[2020] JMCA Civ 32

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 151/2012

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**SISA LOGOS AND EMBLEMS**	**APPELLANT**
AND	**QUEST SECURITY SERVICES LIMITED**	**RESPONDENT**

Ms Jacqueline Cummings instructed by Archer, Cummings & Company for the appellant

Mrs Rachel Dibbs for the respondent

1, 2, 23 February, 7 April 2017 and 10 July 2020

MORRISON P

[1] I have had the great advantage of reading in draft the judgments prepared by my sisters Phillips JA and Edwards JA (Ag) in this matter. As will become apparent, while they are in agreement on some of the important issues in this case, they disagree in other respects, two of which have a direct bearing on the outcome of the appeal. For the reasons which I am happily able to state very briefly, I have come to the conclusion that the manner in which Edwards JA (Ag) proposes to resolve the appeal is to be preferred.

[2] The appellant is a supplier of goods for use in the security industry, while the respondent is a supplier of security guard services. This case concerns a series of dealings between the appellant and the respondent with regard to a quantity of bulletproof vests, belt buckles and handcuffs.

[3] Both Phillips JA and Edwards JA (Ag) agree that, as the learned trial judge found, the bulletproof vests and the belt buckles which the appellant sold to the respondent were not fit for the particular purpose for which they had been purchased. They also agree that, contrary to the learned trial judge's finding, the sale of the latter was not a sale by sample but a sale by description. I agree with them on both points.

[4] However, my sisters disagree on the question of whether, as the learned trial judge found, these goods were also not of merchantable quality. In agreement with the learned trial judge, Phillips JA considers that they were not, while Edwards JA (Ag) takes the view that there was no evidence to support such a finding. For my part, I am strongly inclined to Edwards JA (Ag)'s view on this point. In my view, while the answers will in many cases be the same, the questions whether particular goods are fit for purpose and whether they are of merchantable quality import distinct considerations. In this case, it therefore seems to me that, while the bullet proof vests and the belt buckles were plainly not fit for their known purpose, it does not follow - and there was no evidence to this effect - that they were not of merchantable quality.

[5] But, as both my sisters agree, these are purely academic questions on the evidence in this case, since we are all agreed that the finding that the goods were not fit for their purpose was sufficient to trigger the respondent's right to reject them.

[6] So the more important point of difference between my sisters on this score has to do with whether, as the learned trial judge found, the respondent did in fact reject the bulletproof vests and the belt buckles within a reasonable time. Again in agreement with the learned trial judge, Phillips JA considers that it did so reject them, while Edwards JA (Ag) takes the opposite view.

[7] The learned trial judge arrived at her finding on this issue as a result of her consideration of the evidence that was before the court. On this basis, Phillips JA quite properly emphasises that, based on a long line of authority, this court should generally defer to a trial judge's findings on credibility. However, as Edwards JA (Ag) points out, the authorities also establish that the advantage of having seen and heard the witnesses give evidence enjoyed by a trial judge may be significantly reduced in a case in which there is documentary evidence available against which to test her findings.

[8] In this regard, I have found Edwards JA (Ag)'s detailed analysis of the trail of emails and other documentation, and the record of payments by the respondent for goods supplied by the appellant (including the relevant timeline), compelling. So much so, that I cannot dismiss the logic of the conclusion to which that analysis has led her purely on the basis that the learned trial judge believed the respondent's witnesses and disbelieved

the appellant's. In my respectful view, that very analysis must bring into question the reasonableness of the learned trial judge's conclusions on the credibility issue.

[9] Identical considerations arise, in my view, with regard to the issue of whether the learned trial judge's finding that the sale of handcuffs by the appellant to the respondent was a sale on consignment. On this issue, it also seems to me that the learned trial judge's finding was at variance with the contemporaneous documentary evidence.

[10] I have therefore come to the conclusion that, largely for the reasons which Edwards JA (Ag) has given, the learned trial judge fell into error in finding that (i) the respondent's right of rejection of the defective bullet proof vests and the belt buckles remained alive in all the circumstances of the case; and (ii) the sale of the handcuffs was a sale on consignment. It also follows from this conclusion, in my view, that the counterclaim should not have succeeded.

[11] I would therefore allow the appeal and make the orders which Edwards JA (Ag) has proposed.

[12] On behalf of the court, I must acknowledge and profusely apologise for the long delay in delivery of this judgment. Though regrettable, the delay was unfortunately unavoidable in all the circumstances.

PHILLIPS JA (Dissenting in part)

[13] I have had the benefit of reading the very thorough reasons for judgment prepared by Edwards JA (Ag). I am in agreement with much of her reasoning, and adopt entirely,

gratefully, her statement of the background facts and the chronology of events as they unfolded, and will not repeat them, save where it may assist to give clarity to my reasoning and conclusions. I intend therefore only to set out, succinctly, the matters that I agree with, and regrettably those which, with the greatest respect, I am unable to do so.

[14] The claim which is the subject of this appeal, arose out of alleged unpaid invoices for security guard products, namely, belt buckles, bulletproof vests and handcuffs allegedly sold by the appellant, Sisa Logos & Emblems (Sisa), to the respondent, Quest Security Services Limited (Quest). Sisa sought an amount of US$5,840.00, which was increased to US$7,290.00, and later, in evidence, reduced to US$5,840.00, then US$4,650.00 to reflect a withdrawal of a claim for 200 additional buckles. Quest claimed that the belt buckles and the bulletproof vests it had ordered from Sisa, failed to meet the specifications of the order, were not fit for the particular purpose for which they had been purchased, and remained unused. In relation to the handcuffs, Quest pleaded that they were taken on consignment and had not been sold. Quest claimed that, as a consequence, no sums were due to Sisa, and sums that had been paid pursuant to those invoices, had been mistakenly paid and were to be refunded. That was the basis of Quest's counterclaim in which it sought US$5,600.00.

[15] The learned trial judge, Sinclair-Haynes J (as she then was), gave a comprehensive judgment, demonstrating that she had considered all the evidence adduced, and the submissions made before her. She dismissed Sisa's claim, and gave judgment on Quest's

counterclaim in the sum of US$4,210.00, plus interest at the rate of 3% on the total sum of US$4,210.00 from the date of service, being 12 May 2011, with costs to Quest to be agreed or taxed.

[16] Sisa appealed. The notice and grounds of appeal were filed on 29 November 2012, and contained nine grounds of appeal. Edwards JA (Ag) has set out in detail the learned trial judge's reasons for judgment. Edwards JA (Ag) has also identified the issues raised in the grounds of appeal which require determination in this appeal. I agree with those issues as identified and only set them out below for ease of reference.

> "1) whether the judge erred in her treatment with the evidence;
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> 2) whether the judge erred in her application of the law to the facts in the case;
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> 3) whether the judge was wrong to find that the defects were reported within a reasonable time and that the goods were not accepted;
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> 4) whether the judge was wrong to find that the handcuffs were supplied on a consignment basis; and
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> 5) whether there was sufficient evidence on which the judge could conclude that the counterclaim had been made out."

Issues 1 and 2: The learned trial judge's treatment of the evidence and her application of the law to the facts

[17] Edwards JA (Ag) dealt with issues 1 and 2 together and I will also adopt that approach. In my view, in essence, these issues relate to whether it was reasonable for the learned trial judge to have found that the buckles and the bulletproof vests were not

fit for the purpose for which they had been purchased and also were not of merchantable quality. There also appeared to be an issue as to whether the vests were purchased by sample or by description.

[18] I am in agreement with Edwards JA (Ag)'s finding that there was more than enough evidence to support the learned trial judge's findings, in fact and in law, that the belt buckles supplied failed to conform with the description and the specifications pursuant to the contract for sale. Additionally, the buckles were in breach of the implied condition of sale, there was therefore no contract of sale, and title in them did not pass to Quest. On that basis alone, Quest was entitled to reject the belt buckles. The evidence which the learned trial judge accepted was that the buckles were too small to fit the belts that Quest had in stock, which had been shown to Sisa's representative, who had taken measurements of the belts. The buckles also only bore the name "QUEST", but not the logo as specified. The buckles therefore did not fit the description given, were useless to Quest, and at trial, remained unused.

[19] Edwards JA (Ag) agreed with the learned trial judge's finding that the belt buckles that were delivered were not fit for the particular purpose for which they were purchased. They were therefore in breach of sections 14 and 15 of the Sale of Goods Act (the Act). However, Edwards JA (Ag) found that there was no evidence upon which the learned trial judge could have found that they were not of merchantable quality. There was some evidence that Sisa could have supplied belts to fit the buckles, but there was no evidence that those belts were ever produced. Nevertheless, given the learned trial judge's findings

on this issue, I am in agreement with Edwards JA (Ag) that it was not of much significance whether the belt buckles were of merchantable quality.

[20] In relation to the bulletproof vests, I am also in agreement with Edwards JA (Ag) that the learned trial judge was correct to find that Sisa was in breach of the implied and express condition that the bulletproof vests would be reasonably fit for their purpose, which was to protect security guards from bullet wounds to the chest, while providing them with freedom of movement and access to their firearm. Further, the learned trial judge, based on the evidence, was correct to find that Sisa and Quest contemplated and knew the basis for, and purpose of the bulletproof vests in the trade.

[21] Although Edwards JA (Ag) accepted that there was evidence to support the finding of the learned trial judge that the bulletproof vests were not fit for the purpose intended, she did not, however, agree with the learned trial judge's finding that they were not of merchantable quality. She cited the case of **Cammell Laird and Company Limited v The Manganese Bronze and Brass Company Limited** [1943] AC 402, at page 430 for the definition of "merchantable quality", and concluded that there was no evidence that the bulletproof vests were of no saleable use. She also relied on the dicta in **Grant v Australian Knitting Mills Limited and Others** [1936] AC 85, at pages 99-100, to support that contention.

[22] As indicated, there was an issue with regard to whether the sale of the bulletproof vests was one by description or sample. Where goods are sold by description, they are "sold not merely as a specific thing, but as a thing corresponding to a description" (see

Grant v Australian Knitting Mills Ltd). In a contract for sale by sample, there is an implied term that the bulk will correspond to the sample in quality, and the goods will be free from any defect making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample (see **Godley v Perry, Burton & Sons Ltd (Bermondsey) (Third Party) and Graham (Fourth Party)** [1960] 1 All ER 36).

[23] Section 15(b) of the Act states that:

> "Where goods are bought by description from a seller who deals in goods of that description … there is an implied condition that the goods shall be of merchantable quality ..."

Section 16(2) (c) of the Act provides that:

> "In a case of a contract for sale by sample—
>
> …
>
> (c) there is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample."

[24] In the instant case, both Sisa and Quest agreed that when the order was placed for the bulletproof vests, Mr Omar Farach, Sisa's internal divisional manager, was shown a vest that accorded with descriptions given to Sisa by Mr Joseph Dibbs, Quest's managing director. It was also agreed that the bulletproof vests would conform with that description. Mr Farach admitted in paragraph 23 of his witness statement that the second order for the bulletproof vests was a "repeat of a previous order of 2A quality bulletproof vests" that Quest had made to Sisa in January 2008. The bulletproof vests were therefore

the subject of a sale by description, and not by sample, as they were ordered based on the first set of bulletproof vests sold to Quest by Sisa.

[25] Having concluded that the sale was one by description, a determination must therefore be made as to whether the goods were of "merchantable quality". The House of Lords in **Henry Kendall & Sons (A Firm) v William Lillico & Sons Ltd and Others; Holland Colombo Trading Society Ltd v Grimsdale & Sons Ltd (Consolidated Appeals); Grimsdale & Sons Ltd v Suffolk Agricultural Poultry Producers Association** [1969] 2 AC 31, cited with approval the definition of "merchantable quality" in **Cammell Laird** and **Grant v Australian Knitting Mills**. Lord Reid, on behalf of the court, reformulated the definition of "merchantable quality" to now mean:

> "'...that the goods in the form in which they were tendered were of no use for any purpose for which goods which complied with the description under which these goods were sold would normally be used, and hence were not saleable under that description.' This is an objective test: 'were of no use for any purpose …' must mean 'would not have been used by a reasonable man for any purpose ….'." (See page 77)

Lord Reid explained further that:

> "If the description in the contract was so limited that goods sold under it would normally be used for only one purpose, then the goods would be unmerchantable under that description if they were of no use for that purpose. But if the description was so general that goods sold under it are normally used for several purposes, then goods are merchantable under that description if they are fit for any one of these purposes: if the buyer wanted the goods for one of those several purposes for which the goods delivered did not happen to be suitable, though they were suitable for other

> purposes for which goods bought under that description are normally bought, then he cannot complain." (See page 77)

[26] The issue as to what amounts to "merchantable quality" was discussed in **Godley v Perry**. In that case a six year old boy bought a catapult by description that he had seen in Perry's shop window. While using the catapult properly, it broke and struck him in his left eye, causing a loss of sight in that eye. He filed a claim against Perry. Perry, having bought the catapult from Burton & Sons by sample, joined them as a third party. Burton & Sons added Graham as the fourth party as it in turn had purchased the catapult, by sample, from Graham who imported them from Hong Kong. Edmund Davies J found that all defendants were liable as the catapult had a defect which made it "a most dangerous toy to be let loose on the juvenile market", and so was not reasonably fit for the purpose for which it was required. That defect rendered the catapult unmerchantable, and was one which would not have been apparent on a reasonable examination of the sample.

[27] In the instant case, the evidence adduced before the learned trial judge, on Quest's behalf, was that on a reasonable examination, the vests:

> "(i) [were] remarkably smaller in size than the subject vests,
> (ii) contained the Quest Security logo in embroidery at the back of the vests [while the subject vests] did not contain the said embroidery, but rather a [cheaply] stitched patch logo which was not properly stitched on, and
> (iii) had gun and ammunition holders on the front part of the vests, while the subject vests did not contain any

> holders at all." (See paragraph 56 of Quest's written submissions)

According to Quest, the bulletproof vests were ordered "on the basis that they would have the same identical requirements, specifications, standard design and obviously, the same purpose as the first set of vests" (see paragraph 49 of Quest's written submissions).

[28] In his witness statement, Quest's operation manager, Mr Garth Marriott, stated that the bulletproof inserts were falling out through the seams of the vests which could put the lives of the security guards at risk. Additionally, he said that:

> "the [bulletproof] vests did not contain serial numbers, which are required by the Ministry of National Security and were irregularly large and could not fit properly on any of our security guards, regardless of the shape, size and build of the guard ... [T]he velcro continuously stuck out at the front of the vest and there was no fastening or strap on the vest for the Velcro to be safely fastened. In fact, the vests fitted like a tunic and covered the firearms preventing access to the firearm holder and none of Quest's Security guards could wear the vests."

[29] At the trial, in demonstrating the ill-fit of the bulletproof vests, Mr Marriott put on one of vests that is subject of the claim, and complained that there was space between the vest and the chest. He stated further that:

> "[v]ests are to carry flash batons, flashlights, magazine holders for firearm. This vest has no magazine holder or any utility holder. It covers your firearm so you have no way of defending yourself. When you sit the vest rides up to your neck. The space is large and unprotected."

[30] In my view, there was both a 'reasonable' and 'practical' examination of the vests. The learned trial judge had this to say at paragraph [21] of her judgment:

> "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."

And at paragraph [22]:

> "The vests, with the consent of the parties, were modelled not only by Mr Marriott, 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 complaint."

[31] The learned trial judge, having made the observations above, concluded that the vests did not correspond with the description given or the sample provided, and so it was "abundantly plain that they are not of merchantable quality and are unfit for the purpose of providing the required protection for the guards". She also indicated that, in the circumstances, property in the vests did not pass to Quest. In my view, the subject vests were so far removed from the description given to Sisa by Quest, and had so many varied and significant defects, that although not a sale by sample, they were not in compliance with the descriptions and specifications given, were of no use, for any purpose, by any reasonable man, and were therefore not of merchantable quality. Save with regard to her

decision on sale by sample, the learned trial judge cannot otherwise be faulted for her conclusion on this issue. I therefore do not agree with Edwards JA (Ag) in this regard.

Issue 3: Were the goods reported in a reasonable time, or were the goods rejected?

[32] It is in respect of this issue that regrettably I differ substantively from Edwards JA (Ag). The question here is whether the goods had been rejected, as, if they had not been, Quest would have to pay for them. The learned trial judge found that there was evidence to suggest that they had been. She stated that the main witnesses for Quest said that Sisa's representative, Mr Farach, came to their offices often, and they gave oral instructions to him when the goods were deficient, and he collected and replaced them. That had happened with regard to the first shipment of the bulletproof vests. With regard to the second shipment of the bulletproof vests, Mr Farach came and collected them as they did not have serial numbers on them. He fixed that problem and returned them to Quest. There does not seem to be any specific date in the evidence when the vests were returned, but it was sometime in September or thereafter, and he was told verbally then, that at least, the vests were useless.

[33] In relation to the buckles, the evidence was that before Mr Farach had been told about the issues raised with the vests, he had been told that the buckles could not work. He had indicated that he was not taking back the buckles as the name "QUEST" was imprinted on them and so they could not be resold. Mr Farach said in evidence that, in relation to the vests, he was unaware of the further difficulties alleged in relation to them. However, it was Quest's evidence that both Mr Dibbs and Mrs Angela Hunter (an

administrative assistant for Quest) told Mr Farach specifically of the deficiencies existing with the buckles and the vests, as he was given to visit the offices often. Mrs Hunter said in evidence that she expected him to come back for the defective goods as he had done in the past, and she had not written to him until much later, when he had not done so.

[34] In my view, it did not seem unreasonable that the deficiencies with regard to the buckles and the vests would have been communicated to Sisa by Quest, based on the evidence, and the demonstration at trial the vests were: ill-fitting; unable to be used; too big; did not have a place for the firearm and other security items; that the guard was unable to move without the vest rising up and choking him; and that there was no protection from bullets in the chest, due to a leaking of the insert.

[35] Edwards JA (Ag) found that the emails written subsequently were not consistent with this position, and that certain sums had been paid by Quest towards settling outstanding invoices in respect of the impugned items. But there were at least two emails from Sisa to Quest that referred to the difficulties being experienced by them. Edwards JA (Ag) found that the payments which had been made by Quest had been made at a time when there had been these complaints, and so to claim that the goods were defective, allegedly lacking in "merchantable quality" and had been rejected, was inconsistent and insincere. But the representatives of Quest were saying that there was a running account between the parties, and payments had been made by the accounting department of Quest, without the knowledge of the deficiencies in the items. Nonetheless, the problem with all of this, in my view, is that the learned trial judge believed the

representatives of Quest and did not believe Sisa's representative, and also said that whenever there was a difference in positions taken by them, she did not accept Sisa's contention.

[36] This court has consistently stated its position on the treatment of findings of fact by a trial judge. In **Herbert Cockings v Gertrude Cockings** [2018] JMCA Civ 17, the court highlighted this consistent approach at paragraph [56]:

> "[56] This court has stated in numerous cases that it will not lightly disturb findings of fact made at first instance by the tribunal charged with that responsibility. This approach was endorsed by the Privy Council in **Industrial Chemical Co (Ja) Ltd v Ellis** (1986) 23 JLR 35 ('**Industrial Chemical**') and **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21. Brooks JA referred to these authorities in **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7 ('**Rayon Sinclair**'), where he gave a comprehensive outline of the law relating to the findings of fact at paragraphs [7]-[10]. At paragraph [10], he cited the following guiding principles stated by K Harrison JA at page 15 of **Eurtis Morrison v Erald Wiggan and Another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 56/2000, judgment delivered 3 November 2005:
>
> > 'The principles derived from the previously decided cases on the point of findings of fact] can therefore be summarized as follows: (a) Where the sole question is one of credibility of the witnesses, an appellate court will only interfere with the judge's findings of fact where the judge has misdirected himself or herself or if the conclusion arrived at by the learned judge is plainly wrong. (b) On the other hand, where the question does not concern one of credibility but rather the proper inferences that ought to have been drawn from the evidence, the appellate court may review that evidence and make the necessary inferences which the trial judge failed to make.' "

[37] In the Privy Council case of **Paymaster (Jamaica) Limited and Another v Grace Kennedy Remittance Services Limited; Paymaster (Jamaica) Limited v Grace Kennedy Remittance Services Limited and Another** [2017] UKPC 40, emanating from this court, Lord Hodge on behalf of the Board, in addressing this point, indicated that there are constraints on an appellate court when called upon to review the findings of fact of the judge of first instance, who, he said, had heard and seen the witnesses give oral evidence in court. He referred to the oft cited speech of Lord Thankerton in **Watt or Thomas v Thomas** [1947] AC 484, and the insightful words of Lord Reed in **Henderson v Foxworth Investments Ltd and Another** [2014] UKSC 41, wherein he stated at paragraph 67:

> "in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

[38] Based on the above guidance, I find it difficult, therefore, to differ from the learned trial judge with regard to this issue of the rejection of the goods, as there was evidence which she could accept that the items had been refused.

[39] Section 34 of the Act requires that the purchaser be given a reasonable time to examine the goods delivered to him, in order to ascertain if they were in conformity with the contract. Section 35 of the Act states that the buyer will have accepted the goods if

he so indicates, or acts inconsistently with the ownership of the seller, or allows a reasonable time to have passed without intimating to the seller that he has rejected the goods. Section 36 of the Act, indicates that Quest was not obliged to return the items, but ought to indicate that they were rejecting them. In fact, section 36 states that:

> "Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them."

[40] Edwards JA (Ag) appeared to conclude that Quest's rejection of the goods, even if accepted, had been made too late. However, the learned trial judge, having examined several authorities, including the case of **Flynn v Scott** (1949) SC 442, referred to the decision of Lord Mackintosh where he said that "what is a reasonable time is a question of fact, and depends upon the whole circumstances of the case". Section 55 of the Act echoes that position as follows:

> "Where by this Act, any reference is made to a reasonable time the question what is reasonable is a question of fact."

[41] The learned trial judge found the evidence of Mrs Hunter to be credible. She accepted Mrs Hunter's evidence that she had spoken to Mr Farach prior to sending the emails in September 2009 about the absence of serial numbers, and then in January 2010, when she had informed him that the vests were unfit for the purpose for which they had been purchased. She also accepted Mrs Hunter's evidence that the relationship

between Mr Farach and Quest had developed to the point where she felt confident that, as indicated, he would collect the vests on his visit to Jamaica, and so she had regarded it as unnecessary to send an email immediately to him. She highlighted that it was also Mr Farach's evidence that the relationship between the parties had developed to the extent that he was affording Quest credit. She also accepted Mr Dibbs' evidence that Mr Farach had arranged a meeting with Quest's operations manager and had promised to remedy the defects. Mr Dibbs also testified that he had told Mr Farach about the defects and Quest's rejection of them within a month of the delivery of the vests and of the buckles. The learned trial judge noted 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; and the relationship the parties enjoyed.

[42] In the light of those circumstances, she found that it was not unreasonable that Quest did not initially register its complaint in writing and that it had informed Sisa of its dissatisfaction with the vests and the buckles within a reasonable time. I cannot fault the learned trial judge for this finding, and, in any event, the parties continued to do business.

Issue 4: Were the handcuffs supplied on a consignment basis?

[43] In relation to the handcuffs, this is also a situation of the learned trial judge believing the representatives of Quest. They said that they did not sell handcuffs, as it did not form part of the guards' standard equipment. It was Mrs Hunter's evidence that it was only supervisors who had powers of arrest who used handcuffs, and they usually had their own handcuffs. The evidence is that Sisa asked Quest to assist with filing a

purchase order to get the handcuffs off the wharf, as Sisa had over-shipped, and it was holding up their (Sisa's) entire shipment (which included goods for someone else). Therefore, it did not seem unreasonable for the learned trial judge to find that it was in desperation, that Sisa asked Quest to help, and that Quest did so. It was Mr Dibbs' evidence that Mr Farach had told him that he would "never have to pay for them [handcuffs] until they were sold". The purchase order dated 26 February 2009, indicating a $0.00 purchase price, seemed to support this contention.

[44] In this case, much has been made of the use of the description of the contract as being one of "consignment", but in my view, it really was a case of, "if I can sell them, I will, if I cannot, then you will have to take them back or sell them to someone else". It seemed quite reasonable, and that is what the learned trial judge found. The handcuffs were never sold. Mr Farach said that he had received US$1,450.00 on account of them. Mr Dibbs said that a further payment had been received by him, but in any event, any payment made to Sisa in that regard would have been mistakenly paid. The law permits a refund of monies paid under a mistake of fact (see **Barclays Bank Ltd v W J Simms, Son and Cooke (Southern) Ltd** [1980] QB 677). Mistake of fact was pleaded in Quest's defence and counterclaim. The learned trial judge accepted Quest's evidence in this regard also.

The running account

[45] There was also evidence in the emails and the documentation that there was a running account between the parties. Quest ordered other items not the subject of the claim before the court, for example, ties, caps, lanyards and helmets. Quest was

permitted credit, and appeared to pay in tranches. Indeed, there were emails from Mrs Hunter, on 25 January 2010, that Mr Farach should collect the vests as they could not be used, and that Quest was unable to distribute the handcuffs and that he should collect those as well. Yet, at the same time, Mrs Hunter ordered 500 ties. Later, on 2 March 2010, Mr Farach requested payment on the belt buckles, bulletproof vests and handcuffs. On 13 April 2010, Mrs Hunter ordered 500 ties and 500 caps for immediate delivery. Quest's representatives said that this running account was essentially the arrangement between the parties, and there did not seem to be any challenge to that, and the learned trial judge believed them.

Issue 5: Was there sufficient evidence to conclude that the counterclaim had been made out?

[46] I agree with Edwards JA (Ag) that the claim, and by extension the appeal, concerns goods supplied to Quest by Sisa in respect of which amounts allegedly remain unpaid on invoices in relation to the bulletproof vests, metal buckles and handcuffs. My learned sister, by her analysis, has accepted that Sisa received US$5,660.00 from Quest, which had been applied against invoices for the belt buckles, handcuffs and bulletproof vests. This amount was also pleaded by Sisa as having been received from Quest. But, in the witness statement and the evidence, Mr Farach stated that he had received US$4,210.00 (see paragraph 12 of his witness statement).

[47] I am of the view, that Quest having not accepted the bulletproof vests, title did not pass to it, and therefore any money paid on account of the vests was paid by mistake. In addition to advising Mr Farach verbally about the defects in the bulletproof vests, Quest

sent at least two emails to Sisa indicating the defects in the vests: the first on 9 September 2009, stating that the serial number was missing, and on 25 January 2010 indicating that the vests did not fit properly. It could therefore be concluded that Quest could not have reasonably been expected to pay on the invoice for the vests. In any event, I am of the view that since the title did not pass to Quest for the vests, it should be refunded any funds paid on account of the bulletproof vests.

[48] In relation to the handcuffs, I am of the view that Quest should succeed in its counterclaim for amounts paid on their account that was applied to the invoice for the handcuffs. Quest, from as early as 25 January 2010 sent an email not only about the vests being ill-fitting, but also about the inability to sell the handcuffs. The email stated that:

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

[49] It is clear from the evidence and the learned trial judge found that Quest assisted Sisa in a time of need by issuing a purchase order to facilitate the clearance of the handcuffs and taking them on a consignment basis. Quest, having not purchased or ordered the handcuffs, and having expressly terminated the consignment arrangement in writing, ought to succeed on this aspect of the counterclaim.

[50] The court, having found that Quest was entitled to reject the belt buckles because they did not fit the description and specifications, and that that was communicated to Sisa, and also that they were not fit for the particular purpose for which they were ordered, would result in Quest being entitled to succeed on the counterclaim in this regard also. As indicated previously, the learned trial judge dismissed the claim and made an order on the counterclaim.

[51] It is only left therefore to decide whether the quantum of the award made by the learned trial judge was correct. The learned trial judge, having concluded that the amounts paid by Quest were misapplied, found, as stated in her reasons for judgment, that Quest was entitled to an award of US$4,185.00 which represents "the amount which was mistakenly paid for the bulletproof vest which was misapplied by [Sisa] to the account of the handcuffs and the belt buckles". The judgment, however, was for a different amount, namely, US$4,210.00. This was less than the amount counterclaimed by US$1,450.00, which was the amount stated by Mr Dibbs which had also been paid mistakenly to Mr Farach, and had been allotted by him to the outstanding invoices in respect of the impugned items. However, the evidence by Mr Farach disclosed that Sisa had received the following sums from Quest in respect of the impugned items, namely: US$1,785.00 in respect of the buckles; US$975.00 in respect of the vests; and US$1,450.00 in respect of the handcuffs. Quest, in my view, would therefore only be entitled to be repaid these sums (US$4,210.00), with interest, as directed by the learned trial judge. In any event, there was no counter-notice filed by Quest against the judgment

of Sinclair-Haynes J to obtain the increased sum of US$5,660.00, which would include the alleged extra payment of the US$1,450.00.

Conclusion

[52] The goods (buckles and bulletproof vests) were defective, did not comply with description given, were not fit for the purpose for which they had been purchased, and in the case of the bulletproof vests, were also not of merchantable quality. Property in the goods, therefore, did not pass. The goods were also rejected by Quest. Accordingly, any sums accepted as having been paid, would, as Quest had contended, have been so paid under a mistake of fact, and those sums ought to be returned. I am of the view that it would be unreasonable that these defective goods should be paid for once the evidence of rejection was accepted. Additionally, once the explanation with regard to the reason why the handcuffs remained with Quest had been accepted, and the handcuffs all remained unsold, no sums would be due to Sisa with regard to these items, and any monies paid in error ought also to be returned to Quest.

[53] I would therefore not disturb the finding of the learned trial judge on the counterclaim. I would make the order that the amount of US$4,210.00 should be paid by Sisa to Quest, with interest, as ordered by the learned trial judge, affirming the order she had made in respect of Quest's counterclaim. I would thereby dismiss the appeal, with costs to Quest, to be taxed if not agreed.

EDWARDS JA (AG)

Introduction

[54] This appeal was brought by Sisa Logos and Emblems (the appellant), which was the claimant in the court below, against the decision of Sinclair-Haynes J (as she then was) (the learned judge) made on 26 September 2012. Having heard the claim and the counter claim brought by Quest Security Services Limited (the respondent), which was the defendant in the court below, the learned judge made the following orders in favour of the respondent:

> "1. The Claimant's claim is dismissed.
>
> 2. The Defendant is awarded Judgment on its counterclaim in the sum of US$4,210.00 plus interest at the rate of 3% on the total sum of US$4,210.00 from the date of service, being May 12, 2011; and
>
> 3. Costs to the Defendant to agreed or taxed."

The facts

[55] The claim arose out of alleged unpaid invoices for products used in the security guard services sector, specifically handcuffs, belt buckles, and bulletproof vests, sold by the appellant to the respondent. The claim form was filed by the appellant on 11 March 2011, seeking the total sum of US$5,840.00. However, in the witness statement of Omar Farach (Mr Farach), who gave evidence for the appellant, the appellant later asserted that the respondent owed the sum of US$7,290.00 broken-down as follows:

a.	Belt buckles:	$1,190.00

b.	Bulletproof Vests:	$5,400.00
c.	Handcuffs:	$ 700.00

[56] The appellant had supplied 500 metal belt buckles (although only 300 were ordered), 12 bulletproof vests (although 15 were ordered) and 50 handcuffs and cases to the respondent. The belt buckles were ordered with specifications as to size specifically to fit onto belts worn by security guards employed to the respondent. The bulletproof vests ordered by the respondent were of the same type previously supplied by the appellant, but the respondent alleged that the bulletproof vests supplied were not the same as the first set. There was a dispute as to the basis upon which the handcuffs were supplied as the appellant claimed it was an outright sale and the respondent claimed they were supplied on consignment.

[57] The bulletproof vests and handcuffs were not paid for by the respondent after delivery. On the appellant's case, the 300 belt buckles were paid for but the respondent claimed that the monies paid to the appellant and used by the appellant to offset the costs of the 300 belt buckles were in fact paid under a mistake of fact and ought to be returned to the respondent. It also claimed that monies paid to the appellant on a running account for other goods were misapplied by the appellant to offset the costs of the defective bulletproof vests and the handcuffs.

[58] The respondent filed a defence and counterclaim on 10 May 2011, claiming that no sums were due and owing to the appellant and that, in fact, sums were inadvertently paid to the appellant which ought to be refunded. The counterclaim sought the sum of

US$5,660.00 plus interest thereon as the return of monies paid under a mistake of fact. The respondent was successful on its counterclaim as shown in in the orders set out in paragraph [3] above.

[59] The evidence for the appellant was given by Mr Farach, who was the International Divisional Manager for the appellant. The evidence for the respondent was given by the Managing Director Mr Joseph Dibbs (Mr Dibbs), the Operations Manager Mr Garth Marriot (Mr Marriot) and the Administrative Assistant Mrs Angela Hunter (Mrs Hunter).

The learned judge's reasons for judgment

[60] In her written reasons, the learned judge found that the appellant and the respondent had enjoyed a good relationship as supplier and customer, which was brought to an end because of the issue with the bulletproof vests, handcuffs and belt buckles. In assessing the evidence led before the court, the learned judge concluded that credibility was at the heart of the matter. The learned judge also found that sections 14, 15 and 16 of the Sale of Goods Act (the Act) were applicable. I will now consider the findings of the learned judge as they pertained to each product, as well as her finding on the question of whether the products had been rejected within a reasonable time as required by the Act.

<u>The belt buckles</u>

[61] With respect to the belt buckles, the learned judge found that the order for belt buckles was made orally between Mr Farach and Mr Dibbs. She also found as a fact, that the appellant had visited the respondent's offices on numerous occasions and that on a

balance of probability, Mr Farach was shown the belts, was informed of the need for the belt buckles to fit the belts shown to him and for the respondent's logo to be placed on the belt buckles. She also accepted as true, the evidence of Mr Dibbs that Mr Farach measured a sample of the belts which the belt buckles were to fit.

[62] The learned judge accepted that the belt buckles supplied did not satisfy the specifications given to Mr Farach, in that they did not correspond to the measurements given and were too small to fit the belts. She accepted the evidence that they were made of the wrong material and did not carry the respondent's logo and, therefore, they were not fit for the purpose required. She found that the purpose was for the belt buckles to fit the respondent's belts which were shown to Mr Farach. The learned judge also found, based on what she considered to be the credible evidence of Mr Dibbs and Mrs Hunter, that Mr Farach was told that the belt buckles were useless. She found Mr Farach unreliable and accepted the evidence of the respondent's witnesses to the extent that it conflicted with that of Mr Farach. The learned judge also found that the belt buckles remained in their original box and packaging and had never been used.

The bulletproof vests

[63] With regard to the bulletproof vests, the learned judge found that the supplier was aware of the purpose for which the vests were required. The learned judge also found that as a manufacturer of bulletproof vests, the appellant impliedly warranted that the bulletproof vests supplied were fit for the purpose for which they were required. The learned judge concluded that, at a cursory glance, the bulletproof vests supplied by the appellant did not compare favourably to the sample shown to them by the respondent.

She found that Mr Farach had agreed, in evidence, that the bulletproof vests supplied were different from the sample, in that they were larger and had no ammunition holder. The learned judge also found, based on fittings of one of the disputed vest on four models (three volunteer police constables and Mr Marriott), that the vests were ill-fitting.

[64] She also found that the respondent only accepted the first set of bulletproof vests, ordered from the appellant, after the appellant had taken them back for repairs to defects in them, having responded when the respondent complained. She found that the appellant's products were not without defect. The learned judge further found that the respondent had relied on the appellant's representation as to his knowledge of security products to its detriment. The learned judge found that it was abundantly plain that the second set of bulletproof vests supplied by the appellant were not of merchantable quality and were not fit for the purpose of providing the required protection for the guards. As a result, the learned judge found that property in those bulletproof vests had not passed.

[65] With regard to the quantity of bulletproof vests delivered, the learned judge found that the appellant's evidence was contradictory. She rejected Mr Farach's claim that the 15 vests were supplied at a cost of US$425.00 each, totalling US$6,375.00. She found that 12 bulletproof vests were received by the respondent based on invoice numbered 10517, dated 18 June 2009 for US$5,100.00 at a cost of US$425.00 each. This invoice was produced by the respondent at trial. In accepting this invoice as the true invoice for the bulletproof vests, the learned judge rejected the invoice numbered 10475 produced by the appellant on his claim for the delivery of 15 bulletproof vests. She, however,

accepted the evidence by Mr Farach that the price of the bulletproof vests was inflated by US$10.00, which meant the claim ought to have been reduced by US$150.00.

The handcuffs

[66] With regard to the handcuffs, the learned judge correctly viewed the issue as a question of whether they were delivered under a contract of sale or were taken on a consignment basis. The learned judge analysed the evidence, firstly, of the offer of the handcuffs made by Mr Farach to the respondent in writing on 16 February 2009 and 18 February 2009. The learned judge found that the second written offer made by Mr Farach on 18 February 2009 had not been accepted by the respondent. She also considered, secondly, the effect of Mrs Hunter's letter of 26 February 2009 to Karst Agencies Limited and found that it was sent in response to Mr Farach's plea for assistance in getting the handcuffs into the island and that did not refute the respondent's claim that it took the handcuffs on consignment. In doing so, she also accepted the evidence from the respondent's witness, Mrs Hunter, that she had informed Mr Farach that they would only take the handcuffs on a consignment basis. The learned judge also considered the respondent's letter of 25 January 2010 requesting that the handcuffs be taken back, as well as the letter of 3 March 2010 in response to the appellant's demand for payment by email, and rejected the appellant's contention that the respondent had purchased the handcuffs.

Whether the goods were rejected within a reasonable time.

[67] The learned judge considered whether the defective goods were accepted or rejected and the defects reported to the appellant within a reasonable time. Having

accepted the evidence of the respondent's witnesses that Mr Farach was informed of the defects in the goods by telephone on several occasions, and that a meeting was arranged between Mr Farach and Mr Marriot for the defects to be remedied, the learned judge found that the defects in the items were reported within a reasonable time and that the goods had been rejected. The learned judge also found that it was not unreasonable that the defendant did not initially register its complaint in writing.

The counterclaim

[68] On the counterclaim, the learned judge found that the respondent had made out its case and that the appellant was liable to reimburse the respondent US$4,185.00 as payment mistakenly made for the handcuffs and for the defective goods.

Grounds of appeal

[69] The grounds of appeal filed by the appellant were as follows:

> "(a) The Learned Trial Judge's judgment is unreasonable having regard to the evidence in the action.
>
> (b) The Learned Trial Judge failed to reconcile and recognize the fact that the viva voche [sic] evidence of the Respondent's witnesses was inconsistent with the written and exchange of e-mails between the parties herein.
>
> (c) The Learned Trial Judge misunderstood the evidence of the parties and failed to appreciate the difference between defective merchandise *or* goods not fitting specifications *and* merchantable quality of goods or goods unfit for the purpose for which they were required.
>
> (d) The Learned Trial Judge erred when she held that the Respondent informed the Appellant of its

dissatisfaction with its products within a reasonable time.

(e) The Learned Trial Judge failed to place weight on the collateral agreement made between the parties and written on the invoice for metal buckles No1142 dated April 2007.

(f) The Learned Trial Judge erred when she held that the Respondent has proved its counterclaim herein as there was no evidence led to prove same.

(g) The Learned Trial Judge failed to realize that some of the claims and statements made by the Respondent's witnesses were not pleaded in their Defence and Counterclaim and hence could or should not be admissible.

(h) The Learned Trial Judge failed to appreciate that some of the evidence introduced by the Respondent's witnesses were [sic] not put to the Appellant's witness and hence were [sic] inadmissible.

(i) The Learned Trial Judge failed to take into account in assessing the evidence of the witness for the Appellant that the native language of the witness is Spanish and hence it affected his response and understanding."

The issues

[70] The issues for determination in this appeal, based on the grounds of appeal filed, to my mind, are as follows:

1) whether the learned judge erred in her treatment with the evidence;

2) whether the learned judge erred in her application of the law to the facts in the case;

3) whether the learned judge was wrong to find that the defects were reported within a reasonable time and that the goods were not accepted;

4) whether the learned judge was wrong to find that the handcuffs were supplied on a consignment basis; and

5) whether there was sufficient evidence on which the learned judge could conclude that the counter claim had been made out.

The role of the Court of Appeal

[71] The issues which the learned judge had to determine were largely based on factual assertions and documentary evidence. The question now for determination, is whether or not this court should interfere with her decision, arrived at largely as a result of her findings of fact. Counsel cited several cases to assist this court in its decision whether to interfere with the learned judge's findings. Based on the principles outlined in the cases, this court, in determining this appeal, will not set aside the decision of the learned judge, unless, after a thorough assessment, it is found that the conclusion she arrived at was plainly wrong either because she (a) misdirected herself or misapplied the law to the facts before her; (b) failed to draw the proper inferences that ought to have been drawn from the evidence, (c) failed to make use of the advantage given to her of seeing and hearing the witnesses; or, her findings are not supported by the evidence (see the judgment of

their Lordships in the Privy Council in **Industrial Chemical Co (Ja) Ltd v Ellis** (1986) 23 JLR 35).

[72] In **Green v Green** [2003] UKPC 39 (a decision from this jurisdiction), Lord Hope of Craighead delivering the judgment of the Board stated at para [13] that:

> "There is another principle which must be taken into account in this case. It applies where the decision of the judge at first instance is taken to appeal and the appellate court is asked to consider whether the judge's decision was justified by the evidence. In **Watt v Thomas** [I947] AC 484, 487- 488 Lord Thankerton said that where a question of fact has been tried by a judge without a jury, and there is no question of his having misdirected himself, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that the decision of the judge cannot be explained by any advantage which he enjoyed by reason of having seen and heard the witnesses."

[73] In **Central Mining and Excavating Ltd v Croswell and Others** (1993) 30 JLR 503 Wolfe JA (as he then was) stated at pages 518 and 519 of the judgment:

> "The principles on which an appellate court will interfere with a finding of fact by a trial judge are well settled. The court will only do so if the judge has misdirected himself or if it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain the judge's conclusion. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses. In such circumstances, the matter will then become at large for the appellate court. See **Watt (or Thomas) v. Thomas** [I947] 1 All E.R. 582. However, where it is not so much a question of the credibility of the witnesses, but the sole question is the proper inference to be drawn from specific facts, an appellate court is in a good position to evaluate the

> evidence as the trial judge and should form its own independent opinion, though it will give weight to the opinion of the trial judge."

[74] In **Edwards and Another v Buxton** (1982) 30 WIR 82, a decision from the Eastern Caribbean States Court of Appeal, Berridge JA stated at page 87:

> "The trial judge had an advantage which this court does not have and, while the trial judge is not infallible and may, on occasions, go wrong on a question of fact, this court will only disturb a judge's decision on facts where there is no evidence at all, or only a scintilla of evidence, to support it. The invariable practice of a court of review is to act on the principle that the judge was in a better position than the court to assess the credibility of the witnesses and the value of their evidence …"

[75] Where a trial judge's finding of facts is based primarily on documentary evidence, the trial judge would have had no better advantage than the appellate court. In such a case, the appellate court may draw any inference of fact it considers justified from a proper examination of those documents and will more readily interfere with the findings of a trial judge (see **Chin v Chin** (Privy Council Appeal No 61/1999 delivered 12 February 2001).

[76] Although not cited by counsel in this case, these principles were more recently applied by this court in **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7 where Brooks JA, at paras [7]-[10], considered with approval, various authorities dealing with the approach an appellate court ought to take when asked to disturb the findings made by a judge at first instance. These authorities included **Industrial Chemical Co (Ja) v Ellis**; **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC; **Clarence Royes v Carlton Campbell and Another** (unreported) Court of

Appeal, Jamaica, Supreme Court Civil Appeal No 133/2002, judgment delivered 3 November 2005 and **Eurtis Morrison v Erald Wiggan and Another** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 56/2000, judgment delivered 3 November 2005. All these cases authorise the approach set out in paragraph [20] above.

[77] In **Beacon Insurance** the Board in outlining the principles said, inter alia this:

> "…It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong.' See for example, Lord Macmillan in *Thomas v Thomas* [1947] AC 484] at p 491 and Lord Hope of Craighead in *Thomson v Kvaerner Govan Ltd* 2004 SC (HL) 1, paras 16-19…
>
> [I]t directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence:"

[78] There is some amount of overlapping as regards the grounds of appeal and the issues to which they give rise. Therefore, issues 1 and 2 will be dealt with together. The remaining issues will be dealt with separately and they will all be dealt with in the manner in which they impact each ground filed.

Issues 1 and 2 - Whether the learned judge erred in her treatment with the evidence and whether the learned judge erred in her application of the law to the facts in the case (grounds (a), (c), (h) and (i)).

Appellant's submissions

[79] Counsel for the appellant, Ms Cummings, submitted that the learned judge's decision was unreasonable having regard to the evidence in the action and, in that regard, she erred in "misappropriating" the weight to be placed on the evidence taken in relation to the customs associated with contemporary business practice and the law concerning the sale of goods. Counsel argued that a thorough re-examination of the evidence in the case would yield different results, as the findings of fact in this case are not supported by the law on this issue.

[80] Counsel further argued that the learned judge misunderstood the evidence of the parties and failed to appreciate the difference between merchandise or goods not fitting specifications and merchantable quality of goods or goods unfit for the purposes for which they were required. The appellant's witnesses, she said, also alleged that the business relationship between the appellant and the respondent was based on the fact that the appellant's prices were competitive and its products were of good quality. Counsel pointed to the evidence of Mr Dibbs who, she said, confirmed that it was this which caused him to do business with the appellant and that he had no hesitation in making a second order of bulletproof vests from the respondent.

[81] Counsel further submitted that the learned judge erroneously found that the second set of bulletproof vests were not of merchantable quality and were unfit for the purpose of providing the required protection for the guards. Counsel argued that according to the law, goods are of merchantable quality if they are fit for the purpose or purposes for which goods of that kind are commonly bought and as durable as it is

reasonable to expect, having regard to any description applied to them. Counsel pointed to the fact that the email ordering the bulletproof vests made no mention of size and referred only to quantity. She also pointed out that in the September 2009 letter of complaint, the only complaints were the missing serial numbers and the quantity. She noted that by the trial date, the issue of the serial numbers had been resolved and it had now become a case of the bulletproof vests being ill-fitting.

[82] Counsel also argued that, in this case, the evidence showed that bulletproof vests came in varying sizes and that the size of the bulletproof vests delivered was extra-large and not fitting to the required specifications. As a result, they could not be utilized by the security guards as they were of the wrong size. Hence counsel argued that although the evidence was showing that the items delivered by the respondent were not fitting the specifications because they all came in extra-large, they were still of merchantable quality. Counsel also submitted that the learned judge failed to take into account, in assessing the evidence of the witness for the appellant, that the native language of the witness is Spanish and hence it affected his responses and understanding. Counsel pointed to the fact that the crux of the case came down to credibility of the witnesses for both sides and that the learned judge placed a high value on the "deemed" credibility of the respondent's witnesses, and found the appellant's witness inconsistent and hence unreliable.

[83] Counsel asked this court to note that the appellant's single witness Mr Farach was intensely cross-examined over a period of three different sessions in a language that he

was not fully comfortable with. She claimed that his answers at times reflected his comfort level and demeanour which was interpreted by the learned judge negatively and to his detriment, causing the learned judge to find him unreliable, when it was really because at times he simply did not understand. This, she said, also caused the learned judge to "misappropriate" the weight to be placed on the documentary evidence, rather than the supposed credibility of the witnesses for the respondents who the learned judge allowed to systematically tailor their evidence to create stories favourable to the respondent's case, resulting in a miscarriage of justice to the appellant who was detrimentally prejudiced.

[84] Counsel cited the case of **Industria Petroquimica Dorninicana C & A v Motivation Processors Ltd** (unreported), Supreme Court, Jamaica, Claim No CL 2000/I-004, judgment delivered 25 April 2008 ('**Industria Petroquimica**') in support of her contentions.

Respondent's submissions

[85] Counsel, Mrs Dibbs, on behalf of the respondent, submitted that the respondent did not owe the appellant any sums, and that it was, in fact, the appellant that owed the respondent. Counsel argued that the appellant and the respondent entered into a contract by description for the sale of belt buckles, which was breached by the appellant as the belt buckles supplied to the appellant failed to conform with the description in the contract, and the belt buckles were not fit for the particular purpose for which they were purchased. Counsel also maintained that the respondent entered into a contract of sale by sample for the bulletproof vests, which was also breached by the appellant as the

bulletproof vests supplied to the respondent failed in any way to correspond to the sample bulletproof vest, and were not fit for the particular purpose for which they were purchased. Counsel relied on the cases of **Drummond v Van Ingen** (1887) 12 App Cas 284, **Varley v Whipp** [1900] 1 QB 513 and **Arcos Ltd v EA Ronaasen & Son** [1933] AC 470 to support her contentions.

[86] Counsel further contended that the learned judge had the advantage of seeing and hearing the witnesses and had the opportunity also of observing their demeanour and was, thereby, in a position to assess their credibility. Having had that advantage, counsel submitted, in the end, she was able to find the witnesses for the respondent credible. Counsel pointed out that there was evidence from independent demonstrations by the three volunteers and Mr Marriot, who were of four different physical statures, who tried on the bulletproof vest in issue. This, she said, provided independent supporting evidence which concurred with the evidence of the respondent's witnesses. Counsel also noted that Mr Farach saw the entire box of handcuffs and belt buckles unopened in their original packaging. Counsel submitted that a heavy burden rests upon the appellant to establish that the learned trial judge had misdirected herself and that her findings were erroneous and could not be supported by the evidence. Counsel submitted that the findings of the learned judge turned solely on the credibility of the witnesses and it was open to her to find as she did on the facts before her. Further, the learned judge had made full use of the advantage of seeing and hearing the witnesses and her judgment contains a reasoned analysis of the evidence.

Analysis and conclusions on issues 1 and 2- (grounds (a), (c), (h) and (i))

A. The evidence relevant to the contract for the belt buckles, the learned judge's treatment of that evidence and the application of the relevant law

[87] Counsel for the respondent submitted that title to the belt buckles never passed to the respondent pursuant to the provisions of the Act because they failed to match the description provided to the seller by the respondent. There is support in the law for that proposition. Counsel also submitted that whether or not the belt buckles provided by the appellant were of merchantable quality, the fact that they did not adhere to the description provided by the respondent meant there was no contract to purchase the buckles as supplied by the appellant. There is also support in the law for that proposition. I will refer to the law in support of counsel's proposition at a more convenient point in this judgment.

[88] It is an agreed fact that 300 belt buckles were ordered by the respondent from the appellant. It is also an agreed fact that 500 belt buckles were delivered. It was the evidence of Mr Farach that he met with Mr Dibbs about the belt buckles and that Mr Dibbs ordered belt buckles for use by the respondent's security guards. These were belt buckles that the appellant had to manufacture for the respondent. He denied he was shown or measured any belt and denied he was asked to place the respondent's logo on the belt buckles. The learned judge found on the evidence that although 500 belt buckles were delivered, there was an agreement that the additional 200, which were not ordered but which had been delivered, were not to be paid for until opened or used by the respondent. This finding was supported by Exhibit 1 which was an invoice for the belt buckles dated April 2007. That invoice was for 500 metal belt buckles at a unit costs of US$5.95 totalling

US$2,975.00. The terms were cash on delivery (COD). It also contained a collateral agreement for the additional 200 belt buckles. The trial judge was able to observe that the entire box of belt buckles remained, in 2012, in its original packaging having been unused by the respondent. The appellant's original claim in regard to the belt buckles is based on the invoice dated April 2007, in the sum of US$2,975.00. In his witness statement dated 12 April 2012, Mr Farach admitted receiving an order for 300 belt buckles in April 2007 from the respondent but had supplied 500 in error.

[89] In paragraphs 9-12 of his witness statement Mr Farach gave evidence as follows:

> "9. On 24 May 2007 I received an e-mail from Mr. Joseph Dibbs stating that they did not expect the buckles and they will pay us the following month. I exhibit hereto marked "OF 2" a copy of his said e-mail.
>
> 10. I had a discussion with Mr. Dibbs about the oversupply to him of the metal buckles and we agrees [sic] that he would pay for the 300 that he originally ordered and then after he paid for that then he would begin paying for the extra 200 buckles that her [sic] received."
>
> …
>
> 12. To date we have only received US$1,785.00 from them for these specially manufactured metal belt buckles from Quest Security Services Limited and they still owe us the sum of US$1,190.00 for these items."

[90] When Mr Farach was confronted on cross-examination with the invoice dated April 2007, he admitted that the contents of his witness statements were inaccurate as he agreed that he and Mr Dibbs came to an agreement in regard to the 200 extra belt buckles. He also admitted that the agreement was reduced to writing on the same invoice

dated April 2007, which was attached as Exhibit 1 to his witness statement. That agreement was in the following terms:

> "First pay will be for 300 buckles US$1,785.00. New balance for 200 buckles US$1,190.00 will be pay until Quest Security use or open the 200 new buckles."

[91] After being shown the 500 belt buckles still unopened, Mr Farach agreed that they were all unopened, unused, and still in their original packaging. As a result, he officially withdrew the appellant's claim for the sum of US$1,190.00 for the 200 belt buckles. The learned judge was entitled to consider, based on this recantation regarding the 200 belt buckles, whether Mr Farach was "shifty or deceptive" or was honestly mistaken on this point.

[92] Mr Farach having withdrawn the claim for 200 belt buckles, the appellant's claim was reduced, on their own evidence, by US$1,190.00 (being for the 200 belt buckles in the amount of US$1,190.00). At that point, all that remained for the learned judge's determination on the appellant's claim, was the claim for the sum of US$4,650.00 for handcuffs and bulletproof vests. The learned judge also had to determine, on the respondent's counterclaim, whether the appellant was entitled to payment for the 300 remaining belts in the face of the respondent's submission that the 500 belt buckles supplied by the appellant were defective and not in conformity with the order, and its claim that the sum of US$1,785.00 paid to the appellant and taken as payment for the 300 defective belt buckles was a mistake.

[93] The relevant evidence before the learned judge on the appellant's claim was that on several occasions, Mr Farach would visit the office of the respondent and would meet Mr Dibbs and take orders from him in person. Although Mr Farach stated in paragraph 6 of his witness statement that in April 2007 he received a purchase order from the respondent for 300 metal belt buckles, in cross-examination on 4 June 2012, Mr Farach was unable to produce any purchase order for the said metal buckles and no such purchase order was ever tendered into evidence by the appellant. Mr Farach eventually admitted meeting with Mr Dibbs, who placed an order for specific belt buckles, orally. Mr Dibbs also testified that he placed the order orally to Mr Farach on one of Mr Farach's many visits to the respondent's office.

[94] Mr Farach also gave evidence in court that he was not shown a sample belt buckle or any belt that they were supposed to fit, by the respondent and he was only now aware that the buckles did not fit. However, Mr Dibbs told the court that it was he who placed the order for 300 belt buckles and gave Mr Farach specific details about the type of belt buckle required to fit belts which the respondent was already using. Mr Dibbs' evidence was that he showed Mr Farach the belts, which were standard security belts, which he needed the belt buckles to match and fit unto. Mr Dibbs further evidence was that he personally observed Mr Farach take measurements of the said belt so that he would ensure that the belt buckles would fit the belts. Mr Dibbs also stated that he had requested that the belt buckle be similar to those that Mr Farach was already manufacturing for other security companies in Jamaica and also requested that each belt buckle contain the respondent's logo.

[95] The substance of Mr Dibbs' evidence both in his witness summary and in evidence on oath in court, was that the belt buckles he received from the appellant were not the belt buckles which he ordered because they did not meet the agreed specifications as follows:

1. The belt buckles he received were of a military style belt and not the security style belt he had ordered;

2. The belt buckles did not fit unto Quest Security's belts which were shown to Mr Farach and measurements taken at the time he placed the order. The size and width of the belt buckles were too small.

3. The belt buckles did not contain the Quest Security logo and instead, contained only Quest Security's name.

4. The material of which the belt buckles were made was not the material which he ordered.

[96] In fact, during his cross-examination, Mr Farach admitted that the belt buckles he supplied to the respondent were belt buckles which were made for belts that the appellant supplied. The evidence of Mr Garth Marriot for the respondent, supported that of Mr Dibbs with regard to the defects in the belt buckles.

[97] This was the competing evidence for both sides heard by the learned judge with respect to the belt buckles. The learned judge took the view that, on a balance of probability and in the absence of a purchase order, the contract was an oral contract for the sale of belt buckles, that Mr Farach was shown a sample of the belts the buckles were required to fit and was informed of the specifications.

Section 2(1) of the Act provides that:

> "A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. ..."

[98] Section 4 of the Act also provides that "...a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties". There was no dispute that there was an oral contract for sale of 300 metal belt buckles of a certain specification and description. I can see no reason to trouble those findings which the learned judge was entitled to make on the evidence as led.

(1) Was the sale of the belt buckles a sale by description?

[99] Section 14 of the Act provides that:

> "14. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description."

[100] The expression "contract for the sale of goods by description," in the Act applies to all cases where the buyer has not seen the goods, but relies solely on the description given by the seller (see **Varley v Whipp**, a decision made pursuant to section 13 of the English Sale of Goods Act 1893). In the case of **Varley v Whipp** the plaintiff agreed to sell and the respondent to buy a reaping machine, which the respondent had never seen and which the plaintiff said was only a year old and had only been used to cut about 50 or 60 acres. The subject machine was delivered and shortly afterwards the respondent wrote to the plaintiff complaining that it did not correspond with the plaintiff's statements. The respondent later returned the machine. In an action by the seller to recover the purchase price, the court held that there was an implied condition that the goods should correspond with the description, that there had been no acceptance of the machine by the respondent, within the meaning of section 35, and that the property had not passed to the respondent, within the meaning of section 17, and the plaintiff was not entitled to recover.

[101] In **Arcos Ltd v EA Ronaasen & Son**, agents for the sale of Russian timber agreed to sell to English buyers staves of Russian redwood and whitewood, required by the buyers, as the sellers knew, for making cement barrels. The contract indicated that the staves should be ½ inch thick. When the goods arrived in London, the buyers claimed to reject them on the ground that they did not conform to the description in the contract in that they were not ½ inch thick. In fact, only 5% of the goods conformed with the requirement but the rest were nearly all less than $^{9}/_{16}$ inches thick. Despite finding that the goods were commercially within and merchantable under the contract specification,

and that they were reasonably fit for their purpose, the court held that the buyers were entitled to reject the said goods. The court stated, in fact, that "if the seller wants a margin, he must and in my experiences does stipulate for it".

[102] The court further held that the buyers were entitled to demand goods answering the description in the contract, and were not bound to accept the goods tendered merely because they were merchantable under that description. At page 474 of the judgment, the court stated that:

> "The fact that the goods were merchantable under the contract is no test proper to be applied in determining whether the goods satisfied the contract description ... If the article they have purchased is not in fact the article that has been delivered, they are entitled to reject it, even though it is the commercial equivalent of that which they have bought."

[103] In the instant case, the learned judge was entitled to find that the contract for sale of the belt buckles was an oral contract made by description. The contract was one wherein goods manufactured by the appellant were agreed to be supplied to the seller with specific requirements and was, therefore, capable of being deemed a sale of goods of that description. The learned judge was required to determine on the evidence, whether the belt buckles supplied met the specifications and corresponded with the description. I agree with counsel for the respondent's submission that having accepted the evidence of the respondent, the learned judge was entitled to find that the belt buckles supplied failed to correspond in any way with the description and the specifications pursuant to the contract for sale. On that basis alone, the respondent was entitled to reject the belt buckles.

(2) Were the belt buckles of merchantable quality and fit for purpose

[104] Counsel for the respondent also submitted that the belt buckles supplied were not fit for the particular purpose for which they were ordered and that this particular purpose was clearly communicated by the respondent to the appellant at the time the order was made. She cited the case of **BSS Group plc v Makers (UK) Limited (t/a Allied Services**) [2011] EWCA Civ 809 ('**BSS Group plc**'). Mr Dibbs' evidence was that the purpose of the buckles was to fit belts already in the possession of the respondent. At paragraph 7 of the witness summary of Mr Dibbs, he said the belts were shown to Mr Farach and he took measurements in order to ensure that the buckles fit onto the belts. The appellant was to manufacture those belt buckles especially for the respondent.

[105] Section 15 of the Sale of Goods Act provides:

> "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.
>
> (c) An implied warranty or condition as to quality or fitness for a particular purpose, may be annexed by the usage of the trade."

[106] Section 15(a) of the Act provides, therefore, that where the buyer makes it known expressly or by implication to the seller the purpose for which the goods are required, there is an implied condition that the goods supplied shall be reasonably fit for the purpose for which they were purchased.

[107] **BSS Group plc** is a helpful authority on that point. In that case, the English Court of Appeal held that:

> "The position now is that in a case in which the buyer has made known his purpose, there is *prima facie* an implied condition of fitness which the seller can defeat only by proof that the buyer did not rely, or that it was unreasonable for him to rely, on the skill or judgment of the seller."

[108] In the case of **Drummond v Van Ingen**, cloth merchants ordered cloth which was to be of the same weight as the sample supplied. The purpose of the cloth, known to the suppliers, was for onsale to clothiers and merchants. The cloth supplied was identical in every respect with the sample, but owing to a defect, it was not fit for the particular purpose for which it was purchased. Notwithstanding that the sample itself had the said defect, the court held that there was an implied warranty that the goods would be fit for the particular purpose for which they were purchased.

[109] In the instant case, the learned judge considered whether the belt buckles were fit for purpose and of merchantable quality. She found that they were not.

[110] I agree with counsel for the respondent that the respondent had clearly ordered the belt buckles for a particular purpose, had given the appellant specific details on their requirements and relied on the appellant's skill and judgment as the manufacturer to produce goods of the correct specifications. The belt buckles having failed to meet the requirements and the particular purpose for which they were ordered, the respondent was entitled to reject them as being unfit for the purpose made known. The learned judge was, therefore, correct to find that they were ordered for a particular purpose and that the belt buckles delivered were not fit for that particular purpose.

[111] Section 15(b) of the Act provides that where goods are bought by description from a seller who deals in goods of that description, there is an implied condition that the goods shall be of merchantable quality. The learned judge found that the belt buckles were not of merchantable quality. To my mind, there was no evidence on which the learned judge could have arrived at that conclusion and I agree with counsel for the appellant that she erred in doing so. Nevertheless, in this particular case, it did not matter that the belt buckles were of merchantable quality, the learned judge having accepted the evidence that they were not fit for the purpose for which they were ordered.

[112] It is necessary to state also, in the light of the appellant's complaint, that the above findings by the learned judge, made on the basis of whose evidence she believed as to what was ordered from the appellant, cannot have been impacted by any perceived

disadvantage to Mr Farach in the fact that English was not his native tongue. He clearly articulated that belt buckles were ordered, no belts were shown to him, he measured no belt and he was not told the buckles were to fit belts in the respondent's possession. The learned judge just did not believe him.

B. The evidence relevant to the contract for the bullet proof vests, learned judge's treatment of that evidence and the application of the relevant law

[113] The appellant, at trial, claimed the sum of US$5,400.00 for 15 bulletproof vests, having been paid US$975.00 on account of the bulletproof vests. It was the respondent's contention that the bulletproof vests supplied by the appellant did not, in any way, conform with the sample bulletproof vests it ordered, that it had rejected the bulletproof vests and did not intend to pay for them.

[114] The order for the bulletproof vests was made by email of 15 January 2009, by Mrs Hunter. In paragraph 23 of Mr Farach's witness statement, he admitted that the "particular order of bulletproof vests was a repeat of a previous order of 2A quality bulletproof vests that Quest Security Services Limited made to us in January 2008". Mr Dibbs also stated in evidence at trial, that the second set of bulletproof vests was ordered on the basis that the vests would have the same identical requirements, specifications, standard design and for the same purpose as the first set of bulletproof vests supplied by the appellant. This requirement, however, is not in the email in which Mrs Hunter placed the order but the fact of the requirement was not denied by Mr Farach. Mr Farach responded to Mrs Hunter on 15 January 2009 noting the order made by Mrs Hunter, and

quoting the best price at US$415.00 per vest. Payment was to be 50% on delivery and 50% on the second month, payment being on a two-month credit terms.

[115] Subsequently, an invoice was sent to the respondent for 15 bulletproof vests. It also provided a six-month factory warranty. The bulletproof vests also had an express condition as to purpose stated on the invoice in the following terms:

> "Our vests provide the maximum protection to the body without hindering their movement and freedom. The shield is made of Kevlar material 85% and Kev lam 15% sewn in multiple threads, avoiding this way any possibility of diagonal penetration of projectile or Displacement laminates effects of multiple impacts..."

It also stated that the type of vests, Level IIA, is fit to avoid different kinds of projectiles in the range of 9mm, 38, 22, 45, and similar types of projectile.

[116] The evidence which the learned judge heard and accepted was that the first set of bulletproof vests which were previously ordered and delivered were standard sized and were:

i. a lot smaller in size than that of the disputed bulletproof vests supplied by the appellant;

ii. contained the Quest Security logo in embroidery on the back of the vest while the bulletproof vests supplied by the appellant did not contain the said embroidery but rather a cheaply stitched patch logo which was not properly stitched on; and

iii. had gun strap and ammunition holders on the front part of the vests, while the bulletproof vests supplied by the appellant did not contain any holders at all.

[117] Mr Farach himself agreed that the bulletproof vests in the second supply did not match the first. Mr Marriot gave evidence, in paragraph 5 of his witness statement, as to the defects in the vests which, he said, were of irregular size and could not fit any of the respondent's guards regardless of shape, size or built. The Velcro stuck out at the front of the vests and there was no fastening to strap on the vests for the Velcro to safely fasten. It fitted like a tunic and covered the firearms preventing access to the firearm holder.

[118] In order to demonstrate the differences between the previously supplied bulletproof vests and those which were delivered, Mr Marriot tried on both, from which it could have been gleaned that:

a) the bulletproof vests delivered by the appellant were extremely long;

b) there was a gap between the vest and the chest resulting in the chest area being left exposed;

c) the bulletproof vest covered the firearm holder on the wearer's waist thereby restricting access to the firearm; and

d) when seated, the vest would ride up and choke the wearer.

[119] At the court's request, three officers of the court said to be of varying sizes and weights also tried on the disputed bulletproof vests. The learned judge was able to observe that the subject vest was much larger and fit differently from the vests which were previously supplied. When fitted on all three officers, the learned judge found that the subject bulletproof vest did not provide adequate protection, restricted access to their firearms and rode up on their necks.

(1) Was the sale of the bulletproof vests a sale by sample?

[120] The respondent claimed that the sale of the bulletproof vests was a sale by sample as it was ordered based on the sample provided by the first set of bulletproof vests ordered from and supplied by the appellant. One of the issues considered by the learned judge was whether the sale of the bulletproof vests was by sample and whether what was delivered conformed to the sample. Both parties agreed that when the disputed vests were ordered, Mr Farach was aware that there had been a previous order and that the second order was to be the same as the first.

[121] Section 16(1) of the Act provides that a contract for sale is a "contract for sale by sample where there is a term in the contract, express, or implied to that effect". Section 16(2) provides that:

"(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 unmerchantable, which would not be apparent on reasonable examination of the sample."

[122] In Chitty on Contracts, under the heading - Specific Contracts, 25th Edition at para 4175, it states that "correspondence [of the bulk goods with the sample] must be precise" (see also **E & S Ruben Ltd v Faire Bros & Co Ltd** [1949] 1 KB 254 also cited by the respondent). Furthermore, "[t]he extent to which there must be conformity - whether it need be visual only, or whether the two must correspond on analysis, depends on the contemplation of the parties and the usage of the trade".

[123] In this case, the learned judge made several key findings that the bulletproof vests supplied:

(i) were larger than the sample;

(ii) did not contain the respondent's logo in embroidery on the back; and

(iii) did not contain the ammunition holder.

[124] The question is whether the learned judge was correct to find that there was a sample and that the bulletproof vests supplied did not conform to the sample. The learned

judge, having thoroughly examined the bulletproof vests supplied against the vests from the previous order produced in court, could not be faulted for coming to the conclusion that the bulletproof vests supplied by the appellant did not match the ones previously supplied. However, this did not mean the sale of the second set of bullet proof vests was a sale by sample, pursuant to section 16(2) of the Act.

[125] The second set of bullet proof vests was manufactured and supplied by the appellant after the order was made. They did not form part of the bulk of the first order and, therefore, could not have been a sample from that order. The only possible proper finding the learned judge could have made is that the second set of bullet proof vests was to have been of the same description or specification as the first set. The second set of vests was not the bulk from which the sample of the first set were taken. The learned judge was, therefore, in error to find that it was a sale by sample.

[126] Nothing in the evidence, however, turned on whether Mr Farach spoke perfect English or not, and, in any event, Mr Farach's evidence amounted to an admission that the bulletproof vests supplied were not of the same specifications as the ones supplied in the previous order.

(2) Were the bulletproof vests of merchantable quality and fit for purpose?

[127] The learned judge found that because of the defects in the bulletproof vests they were not fit for purpose and were not of merchantable quality.

[128] The evidence presented to the learned judge was that bulletproof vests were for the purpose of protecting the wearer against bullets to vital internal organs in the chest

area and ought to provide the wearer with freedom of movement and that this was in the contemplation of both the appellant and the respondent at all material times. Mr Farach admitted that he knew the respondent's intended use of the bulletproof vests. Although Mr Farach denied that the respondent informed him of the deficiencies in the buckles and vests, he did not deny that the vest brought to court was clearly ill-fitting.

[129] There was also an express warranty to be found in the invoice for the bulletproof vests, where it was stated thereon that "the vests provide the maximum protection to the body without hindering … movement freedom". It was clear on the evidence that this was not so. The demonstration before the learned judge that the bulletproof vest remained ill-fitting on more than one person of varying height and size provided evidence from which the learned judge could have found that the bulletproof vest was not fit for the purpose made known to the appellant.

[130] Mr Farach himself testified that bulletproof vests are to protect the wearer against bullets, while providing the wearer with freedom of movement. He also testified, on cross-examination, that some persons who wear those vests are security guards. Mr Marriot's unchallenged testimony was that a bulletproof vest was to fully protect the chest area and internal organs of the wearer of the vests from any gunshot wounds. The appellant knew the purpose for which the respondent ordered the bulletproof vests as Mr Farach admitted on cross-examination that the bulletproof vests are worn by security guards and that the appellant had previously sold vests to the respondent for that purpose. It was clear, therefore, that the respondent relied on the skill and judgment of the appellant to

provide bulletproof vests that would fit in a way which would provide maximum protection to the respondent's security guards.

[131] The case of **Flynn v Scott [**1949] SC 442 relied on by the appellant can be distinguished on the basis that in that case, the buyer did not make known to the seller any specific purpose for which the van was being bought, only a general purpose. There is no warranty provided that any good will be suitable for general purposes for which such goods are used. For there to be an implied warranty or condition, there must be a specified or particular purpose indicated to the seller.

[132] There was sufficient evidence for the learned judge to find that the appellant had breached the implied and express condition that the subject bulletproof vests were fit to protect the security guards from bullet wounds to the chest while providing them with freedom of movement and access to their firearm. There was also sufficient evidence for the learned judge to find that the appellant and the respondent contemplated and knew what the trade in bulletproof vests was for. The evidence in regard to the appellant's breach of implied and express condition that the vests were reasonably fit for their purpose was clear and the learned judge was correct to so find. The learned judge was therefore not in error. The appellant was clearly in breach of the implied condition that the bulletproof vests were reasonably fit for the purpose intended pursuant to section 15(a) of the Act. The duty to provide goods reasonably fit for the purpose made known is a strict one: it is no defence that all care was taken (see Benjamin's Sale of Goods, 4th Edition, para 11-068).

[133] The learned judge went on to also find that the bulletproof vests were not of merchantable quality. However, only one bulletproof vest was brought to court by the respondent. There was no evidence as to what became of the remainder. The evidence was that the bulletproof vests came in standard sizes of large, medium, small and perhaps extra-large. Counsel for the appellant submitted that the one brought to court was an extra-large and that perhaps all the vests supplied may have been inadvertently made extra-large. That by itself, counsel submitted, would not make them not of merchantable quality. I tend to agree.

[134] In the case of **Godley v Perry (Burton & Sons (Bermondsey) Third Party Graham Fourth Party)** [1960] 1 All ER 36, the court held that the respondent was in breach of the Sale of Goods Act. The defendant was a newsagent who sold children's toys and the plaintiff was a boy of six years old, who saw catapults displayed in the defendant's window and purchased one of them. While properly using it, the catapult broke and struck the plaintiff in the left eye. The defendant had bought the catapult from a wholesaler with whom he had dealt for some time. The sale between the defendant and the wholesaler was by sample, the defendant's wife having examined it. The wholesaler's supplier was another wholesaler, G, who imported them from Hong Kong where they were made. The sale between the wholesalers was also one of sample. The court held that the defendant was in breach of the Sale of Goods Act as the catapult was not reasonably fit for the purpose for which it was required, and the plaintiff relied on the seller's skill or judgment. The catapult was bought by description although it was sold over the counter, and it was not of merchantable quality.

[135] In the instant case, although there was evidence to support the finding of the learned judge that the bulletproof vests were not fit for purpose, the same cannot be said of the finding that they were not of merchantable quality - see the definition of "merchantable quality" cited in **Cammell Laird & Co Ltd v Manganese Bronze and Brass Co Ltd** [1943] AC 402 at 430, cited in **Industria Petroquimica** at paragraph 76. There was no evidence that the bulletproof vests were of no saleable use. See also **Grant v Australian Knitting Mills Ltd** [1936] AC 85 at 99-100, a decision of the Privy Council in a case from Australia.

[136] There is some merit in these grounds.

Was Mr Farach prejudiced by the fact that English was not his native tongue?

[137] The findings of the learned judge on these two issues did not hinge primarily on the credibility of the witnesses nor was the fact that English was not Mr Farach's primary language of any impact on the findings. The finding on the 200 belt buckles was based on the collateral agreement on the invoice. The finding on the bulletproof vests was based on the demonstrated differences between the sample vests in court and one of the vests supplied by the appellant. The findings on the belt buckles were, admittedly, largely based on the acceptance of the truthfulness of the witness as to the terms of the oral contract, which did not depend on whether Mr Farach spoke perfect English or not. As for the handcuffs, this was largely based on the interpretation the learned judge placed on the correspondence between the parties. The credibility or lack thereof of Mr Farach, found by the learned judge, was based on the inconsistencies in his witness statement and his

evidence, and the dichotomy between his evidence and the documentary proof. There was nothing which turned on the fact that English was not his native language.

[138] There is no merit in this complaint.

Issue 3 -Was the learned judge wrong to find that the defects were reported within a reasonable time (grounds (b) and (d))?

Appellant's submissions

[139] Counsel for the appellant argued that the learned judge erred when she held that the respondent informed the appellant of its dissatisfaction with its products within a reasonable time. Counsel cited section 35 of the Act. Counsel submitted that the respondent was deemed to have accepted the goods after the lapse of a reasonable time, having retained the goods without intimating to the appellant that he had rejected them. Counsel argued that the questions that are material in determining whether a reasonable time had elapsed included whether the buyer has had a reasonable opportunity of examining the goods.

[140] Counsel asserted, in summary, that:

a. A total of 15 bulletproof vests were delivered to the respondent by the appellant in February 2009.

b. The documentary evidence is that the appellant gave the respondent a six-month warranty on the bulletproof vests that it ordered in February 2009. Thus the respondent had six months to complain to the

appellant of any problems it had with the vests and the appellant would be obligated to replace, repair or remedy any defect in the vests.

c. The appellant did not complain of any alleged defect in the bulletproof vests within that time or within a reasonable time.

d. The appellant having accepted delivery of the bulletproof vest is obliged to pay for them.

e. At no time did the respondent complain about the belt buckles and had fully paid for them.

Counsel submitted that, in the circumstances, there was no reasonable basis on which the court could find that Mr Farach was informed that the vests and buckles were useless.

[141] Counsel argued that the respondent's witnesses all alleged that the first set of bulletproof vests ordered and supplied had defects and that these defects were remedied by Mr Farach, after they complained. Counsel argued that the learned judge failed to draw the proper inference that if the defects in the second set of bulletproof vests had been reported to the appellant there would be no reason why those defects would not have been remedied also. The fact that the bulletproof vests did not properly fit any of the respondent's guards, counsel pointed out, did not form a part of the respondent's defence or counterclaim, and the first mention of ill-fit was 20 January 2010 when the

respondent wrote asking for the appellant to take them back. This, counsel noted, was several months after delivery. Counsel argued that it was unreasonable for the learned judge to accept the viva voce evidence of the respondent's witnesses that there was an oral rejection, when there was no basis on which she could have done so. Counsel pointed to the fact that by the time of the written complaint in January 2010, the respondent had already partially paid for the vests.

[142] Counsel cited **Ramnasibsingh (Trading as Rio Claro Saw Mill) v Mayaro/Rio Claro Regional Corporation** (unreported), High Court of Justice, Republic of Trinidad and Tobago, Claim No S-253 of 1997, judgment delivered 17 July 2006 where it was held that rejection of the goods 23 days after delivery of goods of merchantable quality was unreasonable as the respondent in that case took a step to accept the goods. Counsel also cited **Flynn v Scott** where the English court held that the rejection of a motor vehicle after 21 days was not timeous and **Cash v Giles** (1828) 3 Carrington and Payne 477 where the court in England again held that the retention of goods after several years waived any objection to the defects in the goods.

Respondent's submissions

[143] The respondent submitted that the belt buckles did not match the specifications provided to the appellant and that Mr Farach was advised that they were of no use to the respondent from 2007. Counsel also submitted that the belt buckles were rejected, and the appellant was well aware of the rejection. Counsel pointed to the fact that Ms Hunter, testified that she notified Mr Farach on the telephone on several occasions about the defective nature of the bulletproof vests and of the respondent's rejection of them.

Counsel accordingly submitted that it timeously rejected the bulletproof vests upon its examination of them.

[144] Counsel submitted that the appellant was liable to the respondent for the defects which were contained in the bulletproof vests and the belt buckles. Accordingly, the respondent was not liable to pay the appellant for them.

The learned judge's treatment of the evidence relevant to this issue and the application of the relevant law

[145] The appellant was entitled to demand belt buckles answering the description in the contract and was not bound to accept the said belt buckles tendered merely because they were of merchantable quality, if they were not fit for the purpose for which they were intended. On that premise, the respondent was entitled to reject the belt buckles. If the bulletproof vests were also unfit for the purpose for which they were ordered, the respondent was entitled to reject those goods as well. The question is whether the respondent accepted the goods or whether there was evidence that the respondent not only rejected the goods but did so within a reasonable time.

[146] The learned judge had to determine whether the goods had been accepted by the respondent or had been rejected within a reasonable time. I will, therefore, examine how the learned judge treated with the evidence surrounding the alleged rejection of each product, separately.

(1) The belt buckles

[147] In paragraph 11 of his witness statement, Mr Farach stated that:

> "11. After delivery of those specially manufactured belt buckles we received no complaint or comment about the items from Mr Dibbs or anyone at Quest Security Services Limited about any problem or defect with these specially manufactured metal belt buckles."

[148] During his cross-examination, Mr Farach said he was not aware that the respondent was claiming that the belt buckles did not fit. He did admit that after the belt buckles were delivered to the respondent, he spoke to Mr Dibbs but denied Mr Dibbs told him the buckles did not fit and he was trying to find belts to fit them. He said that if Mr Dibbs had told him that, he would have supplied the belts to fit the buckles. Mr Dibbs gave evidence that he advised Mr Farach on several occasions that the belt buckles which were supplied did not correspond with what they ordered and Mr Farach told him that because the belt buckles had Quest Security's name on it, the appellant had no use for the said buckles. Mr Dibbs, in his witness summary, stated that the belt buckles supplied were of no use to the respondent and Mr Farach was told this when he telephoned. At paragraph 10, he said the belt buckles and vests were defective and he tried to sell them but was not successful. The 300 belt buckles were fully paid for.

[149] The invoice for the belt buckles was in April 2007, and on 24 May 2007 Mr Dibbs wrote to the appellant in these terms:

> "Omar,
>
> Our accounts department was not expecting the belt buckles on this month's budget. **So they paid as much as they could**. Next month we will settle the balance.
>
> Sorry for the inconvenience." (My emphasis)

[150] The learned judge accepted the evidence of Mr Dibbs that he told Mr Farach the belt buckles were useless and that at the time he wrote this letter, the accounts department was not aware of the defects. The learned judge failed to consider the evidence of Mr Farach that if he had been told that the buckles could not fit the belts that the respondent had, he would have supplied them with belts. Although Mr Dibbs said that he had 200 or more belts in storage, he gave no evidence that he asked Mr Farach to supply belts for the buckles since they could not fit the ones in the possession of the respondent. His evidence was that Mr Farage said the name "Quest" was on the buckles. However, this did not prevent the belts from being supplied, especially since from Mr Dibbs evidence more belt buckles were ordered than the amount of belts he had in stock. Where were the belts for the remaining 300 buckles to come from? It was necessary for the learned judge to take this into consideration because there was uncontroverted evidence that whenever defects were pointed out to Mr Farach, he took back the goods and remedied them. Why would he have failed to do so in this case, especially since the belt buckles were made to fit belts that the appellant also manufactured? An examination of his past conduct as a commercial seller towards his commercial buyer was necessary to see if there was an alleged deviation for which there was an explanation provided in the evidence. Neither did the learned judge examine the evidence of the part payment on the belt buckles by 24 May 2007 and the fact that nothing in the email to Mr Farach from Mr Dibbs in May 2007, indicated any defects in the belt buckles.

(2) The bulletproof vests

[151] The invoice for the bulletproof vests exhibited by the appellant is dated February 2009. That exhibited by the respondent is dated June 2009. On the appellant's case, the bulletproof vests were delivered between April and June 2009. The appellant had promised delivery for April 2009. An invoice was sent for 12 vests in June 2009. The respondent's evidence is that the vests were delivered in June of 2009. The bulletproof vests were, however, ordered on 15 January 2009, two years after the defective belt buckles, which the respondent still had in its possession, had been paid for and had not been collected by Mr Farach.

[152] The vests having been delivered, and when no payment was forthcoming, Mr Farach wrote to Mrs Hunter on 14 August 2009 referencing invoice 10517 for bulletproof vests delivered 18 June 2009 with a balance of US$5,100.00. Mrs Hunter wrote back 9 September 2009 indicating that the respondent did receive 12 bulletproof vests but they had no serial numbers, which was a requirement. The first written complaint about the vests was therefore made by Mrs Hunter on 9 September 2009, but the only complaint was about the lack of serial numbers. The bulletproof vests were taken back by the appellant and returned with the serial numbers. The second complaint came on 25 January 2010 after the appellant enquired about payment. This time, the complaint was that the vests were ill-fitting. In that email, Mrs Hunter asked that they be taken back as they did not fit comfortably and were choking the guards when they tried them on. There is no mention of the defective belt buckles in this email although they were still in the possession of the respondent. Mrs Hunter also wrote on the 14 April 2010 but did not

complain about the quality of the vests in that email. Neither did she do so in the March 2010 emails or in the 4 May 2010 email. Instead, there was a commitment to pay.

[153] In his witness statement Mr Marriot claimed that the belt buckles and bulletproof vests were defective, but he made no mention of them being rejected. Although Mr Dibbs claimed that the defects in the vests were brought to his attention by Mr Marriot and he arranged a meeting with Mr Farach and Mr Marriot, there is no mention of any such meeting or its outcome in Mr Marriot's evidence. Mrs Hunter gave evidence that she started working at the respondent in August 2007, that is long after the belt buckles were ordered and delivered. In her witness statement at paragraphs 9 and 10, in reference to the first order of bulletproof vests from the appellant, she said they arrived defective. She complained to Mr Farach about the defects in the vests and he came for them and adjusted them. At paragraph 11, she said that the appellant purchased a second set of bulletproof vests but they arrived without the serial numbers. Mr Farach retrieved them and made the corrections. At paragraph 12, she says that when the vests were returned, they realized that they were still defective and were "irregularly large". She said she complained on the phone to Mr Farach but he did not return to retrieve them. On this evidence, the learned judge determined that the goods were rejected within a reasonable time.

Analysis and conclusion on Issue 3- (grounds (d) and (b))

[154] Section 34 of the Act provides that:

> "(1) Where goods are delivered to the buyer, 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.
>
> (2) 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."

[155] Section 35 of the Act provides as follows:

> "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."

[156] Section 36 of the Act provides that

> "Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them."

[157] Section 55 of the Act indicates that, "[w]here, by this Act, any reference is made to a reasonable time the question what is a reasonable time is a question of fact" (see also Chitty on Contracts, Specific Contracts, para 4278).

[158] In the case of the bulletproof vests, these were ordered in January 2009, two years after the receipt of the belt buckles which were alleged to be defective but were never collected by the appellant. Mr Dibbs alleged that he ordered the bulletproof vests because the appellant had promised to give a credit note for the belt buckles. This did not happen.

Since the delivery of the belt buckles in 2007, the respondent ordered the first set of bulletproof vests in 2008 and paid for them without demanding any credit note. The second set of bulletproof vests were ordered in writing without any written reminder of the promise of a credit note for the belt buckles. Several emails were written by Mr Farach and his account manager demanding the outstanding payments for the bulletproof vests and handcuffs, but not once did the respondent raise any issue of a credit note for the defective belt buckles. Instead, the documentary evidence showed that the respondent set up a payment plan and made promises to pay. This weakness in the respondent's defence was not considered by the learned judge.

[159] Mr Farach insists the first time he heard that the belt buckles were defective was after he sued for outstanding payments. In my view, there was no basis for the learned judge to have accepted the bare assertion of the respondent's witnesses that it had rejected the belt buckles, having orally reported the defects in time. The belt buckles were in the respondent's possession for over two years unopened. They were partially paid for within weeks of delivery and fully paid for after a couple of months. That was sufficient time to ascertain they were defective pursuant to section 34 of the Act. As an aside, there is no evidence from the records in this court how the respondent knew the buckles did not fit the belts, if they remained in the unopened packages. Unlike the bulletproof vests, there was no demonstration in court of the fact that the buckles did not fit the belts, except to show the court the unopened packages.

[160] The evidence of Mrs Hunter and Mr Dibbs is that Mr Farach visited their offices monthly and called frequently, yet at no time were the buckles handed back to Mr Farach. The further evidence is that Mr Farach did business in Jamaica, not only with the respondent, but other security companies; and that, as the appellant's international representative, he was frequently in Jamaica. The evidence too is that the respondent bought several items from the appellant between 2007 and 2008, therefore, there would have been no need to await a credit note to apply to an order of bulletproof vests in 2009 to cure the defect in the belt buckles bought in 2007. In any event, the learned judge failed to consider that the respondent had bought bulletproof vests from the appellant in 2008, which were supplied defective, corrected and paid for. During that time, there was no mention of the defects in the belt buckles or any set-off or credit note resulting from that defective supply in any correspondence between the parties.

[161] Furthermore, the learned judge also failed to consider that, one month after the delivery of the belt buckles, Mr Dibbs wrote an email dated 24 May 2007 asking for time to pay, having earlier only made a partial payment on the invoice for the belt buckles. This was not only sufficient time to examine the goods but the conduct of the respondent showed in clear terms an acceptance of the goods, pursuant to section 35 of the Act. One month was more than a reasonable time to examine the belt buckles and to decide whether to accept or reject them. The partial payment for them and the letter of 24 may 2007 requesting time to pay the balance was unequivocal evidence that the goods were accepted by the respondent. Mr Dibbs' explanation that at the time of the payment the goods had not yet been examined, ought not to have been accepted by the learned judge

because not only had one month passed before part payment was made, which was more than a reasonable time for examination of belt buckles, but the goods having not been fully paid for at once, there was more than sufficient time for examination between the first payment and the final payment, for the goods to have been examined. Even if the learned judge did not accept that a month was a reasonable time for examination of the belt buckles, the respondent, thereafter, paid for the goods in full. The learned judge failed to state how she reconciled this email with the evidence of Mr Dibbs, other than to recite the evidence of Mr Dibbs that in May 2007, after a delivery in April 2007, the respondent had not yet examined the goods.

[162] On 25 January 2010, Mrs Hunter wrote to the appellant requesting 500 ties and the retrieval of the bulletproof vests. There was no mention of the defective belt buckles. On 2 March 2010, the appellant wrote to the respondent indicating the outstanding balances on the invoices for the bulletproof vests, buckles and handcuffs. On 3 March 2010 Mrs Hunter responded with regard to the handcuffs only. There was no mention of any defective goods.

[163] In its pleadings, the respondent was content to state that the belt buckles did not comply with the specifications of the order, but did not state what those specifications were. It was only in oral evidence before the court that this was identified. As I said earlier, it is unclear how this failure to fit was ascertained as the belt buckles remained unopened. In the case of the belt buckles, they were paid for in two tranches a month after delivery. Counsel for the respondent submitted that the fact that the 500 unopened

belt buckles remained in their packaging from the time of delivery in or about 2007 to the time of trial in 2012, was evidence of their rejection. I cannot agree that this was sufficient evidence of their rejection. In my view, with respect to the belt buckles, the finding of the learned judge that the defects were communicated orally is unreasonable based on the evidence, documentary and oral, and was not an inference she could properly draw nor a finding which could be supported on the basis of credibility alone.

[164] In the case of the bulletproof vests, no written mention was made about any defects in them or any rejection of them in the email of 9 September 2009, except for the missing serial numbers. They were returned and that defect remedied. Thereafter, they were delivered to the respondent who accepted them. The first complaint about them being ill-fitting only came five months later on 25 January 2010. By September 2009 the goods had clearly been examined for the witness to be able to note the missing serial numbers. All defects could have been detected at the time the bulletproof vests were examined. Having kept the goods for over five months after September 2009, the respondents had accepted the goods and could no longer complain of a defect in the goods.

[165] Mr Dibbs sought to say the payment of US$975.00 in August 2010 was for helmets for which advanced payment was demanded by Mr Farach. But this is not true. No helmets were delivered to the respondent. The only mention of helmets was in the email of Mrs Hunter on 26 May 2010 in which she, after informing that they were working on the appellant's payments, asked if it had any ballistic helmets in Jamaica for which they

could pay cash on behalf of a client of Mr Dibbs. It is clear that the US$975.00 was not paid on 19 August 2010 for any helmets.

[166] The several emails with promises to pay and the conduct of the respondent were wholly inconsistent with a rejection of the goods. In his witness summary, at paragraph 10, Mr Dibbs stated that when it came to his attention that the belt buckles and bulletproof vests were defective he "tried to re-sell them but was not successful". This was an action wholly inconsistent with ownership by the appellant, pursuant to section 35 of the Act. There was, therefore, no proper basis on which the learned judge could have found that the belt buckles and bulletproof vests were rejected. The respondent paid for the goods and tried to sell them which is an act inconsistent with ownership by the seller. The learned judge was wrong to find that the respondent had rejected the goods. Property in the goods had passed. On this issue the learned judge erred. These grounds of appeal would, therefore, succeed.

Issue 4 – Was the learned judge correct in her finding that the handcuffs were supplied on a consignment basis? (Grounds (e), (g) and (h))

Appellant's submissions

[167] Counsel argued that the learned judge was wrong in her findings as regards the handcuffs and was wrong to find that in the email dated 16 February 2009, Mr Farach was seeking the respondent's assistance in clearing the handcuffs as the appellant had found itself in a predicament. Counsel also submitted that the learned judge failed to appreciate that some of the evidence introduced by the respondent's witnesses was not put to the appellant's witnesses and hence were inadmissible. Counsel argued that the

respondent's witnesses were allowed to introduce evidence which was previously not disclosed or asked of the appellant's witnesses at any point in the trial. This evidence, counsel maintained, was tailored to fit the respondent's case and this directly resulted in a miscarriage of justice to the appellant as the evidence was not tested nor could it be commented upon by them.

[168] Counsel argued that the respondent was allowed to elicit evidence of a "consignment agreement" which had not existed previous to the pre-trial and disclosure process. Counsel for the appellant maintained that there was no consignment agreement for the handcuffs delivered to the respondent. There was no such agreement prior to the exchange of the goods or any such agreement subsequent to the goods being delivered.

[169] Counsel contended that there is documentary evidence that the handcuffs were delivered to the respondent by Mr Farach. Counsel asked the court to note that it was not until the email of 25 January 2010 that the respondent made any mention of the handcuffs to the appellant. Counsel submitted that this period of ten months is quite an unreasonable time to seek to reject the handcuffs. Counsel also contended that the learned judge failed to understand the significance of the collateral agreement on the invoice for the belt buckles and therefore failed to place the appropriate weight on it. Counsel submitted that if the learned judge had understood the significance of the collateral agreement, she would have realized that Mr Farach would not have entered into a consignment agreement without recording it in writing as he did with the 200 belt buckles.

Respondent's submissions

[170] Counsel for the respondent maintained that the handcuffs supplied to the respondent by the appellant were supplied on a contingency basis and these were yet to be sold by the respondent. Counsel submitted that the respondent did not order or agree to buy any handcuffs from the appellant and, therefore, did not owe the appellant any sums of money for the handcuffs. Counsel pointed out that there was no invoice for the handcuffs and the invoice that the appellant was claiming payment for the handcuff on was never tendered into evidence.

[171] Counsel submitted that the respondent had agreed to assist the appellant in taking the handcuffs on a consignment basis only, whereby it would attempt to sell the handcuffs and if and when it sold the said handcuffs, the respondent would pay the appellant the agreed sum of US$33.00 per set of handcuffs. The appellant further submitted that, to date, the respondent had been unable to sell any of the handcuffs and, therefore, does not owe the appellant any sums for the said handcuffs.

[172] Counsel submitted further, that the purchase order prepared by the respondent with a cost of US$0.00 did not show that the respondent had an intention to pay for the handcuffs. Instead, she said, it showed that there was no contract for the handcuffs to be supplied and paid for.

<u>The learned judge's treatment of the evidence on this issue</u>

[173] The evidence before the learned judge regarding the handcuffs was that, on 16 February 2009, Mr Farach emailed Mrs Hunter requesting that she enquire of Mr Dibbs

whether he would accept 50 handcuffs from an oversupply which had arrived in Jamaica for another client, which could not be cleared because there was no purchase order for the additional amount. Mr Farach quoted a price of US$33.00 per set for the handcuffs on stated payment terms. On 17 February 2009, Mr Farach again wrote to Mrs Hunter requesting confirmation about the handcuffs and provided information so that the appellant could issue a purchase order for the said handcuffs. On 18 February 2009, Mr Farach again wrote Mrs Hunter requesting that the respondent accept the additional handcuffs.

[174] Mrs Hunter testified that she spoke with Mr Dibbs who agreed to assist the appellant in having the shipment cleared. However, Mrs Hunter stated that Mr Dibbs advised that the handcuffs would be taken on a consignment basis only. Mrs Hunter also testified that she then spoke to Mr Farach and advised him of Mr Dibbs' condition for taking the handcuffs, that is, on a consignment basis only. Mr Dibbs gave evidence that he also personally spoke to Mr Farach and told him he would only accept the handcuffs on a consignment basis, to which Mr Farach agreed. Mr Dibbs' explanation for insisting on a consignment agreement was that the respondent did not generally use handcuffs and handcuffs did not form part of its security guards' standard equipment. The evidence further showed that the respondent provided a purchase order dated 26 February 2009, for the handcuffs in the amount of US$0.00.

[175] Mr Farach denied that he entered into a consignment agreement for the handcuffs and gave evidence that the appellant did not sell any goods anywhere in the world on

consignment. He agreed he spoke to Mr Dibbs or Mrs Hunter regarding the handcuffs but could not recall exactly who he had spoken to.

[176] The learned judge found that the emails from Mr Farach clearly showed that he was desperate to have the shipment of handcuffs cleared. It was this desperation, she found, which caused him to enter into the consignment agreement. She also found the zero sum on the purchase order significant, as in her view, it showed that no sums would be due and owing to the appellant unless and until the respondent sold the handcuffs. On that basis, she found that the agreement regarding the handcuffs was not a contract for the sale of the handcuffs to the respondent.

Analysis and conclusion on issue 4

[177] The parties to a contract are at liberty to specify the time at which payment is to be made by the buyer - see Benjamin's Sale of Goods, at page 418, para 9-014. The appellant claimed that the respondent owed US$700.00 for the sale of the handcuffs, having paid some monies on account. The learned judge found that the sale was on consignment and therefore nothing was due and owing. The learned judge looked at the correspondence surrounding the handcuffs and how they came to be in the custody of the respondent and concluded they were taken on consignment. The question is whether she could reasonably have come to that conclusion.

[178] There were three offers made to the respondent in writing for an outright sale of the handcuffs to them. The first was 16 February 2009 offering the handcuffs on sale with good credit terms. The second was 17 February 2009 seeking confirmation and

giving information regarding the broker used by the appellant. The third letter again asked for confirmation of the sale and informing of the process in accessing the goods and the payment terms. There is nothing in those letters which offered the goods on consignment.

[179] There is no written response from the respondent with regard to the offer by the appellant. However, the respondent did follow the instructions in the second and third letter from Mr Farach, as to how to access the goods and did access the goods by following those instructions. It is to be recalled that Mrs Hunter issued the purchase order to Karst Agencies Ltd on Mr Farach's instructions and in fact he even emailed her the information for this purpose. To my mind, implicit in that action was an acceptance of the goods on the terms offered by Mr Farach, unless the contrary is shown.

[180] The witnesses for the respondent, Mrs Hunter and Mr Dibbs, gave evidence which amounted to the fact that, faced with a written offer from Mr Farach and instructions on how to access the goods if they took up the offer, they orally told Mr Farach that they would take the goods on consignment and he orally accepted. There is no written evidence of Mr Farach accepting that offer of delivery on consignment.

[181] The handcuffs were delivered in February or March 2009 to the respondent. There is a delivery receipt from Ms Sonja Y Edwards which bears the date 27 March 2009. On 1 March 2010, Mrs Hunter wrote to Mr Farach that the accounts department had agreed to a payment schedule to clear the total amount of US$7,250.00 over five months, with a monthly payment of US$1,450.00. It is interesting to note that the balance on the

handcuffs of US$2,150.00 and on the bulletproof vests of US$5,100.00 amounts to exactly US$7,250.00. Two payments of US$1,450.00 were subsequently made by the respondent on the account as promised.

[182] The first written reference to the handcuffs after the agreement came from Mrs Hunter in January 2010. On 25 January 2010, Mrs Hunter wrote to the appellant and in that email Mrs Hunter mentioned that the respondent was not able to distribute the handcuffs as the guards were buying them cheaper elsewhere and asked they be taken back and offered to another company. This request for goods to be taken back, in my view, is not consistent with a consignment contract, where the consignee would be at liberty to return the unsold goods at any time. In that email she makes no reference to the handcuffs being taken on consignment. Mrs Hunter also indicated in evidence, that she spoke with Mr Farach on the phone and he would come into office on several occasions between March 2009 and March 2010, but at no time was any mention of the handcuffs made to him before January 2010, neither were they handed back to him.

[183] On 2 March 2010, Mr Farach wrote to the respondent to indicate that there were outstanding balances on the handcuffs of US$2,150.00 for over 10 months, bulletproof vests of US$6,375.00 for a year and metal buckles (the US$1,190.00 later abandoned) for three years. He confirmed receipt of the US$1,450.00, but suggested a monthly payment of US$1,653.00 over five months, to cover the total balance on all three products which he made out to be US$9,715.00. After the payment of US$1,450.00 was applied,

he had a new balance of US$8,265.00. On 3 March 2010 he received a curious response from Mrs Hunter which I will reproduce here. Mrs Hunter said this:

> "Dear Mr Farach:
>
> We are in receipt of the below email. As we communicated to you before we are unable to dispose of the 50 Hand Cuffs [sic]. 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."

[184] So, on 2 March 2010, having suggested a payment plan to reduce the balance owed to the appellant which, based on the figures clearly included the handcuffs, one day later, Mrs Hunter was asking for them to be taken back. Even more curious is the wording of the letter which makes no reference to a consignment agreement. In fact, a literal reading of this email would suggest that, having agreed to buy them (whether or not it was to assist clearance), the respondent could not sell them and was now asking the appellant to assist by selling them to someone else. The offer to send the goods directly to the new buyer rather than back to the alleged consignor is telling.

[185] The conduct of the parties is to be assessed as they were, that is, business people entering into a commercial contract. In my view, it defies logic that the respondent, having been written to with regard to an offer, fails to make a written response rejecting that offer but instead makes an oral agreement for a consignment agreement which was not part of the offer and which was never reduced to writing or referred to in writing anywhere. This is to be juxtaposed against the unchallenged evidence of Mr Farach that his company does not sell goods on consignment anywhere in the world. The respondent

has not said that it had ever taken anything from the appellant on consignment before. The learned judge dismissed this commercial practice by the appellant by saying he was desperate. In my view, desperation cannot explain away an established business practice, especially since Mr Farach was not a sole trader and all that would happen if the handcuffs were not bought by the respondent is that, at the worst, they would be returned to their place of origin. In such a case, the fact that Mr Farach may have wanted to avoid a commercial loss of having goods returned to their place of origin, it could not reasonably, in any commercial sense, be ascribed to desperation.

[186] Even if one accepts that Mr Farach was desperate, as the learned judge found, the conduct of the respondent is not consistent with a party to a contract on consignment. The goods were taken in March 2009, cleared by the broker on behalf of the respondent and delivered to them. This evidence gives lie to that of Mr Dibbs that Mr Farach had the handcuffs in his custody and left them at the respondent's offices because he was late for the airport. The handcuffs were partially paid for. They were kept for more than a year. In this oral contract on consignment claimed by the respondent, there was no evidence of the terms. How long were the goods to be kept before they were returned, if not sold, for instance? When did the respondent realise it could not sell the handcuffs because its guards were getting them cheaper elsewhere? Would it have taken a year to know that? These were pertinent questions the learned judge needed to resolve.

[187] The learned judge found it most telling that a purchase order was prepared by the respondent dated 26 February 2009 for the handcuffs in the amount of US$0.00. The

purchase order was issued to Karst Agencies Ltd, an agent of the appellant, by Mr Dibbs. The purchase order was simply what it said, an order for the handcuffs, it did not need to have any cost inserted on it by Mr Dibbs in the same way the orders by email from Mrs Hunter had no cost inserted in them. It is the invoice that is important in the case of cost. In this case, the invoice for the handcuffs came in March 2009 with total costs of US$2,150.00. In my view, the learned judge erred in placing too much emphasis on the zero sum in the purchase order in coming to her conclusion. As a result, she took into account an irrelevant matter and failed to take account of the more relevant fact of the invoice.

[188] Mr Farach had directed that the purchase order was to be made out to Karst Agencies Ltd for the goods to be cleared. He did not direct that the purchase order was to have US$0.00 on it. That was entirely up to the respondent who prepared the purchase order. It cannot be said, despite the claim by the respondent, that the inescapable inference to be drawn from the zero sum was that it meant that the goods were being taken on consignment. Mr Farach sent the respondent an invoice for the handcuffs which were partially paid for. This indicates an acceptance of the goods on the terms supplied by Mr Farach. At the time of the demand for payment, there were no other goods supplied to the appellant, so the only payments on the account were for the three items: handcuffs, buckles and vests. Mr Dibbs sought to say he had ordered security helmets for which Mr Farach demanded advance payments, which he made, and that this payment was misapplied by the appellant. The learned judge accepted this explanation for the

payment. For reasons which I will come to later when discussing the counter-claim, there was no credible evidence on which she could have relied to have done so.

[189] Furthermore, I agree with counsel for the appellant that the learned judge failed to give due regard to the previous conduct of Mr Farach. When Mr Farach had oversupplied the belt buckles, he made sure to draft a collateral agreement for the extra buckles on the invoice for the original order. He was entitled to have the learned judge consider that in his favour when she considered that he had a written offer for outright sale, but nowhere was there any written indication of a contract on consignment except for the oral say so of Mr Dibbs and Mrs Hunter. If there had been an oral contract for consignment arrangement, would Mr Farach have penned this onto the invoice as he did before? No consideration was given to this question in Mr Farach's favour.

[190] To my mind, the finding by the learned judge that the supply of the handcuffs was by consignment was unreasonable and is not supported by the evidence. In that regard she erred.

Issue 5- Whether there was sufficient evidence from which the learned **judge could conclude that the counterclaim had been made out (grounds (f), (g) and (h))**

Appellant's submissions

[191] Counsel Ms Cummings submitted that the learned judge erred when she held that the respondent had proved its counterclaim on a balance of probabilities, as there was no evidence led from which she could find that the counterclaim was proven. Counsel submitted that the respondent had failed to prove that it had overpaid for any item

ordered from and supplied by the appellant, and therefore failed to discharge its burden of proof on the counterclaim. She also argued that there was no proof of the respondent's averment that the payments were mistakenly made by its accounts department because they were unaware of the respondent's claim against the appellant. Counsel submitted that it was clear that the payments were not made by mistake. Counsel argued further that at no time during the trial did the respondent successfully demonstrate that an error had occurred with its payments and therefore did not meet its burden to prove its counterclaim. Counsel argued that the learned judge's findings of fact were not supported by the evidence in so far as it related to the findings that:

(i) it is not improbable that the respondent could have mistakenly paid for the items;

(ii) at the time the payment was made by the respondent, it had not discovered the defects with the belt buckles;

(iii) the appellant converted the sum of US$975.00 intended as an advance for security helmets, as payment towards the belt buckles; and that

(iv) the respondent had a running account with the appellant.

[192] Counsel submitted that the learned judge failed to recognize and reconcile the fact that the viva voce evidence of the respondent's witnesses was inconsistent with the written exchange of emails between the parties. Counsel maintained that the witnesses

for the respondent systematically tailored their evidence favourably to their case and to counter the documentary evidence which was patently different. The witnesses could not sufficiently account for the disparity in their evidence with the documentary evidence and the learned judge failed to reconcile this in coming to her findings.

[193] Counsel also submitted that the learned judge failed to realize that some of the claims and statements made by the respondent's witnesses were not pleaded in their defence and counterclaim and hence could or should not have been admissible. Counsel argued that one of the tenets of disclosure was to prevent trial by ambush. This, she said, was even more pronounced in civil cases where evidence is normally admitted in written form prior to the actual trial. Counsel also pointed to the fact that the respondent, despite it not being part of its defence and counterclaim, and despite it not being the claim of the appellant, exhibited an invoice dated 18 June 2009 from the respondent as the "real invoice". This was brought to counter the invoice dated February 2009 numbered 10545 as the invoice for the bulletproof vests for which it was sued, and despite the appellant's witness Mr Farach exhibiting this invoice to his witness statement in proof of the appellant's case. Counsel contended that the respondent, despite having ample time from the time of receipt of the particulars of claim and the receipt of the witness statements of the appellant's witnesses, to produce that invoice, failed so to do. Counsel pointed to the fact that at no time during the two occasions the matter came up in chambers for a pre-trial review on 2 May 2012 and 16 May 2012, did the respondent seek to strike out the appellant's invoice and the other documents exhibited to the witness

statement of Mr Farach, which she said, proved the debt owed to the appellant by the respondent.

Respondent's submissions

[194] Mrs Dibbs submitted that although the appellant formally withdrew his claim for the 200 extra belt buckles during his cross-examination, the respondent's counterclaim was still before the court for determination. Counsel maintained that at the time the payments claimed were made, they were made towards a running account for other items such as ties, lanyards and caps, which were purchased from the appellant. The appellant, she contended, wrongfully misapplied those payments to the invoices for the defective goods. The result, counsel said, was that the respondent paid the appellant for the belt buckles which, after delivery, were found not to be fit for purpose; it also paid the appellant for the bulletproof vests which failed to conform to the sample and were not fit for purpose. Counsel submitted that the appellant should return to the respondent the sum of US$1,785.00, which was inadvertently paid to the appellant for the non-conforming belt buckles, the US$975.00 that was applied to the bulletproof vests, as well as the US$1,450.00 applied to the handcuffs which were supplied on consignment.

Analysis and conclusion on Issue 5

(1) The learned judge's treatment of the evidence on this issue

[195] The learned judge found that the respondent paid the sum of US$1,785.00 to the appellant for 300 belt buckles pursuant to the invoice dated April 2007. Indeed, Mr Farach stated at paragraph 12 of his witness statement that the appellant did receive the sum of US$1,785.00 for payment of the 300 belt buckles. She accepted the respondent's viva

voce claim that the monies had been paid under the mistaken assumption of fact that the belt buckles met the specifications. The learned judge found that US$975.00 had also been paid. The respondent claimed this had been paid on account of security helmets supplied by the appellant which the appellant then used to offset the costs of the defective vests. US$1,450.00 was also paid which the respondent claimed was because it had a running account for other goods supplied by the appellant but was wrongfully applied by the appellant towards the costs of the handcuffs. The learned judge accepted this as true.

[196] Mr Dibbs gave evidence how the respondent came to have made payments he claimed totalled US$5,660.00 to the appellant towards these disputed invoices. Mr Dibbs relied on the respondent's emails to explain that the respondent had paid U$5,660.00 to the appellant. The respondent paid US$1,785.00 for the 300 belt buckles it said were defective. This, it said, was a mistake because the accounts department did not know the goods were defective. The learned judge accepted this explanation despite the payment being made a month after delivery and after Mr Dibbs himself had written to the appellant apologising for the late payment. The learned judge accepted that the respondent was paying on a running account without hearing any evidence as to which accounts were running, for what goods and over what period.

[197] The question is whether the respondent was entitled as a matter of fact and law, to be reimbursed for payments made on a contract for sale of goods because of mistaken payments.

(2) Was the respondent entitled to reimbursement for mistaken payments?

[198] Counsel for the respondent relied on the case of **Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd and another** [1979] 3 All ER 522 ('**Barclays Bank**'), for support of her contention that the respondent's payments made for defective goods was a mistake and should be returned. The head note of that case reads as follows:

> "(1) Where a person paid money to another under a mistake of fact which caused him to make the payment, he was prima facie entitled to recover it as money paid under a mistake of fact. His claim may however fail if (i) the payer had intended that the payee should have the money at all events (irrespective of whether the fact was true or false) or was deemed in law to have so intended; (ii) the payment had been made for good consideration, and in particular if the money had been paid to discharge, and did discharge a debt owed to the payee (or a principal on whose behalf he was authorised to receive payment) by the payer or by a third party by whom he had been authorised to discharge the debtor (iii) the payee had changed his position in good faith or was deemed in law to have done so."

[199] In **Barclays Bank**, the bank's customer owed £24,000.00 to a building company who drew a cheque to the company for that amount. The building company's bankers appointed a receiver of the building company under the terms of a mortgage debenture granted to them. The customer learned of the appointment and telephoned his bank Barclay advising them to stop the payment. Barclay immediately put it into the computer system. The cheque reached the receiver who paid it into National Westminster Bank with a direction that it be specifically cleared. Due to a mistake by an employee of Barclays Bank, who had overlooked the stop instruction, Barclays Bank paid on the cheque. Barclays Bank subsequently demanded repayment of the cheque from the receiver but he refused to repay. The court held that where the bank paid under a mistake of fact, a

cheque drawn on it by one of its customers, it was prima facie entitled to recover payment from the payee if it had acted without mandate unless the payee had changed his position in good faith or was deemed in law to have done so.

[200] In this case, the respondent pleaded that the payments on the belt buckles were made essentially because the accounts department did not know it had a claim against the appellant. It was only at the trial that the respondent claimed that the belt buckles were paid for because it was not yet aware of the defects and the rest of the monies were paid on a running account. Payment on a running account is a different fact from payment because the accounts department did not know the goods were defective. He who asserts must prove. The respondent provided no proof of this running account except for the self-serving assertions of Mr Dibbs that it existed. Mr Dibbs, who relied on this late defence, had an accounts department which made the payments. No one from accounts gave evidence of it and certainly no record of this running account was produced. In fact, even in his oral assertion, Mr Dibbs provided no details as to this running account, such as which goods, when ordered and the balances thereon.

[201] The sums of monies paid by the respondent are not in dispute. In fact, Mr Farach's witness statement refers to having received the following sums of monies:

1.	US$1,785.00
11.	US$975.00
111.	US$1,450.00
Total	**US$4,210.00**

[202] Mr Farach produced invoice number 10545 dated February 2009, totalling US$6,375.00 for 15 bulletproof vests at a costs of US$425 per vest. He later admitted that the price was overstated and was a mistake as it should have been US$415 per vest. He also produced invoice number 10538 dated 27 March 2009 for 50 handcuffs in cases at a cost of US$34.50 and US$8.50 each respectively, totalling US$2,150.00. Invoice number 10263 dated April 2007 was also produced for the 500 belt buckles at a cost of US$5.95 each in the sum of US$2,975.00. It is the balance on this latter invoice for 200 of these belt buckles that was abandoned by the appellant, the 300 belt buckles originally ordered being fully paid for at US$1,785.00. In relation to the payment of US$975.00, Mr Farach said that this was paid on the account of the bulletproof vests and the US$1,450.00 was on the account of the handcuffs. No claim was made by the appellant for any outstanding sums on any other goods.

[203] The total claim for the bulletproof vests, it will be seen later, should actually have been US$5,100.00 based on invoice 10517 for 12 bulletproof vests, although the appellant's balance was based on invoice 10545 for 15 bulletproof vests. The total for the handcuffs was US$2,150.00. US$5,100.00 and US$2,150.00 amounts to US$7,250.00. There is an email from Mrs Hunter dated 1 March 2010 in which, in reference to a payment schedule for outstanding amounts, she states:

> "Dear Mr Farach our Accounts Department has agreed to the following payment schedule.
>
> 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.

Kindly confirm receipt of each monthly payment.

Thanking you for your kind patience."

[204] Mrs Hunter's evidence is that the respondent had payment plans with its suppliers and a running account with the appellant. That email, she said, was referring to payments on the running account. Again, no evidence came from Mrs Hunter as to what goods that running account was for.

[205] The letter to Mrs Hunter from the appellant dated 2 March 2010 was clearly in response to her letter of 1 March 2010. In the appellant's letter, it references "RE: PAYMENT SCHEDULE FOR OUTSTANDING AMOUNTS/SISA Reply correct amount details & Information". It goes on to refer to balances on only three products: namely the belt buckles, the handcuffs and the bulletproof vests. It references the amounts outstanding and for how long they had been outstanding. It was clearly intended to correct the amount stated by Mrs Hunter in her email. No other product is mentioned in Mr Farach's response and no other outstanding balances are mentioned there. The account for the three subject products as at 2 March 2010 was a total of US$9,715.00. It also confirmed receipt of the US$1,450 from the respondent as per its payment schedule in Mrs Hunter's letter of 1 March 2010. It also gave a new balance of US$8,265.00. On 3 March 2010, Mrs Hunter wrote back to Mr Farach, not denying the balances or the items on the accounts, but indicating that they were unable to dispose of the handcuffs and asking that they be sold to other customers.

[206] On 5 August 2010, the account manager for the appellant wrote to the respondent lamenting the lack of payment on the account which listed the three invoices for the three products that are the subject of this claim, and noting that the last payment on the balances was US$1,450.00 made on 19 March 2010, with the result that the new balance on the account was US$6,815.00. The amount of US$975.00 was paid by wire transfer on 19 August 2010 after the appellant's account manager wrote on 13 August 2010 asking again for payment on the three accounts, payment having been promised by the respondent at the beginning of August. On 23 August 2010, the account manager wrote to Mr Dibbs acknowledging payment by wire transfer of the US$975.00, which he deducted from the balance of US$6,815.00 leaving a balance of US$5,840.00. On 5 October 2010, the respondent was reminded of the last payment of US$975.00 made in August 2010 and that the appellant was awaiting the promised monthly payments to clear the outstanding balance of US$5,840.00. All these emails were exhibits before the learned judge. Not once did the respondent reply to the accounts manager indicating that the payments were being misapplied as they were meant to be applied to other goods.

[207] The assertion by the respondent that there was a running account was accepted by the learned judge based on the fact that the appellant supplied several products to the respondent and based on Mr Farach's evidence that he gave them credit terms. She had no evidence from the respondent as to which products and over which time period this running account was in relation to. Mr Farach's evidence was that based on the relationship he developed with the respondent, he supplied goods to them on credit terms but they often paid late. The email correspondence generally supported this fact.

[208] I have made a minute examination of the documents in this case to see if there was any evidence from which the learned judge could have correctly drawn an inference that there was a running account at the time the relevant payments were made. I have found none. The only evidence of goods supplied, during the relevant period, other than the three in dispute, were caps on invoice 10460, which were fully paid for in March 2009 before the bulletproof vests were delivered. The other orders made between 2007 and 2008 were for ties, caps, belt buckles, the first shipment of bulletproof vests and lanyards. The ties were fully paid for in June 2008, the first set of bulletproof vests was fully paid for between February and April 2008 and the caps were paid for by February 2008. The last payment in 2008 was for the lanyards which were fully paid for in July 2008. The respondent's account with the appellant closed for that period with a warm letter in July 2008 from Mr Farach in which he said:

> "Good day dear Ms Hunter,
>
> We glad to inform at you that we receive your kindly update payment from your lanyards.
>
> Will be our pleasure assist to Quest for your future orders
>
> Kind regards,
>
> Omar J, Farach
>
> SISA"

[209] The year 2009 opened with the orders for the second set of bulletproof vests followed by the handcuffs. There was an order for 500 ties with new design made 25 January 2010. There has been no mention of it since. There was an order for 500 ties and 500 caps April 2010, but there is no evidence these were ever supplied. The

respondent said advance payments were made for security helmets it ordered from the appellant but there is no evidence of this. The only reference to security helmets was, as noted earlier, made in a letter dated 26 May 2010, where Mrs Hunter wrote to Mr Farach informing him that the accounts department was still working on his payments (presumably towards the three outstanding invoices), but informed that Mr Dibbs had a client who needed ballistic helmets and offered to buy those cash. There is no further mention of them in any correspondence and there is no evidence they had ever been supplied.

[210] The second set of bulletproof vests was ordered by email January 2009. Mr Farach accepted the order on the same day by email. An invoice was generated in February 2009 for the vests. Only caps were ordered around the same time. On the 16 February 2009 Mrs Hunter emailed the appellant to say the caps were received and asking for an invoice so that the respondent could pay for them. On the same day, Mr Farach wrote sending invoice 10460 and asking for payment. This invoice was not before the court and no evidence was led as to the cost of these caps and when they were paid for. This was before the handcuffs and certainly before the delivery of the vests. No demand was ever made by the appellant for outstanding balances on these caps and no proper inference could be drawn that it formed part of any running account.

[211] The appellant's claim was for goods supplied over a period of between 2007 and 2009 and an account for three products, the belt buckles in 2007 and the bulletproof vests and handcuffs in 2009. They claimed for nothing else.

[212] The evidence clearly showed that there was no running account with the appellant at the relevant time. The respondent simply failed to pay on time and constantly had to be reminded to pay. In 2008 all the orders from 2007 to 2008 for caps, ties and lanyards were paid off except for the 200 metal belt buckles. The last payment in 2008 was made in July 2008 for the lanyards. The only accounts in 2009, therefore, were the three products, the subject of this appeal and the order for caps on invoice 10460, which one has to assume was paid, since after Mrs Hunter confirmed receipt of the caps in February 2009, there is no further mention of them in any of the voluminous correspondence between the parties. All the subsequent correspondence and entreaties from the appellant were in regard to bulletproof vests, metal buckles and handcuffs. If there were other products supplied and being paid for as asserted by the respondent, the onus was on the respondent to say what these products were, for which period and the balances during that period. No such evidence was presented to the court.

[213] The learned judge said she found that email exchanges between the parties clearly demonstrated that there was a running account. She, however, did not highlight any of those emails. I have already demonstrated that the documents, including email exchanges, show that there was no running account for any product other than those in dispute, during the relevant period. The learned judge also found that, based on the appellant's errors in oversupplying goods and overcharging for them, it was not improbable that the respondent would mistakenly pay for the items. In my view, this was not an inference she could properly make from that fact alone.

[214] The learned judge also accepted Mr Dibbs' evidence that he was required to pay for the security helmets in advance which accounted for the payment of US$975.00. I have already demonstrated that the emails do not support this because the enquiry was made in May 2010 of ballistic helmets and there was no response to that enquiry up to the time payment of US$975.00 was made in August 2010. The learned judge also found that the absence of any mention of the payment for the helmets in the respondent's pleading was an honest error. This is not a finding that she could properly make, there being no evidence led as to why it was left out. She accepted that the payment of US$1,450.00 was misapplied and must be returned. She, however, failed to find what product the payment was intended to be applied to or what other product was owed for when the payment was made. She gave judgment in the sum of US$4,185.00 although the respondent had counterclaimed for US$5,660.00. In arriving at a figure less than what was counterclaimed, the learned judge found that the remainder must have been paid on the running account. This was not a finding she could properly make as there was no evidence in support of it.

[215] Furthermore, with regard to the belt buckles, in my view, Mr Dibbs' letter of 24 May 2007 ought to have put paid to any claim by the respondent that the payments for the belt buckles were by mistake, since payment on account of the belt buckles was deliberately made on an existing contract and was intended to be made on that contract. There was therefore, no mistake.

[216] Unlike the **Barclays Bank** case, the respondent had not provided any credible evidence of a mistaken payment other than that it inadvertently paid for defective belt buckles, and that it paid the sums on a running account which sums were misapplied to the defective bulletproof vests and handcuffs which were taken on consignment. In the face of the strong documentary evidence provided by the appellant, the learned judge erred when she concluded that the respondent had proven its case on the counterclaim and was thereby entitled to a refund.

[217] These grounds of appeal should, therefore, succeed.

(2) The issue of the correct invoice and the correct amount in dispute over the bulletproof vests

[218] As noted above, the appellant originally claimed for US$7,290.00. When the claim for the 200 bulletproof vests was abandoned, the claim was reduced to US$6,100.00. It was later reduced to US$5,800.00 because the court found that only 12 bulletproof vests were supplied at a cost of US$425.00, totalling US$5,100.00. This was again reduced because the learned judge also found, and Mr Farach agreed, that he had mistakenly overcharged on the vests by US$10.00 each. The correct charge for the bulletproof vests should therefore have been 12 at a cost of US$415.00 each, totalling US$4,980.00. The respondent having paid US$975.00 on that account, the balance for the bulletproof vests was US$4,005.00. The total amount of the appellant's claim should, therefore, have been US$4,705.00.00.

[219] That should have been sufficient to dispose of this aspect of the appeal. Counsel for the appellant, however, has raised the issue of whether the learned judge ought to

have accepted that only 12 bulletproof vests were delivered based on the invoices presented in the court. For my part, I do not see how the learned judge could have come to any other conclusion. In Mr Farach's witness statement, at paragraph 13, he noted that Mrs Hunter had contacted him via electronic mail requesting 15 bulletproof vests. This was the email dated 15 January 2009. At paragraph 14 of the said witness statement, Mr Farach further indicated that in response (in an email of the same date), he advised via email that the cost would be US$415.00 each.

[220] In the end, the respondent claimed that only 12 bulletproof vests were supplied, whilst Mr Farach insisted that 15 were supplied. He, however admitted that the respondent had mistakenly been overcharged for the vests by US$10.00 each. The appellant in claiming for payment for the bulletproof vests exhibited invoice numbered 10545, in the total amount of US$6,375.00 for 15 bulletproof vests. On the other hand, the respondent claimed that the correct invoice for the sale of the bulletproof vests was the one numbered 10517 which it produced. Mr Farach admitted in cross-examination that invoice 10517 was the true invoice but said it contained an error in that it stated a quantity of 12 instead of 15. The evidence presented to the learned judge by the respondent, which she accepted, was that the invoice numbered 10545 in the amount of US$6,375.00 was a pro forma invoice created by the appellant solely for the purpose of the respondent obtaining an entry permit for the 15 bulletproof vests, which permit was required in order to import the said vests. The appellant issued invoice 10517 in the amount of US$5,100.00 in June 2009 for 12 bulletproof vests which was the amount actually delivered. The respondent’s evidence is that this was the correct invoice. The

learned judge admitted the invoice numbered 10517, for 12 bulletproof vests at a cost of US$5,100.00, although it was lately produced at the trial, and accepted that it was the true invoice.

[221] Based on the position arrived at with regard to this appeal, it is not necessary to say anything on the exercise of the learned judge's discretion to admit into evidence, invoice numbered 10517 which was introduced late at the trial. In any event, there could be little prejudice to the appellant, resulting from this late introduction, since it is clear that the invoice originated from its offices based on the clear reference to it in the email dated 14 August 2009 from the appellant to Mrs Hunter. That email stated that:

> "Invoice # 10517 (USD 5,100) from the bullet proof vest delivered on June ... **TOTAL BALANCE DUE**: **USD 5,100.00)**."

The only thing that was left for the learned judge to determine, therefore, was whether 15 bulletproof vests were supplied or 12.

[222] The learned judge resolved it on a pure mathematical basis by simply dividing US$5,100.00 by 12 which equated to US$425.00, which was the cost of each of the vest mistakenly charged by the appellant. In strict mathematical terms, 15 vests at a cost of US$425.00 each equates to US$6,375.12 vests at a cost of US$425.00 each equates to US$5,100.00. Therefore, just on the basis of the 14 August 2009 email, the monies due to the appellant, based on its demand for payment for the vests would be US$5,100.00 for 12 vests at the overcharged price of US$425.00. This is entirely in keeping with invoice 10157.

[223] When consideration is given to the fact that the vests were mistakenly overpriced, the true balance due to the appellant for the vests was US$4,980.00, being 12 bulletproof vests at a cost of US$415.00. It is from this balance of US$4,980.00 that the sum of US$975.00 which was paid on the account of the bulletproof vests by the respondent should be deducted to arrive at the sum due and owing to the appellant on its claim for the vests. I would, therefore have awarded the appellant the sum of US$4,005.00 for the balance on the bulletproof vests and US$700.00 on the balance for the handcuffs. The appellant is therefore, entitled on its claim to US$4,705.00 plus interest and to judgment on the counterclaim with costs.

Conclusion

[224] The uncontroverted evidence in this case is that the appellant supplied the disputed goods to the respondent, following which the respondent paid a substantial portion of money to the appellant and made arrangements to pay the outstanding sums for the cost of the items. Up to trial the respondent still had the goods in their possession. They were never returned. In the circumstances, pursuant to the Sale of Goods Act, the only way the respondent could have escaped liability to pay is, if, pursuant to a contract for sale, the goods provided were (a) not fit for the purpose for which they were provided or were not of merchantable quality (section 15), and most importantly (b) were rejected within a reasonable time, the buyer having had a reasonable opportunity to inspect the goods (sections 34, 35 and 36).

[225] The learned judge was entitled to find, having accepted the evidence of the respondent, that there was an oral contract for sale of the belt buckles by description,

and that the belt buckles, as a matter of fact and law, failed to correspond with the description/specifications of the contract. On that basis alone, the respondent would have been entitled to reject the belt buckles.

[226] Notwithstanding this, however, she erred in finding that the belt buckles were in fact rejected by the respondent, by way of oral communication of the defects by the respondent to the appellant within one month of their delivery. Based on both the documentary and oral evidence before the court, this was not a finding she could reasonably make on the basis of credibility alone, particularly in light of the fact that the undisputed documentary evidence revealed that the respondent:

a) paid on account them within a month of delivery and fully paid for them within months thereafter;

b) had a reasonable time to inspect the goods after delivery but nevertheless paid for them without complaint;

c) kept the belt buckles in their possession for over two years, despite the undisputed evidence that the representative of the appellant's agent, Mr Farach, made numerous visits to their offices;

d) made subsequent orders for different items, and made no mention of any defects in the belt buckles in any of the numerous email communication between the respondent and the appellant subsequent, to the delivery of those items; and

e) provided no evidence of any existing credit note for the belt buckles, as asserted by it's representatives in oral evidence before the learned judge, having paid additional sums of money for subsequent purchases, in full.

[227] The undisputed evidence is that subsequent to the purchase of the belt buckles, the respondent in 2008 purchased a set of bulletproof vests from the appellant, which were supplied defective but corrected upon complaints made to the appellant and were fully paid for. No set off for defective belt buckles on any credit note was requested and none was granted. There was no documentary proof in the plethora of emails passing between the parties of any request for a set off based on any credit note for "defective" belt buckles.

[228] Similarly, in respect of the bulletproof vests ordered in 2009, although there was evidence before the court on which to find that the respondent was entitled to reject the vests, under a contract of sale by description, as they were ill-fitting due to their overly large size and, therefore, not fit for the purpose for which they were purchased, which was to adequately fit and protect the respondent's guards, there was no evidence on which the learned judge could have reasonably concluded that they were not merchantable. Even though the failure to fit the respondent's guards was enough to reject the vests, the learned judge erred in fact and law in finding that these had in fact been rejected by the respondent, within a reasonable time of inspection, as again, there was no written evidence of same in the many emails shared between the parties. The only

complaint, upon request for payment within 4 to 6 months after delivery, being that the vests had no serial numbers. This was remedied by the appellant who took them back, fixed the problem and returned them to the respondent who then accepted them. The first written evidence of a complaint about the fit of the vests came some five months later, after the respondent had paid more money to the appellant and had attempted to sell the vests. The conduct of the parties directly contradicted the oral evidence of the respondent's witnesses that they had rejected the vests orally, and as such it was unreasonable for the learned judge to accept the respondents' version of events as credible. The law in this area is very clear and once Mr Dibbs, the managing director of the respondent, admitted that he had attempted to sell the vests, that was the end of the matter, as that was uncontroverted proof that the respondent had accepted the vests and ought to have been found by the learned judge to be an action by the respondent contrary to any ownership by the appellant.

[229] In respect of the handcuffs, having regard to the documentary evidence, it was wrong for the learned judge to find that the handcuffs were taken on a consignment. The emails by Mr Farach did not point to any express or implied offer of a consignment agreement, but to the contrary, expressly indicated that the appellant would give the respondent a favourable payment plan on which to pay for the handcuffs over time. There was no written evidence of a rejection of any term in the emails, but rather, the respondent followed the instructions given to clear the handcuffs for purchase. The agent of the respondent wrote to the appellant proposing a payment plan for sums which clearly included that of the price for the handcuffs.

[230] Any advantage of the learned judge to be gained from assessing first-hand the demeanour of the witnesses could not have outweighed the clear and undisputed documentary evidence, and the logical inferences to be drawn from the conduct of the parties. In the balance, therefore, the learned judge was wrong to dismiss the appellant's claim.

[231] In respect of the counterclaim, the learned judge was wrong to accept the viva voce evidence of the witnesses for the respondent that the sums of US$1785.00 and US$975.00 paid to the appellant and applied to the invoices for the belt buckles and the vests were mistakenly paid. There was insufficient evidence before the court on which the learned judge could have accepted the bald assertions of the respondent that the moneys were paid on a running account for other goods for which the respondent owed the appellant. There was no evidence of what, if any, those goods were. Although at some earlier point before the relevant goods, the respondent had a running account with the appellant for which it received goods on credit, there was no evidence that this was so at the material time. There was simply no evidence that, at the material time, there were any other goods for which the respondent owed and that it would have intended the money to be applied to. For the learned judge to have found that it was not "improbable" that the respondent mistakenly paid for the items was unreasonable in the light of the uncontroverted documentary evidence, invoices and emails, which showed indisputably that there was no running account. The respondent's oral evidence on the issue, in the circumstances fell short of the standard of proof which the respondent was to meet.

[232] Finally, the fact that Mr Farach was not a native speaker of English did not adversely affect the learned judge's assessment of the evidence, nor was it necessary for this court to assess the learned judge's discretion to admit the impugned invoice into evidence late at trial. In any event, no prejudice would have been caused to the appellant by this late admission, the appellant itself having referenced the invoice.

[233] I, therefore, conclude that the appeal ought to succeed.

MORRISON P

ORDER

By majority (Phillips JA dissenting in part)

a) The appeal is allowed.

b) The judgment and orders of Sinclair-Haynes J, made on 26 September 2012, are set aside.

c) Judgment is entered for the appellant on the claim in the sum of US$4,705.00 with interest at the rate of 3% from the date of service.

d) Judgment is entered for the appellant on the counterclaim.

e) Costs of this appeal and costs in the court below to the appellant to be taxed if not agreed.