THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2016-03938

BETWEEN

TRANSCONTINENTAL DISTRIBUTION LIMITED **CLAIMANT**

AND

T.N. RAMNAUTH & COMPANY LIMITED **DEFENDANT**

Before the Honourable Madame Justice Margaret Y. Mohammed

Dated the 2nd March, 2018

APPEARANCES:
Ms. Theresa Hadad Attorney at law for the Claimant.
Mr. Haresh Ramnath Attorney at law for the Defendant.

JUDGMENT

1. The Claimant's claim is for the sum of $150,937.50 being monies due for the supply of a chemical ATAC-247 ("the product") to solve a slime production caused by algae at the Los Bajos Water Treatment Plant ("the Water Treatment Plant"). The Claimant's contention was that the cost of large scale testing of the product would be borne by the Defendant there being two set of promising bench tests before. The Claimant delivered 5 totes of the product and the Defendant paid one half of the cost.

2. The Claimant contends that before it supplied the product for large scale testing, it received a request from the Defendant to issue a quotation for 5 totes of the product to the Defendant on the 11th September 2013. The Claimant issued the quotation on the same day. The Claimant received a further request from the Defendant and on the 7th October 2013 the Claimant issued a quotation to the Defendant for 32 totes of the product. The terms provided that 50% of payment shall be made in advance of delivery and the remaining 50% to be paid 14 days after receipt of the product. On the 21st October 2013, the Defendant agreed to purchase a smaller quantity of the product in order to carry out the larger scale testing required to determine the performance and suitability of the product. The Defendant purchased 5 totes of the product. The invoice specifically provided that payment of 50% of the balance was due within 14 days of receipt.

3. The Claimant's case is that the Defendant took delivery of the product but failed to make payment to it in the sum of $150,937.50 in accordance with the Agreement concluded between the Claimant and the Defendant, the terms of which are contained in Purchase Order dated the 22nd October 2013 ("the Purchase Order") and the Invoice dated the 29th November 2013 ("the Invoice").

4. The Defendant has denied liability and called upon the Claimant to collect the unused totes of the product and to refund the Defendant the monies it paid. The Defendant admitted that it purchased the 5 totes of the product for the large scale testing. It also admitted that the terms of the Agreement for the purchase was that it would pay a deposit of 50% and that it would pay the balance 14 days after the receipt of the product.

5. The Defendant admitted that it has not paid the balance due to the Claimant since the Defendant's case is that the large scale use of the product failed even at a usage of three times the recommended dosage and that it was an essential term of the Agreement between the parties that the Claimant's product would be able to suitably deal with the algal slime production and it did not. The Defendant averred that the Claimant guaranteed that the product would be successful for the purpose for which it was used. As a result of that misrepresentation, the Agreement between the Claimant and the Defendant was frustrated

and the Defendant stopped using the product after utilizing three quarters of 1 tote of the product. The Defendant counterclaims for the sum of $150,937.50 and interest.

6. In response to the Defendant's counterclaim, the Claimant denied providing any guarantee to the Defendant that the product would successfully eliminate the algal slime problem. The Claimant also denied breaching or frustrating the Agreement.

7. The Claimant averred that the Defendant has not disclosed any grounds for defending the claim brought against it and that it did not misrepresent the ability of the product to perform as desired by the Defendant. The Claimant maintained that the supply of the product was for testing of the suitability of the product for further use on a large scale.

8. It was not in dispute from the pleadings that:

   (i) The Agreement between the Claimant and Defendant was for the purchase of the 5 totes of the product.
   (ii) The product was purchased for larger scale testing.
   (iii) Based on the Purchase Order and the Invoice the terms and conditions of payment was 50% payment upon delivery and the balance 14 days after receipt.
   (iv) The product was delivered by the Claimant to the Defendant which did not pay the balance.

9. Based on the undisputed facts the Claimant's claim is made out on the pleadings. However there were three issues which arose from the Defence namely:

   (a) Did the Claimant misrepresent to the Defendant that the product would deal with the algae slime problem and was the Defendant induced by the misrepresentation to enter into the Agreement?
   (b) If yes to (a) did the Defendant still accept the product?
   (c) Was the Agreement frustrated?

10. At the trial the Claimant called one witness Mr Chandrabhan Tony Bissoondialsingh who is a director and shareholder of the Claimant and the Defendant's witness was Mr. Isaac Jurawan who is a Project Manager employed by the Defendant.

Did the Claimant misrepresent to the Defendant that the product would deal with the algae slime problem and was the Defendant induced by the misrepresentation to enter into the Agreement?

11. It was submitted on behalf of the Claimant that the product was purchased for large scale testing and that the very nature of testing entails a possibility that the product may or may not have worked and the Defendant accepted this risk when it entered into the Agreement. It was also argued that the Technical Document which the Claimant provided the Defendant in an e-mail dated 11th September 2013 cannot be interpreted as a guarantee or a warranty as to the performance of the product and the Defendant is unable to prove that it relied on and was induced by the Technical Document to enter into the Agreement.

12. Counsel for the Defendant argued that the product was purchased for large scale testing (the plant test) to determine the dosage of the product which would be required to destroy the algae and not to determine whether the product would have been successful. It was submitted on behalf of the Defendant that the Technical Document supported its case that the large scale testing was to determine the dosage and not to determine if it would work. It was also submitted that it was an essential term of the Agreement between the parties that the product would be able to suitably deal with the algae production but it failed.

13. The onus is on the Defendant to prove that the Claimant represented to it that the product would deal with the algae slime problem at the Water Treatment Plant and that this representation operated in its mind when it entered into the Agreement.

14. **Chitty on Contracts**[1] describes a false statement of fact as:

> "A misrepresentation must be a false statement of facts, past or present, as distinct from a statement of opinion, or the intention or mere commendatory statements. Mere "puff" do not amount to representations."

[1] Volume 1, 30th Ed para 6-006

15. **Chitty** goes on to state at paragraph 6-007 that:

> "However, in certain circumstances a statement of opinion or of intention may be regarded as a statement of fact, and therefore as a ground for avoiding a contract if the statement is false. Thus, if it can be proved that the person who expressed the opinion did not hold it, or could not, as a reasonable man having his knowledge of the facts, honestly have held it, the statement may be regarded as a statement of fact[2]".

16. Section 16(3) of the **Sale of Goods Act**[3] states that where a seller sells goods in the course of a business and the buyer expressly or by implication makes known to the seller any particular purpose for which the goods are being brought there is an implied condition that the goods supplied are reasonably fit for that purpose.

17. What was the purpose for the Defendant purchasing the 5 totes of the product? According to the evidence Mr. Bissoondialsingh there were 2 promising bench test of the product. Mr Bissondialsingh attached a contemporaneous document as "CB2" to his witness statement which was an email dated the 11th July 2013 where he stated that the testing of 100 gals at 200 parts per million (ppm) and 500 ppm were underway and after 24 hours there was no slime found. He also attached as "CB 5" which was another email confirmed this position.

18. Subsequent to the bench testing the Defendant was not willing to sign a Memorandum of Understanding ("the MOU") until it was proven that the product was successful. Mr Bissoondialsingh further testified that on the 11th day of September, 2013 the Claimant prepared and supplied the Technical Document which detailed the technical chemistry and capabilities of the product and subsequently he provided the quotations for the totes. He attached as CB 7 an email dated 11th September, 2013 from him to Mr Jurawan where he provided a quote for the product a metering pump. He also stated in the email the 200 ppm treatment level there was a 52 hour slime free period and that he anticipated that after full scale testing the treatment level will be significantly lower than 200ppm.

[2] Connolly Limited v Bellway Homes Limited [2007]EWCH 895
[3] Chapter 82:30

19. On the 7th October, 2013 Mr Bissoondialsingh said he issued another quotation to the Defendant for 32 totes of the product in response to a request from the Defendant. He attached a copy of the quotation to his witness statement as "CB 9". Mr Bissondialsingh said that he also informed Mr. Jurawan that it was not advisable to order such a large quantity of the product since it still had to be full scale tested. However Mr Jurawan insisted on the issuance of the quotation and requested payment terms of 50% up front with the balance to be paid 14 days after receipt.

20. Subsequent to the quotation issued in early October 2013 Mr Bissoondialsingh stated that he visited Trinidad in October 2013 and met with Mr. Jurawan and Mr. Ramnauth of the Defendant on the 21st October, 2013. He again advised them not to order 32 totes of the product since full scale testing was required to determine performance and suitability. He also told them that it would be better to pay for a small number of totes and determine whether the product worked to solve their problem. Mr. Jurawan then said that the Defendant would order 5 totes of the product for testing. According to Mr Bissoondialsingh he told Mr Jurawan that the Defendant would have to pay for all 5 totes up front and Mr Jurawan asked him for the payment terms which he had negotiated in respect of the 32 totes of the product. According to Mr Bissoondialsingh he reluctantly agreed and the Defendant issued the Purchase Order for 5 totes and payment for 50% of the 5 totes. He attached as "CB 10" to his witness statement a copy of the Invoice.

21. Mr Bissoondialsingh stated that the large scale testing was carried out by the Defendant and he was informed by their representatives that it was not successful but he was not given any additional specifics. He attached as CB 11 to his witness statement an email dated the 5th November 2013 from Mr Jurawan with an attachment called a Method of Statement. In the said statement the objectives of the plant test was to verify no slime accumulation on the Strainers as experienced without chemical treatment; no kill of bio-culture after 4 hours contact time and optimum dosage concentration.

22. Mr Bissoondialsingh's evidence was unshaken in cross-examination. He confirmed that the Defendant was looking for a product to deal with the algal slime at the Water Treatment

Plant and that there were two bench tests with positive results prior to the Agreement. He accepted that the Defendant did not sign the MOU since the Defendant wanted proof that the product was successful. He accepted that before he supplied the product he sent a quote for 4 totes and the Technical Document. However, he said that the Technical Document was unrelated to the quote and that it was not a guarantee that the product would work. He was shown the Technical Document and he was asked if the product could have done the 6 things listed in the fifth paragraph namely:

> " -exhibit adequate algal control (min 48hrs)
> -degrade rapidly with a low half-life
> -have no physical or chemical effect on the water separation/treatment process
> -have minimal or no effect on bacteria growth at the Bioreactor stage
> -exhibit minimal aquatic toxicity
> -eventually degrade to environmentally benign components."

23. He stated that the product could have solved the algal slime problem but that there were other factors which he listed in the last paragraph of page 2 namely *"numerous variations should be investigated with respect to the current levels of flocculants and coagulants being added. Once the minimum satisfactory treat rate for ATAC-247 is established it will be necessary to prove that there is minimal/no effect on the bacteria colony at the Bioreactor stage."*

24. Mr Bissondialsingh stated that the Defendant was aware of all the variables which could affect the outcome of the large scale testing. He also stated in cross-examination that 5 totes of the product was ordered by the Defendant to see if it worked and not if it worked at 200 ppm. He was told that it did not work and that the Defendant had used three quarters of 1 tote. He was not given any information on the conditions or test parameters used for the large scale testing.

25. I found Mr Bissondialsingh to be a witness of truth since his evidence in cross-examination was consistent with his witness statement and his pleadings. His evidence was also supported by the several contemporaneous documents which he annexed to his witness statement which was not disputed by the Defendant.

26. According to Mr Jurawan's witness statement in the bench testing which was commenced in May, 2013 the product had shown on visual inspection to produce no slime at a dosage of 200ppm while showing no bacteria kill after four hours residence time. He said that the Technical Document was sent together with an e-mail which he attached to his witness statement as "A". This is also the same document attached to the witness statement of Mr Bissoondialsingh as "CB 8".

27. According to Mr Jurawan when the Defendant purchased the 5 totes the Claimant, its servants and/or agents warranted and/or represented and/or guaranteed that its product would be successful for the purpose for which it was used at or about dosages of 200 ppm. The plant test was done to determine what dosage of the product would be required, not to determine whether the product would have been successful. He said that from Wednesday the 4th day of December, 2013 to Wednesday the 11th day of December, 2013 the product was used in the large scale testing, and even at 600 ppm being three times the indicated dosage during Jar Testing it failed. Therefore the large-scale use or plant test of the product was unsuccessful for the purpose it was purchased.

28. In cross-examination Mr Jurawan agreed that he received a quote from the Claimant on the 7th October 2013 for 32 totes and that later in October 2013 he met with Mr Bissoondialsingh. He accepted that the Defendant issued a purchase order for 5 totes. However he said that the condition for the purchase was that it was fit for the purpose the Defendant wanted it for which was for a plant test. This was in stark contrast to paragraph 7 of his witness statement that the Defendant purchased the 5 totes of the product to determine the dosage of the product. In my view, this material inconsistency undermined the credibility of the Defendant's case that the Claimant represented to it that the product would have dealt with the algae slime problem and the purpose of the test was to determine the dosage. In my view, Mr Jurawan's admission in cross-examination was consistent with the Claimant's case that the 5 totes of the product was purchased by the Defendant to do the large scale testing.

29. Mr Jurawan in cross-examination admitted that he recalled seeing the email (CB 11) dated 5th November 2013 to Mr Peters, Kevin Conroy and Shyam Dial. This was an email which Mr Jurawan had sent. He accepted that the second paragraph in the email stated that:

> "If Test is successful, further Order will allow its use for the final commissioning of the Plant in early January 2014. A detail Schedule and arrivals of Golder & Hoffland personnel will be developed for the seeding of ICBs and subsequent commissioning in January 2014."

30. Counsel for the Claimant put to Mr Jurawan that based on the email dated 5th November 2013 the large scale testing could go either way. Mr Jurawan did not accept this but instead stated that they were given certain expectations. Later he accepted that the reasons for the large scale testing was because the results could have gone either way. In my opinion even if there were oral expectations which I do not accept, the email is clear that no such expectations were given.

31. In my opinion when the Defendant purchased the 5 totes the purpose was to conduct the plant test to determine suitability of the product on a large scale and not to determine the dosage. Further before the Defendant purchased the 5 totes for the large scale plant test the Claimant did not represent to the Defendant that the product would deal with the algae slime problems and as such the Defendant was not induced any such representation in entering the agreement. I have arrived at this conclusion for the following reasons.

32. Firstly, it was clear from the emails that the Claimant was always informing the Defendant of the results of the bench tests at the different dosage. There was nothing in the e-mails which conveyed to the Defendant the product would deal with the algae slime problem. In my opinion the consistent position from the Claimant was that after the results of the positive bench test at different dosages large scale testing was required to determine success in use of the product and this was one of the reasons for the detailed guidelines set out in CB11. Further, the Defendant knew from the bench testing the results from the use of different dosages which produced the positive results was 200 ppm and 400 ppm. Further it also knew that the Technical Document which it sought to rely on stated at page 2 that a 100 gallon test with a treatment rate of 200ppm of the product on the 9th July 2013 resulted

in the delay of slime formation by 58 hours and that a 100 gallon test with a treatment rate of 400 ppm of the product on the 16th July 2013 showed no appearance of slime for well over 7 days (168hrs); indicating that slime production may have been completely eradicated and that tests were slated for investigation at 250ppm and 300ppm in July 2013. In essence it stated the results of different dosages in the bench testing.

33. Secondly, there was nothing in the Technical Document which could have been interpreted as guaranteeing that the product was suitable to deal with the algae slime problem.

34. Thirdly, the Defendant did not place any evidence before the Court to demonstrate that the Claimant represented that a different dosage would have produced a positive result as shown in the bench tests.

35. Fourthly, the Defendant has not disputed that at the meeting on the 21st October 2013 when Mr Bissoondialsingh met with Mr Jurawan and Mr Ramnauth he told them not to order 32 totes of the product since full scale testing was required to determine performance and suitability and that it would be better to pay for a small number of totes to determine whether the product worked to solve their problem. In my view the only plausible reason the Defendant purchased the 5 totes was because it was fully aware that the large scale testing was to determine performance and suitability and not dosage. If it had thought otherwise it would have gone ahead and purchase the 32 totes if dosage was the only issue.

If yes, did the Defendant accept the product?

36. Section 13 (3) of the **Sale of Goods Act** provides that in circumstances where a buyer has accepted the goods, the breach of a condition by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods unless there is a term of the contract to that effect.

37. Section 36 of the **Sale of Goods Act** provides that a buyer is deemed to have accepted the goods when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he rejected them.

38. According to Mr Bissondialsingh, Mr. Jurawan of the Defendant approved the payment of the balance due to the Claimant on the 16th December, 2013. He attached as "CB 12" to his witness statement a copy of the Invoice electronically stamped with the approval. He also attached as "CB13" copies of emails exchanged between Mr Jurawan and Mr Ramnuath where Mr. Ramnauth objected to the payment of the balance of the purchase price for the 5 totes. The contents of Mr Ramnauth's email is instructive in demonstrating the state of mind of Mr Ramnauth in December 2013. It stated:

> "I am not sure if this is an approval to pay the final amount to Tony but since this chemical did not work, as all had expected I thought you would have engaged into some sort of compromise about the pending balance. I think we should not pay for anymore than we have already until some meeting is called to clarify same. TN"

39. In my opinion, the email which has not been disputed by the Defendant clearly demonstrates that Mr Jurawan had the authority to approve payment which Mr Ramnauth was aware of.

40. In cross-examination Mr Bissoondialsingh stated that he did not recall that part of the Agreement was that any of the unused product was required to be returned. He received half of the fee in the sum of $150,937.00 and that he was unaware that the Defendant's protocol was that Mr Ramnauth himself had to approve the payment of the balance since he had always dealt with Mr Jurawan.

41. According to Mr Jurawan the payment of the balance had to be approved by Mr. T.N. Ramnauth and that such an approval was made in mistake. He also stated that the Claimant was specifically instructed to collect the unused portion of the product since the Defendant has no use for the chemical.

42. In cross-examination Counsel for the Claimant put exhibit CB 12 of the Claimant's witness statement (the Invoice) to Mr Jurawan. He was asked if it said that all sales were final. He responded that he did not see his signature and he could not recall if he signed it. Yet later he did not deny that "OK the payment of the balance" was stated at the end of the invoice.

According to Mr Jurawan the Managing Director Mr Ramnauth objected to payment after he approved it since he was unhappy and he was unwilling to accept his approval. Mr Jurawan accepted that although he is in a managerial position he could not approve payment. Yet he was unable to account for the failure by the Defendant to call another officer of the Defendant to indicate who could approve the payment of the balance. Later Mr Jurawan stated that he approved the Purchase Order but he could not approve the balance.

43. In my opinion, Mr Jurawan's evidence was not credible since it was clear that he had the authority to contract with the Claimant on behalf of the Defendant. In my view, he knew that he had the authority to approve payment and this was the reason he was evasive in his responses to Counsel for the Claimant. In any event, the Defendant failed to call Mr Ramnauth as a witness who met with Mr Bissoondialsingh in October 2013 and who refused to authorize the payment. In my opinion, Mr Ramnauth is an important witness for the Defendant to state the reason for not paying the balance. In my opinion, the Defendant did not call him as a witness since it would have been detrimental to the Defendant.

44. In any event even if the Defendant was of the view that the product was not fit for its purpose it accepted the product since it did not indicate to the Claimant its intention to reject or return the product prior to the letter dated 19th January 2016 from its Attorney at law in response to the Claimant's pre-action protocol letter. It allowed nearly 2 years to pass after it used the product to reject the product. Indeed Mr Jurawan's admission in cross-examination that he approved the balance of the payment to the Claimant was evidence of the Defendant's acceptance of the product.

Was the Agreement frustrated?

45. It was submitted on behalf of the Claimant that the Defendant's plea that the Agreement was frustrated is in conflict with its other defences and the Defendant has not pleaded any factual event which is capable of being considered to have frustrated the Agreement and even if the Court is minded to hold that the Defendant did prove such a fact, then it is

submitted that frustration does not entitle the Defendant to a refund of the portion of the purchase price paid.

46. Counsel for the Defendant argued that it was an essential term of the Agreement that the product would have been able to suitably deal with the algae production but it failed and the breach of this fundamental term entitled the Defendant the innocent party to rescind the Agreement.

47. In **Anand Beharrylal v Dhanraj Soodeen and Anor**[4] Rahim J set out the relevant principles on the doctrine of frustration which I respectfully adopt. At paragraphs 24 to 26 he stated:

> "24. Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract: ***Davis Contractors Ltd v Fareham UDC [1956] AC 696 at 729 per Lord Radcliffe***.
>
> 25. Frustration of a contract does not merely suspend parties' obligations, but discharges the partiers from the obligation to per their contractual duties: ***Common Law Series: The Law of Contract, Chapter 7 para. 7.65.***
>
> 26. An event relied upon as frustrating the contract is 'something which happens in the world of fact': ***Denny Mott & Dickson Ltd v James B Fraser &Co Ltd [1944] AC 265 at 276."***

48. According to Mr Bissoondialsingh's witness statement the large scale testing was carried out by the Defendant and he was informed by their representatives that it was not successful but he was not given any additional specifics. In cross-examination Mr Bissondialsingh said that he was told that it did not work and that the Defendant had used three quarters of one tote. He was not given any information on the conditions or test parameters used for the large scale testing.

[4] CV2011-04453

49. Mr Jurawan stated in his witness statement that the Agreement was frustrated since the product did not work and that the Claimant knew or ought to have known that it was not entitled to the balance as its product had failed in breach of its warranty, representation or guarantee to produce the desired result. He repeatedly stated that the Agreement was frustrated but notably he did not state how.

50. In cross-examination, Mr Jurawan also accepted that the third paragraph of the email dated 5th November 2013 ("CB 11") reference is made to progress reports to stakeholders. He recalled that they were sent but he did not bring them with him. It was put to Mr Jurawan by Counsel for the Claimant that the only documents he attached to his witness statement were an email dated the 13th September 2012 from Mr Bissondialsingh to him and the Technical Document to which he agreed. Mr Jurawan was asked where were the test results for the large scale testing. He responded by stating that he could not say where they were. He said that field persons employed by the Defendant conducted the tests and that although he was not present all the time he went to progress meetings. However, he could not say if the progress reports were provided to the Claimant. Yet he admitted that no progress reports were annexed to the Defence. Astonishingly Mr Jurawan stated that the progress reports for December 2013 were produced but they are at the Water Treatment Plant. He also accepted that the field persons who did the tests did not file any witness statements on behalf of the Defendant in this matter. In my opinion, Mr Jurawan's evidence was not credible since his responses demonstrated that he was making up evidence as the case went along.

51. I have concluded that the Agreement was not frustrated since there was no evidence to support such a finding. Further, it was the Defendant's case that it did not pay the balance of the purchase price for the product since the Agreement was frustrated because the product did not produce the results which the Claimant had warranted or represented that it would do. Even if this was so, which I do not accept, in the absence of providing the progress reports to the Court to demonstrate that the Defendant conducted the field tests within the parameters of the technical specifications and the test failed the Defendant provided no evidence to support this claim.

ORDER

52. Judgment for the Claimant.

53. The Defendant's Counterclaim is dismissed.

54. The Defendant to pay to the Claimant the sum of $150,937.50 being monies due and owing to the Claimant for the supply of good to the Defendant.

55. The Defendant to pay the Claimant interest on the aforesaid sum at the rate of 2.5% per annum from the 13th December 2013 to judgment.

56. The Defendant to pay the Claimant's costs in the sum of $ 68,054.64.

Margaret Y Mohammed
Judge