[2012] JMSC Civ 175

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 05279 OF 2009

BETWEEN	**MID ISLAND POULTRY LTD**	**CLAIMANT**
A N D	**ELECTRICAL REWIND SERVICES LTD.**	**1ST DEFENDANT**
A N D	**JOHN SALTER**	**2ND DEFENDANT**

Mrs. Jacqueline Samuels Brown, Q.C. & Tamara Malcolm, instructed by Firmlaw, for the Claimant

Mr. Garth Lyttle, instructed by Garth Lyttle & Co. for the Defendants

HEARD: November 24, December 20, 2011 & November 30, 2012

Breach of Contract - Negligence-Detinue & Conversion – Whether Claim for damages for negligence can properly be pursued in circumstances which are founded on a contractual agreement – Whether Second Defendant has properly been made a party to Claim – Failure to put forward reasons for denial of one aspect of Claimant's Claims – Effect of such failure.

Anderson, K., J.

[1] This Claim is one for breach of contract and/or negligence and/or detinue and conversion. The Claimant obviously cannot, even if they have proven their Claim under all or some of their three heads of Claim (breach of contract, negligence, detinue and conversion), cannot recover damages for same under more than one such head, although perhaps, the Claimant may be able to obtain an award of damages in its favour, arising from proof of the Claim founded on negligence, or breach of contract and also an Order in his favour, for the return of the blast freeze refrigerator unit. The reason for this, is that the Claimant ought not to be over-compensated by this Court,

even if this Court were to determine the Defendants, or either of them, as being liable on one or more of the heads of Claim.

[2] The Claim relates to the following situation. On March 9, 2007, the Claimant orally contracted one or the other, or both of the Defendants (there is, in the Claimant's Particulars of Claim, a conspicuous lack of clarity in this regard and this will be addressed further on in this Judgment) to service/repair their blast freeze refrigerator unit in exchange for payment of the sum of $316,122.75. The Claimant is involved in the rearing and sale of poultry. The Defendants do not dispute any of this, but neither do they dispute, in their joint and singular defence as filed, that at all material times, the Second Defendant had represented himself as acting and was acting for and on behalf of the First Defendant. Equally too, there is no dispute that the owner and managing director of the First Defendant at the material time, was the Second Defendant and that it was the Second Defendant who had communicated with the Claimant about the work that would be done in terms of servicing/repair of the Claimant's blast freeze unit and also, about the cost for doing same and the time period within which such was expected to be completed. Insofar as that time period is concerned, the Claimant's managing director – Mr. Donovan Hunter and the Second Defendant, had agreed that the repairs/servicing of the blast freeze unit, would have been completed within, 'a reasonable time, and that the unit would then have been returned to the Claimant in full and proper working order.' It is further alleged that to date, the said blast freeze unit remains in the Defendants' possession, albeit that it had been returned, on more than one occasion, to the Claimant, who had, not long after each such occasion, returned the same to the Defendants, for further repairs to be conducted.

[3] The Claimant and the Defendants accept that the Claimant had paid, by cheque, for the services rendered, in respect of the servicing/repair of the blast freeze unit and the two cheques paid for that purpose, were made out in favour of the First Defendant only. Based to some extent on that, but also and primarily on the fact that it has been accepted by all parties, in terms of their Particulars of Claim and Defence, that at all material times, the Second Defendant was acting, in terms of the servicing/repair work to be done, for and on behalf of the First Defendant, it is apparent that the Second

Defendant cannot and should not, in the particular circumstances of this particular Claim, be held liable for breach of contract. In the circumstances, on the Claimant's Claim against the Second Defendant for damages for breach of contract, Judgment is awarded in favour of the Second Defendant. To my mind, there was no proper basis, on what has been set out in the Claimant's Particulars of Claim, for pursuit of a breach of contract Claim against the Second Defendant. In the circumstances, the Second Defendant could and should have sought, in that regard, Summary Judgment at Case Management Conference. This was not done. The pursuit of a hopeless head of Claim by the Claimant as against the Second Defendant, that being the Claim for damages for breach of contract, taken along with the Second Defendant's failure to seek, at any stage throughout this Claim, Summary Judgment in his favour, on that head of Claim, must result in consequences for both parties, insofar as costs are concerned.

[4] The Defendants are contending that the said blast freeze unit was in fact repaired on more than one occasion by the Defendants, but was on the first two occasions when it was so repaired by the Defendants, it was repaired satisfactorily and competently and was, on each of those occasions, repaired to correct different problems which on each of those two occasions, existed in relation to the unit. That unit was sent to the Defendants, on a third occasion, about six months after it had been repaired by the Defendants for the second time and returned to the Claimant. The Defendants contend that after the unit was received by the third occasion, for repair, it was discovered that it was previously worked on by a third party and had become defective. It was nonetheless, repaired and returned to the Claimant.

[5] The Claimant, on the other hand, is contending that the said unit has never been satisfactorily repaired and that the Defendants have been negligent in that regard, in several respects – all of which have been specified in paragraph 22 of the Claimant's Particulars of Claim. Further or alternatively, the Claimant seeks damages for breach of contract in that regard. In addition, the Claimant is contending that on the last occasion when the unit was supposedly repaired by the First Defendant and returned to them, it was not in fact returned, but instead, it was a different unit that was sent to them. Accordingly, it is the Claimant's case that they thereafter returned that motor unit to the

Defendants for it to be substituted and the proper repairs done. It is alleged that to date though, the Claimant's unit has not yet been returned to them by the Defendants. This particular aspect of the Claimant's allegations in this Claim are set out in paragraphs 19-21 of the Claimant's Particulars of Claim. Accordingly, the Claimant has also sought damages against the Defendants for detinue and conversion. The Claimant, it should be noted, has also alleged as one of its, 'Particulars of Negligence and/or Breach of Contract and/or Detinue and Conversion,' at paragraph 22 of its Particulars of Claim, in clauses f, g, h and i, thereof, the following:

> *'f) converting the Claimants motor unit to their own use and for their own benefit;*
>
> *g) returning a different, older and inferior motor unit to the Claimant under the guise that it was the same unit that it had presented for repair;*
>
> *h) replacing the Claimants motor unit with a different older inferior model unit;*
>
> *i) refusing to return the Claimant's original 304P Compressor blast freeze refrigerator unit.'*

[6] Interestingly enough, in the Defendants' joint and singular Defence as filed, at paragraph 5 thereof, it is apparent that there was no specific defence put forward in response to that which was alleged by the Claimant in paragraphs 19-21 of the Claimant's Particulars of Claim, insofar as the alleged retention by the Defendants of the Claimant's unit and return to the Claimant of a different unit then the one which was given to the First Defendant on a third occasion, for repair, is concerned. Rather than put forward any specific defence in that regard, all that the Defendants have stated in their Defence with respect thereto is as now set out: Paragraph 5 of Defence – 'As to paragraphs 15-21 the Defendants will say that the aforesaid blast freeze refrigerator unit which houses the compressor, was old and the best effort of our workmen was used in an attempt to salvage and repair the baldly worn compressor but without success.' This was a very odd and lacking in detail, response to a specific averment as made by the Claimant in paragraphs 19-21, which the Defendants ought to have been able to

specifically respond to, as they would best know whether or not the unit which was last passed on to the Claimant by the First Defendant, was or was not the said unit which belonged to the Claimant and which had been under repair by the First Defendant, on various occasions over some period of time. There was, however, forthcoming from the Defendants, no such specific response in that regard. Instead, since the Claimant also specifically averred the same and in addition, also alleged conversion in paragraph 22 (f), (g), (h) and (i) of its Particulars of Claim as Particulars, the Defendant responded to those Particulars of Negligence and/or Breach of Contract and Detinue and Conversion, by stating in paragraph 6 of their joint and singular Defence, that – 'All allegations of negligence, incompetence, failure in respect of duty of care as shown in sub-paragraphs a-j are denied.'

[7] What, if any at all, should the effect on the outcome of the Claimant's Claim in respect of the Claim for damages for detinue and conversion, be, arising from the bare denial thereof as set out at paragraph 6 of the Defendants' Defence? The answer to that question is clearly set out in Rule 10.5 of the Civil Procedure Rules (CPR) and in particular, in paragraphs (1), (4) and (5) of that Rule. Paragraph (1) of that Rule states:

> *'The defence must set out all the facts on which the Defendant relies to dispute the claim.'*

Paragraph (4) states:

> *'Where the Defendant denies any of the allegations in the Claim Form or Particulars of Claim (a) the Defendant must state the reasons for doing so; and (b) if the Defendant intends to prove a different version of events from that given by the Claimant, the Defendant's own version must be set out in the defence.'*

Paragraph (5) states:

> *'Where, in relation to any allegation in the claim form or Particulars of Claim, the Defendant does not – (a) admit it; or (b) deny it and put forward a different version of events, the defendant must state the reasons for resisting the allegation.'*

[8] It is very clear from these provisions of the CPR, that the Defendants have not, in respect of the allegation of detinue and conversion as made against them, complied with either Rule 10.5 (1) or Rule 10.5 (5) or the CPR insofar as their joint and singular Defence is concerned. The Second Defendant though, cannot be held liable for detinue and/or conversion in respect of the Claimant's unit, since, although he has had access to the same, as the managing director of the First Defendant and as technician who has worked on the same, while acting in that regard, for and on behalf of the First Defendant, as its servant or agent, in that context, as aforementioned, he cannot and ought not to be personally held liable for the Claim made against him, for detinue and conversion. Similarly, in that regard, as per the Claim against the Second Defendant for breach of contract, there must be consequences in costs for both parties, arising from this conclusion of this Court.

[9] Insofar as the First Defendant is concerned, however, the situation is very different. The failure on that Defendant's part to put forward any specific reason(s) for resisting the Claimant's allegation against it, of detinue and/or conversion is fatal to its defence of a bare denial in that regard. Such a 'defence' is an invalid one in law. Since the First Defendant was denying that aspect of the Claim and did not put forward a different version of events in that regard, the First Defendant was legally obliged to state reasons for resisting the Claimant's allegation of detinue and conversion of its unit, as made against both Defendants. The failure to state such reasons in circumstances where the First Defendant did, in paragraph 6 of its Defence, deny the allegations of detinue and conversion, but failed to put forward a different version of events in that regard, this being an even worse omission in view of the fact that the First Defendant clearly could have and should have put forward a different version of events in that regard, renders the bare denial of the Defendant, an invalid defence to the Claim against the First Defendant for damages for detinue and conversion.

[10] It must be recognized by litigants and by the Attorneys who represent them, that Rules 10.5 (1), (4) and (5) are each expressed in mandatory terms, as highlighted by the use of the word, 'must' in each such rule. Rules that are expressed in mandatory terms, must be complied with and the failure to do so, may very well be fatal to either a

Claim or a Defence (as the case may be). See in that regard: **Dorothy Vendryes and Dr. Richard Keane and Karene Keane –** Supreme Court Civil Appeal No. 101 of 2009**.**

[11] The Claimant has, in terms of all the reliefs being sought on his Claim, claimed for return of the blast freeze refrigerator unit and special damages of $316,122.75 and interest at a commercial rate of 24% and costs, in addition to such further and/or other relief as this Honourable Court deems just. He has therefore not specifically claimed for general damages, but perhaps nonetheless, the same could be awarded by this Court as 'further and/or other relief.' In respect of the Claimant's Claim for detinue and conversion is concerned, this Court cannot and will not award any general damages to the Claimant, as there exists no evidence before this Court as would properly enable this Court so to do. In order for this Court to have been properly able to have done so, evidence would have had to have been presented to it, by means of which, this Court could have properly assessed the value of the loss to the Claimant arising from the First Defendant's unlawful detention of his blast freeze unit. This Court has not even so much as been provided with any evidence as to the value of the unit either as at the date of trial, or as at the date of its conversion by the First Defendant. In that regard, it should be carefully noted that the measure of damages for detinue, is the value of the goods or chattel at the date of trial. See: Supreme Court Civil Appeal No. 109/2010 – **The Attorney General and The Transport Authority and Aston Burey**, per Harris J.A., at paragraphs 7 and 8; and **Rosenthal v Alderton and Sons Ltd.** [1946] 1 All E.R. 583. Also see paragraph 7 of the Judgment of Jamaica's Court of Appeal in the **Aston Burey** case, for the measure of damages in conversion, which is, in that Court's Judgment in that case, stated as being the value of the goods or chattel at the time of conversion.

[12] In this Claim, arising from the First Defendant's failure to plead a specific defence in response to the Claimant's assertions in its Particulars of Claim as made against him, based on the torts of both detinue and conversion, it is now very clear to this Court, that if it were to be properly in a position to award damages to the Claimant, such damages would have to be assessed based on the value of the chattel as at the date of its conversion by the First Defendant, this because that value would undoubtedly be a

higher one than its value as at the date of trial. Since it is a Claim for both detinue and conversion, the measure of damages to be awarded to the Claimant, should be based on the sum which will fairly compensate them arising from the commission of both of those torts in relation to them. The First Defendant cannot be permitted to profit from his own wrongdoing.

[13] Whilst there does exist evidence as to the price which the Claimant purchased the unit for in 2003, such then proposed evidence was never particularized in the Claimant's Particulars of Claim and therefore, in accordance with Rule 8.9 A of Jamaica's Civil Procedure Rules, as no permission to rely on same, was ever granted by this Court – since in fact no such permission was ever sought, the Claimant cannot, in any event now rely on same for the purpose of proving its Claim for damages arising from the detinue and conversion by the First Defendant, of the unit.

[14] In any event though, it is the value of the unit as at the date of its conversion by the First Defendant, that having been in 2007 – which was the year in which it was sent to the First Defendant for repair, as it then was not working, that is the relevant date for the purpose of assessing damages in this Particular Claim. No evidence whatsoever, has been provided to this Court, to even so much as properly enable this Court to infer what such value would then have been. In the circumstances, this Court cannot and will not make an award of damages in favour of the Claimant, arising from that which this Court has concluded, is the liability of the First Defendant to the Claimant arising from the detinue and conversion of the unit.

[15] Thus, this Court can and will only Order the return of the unit to the Claimant by the First Defendant, within a specified time hereafter, that being seven (7) days from the date of this Judgment. On the Claim for detinue and conversion therefore, Judgment on that aspect of the Claim, is awarded in favour of the Claimant as against the First Defendant and for reasons earlier provided in the Judgment, in favour of the Second Defendant, as against the Claimant.

[16] The Claimant has also claimed damages for the Defendants' negligence and/or breach of contract, in essence, arising from that which he has alleged as being the Defendants' failure to repair or properly repair the Claimant's blast freeze unit. In that regard, the Claimant has, in paragraph 22 of his Particulars of Claim, sought to rely on the very same particulars in respect of his Claim for damages arising from the alleged negligence of the Defendants in relation to that blast freeze unit, as he is relying on in relation to the alleged breach of contract by the Defendants in respect of the same unit.

[17] The Court of Appeal of Jamaica has made it clear, in its judgment in the case: **Laufer v F.S.I. Financial Services U.S. Inc. and International Marbella Club S.A.** Supreme Court Civil Appeal No. 2 of 88**,** following on the Privy Council's Judgment, on this particular point, as was rendered in: **Tai Hing Cotton Mill Ltd. v Liu Chong Hing Bank Ltd. and others** – [1985] 2 All E.R. 947, esp. at p. 957, per Ld. Scarman, that a Claim founded on negligence seeking to recover damages for that which constitutes pure economic loss and which thus, does not arise from damage to property or injury to a person, cannot lawfully be pursued and must, of necessity, fail. Instead, where such a Claim could instead have been pursued as a breach of contract Claim, then, if a Claim is framed, just as the case now at hand before this Court for determination, has been, as an alternative Claim between damages for negligence, which is a tort and damages for breach of contract, then it is only the breach of contract Claim that can properly be pursued, if it is that those Claims are founded on the same facts and the fact pattern of that case is such that the Claim for damages for negligence, seeks to recover that which has been termed by Courts over the last several decades, as 'pure economic loss.' On this point, in the **Laufer v Marbella** case (op. cit) see the Judgment of Wright, J.A. at pp. 12-24.

[18] This Court is, in the circumstances, obliged to dismiss the Claimant's Claim against both Defendants, for damages based on the law of negligence. Such a Claim seeks to recover for that which can be categorized as nothing other than, pure economic loss, arising, not from damage to property, but instead, as aforementioned, arising from failing to properly repair the Claimant's blast freeze unit. The Claimant has Claimed the sum of $316,122.75 as special damages in respect of that Claim, this also

being the same sum which he has claimed as damages for breach of contract, this insofar as that total sum ($316,122.75) was paid by the Claimant to the First Defendant arising from their contractual agreement that such sum was to have been paid to the First Defendant by the Claimant for the repairs then expected to have been done to the blast freeze unit. The Claimant's Claim for damages for breach of contract can properly be pursued by him and if it is that the First Defendant is determined as being in breach of contract, then the Claimant may very well be entitled to recover the entire sum of $316,122.75, or at the very least, such part thereof as this Court may deem appropriate. As such, the Claimant's Claim for damages for negligence is dismissed and Judgment on that aspect of the Claim is awarded to the Defendants. It is to be recalled at this juncture that Judgment on the breach of contract Claim, has been awarded to the Second Defendant.

[19] Insofar as they Claimants claim for damages for breach of contract is concerned, the relevant evidence of importance, is as follows: The Claimant had purchased the 30 HP blast freeze refrigerator unit (described earlier and hereafter in this Judgment, as 'the unit') for the purposes of his business, which is that of poultry production and distribution. The unit was purchased for the purpose of storing and freezing poultry, prior to distribution.

[20] In 2007, the unit stopped freezing as it had by then, become defective. Accordingly, the managing director of the Claimant then contacted the Second Defendant, who was then the First Defendant's managing director, with a view to having the First Defendant repair the unit. Contractual agreement was reached in that regard and it was agreed that the Claimant would pay the sum of $316,122.75 as consideration for effecting said repairs. With that having been agreed upon the Second Defendant collected the unit from the Claimant.

[21] Whilst this Court has noted that at paragraph 9 of the Claimant's Particulars of Claim, it has been specified that, 'Based on the above an agreement was made between the Claimant and the Defendants, it was expressly agreed, *inter alia*, that the

Defendants would service/repair the Claimant's blast freeze refrigerator unit within a reasonable time and return it to the Claimant in full and proper working order.'

[22] By their use of the wording as the preliminary words in paragraph 9 of their Particulars of Claim, 'Based on the above…,' it is clear to me, that the Claimant is thereby referring to that which has been particularized by the Claimant in the paragraphs preceding paragraph 9 of its Particulars of Claim. From the wording of those preceding paragraphs, it is very apparent that certainly as a matter of law, the contractual agreement concerned, was entered into as between the Claimant and the First Defendant. This is because, amongst those paragraphs, it has been made clear that:

> *i) 'At all material times, the Second Defendant assured the Claimant that he was acting as servant or agent of the First Defendant,'*
>
> *ii) 'The Second Defendant warranted to the Claimant that he supervised work on behalf of the First Defendant and that the work would be competently done.'*
>
> *iii) 'In the alternative that the Second Defendant presented himself as the Manager for the First named Defendant with the authority to execute an agreement for and on behalf of the First named Defendant for the services as provided for under paragraph 9 herein;*
>
> *iv) 'The Second Defendant is and was at all material times the Manager of the First named Defendant with the actual and/or ostensible authority to act for the First Defendant' (Paragraphs 3, 4,5 and 6 of Claimant's Particulars of Claim).*

[23] Considered in that context it is pellucid, that the relevant contractual agreement for the repair of the unit was as between the Claimant and the First Defendant. The Second Defendant was the person who would carry out the work on the unit, on the First Defendant's behalf, but in that regard, any Claim for damages for breach of contract and/or detinue/conversion in respect of the unit, can only properly lie at the feet of the First Defendant. Insofar as negligence is concerned, since that Claim cannot, as a matter of law be sustained, as the Claimant seeks nothing other than damages for pure economic loss in circumstances wherein there exists a contractual relationship

between the Claimant and the First Defendant, it is very apparent that the Claimant's Claim for damages for negligence as against the First Defendant, cannot succeed.

[24] Returning then, to the evidence in this case, it is to be noted that the evidence specified at paragraphs 15 and 16 of this Judgment, constitutes to a great extent, the only aspects of the overall evidence given by the respective parties and their respective cases as pleaded which are not in dispute. A few other aspects which are not in dispute however, should be mentioned at this point and these are as follows: When the unit was, according to the evidence as given by the Second Defendant, 'repaired' the first time and returned to the Claimant, the Claimant paid, by way of cheque made payable, not surprisingly, to the First Defendant', the sum of $137,297.25. At a later date, that being October 19, 2007, after the unit had been returned once again for further repair, the Claimant once again made a further payment, also by cheque made payable to the First Defendant, in the sum of $178,825.50. As such the total payment made by the Claimant to the First Defendant is $316,122.75 and thus, this is the sum which the Claimant now seeks recovery of through this Claim and in this Court. There is no dispute between the parties, that the Second Defendant was never paid any sum by the Claimant arising either from any work done or to be done by him on the Second Defendant's behalf. There is also no dispute that the invoices presented to the Claimant for work done on the unit were presented by the First Defendant, Equally too, there is no dispute that there presently exists, as between the Claimant and the First Defendant, full payment by the Claimant of both invoices presented to them by the First Defendant, for repair work done to the unit.

[25] There is also no dispute that the First Defendant is currently in possession of the unit. Whilst there was evidence given under cross-examination, by the Claimant's managing director – Mr. Donovan Hunter, that it would cost U.S.$12,000 to replace the compressor which had, while housed in the unit, been sent to the First Defendant for repair, as part and parcel of the unit which actually houses two compressors, Mr. Hunter also made it clear during cross-examination, that the sum of U.S.$12,000 would be the cost to replace that which he claims to be the defective compressor in the unit, with a new compressor.

[26] The Claimant did not, however, assert in its Particulars of Claim, such replacement cost, in terms of one of the compressors in the unit, in his Particulars of Claim and thus, cannot properly seek to rely on it, since as required by Rule 8.9A of the CPR, no permission from this Court was ever sought in that regard and thus, none such was ever granted by this Court. In any event though, even if such permission had been sought and granted by this Court, it would have been to no avail, insofar as the award of damages to the Claimant for detinue and conversion of the unit by the First Defendant is concerned. This is because, in that regard, it is not the cost of purchase of a new compressor that is relevant, but instead, the cost of replacing the unit – this being , not the cost of replacing same with a new unit, but instead, the cost of replacing the unit, with one of comparable value – this taking into account that it was defective when it was first handed over by the Claimant to the First Defendant, for repair and was also, at that stage, at least , by then, four (4) years old (as it was purchased in 2003.)

[27] In the circumstances, Judgment on the Claim brought as against the First Defendant, for detinue and conversion must be and is granted in favour of the Claimant and the return of the unit is ordered. Same is to be returned to the Claimant by or before December 7, 2012 at 4:00 p.m. on that day.

[28] Just for the sake of completeness as regards the Claimant's Claim for detinue and conversion, it should be mentioned that at trial, the Second Defendant gave evidence of having passed on to the Claimant at some time during the course of the series of repair efforts that had been undergone over quite some period of time, a, 'substitute compressor.' He further testified that that, 'substitute compressor' was in good working order when it was lent to the Claimant whilst the repair work on the unit was being done. The Claimant though, has denied that the substitute compressor was ever in good working order and also, has contended that he was never even so much as expressly made aware that that he was being loaned a substitute compressor, since at all material times, the Defendants had represented to him that the substitute compressor was the unit. According to the Second Defendant in his testimony – *'Fair*

exchange is no robbery is an expression that I use all the time in England and here. That's what we work off of.'

[29] With all due respect to the Second Defendant's viewpoint as expressed in the use of the well-know expression – 'Fair exchange is no robbery', this is not a defence in law, to a Claim for detinue and conversion, unless the party whose property has been allegedly unlawfully detained and converted, has agreed to such exchange. There exists dispute between the Claimant's managing director and the Second Defendant, as to whether any such agreement was ever reached. This Court though, has not addressed its mind to this issue, since it does not and cannot properly arise for consideration by this Court. It cannot properly arise, because it was never set out in any portion of the Defendant's Defence, that there was agreement to such an exchange and that, in the circumstances; the Defendants are denying that there was any detinue and conversion by them, of the unit. In the circumstances, neither the Defendants nor either of them can rely on that assertion of agreement to a substitute compressor being exchanged for the unit which was defective, as a Defence.

[30] This Court has, of necessity, had to pay careful regard to the evidence of the respective parties, as well as the Particulars of Claim and Defence, in adjudicating upon the entirety of this Claim. This Court has, earlier in this Judgment, specified as per paragraph 9 of the Claimant's Particulars of Claim, exactly what the Claimant is contending was the nature of the contractual agreement between itself and the Defendants and thus, will not repeat the same at this juncture.

[31] Further on in its Particulars of Claim, the Claimant alleges that:

> *'Based on the said agreement on the 9th day of March, 2007, the Second Defendant took Possession of the blast freeze refrigerator Unit from the premises of the Claimant for the purported purpose of repairing same.' (Paragraph 11)*
>
> *'On the 12th day of March 2007, the Second Defendant returned the Unit and assured the Claimant that it was repaired, and the Claimant accordingly handed to the Second Defendant the sum of $137,297.25 on National*

> *Commercial Bank Cheque No. 21069 made out in favour of the First named Defendant. (Paragraph 12)*
>
> *'On the 13th day of March 2007, the Claimant noted that the unit was not repaired as represented by the Second Defendant, as the Unit was still malfunctioning.' (Paragraph 13)*

[32] I have highlighted in this Judgment at this stage, paragraphs 11, 12 and 13 of the Particulars of Claim, because, in at least a few important respects, that which has been set out therein, is divergent from that which was given as the evidence-in-chief of the Claimant, through its managing director – Mr. Donovan Hunter, insofar as his witness statement is concerned. Such divergence has arisen firstly, insofar as in paragraph 5 of his witness statement, it is stated by Mr. Hunter, that when Mr. Salter arrived at the company premises to collect the unit for repair, he told Mr. Hunter that he needed $100,000.00 to buy parts, before he could begin the repairs to the unit. Mr. Hunter's testimony- in-chief was that he then handed him (referring here to Mr. Salter), a cheque for the amount requested and he left the premises.

[33] This is the first rather significant divergence from the Claimant's Particulars of Claim, in that, in its Particulars of Claim, no mention whatsoever has therein been made, of a $100,000.00 deposit having been requested to cover the purchase of parts, before the repair of the unit was commenced, or as to such sum ($100,000.00) having been then paid, by separate cheque made payable to either of the Defendants.

[34] There is also divergence insofar as the making of payment is concerned, because Mr. Hunter also testified-in-chief, as per paragraph 6 of his witness statement, that when he was called by Mr. Salter and told that the unit was repaired and ready to be collected, he asked his employee, Mr. Ralston McCormack to collect the unit and he then sent the remainder of the payment of $137,297.25 with him, to pay Mr. Salter. The divergence as regards the timing and mode of payments has arisen because, it is to be recalled, that in its Particulars of Claim, the Claimant has stated that it was a single payment by cheque, of $137,297.25 which was made on the 12th March 2007, to the

First Defendant, this after the unit had been repaired, according to what Mr. Hunter had been told by the Second Defendant.

[35] Another significant divergence, is that in its Particulars of Claim, the Claimant has asserted that whilst the unit was returned on the assurance given to it by the Second Defendant that it had been repaired, on the very next day, that being March 13, 2007, it was noted by Claimant that the unit was not repaired, as it was still malfunctioning. In its Particulars of Claim, the Claimant has not specified whether, at any time after the unit was returned to it after having allegedly been repaired, that being March 12, 2007, it at least appeared to, or was working as it then should have. This once again though, is divergent from the evidence-in-chief of both Mr. Hunter and Mr. McCormack, who was, at the material time, a refridgeration technician employed by the Claimant. Mr. McCormack, who testified at trial, as a witness for the Claimant, testified that the unit, when installed by him after it had allegedly been repaired, seemed to be freezing the poultry and that it was not until, 'some days later', that he realized that the compressor stopped freezing the poultry as it should. On that point, Mr. Hunter's testimony-in-chief, as per his witness statement, was that when the unit was returned to the Claimant on March 12, 2007, as having allegedly been repaired, it was then installed by Mr. McCormack and it froze effectively for one week, after which it then started to make noises, which it did not do before.

[36] Clearly therefore, both the evidence as given by the only witnesses called upon by the Claimant to provide testimony on its behalf, which was sworn to at trial by them, these being Messrs. Hunter and McCormack and that which has been set out in the Claimant's Particulars of Claim and therein certified by the Claimant's managing director – the said Mr. Hunter, as being true and correct, this as to how long after it was first returned, it was working effectively, cannot all be both truthful and correct. The Particulars of Claim suggests that by the next day after it was returned to the Claimant for the first time, it was noticed that it was not working, whereas both the evidence at trial as given by Mr. Hunter, as also by Mr. McCormack, on the Claimant's behalf, suggest that the unit worked for either a few days, or a week before it started to again, function ineffectively, by not freezing.

[37] It is, it should be noted, Mr. Hunter's evidence-in-chief, as derived from his witness statement, that after that which he believed, initially, to have been the unit, was returned to him by the First Defendant as having been repaired and not long thereafter, it stopped working effectively, he (Mr. Hunter) then decided to return that unit to the First Defendant. Upon returning that unit, Mr. Hunter told the Second Defendant that he knew that the unit which he had given to the Defendants to be repaired had not been the one which was returned to him. By then, Mr. Hunter had formed that viewpoint, based on certain things which were told to him by the persons from whom he had purchased the unit, in Trinidad. Those persons were then visiting Jamaica and had visited the Claimant's farm one day during the course of their visit to the island.

[38] The persons from whom he had bought the unit, when they visited the Claimant's farm, had enquired of Mr. Hunter, why he was not using the unit which he had purchased from them. In response to that enquiry, Mr. Hunter then told them that it was the same unit, but he had to have it repaired. The men from whom the Claimant had purchased the unit, then looked more closely at that unit which Mr. Hunter believed, at least until just before then, was the unit which had been passed on to the Defendants for repair. Having looked more closely at that unit, they then informed Mr. Hunter that that unit was not the one which they had sold him and that it was an older model. They then went on to explain to Mr. Hunter, that the older motors have two bongs, whereas, the newer motors, such as the one which they sold him, have one bong. They also then pointed out to Mr. Hunter that the compressor unit which had been given over to him by the Defendants, as being the unit which had been sent to them for repair, had two bongs. It was at that juncture, that Mr. Hunter formed the impression that the Claimant's unit had not in fact been the unit which was returned to the Claimant.

[39] At this juncture in this Judgment, this Court must make mention that the evidence as to what was allegedly told to Mr. Hunter by the men from whom he had purchased the unit, even if accepted by this Court as being true, was not admitted as evidence, for the purpose of proving the truth of its contents. That evidence could not have been admitted for that purpose, since then it would have constituted hearsay evidence not

falling within the ambit of any of the now well-established exceptions to the hearsay rule. That evidence was however admitted, notwithstanding the defence counsel's objection to the admission into evidence of same. The same was admitted as original evidence going towards establishing what influenced Mr. Hunter's state of mind at the material time, that that unit which had passed to him by the Defendants as supposedly being the unit which had just been repaired, was not in fact, the unit.

[40] When considered in that context, it is apparent that there exists no independent evidence placed before this Court by the Claimant, that that unit which was passed to him by the Defendants after the unit had first been sent to them for repair, was not the unit. Such independent evidence should preferably have, if it could have been made available, been provided to this Court by an expert witness duly appointed by this Court. No such expert evidence was provided to this Court during the trial of this Claim.

[41] The lack of expert evidence during the trial of this Claim however, does not necessarily mean that the Claimant does not have evidence sufficient to prove that that unit which was first passed to him by the Defendants was not the unit. This Court so concludes, because evidence has also been provided to this Court by Mr. Hunter, that after he had spoken with the persons from whom he had purchased the unit, he decided to return that unit, which by then, in any event, was not working. That unit was returned and when it was returned, Mr. Hunter spoke with Mr. Salter and then told him that he knew the unit that he had been given by Mr. Salter, was not the one which he had left to be repaired and that he had been given an older motor. To that assertion, it is alleged that Mr. Salter then responded by telling Mr. Hunter that he had wanted his unit back in a rush and it was not ready, so he gave him that unit instead. Mr. Hunter then told Mr. Salter to take back the unit which was given to him and to return the unit to him. Mr. Salter then, in response to that request, revealed to Mr. Hunter, that he no longer had his compressor unit, as it had been given to another customer. (See paragraph 9 of Donovan Hunter's witness statement).

[42] That exchange of words between Mr. Hunter and Mr. Salter, as set out in some detail, immediately above, is perhaps the best evidence that could exist, if it is accepted

by this Court as being a truthful account and if in law, it can be accepted and acted on by this Court, that that unit was not the unit which had been sent for repair. It is perhaps the best evidence of such, because it comes from the mouth of the person who, according to his evidence as given at trial, was the only person who worked on the repair of the unit and who is also the managing director of the First Defendant – which is the entity that entered into the oral contract with the Claimant, for the repair of the unit.

[43] This Court however, finds itself unable to act on the assertion as made in the evidence of Mr. Hunter at trial, that he was told by Mr. Salter that the unit which was passed to Mr. Hunter was not the unit which had been sent for repair. This is an assertion which undoubtedly, the Claimant is relying on, in an effort prove its Claim. Rule 8.9A of Jamaica's Civil Procedure Rules, prohibits a Claimant from relying on an allegation or factual assertion, which is not set out in the Particulars of Claim, but which could have been set out there, unless the Court gives permission. In the case at hand, no permission was ever sought and thus, none such was, or could have been granted by this Court. Such permission was required though, because the factual assertion as made by the Claimant's witness – Mr. Hunter, in paragraph 9 of his witness statement is not in any respect whatsoever, set out in the Claimant's Particulars of Claim, this even though, it is undoubtedly, a very important factual assertion, since without the benefit of being able to rely on same, the Claimant would be without the benefit of any evidence whatsoever, as could properly be accepted and acted on by this Court, in proof of their contention that that unit which was passed to them on the first occasion, by the Defendants, was not the unit which had been sent for repair.

[44] As things stand on that particular issue, however, all is far from lost, insofar as the Claimant is concerned. This is because, as stated earlier in this Judgment, the Defendants have not properly traversed, in their joint Defence as filed, the allegation of detinue and conversion. In that regard, all that they put forward as a purported Defence, is a bare denial. This is inadequate and cannot be taken as constituting a proper traversal of the Claimant's Claim in that respect. This is why Judgment on that Claim for detinue and conversion has been awarded to the Claimant as against the First

Defendant Judgment on that Claim has not been awarded to the Second Defendant, only because, the Second Defendant had never, for and/or on his own behalf, ever had custody of the unit. At all times when he (the Second Defendant), had custody of the unit, he had same, for and on behalf of the First Defendant, as it was with the First Defendant that the Claimant had contracted for the repair work to the unit, to be done.

[45] In the circumstances, it is very clear, that the First Defendant must be in breach of contract for the repair of the unit, since, insofar as they did not properly traverse the detinue and conversion aspect of the Claimant's Claim and this Court has therefore determined that Claim as having been proven, it must inexorably follow, that this Court must conclude that the First Defendant has either not at all repaired the unit, or even if they have repaired it, they have not returned it to the Claimant within a reasonable time, as had been agreed upon. It must be recalled that it has been alleged by the Claimant in paragraph 9 of its Particulars of Claim and in fact, admitted to by the Defendants in their Defence, that in terms, of the agreement between the Claimant and the Defendants, 'it was expressly agreed, inter alia, that the Defendants would service/repair the Claimant's blast freeze refrigerator unit within a reasonable time and return it to the Claimant in full and proper working order.'

[46] In the circumstances, this Court awards Judgment in the Claimant's favour, as against the First Defendant only, on the Claimant's Claim for breach of contract. Judgment on that aspect of the Claim has already been awarded in the Second Defendant's favour, as he was not a party to the relevant contractual agreement.

[47] The Claimant has claimed the sum of $316,122.75 as damages for breach of contract, as this was the total sum which is not disputed that was paid by the Claimant to the First Defendant, over a period of time, for the purpose of repair work to have been done to the unit. The Claimant is entitled to recover the entirety of that paid sum. As no claim was set out in the Particulars of Claim, for loss of income, or for any special expense incurred as a consequence of the failure to repair and return the unit within a reasonable time and in full and proper working order, no award of damages can properly be made by this Court in that regard.

[48] Thus, my Orders are as follows:

i) Judgment on the entirety of the Claim, for the Second Defendant against the Claimant.

ii) Judgment on the Claim for damages for negligence is awarded in favour of the First Defendant.

iii) Judgment on the Claim for return of the unit arising from the detinue and conversion of same is awarded to the Claimant as against the First Defendant and a.) IT IS ORDERED THAT the First Defendant shall return the unit to the Claimant, by or before December 7, at 4 p.m. on that day; b.) The blast freezer unit which was last provided to the Claimant by the First Defendant shall be returned to the First Defendant on or before December 7, 2012 at 4:00 p.m. on that day.

iv) Judgment on the Claimant Claim for damages for breach of contract, is awarded to the Claimant, as against the First Defendant and in that regard, the Claimant is awarded damages in the sum of $316,122.75 with interest from as of October 31, 2007 to the date of this Judgment (November 30, 2012), at a rate of 6%.

v) The Second Defendant is awarded costs of the portion of the Claim in terms of proceedings leading up to an inclusive of the Case Management Conference herein and shall be entitled to no further costs in respect of this Claim.

vi) The Costs awarded to the Second Defendant as per Order No. 5 above, shall be recoverable by the Second Defendant from the First Defendant and such costs shall be taxed, if not sooner agreed.

vii) Costs are awarded to the Claimant in the Claim and such costs are summarily assessed at $1,000,000.00.

viii) The Claimant shall file and serve this Order.

ix) Stay of execution granted to the First Defendant up to and inclusive of January 31, 2013.

[49] Permit me to close this Judgment by specifically addressing the issue of interest on damages. The Claimant has claimed for interest on any such sum of damages as may be awarded to it, at a commercial rate of 24.5%. There was no evidence presented to this Court by the Claimant however, to prove what the commercial rate of interest in Jamaica has been at any particular moment in time as may be pertinent to the case at hand. In the absence of such evidence, this Court cannot award interest at a commercial rate, this notwithstanding that the Claimant's Claim as regards that which undoubtedly is, a commercial transaction. This Court can only when exercising a discretionary power, act on evidence, in order to award interest on damages at a particular rate, to the Claimant. See: **BCIC v Perrrier** – [1996] 33 J.L.R. 119, as regards the proof to be led in order to entitle this Court to award interest at a commercial rate.

[50] The interest awarded on damages to the Claimant, is at a rate of 6%, in keeping with the well established rule of practice in Jamaica, that interest on special damages, should be half that which is awarded on Judgment debts. See **Vandyard Dacres and Carla Dacres v Tania Reid** SCCA 103/00, per Harrison, J.A. The Law Reform (Miscellaneous Provisions) Act, at Section 3, provides that interest on damages shall be awarded at such rate as this Court shall think fit. In this Claim, the Claimant has claimed for a specific sum (special damages), arising from the breach of contract. That specific sum claimed for, is the sum contracted between the parties as the sum to have been paid for the repair of the unit. That sum being special damages therefore, interest thereon is awarded at the rate of 6%. Such interest would apply from as of the date of the breach of contract until the date of this Judgment. This Court has determined the date of that breach of contract as being October 31, 2007. This Court will hear the parties on the matter of costs before deciding as to how such should be awarded.

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Hon. Kirk Anderson, J.