THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No CV2015-03969

BETWEEN

ROHIT SEEKUMAR

(Trading as "Copying Express")

Claimant

AND

McENEARNEY BUSINESS MACHINES LIMITED

Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Appearances:

Mr. Kingsley Walesby for the Claimant

Mr. Ravi Heffes-Doon instructed by Mr. Andre Rudder for the Defendant

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DECISION ON CONTENTS OF REPLY

I. BACKGROUND:

[1] The Claimant, a commercial photocopying business entered into Maintenance Agreements with the Defendant, a company that supplies machines, parts and maintenance services, sometime in 2006. These Maintenance Agreements were with

respect to several of the Claimant's used photocopying machines and required that the Defendant provide maintenance services periodically.

[2] The expressed and implied terms of these Maintenance Agreements are central to this claim and are largely in dispute, save that it was agreed (i) that the Defendant was responsible for conducting preventative maintenance on the machines so as to keep them in good working condition; (ii) that upon request, the Defendant would take possession of the used machines to effect the necessary maintenance services; and (iii) that, on certain conditions, while a machine was in the Defendant's possession, a "loaner machine" would be supplied to the Claimant in the interim.

[3] In 2007, the Claimant alleged that it operated 5 used photocopying machines that began to break down and the Defendant failed to fulfil its contractual obligations to repair same. This failure has resulted in loss of customers and goodwill to the Claimant.

[4] Sometime thereafter, the Claimant entered into an oral agreement to purchase 4 new photocopying machines from the Defendant, the terms of which are also contested. These new machines malfunctioned and the Claimant similarly alleged that the Defendant's inability to repair them has caused loss. In an attempt to resume its business efficiency, the Claimant was forced to purchase 5 new machines from another company.

[5] The Defendant, in its denial of liability for the claim, has contested several facts in its defence that all relate to (i) the terms and expiry dates of the Maintenance Agreements; (ii) the product life span of the used and new machines; and (iii) the existence and terms of the alleged oral agreement for the purchase of the new machines.

[6] In light of this and having considered the Defence as filed, the Claimant, at the first Case Management Conference of the 7th November, 2016, expressed the desire to file a Reply whereupon the Court made the following order:

> **1. Proposed application for permission to file a Reply to the Defendant's to be filed and served with draft Reply annexed on or before 18th November, 2016.**

2. **The Court shall attempt to deal with such application without a hearing after consultation with attorney-at-law for the Defendant.**

3. **In the event that there is objection to the draft Reply by the Defendant's attorney, then the said application will be heard on 16th December, 2016 at 10:30am for 15 minutes in courtroom SF10.**

4. **The CMC is adjourned to the 16th December, 2016 at 10:30am in SF10.**

[7] Upon filing of the Notice of Application pursuant to **Part 10.10 of the CPR** (the "Claimant's Application") seeking leave to file the proposed Reply, and upon consultation with the Defendant's attorney, the Defendant intimated its intention to object to several paragraphs of the draft Reply. Thus the said application was to be heard at the next CMC.

[8] On the 16th December, 2016 the Defendant's attorney was unable to attend Court and so the CMC was adjourned to the 10th February, 2017 at which hearing the Court ordered that written submissions be filed by both parties on the issue of whether the Court should grant leave for the Claimant's Application.

[9] Having considered the written submissions of both parties, the Court must now give its decision on the Claimant's Application.

II. LAW:

[10] The legal principles with respect to the granting of the Claimant's Application are straightforward and not disputed between the parties— a Reply can only be filed in response to matters raised in the Defence, which were not and should not have been dealt in the Statement of Case. Accordingly, a Reply must neither restate the claim nor is it to be drafted as a defence to a defence: **First Citizen's Bank v Shepboys**

Limited[1]; **Mayfair Knitting (Trinidad) Ltd v McFarlane's Design Studio Ltd**[2]; and **Raymatie Mungroo v Andy Seerattan and Ors**[3].

[11] The draft Reply as attached to the Claimant's Application contains 51 paragraphs, 27 of which are objected to by the Defendant. **The Claimant has conceded to the striking out of 13 of those 51 paragraphs, namely paragraphs 7, 9 (lines six to sixteen only, beginning with the sentence "It is further averred" to the end of the paragraph), 13, 26, 29, 30, 31, 37, 39, 43, 46, 48 and 49. These paragraphs shall therefore be struck out from the draft Reply.**

[12] The Defendant further objects to 15 of the remaining 38 paragraphs as follows: **paragraphs 10, 11 (a) – (e), 12, 14 (a) – (c), 15, 16 & 17, the ninth line of 28, 32 - 34, second sentence onwards of 37, 38, 45 and 47**.

III. ANALYSIS:

[13] **Paragraph 10 of the Reply** is stated as being in response to paragraph 11 of the Defence, which essentially averred that the Defendant agreed that it contracted to provide a loaner machine to the Claimant while a used machine was in its possession, but not for circumstances where the said used machine required major repairs or reconditioning.

The Claimant in his Reply is effectively denying this averment by stating that the Defendant had agreed that the used machines in its possession did not require major reconditioning and in support, relied on letters dated the 4th October, 2010 and the 10th October, 2011.

The Court agrees that the issue with respect to the nature of the repairs required on the used machines is a new issue that was raised in the Defence and which warranted a Reply.

[1] Civ. App. P 231 of 2011
[2] CV2007-002865
[3] CV 2013-04801

However, the Court notes that the letters attached to paragraph 10 of the Reply have already been attached to paragraph 16 of the Amended Statement of Case and accordingly, is repetitive.

Further, as these letters are the evidence in support of the averment in paragraph 10 of the Reply, the entire paragraph is repetitive. A perusal of paragraph 16 of the Amended Statement of Case and the attached letters suffices to deal with the facts raised at paragraph 11 of the Defence.

Accordingly, paragraph 10 should be struck out as it amounts to a restatement of the Amended Statement of Case.

[14] **Paragraph 11 of the Reply and its sub-paragraphs** are in response to paragraph 12 of the Defence, which states that the Claimant's 5 used machines were near the end of their product lifespan when the Defendant began servicing them.

The issue raised here, that concerns the product lifespan of the used machines, is indeed a new issue raised in the Defence that warrants a Reply.

Paragraph 11 of the Reply attempts to deny this allegation of the Defence by comparing it to other machines that had been previously purchased by the Claimant and whose life span was for 16 years and therefore, not coming to an end.

Attorney for the Defendant submitted that these "other machines" are not part of the claim and are therefore irrelevant. The 5 used machines material to the claim, as described by the Claimant at paragraph 4 of the Amended Statement of Case, are Canon IR 330, 330, 400E, 400S & 400S.

While the Court agrees that these "other machines" were not part of the claim, they are pleaded to make a point of comparison on the issue of the product life span of the used machines.

Accordingly, for the purposes of challenging the purported expiry of the product life span of the used machines, paragraph 11 of the draft Reply is permissible.

[15] **Paragraph 12** is in response to the 13th paragraph of the Defence, which pleads that the Maintenance Agreements with respect to the 5 used machines expired in November 2011.

The Court finds that the issue of the expiration date of the Maintenance Agreements is indeed a new issue raised in the Defence.

The Reply attempts to deny this averment by stating that the Defendant failed to provide consideration under the Maintenance Agreement for the 21-month period prior to the expiration date when 2 of the used machines remained in the Defendant's possession.

The Court, however, agrees with the Defendant that this has already been pleaded at paragraph 18 (e) of the Amended Statement of Case and is therefore repetitive and should be struck out.

[16] **Paragraphs 14 (a) – (c)** is in response to paragraph 15 of the Defence, where the Claimant was put to proof that the machines broke down causing loss of income and which averred that many of the parts for the machines were unavailable and therefore, the failure to repair same would not have amounted to a breach.

The new issue raised here was the averment with respect to the unavailability of parts for the used machines.

However, the Reply's response at sub-paragraph (a) has, in this Court's opinion, already been pleaded at paragraph 18 (a) and (c) of the Amended Statement of Case and should therefore be struck out.

Subparagraphs (b) & (c) are permissible.

[17] **Paragraph 15 of the Reply** denies paragraph 16 of the Defence. The Court notes that it is expressly stated in the Reply that the Claimant seeks to repeat paragraphs 21 and 22 of the Amended Statement of Case in paragraph 15, which, the said paragraph 15 effectively does and therefore, **should be struck out as being a restatement of the Statement of Case**.

[18] **<u>Paragraph 16 of the Reply</u>** denies paragraph 17 of the Defence, which states that in 2011, three of the used machines were removed from the Claimant's premises at the request of the Claimant for major repairs.

The Reply responds by stating that the machines were removed in 2009 for small repairs and relies on a letter in support.

As correctly submitted by attorney for the Defendant, this letter and the relative Reply paragraph have already been pleaded at paragraphs 9 – 13 of the Amended Statement of Case.

<u>Accordingly, paragraph 16 of the Reply ought to be struck out</u>.

[19] **<u>The 17th paragraph of the Reply</u>** states that none of the 3 machines that were removed needed major repairs and proceeds to detail the minor repairs that were, in fact, needed.

The Court finds that the issue of the nature of the repairs required on the used machines is a new issue raised by the Defence, which warrants a reply. Further the contents of paragraph 17 were not pleaded in the Amended Statement of Case nor should it have been as the Claimant would not have been aware that the Defendant would be challenging the nature of the repairs to be effected on the used machines.

<u>Paragraph 17 of the Reply is therefore permissible</u>.

[20] **<u>Paragraph 28 of the Reply</u>** denies paragraph 27(3) of the Defence, where the Defendant averred that the used machines had reached the end of their life span and needed replacement or major repairs and that the Defendant used its best efforts to repair same by using parts from 2 of the 5 used machines.

The new issues raised here relate to the product life span of the used machines and the nature of the repairs needed.

The objected part of the Reply under this paragraph is from the 9th line onwards. It attempts to rebut the Defence by averring that other machines purchased by the Claimant prior to the used machines had a lifespan of 16 years.

While this is a permissible reply, these facts have already been permitted at paragraph 11 of the Reply.

<u>Accordingly, lines 9 – 14 of paragraph 28 beginning with the sentence "It is further averred" to the end of the paragraph are repetitive and should therefore be struck out</u>.

[21] **<u>Paragraph 32 of the Reply</u>** seeks to deny paragraph 31 of the Defence, which puts the Claimant to proof of the damage to the GPR 15/16 drum and further averred that its policy is to give credit value for any item damaged by one of the Defendant's technicians.

The issue of the damaged drum is *not* a new issue raised in the Defence. However, the issue of the Defendant's alleged policy is.

At paragraph 32 of the Reply, the Claimant seeks to rebut the Defence by stating that the Maintenance Manager of the Defendant was aware of the damaged drum. This is, therefore, not a response to the new issue but rather an averment in support of the allegation that the drum was indeed damaged.

Having already pleaded the damaged drum at paragraph 26 of the Amended Statement of Case, this averment with respect to the Maintenance Manager of the Defendant should likewise have been pleaded at that point.

<u>Accordingly, paragraph 32 of the Reply will be struck out</u>.

[22] **<u>Paragraph 33</u>** and the **<u>second sentence of paragraph 34</u>** of the Reply concern the product lifespan of the used machines and have already been dealt with in paragraph 11 of the draft Reply.

<u>Accordingly, paragraph 33 and the second sentence of paragraph 34 will be struck out</u>.

[23] **<u>Paragraph 38</u>** of the Reply seeks to deny paragraph 38 of the Defence, which stated that the Claimant made 2 requests for the repair of one of the new machines, which had reached the end of its product life span and, further alleged that upon each request, the machine was repaired within 3 – 4 days.

The Court does *not* find this to be a new issue raised by the Defence. This issue of the failure to repair the machine in a timely manner and the resulting breach of the oral contract had already been raised by the Claimant at paragraph 29 of the Amended Statement of Case.

Accordingly, paragraph 38 response, by stating that the Defendant failed to conduct repair works on the machine as claimed is repetitive and ought to be struck out.

[24] **Paragraph 45 of the Reply** is in response to paragraph 43 of the Defence, which stated that the Maintenance Agreement for machine 5300 expired in February, 2014 and therefore, the Defendant had no obligation to repair same.

The expiry date of the Maintenance Agreement for machine 5300 is indeed a new issue raised by the Defendant.

The Claimant wishes to Reply by stating that the Maintenance Agreement was ongoing as the Defendant never issued a formal discontinuation letter to the Claimant pursuant to the Agreement.

Counsel for the Defendant submitted that, at paragraph 21 of the Amended Statement of Case, the Claimant pleaded that the Maintenance Agreement with respect to machine 5300 commenced in 2007 and ran for a period of 5 years or until the machine printed 5 million copies, and therefore, the Claimant has effectively agreed that the Agreement would have ended in 2012. Mr. Heffes-Doon contended that the Reply is therefore contradictory and impermissible.

While the Court may not be convinced that this amounts to a contradiction, especially when considering that paragraph 21 of the Amended Statement of Case says that the Agreement ran for either 5 years or until 5 million copies, it is nevertheless repetitive. The Court is of the opinion that the Claimant has already responded to the issue of the expiry date of the Maintenance Agreement with respect to machine 5300 by way of paragraph 21 of the Amended Statement of Case.

Accordingly, paragraph 45 is repetitive and unnecessary and should be struck out.

[25] **<u>Paragraph 47 of the Reply</u>** denies paragraph 45 of the Defence and states expressly that it repeats paragraph 24 of the Statement of a Case.

It is therefore repetitive and should not be allowed in the Reply.

IV. <u>DISPOSITION</u>:

[22] Having considered the pleadings, the draft Reply and the submissions of both parties, the Court orders as follows:

<u>ORDER</u>:

I Paragraphs 10, 12, 14(a), 15, 16, 28, 32, 33, 34 (second sentence beginning with "It is averred that the older" to "in excess of 2 million copies"), 38, 45 & 47 of the draft Reply be and are hereby struck out.

II By concession of the Claimant, paragraphs 7, 9 (lines six to sixteen only, beginning with the sentence "It is further averred" to the end of the paragraph), 13, 26, 29, 30, 31, 37, 39, 43, 46, 48 and 49 be and are hereby struck out.

III Permission is hereby granted to the Claimant to file and serve a Reply to the Defendant's Defence on or before the 22nd May, 2017 in terms of the draft Reply attached to Notice of Application filed on 18th November, 2016 excluding the paragraphs or part thereof to be struck out as ordered in clauses I and II of this order.

Dated this 8th day of May, 2017

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Robin N. Mohammed
Judge