THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2016-00070

BETWEEN

CARVER MORRIS

First Claimant

LISA MORRIS

(Formerly Lisa Parmassar)

Second Claimant

AND

AZEE SHIPPING AND TRADING COMPANY LTD

Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. G. Raphael instructed by Ms. D. Marcano for the Claimants

Mr. G. Simonette instructed by Ms. S. Vailloo for the Defendant

Judgment

1. This is a claim for breach of contract arising out of a contract for the shipment of goods. The claimants, a husband and wife were returning residents to Trinidad from Ghana and so retained the services of the defendant to ship their personal and household effects valued at $37,674.00 ("the goods") from Ghana to Port of Spain, Trinidad. The claimants claim that on the 21st October, 2014, the defendant agreed to ship the goods to Trinidad within three weeks. As at the 13th January, 2016, some fifteen months subsequent to the claimants having entered into the agreement with the defendant, their goods had not been delivered to Trinidad. The claimants claim that because of the unreasonable and protracted delay of the defendant in delivering the goods, they were entitled to treat the agreement with the defendant as repudiated. As such, by Claim Form filed on the 13th January, 2016, the claimants seek damages for breach of contract, the return of the goods or their value and the sum of $154,495.45 which represents the cost paid to air freight the goods.

2. It is undisputed that the goods arrived in Trinidad on the 1st May, 2016 and that the parties herein with their respective attorneys inspected the goods. It is also undisputed that the goods were moldy and appeared to have been damaged by the effects of water and the claimants refused to take delivery of the goods.

3. By Amended Defence and Counterclaim filed on the 21st February, 2017 the defendant admits that the cost of airfreighting the goods was $154,495.45 but claims that Republic Bank Limited paid that cost on behalf of the claimants. The defendant further claims that Doxa Worldwide Movers Limited ("Doxa") was engaged to send the goods via air freight. Subsequent to the inspection and as the claimants refused to take delivery of the goods, the defendant made proposals to the claimants to repair, dry clean and/or replace their goods that were damaged and/or missing. The claimants made a counter proposal whereby they instructed that they would accept delivery of their goods upon the defendant paying the sum of $100,000.00 plus legal costs. Suffice it to say that the parties arrived at no agreement in respect thereof.

4. Consequently, the defendant denies the claimants are entitled to the relief as claimed by them and counterclaim for inter alia the cost of storing the claimant's goods at their warehouse located at Tradezone Compound, El Socorro, at the rate of $1,000.00 per month ($10.00 per cubic square foot x 100 cubic square foot) from May, 2016.

Issues

5. The main issue for determination is whether there was a breach of the contract for carriage of the goods ("the contract") by the defendant and if so whether the nature of the breach is such that it entitled the claimants to treat the contract at an end. In order to decide that issue, the following issues have to be resolved;
    i. Whether there was an expressed or implied term in the contract to ship the claimants' goods within three weeks and if so whether that term was a condition of the contract;
    ii. If there was a term in the contract to ship the claimants' goods within three weeks, whether defendant was in breach of that term;
    iii. Whether the claimants were entitled to repudiate the contract and if so whether they did;
    iv. Whether the claimants are entitled to damages; and
    v. Whether the defendant is entitled to the storage costs.

The case for the claimants

6. The claimants called one witness, the first claimant, Carver Morris ("Carver"). Carver is a freelance Project Manager. The second claimant, Lisa Morris ("Lisa") and Carver lived in Ghana from October, 2013 to October, 2014. In November, 2014 Carver was returning to Trinidad and as a returning citizen he had to ship his personal and household goods ("the goods") from Ghana to Trinidad.

7. Carver testified that in or about the 18th October, 2014 he retained the services of the defendant to air freight the goods from Ghana to Trinidad. During cross-examination, he testified that the essential obligation of the defendant was to deliver his goods from Ghana

to Trinidad. He further testified that one of the terms of the agreement was that his goods would arrive in Trinidad within three to four weeks. During cross-examination, Carver testified that when Doxa's agents were packing his goods in Ghana for shipment, he asked an individual by the name of Mathew how long it would take for the goods to be delivered in Trinidad and that Mathew informed him that it would take three to four weeks. He further testified during cross-examination that he did not make any agreement with Donnafaye Bahadursingh ("Bahadursingh") the Managing Director of the defendant to have his goods shipped within three to four weeks.

8. According to Carver, the defendant engaged its agent Doxa to send the goods via air freight. Around the 18th October, 2014, in the presence of Carver, Doxa inspected the goods and agreed with him that the value of same was $37,674.00. He testified that as most of his goods were clothing and other miscellaneous goods, he neither had bills or receipts to support the value nor was he asked by the defendant or Doxa to provide bills or receipts to support the value. Bahadursingh in her evidence testified that the defendant used the value of the goods as declared by the claimants to effect cargo insurance on same. The court therefore finds that it is reasonable to infer that the defendant accepted that the value of the goods was $37,674.00.

9. Further, he testified that in his presence, the goods were originally packaged in large boxes but subsequently shipped in smaller packages. On the 13th November, 2014 a cheque in the sum of $154,495.45 was sent to the defendant by Republic Bank Limited ("the bank") on the claimants' behalf.

10. During cross-examination, Carver was referred to an airway bill issued by British Airways World Cargo dated the 22nd April, 2016[1]. He agreed that according to this airway bill, Lisa was the consignee of the goods.

11. On the 20th March, 2015 Carver sent a text message to Bahadursingh enquiring when the goods would arrive. Bahadursingh responded to Carver on the same day and stated that she was working on the goods every day and an email was sent to one Mr. Le Hunte, the

[1] Exhibited at "A.Z.1" of the Amended Defence and Counterclaim.

Executive Director of Risk of the HFC Bank in Ghana. Carver replied to this message on the same day and asked when he would hear from them since he had expected communication some two weeks before. On the 25th March, 2015 Bahadursingh replied to Carver's message indicating that she was awaiting flight details and the waybill and that she would call him later. Subsequent to that message, Carver received no further correspondence from Bahadursingh and his calls to the defendant went unanswered.

12. Having exhausted his attempts to get information about an average date for arrival of his goods, he retained the services of Gerard Raphael and Associates. By letter dated the 18th September, 2015, ("the September letter") Carver's attorneys wrote to the defendant demanding a status update with respect to the shipment and delivery of the goods. The defendant did not respond to the September letter and so Carver's attorneys wrote to the defendant again by letter dated the 4th November, 2015 ('the November letter") which referred to the September letter. However, the defendant also failed to respond to the November letter. Consequently, on Carver's instructions this claim was instituted.

13. On the 27th April, 2016 whilst in court the defendant indicated that the goods were scheduled to arrive on the 1st May, 2016 some nineteen months of the date of shipping. On the 9th May, 2016 Carver accompanied by his attorney visited the defendant's warehouse. Carver's attorney and the defendant's attorney jointly inspected the goods. Carver testified that he was shocked and distraught to see the condition of his goods. The goods were wet, moldy, soiled and damaged. Also, his grooming kit and an eight pack of batteries were missing. Carver exhibited photographs showing the condition of the goods.

14. He testified that he refused to accept the goods because 1) it was a frustrating experience in attempting to get his goods, 2) there was an unreasonable delay in having his goods air freighted, and 3) the goods were in a horrible condition.

15. By letter dated the 16th May, 2016, the defendant's attorney wrote to the claimant's attorney to inform the claimants of the condition/status of the goods and the defendant's proposed remedies in relation to the goods. The defendant proposed to have goods repaired, replaced and/or dry cleaned depending on the nature of the damage to each item.

16. By letter dated the 25th May, 2016, Carver's attorney wrote to the defendant's attorney that the claimants were prepared to accept the goods in its present condition upon the payment of $100,000.00 plus costs as compensation for the breach of contract. This letter further argued that the claimants were entitled to a refund of $154,495.45 since they had been charged that shipping cost based on the larger packaging in which the goods were originally packed but as the goods were actually shipped in smaller packaging they were entitled to a refund of those charges. The defendant did not respond to this letter.

17. Carver testified that he was advised that he was not obligated to pay storage costs to the defendant as it failed to deliver his goods within three to four weeks in accordance with the agreement.

18. During cross-examination, he was referred to a certificate of insurances issued by Bankers Insurance Limited.[2] He agreed that this was a certificate of insurance for the goods that were being shipped.

The case for the defendant

19. The defendant called two witnesses, Bahadursingh and Mahabal.

20. **Bahadursingh** testified that the defendant provides ocean freight, air freight, brokerage, packing and crating, warehousing and storage, trucking and haulage services. She has been in the industry for over thirty-five years.

21. She further testified that Lisa was at the material time an employee of the bank stationed in Ghana. According to Bahadursingh, since 2012 the defendant has been contracted by the bank to provide shipping services to its employees. Those shipping services were part of the bank's employees' benefits when the employees were assigned to overseas offices in Barbados, the Cayman Islands, Ghana, Guyana and Suriname. She testified that as Lisa was being repatriated from Ghana to Trinidad, at the request of the bank, the personal

[2] Exhibited at "A.Z.4" of the Amended Defence and Counterclaim.

effects of Carver were being shipped from Ghana to Trinidad. She also testified that there was no agreement between the defendant and the claimant that the goods would be delivered within three to four weeks.

22. During cross-examination, Bahadursingh testified that in 2014 Doxa was the defendant's agent and that she knew that personnel from Doxa collected the claimants' goods in Ghana. She further testified during cross-examination that agreement to ship the goods within three to four weeks was entered into between Carver and the agent of Doxa. That the defendant knew about the agreement after it was made.

23. Bahadursingh testified that as part of Lisa' employment with the bank, the bank paid to the defendant the cost of Carver's relocation from Ghana to Trinidad which was sum of $154,495.45. On the 21st October, 2014, the defendant in accordance with the contract between it and the bank, submitted an invoice to the bank for the sum of $154,495.45. The bank paid the defendant the sum of $154,495.45 by cheque. As such, Bahadursingh testified that the claimants are not entitled to recover the sum of $154,495.45 as same was not paid by them personally but by the bank.

24. During cross-examination Bahadursingh was referred to a Tax Invoice dated the 21st October, 2014 which was prepared by the defendant for the bank. In this invoice the cost $154,495.45 was broken down into the three following sums;

    i. air freight - $135,595.45;
    ii. origin services, Ghana - $15,400.00;
    iii. Transportation, packing, customs & formalities - $3,500.00.

25. During cross-examination, Bahadursingh testified that 1) the air freight charges includes the freighting of the shipment, the airline handling charges at origin, at the transshipment point and at the destination point; 2) the origin charges includes the charges of picking up the shipment, packing, packing materials, crating and transporting the shipment to the airport and 3) transportation, unpacking, customs and formalities are destination charges such as customs clearance.

26. According to Bahadursingh, around 2015 the defendant arranged for the shipment of Lisa's personal goods and effects from Ghana to Trinidad. Bahadursingh testified that as with Carver's goods, Lisa's goods were also affected by humidity during its journey from Ghana to Trinidad and that Lisa accepted the defendant's offer to dry clean and polish her clothing and shoes.

27. Bahadursingh testified that the claimants' goods arrived in Trinidad on the 1st May, 2016 and on the 9th May, 2016 the defendant, the claimants and their respective attorneys jointly inspected the goods and found most of the goods were in a wet condition. She further testified that the goods were 100% used household goods which included an electronic iron, kitchen ware, a painting, a computer, a surge protector, a television set, a voltage stabilizer, a used mountain bike, clothing, shoes, books, CDs, shea butter, newspapers and food goods such as packs of nuts and cans of soft drink.

28. According to Bahadursingh, by letter dated the 16th May, 2016 the defendant through its attorney informed the claimants' attorney of the status/condition of the goods and the defendants' proposal to repair and/or replace the goods. The claimants responded to this letter by letter dated the 25th May, 2016 wherein they made their counter proposal that they were willing to accept the goods in its condition on the payment of $100,000.00 plus costs as compensation for the breach of contract. The defendant however, did not receive the claimants' letter in response above, until the 6th June, 2016 by which time it had written another letter of even date (dispatched via email) to the claimants demanding a reply to its proposals made by letter dated the 16th May, 2016.

29. According to Bahadursingh, the defendant used the claimants' declared value of the goods ($37,674.00) to effect cargo insurance on behalf of the claimants in the sum of $10,000.00USD with Banker's Insurance Company of Trinidad and Tobago (Banker's Insurance"). The defendant has submitted a claim for damaged goods to Banker's Insurance under its policy of insurance for cargo. Banker's Insurance referred the defendant's claim to its loss adjuster, Armah Adjusting Services ("Armah"). In or around May, 2016 Armah's agent, Rodney Mahabal ("Mahabal") conducted a physical inspection of the goods and confirmed in a letter dated the 6th June, 2016 that the inspection of the

goods revealed that same were 100% used household goods. Bahadursingh testified that Mahabal informed the defendant that in order for him to assess the claim, he required the consignee, Lisa to provide proof of the cost of the goods.

30. In around June, 2016 the defendant through its attorneys demanded that the claimants provide proof of the cost of each of their goods in order to facilitate completion of the assessment exercise so that the insurance claim could be assessed and paid. Bahadursingh testified that the claimants have to date failed to provide any information to prove the value of the goods. Consequently, Bankers Insurance has not yet concluded the processing of the insurance claim which according to Bahadursingh is a benefit to Lisa.

31. Bahadursingh testified that the claimants' goods remained stored at the defendant's warehouse and that the storage costs continue to accrue. That the goods occupy an area of 100 cubic feet which costs $10.00 per cubic per month. Therefore, the goods have been accruing storage costs of $1,000.00 per month since May, 2016.

32. Bahadursingh testified that as Carver's goods arrived, the defendant has discharged its freight obligations. She further testified that the claimants' recourse ought to be directed solely at recovering the insured risk.

33. During cross-examination, Bahadursingh testified that the bank was charged on the dimension and the weight of the goods not on the packaging of same. She referred to the airway bill issued by British Airways World Cargo dated the 22nd April, 2016 to prove that the bank was charged based on the dimension and weight of the goods. The court finds that this evidence of Bahadursingh is devoid of logic as it can be reasonably inferred that a bigger package would have bigger dimensions and therefore a larger volume and weight. Be that as it may, the claimants have not put forward any evidence of the difference in the sizes of the packages to support a claim for refund by reason of the alleged change in packaging.

34. **Mahabal** is the Chief Executive of Armah. He testified that in furtherance of providing an assessment of the loss, he inspected the claimants' goods on the 17th May, 2016 at the defendant's premises and found that the goods were in a wet condition. He exhibited

photographs of the damaged goods. He further testified that following the inspections of the goods, in order to proceed with the assessment, he required proof of the costs or the value of each of the goods in the form of receipts from the claimants. He was advised by the defendant that to date the claimants have not provided any receipts.

35. Mahabal testified that he produced a preliminary report dated the 18th September, 2017 and recommended therein that a provisional reserve of $30,000.00 be raised against the loss. He further testified that the insurance claim is yet to be finalized by Banker's Insurance. The court finds that the evidence of Mahabal was of no assistance to the resolution of the issues in this case.

Issues 1 & 2

36. It is the case of the claimants that the defendant agreed on the 21st October, 2014 to deliver their goods within three weeks. The claimants submitted that the defendant never disputed this in its Defence and Counterclaim. Although, the defendant did not in fact specifically deny and/or address whether it agreed to ship the goods within three weeks in its Defence and Counterclaim, the tenor of the defendant's Defence and Counterclaim leads one to reasonably conclude that it did not accept that the delivery of the goods within three weeks formed part of the contract. The court also finds that this issue is a critical one to this case and so it needs to be decided.

37. Contracts may be expressed or implied, or partly expressed and partly implied. Contracts are expressed to the extent that their terms are set out either by word of mouth or in writing. They are implied to the extent their terms are a necessary inference from the words or conduct of the parties.[3] ***Halsbury's Laws of England, Volume 22 (2012), paragraph 556 & 557*** stated as follows;

"In assessing whether defective performance gives rise to the right to terminate the courts first ask whether the term of the contract was a condition or a warranty. The significance of this distinction is that a breach of condition entitles the innocent party to terminate the

[3] Halsbury's Laws of England, Volume 22 (2012), paragraph 218.

contract and claim damages for any loss he may have suffered, regardless of the seriousness of the breach as a matter of fact, whereas a breach of warranty only entitles him to damages…the question whether it is a condition or a warranty (or neither) depends upon the intention of the parties as revealed by the construction of the contract. Where the contract contains no indication on its face of the status of the terms, the court must look at the contract in the light of the surrounding circumstances in order to decide the intention of the parties. Important factors to be taken into consideration are the extent to which the fulfilment of the term would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out, and whether the obligation arising from the term goes so directly to the substance of the contract that its non-performance may fairly be considered as a substantial failure to perform the contract at all. If a term is then classified as a condition, it is unnecessary for the innocent party terminating in a particular case to show that the consequences of the breach go substantially to the root of the contract, or even cause him any damage at all."

38. In ***Attorney General of Belize and others v Belize Telecom Ltd and another***[4], Lord Hoffman, delivering the judgment of the Privy Council, stated the following in relation to the process of implication of terms:

"[16]…The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute… It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see Investors Compensation Scheme Ltd. v. West Bromwich Building Society [1998] 1 All ER 98, [1998] 1 BCLC 493, [1998] 1 WLR 896, 912-913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument…

[4] [2009] UKPC 10 at paragraphs 16 & 21

[21] It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer – the implied term must "go without saying", it must be "necessary to give business efficacy to the contract" and so on – but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument read as a whole against the relevant background, would reasonably be understood to mean?"

39. At paragraph 4 of the Statement of Case, the claimants pleaded that it was agreed between them and the defendant that the cost to airfreight the goods was $154,495.45 and that the defendant would deliver the goods within a period of three weeks. The only evidence in this case of the existence of this term came from Carver. In his witness statement, Carver testified that one of the terms of the contract was that his goods would be delivered within three to four weeks. During cross-examination, Carver explained how this term came about. He testified that whilst packaging his goods, he asked one of Doxa's agents, Mathew how long it would take for the goods to be delivered to Trinidad and that Mathew informed him that it would take three to four weeks. He further testified during cross-examination that he did not make any agreement with Bahadursingh, the Managing Director of the defendant to have his goods shipped within three to four weeks.

40. The court notes that the purported term was pleaded as three weeks whereas Carver in his evidence stated that it was three to four weeks. The court finds that this lack of consistency of the term depicts that Carver's evidence in relation to the term is unreliable. Additionally, upon an examination of the air waybill[5] the court finds that there was no express written term of delivery within three weeks or any term for the time of delivery and/or delay as a matter of fact. To the contrary and as correctly pointed out by the defendant, the air waybill clearly stated that the shipment route was from Accra to London to Port of Spain and that

[5] See air waybill #2210 7326 attached to Bahadursingh's witness statement at "D.B.2" ("the air waybill").

the carrier reserved the right *"to carry the goods via intermediate stopping places where the carrier deems appropriate"*. It follows as a matter of logic that the routing any cargo may have an impact on the length of time it takes for arrival and delivery. This was at the option of the defendant.

41. The claimants relied on the case of ***Panalpina International Transport Ltd v Densil Underwear Ltd***[6] wherein the defendants, who wished to send a consignment of shirts to Nigeria for the Christmas market, agreed with the plaintiff carriers that the goods would leave in early December. The air waybill incorporated the provisions of the Warsaw Convention, providing that the carrier would be liable for damage occasioned by delay but that he would not be liable if all necessary measures to avoid the damage had been taken or if it was impossible for such measures to be taken. The flight on which the goods were intended to leave, on the 2nd December, was delayed and the goods eventually left on a different flight altogether, arriving too late for the Christmas market in Nigeria. The purchaser rejected them and when the plaintiffs claimed payment of the freight the defendants counterclaimed for the difference between the price the goods would have received if delivered on time and the price actually obtained. The court held that 1) there was a contract that the goods should go on the flight intended to leave on the 2nd December with the obligation to deliver within a reasonable time and to take care and avoid negligence, 2) that the defendants had chosen air travel because they wanted speedy delivery, 3) the delay was unreasonable and there had been a breach of their obligations by the plaintiffs. Consequently, the court found that as they had failed to disprove liability within the provisions of the Warsaw Convention, the plaintiffs were liable on the counterclaim, and the damages would include the lost Christmas revenue because the plaintiffs knew that the purchaser wanted the goods for sale on the Christmas market.

42. The court agrees with the submissions of the defendant that the facts of ***Panalpina*** are materially different from the instant case. That the term in ***Panalpina*** coupled with the notice of commercial status of the consignment of shirts required for sale during the Christmas period in Nigeria provided the legal basis for the court upholding an implied

[6] [1981] 1 Lloyd's Law Reports 187.

term to deliver within a reasonable time and triggering the recovery of damages for delay. It can therefore be said that the term in ***Panalpina*** did affect the substance and foundation of the adventure which the contract was intended to carry. However, in the instant case a term to deliver within three to four weeks (if made) would not have affected the substance and foundation of the adventure which the contract was intended to carry since the claimants have not provided any evidence of what damage has incurred by reason of the delay in shipment of their goods. Further, Carver during cross-examination agreed that the essential obligation of the defendant was to deliver his goods from Ghana to Trinidad.

43. It follows and the court finds that if Mr. Carver did in fact ask about the time it would take for the goods to arrive (which seems plausible as when someone is shipping goods they more often than not would wish to have an estimate of arrival), such an enquiry was a general one and the answer was not meant to be an expressed oral term of the contract far less a condition. Nor was it meant to be a warranty. It was simply relevant information of an approximate date of arrival.

44. Further, when the court asks itself whether the implication of such a term would spell out in express words what the contract would be understood to mean, the answer is no. The air waybill clearly states that the carrier may carry the goods via intermediate stopping places where the carrier deems appropriate. The court therefore agrees with the submission of the defendant that even if a term could be implied, such an implied term would contradict the express terms contained in the air waybill and so ought not to be applied.

45. The court therefore finds that the claimants have failed to prove that delivery of the goods within three to four weeks was an expressed and/or implied term of the contract and that the defendant breached same. It follows that delivery of the goods within three weeks was not a condition of the contract nor a warranty.

Issue 3

The submissions of the claimants

46. The claimants submitted that they repudiated the contract they made with the defendant since they by this claim demanded the return of the goods or their value and a total refund of their monies they had paid to air freight the goods.

47. The claimants further submitted that as long as a party elects to treat the contract as discharged and has communicated that decision to the party in default, his election is final and cannot be retracted.[7] As such, the claimants submitted as they elected to accept the defendant's repudiation of the contract, they (the claimants) cannot lawfully retract their decision. That their agreement to view the goods was subject to the claim which they had already instituted against the defendant and their recession of that agreement.

48. The claimants submitted that even if the court holds that the contract was still existing when the goods arrived in Trinidad, they were entitled to repudiate the contract because of 1) the unreasonable and protracted delay by the defendant in delivering the goods and 2) some of the goods were missing, some were moldy and some were damaged by water. As such, the claimants submitted that the defendant has never attempted to deliver nor has it ever delivered the goods to the claimants in the condition the goods were in when same were packaged in Ghana.

49. As such, the claimants submitted that the unreasonable and unjustifiable delay of the defendant in this matter entitled them to bring the contract to an end and to seek a refund of the freight and the value of the goods.

The submissions of the defendant

50. The defendant submitted that the total refund of the shipping cost pursued by the claimants cannot be maintained as they would have needed to plead a total failure of consideration which they have not done. According to the defendant, the contract for the carriage of goods has been performed since the goods have arrived. As such, the defendant submitted that as it has substantially performed its contractual obligations and as the claimants have obtained substantially the whole benefit which was the intention of the parties that they

[7] See Scarf v Jardine (1882) 7 App. Case 345 at 361 per Lord Blackman.

should obtain from the services provided by the defendant, the claimant are disentitled to treat themselves as discharged from the contract.

51. According to the defendant, it has delivered the shipment and this has been accepted by the conduct of the claimants on the inspection. The defendant submitted that clothing was found to be moldy and certain minor goods missing. That at that point, the claimants' pursuable cause of action became claims to the replacement of goods missing and the cost to repair damaged goods. The defendant submitted that the status of the shipment revealed following the inspection on the 9th May, 2016, would have amounted to circumstances which became known after the date of the first CMC which would have entitled the claimants to a grant of permission to amend the Statement of Case following the first CMC to pursue claims for replacement and/or repair. That notwithstanding that, no such amendment was pursued by the claimants.

52. According to the defendant, repudiation is a strict doctrine. The defendant relied on the cased of **Howard v Pickford Tool**[8], wherein Asquith LJ stated at page 421 that *"an unaccepted repudiation is a thing writ in water and of no value to anybody".* The defendant submitted that at no time did either the claimants or their Attorney give notice that they viewed the defendant's conduct to be in repudiation of contract which they accepted. That this position was admitted by the claimants' witness under cross-examination. The defendant further submitted that to the contrary, the claimants' Attorney's letter dated 18th November, 2015 sought disclosure of the status of the shipment and its delivery with the effect of affirmation of the contract. Accordingly, the defendant submitted that the mention of repudiation in the Reply to Defence and Counterclaim is of no legal effect.

53. Moreover, the defendant submitted that the claimants have misconstrued the law regarding rescission. According to the defendant, the claimants cannot on the facts of this case, advance any credible case on rescission. The defendant submitted that the claimants could have only advanced a case in rescission if it had obtained its agreement to return payments made on behalf of them and in return provided the defendant a release from their obligations to perform further under the contract. According to the defendant, the law of

[8] [1951] 1 KB 417

contract recognizes that in such a circumstance, the consideration for the discharge of each party is to be found in the abandonment by each party of his right to performance or his right to damages, as the case may be.[9] Additionally, the defendant submitted that in any event, a claim to rescission was not pleaded.

Findings

54. Repudiation is a rejection or renunciation of a duty or obligation. In contract, one party (A) may put himself in breach by evincing an intention, by words or conduct, of repudiating his obligations under the contract in some essential respect. Repudiation will give the innocent party (B) the right to treat the contract as discharge and claim damages.[10] The court agrees with the submissions of the claimant that if the innocent party chooses to treat the contract as discharged, he must make his decision known to the party in default and that once he has done so, his choice is final and cannot be withdrawn.[11]

55. However, the court disagrees with the claimants' submissions that they repudiated the contract by the initiation of this claim since by this very claim they sought the return of the goods and/or their value. The court therefore agrees with the submissions of the defendant that neither the claimants nor their attorney gave notice that they viewed the defendant's conduct to be in repudiation of which the claimants accepted. Further, since the initiation of this claim, the contract has been performed by the defendant as since the goods have arrived. Therefore, the court agrees with the submissions of the defendant that as it has substantially performed its contractual obligations and as the claimants have obtained substantially the whole benefit which was the intention of the parties that they should obtain from the services provided by the defendant, the claimants were not entitled in law to have accepted a repudiation which did not in fact occur.

[9] See Chitty on Contracts, 29th Edition, Volume 1, Paragraph 22-025 to 22-027
[10] See Halsbury's Laws of England Volume 22 (2012) 5th Edition para 560
[11] See Cheshire, Fifoot & Furmston's Law of Contract, 15th Edition, page 692.

56. Additionally, the court agrees with the submissions of the defendant that the claimants have misconstrued the law regarding rescission. ***Halsbury's Laws of England, Volume 22 (2012), paragraph 577*** states as follows;

"Where a contract is executory on both sides, the parties may terminate it by mutual consent… Such rescission may take the form of an express agreement or may be inferred from conduct (as where neither party has insisted on performance of the contract for a long period of time, or where the parties have acted in a manner inconsistent with the continuance of the contract, or have made a new contract). The consideration for the contract of discharge will usually lie in the abandonment by each side of their rights under the previous (wholly executory) contract…"

57. As such, the court agrees with the submissions of the defendant that the claimants could have only advanced a case in rescission if they had obtained the defendant's agreement to return the payments made on behalf of them and in return provided the defendant a release from their obligations to perform further under the contract.

Issue 4

58. As the court found that the defendant was not in breach of the contract, the claimants are not entitled to damages for breach of contract. Further, as the court found that the contract was not repudiated and/or rescinded by the claimants, they are not entitled to a refund of the sum of $154,495.45.

59. The claimants are entitled to damages for the value of damage to their goods or value of replacement of goods destroyed. However, the claimants have not provided any list of the goods that were damaged and/or destroyed or the estimated cost of replacing the goods. The defendant however by letter dated the 16th May, 2016 listed out the condition or status of the goods as follows;

Description of item	Status/Condition
One grooming kit-Wahl Lithium	Missing from shipment
One 8 pack of AAA batteries	Missing from shipment
Four boxes of medication	Expired
One computer	Not loading program
One big carton of tissues	Damaged
One drain board	Rusted
One cracked large oval serving tray	Damaged
One box shea butter	Damaged
Unknown number of men's suits	Unclean
Unknown number of clothing items	Unclean
One bicycle	Tyres deflated
One 220/110 volt transformer	Suspected water damage
One voltage regulator 2000 VA maximum	Unsure problem

60. It is clear from the above that all of Carver's goods were damaged and/or rendered useless. As there was no evidence of the cost to repair the damages of the goods before the court, the court will be guided by the declared value of the goods which has not been challenged or disputed. The court will therefore award the claimants the sum of $37,674.00 which was the declared value of the goods.

61. As it relates to insurance claim, that is a matter between the insurer and the defendant and not one for the claimants since the defendant has made a claim from its insurer with whom it has a contract.

Issue 4

The submissions of the claimant

62. The claimants submitted that if the court accepts their arguments, then it follows that the defendant's counterclaim must be dismissed. The claimants further submitted that the

defendant's counterclaim must also be dismissed since there was never any agreement by them to pay storage costs and that the storage costs only arose because of the delay by the defendant in the delivery of the goods. Moreover, the claimants submitted that the last communication with a proposal to settle the matter amicably came from them and that the defendant has not responded to their proposals.

The submissions of the defendant

63. The defendant submitted that during cross-examination Carver accepted that the claimants had incurred storage charges and that he had seen the defendant's letter dated the 9th February, 2017 which stated that the storage charges to that date was $9,000.00. This letter was not replied to by the claimants. Carver further accepted during cross-examination that storage charges at $10.00 per cubic foot per month equalling to $1,000.00 per month were being incurred. Carver also accepted that he received the defendant's invoice dated the 28th November, 2017 which showed that a further sum of $9,000.00 in storage charges had been incurred. The defendant submitted that having accepted the status of the counterclaim and the formulas for quantifying same, Carver later denied that the total storage costs of $21,000.00 was due and owing. According to the defendant, his consistency under cross-examination on this point outweighs his inconsistent denial at the end. As such, the defendant submitted that it is entitled to an order for payment of the storage costs up to the date of judgment.

64. Moreover, the defendant submitted that it is inaccurate for the claimants to state that the last communication to settle the matter amicably came from them and that the defendant never responded to their proposals. According to the defendant, the record shows that by letter dated the 2nd September, 2016 from its Attorney at Law to the claimants' Attorney at Law and by letter dated the 6th June, 2016 from Armah Adjusting Services Ltd., the defendant in furtherance of a hopeful resolution of the matter sought the claimants' assistance with processing an insurance claim for compensation payable to the consignee (Lisa) of the goods.

Findings

65. Although, there was a delay in the delivery of the goods, the claimants were not entitled to repudiate the contract by refusing to accept the delivery of the goods as there was no term or condition that the goods were to be delivered within three to four weeks and the court so finds. Further, the court finds that Carver acted unreasonable in rejecting the defendant's offer to replace and/or repair the goods. The court therefore finds that the defendant is entitled to reasonable storage fees.

66. The goods arrived in Trinidad on the 1st May, 2016. On the 9th May, 2016 there was a joint inspection of the goods. On this date, Caver refused to accept delivery of the goods and as such the goods remained stored at the defendant's warehouse. According to the evidence of Bahadursingh, the goods occupied 100 cubic square foot. The cost of per cubic foot is $10.00 and so the cost per month was $1,000.00.

67. Although Carver refused to accept delivery of the goods on the 9th May, 2016, after the inspection of the goods by letter dated the 16th May, 2016, the defendant proposed to replace and/or repair the damaged goods. By letter dated the 25th May, 2016 the claimants made a counter proposal to accept the delivery of the goods upon the defendant paying the sum of $100,000.00 plus costs. Although there is no evidence of the defendant replying to the claimants' counter proposal, by letter dated the 2nd September, 2016 the defendant asked the claimants to provide receipts to verify the costs of each of the goods in order to proceed with the insurance claim. This letter in substance showed that the defendant had no intention of accepting the claimants' counter proposal.

68. The defendant only notified the claimants of the storage fees by letter dated the 9th February, 2017. Therefore it is reasonable to conclude that the claimants were unaware of the fact that prior to that date the storage fees were accruing. In those circumstances, the court finds that it is reasonable to order the claimants to pay the storage fees from February, 2017 when they became aware that same was accruing. The court therefore finds that a reasonable storage fee is 15,000.00.

Costs

69. The claimants' claim was partially a liquidated claim in the sum of $192,169.45 and a claim for damages for breach of contract. The damages awarded in resepct of the damage to the goods is in fact the measure of damages for breach of contract. The court will therefore order the claimants to pay to the defendant the prescribed costs of the claim based on the value of $34,674.00. The counterclaim was also a liquidated claim for storage fees at the rate of $1,000.00 per month but the courts order is made for $15,000.00. In those circumstances, the court will order that the claimants pay the prescribed costs of the counterclaim based on a value of $15,000.00.

Interest

70. No relief for interest was sought nor were any submissions made thereon.

Disposition

71. The order of the court is as follows;

    a) The defendant shall to pay the claimants the sum of $34,674.00 on the claim;
    b) The claimants shall pay to the defendant the sum of $15,000.00 on the counterclaim;
    c) The defendant shall pay to the claimant the prescribed costs of the claim based on the value of the claim being one of $34,674.00; and
    d) The claimants shall pay to the defendant the prescribed costs of the counterclaim based on a value of $15,000.00.

Dated the 10th May, 2018

Ricky Rahim
Judge