IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2018CD00259

BETWEEN	**NATIONAL EXPORT-IMPORT BANK OF JAMAICA LIMITED**	**CLAIMANT**
AND	**DDB ISLAND 1962 COMPANY LIMITED**	**1ST DEFENDANT**
AND	**DARRELL BURGESS**	**2ND DEFENDANT**
AND	**DDB ISLAND 1962 COMPANY LIMITED**	**ANCILLARY CLAIMANT**
AND	**JAMAICA BUSINESS DEVELOPMENT CORPORATION**	**ANCILLARY DEFENDANT**

Contract – Whether for sale of goods or on consignment- Unsold goods-Whether promise to purchase unsold goods-Whether duty of care to safely pack before shipping and return-Whether duty discharged by retaining a shipping agent.

Kashima Moore, watching proceedings on behalf of the Claimant, instructed by Nigel Jones & Co.

Lance Rose, for the 1st Defendant/Ancillary Claimant and the 2nd Defendant

Adrian Cottrell, for the Ancillary Defendant, instructed by Myers Fletcher & Gordon

Heard: 1st, 2nd, 3rd, 4th & 5th July 2019 and 27th September 2019.

IN OPEN COURT

BATTS J.

[1] On the first morning of trial Mr. Rose, who appeared for both the 1st Defendant/Ancillary Claimant and the 2nd Defendant, indicated that he was recently retained in the matter and needed an adjournment. I declined to adjourn and, instead, stood the case over to the following day. On that day Mr Cotterell, who appeared for the Ancillary Defendant, applied to strike out portions of the 1st Defendant's/Ancillary Claimant's witness statement filed on the 1st July 2019. Upon enquiry, I was told that, there had been no earlier opportunity to make the application as the witness statement had been filed after the pre-trial review. I therefore considered the application.

[2] Having heard submissions I ordered as follows:

a) Paragraph 9: beginning with the words "however with the knowledge" to the end was struck out. There was no allegation in the Particulars of Claim to which this evidence could relate.

b) Paragraph 11: beginning with the words "this I did because," to the end was struck out as no allegation of duress was made in the Particulars of Claim.

c) Paragraph 12: the words "however had no choice" to "I signed unwillingly" struck out as there `was no pleading to which that evidence could relate.

d) Paragraph 12: the words "The Term" to the end were struck out as there is no plea of collusion or other allegation to which the evidence could relate.

e) Paragraph 15: the entire paragraph is struck out as there is no allegation in the pleadings to which the evidence could relate.

f) Paragraph 19: the words “See paragraph 6 in letter dated February 6 2014” to the end is struck out. I also ordered that Exhibit 19 (letter dated 6th February 2014) be removed from the witness statement. These related to without prejudice correspondence and were therefore privileged from disclosure.

[3] With these preliminaries out of the way the taking of evidence could commence. I will not restate the entirety of the evidence led but will reference only such of it as is necessary to explain my findings and decision. Before doing so however, it is necessary to indicate that, the issue between the Claimant and the 1st and 2nd Defendants has already been resolved in the Claimant’s favour. This was by way of summary judgement see formal order, dated 21st September 2018 and, filed on the 10th October 2018. That judgment is for $ 2,918,435.52 with interest thereon of $1,819,647.25. Execution was stayed pending the resolution of the Ancillary Claim or further order of the court. It is the Ancillary Claim which has come on for trial before me.

[4] In that Ancillary Claim the 1st Defendant/Ancillary Claimant asserts that the Ancillary Defendant is liable to indemnify and/or contribute to the 1st Defendant’s /Ancillary Claimant’s liability to the Claimant. It is alleged that the Ancillary Defendant induced the 1st Defendant/Ancillary Claimant to produce 1000 cases of its product (bottled water) on the basis that the Ancillary Defendant would pay for them. This promise caused the 1st Defendant/Ancillary Claimant to borrow money from the Claimant. The loan was to allow for the production of 1000 cases of product. It is also alleged that the Ancillary Defendant misrepresented to the 1st Defendant/Ancillary Claimant that it had a distributor who would take any

unsold product. The Ancillary Defendant, it is also alleged, falsely claims that the products were sent on consignment and refused to pay for them. There were 700 unsold cases which were subsequently returned to the 1st Defendant/Ancillary Claimant. It is further alleged that the returned cases were damaged due to inadequate or improper packing and/or storage. Damages and/or an indemnity are claimed for breach of contract and/or fraudulent misrepresentation and/or negligence.

[5] The Ancillary Defendant in turn filed an Ancillary Claim against the 1st and 2nd Defendants. This is with respect to money borrowed by the 1st Defendant, and Guaranteed by the 2nd Defendant, from the Ancillary Defendant. By order, dated the 11th January 2019, this Ancillary Claim was converted to a Counterclaim and Setoff in the Ancillary Proceedings already commenced by the 1st Defendant. The amount counterclaimed by the Ancillary Defendant, against the 1st Defendant/Ancillary Claimant and the 2nd Defendant, is $3,816,252.38 plus interest and late payment fees. The Defences to Counterclaim, filed on the 4th March 2019, state that the loan was not serviced because the Ancillary Defendant had not paid for the product it had purchased from the 1st Defendant/Ancillary Claimant.

[6] Having seen and heard the witnesses, and having reviewed the documentation, it is fair to say the factual issues were not difficult to resolve. In the first place I find there was no agreement for the purchase and sale of goods between the 1st Defendant/Ancillary Claimant and the Ancillary Defendant. Mr. Darrell Burgess who gave evidence for the 1st Defendant/Ancillary Claimant said, at paragraph 27 of his witness statement, that a representative of the Ancillary Defendant informed him of:

> *"an opportunity to have my products sold in the United Kingdom through the auspices of the Jamaica Business Development Corporation at the London Olympics which would take place in August*

2012 and coincided with Jamaica Fiftieth Anniversary Celebration."

[7] He went on to detail attendance at a meeting at which he was told that the Ancillary Defendant wanted to purchase 1000 cases of his product. He said that they intended to retail his products at four locations. Paradoxically he also stated, in paragraph 4 of his witness statement that the Ancillary Defendant wanted to be paid a commission of 30% of the sales. He stated also that the Ancillary Defendant's representative, Mrs. Janine Taylor, said there was a distributor in the United Kingdom who would take any unsold product. This evidence is sufficient to cast grave doubt on the allegation of a sale to the Ancillary Defendant. This is because it is entirely inconsistent for the purchaser of items to also be paid a commission for the purchase/sale of the same items. Commission is ordinarily paid by the owner to the person who sells items on the owner's behalf. Similarly, if the Ancillary Defendant was indeed purchasing the items the question, of a distributor taking unsold product or of what was to happen to unsold product, would be of no moment to the 1st Defendant/Ancillary Claimant. The illogic of the position was made clear in the witnesses' answers to the court:

"*J:* *who would pay it*

A: *taken from what they sold when they retailed the product*

J: *JBDC bought product from you. Then having sold their product they pay themselves a commission*

A: *Correct"*

[8] The documentary evidence sheds light on the true nature of the arrangement. There is the letter to the 1st Defendant/Ancillary Claimant from the Ancillary Defendant dated 30th May, 2012 (Exhibit 13). That letter, which Mr. Dorrell Burgess denied receiving, states clearly that the goods would be sent on consignment. There is also the reference to "consignment" in an email dated 3rd

July 2012 (Exhibit 7). The form of participation agreement (Exhibit 8), a signed version of which was never put in evidence, also clearly references "consignment". In this regard Mr. Burgess, by email dated 17th July 2012 (Exhibit 9), critiques the agreement but raises no objection to the reference to consignment. His problems, in that letter, were with the amount of commission and the absence of a guaranteed market for any unsold goods. Finally there is the Participation Agreement (page 26 of Exhibit 23) which is really a form signed and completed by, the 1st Defendant/Ancillary Claimant's representative, Mr. Darrell Burgess. That form references the payment of 20% commission and delivery on consignment. Mr. Burgess could not explain the check mark beside "consignment", save to point out, that it was below his signature.

[9] On the weight of the evidence, and on a balance of probabilities, I find that the Ancillary Defendant did not buy 1000, or any, cases of the 1st Defendant/Ancillary Claimant's product. The product was sent, to the Jamaican independence celebrations in London, to be exhibited and sold on a consignment basis. The Ancillary Defendant was entitled to a commission on those items sold. The net proceeds of sale were to be remitted, to the Claimant on behalf of the 1st Defendant/ Ancillary Claimant, by the Ancillary Defendant.

[10] The other major factual issue concerns whether the Ancillary Defendant had any liability as it related to the unsold product. In other words, had they guaranteed the 1st Defendant/Ancillary Claimant a market in London for unsold product or, did they guarantee that a distributor would purchase any unsold product. The 1st Defendant/Ancillary Claimant does not rely on documentary evidence to support this aspect of the claim. It is based on alleged representations by the Ancillary Defendant's representatives.

[11] The documentation, in the form of email from the 1st Defendant/Ancillary Claimant, suggests that there was either no such representation or no reliance on the said representation. In the first place by email dated 21st May 2012 (page 35 Exhibit 23) Mr. Burrell submitted the 1st Defendant's/Ancillary Claimant's

projected income/expense analysis. That document contains an allowance for "unsold product." This is inconsistent with a guaranteed market for unsold product. If the 1st Defendant/Ancillary Claimant believed, that unsold product would be purchased by distributors, then there should be no provision for unsold product. Then there is the email written by the 1st Defendant/Ancillary Claimant and dated 27th September 2012 (Exhibit 23 page 64). It is an email captioned "Re: *Commissions on Island 62 Water – an option to sell the water in the UK."* It reads as follows:

> *"Sir Harold:*
>
> *To be clear, JDBC/Things Jamaica has custody and is wholly responsible for the Island '62 stock that is in the UK; please therefore confirm with JLB the final quantities they'll be taking and invoice accordingly. Thereafter I assume and sincerely hope that the unsold stock will be return(sic) to Jamaica on the timetable previously discussed. Island 62's part in this discussion was only to request the waiver on JDBC's commission. Thank you"*
>
> *Darrell*

[12] It is significant that the Ancillary Claimant does not, in that email, advert to a commitment to take unsold product. In cross examination, the Ancillary Claimant's witness answered thus,

> *"Q: in this email did you mention JLB agreeing to take unsold stock*
>
> *A: (Pause) No this email does not mention unsold stock*
>
> *Q: You mentioned that if JLB agree to bring additional quantities, it would limit the returns. So always possibility that some would be returned to Jamaica.*

A: no possibility as JLBD said JLB would take unsold product

Q: In this email you refer to that possibility

A: Correct

Q: You never said "I thought you would take unsold."

A: I never had discussion on agreement with JLB."

[13] This explanation does not convince me. Furthermore Mr. Burgess, in emails dated 30 August 2012 sent at 7:45 a.m., 31st August 2012 sent at 7:23 a.m. and 31st August 2012 sent at 7:44 p.m. (pages 55, 53 and 54 of exhibit 23), did not assert that the Ancillary Defendant had committed to taking unsold product. In an email dated 14th August 2012 at 6:48 a.m. (page 51 exhibit 23) he stated,

> "*As our discussions never included the option to return the stock to Jamaica..."*

This is not a positive affirmation of an agreement, or even that a representation had been made, that the unsold stock would be taken. It merely indicates that the return of product to Jamaica was not discussed. It is as consistent, with confidence that all product in the UK would be sold, as it is with a promise that unsold product would be taken. The failure, to positively allege such a promise, is all the more surprising as that email was in direct response to the Ancillary Defendant's first communication about the unsold goods; see email dated 14th August 2012 at 6:04 a.m. (page 48 Exhibit 23). I therefore find, as a fact, that there was no commitment by the Ancillary Defendant to take unsold stock nor any guarantee or promise that unsold stock would be purchased by a third party.

[14] In any event it is clear that the 1st Defendant/Ancillary Claimant agreed to accept return of the unsold stock. This would constitute a waiver and/or acquiescence with the return of unsold product. The final questions, for determination, concern any alleged damage to the stock which was returned and whether such damage was caused by the Ancillary Defendant.

[15] In his witness statement, filed on the 1st July 2019, Mr. Darrell Burgess asserts that he insisted that the unsold product be returned urgently, (see paragraph 18). He complained that they were returned only seven weeks prior to their expiry date. Further that they were not returned palletised or shrink wrapped, see paragraph 19. He describes the damage, to product cases and product, at paragraph 20 of his witness statement. He says at paragraph 21,

> *"Given that the product was perilously close to expiry, Island 62 decided to proceed with the exercise to remove the bottles from the damaged cases and place them in new cases. Having embarked on this exercise it was discovered that a vast majority of bottles were also damaged – crushed, scoffed and dirty with labels leaking and labels illegible. With the realization that most of the products were damaged we gave up on the exercise. The products were left in the warehouse at Spike Industries but soon started to spoil and so we disposed of the products by opening the bottles and spilling them into the drains at Spike Industries."*

[16] There is documentary support for the assertion that the Ancillary Defendant was informed about the expiry date of product and the need for urgent return, see Exhibit 15 and, pages 53 and 54 of exhibit 23 (two emails both dated 31 August 2012). The response from the Ancillary Defendant was rather insensitive, see exhibit 16 (email dated 31 August 2012). It did however offer to pursue *"additional opportunities in the UK"* for the product. The offer appears either not to have been accepted or, if accepted, proved unsuccessful.

[17] The amount of product returned, and collected by the 1st Defendant/Ancillary Claimant, I find as a fact, was 704 cases see: Exhibit 20 (tally sheet), exhibit 23 page 80 (letter dated 5th February 2013) and, witness statement of Darrell Burgess at paragraph 20. Exhibit 18 (email dated 30th November 2012) I find, has an erroneous count. My acceptance of the Ancillary Defendant's accounting, as contained in the letter dated 5th February 2013 (page 80 exhibit 23), means that there was an "unexplained variance" of 811 bottles (33.79

cases). There were also 417 bottles (17.38 cases) admittedly damaged which were not included in those returned.

[18] The additional question, for my determination, is whether the 704 cases returned were in saleable condition and, if not, whether the Ancillary Defendant is liable. The Ancillary Defendant's evidence, as it related to the condition of unsold product, was unspecific. Mr. Harold Davis, deputy Chief Executive Officer of the Ancillary Defendant, stated he advised all participants that the Ancillary Defendant would ship all unsold product back to Jamaica (see paragraph 16 of his witness statement). He said the offer to arrange shipping was not obligatory but out of a desire to assist. He says 704 cases were unsold and were packaged by "JLB Shipment Limited" see paragraph 18 of his witness statement. He described the product as being in "*reasonable"* condition on return (Paragraph 21) but that 417 bottles were damaged. In her witness statement, filed on the 16th May 2019, Michelle Cowan the Finance Manager made no reference to the returned unsold product.

[19] When he was being cross-examined it was suggested to Mr. Burgess that it was JLB Shipping which did the packing. Mr. Burgess was firm that it was the Ancillary Defendant which did the shipping. There was no challenge to the allegation that the product was damaged. When Mr. Harold Davis, giving evidence for the Ancillary Defendant, was cross-examined on this aspect some interesting evidence emerged,

> *"Q: if a consignment and you don't return the goods don't you have to pay for the ones you don't return.*
>
> *A: yes, our responsibility."*

Although specifically challenged about the variance he was not asked, nor were suggestions put, about the unsold product that was allegedly returned damaged.

[20] The goods having been taken on consignment, and the Ancillary Defendant having acknowledged a duty to return unsold items, renders the Ancillary Defendant liable for the unexplained variance as well as for those damaged prior

to return. These totalled 1,228 bottles or 51.17 cases. There was no expert evidence provided, either as to the condition of the goods upon their return, or the cause of that condition. On the other hand the evidence that goods were damaged was not challenged, nor indeed was evidence led by the Ancillary Defendant, as to the manner of packing. The Ancillary Claimant's evidence is that the failure to palletise and shrink wrap resulted in the cases being bounced about during shipping. It does seem logical that articles of this nature ought to be carefully packaged. The Ancillary Defendant having taken on the responsibility, even if voluntarily, of shipping the goods back to Jamaica had a duty of care. That duty was to take reasonable care to see that the goods were safely packaged before being shipped back to Jamaica. It ought to have been in their contemplation that, if the goods were not properly packed, damage might be caused.

[21] The question that emerges therefore is whether there was a breach of that duty. Was the duty discharged by having another entity, JLB Shipment Ltd, ship the goods? The court needs evidence, as to the steps taken in the discharge of a duty, in order to say whether reasonable care has been taken in its discharge. Evidence- of damage and inadequate packing, having been lead by the 1st Defendant/Ancillary Claimant, the evidential burden shifts to the Ancillary Defendant. There is no or no sufficient evidence. We do not know if JLB Shipment was informed of the perishable nature of the goods. We do not know who packed the goods for shipping. We do not know of JLB Shipment's experience or expertise in the shipping of goods of this nature. We do not therefore know if it was reasonable for the Ancillary Defendant to rely on JLB Shipment in that regard. We do know however, as I find as a fact, that the goods were not packed in a manner necessary to ensure their arrival in good condition. I accept Mr Burgess' evidence that, upon inspection, the bulk of the goods and their packagings were in a condition such as to be unsaleable. I agree that this was his reason for discarding them. I therefore find the Ancillary Defendant liable, for failing to take reasonable care, when shipping the unsold goods back

to Jamaica. The Ancillary Defendant will no doubt advise itself as to whether or not it has any recourse against JLB Shipment Ltd.

[22] The loss to the 1st Defendant/Ancillary Claimant is the value of the damaged goods, whether returned or not, as well as the "unexplained variance" that is those unaccounted for by the Ancillary Defendant. These all total 755.17 cases (704 plus 51.17) There is no expert evidence as to the value of the items as at the date of return to Jamaica. We do however have the purchase order issued by the Ancillary Defendant "as part of its normal procurement and accounting process", see paragraph 9 witness statement of Harold Davis. That purchase order, was dated May, 24th 2012 and, was in the amount of J$3,360,000 (being J$3,360.00 per case). The purchase order indicates there are 24 bottles in each case. The unit price per bottle is J$140.00. The 1st Defendant/Ancillary Claimant is therefore entitled to recover, from the Ancillary Defendant, the value of unaccounted for and/or unsold product damaged upon return and being of unmerchantable quality. That is: 755.17 cases x $3,360 = $2,537,371.20

[23] There was not much evidence lead with regard to the Counterclaim by the Ancillary Defendant against the 1st Defendant/Ancillary Claimant and the 2nd Defendant. This relates to a loan by the Ancillary Defendant in December 2011 (see Exhibit 23 page 1 to 13). The witness statement of Michelle Cowan outlines the amount due and owing. She, in cross-examination, admitted that they were in the process of exercising powers of sale over property mortgaged to secure the loan. If and when completed these amounts would have to be brought into account. It is therefore irrelevant to my decision that a sale of mortgaged property is in progress. There is no doubt, that the 1st and 2nd Defendants are indebted to the Ancillary Defendant. As at the 30th June 2019, the amount owed is $7,280,000 with daily interest of $1,170 and late fees of $270 accruing daily (see evidence in amplification of Michelle Cowan).

[24] I have found that the amount of $2,537,371.20 is due to the 1st Defendant/ Ancillary Claimant from the Ancillary Defendant. The 1st Defendant/Ancillary Claimant is entitled to interest on that amount at a rate of 3% per annum from the date of the loss, that is the date the goods were delivered in damaged condition, being the 30th November 2012 (see Exhibit 17, email dated 29th November 2012). The total to be set off, as at the 30th day of June 2019, is therefore $3,038,502.00 [being $ 2,537,371.20 plus $501,130.82 (three percent interest per annum for six years and seven months)].

[25] In the result and for the reasons stated above there is judgment, for the Ancillary Defendant against the 1st Defendant/Ancillary Claimant and the 2nd Defendant, as follows:

Amount due to Ancillary Defendant for unpaid loan as at June 2019	$7,280,000.00
Less amount set off for damage, to unsold and unaccounted for goods, as at June 2019	$3,038,502.00
Total	$4,241,498.00

Interest will run at the contractually agreed rate of 10 percent per annum from the 30th June 2019 until payment. The 1st Defendant/Ancillary Claimant succeeded, in part, on the Ancillary Claim and the Ancillary Defendant on its counterclaim. I therefore will make no order for costs.

David Batts
Puisne Judge.