THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2018-01101

BETWEEN

Capil's and Company Limited

Claimant

AND

Education Facilities Company Limited

Defendant

Before the Honourable Madam Justice Eleanor Joye Donaldson-Honeywell

Delivered on: 30 April 2020

Appearances:

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

Mrs. Elena DaSilva-Ottley, Attorney-at-law for the Defendant

JUDGEMENT

A. Introduction

1. The Parties entered into multiple individual contracts between 2011 and 2016 for the supply and installation of goods and service for various schools. The Claimant now claims monies due and owing under the contracts for goods purchased along with interest and storage fees.

2. The Defendant denies the Claim, contending that it is highly inflated with regard inter alia to the claim for contractual interest and storage expenses, which the Defendant claims never formed part of the negotiations or contracts between the Parties.

3. The Defendant further contends that part of the Claim is statute barred as the prescribed limitation period under **Section 3 of the Limitation of Certain Actions Act, Chap. 7:09** elapsed. The following contracts and invoices are identified at paragraphs 14 to 21 of the Defence as being statute barred:

    - Febeau Village Government Primary School, Invoices Nos. 1162, 1115, 1117 & 1243;
    - Monkey Town Government Primary School, Invoices Nos. 1116, 1161 & 1343;
    - Arima New Government Primary School, Package 4;
    - Biche High School, Invoices Nos. 1013, 1021 & 1024; and
    - St Barbara's Baptist Primary School, Package 4: Invoices Nos. 1052, 1053 & 1054, Package 8: Invoices Nos. 1042, 1043, 1047, 1048, 1050 & 1051.

B. <u>Procedural history</u>

4. The Claim commenced on 4 April 2018 one year after the Claimant had sent a pre-action protocol letter to the Defendant. By Amended Claim Form and Statement of Case filed on 4 June 2018, the Claimant seeks damages for breach of contract against the Defendant as follows:
    i) The sum of Three Hundred and Fifty-Four Thousand, Five Hundred and Seventy-Seven Dollars and Ninety-Nine Cents ($354,577.99) due from the Defendant under contracts and purchase orders listed in the Claim;
    ii) Interest to the date of filing of the Claim, pursuant to the terms and conditions set out in invoices exhibited to the Claim, in the sum of Four Hundred and Ninety-Five Thousand, Five Hundred and Sixty-Four dollars and Sixty cents ($495,564.60);

iii) Interest from "the date of issue" which is taken to mean from the date of filing the claim, to the date of judgment at the contractual interest rate of 1.5% per month;

iv) Storage fees at 1% on goods being stored at the Claimant's warehouse facilities plus interest at 1.5% per month on outstanding storage fees. In total, the claim for storage fees amounted to Five Hundred and Ninety-Three Thousand, Fifty-Five Dollars and Thirty Cents to date ($593,055.30) at the date of filing of the Claim;

v) Costs.

5. The Claimant's Amended Statement of Case set out the Claimant's version of events as follows:

i) During the period 2011 to 2016, the parties entered into several contracts which stipulated the Payment Terms for certain goods as follows:

> *"On Supply: Sixty (60%) percent of the Contract Price for the supply of goods shall be paid upon delivery of the Goods and upon submission of the documents specified in the Bidding Data Sheet. On Acceptance: The remaining forty (40%) percent of the Contract Price for the supply of the goods shall be paid to the Supplier within thirty (30) days after the date of the acceptance certificate for the respective delivery issued by the Purchaser."*

ii) Every invoice and delivery note issued by the Claimant and signed by the Defendant contained the words:

> *"Interest at the rate of $1^1/_2$ % per month will be payable by the buyer for bills unpaid after 7 days from the date of delivery."*

iii) A course of dealings developed wherein the Claimant allowed for the time for settling of bills to be extended from seven to thirty days.

iv) In breach of several of these contracts, the Defendant either failed to pay the Claimant in full for goods delivered within the time limited for so doing or at all, or failed to accept delivery of goods within the time limited for so doing or at all.

The details are set out in tables from paras. 7 to 20 of the Amended Statement of Case.

v) The Claimant, at its own expense, stored the goods regarding which the Defendant failed to accept delivery. The Claimant demanded a Storage Fee of 1% after a period of three months from the Contract Delivery Date. Additionally, the Claimant charged interest at 1.5% on the unpaid storage fee.

vi) The Claimant avers that there was a running account established between the parties, reflected in monthly statements in the form of consolidated records. As part of the course of dealings and running account, the Claimant says the Defendant often made payments for several invoices in one cheque. The Claimant claims that the balance due and owing is $354,577.99 with interest in the amount of $495,564.60 and storage costs in the sum of $593,055.30.

vii) The Claimant sent a pre-action protocol letter demanding payment of the monies owed on 20 April 2017. There was no substantive response but accountants representing each party met at the Defendant's offices in the first week of July 2017 to discuss the outstanding sums. At that time, the Defendant requested all relevant documentation in order to verify charges.

viii) The Claimant sought, from the outset in its pleadings, to address the issue of the time that had elapsed before it commenced litigation. The Claimant addressed this in the Statement of Case although the Defendant had not yet filed a limitation defence. At paragraph 23 of an Amended Statement of Case, it is pleaded that the request by the Defendant for documents amounted to a waiver of the limitation defence. This is the Claimant's only pleading in relation to a limitation defence. However, later on in closing submissions, the Claimant argued that "*the existence of the said running account has the effect that any individual unpaid invoices dated prior to the threshold of the date for the expiration of the limitation period does not take effect as the substantial date, but rather the last payment made by the Defendant to the Claimant which was a payment to the account acts as the material date.*"

6. The Defendant's version of events, as pleaded in its Defence, was in summary as follows:
    i) The Defendant entered into several contracts with the Claimant during the period September 2011 to October 2016;
    ii) Each of the Contracts comprised the Defendant's Invitation to Tender for the items, the Claimant's response thereto, the issue by the Defendant and execution by the Claimant of the Letter of Acceptance. Invoices were subsequently issued by the Claimant and the purported Terms and Conditions of sale endorsed thereon neither formed any part of the Contracts nor reflected the common intention of the Parties;
    iii) There was no agreement between the Parties for interest or storage fees. The representatives of the Defendant that signed the invoices did not have any actual or ostensible authority to vary the Contracts. In any event, those persons signed the invoices for the sole purpose of acknowledging receipt of the items described therein;
    iv) The Defendant denies that it is liable for the storage fees, and contends that even if the Claimant did store the goods as alleged, the Claimant failed to mitigate its loss by selling the items in storage;
    v) The Defendant denies there was any course of dealing or a running account established by the sending of consolidated records;
    vi) The Defendant denies that its request for the Claimant to provide documents in respect of the alleged indebtedness amounted to either a waiver of the limitation period or an acknowledgement of the debt. In closing submissions, the Defendant pointed out that the Claimant's own accounting records made note of statutory limitation dates applicable to the contracts. The Defendant maintains that since this Claim was not commenced until 4 April 2018, all causes of action accruing before 3 April 2014 cannot be pursued;
    vii) The Defendant contends that the Claimant is indebted to the Defendant for sums overpaid in relation to interest which was not authorised by the Contracts and this must be set-off against the quantum claimed;

viii) The Defendant further pleads that the Claimant did not deliver to the Egypt Village Primary School a balance of $83,017.35 worth of goods paid for by the Defendant. Likewise, they say $40,766.44 worth of goods was paid for but not delivered to the Princes Town East Secondary School. According to the Defendant, the indebtedness of the Claimant to the Defendant in respect of the Contracts for these two schools must be set-off against the quantum the Claimant seeks to recover from the Defendant in this Claim. This set-off Defence could not have been considered, however, as no evidence was presented by the Defendant that it paid in full for some goods that were not delivered.

7. The pleadings closed with a Reply filed on 10 December 2018 in accordance with directions given by the Court by Order dated 7 December 2018. The Claimant's Reply to additional points arising from the Defendant's case is summarised as follows:
    i) Receipt of the goods was acknowledged by the Delivery Slips;
    ii) There could be no mitigation of loss by sale of the goods purchased for the Defendant because they were intended for schools and were not normally or habitually sold by the Claimant in its retail business. The only available market for the large quantity of school supplies would be the Government of Trinidad and Tobago through one of its special purpose companies such as the Defendant herein. Furthermore, some of the items purchased and stored by the Claimant at its warehouse facility in Trincity were paid for in part by the Defendant and as such the Claimant was unable to dispose of same;
    iii) From some time in or about 2015, the Claimant issued the Defendant invoices/statements clearly setting out the cost of storage. The Defendant failed to inform the Claimant that it no longer wished to have the goods stored on its behalf so as to allow the Claimant to attempt to dispose of the items.
    iv) The Defendant did not refuse, at any time, to accept delivery of goods based on breach of any alleged warranty. To the extent that the Defendant now pleads that

some of the goods may have been defective, in breach of warranty the Defendant is required to prove this strictly.

v) The Claimant did not, in the Reply, address the Defendant's pleading that their request for documentation did not amount to a waiver of the limitation Defence.

8. The parties were directed to file witness statements and propositions of law. There was not full compliance. An application by the Defendant for relief from sanctions for failing to file on time was dismissed on 7 November 2019. Counsel for the Claimant's objections to the content and form of propositions of law filed by the Defendant were upheld. The matter therefore proceeded to Trial based on evidence and propositions of law filed only by the Claimant.

9. On conclusion of the Trial on 7 January 2020, the parties filed written closing submissions and responses thereto by exchange which closed on 23 April 2020.

C. <u>Issues</u>

10. The issues to be determined are whether:

i) Interest claimed on unpaid sums formed part of the contract/agreement between the parties;

ii) the Storage Fee on uncollected items formed part of the contract/agreement between the parties;

iii) there is sufficient evidence of the Claimant's storage of the Defendant's goods, in support of its storage fee charge;

iv) the Claimant's losses were sufficiently mitigated by storing the goods for this extended period; and

v) part of the Claimant's claim is barred by the statutory limitation period.

D. Evidence

11. Only the Claimant filed evidence within the time specified. Three witness statements were filed on behalf of the Claimant, sworn by the following witnesses:
    i) Ms. Jennifer Dookeeram, Accounts Executive
    ii) Mr. Carlos Weekes, Warehouse Manager
    iii) Mr. Dexter Parris, Manager.

12. Mr. Parris stated in his witness statement that once a purchase of goods contract was agreed to with the Defendant, the Claimant sourced and purchased the goods but only delivered them to the Defendant when it indicated through its agents that it was ready to receive them. Further, he said that on delivery of the goods, the Claimant issued invoices and delivery notes, which identified the interest payable for bills unpaid after 7 days. This grace period was extended to thirty days.

13. In cross-examining this witness, Counsel for the Defendant sought to highlight a discrepancy between the emailed instructions of Ms. Carol Smith, Project Officer for the Defendant and what was actually done. One email from Ms Smith to Mr. Parris, attached to his statement, asked that he ensure a teacher signed the relevant documents. Counsel for the Defendant questioned Mr. Parris about three of the invoices dated 22 September 2016, which indicated that a receptionist signed.

14. Under cross-examination, Mr. Parris admitted that he did not inform the Defendant of storage fees accruing via email or otherwise. He said that he did not attach proof that the Defendant was informed of the storage fees but made clear that providing that information was not his responsibility. In the absence of witness statements filed by the Defendant, however, there is no evidence from the Defendant that the information on storage fees charged was not received.

15. Counsel for the Defendant also questioned this witness on whether the items could have been sold e.g. in a warehouse sale. Mr. Parris when asked generally about whether the Claimant ever holds warehouse sales responded stating that they hold such sales but do so to sell repossessed goods. However, this information was irrelevant to the instant case. There was no pleading or evidence from the Defendant that in the years after contracting to purchase goods from the Claimant, they no longer required the goods and so informed the Claimant. In fact, the evidence before the Court is as to the continual nature of the contractual relationship between the parties. This does not support any basis for the Claimant to take measures such as repossession and sale of the Defendant's goods.

16. Ms. Dookeeram attached to her witness statement the monthly statements of accounts she started preparing in August 2014 when the Defendant's payments became sporadic. Counsel for the Defendant sought, in cross-examination of this witness, to establish that the Claimant never sent letters with these monthly statements to the Defendant thereby informing the company that storage fees were accruing. Ms. Dookeram was unwavering in her testimony that the correspondence was sent monthly, but she said that there was no covering letter demonstrating this correspondence attached to her own witness statement.

17. The lack of evidence from Mr. Parris and Ms Dookeram as to delivery of the accounts setting out the storage fees to the Defendant must, however, be looked at in the context of the pleaded case. The Claimant's pleading at paragraph 11 of the Statement of Case that the "consolidated records" of accounts, including storage fees, were sent by email to the defendant's accountant periodically (a sample of such email sent by one Trisha Doolam is included at page 0513 of Volume 1 of the Trial Bundle), was not denied in the Defendant's pleadings.

18. In fact, although at paragraph 7 of the Defence, the Claimant's entitlement to charge the storage fees is contested, there is no denial by the Defendant of the fact that the

accounts, with charges for storage fees, were sent. The un-contradicted pleadings and evidence supported the Claimant's case that the storage fees were included in monthly statements delivered to the Defendant.

19. Mr. Weekes gave evidence that his role was to oversee delivery of the goods requested by the Defendant. This involved assigning a driver and ensuring that invoices and delivery notes were sent and returned signed. He states that the storage space was generally used for other goods belonging to the Claimant company but that when it became the practice that the Defendant's goods would be stored for long periods of time, that area of the warehouse was permanently assigned to storage of the Defendant's goods.

20. Under cross-examination, Mr Weekes stated that there is special storage space, a strong room, for fragile items in the warehouse. The main thrust of Counsel for the Defendant's questioning of this witness was to underscore the lack of itemisation in his witness statement of the goods currently being stored and the lack of evidence on their current condition.

E. Law and Analysis

Limitation period

21. The Defendant submits that parts of the Claimant's Claim are time-barred by statute, as they concern payments outstanding for more than four years before the Claim was filed. The Claimant, in its pleadings, suggested that the Defendant's request for further documentation from the Claimant to verify the charges, after the parties met to discuss the disputed quantum owed, amounts to a waiver of the limitation defence.

22. In submissions however, Counsel for the Claimant makes no mention of this response to the limitation defence. In any event, the contention is unsupported by law. **Section 12 (2) of the Limitation of Certain Actions Act, Chap. 7:09** provides:

"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 therefore 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 the acknowledgment or payment."

23. The case of **Surrendra Overseas Limited v Government of Sri Lanka [1977] 1 WLR 565** (applied by Rahim J. in the case of **National Insurance Board of Trinidad and Tobago v Quality Security Bodyguard Services Limited CV2018-03558**) considered what was meant by an acknowledgement in the comparable UK Limitation Act:

    "But, taking the debtor's statement as a whole, as it must be, he can be only held to have acknowledged the claim if he has in effect admitted his legal liability to pay that which the plaintiff seeks to recover. If he has denied liability whether on the ground of what in pleader's language is called "avoidance" or on the ground of alleged set off or cross claim then his statement does not amount to an acknowledgement of the creditor's claim."

24. Without more, the request for further particulars by the Defendant of the debt claimed by the Claimant cannot be considered an acknowledgment of the debt sufficient to extend the limitation period.

25. The Claimant also submitted at paragraph 30 of its submissions that the Defendant's establishment of a running account with the Claimant had the effect of extending the period of limitation to run from the date of last payment on the account. The Defendant is convincing in its submission in reply that the following factors prove that there did not exist any such running account:

    i) The Claimant issued invoices and statements which itemized each individual school and package.

ii) The Pleaded case and Submissions of the Claimant suggest separate contracts and separate payments issued relative to each individual contractual arrangement. The Claimant's Submission at paragraph 2 also states, "the claim is made up of multiple individual contracts between the parties". It is submitted by the Defendant that this shows that the Claimant treated each package was treated as a separate debt.

iii) The Defendant's contention is that payment was issued under each specific contract, effectively making payment separate for each school/contract. This is demonstrated by the payment of 60% of the cost on supply, and subsequent delivery. In this way, the individual statement for each school was credited to individual invoices, and not to reduce an overall cumulative singular debt owed by the Defendant.

iv) The Defendant submits that payment toward each individual package/contract was meant to terminate the contract for that particular school or package. Once all items were delivered and installed at that particular school, final payment would be issued.

v) The Defendant responds to the Claimant's paragraph 14 submission that the Defendant would often make payments for multiple invoices by the payment of one cheque to apply to various contracts, by submitting that it is an inaccurate analysis. Specifically, the Defendant highlights the Claimant's reference to the Defendant's payment of $151,252.97 towards the Early Childhood Care and Education Centres ["ECCEC"] as an overpayment for goods valued at only $25,171.66. This the Claimant had submitted, was an example of an overpayment that went towards a running account.

vi) The Defendant, in response, directs the Court to paragraph 19 of the Statement of Case where the record of this payment is set out in a table, under the heading "Lot 4 Contract". The value of the entire contract is $252,088.28 and the payment dated 11 September 2013 of $151,252.97 is precisely 60% of the contract value. The Defendant underscored that the $252,088.28 was not an overpayment, but

reflective of the contractual obligation to pay 60% upon supply. There is merit to this submission. Although there were some undelivered goods for the ECCEC contract to which the down payment could be applied there was no indication that the down payment may have been applied to other contracts in a running account.

26. In further support of this submission the Defendant cited the reference made in **Clico Investment Bank Limited Islamic Banking Services, IBS v Hassal Enterprises Limited CV2014-02564** to the statement in **Ishrack Daniel trading as Daniel's Grocery & Liquor Store v Trinidad and Tobago Defence Force & Ors CV2014-00217** on the definition of a running account:

> *"In support of its assertion, the claimant suggested that the court must look to the record to assist in the determination of whether there was a continuing business relationship to support the existence of a running account which is usually characterized, as identified in Ishrack Daniel v TTDF and WH Smith Travel Holdings Limited by:*
>
> *29.1. A consolidated record which reflected what the balance was at any point in time;*
>
> *29.2. An express or implied agreement between the parties that the monetary outcome of each transaction shall not be settled separately;*
>
> *29.3. Continuous dealings not intended to terminate with one contract; and*
>
> *29.4. Outstanding items uniting to form one entire demand"*

27. The Defendant has sufficiently answered the Claimant's contention on the overpayment going to a running account, by showing that the sum identified by the Claimant was in fact the 60% agreed sum for payment on supply. As the Defendant outlines in reply submissions, the contracts were treated by both parties as separate, with separate invoices and statements being issued by the Claimant throughout their dealings. The requirements outlined in **Ishrack** do not apply to the present circumstances, therefore,

and the Claimant failed to prove the existence of a running account capable of extending the limitation period.

28. Therefore, the Defendant's limitation defence succeeds and the Claimant's claims for sums owing prior to the four-year limit must fail. Thus, only invoices due after the statute barred date, which Defendant says amounts to $139,882.15, are recoverable.

Interest

29. The Defendant's defence that the interest at 1.5% per month on unpaid bills was not part of the contract has not been supported by any evidence from the Defendant. The Defendant at paragraph 10 of submissions indicated that the uncontroverted evidence from the Claimant was that the notification of 1.5% interest was not included on the delivery notes. However, the Claimant in reply submissions accurately highlights that it was pleaded in the Amended Statement of Case and provided in evidence that the terms of interest were included on both the backs of the invoices and delivery notes. Indeed, the interest figure was proven by the Claimant to be set out in the Terms and Conditions at the back of each of the 178 invoices and delivery notes signed by the Defendant's employees over the period 2013 to 2016.

30. The Claimant also claims that these sums were included in monthly statements sent to the Defendant to outline accruing sums. At no point during this period did the Defendant make objection to this term.

31. Furthermore, the Defendant's placement of further orders as well as entering into further agreements while still making part payments to the Claimant implies its agreement to these terms.

32. The Defendant cites **Chitty on Contracts Vol. 1 33rd Ed. Paragraph 26-282** which states that interest should not be awarded unless the Claimant has been deprived of income-producing property:

> *"The court should not award interest if that would give the claimant double recovery for the same loss: the use of property, of the receipt of the income arising from its use, is equivalent of interest earned by a sum of money. For instance, if the seller retains income-producing property, which would have been transferred to the buyer had he paid the price, the seller should not be given interest on the price if he is entitled to the income arising from the property during the delay until the price is paid. Where the breach of contract deprives the claimant of the use of land or goods, and the court awards him damages for the loss of that use (e.g. loss of rents or profits) he should not also be awarded interest on the value (or price) of the land or goods."*

33. It is clear that this passage has no application to the present circumstances, as the Claimant while storing the items of the Defendant, whether they were partly paid for or ordered and not accepted, was not entitled to make use of the property to earn income. The Defendant, when it became ready to accept the goods, would not likely have accepted used goods. Therefore, the Claimant cannot be said to be "entitled" to the income arising from the property during the delay as envisioned by this extract.

34. Further, the final sentence of the passage discusses a circumstance where damages for loss of use have been awarded in the instance where the Claimant is deprived of the use of the property. No damages for loss of use have been claimed or awarded in this case.

35. The Defendant contends that the Claimant failed to prove that the invoices which set out the interest rate being charged were signed by authorised agents of the Defendant. However, in the absence of evidence from the Defendant to support that those signing

the invoice and delivery note to accept the goods delivered by the Claimant were not authorised by such signing to agree to the interest rate, this issue cannot be substantively determined in their favour.

36. With regard to the Defendant's submission on the interest rate being unfair and unreasonable, there is no pleading from the Defendant to support this contention. There is also no evidence from the Defendant. To succeed in this contention, the Defendant ought to have pleaded it and presented some evidence of what rate should normally apply i.e. prevailing rates for non-payment on delivered goods.

37. The Defendant's contention in submissions that the interest claimed amounts to a penalty clause also was neither pleaded nor raised in these proceedings and therefore does not fall to be determined by this Court.

Storage Fee

38. The Defendant's submission on the storage fees for keeping the goods pending delivery by the Claimant is that there was no agreement between the parties for such a fee. They submit that it was not a fee that had ever been paid before and there was no evidence of correspondence with the Defendant about the fee.

39. The submission of the Claimant justifying the storage fee claim is based on S.49 & 50 of the **Sale of Goods Act, Chap. 82:30** which provides for the maintaining of an action against a buyer for payment as well as damages for non-acceptance. In the present case, the damage the Claimant suffered was the cost of storage of the items until the Defendant accepted delivery. The Claimant also cites **Chitty on Contracts Vol II 25th Ed.** on Specific Contracts at paragraph 4281:

> *"When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request to take delivery of the goods, he is liable to the seller for any loss*

occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods." [Greaves v Ashlin (1813) 3 Camp 426].

40. Accordingly, the validity of a claim for storage fees in these circumstances is supported by statute and under common law. As determined by Rahim J. in **Carver Morris & Lisa Morris v Azee Shipping and Trading Company Ltd CV2016-00070**, once the Defendant was aware that it was accruing, the storage fee should be paid.

41. The Claimant's evidence is that the claim for storage fees was included in monthly statements from around 2014 with no protest from the Defendant. On a balance of probabilities and in the absence of sworn evidence to the contrary from the Defendant, these statements were being received by the Defendant and/or its employees.

42. The Defendant, in submissions, disputes the time from which the storage costs accrued, arguing that charging of storage costs from the date they were stored in the Claimant's warehouse was unfair and uncontemplated in the written agreement between the parties.

43. However, the issue in the present case was undue delay by the Defendant in accepting delivery of the items. The Claimant could not be expected to bear the cost of storage indefinitely and this was not expressly provided for in the contracts. Therefore, the storage fee reasonably accrued after a reasonable period for acceptance by the Defendant had elapsed. The Claimant at paragraph 8 of its Amended Statement of Case states that the Storage Fee was only charged after a reasonable delivery date of three months had elapsed from the Contract Delivery Date.

44. This three-month period appears reasonable, particularly in light of the understanding the parties had in relation to allowing final payments to be made within a month from

the supply of the goods. Therefore, there is no unfairness in the date from which storage fees were charged. The Defendant also disputes the value of the goods upon which storage fees should be calculated. However, in the absence of any evidence that the value has decreased, the Claimant's Claim based on the original value is accepted.

Proof of Storage

45. The Defendant submits that the record reflects that some goods that were delivered had to be returned and replaced. The Defendant directs the Court's attention to three items – a damaged garbage bin, a missing mop and a missing cord for a cooker. This, the Defendant suggests, supports their contention that the Claimant was required to show that the goods were and continued to be of merchantable quality.

46. There is, however, no positive evidence from the Defendant that there were defects in the goods generally. These three items, among the hundreds of goods delivered, cannot be said to imply general defects in the goods provided such that the Claimant would be required to prove the quality of those left undelivered in their storage room. The Defendant also did not put forward any pleading to suggest that there were defects in the Claimant's general supply of goods or that they were not of merchantable quality. It merely disputed the fact that the goods had been stored at all and put the Claimant to proof. The Claimant therefore had no case to answer with regard to defects when preparing witness statements.

47. The testimony of the Claimant's witnesses that the goods are still in storage sufficiently proves that aspect of the case as there is no evidence to the contrary on the Defendant's part. However, as the Defendant is required to pay the Claimant the full sum owed as well as storage fees for the goods, the Defendant would also be entitled to take possession of the goods in their present condition.

Mitigation of Loss

48. The Defendant submits that the Claimant had the right to repossess and sell items for which they have not been paid and suggests that the Claimant should have exercised this right in mitigation. Counsel for the Defendant refers to Clause 9 of the Terms and Conditions between the parties, submitting that as ownership lay with the seller until delivery, they were at liberty to sell. They point to the evidence of Mr. Parris that items damaged or repossessed are usually sold in warehouse sales or in the main store.

49. The Claimant submits, however, that different circumstances existed in relation to the contracts with the Defendant and the goods subject to those contracts. It is submitted, firstly, that recovery of the goods already delivered would have been unjust, as the goods would be utilised by the children in the schools to which they were delivered. Secondly, it is submitted that resale of the specific goods in the contracts that were designated for schools would have been difficult and unlikely. This is uncontradicted by evidence from the Defendant. Finally, they submit that the Defendant's refusal to take delivery while still making payments on their accounts put the Claimant in a difficult position of being obliged to continue to carry out their end of the contracts by keeping the goods in storage for the Defendant. Sale of the goods could have given rise to a breach of contract action against the Claimant.

50. The Claimant in reply submissions cites **McGregor on Damages 18th Ed. p. 245, 7-023** on "Whether need to mitigate by discontinuing contractual performance":

> *"Nor, it seems, need a claimant take steps to mitigate loss, even after the defendant's performance of the contract which he has repudiated falls due, by accepting the repudiation and suing for damages. He may instead, where he can do so without the defendant's assistance, perform his side of the contract and claim in debt for the contract price. Even if this involves incurring expense in the performance of the contract which, in face of the defendant's repudiation, is rendered useless, the claimant is not required to minimise the loss by accepting the*

repudiation and suing for damages. This conclusion was reached in White & Carter (Councils) Ltd v McGregor [1962] AC 413, [1961] 3 All ER 1178, HL.*"*

51. In the **White & Carter** decision, a client wished to withdraw from a contract with its advertisers before it began and offered to pay the advertisers any losses suffered; however, the advertisers chose to continue to perform and then claimed their fee. The court upheld the advertiser's claim for their fee. The majority decision turned on the proposition that the clients' repudiation, being unaccepted, could not affect the advertisers' contractual rights, and the duty to mitigate was not mentioned. However in The Law of Damages (Common Law Series) 2nd Ed. (May 2010) at [5.65] this case is referred to as clearly establishing that there is no room for the doctrine of mitigation in claims for *simple debt*.

52. This is further supported by the learning in **Halsbury's Laws of England on Damages (Vol. 29 (2019)) at [379]**. Discussing the limits to the duty to mitigate, it states:

> *"First, it does not apply to a claim in debt. So a claimant who can perform his contract without the co-operation of the other party can claim the price of performance in full despite a prior repudiation by the latter, even though by not performing he might have suffered a reduced, or a nil, loss."*

53. The present case involves partly, claims in debt for the price of the goods sourced for the Defendant including interest and partly the claim in damages for storage costs incurred. However, the claim for storage fees are consequential losses as a result of the Defendant's failure to complete its end of the contract. As the learning suggests, therefore, the Claimant was under no duty to accept repudiation of the contract earlier and sue the Defendant in mitigation of its losses.

F. Conclusion

54. The Claim is determined in the Claimant's favour, save for the parts of the Claim in relation to sums owed prior to April 2014 which are statute-barred. That aspect of the Claim, in an amount to be jointly calculated by the parties, is dismissed.

55. It is, therefore, hereby ordered as follows:

i) The Claimant's Claim for monies contractually due and payable prior to 3 April 2014 under the contracts and invoices listed at paragraph three (3) of this judgement is statute barred and is therefore dismissed and the Claimant is entitled to retain possession of the goods that were the subject matter of those contracts.

ii) Judgement for the Claimant on its non-statute barred Claims under the remaining Contracts and Purchase Orders listed herein is awarded as follows:

a. The Defendant is to pay to the Claimant the sum contractually due, subject to the Claimant permitting the Defendant to take possession of the goods that were the subject matter of the contracts in relation to which payment has been awarded;

b. The Defendant is to pay to the Claimant interest at the rate of 1.5% on the said sum referred to at a. above, calculated from 7 days after the contractual date of delivery to the date of this Judgement;

c. The Defendant is to pay to the Claimant storage fees on the goods at the rate of 1% on the balance per month plus interest on the storage fee at 1.5% per month as from three months after the contract delivery date to the date of this judgement;

d. The Defendant is to pay the Claimant's costs of the Claim on the prescribed basis.

iii) The parties are jointly to calculate the quantum of the monetary award and costs to be included in the Court's order to reflect the decisions made at sub-paragraph ii) above.

iv) Thereafter, the Claimant is to file a Draft Order setting out this agreed calculation on or before 4 May 2020.

v) In default of such filing the Court will, on an application filed by the Claimant with an Affidavit explaining efforts made to arrive at a joint calculation, make an Order in Chambers as to the calculation of the quantum of damages and costs.

vi) Liberty to Apply.

E J D. Honeywell

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Eleanor Joye Donaldson-Honeywell

Judge

Assisted by Christie Borely JRC I