

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Port of Spain

Claim No.: CV2018-01101

Between

CAPIL'S AND COMPANY LIMITED

Claimant/Applicant

And

EDUCATION FACILITIES COMPANY LIMITED

Defendant/Respondent

Before the Honourable Mme. Justice Donaldson-Honeywell

Date of Delivery: 7 December 2018

Appearances

Ms Lesley-Ann Lucky-Samaroo and Ms Sasha Nath, Attorneys-at-Law for the Claimant

Mr. Ravi Heffes-Doon and Mr. Kern Saney, Attorneys-at-Law for the Defendant

RULING

A. Introduction

1. This is a ruling on an application by the Claimant for permission to file a Reply in a claim for breach of contract. The Defendant objects to the filing of the Reply on the grounds

that certain averments ought to have been included in the initial claim and not in answer to the Defence, and also that it attempts to introduce a new ground of claim.

B. Law

2. As accepted by both parties, the Reply should only deal with 'new' matters that are raised by the Defence and permission to file such a reply is at the Court's discretion. The Reply is not to be used as a 'second bite of the cherry' – See **First Citizen's Bank v Shepboys Limited CA P231 of 2011; Austin-Pinder v Massy Stores CV2016-03491; Mayfair Knitting Mills (Trinidad) Limited v McFarlane's Design Studios Limited CV2007-02865.**

C. Background

3. The relief sought in the instant claim is for the unpaid purchase price of certain goods and for storage fees for the goods which the Claimant alleges that the Defendant was unable to accept delivery of. The Defendant in its Defence denies that there was any agreement between the parties to pay storage fees. The Defendant further suggests that there were steps that the Claimant could have taken to mitigate its loss i.e. to sell or otherwise dispose of the goods.
4. The Claimant in its proposed Reply at paragraph 3 attempts to set out information upon which the agreement to pay storage fees can be inferred, stating that storage was done at the request of the Defendant. The Claimant also set out certain factors that prevented it from mitigating its loss i.e. the lack of a market for the goods that it did not sell in its usual business and that there had been part payment by the Defendant for the goods.

D. The Draft Reply

Paragraph 3(a)

5. The Defendant objects to the pleading that the goods were stored at the request of the Defendant on the grounds that it was a key fact that should have been included in the Statement of Case. Indeed, I would consider this to be a key averment that should have

been included in the original claim if it was going to be relied on. This statement in the Draft Reply is not allowed.

Paragraph 3(b)

6. The Defendant objects to the pleading by the Claimant that it does not habitually sell these types of goods in its retail business on the grounds that it is not responsive to anything in the Defence. I find, however, that the Claimant's pleading on the fact that it did not sell these types of goods in its usual course of business to be in response to the Defendant's suggestion that it should have mitigated its loss. This paragraph will be allowed.

Paragraph 3(c)

7. The Defendant states that the pleading that the Claimant was unable to dispose of the items as they were paid for in part by the Defendant is inconsistent with the Statement of Case. The Defendant cites the terms and conditions of the agreement between the parties to show that title remained with the seller until full payment and thus the Claimant was not barred from selling. However, I do not find that the pleading in relation to selling the goods is inconsistent with the terms and conditions of the agreement pleaded as the Claimant is not necessarily stating that it was barred from selling due to lack of title but possibly simply did not opt to do so because of the part payment by the Defendant. Without finding such as a fact, I would allow this paragraph to be included in the reply.

Paragraph 3(d)

8. The Defendant objects to the Claimant's pleading that it issued invoices/statements to the Defendant setting out the cost of storage on the grounds that it should have been pleaded in the Statement of Case. However, it is clear that this is simply an assertion that is backed up by the invoices annexed to the original statement of case. These invoices are dated and do go back as far as 2015. As a result, there is no prejudice to the Defendant in it being left in the reply and this pleading will be allowed.

Paragraph 3(e)

9. The Defendant objects to the Claimant's pleading that the Defendant never refused delivery because of breach of warranty as set out in the Defendant's Defence. The ground for the objection is that facts relating to an unjustified refusal of goods should have been pleaded in the statement of case. The Claimant argues that the Defendant's pleading that the goods were not accepted based on the warranty is a new fact that had never been expressed to it before. As stated in *Mayfair* at [11] citing Blackstone's, a reply "*exists solely for the purpose of dealing disjunctively with matters which could not properly have been dealt with in the particulars of claim, but which require a response once they have been raised in the defence*". As the Claimant would not have been aware of this defence at the time of filing its claim, I find that it could not have been dealt with in the particulars of claim. Further, I find that this pleading by the Claimant in the Draft Reply is a direct response to a defence raised by the Defendant. Therefore, it will be allowed.

Paragraph 3(f)

10. The Defendant objects to the proposed pleading that the Defendant refused delivery for the express reason that it was not ready to accept same. The grounds for this objection is that this is a material part of the case that should have been pleaded. Indeed, this is a material fact that should have been indicated in the initial claim given the fact that the Claimant is relying on an alleged agreement to pay storage fees. The reason for requiring same should have been outlined in the initial claim. Although the Claimant may have been unaware that this defence would be raised, this is a crucial point to be made in relation to its own claim and therefore should have been included. This paragraph will therefore not be allowed.

Paragraph 3(g)

11. The Defendant objects to the inclusion in the reply of the averment that the only available market for the goods would be the Government. The grounds for the objection is that it is an attempt to raise a new ground of claim under **Section 50 of the Sale of Goods Act, Chapter 82:50**. However, it appears that the Claimant is responding again to the suggestion that it should have mitigated its losses, relying on the said Act to show the requirements to be followed where such issues of non-acceptance arise. This paragraph therefore will be allowed.

Paragraph 4

12. The Defendant objects to the Claimant's introduction of a new claim under S.50 of the **Sale of Goods Act, Chap. 82:50** on the grounds that it is not responsive to anything in the Defence but merely a belated attempt to introduce a new ground of claim. This section provides circumstances under which a seller can claim damages for non-acceptance:

"50. (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

[Emphasis Added]

13. A Claimant should not introduce new claims or new causes of action in a reply and if he wishes to do so, he should instead amend his particulars of claim – **Continental Corporation v North Plant LPG Cooperative Society Limited CV2015-02802**. However, in this instance, as previously stated the Claimant is seeking to address the Defence of lack of mitigation by reference to the Act. As that was a new issue raised the pleading is allowed.

Paragraph 5 & 6

14. The Defendant objects to these paragraphs on the basis that they amount to a restatement of the claim. However, due to the apparent conflation of the interest and the balance due by the Defendant in the defence, the Claimant alleges that it was necessary to clarify its case in response. Indeed, it does assist in crystallisation of the issues before this court. These paragraphs will be allowed.

D. Decision

15. (i) The Claimant is permitted to file a Reply on or before December 11, 2018
(ii) The Reply must be in terms of the Draft attached to this application save that paragraphs 3(a) and 3(f) of the Draft must not be included.
(iii) Costs in the Cause.

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Eleanor Joye Donaldson-Honeywell

Judge

Assisted by: Christie Borely JRC I