

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

Claim No. CV2018-04281

**BETWEEN**

**BUILD TO LAST HARDWARE AND ROOF MANUFACTURING LTD**

Claimant

**AND**

**MERLIN LACROIX**

1st Defendant

**L'S GENERAL SUPPLY STORE LIMITED**

2nd Defendant

**Before the Honourable Mr. Justice R. Rahim**

Date of delivery: Tuesday June 28, 2022.

**Appearances**

Claimant: Ms. T. Kalloo instructed by Ms. C. Prowell

Defendant: Ms. L. Hosein

## JUDGMENT

1. The Claimant, a roof manufacturer, is a limited company and supplier of building material. The Second Defendant is also a limited company and a hardware store and the First Defendant a Director thereof. The claim is for money owing on unpaid invoices for building materials supplied to the Defendant beginning on or around July 15, 2013 when the Defendant requested the supply of building materials as set out in invoice 11717<sup>1</sup> and the Claimant delivered the items to the Defendant per credit facilities extended to the Defendant. The materials delivered were listed on an invoice and signed for by the Defendants upon delivery.
2. Each invoice contained a term that if unpaid for thirty (30) days, the invoice would attract a two percent (2%) rate of interest. It is alleged that despite payment on some invoices, there remains outstanding, a balance on the principal in the sum of five hundred and seventy-one thousand, nine hundred and twenty-three dollars and sixty-nine cents (\$571,923.69) and interest in the sum of five hundred and eleven thousand, four hundred and forty-eight dollars and seventy-one cents (\$511,448.71).
3. The Defence is that some of the invoices are unknown to the Defendant and part of the claim is statute-barred. They say that the relevant period of limitation for invoices (2013 and 2014) 11717 sixty-three thousand, two hundred and fifty dollars (\$63,250.00); 12165 thirty-one thousand, seven hundred and fifty dollars (\$31,750.00); 12504 one thousand, six hundred and fifteen dollars and seventy-five cents (\$1,615.75); 14029 one thousand, two hundred and twenty-one dollars and eighty-eight cents (\$1,221.88); 15447 twenty-five thousand, three hundred dollars (\$25,300.00); 18541 twenty-five thousand, three hundred dollars (\$25,300.00); 15790 four thousand, seven hundred and forty-nine dollars and fifty cents (\$4,749.50); 16283 sixty-two thousand, five hundred and sixty dollars (\$62,560.00); and 16374 twenty-five thousand, seven hundred and sixty dollars (\$25,760.00) have expired before action was brought.
4. Further, twenty-six (26) invoices out of the fifty-two (52) claimed by the Claimant are admitted. Additionally the Defendants say that all invoices for the years 2013 and 2014 have been paid. They say therefore, that the sum of twelve thousand, five hundred and twenty-one dollars (\$12,521.00) is admitted as outstanding.

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<sup>1</sup> See TB3, PDF 10-13, an invoice for building materials and the corresponding delivery notes.

5. The Defendants' case on interest is that although the invoice carried an interest charge of two percent (2%) per month payable on unpaid bills over thirty (30) days, the parties' business agreement impliedly made an exception to that term so that the Defendants would pay by cheque for a group of invoices even after the thirty (30) day period elapsed on those invoices without interest being charged.
6. In its written submissions however, the Claimant admitted that five invoices – 17151 eleven thousand, five hundred dollars (\$11,500.00); 17167 ten thousand, one hundred and twenty dollars (\$10,120.00); 17173 one thousand, six hundred and seventy-four dollars and forty cents (\$1,674.40); 17177 one hundred and eighty-four dollars (\$184.00) and 17217 nineteen thousand, five hundred and fifty dollars (\$19,550.00) were in fact duly paid by the Defendants. The Claimant therefore, claims for only forty-eight (48) invoices as due and owing by the Defendants.

### **Amended Reply**

7. The Claimant avers that most dealings with the Defendants were with Merlin La Croix trading as L's General Hardware Store. As such, invoice number 11717 was signed by agents of the First and Second Defendants.
8. In response to the Claim that claims on some of the invoices are statute-barred, the Claimant set out that five (5) payments made by the Defendants totalling ninety-five thousand dollars (\$95,000.00) were applied to the said invoices between February 12 and July 26, 2016. This payment was made towards the Defendants' total outstanding debt as the cheques were paid "on account" and not specific invoices. Therefore, the Claimant's right of action is deemed to have accrued on or around July 26, 2016, and not before this time. In further response, the other invoices dated 2013 and 2014 are not outside the relevant limitation period.
9. In response to the fifty-two (52) transactions between the parties, the Claimant says the Defendant supplied building material for fifty-three (53) invoices. The Claimant explained that some of those invoices were produced after receiving purchase orders from the Defendants' fax number bearing the First Defendant's letterhead. The letterhead and signatures on the purchase orders are similar or identical to the letterhead, and signatures of other purchase orders which invoices were received and acknowledged by the Defendants as genuine. Finally, the Claimant denied having waived its entitlement to interest.

## **ISSUES**

10. The Issues to be determined are as follows:

- i. Whether the First Defendant is a proper party to these proceedings;
- ii. Whether the Claim is statute-barred in respect of the whole or part of the debt;
- iii. Whether the Defendant is indebted to the Claimant in the sum claimed in the forty-eight (48) invoices;
- iv. Whether interest was part of the agreement between the parties and if it was, whether the Claimant waived its rights to contractual interest.

## **Evidence**

### **The Case for the Claimant**

#### Candice Dubra

11. Candice Dubra is a Wholesale Clerk employed with the Claimant since 2011. She is responsible for collecting orders, writing invoices and sending the orders to be manufactured in the hardware. Dubra testified that an employee of the Second Defendant, Kelly, would contact her to place an order or the purchase order. Dubra then prepared an invoice and sent the order to the Claimant's factory, which would then deliver the order to the Defendants. Should any problems arise, Kelly would liaise with Dubra, and she received no communication regarding the unpaid invoices.

### **Cross-examination**

12. Dubra testified that the First Defendant never placed an order with her, nor did she liaise with the First Defendant. In addition, no invoice was prepared in his name. She explained that she prepared invoices using an invoice book in numerical order. However, she could not explain how consecutive invoices appeared to be repeating the same price for the same material.<sup>2</sup> Dubra

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<sup>2</sup> See for example, TB 3, PDF 19, an invoice dated April 23, 2014, for the sum of twenty-five thousand, three hundred dollars (\$25,300.00) and PDF 22, another invoice dated May 28, 2014 for the sum of twenty-five thousand, three hundred dollars (\$25,300.00).

denied that the invoices were prepared in such a way as to double invoice the Second Defendant for materials.

13. The evidence of the other witness in cross-examination on the issue of participation of the First Defendant in the transactions is largely the same so that the court will not repeat it hereafter, suffice it to say that the court has considered all of the said evidence.

#### Kumarie Harripersad

14. Kumarie Harripersad is a Wholesale Clerk employed with the Claimant. Harripersad also received orders from the Second Defendant and prepared invoices. Harripersad and Dubra shared the task of preparing the invoices and sending the orders to the Claimant's factory. Harripersad testified that the Second Defendant paid towards the invoices by one cheque but would specify the invoices to which payments were being made. Thereafter, Harripersad would enter the information on the Claimant's system to reflect the specific invoices paid.
15. In July 2015, Harripersad and the Claimant's Accountant, Dadbahal-Persad visited the Defendants at its business place in Arouca to query outstanding invoices. They spoke with the wife of the First Defendant, Kelly La Croix, who informed them to leave copies of the unpaid invoices, receipts for paid invoices and a reconciliation document. According to Harripersad, the CEO of the Claimant held weekly receivables meetings to discuss the Defendant's outstanding debt and how it could be resolved.

#### **Cross-examination**

16. An invoice book was used to prepare all invoices, which would then be entered electronically on Peachtree, an accounting software that manages the account of the Second Defendant with the Claimant, including the checking of outstanding invoices and the length of time the invoices have been outstanding. In addition, Peachtree does not allow an invoice to be inputted after one year.
17. Harripersad also explained that the Second Defendant made payments on specific invoices so although it would write a cheque for a lump sum, this amount would be applied to specific invoices chosen by it. Thereafter, a receipt would be sent to the Defendant setting out the invoices to which the monies were applied.

18. The period of credit allowed to the Defendant on an invoice was thirty (30) days. However, every week the Claimant's driver delivered the original invoices and a prepared statement of all outstanding invoices. Harripersad admitted that these statements were exhibited in court. She also admitted that the Second Defendant was never billed for interest until the Claimant took action to recover the outstanding debt.
  
19. The Claimant held meetings with employees on receivables every Monday at which they would examine the debts owed by its customers. She explained that the Second Defendant did not pay its bill in consecutive order but instead chose specific invoices from the weekly statement. Although the Second Defendant was a significant customer, the Claimant continued to supply the Second Defendant with goods despite the existence of the outstanding debt. The statements that were sent to the Second Defendant recorded the amount but not the date of the invoice. Finally, she testified that the Second Defendant paid an invoice every week by cheque.

Cindy Dadbahal-Persad

20. Cindy Dadbahal-Persad is employed as an Accountant by the Claimant. She is in charge of the company's financial transactions, accounts payables, accounts receivables, payroll, and salaries. She explained that when the order is placed the Claimant prepares an invoice. An internal order is sent to the factory to prepare the goods for delivery. The Second Defendant is given a yellow copy invoice for any delivered materials that have not been paid. When payment is ready, the Claimant's driver will take a white copy of the said invoice to the Second Defendant and a receipt confirming that payment was received. A copy of the receipt, the Defendants' cheque, and a blue-coloured copy of the invoice delivered to the Second Defendant upon collection of payment and signed are subsequently sent to the accounting department and recorded into the Peachtree accounting system. Thereafter, the documents are filed in the Claimant's filing room together with any corresponding purchase orders.
  
21. Persad also explained that the Defendants would indicate which invoices it was paying at the time of making payments. Statements with outstanding invoices were faxed to the Defendants or requested by the Claimant's driver.
  
22. Around July 3, 2015, Persad utilised the Peachtree accounting software to reconcile the Defendants' accounts to determine which invoices were outstanding.<sup>3</sup>

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<sup>3</sup> (See TB 3, PDF 90, which is a copy of receivables from February 2013 to January 14, 2017.)

23. Persad says she and Harripersad attended the Second Defendants' office to review and reconcile the outstanding invoices with the Second Defendant but were told to leave copies of the invoices, corresponding delivery notes, and aged receivables instead of having an in-person review and reconciliation.
24. Sometime later, Persad and Kalloo met with the First Defendant and Kelly La Croix his wife. They denied receiving the items on the invoices and claimed they were billed twice for the same goods. As such, Kalloo suggested the Defendants employ another Accountant to review the outstanding invoices, and the Claimant would split the fees for the Accountant. This offer was refused.
25. The Defendants continued making payments to the Claimant until October 2015. However, these payments were made to specific and more recent invoices. The payments were not for the older invoices. Four payments were made for invoices issued from February 2016 to July 26, 2016 in the sum of twenty thousand dollars (\$20,000.00) and a fifth payment of fifteen thousand dollars (\$15,000.00) thereafter. Persad says that following traditional accounting practices, these payments were applied to the oldest outstanding invoices as no specific invoices were listed on the cheques or receipts. The Defendants received no further payment.

### **Cross-examination**

26. The generally accepted accounting principles guided Persad. She began reviewing the Second Defendant's account sometime after 2015. Prior to that, Harripersad managed the Second Defendant's account. The Second Defendant was not entered as a bad debtor on the Claimant's journal and ledger account. She explained that although the Second Defendant was a bad debtor in 2013 and its account was not brought forward in 2014, it was given more lenient payment terms. Usually, letters are written to customers informing them of their bad debts and their ageing invoices. However, due to the relationship with the Claimant being one of its more significant customers, this was not done. Instead, the Claimant's driver went to the Second Defendant with an original unpaid invoice every week. A statement of the outstanding invoices was sent to the Second Defendant but not weekly. At times the statements would also be faxed. Persad testified that soft copies of the statements were always available on the Claimant's system.

27. According to Persad, the Claimant used the first-in, first-out method. Therefore, the first set of invoices issued would be the first set of invoices in to be paid. However, if the customer specified which of the invoices were to be paid the Claimant would oblige as an exception to the general procedure of payment on account. The Second Defendant had a running account. However, because of the excellent working relationship between the parties, the Second Defendant was given a more lenient timeframe to settle its invoices. In addition, no interest was applied to outstanding invoices.
28. Regarding the 2013 invoices, Kallou only requested a reconciliation in 2015 to ensure the Claimant's records were accurate. The invoices and receipts from the driver were used to conduct total reconciliation. Persad testified that Peachtree does not allow an invoice number to be entered twice. Therefore, it was not possible to double-invoice the Defendants.
29. Persad was referred to a particular receipt.<sup>4</sup> She accepted that some of the invoices stated on that receipt were paid in full, and others would have been in part-payments. Persad also accepted that the Claimant should have entered the same on Peachtree. However, Persad attempted to defend the Claimant's position testifying that the Second Defendant had the opportunity in 2015 to review the reconciliation and point out any errors.

#### Anand Maharaj

30. Anand Maharaj is employed as a Driver with the Claimant. According to Maharaj, between 2013 and 2016, almost every Friday, he visited the Defendants' business to collect a cheque for outstanding invoices. Maharaj usually liaised with an employee whose name he could not recall and who is no longer employed with the Defendants. A white copy of an invoice was only given to the Defendants for paid materials.
31. Maharaj also says there were specific invoices he continually took to the Defendants, but no payment was made to the Claimant. In May 2018, Maharaj attempted to deliver a pre-action protocol letter to the Defendants, however, Kelly refused to accept same.

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<sup>4</sup> See TB 3, PDF 80, which is a receipt for forty-two thousand, nine hundred and seventy-eight dollars and forty cents (\$42,978.40) and the SOC with the listed unpaid invoices at TB 1, PDF 22.

## **Cross-examination**

32. Payments were made by cheque, and Maharaj supplied a receipt and wrote on the back of them the invoice numbers for which payments were to be applied. On each visit, he informed the employees of the Second Defendant of its outstanding invoices and provided them with the original invoice of what they intend to pay. A statement of all outstanding invoices also accompanied the invoices. Notwithstanding, a copy of the statement was usually faxed to the Second Defendant. The Second Defendant chose which invoice it wanted to settle. Finally, he confirmed that he never received any interest payment on the paid invoices.

## **Terrence Kalloo**

33. Terrence Kalloo is the Chief Executive Officer of the Claimant. Kalloo's evidence is that the Claimant was flexible with its credit terms and extended the usual credit term of thirty (30) days as the Defendant was a major client. However, if payments were outstanding for too long, the Claimant would request payment to be made on specific outstanding invoices. In addition, due to the downturn in the economy, the Claimant operated with low-profit margins to survive.

34. After Persad prepared a reconciliation of the Defendants' account, it was revealed that it owed the Claimant six hundred and sixty-six thousand, nine hundred and twenty-three dollars and sixty-nine cents (\$666,923.69) exclusive of interest. It is Kalloo's evidence that the Defendants claimed one of its employees (who was terminated) and an employee of the Claimant had been in collusion to bill the Defendants twice. As such, it refused to pay the outstanding debt. Kalloo sent Persad to meet with the Defendants to reconcile the accounts as the Claimant never had an issue with double-billing. However, the Defendant refused same.

35. Kalloo then arranged a meeting with the Defendants and suggested the problem above can be resolved by an audit of the Defendants' account. Despite Kalloo's offer to split the fees to employ another Accountant, then eventually the entire bill, the Defendants refused.

36. The Claimant enjoyed a good relationship with the Defendants, so Kalloo nonetheless continued to do business with the Claimant. He nonetheless continued to call upon the First Defendant to settle the outstanding debt. The First Defendant paid ninety-five thousand dollars (\$95,000.00) towards the Defendants' debt from February 12 to July 26, 2016. After that, it stopped payments and ignored the Claimant's calls.

37. In a letter dated January 23, 2017, Kalloo wrote to the First Defendant demanding payment of six hundred and twenty-six thousand, seventy dollars and fifty-one cents (\$626,070.51).<sup>5</sup> A pre-action protocol letter was eventually sent to the Defendants, who refused to accept it.<sup>6</sup> No response was forthcoming from the Defendants. Kalloo testified that as a result of the debt outstanding by the Defendant, the Claimant's cash flow and line of credit with JMMB were affected. Except his word, there is no supporting evidence of this assertion before the court.

### **Cross-examination**

38. Kalloo explained that the Claimant extended the Second Defendant's credit as it paid regularly on its account. When the Claimant's account went into overdraft, Kalloo spoke with the Second Defendant several times. Eventually, Kalloo wrote to the Second Defendant in 2015 requesting that its account be settled and interest is applied. Before 2015, the Claimant acted in good faith and did not apply interest on the Second Defendant's outstanding invoices.

39. Kalloo testified that the Claimant allowed the Second Defendant to continue ordering materials because it still made payments on other invoices. These invoices would be the more recent ones, but what was important was the Claimant's cash flow.

40. The Claimant periodically reconciled its account receivables and monthly provided the Second Defendant with a statement. According to Kalloo, he gave the Second Defendant statements and copies of all outstanding invoices. In this case, the Defendant never raised an issue with the outstanding invoices.

41. Every Monday, the Claimant held its receivable meetings. In 2013, the Second Defendant's debt was not as significant as the Claimant's monthly savings. However, over the next two years, the outstanding debt increased and Kalloo decided to do reconciliation in hopes of resolving the problem. He further explained that in business, one tries to come to an amicable solution rather than cut off the customer. In this case, the Second Defendant kept making payments, so the parties continued their business relationship.

42. Despite the Second Defendant's outstanding debt, Kalloo says the Claimant's monthly savings far exceeded the said debt.

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<sup>5</sup> See TB 3 PDF 92

<sup>6</sup> See TB 3, PDF 94, namely, a pre-action letter dated May 18, 2018, addressed to the First Defendant.

43. He confirmed that the Claimant's accounting department faxed statements to the Second Defendant, and from time to time, the Claimant's driver carried the said statements to the Second Defendant. Kalloo could not say why copies of these statements were not before the court. He denied that a customer can be billed twice. Each receipt would record the invoice numbers to which payment was applied and then the Second Defendant would be provided with a white copy of the original invoice.

## **The Case for the Defence**

### Merlin La Croix

44. Merlin La Croix is a Director of the Second Defendant and he and his wife are the shareholders. It was incorporated on May 5, 2004, as a Limited Liability Company under the Companies Act.<sup>7</sup> The Second Defendant has been a customer of the Claimant since 2012.

45. The Second Defendant has two branches, one in Arima and the other in Arouca. Merlin testified that he was in charge of the Arima branch and had no involvement with ordering or purchasing goods from the Claimant. Therefore, the Arouca branch ordered goods from the Claimant while the Arima branch collected the said goods.

46. However, as Director of the Second Defendant, Merlin signed off on cheques issued to the Claimant. There were no receipts from the Claimant issued in the name of Merlin. Merlin further says that he never placed an order to the Claimant nor received an invoice from it. One Leon Whittier, an employee of the Second Defendant, was the person who signed for and received goods from the Claimant.

47. Between 2015 and 2016, he was informed by employees of the Second Defendant that there were outstanding invoices for the Claimant. Merlin then signed five (5) cheques for a total sum of ninety-five thousand dollars (\$95,000.00).<sup>8</sup> He testified as to the procedure upon making an order and paying the sums due on the invoices. It was also his evidence that the Claimant never discussed the issue of interest with him. His evidence in chief is otherwise unremarkable and he did not give a reason for failing to respond to the pre-action letter or a reason for refusing to accept same initially.

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<sup>7</sup> See TB 3, PDF 908 namely, a Certificate of Incorporation in the name L's General Supply Store Limited.

<sup>8</sup> See TB 3 PDF 836

## Cross-examination

48. He admitted that the cheques issued to the Claimant were in his name.<sup>9</sup> Merlin further testified that he signed all the cheques and passed them to the Accounts department.

49. Attorney referred Merlin to the Second Defendant's invoices listing and the cheque numbers.<sup>10</sup> Merlin explained that there were multiple chequebooks in use at the same time and he could not say whether the invoices were paid in chronological order. He usually writes the invoice numbers on the back of the cheque. However, he accepted that this was not done for the five (5) payments made from February 2016 to July 2016. He however, denied that the said payments were made towards the forty-eight (48) invoices.

50. He admitted to receiving goods on behalf of the Second Defendant from the Claimant on some occasions, but testified that there was a supervisor who usually performed that function and who is no longer employed with the Second Defendant.

51. Merlin was referred to the signed invoices<sup>11</sup> purportedly signed by employees of the Second Defendant and admitted that none of those past employees were brought as witnesses to verify that goods from the Claimant were not delivered to the Second Defendant contrary to what is set out on the delivery notes.

## Vilma La Croix

52. Vilma La Croix also known as 'Kelly', is a Director, Company Secretary of the Second Defendant and wife of the First Defendant. Vilma, like Merlin, was responsible for overseeing the management and operations of the Second Defendant.

53. Vilma said that when the Second Defendant's Arouca branch made an order to the Claimant, it usually took three days to a week for the ordered goods to be delivered to the Second Defendant's Arima branch. An invoice would be left with the ordered goods when the ordered goods were delivered. On some occasions, if the driver of the Claimant ran out of invoices, they

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<sup>9</sup> See TB 1, PDF 153 which is a cheque listing for the year 2014.

<sup>10</sup> See TB 2, PDF 678 namely, the Second Defendant's listing of invoices received from the Claimant.

<sup>11</sup> See TB 3, PDF 10 -89

will leave a delivery note with the ordered goods. Afterwards, a salesman of the Claimant would give the Second Defendant an invoice on the next visit to the Second Defendant.

54. A salesman from the Claimant visited the Second Defendant's Arouca branch weekly to collect the payment on the Second Defendant's account with the Claimant. The Second Defendant only made payments on its account with the Claimant by cheques. Vilma explained that payment from the Second Defendant would usually cover numerous invoices on the Second Defendant's account with the Claimant.
55. At no time did any of the salesmen for the Claimant inform Vilma that any previous invoice or invoices were outstanding when they discussed what invoices the cheque would apply to.
56. Sometime at the end of 2015 and the beginning of 2016, the Second Defendant's records revealed twenty-six (26) invoices were outstanding. As such, five (5) payments by cheque were made in the sum of ninety-five thousand dollars (\$95,000.00).

#### **Cross-examination**

57. An Accounts Clerk usually made entries on the Claimant's file and Vilma oversaw the file. She was referred to Merlin's cheque listing and testified that either the Accounts Clerk or Merlin would have entered the cheque numbers. She explained that Merlin signed the cheques when payment was made to the Claimant. He reviewed the Claimant's file, prepared a cheque to suit the oldest invoice, and wrote the invoice number to the back of the cheque. When the Claimant's salesman arrived, Vilma took the said file and reviewed the invoices to be paid. She would then be given a receipt.
58. She accepted that there were no records of cheque numbers in the ledger, which meant no payments were made to specific invoices. Vilma also accepted that the end of the ledger reads 'Total of Unpaid Recent Bills' and older invoices were outstanding.<sup>12</sup>
59. She could not explain why the Second Defendant's ledger did not include the twenty-six (26) invoices listed. However, Vilma accepted that she knew of the Claimant's claim that there were fifty-three (53) outstanding invoices as early as 2015. She was referred to invoices and purchase

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<sup>12</sup> See TB 2, PDF 1448

orders<sup>13</sup> by the Second Defendant faxed to the Claimant. She accepted that Leon Whittier and other employees could have authenticated these documents to verify whether the Second Defendant received goods from the Claimant.

***Issue 1- Whether the First Defendant is a proper party to these proceedings***

60. By order dated May 29, 2019, this court ordered that L's General Supply Store Limited be added as the Second Defendant. The Defendants submit that the claim should not have been brought against the First Defendant in the first place. In support of this, it relied on the well-known dicta of ***Salomon v Solomon & Co. Ltd***<sup>14</sup> that the company is a separate legal entity from its directors and shareholders.

61. It further claimed that, except for being a Director of the Second Defendant, the First Defendant had no business relations with the Claimant (no privity of contract) and no circumstance has arisen that should cause the court to pierce the corporate veil.

62. In response, the Claimant says it corresponded with the First Defendant and issued invoices in the name of the Second Defendant. In certain cases, invoices were issued in the name of 'L's General Hardware', 'L's General Supply Store' and in some instances, 'L's General Supply Ltd'. As such, there was never a clear distinction of whether the Claimant dealt with the First Defendant under a trading name or whether it dealt with a registered company.

63. The Claimant also submitted most of the cheques were drawn on the account of Merlin La Croix (the First Defendant), with just one cheque being drawn on the account of 'L's General Supply Store Ltd'. Therefore, the First Defendant acted interchangeably as an individual and as an entity when dealing with the Claimant.

**Discussion**

64. The evidence in this case particularly that set out on the documents is that no invoice or receipt was ever made out in the name of the First Defendant. However, the evidence is that the payments by cheque were made to the Claimant from his account. This is not in issue having been accepted

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<sup>13</sup> See for example- TB 3, PDF 85 namely, an invoice, purchase order 7014, and PDF 109 namely a corresponding purchase order.

<sup>14</sup> [1897] AC 22 page 51

by La Croix in cross-examination. In that regard, exhibit 'C' of the defence lists all of the cheques drawn on his account. Only one is drawn on the account of the Second Defendant.

65. It is the evidence of Mr. Terrance Kalloo, the CEO of the Claimant that in the beginning he was under the impression that he was contracting with the First Defendant who was trading as L's General Supply Store. This evidence is important as it demonstrated that equally at some point the witness came to realise that he was in fact doing business with a limited liability company. That position is underscored by the other witnesses called by the Claimant who all testified that they would receive orders from the hardware, not from the First Defendant.

66. The fact that most of the payments were made by the First Defendant is insufficient in this case to lead to the court being satisfied that the First Defendant was also a party to the agreements. It is clear to the court that Mr. La Croix was acting on behalf of the Second Defendant whenever he was directly involved. In that regard, he may have been the source of funds for the Second Defendant but that is a matter as between he and the Second Defendant and does not make him personally liable in all of the circumstances of this case.

67. As a consequence, the court finds that the First Defendant is not a proper party to the Claim and the Claim will be dismissed against him. For the avoidance of doubt all reference to "the Defendant" hereinafter appearing means the Second Defendant.

***Issue 2- Whether the Claim is statute-barred in respect of the whole or part of the debt***

68. The Defendant alleged that invoices 11717, 12165, 12504, 14029, 15447, 18541, 15790, 16283, and 16374 are statute-barred by Section 3 of the Limitation of Certain Actions Act Chap 7:09 ("the Act"). The Act sets a four-year limitation for actions founded on contract. Section 3 (1) (a) reads:

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

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

69. Section 2(2) of the Act reads:

*Periods of limitation prescribed by this Act, shall be subject to the provisions for extension or postponement of such periods in the case of disability, acknowledgement, part payment, fraud, concealment or mistake.*

70. Section 12(2) of the Act reads:

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

### Submissions of the Defendants

71. The Defendants argue that for the claim to succeed, all invoices must be dated from November 2014 as the Instant Claim was commenced on November 15, 2018. Further, that these were all simple contracts and the limitation period would have applied to all individually. It submitted that the total payment of ninety-five thousand dollars (\$95,000.00) was made with the intention of being applied to twenty-seven (27) invoices (21618, 23031, 23241, 23247, 23256, 23270, 23312, 23328, 23347, 23370, 21790, 21821, 21802, 21840, 21848, 21836, 21848, 21927, 21937, 21948, 21947, 21964, 22056, 22116, 21951, 21954 and 21957) as it was never informed of the earlier invoice (which it says are statute-barred) and therefore, it never intended that moneys be applied to those invoices. The Defendants aver the ordinary course of dealing between the Defendants and the Claimant was to make lump sum payments by cheques. At no time when those payments were made, did the Claimant bring to the Defendants' attention the invoices that were allegedly outstanding. In addition, in all the payments made from November 2014 to October 2015, no payments were applied to the alleged invoices for July 15, 2013 to October 30, 2014.

### Submissions of the Claimant

72. 23. On the other hand, the Claimant contended that the five (5) payments totalling ninety-five thousand dollars (\$95,000.00) were cheques paid on account and not to specific invoices. The Claimant submitted that time did not start running from the invoices dated from July 15, 2013 to October 30, 2014, but on the date the breach occurred. According to the Claimant, the Defendants always had more than thirty (30) days to make payments to the Claimant. Therefore, the parties had a laissez-faire relationship in terms of repayment and thus, payment only became due when

the Defendants sent a cheque months after the invoices were issued and the goods delivered, or where the Claimant requested payment from the Defendants. The Claimant argued that the breach occurred around mid-2015 to late 2016.

73. The Claimant also submitted as a result of the five (5) payments made, time started to run afresh on July 26, 2016 and had until July 26, 2020, to file its Claim. As such, each invoice was a separate cause of action for the relevant limitation period. Importantly, the Claimant made repeated attempts for the Defendants to settle all outstanding invoices.

74. The Claimant argued that specific amounts paid by the Defendants were paid to specific invoices. As such, the last five (5) payments were not made to any specific invoices and the payments were made on account.

75. The Claimant made the point that during cross-examination, Vilma admitted she had knowledge of the fifty-three (53) invoices being claimed by the Claimant as early as 2015. The Claimant is of the view that the Defendants had knowledge of the debt being claimed by the Claimant and in response to this Claim, they made payments “on account” and not to specific invoices as was done on every occasion in their long history of doing business. The Claimant referred to the decision of **Surrendra Overseas Ltd v Government of Sri Lanka**<sup>15</sup>:

*A part-payment, like an acknowledgment, can only revive the cause of action and start time running afresh if it provides evidence in the form of an admission by the debtor that the debt remains due despite the passage of time.*

### Discussion

76. To begin with, an invoice is not the same as a receipt, which is an acknowledgment of payment. The Defendants disputed owing the Claimant the outstanding sums stated in the Claim and averred that the ninety-five thousand dollars (\$95,000.00) payment was made in part, leaving an outstanding balance of twelve thousand, five hundred and twenty-one dollars (\$12,521.00).

77. The Claimant claimed that it managed the Defendant’s account by the Peachtree software (now called Sage 50cloud). Therefore, as it entered each of its invoice, the Claimant would have been

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<sup>15</sup> [1977] 2 All ER 481 per Kerr J at 490

aware of the due date and its expiry. Furthermore, the Claimant's evidence is that the Defendants was a major client that normally paid but did not pay the older invoices despite the issued statements.

78. The fundamental question is whether the payment of ninety-five thousand dollars (\$95,000.00) is considered an acknowledgment of the entire debt.

79. According to the Claimant it regularly informed the Defendant of the unpaid invoices by having Maharaj, the driver deliver statements. But the Defendant never paid the outstanding amounts when drawing cheques. It is the evidence of the Claimant from the witness responsible for managing the account of the Defendant, Cindy Dadbahal-Persad, is that upon receiving cheques, the Defendant would set out to which invoices they should be applied. When the invoices were outstanding for too long, a statement would be sent to the Defendant for collection. The Defendant chose to pay on the newer invoices and not the older ones. It is clear therefore, that the Defendant would not have acknowledged the sums outstanding on the older relevant invoices having refused to pay it. However, at some point the Defendant began paying on the old invoices. This was on February 2016 when he began to pay on account and not on specific invoices. Four (4) payments were made of twenty thousand dollars (\$20,000.00) each and a fifth in the sum of fifteen thousand (\$15,000.00) on July 26, 2016. As the evidence in cross-examination shows, the payment cheques usually carried the number of the invoices being paid, however, the lump sum payments made from February 2016 carried no such numbers. Despite Merlin's denial that these cheques were payable on account, the court finds that it must be the case that they were, as no invoice numbers were written thereon. This is the inescapable inference. It also means that the Claimant's account was correct in applying such sums to the earlier invoices in keeping with standard accounting practices and the court so finds.

80. In *PCA/Interplan Group (J-V) Limited v UDeCOTT*<sup>16</sup> Jones J, as she then was, approved the *ratio* in *Surrendra* (supra) and said that the Claimant is burdened with proving that the part-payment is an admission by the Defendant that the outstanding debt is owed. At paragraphs 17-18, the Honourable Judge stated:

*The words "acknowledges the claim or makes any payment in respect thereof" in section 12 (2) must be referable to the debt or pecuniary claim made. In other words, both the*

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<sup>16</sup> CV2005-00766

*acknowledgment and the part payment must be referable to the sum claimed by the action. That being the case, in order to found an acknowledgment under the Act, there must be an admission in writing or by way of a payment, that the debt or the liquidated pecuniary amount claimed is due....To be an acknowledgment under the section there must either have been an admission as to the specific amount owed or to an amount capable of ascertainment either by calculation, or by extrinsic evidence, without the need for further agreement or negotiation between the parties. If, however, in order to arrive at the quantum of the debt, further negotiation or agreement between the parties is necessary then, in my opinion, the admission cannot be an acknowledgment under the Act, since under the Act the acknowledgment must be in respect of the claim.*

81. In ***Re Footman Bower & Co Ltd***<sup>17</sup> it was held where there is a running account between the debtor and creditor general payments will be treated as reducing the total balance rather than being made in respect of a particular part of the total debt. Buckley J at p. 450 states:

*In the case of a current account, where the debtor-creditor relationship of the parties is recorded in one entire account, into which all liabilities and payments are carried in order of date as a course of dealing extending over a considerable period, the true nature of the debtor's liability is, in my judgment, a single and undivided debt for the amount of the balance due on the account for the time being, without regard to the several items which, as a matter of history, contribute to the balance...In the present case, the debits for goods supplied...constitute one blended fund the parts of which no longer have any distinct existence.*

82. The learned authors of Halsbury's<sup>18</sup> also stated the following:

*Prima facie, the right of appropriation by the creditor does not arise in the case of an account current, that is to say, where there is one entire account into which all receipts and payments are carried in order of date, so that all sums paid in form one blended fund. In such a case the presumption is that the first item on the debit side of the account is intended to be discharged or reduced by the first item on the credit side, and that the various items*

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<sup>17</sup> [1961] Ch 443

<sup>18</sup> Halsbury's Laws of England, Volume 22 (2019), para. 318

*are appropriated in the order in which the receipts and payments are set against each other in the account.*

*This presumption, however, may be rebutted by evidence of an agreement to the contrary or of circumstances from which a contrary intention is to be inferred; and it has no application where the moneys paid to the account are in part the payer's own money and in part moneys held by him as a trustee; in such a case the sums on the debit side are applied in reduction of his own moneys whenever they may have been paid in. As between two or more beneficiaries under different trusts, however, where the moneys belonging to the trustee personally are not sufficient to satisfy the sums drawn out, the ordinary rule applies, except where this would be impracticable or injustice would result between creditors.*

83. The court is of the view that the Defendant specifically acknowledged the older invoices. In that regard, there was one running account in the name of the Defendant so that the accounting procedure of applying a payment to the oldest outstanding invoice would have applied but for the act of the Defendant in specifying the invoices to which the payment was to be applied. This is evidence to the contrary of the presumption created as set out in Halsbury's above. The evidence of the witness Persad under cross-examination supports this<sup>19</sup>:

*Q So then you would see that L's General Supplies Limited accounts, the outstanding amount would have been increasing year by year from 2013?*

*A Correct.*

*Q So why wasn't it brought forth in 2014?*

*A As I said, because of the working relationship with ourself and the client as they were one of our bigger customers.*

*Q Does Build to Last use the FIFO or LIFO method?*

*A First in, first out.*

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<sup>19</sup> Transcript day 1 page 29 lines 25 to 43.

Q *First in, first out.*

A *Mm-hmm (affirmative)*

Q *Therefore, the first set of invoices would be the first set of invoices in to get payment?*

A *Unless when the customer says which invoice to put payment towards. Once that is stated, we would not put it to first in, first out at all. It will be that it would put the payment towards the invoices that would have been stated by the clients themselves.*

84. However, when the Defendant began to pay on account without specifying the invoices that were to be paid, the usual accounting practice would have been engaged and the presumption would have applied. In so doing, the Defendant would have acknowledged the debt owing on the original outstanding invoices thereby reviving the debt under section 12(2) of the Act from the date of last payment on account. The court therefore, finds that the limitation period would have begun afresh on July 26, 2016 and the Claim is not statute-barred.

### **Issue 3- Whether the Defendant is indebted to the Claimant in the sum claimed in the forty-eight (48) invoices**

#### Submissions of the Defendants

85. According to the Defendant, it could not make payments for invoices it was unaware of and the Defendant would pay all bills in the order in which they were received. It argued by way of inference that those invoices were either already paid or did not exist at all and posed the question as to why the purported bills remained unpaid for so long after the Claimant had demanded payment for them. If statements were in fact issued weekly it submitted, then the Claimant had over two hundred (200) statements to choose from to include as documentary evidence yet the Claimant did not provide a single statement as evidence.

86. The accounting software Peachtree made it easily accessible to print a statement for a client showing the amount that was due and owing. Nevertheless no such statement was exhibited into evidence for this matter.

87. Finally, that the Defendant's account should have been written up as a bad debtor. The Defendant was one of its major clients. In the year 2014 the Defendant allegedly owed three hundred and ten thousand, nine hundred and eighty-five dollars and fifty-three cents (\$310,985.53), which sum had increased to six hundred and three thousand, two hundred and seventy-three dollars and sixty-six cents (\$603,273.66) in 2015. The Defendant, therefore, asked the court to accept that it is astounding that the Claimant saw this amount increasing weekly or monthly and did not ask for these purported invoices when the Second Defendant paid other invoices throughout the year.

#### Submissions of the Claimant

88. The Defendants' ledger is handwritten. Importantly, no witness could confirm the accuracy of those records. According to the Defendants' system, commodities were ordered from Arouca and delivered to Arima. The Arima branch would receive copies of the invoice. Only after payment would the original invoices be sent to Arouca's accounting department. Given that orders were placed at Arouca and items and copies of invoices were sent to Arima, record-keeping was more prone to mistake, especially when done manually at a different location.

89. The Claimant contends that the Defendants omitted to check this information and avoided their debt to the Claimant by relying on a ledger neither party could physically verify.

90. The documents reveal that the Defendants paid the Claimant two million, five hundred and forty-three thousand, one hundred and sixty-nine dollars and twenty-nine cents (\$2,543,169.29) in 2014, despite owing it a considerable sum. The Defendants paid the Claimant one million, eight hundred and forty-two thousand, four hundred and twenty-eight dollars and forty-seven cents (\$1,842,428.47) in 2015, the year the parties' relationship broke down. Given these numbers and the parties' strong relationship at the time, the Claimant continued to interact with the Defendants in good faith.

#### Discussion

91. It is well accepted that the burden lies with the Claimant to prove its Claim. It is for the Claimant to prove the invoices that are outstanding whether by way of proof by use of the statements issued and sent to the Defendant or otherwise. The Claim concerned fifty-three (53) outstanding invoices. It appears to the court that the record-keeping of the Claimant was not altogether reliable in that regard. This is the inference to be drawn from the fact that it pleaded money owing on invoices

17151, 17167, 17173, 17177 and 17217 and ran a case on that basis but has however, admitted under cross-examination that it was paid for these invoices.

92. But the same can be said of the Defendant's record-keeping. The case for the Defendant has been that it denied owing on twenty-seven (27) invoices based on the fact that it never received those invoices and admitted receiving twenty-six (26) invoices. The five (5) invoices set out above were not included by the Defendant as being invoices received by it. However, there is evidence that it paid those invoices and was given receipts for same. When the evidence for the Defendant on its process for payment (namely, that it would pay after receiving invoices) is considered the inference is that it would have received the five (5) invoices. But it too had no record of the invoices or its own payments made thereon.

93. Further, the evidence of Mrs. La Croix in her witness statement is that she and another employee personally recorded the invoices received<sup>20</sup>, however, under cross-examination her evidence was as follows:

Q So you would have personal knowledge of everything in the Claimant's file; correct?

A Well, I -- I would have an accounts clerk who would be dealing with it. I would have access to it and I would look at it. Like, if I have to go to do payments, I would go through it with the salesman. But like doing entries and thing, I never used to do the entries. I have a sales clerk that would have been Rachel, at that point in time that would do the entries.

Q So, Mrs. La Croix, you never made entries into the records of the Claimant's file?

A No. No.

Q Mrs. La Croix, I want to draw your attention to your witness statement?

A Uh-huh (affirmative)

Q This will be found at volume 2, page 769, at paragraph 12. Paragraph 12. You're seeing it?

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<sup>20</sup> See paragraph 12 of the witness statement of Vilma La Croix

A Yeah.

Q So, Mrs. La Croix, this is your witness statement and you say, at paragraph 12 –

A Mm-hmm (affirmative)

Q -- “After an order was received the invoice would then be entered and recorded into the Second Defendant’s file ...” meaning L’s General Supply Store Limited, “... by myself or an employee.” Correct? That’s your statement?

A Yeah. Yeah.

Q Okay. But you were just telling us that you had nothing to do with recording information to the file.

A Well, I -- no. I normally wouldn’t do the recording. I wasn’t in charge of that. Maybe at some point in time, if the clerk doesn’t show up for work or something, I might do entries, but nothing -- I wouldn’t do, like, most entries then. I would only do it maybe - - that would be very rare, like if they don’t -- like if they doesn’t come to work or something like that.

Q So (indiscernible 12:08:12 p.m.) in a position to verify the accuracy of these records? You have no personal involvement in them.

A What you mean by that?

Q Mrs. La Croix, the impression I got from your witness statement was that you personally and directly had an involvement with the Claimant’s file that was in the Second Defendant’s possession.

Q But you are now saying that you very rarely would be the one making any entries into these records?

A Yes. Right.

Q So your only interaction, or your only knowledge about the accuracy of the information in these records, will be: when you look at it and you compare it with what the Claimant, salesman, or driver had; correct?

94. In the court's view this evidence added to the uncertainty of the accuracy of the records kept by the Defendant in that it may well have been the case that the invoices were received but not recorded. However, the onus lies with the Claimant to prove its case. The fact that the Defendant may have failed to record the invoices is not one that removes the burden placed on the Claimant. That burden is predicated on the elements of the establishment of a valid contract in that the Claimant must show that there was an agreement for the purchase of goods, that pursuant to that agreement the goods were supplied and that sums remain outstanding on payment for the amount agreed for the goods supplied. In this case the Claimant does not have to demonstrate that the invoices were specifically brought to the attention of the Defendant, or that the Defendant had a record of those invoices. To that extent, the court finds the argument of the Defendant to be somewhat disingenuous in that the fact that the Defendant may have failed to take a proper note of the invoice did not mean that the goods were not delivered according to the agreement between the parties. The court finds in this case that on the evidence, the Claimant has proven the agreement, the delivery of goods pursuant to that agreement and the failure to pay for some of the goods delivered. The evidence of the Claimant has set out in detail by way of exhibits, the relevant invoices and of utmost importance the delivery notes for the goods.
95. It is also not the evidence of the Defendant that it did not receive the goods. Even if this was its case it has failed to prove that it did not receive the goods for which it signed as having received on the delivery note. The delivery notes demonstrate delivery of the goods and the Defendant has failed to bring any witnesses to demonstrate that the goods were not delivered as stated on the delivery notes. The court therefore, finds for the Claimant on that issue.
96. In the court's view, it is also an untenable argument for a party to a contract, having acknowledged receipt of goods pursuant to the terms of that contract pursuant also to orders placed by it to refuse to pay for same on the basis that it has no record of the invoice for the goods in the face of delivery notes that acknowledge receipt of the goods. In any event, it is the admission of Vilma that she knew that the Claimant was contending that the old invoices were outstanding since 2015

but yet the Defendant did nothing to verify the account. The court finds in that regard, that the Defendant did nothing to verify the balance outstanding as it knew that the money was due and owing.

97. The court, therefore, finds that the Defendant is liable to pay for the outstanding invoices. Those invoices number forty-eight (48) after deduction for the five (5) invoices already paid.

#### **Issue 4- Whether the Claimant waived its rights to contractual interest.**

##### Submissions of the Defendant

98. The Defendant submitted that the Claimant waived its rights to claim for the alleged interest from its conduct with the Second Defendant. It was never charged any interest on any amounts the Second Defendant had due and owing, even though the Claimant's invoices stated that interest would be charged for late payments.

99. The Defendant relied on a decision of this court, **Gambit Investments Limited v Deborah Thomas Felix**,<sup>21</sup> where the court stated at paragraph 38:

*Halsbury's summarises the issue in referring to the waiver as a party's promise or assurance to another, whether by words or conduct, upon which the other party relies. The party who has promised a certain stance in a legal relationship cannot then alter or revert said stance. He must keep himself limited to the new qualifications of the relationship that he created.*

100. Therefore, the Defendant argued it would stand to reason that in the present instance the actions of the Claimant (by not charging interest) has led the Second Defendant to believe that this was not part of the contract between the parties. Thus, the Claimant cannot now wish to rely on the interest clause as stated on the invoices.

##### Submissions of the Claimant

101. The Claimant made the point that although interest was not previously enforced against the Defendants, its credit limit got out of hand. The Claimant relied on the learning of Halsbury's Laws of England Volume 22 (2019) Para 380 which state:

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<sup>21</sup> CV2012-00803

*A concession granted by one party (B) to the contract to the other (A) before breach and supported by consideration or in the form of a deed will, subject to any requirement of writing, constitute an effective variation. A similar concession after breach constitutes an accord and satisfaction or release. Nevertheless, where the concession lacks the support of consideration or a deed, it may still have an effect as a waiver by estoppel or forbearance of the obligations under the contract, provided that B's waiver is unequivocal and A has acted upon it...If the party granting the concession (B) has led the other party to believe that he will accept performance at a later date than that originally provided for in the contract B will not be able to refuse that performance when tendered; but if time is of the essence it will remain so as regards the new date. However, if the time of forbearance is not specified in the waiver, B is entitled to impose a reasonable new time limit, which may become of the essence; but, if the new time limit is unreasonable, it only takes effect on expiry of a reasonable time. If B has led the other party to believe that he will accept performance in a different manner from that provided for in the contract he will prima facie be entitled to reject the altered performance but he must then give that other party a reasonable time in which to comply with the strict terms of the contract. Whilst a waiver normally has only a suspensory effect, it may have a permanent effect upon the parties' rights when the original performance becomes impossible or inequitable.*

102. The Claimant contends that each invoice is a separate contract between the parties and that the terms of agreement between the parties were also subject to change, particularly as it related to price and delivery times. Furthermore, there is no consideration and therefore, no variation, even where there is an unequivocal waiver, such waiver can be retracted unilaterally. The Defendants were also informed in writing by letter dated January 23, 2017, that the Claimant was demanding interest.

103. As such, it would be inequitable to hold that interest has been permanently waived by the Claimant.

### Discussion

104. It was pleaded at paragraph 5 of the Defence of the Defendant that the interest charge of two percent (2%) per month was “not part of the arrangement between the Defendant and the Claimant as the Claimant never performed these conditions”. It was also pleaded that the Claimant never mentioned or demanded any such payments during the long history of their business relationship. Further, it was admitted by Mr. Kalloo under cross-examination that interest was

never charged for late payments. It also meant that moneys paid by the Defendant were applied only to the principal sums owed and not to interest even in respect of the older invoices. In fact, it appears on the evidence that even when demands were made on outstanding invoices those demands were not for contractual interest. The difficulty therefore, with the argument of the Claimant lies not only with the issue of whether there was a waiver but also whether the contract between the parties provided for such interest. In the court's view it did not. Such a term appeared not to have been one expressed to the Defendant prior to the entry of the contracts but were only provided for in writing on the invoice that was issued subsequent to or at the time of delivery of the goods. This is the process set out at paragraph 4 of the witness statement of the witness Cindy Dadbahal-Persad. The invoice was therefore, generated after the agreement has been entered into and at the time of part-performance, namely at the time of delivery of the goods.

105. Left to stand on its own should the subject have been only one transaction, the court would have held that such a memo written on a document after agreement would not have been sufficient in law to amount to a term of the contract in keeping with the well-established and known principles of contract law which the court finds its unnecessary to set out at this stage. However, the history of business relations between the parties demonstrate that every invoice issued subsequently contained such a provision so that in continuing to order from the Claimant the Defendant would have in the court's view accepted that contractual interest applied to outstanding payments as set out on the invoice. The payment of contractual interest therefore, became a term of the contract and the court so finds.

106. Additionally, the court finds that the actions of the Claimant in failing to draw the contractual interest to the attention of the Defendant and fundamentally in failing to apply the sums paid to such chargeable contractual interest demonstrated clearly an unequivocal waiver on the part of the Claimant after the breach had occurred. In other words, despite large outstanding sums owing on the invoices the Claimant continued to do business with the Defendant without demanding interest or accounting for interest from successive payments or even notifying the Defendant that it was still owing on interest. It is clear that the Defendant subsequently entered into the various agreements for the purchase of goods in the knowledge that although contract interest was a term, because of the business relationship between the parties the Claimant was not being applied or pursued. There is also a reasonable inference to be had that this may have been one of the factors considered by the Defendant in continuing to do business with the Claimant. This is however, not stated in the witness statement of Merlin La Croix.

107. The court therefore, finds that the Claimant waived its entitlement to interest on the invoices on the basis of the continued business relationship between the parties which came to an end in 2015 at which time a considerable sum remained outstanding. A party that waives may nonetheless rescind such waiver. It is the submission of the Claimant that should the court find in favour of waiver, that such waiver would have been retracted by its letter of January 23, 2017. It is important that the body of that letter be set out:

*Re: Outstanding Debt to Build To last Hardware*

*Your outstanding debt to Build to Last Hardware in the sum of five hundred and fifty-eight thousand, nine hundred and ninety-one dollars and fifty-two cents (\$558,991.52) plus interest in the sum of sixty-seven thousand and seventy-eight dollars (\$67,078.00) which totals six hundred and twenty-six thousand and seventy dollars and fifty-two cents (\$626,070.52) is way overdue. We have tried to work with you and have given you sufficient time to settle this matter. Your frivolous excuse that you did not receive the goods although (duly) signed by our officers is inexplicable.*

*You have deliberately delayed us for too long and although we suggested that you even use your own Accountant to sort out the issues, you have not done so - and this was more than six months ago. We even offered to split the fees for your Accountant. Please be advised that if this matter is not settled within weeks two from the date of this letter, we will be pursuing legal action.*

108. As is clear, the letter simply refers to interest and not to contractual interest as set out on the face of the invoices. However, a calculation of the interest being sought would have led to the reasonable assertion that the Claimant was in fact referring to the interest rate set out on the invoices. This appears to be the first indication by the Claimant that it was retracting its waiver because of the refusal to pay the invoices, which it was entitled to do in law and the cessation of the business relationship. The court therefore, finds that although the Claimant waived the interest, said waiver was subsequently retracted. An order will therefore, be made for payment on forty-eight (48) invoices together with contractual interest thereon.

#### Issue of costs

109. In relation to costs between the Claimant and the Second Defendant costs must follow the event. In relation to costs between the Claimant and the First Defendant, the court is of the view

that it would be inappropriate to make an order for costs in favour of the First Defendant. Had all of the documents been properly considered it would have been a reasonable inference that he was not acting in his personal capacity, however, there is a modicum of reasonableness in the Claimant having brought the Claim against him having regard to his role in all of the transactions and to the fact that some of the invoices were not made to the Second Defendant limited liability company but also to L's General Hardware simpliciter. Further, there was direct communication with him by Mr. Kalloo when the parties first contracted. It was however, equally his duty to make it clear to the Claimant at the time of the transactions that he was acting on behalf of the Second Defendant and he failed so to do. This is of course independent of the duty of the Claimant to have properly considered on the information before it whether its proposed evidence demonstrated that he was acting in his personal capacity trading as L's General Hardware, a task that would have been made more difficult by the failure of the First Defendant to make this clear.

110. Additionally, it is equally clear that he was the guiding mind of the company. One only has to compare the separate Defences filed by both the First and Second Defendants to appreciate that they are in material particularly the same. Ultimately of course both the First Defendant and his wife were the only witnesses for the defence.

111. Finally, it was the duty of the First Defendant to respond to the pre-action letter. This he failed to do and has not provided an explanation for such failure. He would have therefore, had the opportunity to set out the fact that he was not a party to the contracts and the Claimant would have been more informed so as to make a decision as to whether he ought to have been joined. Indeed this is one of the purposes of the pre-action letters. His failure so to do cannot redound to his benefit in relation to costs.

### **Disposition**

112. The order of the court is therefore as follows:

- i. The Claim against the First Defendant is dismissed with no order as to costs.
- ii. The Second Defendant shall pay to the Claimant damages for breach of contract being the sums outstanding on forty-eight (48) invoices together with contractual interest at the rate of two percent (2%) per month on balances outstanding for over thirty (30)

days in the sum of nine hundred and sixty-eight thousand, eight hundred and fifty-four dollars and sixty-six cents (\$968,854.66).

- iii. The Second Defendant shall pay to the Claimant the prescribed costs of the Claim to be calculated by a Registrar in default of agreement.

**Ricky Rahim**

**Judge**