IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 CD 00017

BETWEEN	**SISA LOGOS AND EMBLEMS**	**CLAIMANT**
A N D	**QUEST SECURITY SERVICES LIMITED**	**DEFENDANT**

Jacqueline Cummings instructed by Archer, Cummings and Company for the Claimant.
Jahlil Dabdoub and Karen Dabdoub instructed by Dabdoub and Dabdoub for the Defendant.

Heard: 4th, 5th, 19th, 20th, 26th July and 19th, 26th September, 2012

WHETHER BELT BUCKLES AND BULLETPROOF VESTS ARE OF MERCHANTABLE QUALITY AND UNFIT FOR PURPOSE – WHETHER SAMPLE OF BELT BUCKLE WAS SHOWN TO CLAIMANT- WHETHER HANDCUFFS WERE SUPPLIED ON CONSIGNMENT – WHETHER CLAIMANT WAS NOTIFIED OF DEFECT WITHIN REASONABLE TIME

SINCLAIR-HAYNES J

[1] Over a period of approximately seven years, Sisa Logos and Emblems (Sisa) (claimant) and Quest Security Services, (Quest) (defendant) enjoyed a good relationship of supplier and customer. The delivery of bulletproof vests, handcuffs and belt buckles brought an end to their hitherto good relationship as on the 11 March 2011, Sisa instituted proceedings against Quest for the sum of US$5,840. This sum represents an amount Sisa claims is outstanding for handcuffs, bulletproof vests and belt buckles it supplied Quest.

[2] Quest, however, stridently resists the claim and insists that the belt buckles and the vests did not conform to the orders and were not fit for the purpose. Regarding the claim for the handcuffs, Quest is adamant that the handcuffs were left with it on

consignment. It counterclaims against Sisa for the sum of US$5,600.00 which figure, it claims, represents money mistakenly paid by its Accounts Department.

THE EVIDENCE

THE BELT BUCKLES

[3] Mr. Farach, Sisa's international divisional manager, asserted in his witness statement that Sisa supplied Quest with 500 belt buckles for the sum of US$2,975.00. He acknowledged the receipt of payment in the sum of US$1,785.00. It was his further assertion that Quest has an outstanding balance on that account in the sum of US$1,190.00.

[4] Quest, however contends that payment of the sum of US$1785.00 was made in error. Mr. Dibbs, its managing director, testified that Mr. Farach was shown a sample of the belts worn by the guards and was instructed that the buckles were to fit those belts. He also instructed Mr. Farach that Quest desired to have its logo placed on the buckles similar to the buckles worn by Security and Protection, another security company. It is also his evidence that Mr. Farach took measurements of belts used by Quest.

[5] Mr. Dibbs further testified that the buckles did not fit as they:

a) were too small to accommodate the belts they were require to fit;
b) did not have the required logos;
c) were not the type used by security guards.

Further, they were military type and were not made of the material requested. According to him the sum of $1,785.00 was mistakenly paid on the account for the buckles because he was not at that time aware that they were defective. It is his evidence that he informed Mr. Farach that the belts were unfit for the purpose but Mr. Farach informed him that he could not take them back because the name Quest was on them.

[6] Mr. Farach testified that he met with Mr. Dibbs regarding the belt buckles. It is his evidence that Mr. Dibbs' only specification was quantity. He denied that:

(1) Mr. Dibbs wanted the logo on the belt;
(2) he was given a specific size;
(3) he was shown a sample;
(4) the buckle was required to match the sample;
(5) he took measurements;
(6) he was told that the design should be that of Security and Protection, another security company.

BULLET PROOF VESTS

[7] Mr. Farach averred in his witness statement that, upon receipt of an order for fifteen bulletproof vests from Quest, he advised Ms. Angela Hunter, Quest's administrative assistant, that the cost of each vest was US$415.00. Quest was sent an invoice for the sum of US$6,375.00. Sisa has however, since the delivery of the vests, only received payment in the sum of US$975.00. Quest's indebtedness for the vests, according to his witness statement, is now US$5,400.

[8] Quest trenchantly resists this claim. It contends that the bulletproof vests were defective and ill-fitting to wit:

a) they compromised the safety of the guards as access to their firearms was challenged:
b) the space in the region of the chest exposed the guards to injury;
c) whilst seated, the necks of the vests pushed uncomfortably towards the throats of the guards;
d) the bulletproof inserts were falling out through the seams which endangered the lives of the guards;
e) there was no serial number which was a requirement of the Ministry of National Security;
f) they impeded the movement of the guards, that is, their ability to scale fences;

g) they were larger than the sample; and

h) the logo was not embroidered as requested.

[9] It is Mr. Dibbs' evidence that the sum of US$975.00 was advanced as payment for security helmets but was converted towards the payment of vests by Mr. Farach. Mr. Dibbs testified that he had previously ordered bulletproof vests from Mr. Farach. On that occasion, he showed Mr. Farach a sample of a vest which Quest had ordered from another company and was then using. Those vests supplied by Sisa had certain defects which Mr. Farach remedied. He was induced to place the second order for vests on Mr. Farach's offer of a credit note.

[10] Mr. Marriot, Quest's operations manager, testified that the vests were not the normal size. They were too long and interfered with the firearm in the guards' pockets. There was an overlap, and the space between the vest and the guards' chests endangered the guards. The vests lacked magazine and utility holders. They covered the guards' firearms which obstructed the use of their firearms. They, also, rode up to their necks and created a space which left their chests unprotected.

[11] Mr. Dibbs' evidence is that the operations manager informed him about the problems the guards were encountering. Consequently, he informed Mr. Farach about one month after the delivery of the vests. He, Mr. Farach, spoke with their operations manager. A meeting was arranged by Mr. Farach. It is Mr. Dibbs' further evidence that Mr. Farach informed him that he appreciated the problems and would see what could be done. He also told him that his factory had begun manufacturing vests. It is also his evidence that, formerly, whenever Quest complained about defects to the goods Sisa supplied, Mr. Farach had hastened to correct the problem.

[12] Ms. Angela Hunter is adamant that she informed Mr. Farach by way of telephone that the vests did not fit and could not work. As early as 9 September 2009, she sent an email to Mr. Farach in which she informed him that she had only received 12 vests which had no serial number. In that email she also stated: "This is not good as

we need to identify each vest by serial numbers." She did not email him concerning returning the vests/taking back the vests until September 2010 because she had been speaking with him on the telephone about them. Having spoken to Mr. Farach and informed him that the vests were useless, she felt it was unnecessary to email him. Her understanding was that he would have collected them. According to her, because of the relationship between them, she saw no need to register the complaint in an email before that date. Further, Mr. Farach, to quote her: "*He would always come running to fix."* It is her further evidence that she never knew the vests had a warranty or life span.

THE HANDCUFFS

[13] Mr. Farach testified that Sisa had 50 extra handcuffs which it offered to Quest, which Quest agreed to purchase. He then instructed Quest to obtain an entry permit from the Ministry of National Security. The 50 handcuffs cost US$ 2,150.00. Sisa received payment of US$1,450.00 which left a balance of $700.00. Under cross-examination, however, he admitted that the price of each handcuff was inflated by the sum of US$10.00.

[14] Quest also resists this claim. Ms. Hunter contends that Mr. Farach contacted Quest by way of electronic mail and informed them that Sisa had inadvertently over ordered for a client. He sought Quest's assistance in clearing the additional 50 handcuffs which it had over ordered. According to Ms. Hunter, Mr. Farach urgently needed the handcuffs to be cleared in order that the entire shipment could be cleared. As a result, Quest agreed to assist.

[15] It is Mr. Dibbs' evidence that they were asked to facilitate clearance of the handcuffs. They were offered the handcuffs but he told Mr. Farach that Quest never needed them but would assist. He was unsure as to whether the conversation occurred on the telephone or in person. He informed Mr. Farach that Quest could only take the handcuffs on consignment because his company did not generally use handcuffs. It is also Ms. Hunter's evidence that handcuffs do not form part of the guards' standard equipment.

[16] Under cross-examination Mr Dibbs explained that only supervisors with powers of arrest used handcuffs and they were employed with theirs or they purchased them. It is also his evidence that he told Mr. Farach that some of the guards might want handcuffs and he would offer the handcuffs to them. He testified that Mr. Farach told him he was not required to pay for them until they were sold. It is also his evidence that when the handcuffs were cleared, Mr. Farach actually collected them, but he was hurrying to catch a flight. Mr. Farach begged him to keep and to sell them for him. To date, none has been sold.

ASSESSMENT OF THE EVIDENCE

[17] Credibility is at the heart of this matter. I will first examine the issues relating to the belt buckles and the bulletproof vests. Sections 14 and 15 of the **Sale of Goods Act** are applicable.

Section 14 of the Sale of Goods Act reads:

> *"Where there is a contract of sale of goods by description, there is an implied condition that the goods shall correspond with that description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods correspond with the description."*

Section 15 reads:

> "*Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:*
>
> *(a) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose."*
>
> *(b) Where goods are bought by description from a seller who deals in goods of that description(whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that the*

buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed."

[18] In light of Mr. Dibbs' evidence that he showed Mr. Farach a sample of the belt for which the buckles were required and a sample of the bulletproof vest he had ordered from another company, section 16 of the Sale of Goods Act is also pertinent.

It reads:

(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In case of a contract for sale by sample -

(a) there is an implied condition that the bulk shall correspond with the sample in quality;

(b) there is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample:

(c) there is an implied condition that the goods shall be free from any defect, rendering them merchantable, which would not be apparent on reasonable examination of the sample.

THE BULLETPROOF VESTS

[19] The issue is whether the vests corresponds in quality and is of the type of the sample. It is not in dispute that Mr. Farach was made aware of the purpose for which the vests were required. In any event, Sisa is a manufacturer of bullet proof vests. It therefore impliedly warrants that the vests supplied are fit for the purpose. (See **H L(E) James Drummond & Sons v E H Van Ingen & Co** 1887 HL X11 284).

[20] In the said case, Lord Herschell, at page 291 said:

*"It is equally well settled that upon a sale of goods of a specified description, which the purchaser has no opportunity of examining before the sale, the goods must not only answer that specific description, but must be merchantable under that description. The doctrine was laid down in **Jones v. Just** (1), where all the previous authorities on the point were reviewed. In the case of **Mody v. Gregson** (2), in the Exchequer Chamber, the decision in **Jones v. Just** (1) was approved of and acted upon, and it was further held that the implied warranty that the goods supplied are merchantable was not absolutely excluded by the fact that*

the goods were sold by sample, and that the bulk precisely correspond with it, but was only excluded as regards those matters which the purchaser might, by due diligence in the use of all ordinary and usual means, have ascertained from an examination of the sample. I think that the law enunciated in these cases is sound and not open to doubt. I proceed to consider its application to the facts of the case before us".

[21] It is palpable by mere cursory look at the sample of the bulletproof vest which was shown to Mr. Farach, that the disputed vests which Sisa supplied are larger; the logo is not embroidered and there is no serial number. Indeed, under cross-examination, Mr. Farach admits that the vests in dispute are larger than the sample and unlike the sample, there is no ammunition holder.

[22] The vests, with the consent of the parties, were modeled not only by Mr. Marriot, but also by three police officers in court. Constable Sheldon Patterson was the tallest of the three and rather slender. Constable Tashion Johnson was five feet eleven inches and Constable Carrington Johnson was five feet seven inches and quite stout. The constables all had the same complaints.

[23] It was observed that the vests pushed up to the constables' throats when they sat and there was in fact a space at the side of the vest. Having seen the said vests on four persons of different heights and sizes, it is abundantly plain that they are not of merchantable quality and are unfit for the purpose of providing the required protection for the guards.

[24] In the case of **Varley v Whipp** 1 QB 513, a buyer agreed to purchase a reaping machine which it had not seen but was described by the seller as having been acquired the previous year and had only cut about sixty acres. The machine did not fit the description. It was held that:

"…*there was an implied condition that the goods should correspond with the description, that there was no acceptance of the machine by the defendant, within the meaning of s. 35, that the property had not passed to*

the defendant, within the meaning of s. 17, and the plaintiff was not entitled to recover."

Similarly, the vests do not correspond to the sample. In the circumstances, property in them did not pass to the Defendants.

HOW MANY VESTS WERE SUPPLIED?

[25] There is also an issue as to the quantity of vests supplied. Mr. Dibbs and Ms. Hunter insist that Quest only received 12 of the 15 vests Quest ordered. On the other hand Mr. Farach is adamant that 15 were supplied.

[26] Concerning, the cost of the bullet proof vests, Mr. Farach's evidence is contradictory. In Sisa's pleadings, the claim against Quest was for US$5,840. Mr. Farach's evidence however, is that Quest is indebted to Sisa in the sum of US$7,290. He averred in his witness statement that the cost of the 15 vests it sent to Quest was US$6,375.00 at a cost of US$415.00 each. Invoice numbered 10517 and dated 18 June 2009, states the total cost of the vests supplied as US$5,100. It quoted the price of each as US$425.00. Under cross-examination, Mr. Farach admitted that that invoice was inaccurate as the price was inflated by US$10.00. It is the evidence of Mr. Dibbs' and Ms. Hunter that invoice number 10545 was a proforma invoice which was provided solely for the purpose of obtaining an entry permit for the bulletproof vests. Mr. Farach admits, also, that invoice number 10545, was sent for the purpose of obtaining the required permit and that invoice number 10517 was the correct invoice. $5100 divided by $425 is 12. This invoice supports Quest's claim that they only received 12 vests.

[27] In light of his admission that the sum of $425 was inflated, the claim ought to be reduced by US$150.00. It is noteworthy that Mr. Farach emailed Ms. Hunter on 14 August 2009, and referred to invoice number 10517 which stated the price of the vests delivered as US$5,100.00. It is Mr. Dabdoob's submission that that email confirms that it was only 12 vests that were delivered and that the price was US$415, 00 each. In an email dated 15 January 2009, which he sent to Ms. Hunter, the price per vest was

quoted at US$415.00. Having received US$975.00, Quest owed US$5,400.00 for the vests. The following is part of an email Ms. Hunter sent on the 25 January 2010:

> "(a) …
>
> *(b)Invoice No. 10517 for $500.00 – Bulletproof Vest (15)*
>
> *We are hereby requesting that you take back these vests as we are unable to use them. They do not fit comfortably and are choking the guards when they try them on."*

In that email Ms. Hunter placed the number "15" beside the vests as if acknowledging receipt of 15 vests. Her reference, however, to the invoice number makes it plain that she wrote in response to the invoice sent by Sisa. This court accepts Mr. Dibbs' and Ms. Hunter's evidence in that they received only 12 vests. This court finds Mr. Farach to be an unreliable witness.

THE BELT BUCKLES

[28] I will now consider the issues relating to the belt buckles. Mr. Farach asserted in his witness statement that he discussed with Mr. Dibbs the fact that he had over supplied the metal buckles and it was agreed that Mr. Dibbs would pay for the original order of 300 and thereafter he would commence payment for the 200 which was oversupplied. It was his further assertion that the claimant owed $1,190.00 having paid $1,785.00.

[29] Under cross-examination, however, upon being shown invoice dated April 2007, he admitted that what was contained in his witness statement was inaccurate. He accepted that the agreement was that Quest would pay for the 300 buckles. Payment for the 200 would only become due if Quest used or opened the boxes which contained the oversupplied 200. Indeed, when he was confronted by the unopened boxes which contained the entire 500 buckles, he withdrew the claim for the oversupplied 200.
Is Mr. Farach being shifty and deceptive or was it an honest mistake?

[30] In point of fact, it is his evidence that he received a purchase order from Quest for the said buckles. He was, however, unable to produce same. He testified that he is

only now aware that Quest is claiming that the buckles did not fit. On the other hand, Mr. Dibbs' evidence is that the order was made verbally to Mr. Farach whilst he, Mr. Farach, was on one of his many visits to Quest's office. It is worthy of note that it is also Mr. Farach's testimony that on occasion he visited the defendant's office and took orders. Moreover, Mr. Farach admitted under cross-examination that he was present at the defendant's office at the time the order was made.

[31] The question is whether Mr. Farach, as is asserted by Mr. Dibbs, was shown a sample of the belt for which buckles were required. Was he specifically told that the buckles needed to fit the belts which Quest security guards used? Did he take measurements of the belts? Was a request made that the buckles should be similar to that of Security and Protection? Or, is Mr. Farach being truthful when he asserts that he was not shown any belt and he was given a purchase order?

[32] Ms. Jacqueline Cummings submits that the allegation that the metal buckles were unfit is contradicted by the picture attached to Mr. Marriott's witness statement and Mr. Dibbs' promise to pay for the metal buckles. Mr. Marriot's evidence is that he is unable to testify about the pictures attached to his witness statement. Those pictures, are therefore of no assistance to the court.

[33] It is the view of this court that it is not implausible, in the absence of a purchase order and his acknowledgement that the order was actually taken at Mr. Dibbs's office, that the order was indeed communicated verbally. This court, on a balance of probabilities finds that Mr Farach was shown a sample and was informed of the need for the design on buckle, that is, the necessity for the logo to be placed on the buckle.

[34] In the English House of Lords case of **Aros Ltd. v Ea Ronaasen and Sons** (1933) AC 470, timber supplied by the seller differed slightly in thickness from that which was ordered. The House of Lords held, affirming the decision of the Court of Appeal that "…*the buyers were entitled to demand goods answering the description in*

the contract, and were not bound to accept goods tendered merely because they were merchantable under that description. (See the head notes).

[35] I accept Mr. Dibbs' evidence that the buckles Sisa supplied did not satisfy the specifications. They were too small and therefore were unfit for the purpose for which it was required, that is, to fit the belts which were shown to Mr. Farach. This court accepts as credible the evidence of Mr. Dibbs and Ms. Hunter that Mr. Farach was informed that the vests and buckles were useless. This court finds Mr. Farach to be an unreliable witness and in so far as his evidence conflicts with the witnesses for the defence, this court prefers the evidence of the defence witnesses.

WHETHER SISA WAS INFORMED OF DEFECTS WITHIN A REASONABLE TIME

[36] By virtue of section 36 of the Sale of Goods Act, a buyer is not obliged to return the goods he rejects. His duty is to intimate to the seller, his refusal to accept them. Section 35 of the Sale of Goods Act states:

> *"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."*

[37] The issue now arises as to whether Sisa was timeously informed that the belt buckles and the vests did not fit. It is Ms. Hunter's evidence that she received the vest sometime in June or July 2009. It is however her evidence, which this court accepts, that she spoke to Mr. Farach about the defects on a number of occasions after delivery hence she felt there was no need to registered her complaint by way of email before the 9 September 2010.

[38] Mr. Dibbs' evidence is that upon discovering the defects in the vests, it was reported. He denied that he first complained about the buckles by way of his email in December 2010. It is his evidence that he complained about one month after they received the vests. He testified that Mr. Farach told him he appreciated the problem

and arranged a meeting with the operations manager. It is his further testimony that Mr. Farach informed them that Sisa had begun manufacturing vests and he would remedy the defects.

[39] **The Sale of Goods Act** provides a buyer with a reasonable opportunity of examining goods in order to ensure they conform to the contract.

Section 34 of the **Sale of Goods Act** states:

> *(1) Where goods are delivered to buyers, which he had not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract*
>
> *(3) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract"*

[40] It is settled laws that what amounts to reasonable opportunity is a question of fact. The learned authors of **Chitty on Contract, Specific Contracts** at paragraph 4872, define reasonable time thus:-

> "*What is a "reasonable time" for rejection is a question of fact. In general the buyer is entitled to a reasonable time in which to assess the effects and decide what to do: but if his delay is unnecessarily prejudicial to the seller, it may be held unreasonable. It seems also that the assumption is that in the interests of finality the time should not be long: and there is certainly no requirement that the time be sufficiently long to enable a defect of the type concerned to manifest itself, for this may in the case of some products not be for several years."*

[41] An examination of decided cases on the matter provides guidance. In **Flynn v Scott** (1949) SLT 399, a Scottish case, the purchaser of a second-hand motor vehicle sought to repudiate the contract upon the discovery of a defect which rendered the vehicle unfit for the purpose. In determining the issue of what amounted to 'a reasonable time' Lord MacIntosh said:

> *"Now what is a reasonable time is a question of fact, and depends upon the whole circumstances of the case."*

[42] In that case, the van was purchased and taken away from the seller's yard on the 10th June. There was no intimation of rejection of the van until the 8th July. There was evidence that the van was removed from the pursuer's yard for three days for the purpose of removing a name which was painted on the van, and for painting on its name.

[43] The van broke down on the 17th June, whilst the pursuer was using it to collect bedding. There was no evidence as to whether the van was used immediately before that trip and if it was, for what purpose. In those circumstances, the learned judge was of the opinion that if the pursuer sought to exercise the remedy of rejection, he was bound to intimate this to the seller within a very few days after the car broke down. He said:

> *"…if the remedy of rejection was going to be exercised by the pursuer, he was bound in my opinion to intimate this to the seller within a few days after the 17th June, whereas in point of fact his solicitor's letter of 8th July was the first intimation the seller had that there was anything amiss with the bargain which had been completed on 10th June. There was no proof of any facts and circumstances which would account for or explain or excuse any such long delay in intimating to the seller that the van was to be rejected."*

[44] In **Gunn, Collie & Topping v Purdie** 1946 SLT (sh. Ct) 11, a buyer alleged that a suit he purchased did not conform to the contract because it was not handmade and was not made of the fabric which the seller described to him. No objection was taken by him until he was sued by the seller. He then sought to reject the garments after one year, having worn the same for some months.

[45] The court found that by virtue of section 35 (which is identical to our section 35) he was deemed to have accepted the goods and was therefore not entitled to reject them. In the very old case of **Cash v Giles** (1828) 3 Carrington and Payne 407 172 ER477 a defendant had proven that a threshing machine which he purchased was of no value to properly thresh out corn. The machine was only used twice. The following statement of Justice Park provides guidance:

> "If *the defendant meant to insist that this threshing -machine was not a good one, and suitable to its intended purpose, it was his duty rather to have immediately returned it, or to have given immediate notice to the plaintiff to fetch it away, as it was of no use; now, instead of that, he keeps it for several years. I am clearly of opinion, that, as he has done so, he has waived all objections to its goodness, and is bound to pay for it."*

[46] In the case of **Bernstein v Pamson's Motors (Golders Green)** Ltd [1987] RTR 384, the plaintiff purchased a new motor-car which was found not to be of merchantable quality and was unfit for the purpose. The car was kept for some three weeks and had driven approximately 140 miles. Rougier J, held that the plaintiff was not entitled to rescind the contract as he had ample opportunity to test the car. In construing 'reasonable period' as stated in section 34(1) of the English Act which is identical to section 34 of our Act, he opined:

> *"That section seems to me to be directed solely to what is a reasonable practical interval in commercial terms between a buyer receiving the goods and his ability to send them back, taking into consideration from his point of view the nature of the goods and their function, and from the point of view of the nature of the goods and their function, and from the point of view of the seller the commercial desirability of being able to close his…*

[47] In the case of M **J Hurst consultants v Grange Motors (Brentwood) Ltd.** (1988) 104 LQR a Rolls Royce motor vehicle was purchased late September. It was found to be unfit for the purpose and was rejected on the 12 February. That period was considered reasonable in circumstances.

[48] I accept as credible, the evidence of Ms. Hunter that she had spoken to Mr. Farach prior to sending the email and had informed him that the vests were unfit for the purpose. Her evidence that he was in Guatemala stands uncontroverted. I also accept her evidence that the relationship between Mr. Farach and Quest had developed to the point where she felt confident that he would collect the vests on his visit to Jamaica so regarded it as unnecessary to send an email. Indeed, it is also Mr. Farach's evidence that the relationship had developed to the extent that he was affording them credit. I also accept Mr. Dibbs' evidence that Mr. Farach arranged a meeting with the operations manager and promised to remedy the defects.

[49] In light of the circumstances of this case, that is:

- Mr. Farach's frequent visits to Quest's office;
- regular communication between the parties by telephone;
- Mr. Farach having been in Guatemala at the time when the defects were discerned;
- his history of remedying defects;
- the relationship the parties enjoyed;

this court finds that it is not unreasonable that the defendant did not initially register its complaint in writing. Thus, the court finds that Quest informed Sisa of its dissatisfaction with the vests within a reasonable time.

[50] On 18 June 2009, Mr. Farach sent an invoice to Quest. It was stated on the invoice that there was a six month warranty on the vests. On that invoice it was also stated that the terms were COD. However, in January 2009 Sisa had sent Quest an email in which it stated that Quest was being given time to pay. It is Ms. Hunter's evidence that she never knew the vest had a warranty period. Mr. Dibbs' evidence is that there was no warranty. The issue whether the vests carried a six month warranty, is however now redundant in light of my acceptance of Mr. Dibbs' and Ms. Hunters evidence that Mr. Farach was informed by way of telephone before the expiration of the six month warranty.

THE HANDCUFFS

[51] I will now consider the matter of the handcuffs. The issue is whether Mr. Dibbs agreed to purchase the 50 handcuffs or whether they were taken on consignment.

SUBMISSIONS BY MS. JACQUELINE CUMMINGS FOR THE CLAIMANT

[52] Ms. Cummings submits that cross-examination revealed that Mr. Farach by way of three emails to Mrs. Hunter offered the handcuffs for sale. These emails, she submits, made no reference to consignment. Further, she submits that at all material times Sisa requested payment, Quest did not offer to return the handcuffs. It is her further submission that the goods would have incurred export duty or fees from

Guatemala and import duties, fees or GCT into Jamaica. In those circumstances, the handcuffs would not be sold on a consignment basis. Sisa could not take the goods from Jamaica to Guatemala and incur the same fees again.

[53] She points out that Ms. Hunter's emails which were sent one year after did not mention the word consignment. Her email dated 25 January 2010 requested Sisa to take back the handcuffs because the guards were buying them cheaper and her email of 27 March 2010 only stated that Quest was trying to sell them to someone else. It is her submission that the payment made towards the handcuffs was not made in error. The fact that the purchase order was from Quest and an entry permit application was made by them, demonstrates that it was not. She further submits that the fact that the delivery receipt which was signed by Mrs. Hunter was from Sonija Edwards shows that Sonija Edwards Custom Brokers Limited was the company that delivered the handcuffs to Quest and not Mr. Farach himself. This, she submits, undermines the credibility of Mr. Dibbs' statement that Mr. Farach was in a hurry to catch a plane.

[54] It is also her submission that the letter which Ms. Hunter sent to Karst Agencies Limited requested that handcuffs and locks were to be supplied to Quest. If it were accepted by Quest on consignment there would be no need for that letter. Karst could have kept the handcuffs and sold same since Mr. Farach's evidence is that Karst is their agent. This she submits dispels the myth that the handcuffs were accepted by Quest on consignment.

[55] Wherein lies the truth? That is the question. Careful examination of the documentary evidence is illuminating. The issue of the handcuffs commenced with the following email dated 16 February 2009 from Mr. Farach. It should be noted that Mr. Farach's native tongue is Spanish and his grasp of English grammar is imperfect.

> "…*Dear Ms. Hunter can you please ask Mr. Dibbs if he want 50pcs of Handcuffs because one of our customers request 200pcs of handcuffs but we sent by mistake one box more with 50pcs and this 50pcs need a permit entrance, we just need a purchase order from you and we will do everything for you talking about the permit entrance because now this*

handcuffs are in Jamaica. In case your company wants this handcuffs we can provide to you the pay of them with a good credit time:

50% on September 2009

50% on November 2009…"

[56] In light of this email, the court has no hesitation in finding that Mr. Farach was seeking Quest's assistance in clearing the handcuffs as Sisa had found itself in a predicament. It is also quite plain that he required Quest to obtain a purchase order to clear the handcuffs. Mr. Farach, by way of that email also offered the handcuffs to Quest. The question is whether Quest accepted that offer.

[57] On the 18 February 2009 Mr. Farach/Sisa sent another email to Quest reminding Ms. Hunter that the handcuffs were already in Kingston awaiting the permit and enquired of Ms. Hunter whether Quest had received the confirmation order and would take the handcuffs. That email demonstrates quite clearly that Quest had not, at that point accepted the offer to purchase.

[58] Under cross-examination, Mr. Farach stated that the offer was made to Quest and the price was fixed at US $33.00 per unit. He was adamant that Quest accepted the offer. It is helpful to quote the email which reads:

"Did you have the order confirmation about the 50pcs of handcuffs? Kindly tells us as soon as you can.

We need to know if your company will take the 50pcs of handcuffs for no offer to other customer, as you know the handcuffs are already in Kingston just waiting for the entrance permit.

You just have to make the purchase order to Karst Agencies Ltd.,, and they will make the entrance process, we not charge to you for this process and you will have 7 months for make your first payment of the 50% and the other 50% with one month more of credit time. We hope receive your soon information…"

This portion of the email, in the courts view is a further attempt at persuading Quest to purchase by offering an attractive payment plan.

[59] On the 26 February 2009, Ms. Hunter upon, receiving instructions from Mr. Farach, sent the following email to Karst Agencies Limited.

> "*Kindly supply our organization with 50 double lock handcuffs complete with cases which should be ordered through Sisa Logo, Central America, Guatemala.*
>
> *We would appreciate your kind assistance in the speedy processing of our order."*

[60] It is the finding of this court that that letter was sent pursuant to Sisa's plea for assistance in clearing the handcuffs, not as Ms. Cummings submits, that it refutes Quest's claim that the goods were taken on consignment. This court accepts Ms. Hunter's evidence, which was not controverted, that it was Mr. Farach who instructed her to write to Karst, his broker. I accept her evidence that he instructed her as to the contents of the letter. There is no evidence before this court that Karst is the agent of Sisa and thus could have asked it to keep and sell the handcuffs.

[61] On the 25 January 2010, Ms. Hunter sent an email to Mr. Farach in which she, among other things, requested that he should take back the handcuffs and offer them to another company because the guards were purchasing similar handcuffs at a cheaper price. It reads:

…….

> *(c)Invoice No. 10538 for $2,150.00 – Handcuffs & Cases (50)*
>
> *We have not been able to distribute these handcuffs as the guards are purchasing the same for less money elsewhere. We would therefore ask that you take them back and offer them to another company."*

[62] On the 3 March 2010, in response to an email which was entitled "Payment Schedule For Outstanding Amounts/Sisa Reply correct amount details & Information" in which Sisa claimed *inter alia* the sum of $2,150 for " (*handcuffs and case for handcuffs" delivered on 27 of March 2009.(10 months ago)"* Ms. Hunter emailed Mr. Farach as follows:

> "*We are in receipt of the below email. As we communicated to you before we are unable to dispose of the 50 Hand Cuffs. As you will recall these were given to us to facilitate the clearance of an order for another*

company. We therefore ask that you sell these handcuffs to your other customers as we are unable to sell them. We will deliver them to the purchaser on your behalf."

[63] This court is not in agreement with Ms. Cummings' submission that Quest's response in writing one year later is an indication that it had accepted the goods. This court, however accepts the evidence of Ms. Hunter that having spoken to Mr. Farach on behalf of Mr. Dibbs concerning assisting in the clearance of the handcuff, she informed him that Mr. Dibbs would only take the handcuffs on a consignment basis as Quest had no use for them.

[64] It is the evidence of both Ms. Hunter and Mr. Dibbs that Quest is also a retailer of security products. They sell security products including electronics to their guards I accept Ms. Hunter's and Mr. Dibbs' evidence that Mr. Farach was told that Mr. Dibbs was uncertain as to whether he would be able to sell them. Ms. Hunter's evidence is that she did not email Mr. Farach about the handcuffs because she had already informed him that they were not useful to Quest. She further testified that there was no need to discuss the matter because Mr. Farach had left them with Quest on consignment. On re-examination, it was her evidence that the understanding was that they were to be sold over period.

[65] This court, on a balance of probabilities, finds to be credible the evidence of both Ms. Hunter and Mr. Dibbs that they informed Mr. Farach that they had no ready market so the handcuffs would be taken on consignment. Mr. Dibbs testified that Mr. Farach attended their office every month. Their assertion that they communicated regularly with Mr. Farach on the telephone and in person at their office is substantiated by Mr. Farach himself.

[66] In his witness statement he stated that whenever he was in Jamaica he would attend the office and take orders. It is also his evidence that he would speak to Ms. Hunter and ask her to speak to Mr. Dibbs on his behalf. Ms. Hunter's evidence is that Mr. Farach was the person who mainly called. Mr. Farach also stated in his witness

statement that the relationship developed between them to the extent that Sisa extended a limited amount of credit to Quest.

THE COUNTER CLAIM

[67] Quest has counter claimed for the sum of US$5,660 which it claims to have erroneously paid to Sisa. The issue now to be determined is whether Quest is entitled to recover the monies it claims. It is indisputable that Quest paid the sums of US$1,785.00 and US$975.00 to Sisa. Quest contends that the sum of US$1,785 was paid under the mistaken view that the belts met the required specifications. It contends that the sum of US$975.00 was advanced towards the payment of security helmets which Sisa applied to the account for the vests. Mr. Farach testified that Sisa received the sum of US$1,450.00 as payment towards the handcuffs. Mr. Dabdoub submits that this sum was wrongfully applied.

[68] The case of **Barclay's Bank Ltd. v W J Simms Son and Coke (Southern) Ltd. and another** [1979] All ER 522, considering whether money paid to another under a mistake entitles the person to recover it, examined a long line of authorities. From those authorities Robert Goff J deduced the following:

> *"1. If a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact.*
>
> *2. His claim may however fail if: (a) the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend; (b) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorized to receive the payment) by the payer or by a third party by whom he is authorized to discharge the debt; (c) the payee has changed his position in good faith, or is deemed in law to have done so.*
>
> *To these simple propositions, I append the following footnotes: (a) Proposition 1. This is founded on the speeches in the three cases in the House of Lords, to which I have referred. It is also consistent with the opinion expressed by Turner J in* ***Thomas v Houston Corbett & Co*** *([1969] NZLR 151 at 167). Of course, if the money was due under a contract between the payer and the payee, there can be no recovery on the ground unless the contract itself is held void for mistake (as in*

> ***Norwich Union Fire Insurance Society Ltd. v William H Price Ltd****) or is rescinded by the plaintiff."*

In the instant case, this court has already found that the buckles and the vests do not correspond with the description and instructions Mr. Farach was given and the samples he was shown.

WHETHER SUM OF US $1,785.00 WAS PAID IN ERROR

[69] Was the sum of $1,785.00 mistakenly paid, as alleged by Quest?

Regarding the payments on the vests, Mr. Dibbs testified that the payments were not authorized and were made in error. The problems regarding the vests were not communicated to the Accounts Department. He discovered that payments were made in October 2010 and he issued instructions to stop payment. He testified that the error was a big problem in his organization. He further explained that at that time he was contending with a family illness and consequently was frequently away from the jurisdiction?

[70] According to Ms. Hunter, she was unaware that the vests and handcuffs were included in the invoice as she had already told Mr. Farach that they were useless. It is her evidence that Quest has payment plans with their suppliers and a running account with Sisa. She admitted she was the author of email dated 1 March 2010, in which she stated:-

> *"The total amount being $7250.00 will be paid over a period of five (5) months. The monthly payment commencing March 2010 to July 2010 will be US$1,450.00.*
>
> *Kindly confirm receipt of each monthly payment*."

She, however, explained it was payment on account as Quest has a payment plan with Sisa. She could not speak to fact that in spite of letter of 25 January, Quest made payment for the vests but insisted that that they had a running account with Sisa. According to her, Mr. Farach's email of 5 August 2010 contains several inaccuracies.

[71] Her assertion that Quest had a running account with Sisa is supported by Mr. Farach's evidence that after the relationship developed between Quest and Sisa, he allowed them credit. There is no dispute that Sisa supplied Quest with several items including caps, batons, metal detectors, lanyards and ties for which there was a running account. Further, the emails exchanged by the parties clearly demonstrate that Quest had a running account with Sisa.

[72] Mr. Dibbs testified that at the time he ordered the belt buckles, Mr. Farach told him that if he bought bullet proof vests, he would provide them with a credit note. The invoice sent by Sisa on the 8 June 2009, stated that the 'terms' were "COD". The "condition for pay" required "100 % on delivery" This invoice does not bear the signature of Mr. Farach. It is not speculative to find that it was generated by the Accounts Department. It is this court's view that the invoice is a standard invoice used by Quest's Accounts Department. I am fortified in the view by the fact that the invoice dated April 2007 is identical.

[73] It is the court's finding on a balance of probabilities that Mr. Farach in fact induced Mr. Dibb to purchase the vests by telling him that he would allow him to pay on terms. I am further strengthened in this view by the Mr. Farach's evidence that he allowed Quest to pay on terms after the relationship developed. In fact, the email which Mr. Farrach sent Ms. Hunter on the 15 January 2009, also confirms Mr. Dibbs' claim. It is useful to quote:

> "*It is good to hear from you again, well noted your bullet proof vest order, the best prices for each one is US$415.00 delivered in your company as usual service we provide to QUEST Security Co. Ltd.*
>
> *For this order of Bullet Proof Vest we will provide to you the payment in two months: 50% on deliver & 50% in the second month. We will start immediately with your bullet proof vest order, as you know this kind of product need time and extra times special for the customs process entrance in Jamaica, we can deliver all of your bullet proof vest around April-2009.*
>
> *Meanwhile the caps we are working in them. We will send all of them asap."*

[74] Both Quest and Sisa apparently are prone to making errors. Sisa oversupplied both handcuffs to another company and belt buckles to Quest. On Mr. Farach's evidence, Sisa overcharged Quest for the buckles and was consequently forced to discontinue its claim for $1,190.00. Sisa is not infallible and has on its own admission erred on some occasions. It is therefore not improbable that Quest could have mistakenly paid for the items.

[75] Mr. Dibbs evidence is that upon the arrival of the buckles, Mr. Dibbs emailed Sisa and requested one month to pay. He stated in that email that he was not expecting the buckles then. This is not evidence that he had inspected the buckles at that time. I accept his evidence that, at the time payment was made, he had not discovered the defects. I also accept his evidence that upon discovering the defect, Mr. Farach was informed.

[76] It is Mr Dibbs' evidence that Quest ordered security helmets from Sisa and was required by Sisa to pay in advance. Sisa converted the said US$975, which was intended as an advance for security helmets, as payment towards the belt buckles and the bullet proof vests. No reference was made in Quest's pleadings to the sum of US$975 which Mr. Farach claims was paid towards the security helmets. The counter claim spoke only to sums paid in error. Is Mr. Dibbs' belated assertion about the security helmets a fabrication or was it mistakenly omitted? This court is of the view that it was an honest error. It is worthy of note that Mr. Dibbs gave a witness summary because he was away from the jurisdiction. In any event, the emails between the parties made reference to an order for security helmets.

[77] It is therefore not unreasonable, on a balance of probabilities that it could have been inadvertently omitted by the maker of the witness summary, or that the maker was unaware. In any event both Quest and Sisa seem predisposed to err. It is quite evident to this court that both organizations were not as careful in their dealings as they ought to have been.

[78] Regarding Mr. Dibbs' claim for the sum of US$1450, which Mr. Farach claims was paid towards the account of the handcuffs, having accepted the Defendant's evidence that the arrangement between the parties was that handcuffs were given to Quest on consignment and Mr. Farach's admission that US$1450 was paid towards the handcuffs, this court is of the view that that sum was misapplied and ought to be returned. This court is, however of the view, that Quest is only entitled to the return of the sum of US$4185 which sum represents the amount which was mistakenly paid for the bullet proof vest and which was misapplied by Sisa to the account of the handcuffs and the belt buckles. It is the finding of the court that Quest has not justified its claim for the sum ofUS$5840.00. Those other sums, as this court is of the view that they were paid towards the "running account" about which Ms. Hunter testified.

CONCLUSION

[79] Having had the opportunity of hearing the parties testify, observing their demeanor and countenances and seeing the constables and Mr. Marriot model the vests, the court, on a balance of probabilities prefers the evidence of the witnesses for the defendant.

Consequently, the claimants' claim is dismissed.

The defendant is awarded judgment on its counter claim in the sum of $4185, with interest at the rate of 3% from the 12 May 2011 to the 26 September 2012. Cost to be agreed or taxed.