I N THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C. L. I 044 OF 2000

BETWEEN	INDUSTRIAL SALES	CLAIMANT
AND	JOHN FRANKLIN t/a FRANK I. LEE	1ST DEFENDANT
AND	FRANK I. LEE DISTRIBUTORS LTD	2ND DEFENDANT

Mr. Brian Moodie instructed by Samuda & Johnson for the Claimant

Ms. Gillian Mullings instructed by Mullings & Company for the Defendants

Breach of Contract – Food Storage and Prevention of Infestation Act – Breach of Statutory Duty – Incorporation of a Document into a Contract

Heard 27th and 28th January 2011 and 12th October 2012

Campbell , Q.C., J.

Background

[1] The Claimant is a company registered in accordance with the Companies Act. The Claimant rents cold room space for the storage of perishable food items such as fish and meat products. It is located at Newport West in Kingston. Its facility consists of a small port, with ten cold rooms situated on two floors. The facility is regulated pursuant to the provisions of the Food Storage and Prevention of Infestation Act, and the Regulations made thereunder.

[2] 1st Defendant is the Managing Director of the 2nd Defendant. The 2nd Defendant is a limited liability company, with the 1st Defendant and his widow, Sonia Lee, being the only subscribers with one share each. The company imports fish and meat products for sale and has been using the Claimant's cold storage since 1992.

[3] The Defendant's products are delivered by the consignor directly to the Claimant's facilities. The unchallenged evidence of Donovan Reid is that the containers would be off-loaded into the facility. The Claimant's representatives would be present when goods arrive. The seal on the container would only be broken if a custom officer and a public health inspector were present to certify the meat/fish being wholesome, had arrived in good condition and at a proper storage temperature. If the officers were so satisfied, the goods would be off-loaded in the cold storage.

[4] The 2nd Defendant would, from time to time, collect products from the facility for distribution or sale. There were two consignments of fish for the Defendants during the material period. Firstly, a consignment of fish from Costa Rica on Bill of lading #SJON8M001854 and Caricom Invoice dated the 22nd July 1998, valued US$31,943.34. Secondly, from Suriname, Bill of Lading #SUJM8Ao54 with Caricom invoice dated the 4th August 1998, valued at US$38,301,729.

[5] On the 8th May 2000, the Claimant filed a Writ of Summons against John Franklin in which it sought to recover the amount of J$562,435.50, claiming the amount due and owing to the Claimant pursuant to the terms of an Oral Agreement between the parties for the provision of cold storage facilities for the period April 1998 to December 1998. John Franklin filed a summons to

set aside the Writ of Summons and strike out the Defendant on the basis that he had been improperly joined. On the 9th November 2000, the Defendant's summons was dismissed. On the 20th December 2000, the Defendant filed a defence, denying having contracted in his personal capacity, and alleged that any sum owed would have to be set-off against $5,098,640.00 owed to the Defendant for damage to goods stored at the Claimant's facility. By order on the 8th May 2002, the writ was amended to join the 2nd Defendant and to claim against the Defendants jointly and severally.

The 2nd Defendant's Counterclaim

[6] The 2nd Defendant filed a Defence and Counterclaim, in which it was alleged at paragraph 4;

> The 2nd Defendant avers that the Claimant was under a duty to store the meat products in a reasonable and careful manner and to exercise due care and reasonable care to preserve and keep the meat products in a condition fit for human consumption. In particular, the Plaintiff was under a duty to keep the meat products adequately refrigerated and stored under hygienic and sanitary conditions so that the same would not deteriorate, spoil or become unfit for human consumption.

[7] And at paragraph 5;

> The 2nd Defendant further states that as a result of the Plaintiff's fundamental breach of the contract of bailment to store and keep the meat products in a careful manner and to preserve the meat products in state fit for human consumption, the meat products deteriorated in condition, became spoilt and became unfit for human consumption, whereby the 2nd Defendant suffered loss and damage.

The 2nd Defendant alleged breach of the Food Storage Prevention Act and Regulations. The Defendants counterclaimed in negligence, particularising

among others, failing to maintain a proper temperature control over the meat products, failing to ensure the said facility was cleaned and sanitized, failing to clean the pipes of the said facility.

[8] The Claimant, in its Reply, alleged that it had informed the Defendant by written notice that the Claimant's cold storage facility would be closed on the 5th November 1998 and that the Defendant should remove its goods by the end of October 1998. The period for evacuating the rooms was extended to the 5th December 1998. The Defendant failed to remove the goods and advised the Claimant in or around May 1999, that he was no longer interested in the goods.

Defence to Counterclaim

[9] The Claimant later withdrew its case against the Defendants. Therefore, all that was before the Court was the Defendant's counter-claim. In defence of the counterclaim, the Claimant raised no dispute that the Defendant's fish may have been spoiled as at the 6th May 1999, but grounds its defence on the following facts;

(i) That the invoice issued to the Defendants exempts Industrial Sales Limited from risk of damage. That Industrial Sales Limited may give 14 days notice to the customer to remove his goods. The Claimant cite their "notices" of the 5th October 1998, and the 2nd December 1998, and their letter in January 1999. That the goods were proven to be spoilt in May 1999 seven months after the first notice to remove was given.

[10] Was the spoilage of the two containers of fish the result of the Claimant's breach of contract or negligence; or was it due to the failure of the Defendants in retrieving the products as requested by the Claimant. Industrial Sales, in its written submission, has accepted that exhibit 10,

represents their invoice for the contents of the containers. They also accept that the invoice purports to bill the Defendants for the period Jan – April 1999. The invoice of the consignor and the customs import entry are signed as having been received on the 5th August 1998. In respect of the shipment from Suriname, it was stamped by the Customs Branch on the 13th August 1998. The container from Costa Rica bears an invoice date of the 22nd July 1998.

[11] The gravamen of the Industrial Sales submission is that the tainting and spoiling of the stored goods were not the responsibility of the cold storage, because the spoilage had been in May 1999, seven months after the first notice requesting removal of the goods had been issued. Their letters requesting the Defendants to remove their goods started with the letter of the 5th October 1998 and was extended until the 5th December 1998.

[12] Mr. Linval Reid has been employed to the Claimant from "late 1950s to 1999". He served from 1960 as the maintenance Engineer of the cold storage facility. He says in his witness statement that problems he had earlier catalogued involving the cold storage facility, "intensified" between 1998 and 1999. Those problems included the facility malfunctioning, the lack of expenditure on the maintenance of the pipes in the facility which caused the pipes to rot and burst, resulting in frequent leakage of ammonia. This caused the products being stored becoming saturated with ammonia. This vital evidence is unchallenged. He was sworn and cross-examined. I accept his evidence from the witness-box. There is no challenge that he was the maintenance engineer for Industrial Sales cold storage facility.

[13] Mr. Donovan Richards' testimony was also helpful in determining the date of spoilage. He states in his witness statement that, on arrival, all the 2nd Defendant's goods were certified in his presence as being wholesome. He testifies that on a Monday, during the period September to October 1998, he arrived at work to find the entire place flooded with ammonia. He observed other workers equipped with gas masks, going in the facility to collect products. According to the witness, the smell of ammonia permeated the air. The court finds there is unchallenged evidence that there was a malfunctioning of the plant. I accept the evidence of Mr. Richards and Mr. Reid that there was a major leakage of ammonia sometimes between September and October 1998. I accept that as a result of the leakage, the temperature in the facility would fluctuate, causing the goods in the cold storage to defrost, and become tainted with ammonia.

[14] Mrs. Franklin, in cross-examination, states that it was in late November 1998 that she got the indication that the products were spoilt. She had visited the cold storage to collect fish for the retail store. On arrival, she was met with an overpowering odour of spoilt fish. She testified that "everyone was covering their noses." She said she returned the spoilt fish to the cold storage. She was asked in cross-examination about a report of Mr. Baker, Senior Public Health Inspector, (ex.10), and a letter from the company, concerning that Report. She maintained that the fish was spoilt.

[15] The Report of the 12th March 1999 is unclear as to whether the Defendant was advised of any of the three inspection dates. It is also unclear on which of the dates was the finding in the report related. There is no evidence to whom the Report was addressed or who had commissioned the Report. It is most important to identify what the public health inspectors were seeking to

find. There is no evidence that they had the requisite expertise to say whether the goods were spoilt. There is no statement of facts on which the conclusion of the report is based. There is nothing in the report to state whether the facility complied with the regulatory framework imposed by the pertinent legislation. I accept the evidence of Mrs. Franklin that she had observed the spoilage in late November 1998, and that the Bureau of Standard Report was not the first indication that the fish had spoilt.

[16] The Bureau of Standards Report was based on their visit of the 6th May 1999 `to the Claimant's cold storage. It detailed the non calibration of the recorder, the inability of the inspection to identify the temperature recorder in respect of Room 2, which affected the team in making specific findings on the temperature control in that room. However, the Report was able to confirm, a strong smell of ammonia on entry, which finding supports the testimonies of Messrs Richards and Reid, as to a major leakage between September and October 1998. The Report confirms the insanitary and dilapidated condition of Room 2. The Report notes accumulated grime, the flooring pitted exposing the foundation underneath. The insulation was coming off in certain areas resulting in higher temperatures in those areas. The fish samples had a distinct off odour. The boxes with fish were soft and pliable, instead of being firm and intact. Some of the boxes were torn. The Inspection Report supports the testimonies of Richard, Reid and Mrs. Franklin, as to the lack of proper maintenance of the facility over a protracted period. The undated letter of Franklin indicates that the Defendant was refusing to accept the spoilt fish, by his statement "I deem the fish belongs to you more than me."

[17] Industrial Sales relies on the terms and conditions on the invoice as exempting it from liability. Paragraph 5 of the Reply and Defence to Counterclaim filed on the 28th October 2002, on which it relied to demonstrate the acts/omissions of the 2nd Defendant states;

> Further, on the date that the Second Defendant delivered the said goods to the Plaintiffs' facility, the Plaintiffs issued an Invoice which contained specific terms and conditions governing the parties' relationship, which said terms included but were not limited to the following terms and condition.
>
> > **5b** It is an express term of this Agreement that the risk of damage to or loss of the said goods is borne entirely by the customer and accordingly, it shall be the responsibility of the customer to insure the said goods.

[18] At this trial, the Industrial Sales Ltd relied solely on the interpretation of 5b to exempt it from liability. The Defendant submitted that the exemption clause was of no effect as it was not made contemporaneously with the act of depositing the goods and therefore did not form part of the contract. The testimony of Sonia Franklin is that she received the Invoice which contains the term at 5b, sometime between January and April 1999, it was for a deposit she had made in July 1998. At the time of receipt of the invoice, the goods were already in the cold storage. It has never been contested that the products were deposited before the issuance of the notice of the 5th October 1998, requesting the Defendants to remove their goods from the cold rooms. In any event, there was no suggestion that deposits were made after that date. I assess the evidence of Mrs. Franklin. I find the invoice was received between January and April 1999, well after the delivery of the goods to the cold rooms and the completion of the contract as to their storage. The Claimant's submission that the invoice was a part of the contract is not

consistent with the allegations in their Amended, specially endorsed writ of summons, that the contract between the parties was an Oral Agreement.

[19] There can be no incorporation of a document into a particular contract if that document is only introduced into the transaction after offer and acceptance has occurred (see *Olley* v *Marlborough Court Hotel* [1949] 1 KB 532. One party cannot simply state new terms and thereby successfully include them in a contract once that contract has been made. Mrs. Mullings relied on the principle in **Chapelton v Barry UDC** 1940 1 KB532, 1940 1ALL ER 356, that the invoice did not form part of the contract between the parties. She further submitted that a clause cannot be incorporated after a contract has been concluded, without reasonable notice. See **Thorton vs Shoe Lane Parking Limited**, I find for the Defendants on the counter claim, the breach of the oral agreement between themselves and the Claimant.

Breach of Statutory Duty

[20] The Claimant's answer to the claim of breach of statutory duty is that no evidence has been presented to this Court to ground such a finding. With that, I disagree. The evidence of the inspectors from the Bureau of Standards is material. They had attended on the cold storage facilities of the Claimant and conducted an inspection and produced a Food Inspectorate Department Report Ref. FD/1/1/99 dated the 20th May 1999. The report noted a strong smell of ammonia. The unhygienic state of the floor, which was cracked and pitted in some areas, the insulation to the walls was coming off in some areas. Large sections of insulation had actually come off the wall, exposing the concrete blocks below; as a result, the temperature exceeded the limit for the safe storage of frozen meat and food. The condition of fish that was therein stored, suggest the fish was

improperly stored and, as a result, spoilt. The court was referred to the work, Food Industrial Manual 2nd Edition by M.D. Rankin, at pg. 75, the author states:

> **Meat is usually held in frozen storage at 18^0 to 20^0C. . . . If properly packaged and handled, with consistent temperature control, the storage life of frozen unprocessed meat may be 1 – 2 years or more.**

[21] In respect of fish, the author states at pg. 76:

> **The recommended air temperature for long term storage of sensitive foods is in the range 26^0C – 29^0C. For frozen fish, the air temperature shall be at the bottom end of this range.**

[22] The Food Storage and Prevention of Infestation Regulation 1973 4(1) provides that:

> **Any building for storage of food, or . . . shall be of sound construction and shall be maintained in sound condition. The fabric of walls (other than partition walls) and the roof shall be weatherproof and floors shall be impermeable; and all interior wall surfaces and floors shall be so finished as to provide a reasonably smooth surface, shall be maintained in good condition, and shall be full from open cracks, crevices, holes or any other condition of disrepair, whether similar to the foregoing or not, such as night induced rodents, insects or mites to harbor therein.**

The unchallenged evidence of the Bureau of Standards Report indicates clear breaches of the statutory guidelines for the operation of the cold storage.

[23] I accept Mrs. Franklin's evidence based on her unchallenged evidence I find that the total loads of fish stored was:

(a) 18,480 pounds of fish $1488,400.00

(b) 22,4567 kilogram of fish $3,610,240

$5,098,640.00

[25] The Defendant has been kept out of these payments that have been due to him since December 1998. It ought properly to be put, as best as the circumstances will allow, in the same position, as if the payment had been promptly made. **In British Caribbean Insurance Company Limited v Delbert Perrier** SCCA #114/94 at page 16, Carey JA. said;

> "The question which I posed is, 'On what basis should a judge award interest in a commercial case?' I do not think it can be doubted that where a person has been found to have failed to pay money which he should have, it is only right that he should pay interest to cover the period the money has been withheld. See the observations of Lord Wilberforce in General Tyre & Rubber Co. v Firestone Tyre Rubber Co. (1975) 2 ALL ER 173 at p 188. Our Food and Distribution Ltd. V Greater London Council & Anor. (1981) 3 ALL 716. In that case Forbes J. made an important point as to the basis for awarding interest. He said this at p. 722;
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> > 'Despite the way in which Lord Herschell LC in London, Chatham and Dover Railway Co. v South Eastern Railway Co. (1893) A.C 429 at 437 stated the principle governing the award of interest is awarded against the defendant as a punitive measure for having kept the plaintiff out of his money. I think the principle now recognized is that it is all part of the attempt to achieve restitution in integrum ……. I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the plaintiff would have had to borrow money to supply the place of that which was withheld. I am also satisfied that one should not look at any special position in which the plaintiff may have been one should disregard for instance, the fact that a particular plaintiff, because of his personal situation, could only borrow money at a very high rate or, on the other hand, was able

> to borrow at specially favourable rates. The correct thing to do is to take the rate at which plaintiffs in general could borrow money.'
>
> If restitution in integrum is the rationale for the award of interest, then the rate at which a plaintiff can borrow money must be the rate to be set by the judge in his award."

[25] I accepted the able submission of Counsel that the formula employed in **Design Matrix Limited v L. Phillips CL 1994/D087 delivered on the 19th April 2002** for determining the rate of interest to cover the period the money has been held is applicable to this case. I make an award for the Defendant to be paid interest at the rate of 34% per annum from the 4th December 1998 to the 28th September 2012.

Costs awarded to the Defendants to be agreed or taxed.