & Hardware Supplies,* the name reflected on the purchase orders which preceded the invoices. Further, the First Defendant continued trading under this registered name well after the Notice of Cessation of December 2011.

5. The Claimant also notes that the goods were delivered to either the First or the Second Defendant.

THE DEFENDANTS' CASE[2]

6. The First Defendant contends that trading under Clockwork Construction & Hardware Supplies ceased since December 2011 and the Second Defendant was incorporated in June 2012. Further, the invoices were issued to Clockwork Construction Ltd, an entity not affiliated with the First Defendant and as such, any arrangement was between the Claimant and Clockwork Construction Ltd and/or the Second Defendant.

[1] Extracted from the Claimant's Amended Statement of Case and Submissions.
[2] Extracted from the Defendants' Amended Defence and Submissions

7. Further, the First Defendant submits that none of the invoices show that the person or entity contracted with and is liable to pay is the First Defendant, whether in his name or trading as Clockwork Construction & Hardware Supplies.

8. In the alternative, the First Defendant submits that certain invoices may render action against the First Defendant barred by the Limitation of Certain Actions Act Chap. 7:09.

ISSUES TO BE DETERMINED

9. In the court's view, the pleadings and submissions of the parties raise the following issues for determination:
    a) Whether a valid and enforceable contract existed between the Claimant and the First Defendant and if so;

    b) Did the Second Defendant indirectly or otherwise receive a benefit under the said contract?

    c) Whether the debt allegedly owing to the Claimant was acknowledged by the First Defendant and if not;

    d) Does s. 3(1)(a) of the Limitation of Certain Actions Act Chap. 7:09[3] apply to this matter?

    e) Whether the court can infer, on the evidence, that *Clockwork Construction* and *Clockwork Construction Ltd.* were referred to and used interchangeably by the Claimant, to mean *Clockwork Construction & Hardware Supplies.*

[3] The following actions shall not be brought after the expiry of four years from the date on which the cause of action accrued, that is to say: (a) actions founded on contract (other than a contract made by deed) on quasi-contract or in tort

ASPECTS OF THE LAW

10. The law of contract is governed by statute[4] and the common law. More particularly ss. 5 and 6(3) of the Sale of Goods Act[5] are relevant here.

11. The basic elements of a contract are offer, acceptance and consideration. Underlying these elements is the existence of agreement between and the intention of the parties. As Michael Furmston stated:

> "Agreement, however, is not a mental state but an act and, as an act, it is a matter of inference from conduct. The parties are to be judged not by what is in their minds, but by what they have said or written or done."[6]

12. In ***Hillas & Co Ltd v Arcos Ltd***[7] Lord Tomlin had cause to remark:

> *"The problem for a court of construction must always be so to balance matters that, without violation of essential principle, the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains."*[8]

13. Where, on the other hand, there is no particular trade in question and no familiar business practice to clothe the skeleton of the agreement, the task of spelling out a common intention from mere words may prove too speculative for the court to undertake.[9] See for example ***Scammell v Ouston***.[10] In this case, Goff J also held that even though no contract existed, the Claimants were entitled to

[4] Sale of Goods Act Chap. 82:30

[5] **5.** Subject to this Act and any Act in that behalf, a **contract of sale** may be made in writing (either with or without seal) or by word of mouth, or partly in writing and partly by word of mouth, or **may be implied from the conduct of the parties**. Nothing in this section shall affect the law relating to corporations. **6(3) There is an acceptance of goods** within the meaning of this section **when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there is an acceptance in performance of the contract or not.**

[6] Cheshire, Fitfoot & Furmston's Law of Contract 15th Ed at pg. 38.

[7] [1932] All ER Rep. 494

[8] Ibid at 499

[9] Cheshire, Fitfoot & Furmston's Law of Contract 15th Ed at pg. 52

[10] [1941] AC 251

payment on a *quantum meruit* basis since they had done the work at the Defendants' request and the Defendants had accepted it; also Sumpter v Hodges [1898] 1 QB 673 at 676.[11]

14. Where services have been performed but there is no enforceable contract (or contract term), the court will resolve a quantum meruit claim by examining whether the Defendant has been unjustly enriched[12]. There is a four-step approach to establishing unjust enrichment claims;

    i. Has the Defendant been enriched?
    ii. Was the enrichment at the Claimant's expense?
    iii. Was the enrichment unjust?
    iv. Are there any defences available to the Defendant?

15. In McCutcheon v David Macbrayne Ltd [1964] 1 WLR 125 at 128 Lord Reid opined: *"The judicial task (in the law of contract) is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other*". This view is particularly applicable to the facts of this case and the court applies the learning here.

16. Further still, in relation to whether the First Defendant and the Claimant contracted with each other: in Chittty on Contract Vol 1, 32nd Ed. it states at para 2-002 that the courts normally apply an objective test in determining whether the parties have reached an agreement.

17. *"…the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language…"*[13] This court applies this principle to the course of conduct between the Claimant and First Defendant including the content of the Orders, the invoices and the communications between the lawyers.

[11] In order that that may be done, the circumstances must be such as to give an option to the Defendant to take or not to take the benefit of the work done.
[12] The UK Supreme Court ("UKSC") recently addressed the law again on unjust enrichment in Benedetti v Sawiris & Ors [2013] UKSC 50 and in particular, the issue of how an enrichment should be valued.
[13] Lewison in **The Interpretation of Contracts**, 5th Ed. Quoting at page 28 of the text Sirius International Insurance Co. v FAI Insurance Ltd [2004] 1 WLR 3251

18. **LIMITATION OF CERTAIN ACTIONS ACT CHAP. 7:09**

3. (1) The following actions shall not be brought after the **expiry of four years from the date on which the cause of action accrued**, that is to say:

(a) **actions founded on contract** (other than a contract made by deed) on quasi-contract or in tort;

12. (2) **Where any right of action has accrued to recover any debt or other liquidated pecuniary claim,** or any claim to the personal estate of a deceased person or to any share or interest therein, **and the person liable or accountable therefor acknowledges the claim or <u>makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or payment</u>.**

(3) Notwithstanding subsection (2), a payment of a part of any interest that is due at any time shall not extend the period for claiming the remainder then due, and any payment of interest shall be treated as a payment in respect of the principal debt.

(4) Subject to subsection (3), **a current period of limitation may be repeatedly extended under this section by further acknowledgments or payments,** but a right of action, once barred by this Act, shall not be revived by any subsequent acknowledgment or payment.

19. ***CV2015-01172 George Gonzales Entertainment Services v Sandbox Entertainment Limited and Kevan Gibbs***

Robin Mohammed J at para 9: *"What the Defendant seems to have misunderstood is that the cause of action in this matter is not simply the date that the last invoice was sent. Rather,* ***it is the date that the breach occurred i.e. the date on which the Defendant Company was supposed to pay the monies and failed to do so.*** *In this light, the Defendant, bearing the burden of proof on this issue, has failed to particularize the date at which the cause of action accrued."*

This relates to s. 3(1) of the Act.

20. **CV2016-04062 Franz Lambkin v Fen Mohammed Stores**

Seepersad J at para. 19 *"On the evidence before the Court,* ***the last payment was made on August 30, 2012 and no evidence as to a subsequent acknowledgement in writing re any accepted indebtedness, was put before the court.*** *Accordingly, the relevant four year limitation period would have expired prior to the institution of the instant proceedings which were filed on*

November 10, 2016. Consequently, the Court must dismisses the counterclaim on the basis that the relief sought there-in is now statute barred."

This relates to s. 12(2) of the Act.

THE EVIDENCE

21. To restate the obvious; the burden lies with the Claimant on a balance of probabilities in Civil matters. The Claimant in its written submissions to this court sets out what it perceives as the evidence upon which this case turns in favour of the Claimant.

22. At its core the Claimant's evidence is that not only did it contract with the First Defendant in his personal capacity trading as Clockwork Construction & Hardware Supplies (as evidenced by the Orders exhibited to the Amended Statement of Case as "IRHS 3"), but later, the material was delivered to the First Defendant howsoever he represented himself, whether it be as the Second Defendant in name or otherwise. The court accepts this evidence as inherently consistent with the narrative evidence, documentary evidence, commercial reality, logic and reasonable human experience. The Claimant's undisputed testimony is that during the entire trading period, the Defendant never represented to the Claimant that it had ceased trading or receiving the benefit of the trading as the unincorporated entity that made the orders. In fact this change of circumstances in the view of this court – *notice of cessation* - was represented to the Claimant for the first time in the defence filed in this matter.

23. It is the evidence from the Claimant (and it is so pleaded) that notwithstanding the Defendant now asserting that he, the First Defendant, incorporated the Second Defendant on the 26th June 2012, the said First Defendant continued between the 16th August 2012 to 3 January 2013 to order goods in his own personal trading capacity on the stated terms and conditions. The court also notes the uncontested pleading and evidence that the parties were trading from far back as 2011[14]. The Claimant points to the several Orders signed by the First Defendant on the 'letter head' of *Clockwork Construction and Hardware Supplies.* The First Defendant has not successfully challenged the fact that these orders were made by the First Defendant. This is the finding of the court. Mr. Alfonso noted in his evidence for the Claimant, that the orders were faxed in and this is evidenced by the fax

[14] See para 2 of the witness statement of Mark Alfonso for the Claimant.

print to the top of each order stating clearly that it came from the First Defendant. This is so. So, even without the Defendant's acknowledgment of the Order, the court concludes on the document exhibits and the testimony of the Claimant, that it was the First Defendant's order.

24. The follow up question is: who received the benefit of these orders represented in 'IRHS3'? The orders themselves do not expressly provide for the beneficiary to be anyone else than the First Defendant. Indeed the First Defendant testified that no invoice or purchase order moved between the Claimant and Second Defendant in this matter. The evidence from the Claimant is that it is the First Defendant that was the beneficiary. The Claimant through its witness, Mr Mark Alfonso, Director of Finance of the Claimant, testified that as far as the Claimant was aware the First Defendant did not cease to trade under the business name represented on the Orders. He said that throughout the period 19th October 2011 to 3rd January 2013 the Claimant supplied and delivered to the First Defendant, pursuant to his requests on credit terms, certain items, now the subject of this claim. These items Mr Alfonso testified, were those set out in the Orders and the invoices annexed to his witness statement as "MA3"[15].

25. The Defendant disputes the invoices refer to him, as the First Defendant. He insists that the Claimant dealt with either Clockwork Construction Company Ltd, a company unknown to him, or the Second Defendant, Clockwork Hardware Limited. Either way, the First Defendant contends in his evidence that the Claimant did in fact know he was dealing with an incorporated entity (whosoever that might have been) and not the First Defendant in his personal capacity. The Claimant referred to the invoices (as opposed to the Orders) which apart from one that named C*lockwork Construction Hardware*, as the contracting party, named the contracting parties as either the Second Defendant or C*lockwork Construction Ltd* , the latter being an entity unknown to him. The First Defendant testified that even in the Claimant's pre action letter they consistently referred to the indebtedness to them being that of '*the company*'.[16]

26. Save for the invoice '70379', the other invoices (as opposed to the Orders) referred to 'Clockwork Construction Ltd', a corporate entity on the face of it. The Defendant testified in chief, that this was evidence that the Claimant knew it was dealing with a corporate entity and more specifically, not with the Defendant in his personal capacity or indeed not with a company that he is affiliated with or

[15] See also, "IRHS4" exhibit to the Amended Statement of Case.
[16] See para 21 of the First Defendant's witness statement.

that is known to him. To be clear, the invoices (as opposed to the orders) refer to the 'Clockwork Construction Hardware' and not 'Clockwork Hardware Limited', the Second Defendant. This is in fact so. Mr Alfonso's explanation is that the invoices are made up by a warehouse clerk in a very informal manner. This is information of a procedure that a person in his position would know. He goes on to explain the details by referring to a conversation with the clerk, the content of which I find to be inadmissible hearsay.

27. The place of business of both Defendants was the same, 113 Cemetery St., Munroe Rd., Cunupia. This is significant in the factual context of this Case. Further still, the still undenied fact alleged in para 0.2 of the Amended Statement of case and the witness statement of Mr Alfonso, that the Claimant had been doing business with the Defendant from on or around May 2011 and that the series of transactions that gave rise to this action occurred between August 2012 and January 2013 is also significant. These transactions were not the first transaction between the parties.

28. The Defendant was presented with several occasions to indicate he was conducting business as an entity other than himself in person. I accept that even after he had incorporated the Second Defendant and after he had sought to cease business in the name of the First Defendant he continued to conduct business in person well after the 'cessation'. This is evidenced by the Orders and the fax name of the First Defendant appearing at the top of the individual Orders, the resemblance of the name of the contracting party stated on the Orders, the address of the contracting party being the same address as the First Defendant – 113 Cemetery St., Munroe Rd, Cunupia – and in the end, the failure of the Defendant to dispute the facts as alleged in the pre action letter where it called for any reasonable person to respond and deny that specific fact if it were so. Indeed, even at a later date which afforded the Defendant much more time to contemplate the accurate state of affairs, the First Defendant did not refute the core allegations contained in the pre action letter, including refuting the assertion that the Defendant continued to do business on these disputed invoices in the name of the First Defendant. Nor indeed did the First Defendant do so in the later communications between the Attorneys for the respective parties. In fact, the testimony is, and the court accepts that the Attorney for the First Defendant continued in his correspondence with the Claimant to consistently acknowledge and refer to the claimed indebtedness in the name of the First Defendant initial trading name – "*Clockwork Construction and Hardware Supplies*" - or an inescapably patent abbreviation of it. To be clear, the Attorney for the First Defendant although he

referred to that unincorporated entity as his client, did not accept the extent of the indebtedness of the First or Second Defendant as alleged, but requested further information for his client to review. The Attorney for the Claimant also referred to the First Defendant's trading entity as the "*company*". This court concludes that through the haze of the local commercial parlance, the Attorneys for both the Claimant and the First Defendant, were referring to the same entity; the entity that made the initial orders; the First Defendant.

29. Further to all this, the Defendant testified to the First Defendant not having received the items referred to on the invoices on the basis that the invoices (save possibly one) are not in his name but in that of a corporate entity unknown to him; and in addition, that certain invoices were not stamped as delivered. [17] The upshot of his evidence is that he was aware of the Second Defendant receiving these goods or he mused, that perhaps a 3rd party corporate entity may have been in receipt. However, a cursory look and comparison of the invoices against the Orders would reflect an uncanny resemblance in the nature and quantity of goods traded between the parties. So for instance in the Order of the 21st August 2012 Requisition No. 9649 for 20 lengths of side flashing of 2x15x2 x1/2' is also reflected in the invoice #77762 of the 21st August 2012; the Order of the 16th August, 16 sheets of 35' decking on requisition 9591 is reflected in invoice 77736; likewise the Order of the 13th September 2012 is reflected in invoice 78426. This trend is seen throughout the invoices and Orders. That the specifications and quantities sometimes do not match up entirely is not of great moment. What is clear from the comparison of the two is that what was ordered in quantity, nature and specifications were of the kind traded by the First Defendant generally. The court being satisfied that the First Defendant ordered the items set out in the Orders, then the invoices produced as the First Defendant's indebtedness for the items, is entirely consistent with his business and the allegation made against him in this action.

30. The Defendant denies even knowing a company by the name of Clockwork Construction Limited. The said company name is noted on the several exhibited invoices as having an address on Munroe Rd. That the Defendant would not know a company by that name doing the same type of business as his or in any event purchasing the same type of materials as his from the Claimant, is highly unlikely. Simply put, it is more likely than not, he would know if such a company traded from Monroe Rd.

[17] See Mr Alfonso's evidence that delivered goods are stamped as such.

31. The credibility of the Defendant is further tested for all the reasons set out in paras 9-15 of the Claimant's written submissions. This court adopts the pertinent text and reasoning referred to in those paragraphs and incorporates it in this judgment.

FINDINGS AND CONCLUSIONS

32. The courts earlier findings above are adopted here.

33. Further, that from inception the business was conducted at the Munroe Rd. place of business between the Claimant and the First and/or Second Defendant was virtually indistinguishable, is patent on the evidence[18]. Why is this? It is so for two main reasons; the First Defendant was a beneficiary and employee of both businesses. The business of both the First and Second Defendants was the same and indistinguishable in the court's view. There is no sufficient evidence to suggest that upon the incorporation of the Second Defendant Company that the nature of the business being conducted out of the Munroe Rd. location changed in a discernible or any way. At para. 4 of the First Defendant's witness statement, he sets out the nature of his business as having *consisting mainly of construction materials, tools and hardware supplies and accessories*. This remained the business of the Second Defendant. The First Defendant's name is on every document exhibited to Mr Alfonso's witness statement as "MA14". The court notes that from the 'name search' through to the 'articles of incorporation', notice of change of address and several other notices exhibited, the First Defendant's name appears. That he held a beneficial interest in both entities – First and Second Defendants – is proved and not in doubt.

34. The question as to who ordered the goods is resolved in favour of the Claimant. That is, the First Defendant ordered the items set out in the orders and subsequent invoices. Delivery of the goods were made to the First Defendant. Further still, the terms and conditions of the order and subsequent delivery may be determined at the time of the order/contract and not necessarily on the later production of the invoice. The person who contracted for the purchase and delivery of the items at the time of the order is that person who is, first, bound to pay for the items and secondly, bound by the other terms and conditions, including the 2% per month penalty for unpaid invoices. In any event, the First Defendant never pleaded that he was not bound by the

[18] See the incorporation documents for Clock Work Hardware Ltd at "MA 14"

terms and conditions of the contract as alleged. The pleading, at best, was restricted to the Second Defendant (or other corporate 3rd party) had contracted for and was liable to pay the 2% per month charges on the outstanding payments on the invoices.

35. There was a contract for sale between the First Defendant and the Claimant. The Sale of Goods Act Chap: 82.30 provides also, that a contract for sale may be implied from the conduct of the parties. This is the alternative and obvious case here.

36. That the First Defendant may have received the goods in his new corporate capacity is really in this court's view a post transactional and artificial construct. The goods were delivered to the place of business – at 113 Cemetery St - from where the Order/items were originally ordered and the items placed on sale by the First Defendant, both before and after the formal but concealed cessation of business of the First Defendant's unincorporated trading entity. Again, apart from what this court observes as an inescapable inference, the ***Sale of Goods Act*** at section 6(3) thereof also provides that the *acceptance of goods* includes where a buyer, such as the First Defendant, does an act which recognizes the pre-existing contract of sale. This court concludes that the First Defendant operating at the premises at Cemetery St., Monroe Rd., Cunupia, received the said ordered items and did so in pursuance of the contract of sale which he had entered into at the time of the order and subsequently accepted the terms and conditions on the invoices. Whether he used the premises of or equipment and personnel of another entity – e.g. the Second Defendant – to receive the goods or even to pay for them on his instructions, is a matter for him and does not alter the character of the contract for sale he had earlier entered into with the Claimant and later and further affirmed upon making or causing to be made, certain part payments toward the invoices. There is no evidence of, and neither has the Defendant pleaded or proved that at any point there was, for instance, a *Novation* of the contract he first entered into with the Claimant thereby substituting the Second Defendant or any other entity as a contracting and beneficial party. When the First Defendant entered into the contract by ordering items, this court can discern no sufficient evidence that he intended anyone else other than himself to derive the benefit of those Orders.

37. The Claimant through Mr Alfonso has alleged that the First Defendant is estopped from denying the debt on the basis that he paid monies toward extinguishing the debt. This court agrees. Mr

Alfonso sets out the part payments in paras 21 - 23 of his witness statement. To this, the First Defendant counters that where payment was made it was not by him in his personal capacity. He further said that to date, in one case, despite repeated requests he has not been provided the corresponding purchase order. Even if that is so, payment on several of the invoices have been made without the benefit of a purchase order being produced. Invoices paid although purchase orders not exhibited to any pre action correspondence, claim, defence or witness statements. The order numbers listed in this para below are noted on the respective invoices in exhibit "IRHS4" but were not exhibited in "IRHS3". So for example the Defendant states that invoice 70379 did not have a purchase order. The order was not exhibited in "IRHS3" but the number of the order was noted on the invoice as P.O. #891. The invoices noted below were all stamped 'paid' and include the following:

Purchase Order	Invoice
#462	79613
#460	79249
#459	79239
#455	78800
#891	70379

38. This court accepts the essence of the Claimant's contention that the course of conduct commencing between the Claimant and the First Defendant with the Orders, continued in that mode, to the very last Order and invoice. The Defendant having all but acknowledged that it did not provide the First Defendant with the express notice of its cessation of business as an unincorporated entity in this court view, in all the circumstances of the case, leads to the dominant if not only inference that it failed to provide that information to the Claimant, purposely[19]. A mere bald statement from the Defendant that the Claimant knew of the *cessation* is not sufficient to establish that fact. The later use of the word 'company' or some derivative of that word, or the reference to a corporate entity unknown to the Defendants (and the Claimant) in the language of the communication between the parties and/or their lawyers, is not a definitive reflection of the Claimant or the First Defendant being aware that it was dealing with an entity other than the First Defendant or the Claimant respectively. The import of the *course of conduct* between the parties overwhelmingly point to the Claimant as being reasonably entitled to

[19] See para 4.1 of the Amended Defence. But see para 6 of the witness statement of Fazard Ali.

conclude as the Claimant did, the intentions of the First Defendant from the attitude and said conduct of the First Defendant [20].

39. This court accepts that the invoices (and not the Orders) for the most part do use the name of a corporate entity that is not a party to this matter. This reflects perhaps a poor business/trading practice to allow such a lax and 'informal' process to inform and mischaracterize transactions such as this. As this court noted earlier, the overwhelming tenor of the course of conduct supports the contention that the Claimant and First Defendant remained the relevant parties to the transactions to the end. Further however, *Clockwork Construction Company*, is a name so closely allied to the First Defendant's unincorporated entity and the Second Defendant that it is not a stretch, so to speak, to conclude that it intended to refer to the First Defendant. But moreover, the First Defendant when it had the chance to outright deny the entity referred to on the invoice as being one and the same as the First or Second Defendant, failed to do so. In fact, the letters from counsel for the First Defendant, Mr. Dowlath, addressed the issues surrounding the accuracy or the receipt and/or payment of the said invoices. The court notes that both parties used language to describe each other that lend itself to multiple interpretations if one did not have the benefit of the other evidence in this matter. As noted earlier, this court finds that in any event the course of conduct between the parties during the relevant period supports the dominant contention that the business was being done between the Claimant and the First Defendant.

40. An issue remaining is: which, if not all invoices, represent items actually delivered to the First Defendant for which he can now be held liable? On this issue, the First Defendant referred to the evidence of Mr Alfonso, as to what indicators represent goods delivered, goods paid for and goods billed to a corporate entity. The Defendant's defence to the claim based on the invoices referred to in the Amended Statement of Case along with the witness statement of Mr Alfonso, is set out in para 5 and 6 of the Amended Defence and in the Defendant's written submissions under the various captions: "NON DELIVERY"; "PAID INVOICES"; "INVOICES DIRECTED TO CLOCKWORK CONSTRUCTION LTD".

41. The 11 invoices ostensibly directed to and received by 'Clockwork Construction Ltd" clearly represent a liability to the First Defendant for the reasons provided above.

[20] Ibid., See McCutcheon

42. On the issue of the invoices that are stamped 'paid', which the Claimant has attempted to address in its submissions at para 10 thereof: The invoices are: 70379 for $85,732.50; 78800 for $1805.00; 79239 for $1501.33; 79249 for $9674.00; 79613 for $6963.25 and 77736 for $10,948.00 on which the sum of *$5000.00* only, is endorsed upon it as being paid[21]. In accordance with the evidence of Mr Alfonso, common logic and human experience, the court's conclusion on this point, is in the ordinary course of things, that they were indeed paid. This would be, I think, an unassailable conclusion without more. However, the court is here to determine the issues that the parties themselves cannot resolve and present to the court for its determination by way of pleadings. The Claimant contends that the Defendant did not plead that the said invoices were paid or that the terms and conditions on the invoices referred to and further repeated in para 9 of the Claimant's *Reply* written submissions were not agreed. The First Defendant did in fact plead that the Claimant is put to strict proof of its invoices and claim. The First Defendant did also plead its denial of agreeing to the invoice terms and conditions by virtue of pleading that the invoices were directed to another entity and not the First Defendant. This court finds however, that at all times, notwithstanding the language used in the various pre action communications and documents by both parties, the First Defendant was conducting business with the Claimant.

43. The court further notes, the invoices that the First Defendant says contain the paid stamp and that the Claimant alleges are due and payable, are to be proved by the Claimant as not paid. There are express and bald pleadings by the Claimant that the said invoices were not paid. This is not sufficient having regard to the fact that the onus of proof is on the Claimant. The very documentary proof that the Claimant proffers as proof of the existence of the invoice and import of its contents, contains an endorsement that states "Paid". A reasonable inference is that the amount stated on the invoice has been paid. This court is unable to see the justification for holding otherwise. Similarly, the invoice 77736 for $10,948.00 which is endorsed with the note that $5000.00 has been paid can only be assumed paid. This is so even though the addition and subtraction of the various sums on the invoice do not always add up whatever the permutation one applies. In that confusion, it is the burden of the Claimant to make clear the ultimate import of the contents. The ordinary and reasonable interpretation of that document is that $5000.00

[21] There are some other notations on the invoice produced by the Claimant which may be relevant to this issue but are illegible and the court applies the contra proferentem rule against the Claimant.

of the total that is set out there, has been paid. These several paid invoices add up to $116,624.96 less the balance after the $5000.00 deduction endorsed on invoice #77736. [22]

44. So what then about the evidence of the said Mr. Alfonso on the issue of what was or was not delivered. Some invoices have the standard delivery ink *stamp* and others do not. The court notes however that all the invoices provide at the bottom of the page for the name of the person who delivered the items and that of the person who received it. Invoices not having the "Paid" stamp are endorsed as being received by what appears to be a signature "*A. Peters*". Another signature that appears is that of "*Ashraf Moh'd*". There is no pleading or evidence that attempt to determine or deny that either of these persons were not associated with either defendant. This I find very peculiar and tends to the diminution of the Defendant's denial of the receipt of the items. In the end however, the First Defendant did acknowledge delivery of the items, but that at best, they were delivered to the Second Defendant, albeit at the same premises from which the First Defendant had conducted the same business (of which he an Officer) both before and after the *cessation* and the first Orders of 2012, that has given rise to this action.

45. The First Defendant pleaded a limitation defence in relation to one invoice only - #70379. The point, in the first instance is mute, for this court has found that the amount on that invoice has not been proved to be due and payable.

46. If however the court were wrong on this invoice not having been proved (to be clear the court does not so find); then I say this: The First Defendant received 30 days credit from the Claimant; payment due on the disputed invoice 18/11/2011. *But for* the payment made on 21/1/2013 which extended the limitation period to 21/1/2017 pursuant to s. 12(2) of the Act, the claim would be statute barred. The Claimant's statement of account at "MA15" shows the payment being made towards that invoice on 21/01/2013 by RBC#548 $21,433.00 (cheque exhibited at "MA4").

47. The Defendant's part-payments having been made before the claim was statute barred, that part of s. 12(4) *"but a right of action, once barred by this Act, shall not be revived by any subsequent acknowledgment or payment"* does not apply in this case**.**

[22] This total is subject to correcting any mathematical error in calculating the sums on the respective invoices.

DISPOSITION

48. The Claimant traded and contracted with the First Defendant. The course of conduct establishes this relationship. The contract between the parties required payment on the orders for the goods delivered to and received by the First Defendant at Monroe Rd, Cunupia. The First Defendant has acknowledged his debt and indeed paid sums toward liquidating the debt. Implied in this acknowledgement is the acceptance of the terms and conditions of the credit facility. The Claimant is entitled to his judgment for the principal sum claimed less the sum of the "paid" invoices, together with Costs of this suit. Further, the court being satisfied that the Defendant contracted for and accepted the 2% per month interest penalty on outstanding invoice balances, the First Defendant is liable in the said interest on the outstanding balance as found by this court. There is a lack of uniformity on the date of maturity of the due date on each invoice. For that reason the court fixes the date of the demand letter – February 2014 - for the commencement of liability for the contractual interest and running until the date of Judgment[23].

CONTRACT INTEREST

49. In the event there is dispute over the application of contractual interest the following disposes of that concern. Section 25 of the Supreme Court of Judicature Act Chap 4:01 is of significance as it specifically outlines the powers of the Courts to award interest on debts and damages. Section 25 states: *"In any proceedings tried in any Court of record for 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 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,* ***but nothing in this section—***

(a) shall authorise the giving of interest upon interest;

(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 (Emphasis added)*

[23] See para 3 of the Amended Claim form and para 3 of the relief claimed at page 14 of the Amended Statement of Case.

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

50. In the case of ***Director General of Fair Trading v First National Bank plc [2001] UKHL 52*** §17-20 **[TAB 1]** the Court considered whether an interest provision within a standard credit agreement was a fair contract term, namely that interest on the amount that became payable would be charged at the contractual rate until payment, after as well as before any judgment, and that such obligation was to be independent of and not to merge with the judgment (the interest provision). Accordingly, the Court held that the interest provision was not unfair, and Lord Bingham further stated: *"The borrower's covenant to pay interest on any part of the principal loan outstanding thus survives such a judgment, and Ex p Fewings (1883) 25 Ch D 338 was wrong to lay down any contrary principle. Lord Goodhart adopted the observation of Templeman LJ in Ealing LBC v El Isaac [1980] 2 All ER 548 at 551 [1980] 1 WLR 932 at 937:* ***"I do not for myself understand how a debt payable with interest until actual repayment can be merged in a judgment debt without interest or with a different rate of interest payable thereafter."*** (Emphasis added).

51. It was also held in ***The Royal Bank of Trinidad and Tobago –v- DEF SEC Technologies Limited et al H.C.A 257 of 2002*** that: "*the contracted rate of interest …shall prevail after judgment as well and does not merge in the judgment'* but in fact continues until payment.

52. For the reasons provided above **IT IS HEREBY ORDERED THAT:**

    (i) Judgment for the Claimant against the First Defendant for the principal sum claimed[24] less the sum of the invoices found paid as calculated and set out above;

    (ii) The claim against the Second Defendant is dismissed in its entirety with no order as to Costs;

    (iii) Contractual interest of 2% per month, interest on the unpaid sums from February 2014 to the date of Judgment; and thereafter statutory interest of 5% per annum on the outstanding principal until full satisfaction.

[24] See para 0.6 (I – xvii) of the Amended Statement of Case.

(iv) Costs of this action to be paid to the Claimant by the First Defendant on the Prescribed Costs Scale.

DAVID C HARRIS

HIGH COURT JUDGE

MARCH 6TH, 2020