

**IN THE SUPREME COURT OF BERMUDA**

**APPELLATE JURISDICTION**

**2016: No. 6**

BETWEEN:

**JOSHUA BATES TRADING BERMUDA**

Appellant

-and-

**BRIAN HUXLEY**

Respondent

**JUDGMENT**

*Supply of Services Act (Implied Terms) Act 2003, Sale of Goods Act 1978 and Sale by Description*

Date of Hearing: Thursday 2<sup>nd</sup> June 2016

Date of Judgment: Monday 4<sup>th</sup> July 2016

Mr K. White, (CH&W) for the Appellant

B. Huxley, Respondent in person

1. The Appellant is a company Registered in Bermuda engaged in the business of sourcing, purchasing and supplying goods from overseas for sale to customers in Bermuda and arranging for the goods to be shipped to Bermuda and delivered to said customers.
2. The Respondent requested a quotation for the supply of five kitchen appliances and was given a quotation by the Appellant to the total value of \$22,550.94. The Respondent ordered the appliances and made the requisite down payment of \$17,598.40 toward the purchase thereof. The Appellant sourced, shipped and delivered the appliances to the Respondent on 23<sup>rd</sup> of April 2013.

3. The Respondent inspected the appliances and determined that one of the appliances, a Sub Zero refrigerator (the “Good”) did not correspond with what he had ordered. On the following day, the Respondent informed the Appellant that he was refusing to accept the Good and sent an email to that effect. The Appellant contended that the Good fit the description provided by the Respondent and refused to accept the Respondent’s position.
4. The parties entered into discussions as to how to resolve the dispute. However failing to reach resolution, the Appellant demanded that the Respondent pay the balance outstanding on the order. The Respondent refused. The Appellant thereafter put the matter in the hands of a debt collecting agency.

### **The Magistrate’s Court proceedings**

5. On the 19<sup>th</sup> December 2013 an ordinary summons was filed in and issued out of the Magistrates Court on behalf of the Appellant claiming: \$4,953.54 being the balance on the costs of the five appliances; trucking and handling charges of \$255 and the debt collection fees, interest and costs in the further sum of \$2,163.56 for a total of \$7,371.00.
6. The Respondent filed a Defence and counterclaim disputing the Appellant’s claim on the basis that the Plaintiff’s employee ordered the wrong item. The Respondent counterclaimed for \$11, 722.81 stated to be the cost of the incorrectly supplied Good.

### **The Magistrate’s decision appealed against**

7. Both the Appellant and the Respondent gave viva voce evidence in the hearing of the matter before the Wor. N. Stoneham on 20<sup>th</sup> November 2014. The findings of the Magistrate were set out in a written judgment of the 7<sup>th</sup> October 2015. On page 7 of the record the Magistrate set out her findings on the applicable law. She relied on Section 3 of the Supply of Services (Implied Terms) Act 2003 which provides inter alia, that-

*“In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill”.*

The main findings of fact set out in the decision are to be located on page 8 of the record-

*“I accept as a matter of fact the Plaintiff’s evidence that the “Defendant provided the link’... and that “if you click on the link provided by the Defendant, it would have taken you to the solid door Sub Zero”...and “that’s where the data got screwed.”*

*Further, I accept as a matter of fact, the Defendant’s evidence that – “in the quotation (he) specified Refrigerator; Sub Zero/B1-36U/Over and Under. Left hinge. “This specification was the stainless steel version- STAINLESS STEEL DOOR”.*

*Moreover, I find the Plaintiff did not dispute that-the quote provided by his employee in response to the Defendant’s email request on the 28<sup>th</sup> February, 2013 was a quote and link for a Sub Zero Glass door refrigerator and “They (the Defendant) did not catch the mistake”.*

*“I therefore find on the facts of this case that the Plaintiff in the course of its business did not carry out the service of sourcing and supplying with the necessary care and skill provided for under Section 3 of the Act”.*

*“I therefore refuse the Plaintiff’s claim in its entirety. I award the Defendant’s counterclaim in the sum of BD\$11,722.81”.*

## **The Appeal**

### Error of law

8. The principal ground of appeal argued by Mr White for the Appellant is that the Magistrate erred in law by applying the Supply of Services (Implied Terms) Act 2003. He submits that she thereby failed to apply the correct law, the Sale of Goods Act 1978. Mr White further argued that the Appellant had prayed in aid the said Sale of Goods Act as the appropriate Act for what was essentially a contract between the Appellant and the Respondent for the sale of goods by description; in particular the disputed good. Mr White argues that the contract between the parties did not pertain to the performance of a service by the Appellant for the Respondent.

9. Halsbury's Laws of England on the Sale of Goods and Supply of Services Act defines a contract for sale of Goods as: "a contract the main object of which is the transfer of the property in and the delivery of the possession of, a chattel as such to the buyer". The first question therefore on this appeal is whether there was a contract for the sale of goods. On the facts before the Magistrate the offer was the quotation provided by the Appellant. The acceptance was the Respondent's acceptance of the quotation which was subsequently followed by payment of the specified deposit which amounted to the passing of consideration and hence the creation of a binding contract between the parties for the sale of the goods including the Good in issue.
10. In my judgment the Learned Magistrate did not adequately address the law and thereby fell into error. She made reference to and relied on Section 3 of the Supply of Services (Implied Terms) Act 2003, without first referring the parties to that Act in the hearing. If that were not fatal, then failing that, she did not subsequently give reasons in her written ruling for finding the Supply of Services (Implied Terms) Act to be the applicable Act.
11. Despite being referred to the Sale of Goods Act by the Plaintiff/Appellant, the learned Magistrate did not include in her ruling any reason for rejecting that Act or for preferring the Supply of Services (Implied Terms) Act. Her ruling should at the minimum have done so.
12. The Magistrate's interpretation of the transaction between the parties as a contract for the supply of a service- to wit- a contract for a quotation- fell woefully short of a reasonable assessment of the evidence and the concomitant applicable law governing the matter. For these shortcomings she fell into an error of law.

#### Error of fact

13. The Notice of appeal raises two other substantial issues. The first is that the Learned Magistrate erred in fact in granting judgment in favour of the Respondent and awarding the counterclaim in the sum of \$11,722.81. That the cumulative effect of the

judgment unfairly compensates the Respondent allowing him to keep the Good while he pays nothing for it while at the same time not paying the balance on the invoice for all the goods at the sum of \$5,207.54

14. These grounds concern what the Appellant argues are errors of fact made by the Magistrate. Mr White for the Appellant argues, that in particular, in her findings of fact the learned Magistrate found that in the request for a quotation the specification for the refrigerator was: “Sub Zero/B1-36U/over and Under. Left hinge. This specification was the stainless steel version- STAINLESS STEEL DOOR”.
15. The Appellant and Respondent both agree that the email request for a quotation states “Refrigerator: Sub Zero: B1-36U/Over and Under” but that it provides a hyperlink with descriptive code as follows: <http://www.subzero-wolf.com/builtin-refrigerators/B136UG-overand-under>. The parties agree that there is no mention of a left hinge, and no mention that this description or model number refers to “a stainless steel door”.
16. For his part, in his submissions in the Appeal the Respondent acknowledged that he supplied the hyperlink to the Appellant’s company as descriptive of the refrigerator that he wished the Appellant to source and supply. He admitted that there was an error on the Wolf (Sub Zero) website which provided an incorrect model number. Despite this, the Magistrate found that the parties agreed that delivery was made of a refrigerator that did not fit the description in the above referred link.
17. The learned Magistrate’s finding was clearly contrary to the evidence and contrary to the documents supplied by the Defendant/Respondent. In point of fact Mr Huxley the Defendant at the trial provided the Magistrate with an email which had passed between the parties wherein he stated the he realised that the error made was due to the link on the web site which contained the incorrect model number. On the evidence of the parties in the trial and their submissions in this appeal delivery was made of the model associated with the (erroneous) link.

18. The Learned Magistrate therefore made findings of fact that were contrary to the evidence of both parties and contrary to the documentary evidence submitted by the Defendant Mr Huxley. This notwithstanding that Mr Huxley argued in trial and maintains in this Appeal that it was the Appellant's fault for delivering the wrong refrigerator for not discovering the difference between the specifics of his email (request for a quote) model number and that in the hyper link. But that is not the point here. Here the Magistrate's decisions against the preponderance of the evidence cannot stand as she fell into egregious error of fact.

### The Magistrates' Award

19. The Magistrate's award cannot stand in the circumstances of her errors of law and fact. Further the award cannot stand in principle. The combined effect of the Magistrate's award is that the Respondent was awarded \$11,722.81 representing his counterclaim for the full value of the Good supplied including landed costs, ocean freight and duty) notwithstanding that he had not paid the full price. Although silent on the point, the ruling does not appear to require the Respondent to pay the balance of the purchase price for the uncontested goods supplied to him under the contract.
20. Further the Magistrate's ruling was silent on the additional landed costs of the Good including Us freight, insurance, service fee, documentation, Duty and customs, notwithstanding that all had been presented in evidence as having been costs incurred by the Appellant. The foregoing brought the cost of the Good to \$13,483.20.
21. Nowhere in her ruling has the Magistrate explained how she came to determine her award. She has ordered the Appellant to pay the sum of the counterclaim to the Respondent, yet she has failed to determine what should happen to the contested Good. One can appreciate why the Appellant argues that the Respondent has been unjustly enriched by the award.
22. By the time this matter had come on to be determined, the Respondent, contrary to his earlier rejection of the Good, had built a kitchen cabinet to accommodate the Good and had been using the Good for his own purposes and benefit. The Magistrate did not

take the use of the Good into consideration in making her assessment in so far as can be determined.

23. The Magistrate's award can only properly be regarded as wrong in principle. She has fallen into error for the reasons stated above; for lacking reason, clarity and otherwise for being contrary to the applicable law, that being the Sale of Goods Act. In all the circumstances the judgment and award cannot stand; and are hereby set aside.

Where to from here?

24. It would be contrary to the interest of the parties and the interest of justice for the matter to be sent back to the Magistrates' court for rehearing. There is sufficient evidence for this court to make a determination in this matter. It is clear on the evidence that the error in providing the details of the description of the Good originated with information provided by the Respondent. He admitted that both at trial and in this Appeal. He admitted that where he saw "G" or "Glass" referred to in the description or model number code for the Good he assumed that it meant glass shelf. He clearly made that assumption at his peril.
25. What is more the Respondent admitted that he did not review or give a detailed review of the quotation because he relied on his earlier experience with the Appellant. Again this can only be seen to be his own undoing because he could have discovered the disparity in the model number he provided and the related error on the link he himself provided to the Appellant. He asserts that the error was made by the Appellant's inexperienced employee, but his evidence puts paid to that assertion; it was his own lack of diligence in scrutinizing both the above referred link and the final quotation that permitted the error to affect the description of the Good eventually delivered.
26. Pursuant to section 36 of the Sale of Goods Act 1978 an unsatisfied customer has the right to refuse to accept an unsuitable item and need only communicate that to the supplier. The customer has no obligation to return the item (and has the right therefore to leave it for collection). However section 35 of the Act provides that using the

disputed item is a far cry from a rejection of the item. In the circumstances use of the item is inconsistent with a rejection of the item and the ownership of the supplier.

27. Once the Respondent informed the Appellant that the Good was not to his order the Respondent had the right to refuse it; the matter would have had to be resolved ultimately. However the Respondent thereafter had no right to use the Good.
28. The Respondent argues that if the Good is ordered to be returned to the Appellant, then the Appellant ought to bear the cost of deconstructing the cabinet and should pay for any damage that may be occasioned including to his kitchen floor. I reject this out of hand as contrary to my above findings.
29. In light of the application of the Sale of Goods Act and in light of the preponderance of the evidence, the Magistrate's judgment and award are set aside and judgment is hereby entered for the Appellant in the original sum claimed of \$7,371.10 plus interest and unpaid costs. As for the cost of this Appeal, the Appellant has asked for indemnity costs but I believe that the appropriate order is that the Appellant shall have his costs on the usual basis.

Dated this                      day of                      2016

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Charles-Etta Simmons  
Puisne Judge