



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2017 No: 201

**BETWEEN:**

**SMOOTH AND EASY LIMITED**

Plaintiff

**And**

**ROGER ROYDEN RICHARDSON**

Defendant

## JUDGMENT

*Trial - Contract Law- Misrepresentation of Fact – Applicable legal principles when the Misstatement is incorporated as a Term of the Contract - Breach of Contract - Rescission of Contract - Defendant’s Claim for a Set-Off – Causation of Loss - Remoteness of Damage – Mitigation of Loss -No duty to accept repudiation of contract and sue for damages as discharge of duty to mitigate loss - Statutory Limitation Period- Whether Damages should be awarded where loss is unsupported documentary evidence- Judgment Interest and the Statutory Rate*

**Date of Hearing:**

Tuesday 20 August 2019 and Wednesday 21 August 2019

**Date of Decision:**

Monday 23 September 2019

**Plaintiff:**

Mr. Edward Bailey (Edward P. Bailey & Associates)

**Defendant:**

In Person (Assisted by his daughter, Mrs. Idris Smith)

JUDGMENT of Shade Subair Williams J

### Introduction:

1. The Plaintiff Company (also referred to as “the Plaintiff”) filed a Specially Indorsed Writ of Summons on 30 May 2017 (“the Writ”) claiming damages in the sum of \$136,329.35 arising out of a breach of a contract for the sale of the Defendant’s former business, Triple R Paint Supply (“Triple R”) made on 31 March 2010 (“the Agreement”). The Plaintiff’s case is that

the Defendant misrepresented a material fact in causing the Plaintiff to believe that the Defendant was conveying exclusive distribution rights of a quality paint brand (“exclusive BM rights”) supplied by Benjamin Moore & Co (“Benjamin Moore”). In fact, the Defendant never possessed any exclusive distribution rights with Benjamin Moore and was thus incapable of transferring any such entitlement to the Plaintiff.

2. The principal issues for this Court’s resolve on liability were:
  - (i) Whether the Defendant misstated that he was passing on the exclusive distribution BM rights to the Plaintiff as consideration under the Agreement;
  - (ii) If so, whether this gave rise to a cause of action for unlawful misrepresentation or for a pure breach of contract action; and
  - (iii) Whether the Plaintiff is statute barred from bringing this claim under the Limitation Act 1980, in any event.
3. On the subject of quantum, the main disputed issues were:
  - (i) Whether the Plaintiff should recover damages for losses which were unsupported by documentary proof;
  - (ii) Whether the Plaintiff discharged its duty to mitigate its loss; and
  - (iii) Whether the Court should find that a sum of the Plaintiff’s loss should be set off against its claim for damages on the basis that the Plaintiff gained from the consideration he retained.
4. By agreement between the parties, the Defendant (an elderly man) was assisted throughout the trial by his daughter, Mrs. Idris Smith, in presenting the case for the Defence. Mrs. Smith was also a witness who gave oral evidence in support of her father.
5. Having heard the evidence called by the Plaintiff and the Defendant together with closing speeches from both sides, I reserved judgment which I now provide based on the below reasoning.

## **Summary of the Evidence and Pleadings**

### **Liability**

6. The Plaintiff’s case comprised of the oral evidence of Mr. Gary Wolffe, who is the sole director and shareholder of the Plaintiff Company. Mr. Wolffe told the Court that the Defendant, who he first met in 2009, approached him at his place of business, Smooth & Easy Limited (“Smooth & Easy”) and recounted that he had exclusive BM rights.
7. The Plaintiff said that Mr. Richardson invited him to purchase Triple R together with the exclusive BM rights. This led to further discussions and negotiations between their respective attorneys in the lead-up to the making of the Agreement.

8. The Defendant, on the other hand, gave oral evidence denying that he ever initiated the discussions for the sale of his business and said that it was the Plaintiff who visited the Triple R store. Mr. Richardson told the Court that the Plaintiff on that occasion came upon his wife who was managing the Triple R business at the time since he, Mr. Richardson, had already started his retirement. Mr. Richardson said that Mr. Wolffe subsequently came to his residence and offered to purchase Triple R. Having agreed to sell his business to the Plaintiff, Mr. Richardson stated that he instructed his attorney to draft the Agreement.
9. Most pertinently, the Defendant denied having ever uttered the word 'exclusive' to Mr. Wolffe in describing his contractual relationship with Benjamin Moore for the supply its products. It was also apparent through Mrs. Smith's cross-examination of Mr. Wolffe that the Defence contends that it was not reasonable for Mr. Wolffe to have expected to receive exclusive BM rights under the Agreement.
10. During the cross examination of Mr. Wolffe, Mrs. Smith produced an 18 December 2009 unsigned agreement letter between the parties on Smooth & Easy letterhead:

***Agreement between Mr. Richardson DBA as Triple R Painting and Mr. Gary Wolffe DBA Smooth & Easy Ltd***

*Ref: Hamilton Lease Letter of Intent*

*Lease*

*It is agreed that you will lease your building and the rear parking lot (premises) to Smooth & Easy Floor Refinishing (Smooth & Easy) for a 5-year lease, with the option to renew for another five years, for a monthly amount of \$3000.00.....*

.....

*It is agreed that you have sold your current paint mixing machinery, existing inventory, existing fixed assets inside the Triple R paint store, and the Benjamin Moore Paint Distributorship to Smooth & Easy for an all-inclusive purchase price of \$50,000.00.*

11. Mrs. Smith highlighted the following passage to suggest that the Plaintiff knew that Benjamin Moore would have to be a party to the Agreement in order to transfer the benefit of any distributorship agreement:

*It is also agreed that Smooth & Easy will take over the exclusive rights and distributorship of Benjamin Moore product line that your business currently owns which will be handled by formal and legal agreement between Mr. Richardson, Benjamin Moore, and Smooth & Easy.*

12. Mr. Wolffe, however, insisted that this letter of agreement was made during the early stage of negotiations and that the common intention was always to enter into a contract *about* Benjamin Moore, *not with* Benjamin Moore. He further explained that it was his view that the structure of legal agreements would be two-part: One of the agreements would involve Mr. Richardson contracting with Benjamin Moore directly by an agreement letter confirming Mr. Richardson would transfer the exclusive BM rights to the Plaintiff. The second agreement contemplated by Mr. Wolffe was between Smooth & Easy Ltd and Mr. Richardson reflecting the terms of the Agreement.

13. The Defendant also produced a 20 December 2009 cover letter to the 18 December 2009 unsigned agreement letter which stated at the final paragraph:

*I have attached a basic agreement which you may wish to use for the lease agreement, and sale and purchase agreement as mentioned above, for this purpose for now; however, we will need to have this agreement processed between our two lawyers in order to make it official.*

**The Making of the Agreement:**

14. It is an agreed fact between the parties that at the time of the making of the Agreement, the Plaintiff was represented by attorney Ms. Christine Hoskins and the Defendant was represented by attorney Mr. Myron Simmons. However, the parties' evidence diverged in their accounts on how the Agreement came to be made.
15. The Plaintiff says that the Agreement, made on 31 March 2010, was negotiated, drafted and finalized by the parties' attorneys. Mr. Wolffe produced a signed and dated copy of the Agreement which printed on legal size paper and drafted in a manner consistent with a document prepared by a legally qualified professional person. Mr. Wolffe also produced a certified resolution in favour of the \$50,000 term loan facility in the Plaintiff's name which was drafted and witnessed by Ms. Hoskins.
16. In the Defence pleadings, however, Mr. Richardson alleged that Mr. Wolffe personally drafted the Agreement and brought the draft Agreement to him at his home for his signature to be made. Mr. Richardson averred that Mr. Wolffe was rushed to secure his signature to the Agreement as he, Mr. Wolffe, was hurriedly on his way to the airport. Mr. Richardson claimed that he consequently signed the Agreement without having reviewed it. Mr. Richardson did not confirm this account during his very brief evidence in chief on the stand. However, when cross-examined, he repeated that he signed the Agreement while he was at his residence and professed that only he and Mr. Wolffe were present at his home when he signed the Agreement. Mr. Richardson said that he handed the signed Agreement to Mr. Wolffe but did not recall if Mr. Wolffe signed the document at that point. According to Mr. Richardson, he later retrieved the Agreement from his attorney's office and read and understood the Agreement. The Plaintiff underscored that Mr. Richardson stated during his evidence that everything stated in the Agreement was made in accordance with his instruction to his attorney of many years of practising experience.
17. During evidence in chief, Mr. Bailey invited Mr. Wolffe to comment on Mr. Richardson's version on how the Agreement came to be finalized. In response, Mr. Wolffe, insisted that the Agreement was drafted by the attorneys. Maintaining his position, Mr. Wolffe insisted that it was 'a total lie' to say that he went to Mr. Richardson's house and that it was the attorneys who dealt with the drafting and execution of the Agreement.
18. It was not missed on this Court that Mrs. Smith never put Mr. Richardson's version of the making of the Agreement to Mr. Wolffe. Notably, Mrs. Smith asked Mr. Wolffe about the signing of the Agreement, prefacing one of her questions; "...you stated that both lawyers had drafted it (the Agreement)". Also during cross examination, Mrs. Smith asked Mr. Wolffe about how the Agreement came to be signed and closed. Mr. Wolffe told the Court;

*‘as far as I know the contract first went to Mr. Richardson and then it came back to Ms. Hoskins- and then a copy was sent back to Mr. Richardson- between the two lawyers’.* The furthest extent of Mrs. Smith’s challenge to Mr. Wolffe’s version of how the Agreement was closed was made by placing a partially signed unannotated copy of the Agreement before Mr. Wolffe. She also spoke about earlier drafts of the Agreement which differed from the final draft.

19. Bringing an end to her father’s version of how he came to sign the Agreement, Mrs. Smith volunteered on the witness stand that she only recently remembered that she witnessed her father’s signature to the Agreement which was made at his residence. When cross examined by Mr. Bailey, she conceded that it was an assumption on her part that she was at her father’s house when she witnessed the Agreement. She explained that she had no specific recollection of signing the Agreement but was certain that she recognized the witness signature to be her own signature.

**The content and terms of the Agreement**

20. The Agreement document was only 2 pages in length.

21. Under the ‘Definitions’ section of the Contract the following terms, *inter alia*, are defined:

*‘Business’ means the business carried on by the Seller under the name “Triple R Paint Supply”*

*‘Goodwill’ means the goodwill of the Business including the exclusive right for the Purchaser to use all the trade names now or previously used by the Seller and to represent itself as carrying on the Business in succession to the Seller*

*‘Sale Assets’ means all the Seller’s assets used by it in connection with the Business at the Completion Date.*

*‘Price’ means Fifty thousand Bermuda dollars (BD\$50,000.00)*

*‘Property’ All that part of 5 Elliott Street West in the City of Hamilton, Pembroke HM09 currently occupied by the Business*

22. The pertinent parts of the Contract (in typed text) state:

*The Seller shall sell with full title guarantee and free from encumbrances and the Purchaser shall buy the Business on the Completion Date including assets set out below used by the Seller in connection with it.*

*The Price shall be:*

- *for the goodwill; and*
- *for all existing furniture, fixtures, equipment and shop/workshop machinery as is; and*
- *for the benefit of such contracts for the exclusive supply of product, including, inter alia, Benjamin Moore paint in Bermuda*

- *for the stock-in-trade*

23. In blue ink handwritten annotation, by way of an insert, the words ‘*Bonsal, Tramco*’ are made to appear immediately after the typed text ‘*Benjamin Moore paint*’. Also in blue ink handwritten annotation made on the left hand column space in the same area appears three separate initial signatures. The first signed initials are somewhat illegible and unknown to the parties, but consistent in appearance to the ‘CMH’. The second set of signed initials more clearly appears to be “G.C.W.” and the third and final initials plainly read “RRR”. It is noteworthy that Mr. Richardson accepted that the “RRR” looked like his handwriting.
24. Mr. Richardson told the Court that he did not know who inserted the references ‘*Bonsal, Tramco*’ on the Agreement document and that he did not instruct anyone to include these names in the Agreement. Mr. Wolffe told the Court that he had never before heard of ‘*Bonsal, Tramco*’ before signing the Agreement. This was unchallenged evidence. Mr. Richardson, however, knew these brands well and explained that these were the names of two important and lucrative brand-name paint suppliers who had both been his clients.
25. Moving on to the remaining terms of the Agreement, the Defendant agreed to rent the ‘Property’ to the Plaintiff for a period of 3 years from April 2010 at the monthly rate of \$3000.
26. The final noteworthy term of the Agreement states:

*Upon Completion the Seller shall:*

- *use all reasonable endeavours to obtain for the Purchaser the benefit of all contracts relating to the Business and the Assets to which the Vendor is a party (including, inter alia, the Seller’s agreement with Benjamin Moore to be the exclusive supplier of Benjamin Moore products in Bermuda) and to procure their assignment or novation in favour of the Purchaser. Until such assignment or novation the parties will arrange for a transfer of the benefit (subject to the burden) of each such contract to the Purchaser insofar as is possible without the commition (sic) of a breach of any terms thereof and the Seller shall act under the direction of the Purchaser and as its agent in all matters relating to the same; and*
- *send to the Seller’s customers and suppliers in connection with the Business a circular in a form approved by the Purchaser announcing the transfer of the goodwill and Business to the Purchaser. A partial list of customers having been supplied to the Purchaser.*

27. At the close of the Contract there is in text writing a ‘signed, sealed and delivered’ insert ‘by the above named Roger Roydon Richardson Sr.’ followed by the Defendant’s signature in the style of ‘RRRichardson’. The signature is witnessed by Mrs. Smith. Mr. Wolffe’s signature is also legibly made under the common seal of Smooth & Easy.

***The Alleged Misrepresentation on the Benjamin Moore Paint Supply Term:***

28. When pressed under cross examination, Mr. Wolffe stated that he did some research on the Defendant’s Triple R business. He said that in addition to asking Mr. Richardson and others

about the state and performance of Triple R, he also did an online search on the business where he saw some of its work product on the CedarBridge Academy contract.

29. Throughout the evidence and pleadings, the Plaintiff insisted that the only purpose for the \$50,000 payment was to acquire exclusive BM rights from the Defendant. Mr. Wolffe swore that he would have never entered the Agreement for the transfer of the business and the other brand names of paint for distribution without the exclusive BM rights. He said that it came to him as a big shock to learn that Mr. Richardson never had the exclusive BM rights because he trusted and believed his assurances.
30. Under cross-examination, Mr. Wolffe accepted that he was unaware of what the (true) value was for a distributorship agreement with Benjamin Moore, Bonsal, and Tramco. When asked about his knowledge of the process for obtaining a contract for the supply of Benjamin Moore paint, Mr. Wolffe stated that he later became aware of the requirements via the online application form provided by the US paint company. He stood firm that at the time of the making of the Agreement, he was wholly reliant on the statements made by Mr. Richardson.
31. Mrs. Smith put a document to Mr. Wolffe suggesting that Benjamin Moore would require an initial \$60,000 payment coupled with a proven credit history of good standing in exchange for a distributorship agreement. In reply, Mr. Wolffe stated that he was not aware of any \$60,000 payment requirement nor was he aware of any other payment sum as a condition of obtaining a distributorship deal. Notwithstanding, it was undisputed evidence that Mr. Wolffe later secured a distributorship agreement with Benjamin Moore approximately one year after the Agreement was made. It was also common ground between the parties that Mr. Richardson was the only distributor of the Benjamin Moore line at the time of the Agreement and up until the point that Rowe Spurling Paint Company Ltd (“Rowe Spurling”) became a distributor.

**When the Plaintiff first knew that the Defendant had no exclusive rights to transfer**

32. The Defendant relied on a 13 May 2011 email correspondence to the Plaintiff’s attorney from the Assistant General Counsel for Benjamin Moore, Mr. Marc L. Zoldessy, in support of the his submission that the Plaintiff is time barred under the Limitation Act 1980 from prosecuting this action:

*Ms. Hoskins: I am in receipt of an email that you sent to William Diaz of Benjamin Moore & Co. in regard to your client Triple R. Please be advised that we are unaware of any exclusivity agreement with your client. That would be contrary to the way Benjamin Moore has transacted business since its inception in 1883. In the event you have any such agreement, please forward it to my attention. I would also request that you direct all future correspondence directly to my attention. Thank you.*

*Marc L. Zoldessy  
Assistant General Counsel  
Benjamin Moore & Co.*

33. Ms. Hoskins replied days later on 17 May 2011:

*Mr. Zoldessy: Thank you for your email. When my client purchased Triple R. the Vendor signed an agreement stating that he had the exclusive right to sell Benjamin Moore paint in Bermuda. My client paid a significant amount of money for that right. We will now take the issue up with the Vendor. In the interim I would be grateful if you could let me know if you are planning to sign with another paint company in Bermuda, I know my client is more than willing to sell your paint onto Rowe Spurling at landed price if they truly (sic) want your product.*

*Kind regards,  
Christine*

34. On the same day, 17 May 2011, Mr. Zoldessy wrote:

*Christine: Let me reiterate that Benjamin Moore does not have exclusivity agreements with its retailers. If by chance, your client has a document which purports to contain exclusivity language, please forward same to my attention. As a manufacturer we reserve the right in our sole discretion to sell or not to sell our products to our choice of retailers. I look forward to hearing back from you.*

*Regards,  
Marc L. Zoldessy*

35. A few days thereafter, by letter dated 25 May 2011, Ms. Hoskins wrote the following to Mr. Richardson:

*Dear Mr. Richardson:*

*Re: Benjamin Moore Paint*

*Please be advised that it has recently come to Mr. Wolffe's attention that Rowe Spurling Paint Company are in communications with representatives of Benjamin Moore with a view to selling Benjamin Moore Paint in Bermuda.*

*As you are aware, Smooth and Easy Limited purchased Triple R from you on the basis of their continuing to have the exclusive right to sell Benjamin Moore paint in Bermuda. The purpose of this communication is to provide you with notice that in the event that Rowe Spurling are successful in their endeavours, Smooth and Easy Limited will be seeking the return of the \$50,000 paid to you for that right.*

*I have communicated with Benjamin Moore concerning this matter. If you have any documentation proving your right to exclusively sell Benjamin Moore paint in Bermuda over the years, I would be grateful if you would forward copies to me as soon as possible, so that I can forward to the Benjamin Moore's in house counsel. Alternatively, as I understand you have been selling Benjamin Moor paint exclusively for the past 20+ years, it may be that you had a verbal communication. If so, would you please confirm your willingness to swear an affidavit to that effect.*

*Please feel free to contact either Mr. Wolffe or myself at your earliest convenience.*



*Christine M. Hoskins*

36. Mr. Richardson replied to this letter five days later on 30 May 2011 as follows:

*Gary,*

*It should not be of any surprise to you that Benjamin Moore is in talks with Rowe Spurling Paint Co. While we were in conversation for you to purchase the business they were trying to get Pembroke Paint Co. to take on their line. I guess you were relived (sic) when John Swiff turned them down.*

*Over the years Benjamin Moore would compare Bermuda with Bahamas and the amount of Material they purchase, but what they didn't take into account is that the material used in Bahamas is a much cheaper grade.*

*I would also like to bring to your attention is the amount of materials you are ordering from Benjamin Moore, before you started ordering I explained to you how we ordered materials from Benjamin Moore, nothing less than 10 of each base in 5 gallon pails and 12 single gallons which is 3 cases. Based on your last order dated May 17, 2011 it(')s no surprise they are looking for a second vendor.*

*When you and I talked about all of the products that Triple R carried I made you aware of Benjamin Moore and how they conduct their business. You would need to get your lawyer to write to Benjamin Moore and see if they would let you keep all of their product that Triple R Paint Vo have been selling for the past 30 years. It would be very unfair of Benjamin Moore to pass all of my hard work to one of my previous competitors; we were not successful with the contractors but did have the homeowners. See if your lawyer can negotiate to continue the relationship the Triple R had with Benjamin Moore. I don't know what you said to your lawyer but you and I agreed not to rush Benjamin Moore that is why your orders are still under Triple R Painting Co. Ltd.*

*I was upfront with you and told you all you needed to know about Benjamin Moore.*

*Sincerely,  
RRRichardson*

37. No further written correspondence was sent from Mr. Richardson.

38. Having received Mr. Richardson's 30 May letter, Mr. Wolffe said that he further instructed his lawyer who then emailed Mr. William Diaz, a Benjamin Moore representative who previously visited Mr. Wolffe in Bermuda. Ms. Hoskins then wrote:

*Dear Mr. Diaz:*

*I am Mr. Wolffe's corporate attorney. I would be grateful if you please confirm in writing whether or not Benjamin (sic) Moore is planning on breaking their longstanding agreement with Mr. Richardson of Triple R. The reason for this is that my client purchased Triple R solely to secure this product on an exclusive basis. He has expended considerable sums of*

money, a difficult feat in the current economic climate, to promote your product. He is finally beginning to reap the rewards of this expenditure. The size of Bermuda (24 square miles) is such that another distributor on the Island will substantially negatively impact my client's position. In all dealings with your company there has never been any indication that he was not going to be treated on the same basis as Mr. Richardson. It came as quite a shock to him to hear that you were considering selling your product to Rowe Spurling yesterday.

Could you please advise as soon as possible.

Yours sincerely,  
Christine M. Hoskins  
Watfords

39. Pivotaly, Mr. Wolffe told the Court that the first occasion on which he first received confirmation that there was another Bermuda supplier of the Benjamin Moore paint was on 13 June 2011. He shared the following email to his attorney with the Court:

*Hi Christine  
I have just talked to Benjamin Moore Customer Service (sic) Dept and i (sic) asked if Rowe Spurling was set up as a Distributer they said Yes  
what is our next step.  
thanks Gary.*

40. Mr. Wolffe says that the 13 June 2011 date was the first occasion marking his knowledge that Triple R misrepresented that it had exclusive BM rights. All other lead-up exchanges, he says, fed his suspicion but did not amount to confirmation.

## **Quantum**

41. In the Plaintiff's Statement of Claim, damages are claimed as follows:

*6. The Plaintiff asks that the court grant the sum of Ninety-six Thousand Two Hundred and Twenty Seven Dollars and Fifty-two Cents (BM\$96,227.52) representing:*

<i>i.</i>	<i>the initial costs of the business</i>	<i>BM\$50,000.00</i>
<i>ii.</i>	<i>rent and renovations to the Defendant's property</i>	<i>BM\$31,900.00</i>
<i>iii.</i>	<i>marketing costs of Benjamin Moore paint</i>	<i>BM\$11,052.52</i>
<i>iv.</i>	<i>professional fees</i>	<i>BM\$ 3,275.00</i>
	<i>TOTAL</i>	<i>BM\$96,227.52</i>

	<u><i>Particulars</i></u>	
<i>(1)</i>	<i>The sum due and owing to the Plaintiff;</i>	<i>BM\$96,227.52</i>
<i>(2)</i>	<i>Statutory interest rate of seven (7%) per cent</i>	<i>BM\$40,101.83</i>

*Total to date: BM\$136,329.35*

## **Evidence on the Initial Costs of the Business**

42. There was no real dispute between the parties that the Plaintiff paid the Defendant \$50,000 as consideration for the Agreement and that the \$50,000 loan secured by the Plaintiff for the price of the Agreement was repaid in full.
43. Mr. Wolffe stated in his evidence that the Triple R business had been dormant since 2009. He spoke of an occasion in or around September 2009 when he visited the business and found Mr. Richardson's wife present in the store which he described to be 'basically empty'. He said that there were no products on display in the store.
44. Mr. Wolffe referred to his witness statement in describing the state of Triple R business after the making of the Agreement. At paragraph 3 of his statement he said:

*"Triple-R had been dormant for the previous few years. As a result the premises needed substantial upgrades, painting inside and out, replacement of termite infested items such as the counter, and rusty shelving etc., purchase of new cash register, new peg boards, new lighting and security system, new window security gates, deep cleaning of floor with scrubber and sanitize and replacement of items in bathroom. There was paint on site that had to be disposed of as it had gone hard. This had to be disposed of through Works & Engineering hazardous waste programme. We had to purchase a new shaker as the old paint machinery, was very old and did not shake properly. There were no "valuable" assets to speak of. The only stock-in-trade transferred that was sold was 12 old drums of base mix sold @ \$100 each."*

45. In his elaboration on the stand, Mr. Wolffe said that the distributor-pricing value of the twelve five-gallon drums were \$110.30 each. Mr. Wolffe listed other items which had been left behind by Mr. Richardson and described those items to be in a state of disrepair or of minimal to no value. He challenged Mr. Richardson's description of the premises at handover and took the bedrock position that he did not profit from the conveyance of the Triple-R business. In his words, he 'just maintained'.
46. Mr. Wolffe was challenged at lengths during cross-examination as to the value and recent activity of the Defendant's business at the time of conveyance. To counter his description of desolate premises, Mrs. Idris Smith referred Mr. Wolffe to the total reported poundage for September 2009 Triple R stock, weighing 1827lbs. Mr. Wolffe, however, maintained that when he visited the shop, he did not see any of the paint items reported on the stock order sheet.
47. At paragraphs 8 and 9 of the Defence pleading, the Defendant asserts an entitlement to a set off as follows:
- "Without prejudice to the Defence, the Plaintiff has failed to account in the Statement of Claim for any profit or benefit gained from the purchase of Triple R which include, inter alia, for the following benefits:*
- a. Profits earned as a result of supply arrangements with Bonsal and Tremco brands; and*
  - b. the value of the Goodwill of Triple R at the time of purchase.*

*Without prejudice to the various defences set out herein, including that the limitation period has lapsed, the value of an profits earned as a result of the assets traversed in paragraph 8 above would be set-off against any claim against the Defendant.”*

48. At paragraph 7 of Mr. Wolffe’s witness statement he said:

*“Unfortunately, the Hamilton store was unable to hold it’s (sic) own financially. Triple-R business had been pretty much dormant. The only paint that was being ordered by Triple-R was for specific projects. As outlined above there were very few old customers requiring Benjamin Moore paint. After spending a significant sum on fixing the building and marketing there was not enough business to cover basic operating expenses. The first six months I funded from the Warwick store. However, as it became apparent that the Hamilton store could not support itself Mr. Richardson gave us notice (to quit the premises). Everything was moved to Warwick. Very shortly after that we discovered that Rowe Spurling were (sic) going to be granted a distributorship. There is no question that had I known that Triple-R did not have an exclusive distributorship agreement I would never have entered into the contract with him.”*

### **Rent and Renovations**

49. It was also uncontentious evidence that the Plaintiff spent a total of \$27,000 in rent for the Defendant’s premises after the Agreement was executed.

50. The Plaintiff also claimed to have suffered loss in the sum of \$4,900.00 for metal security gates and the installation of a security system constituting its claim for renovations. The Defendant, however, countered that Mr. Wolffe retrieved these items and should not receive a double benefit by an award of damages. No other evidence of renovations or upgrade to the Defendant’s property or business was placed before the Court.

### **Evidence of Loss incurred for Marketing Costs**

51. The Defendant put the Plaintiff to strict proof on its claims for loss in relation to marketing costs.

52. Mr. Wolffe told the Court that the Plaintiff incurred considerable loss for the advertising expenses related to the store and to the Benjamin Moore brand. While he did not specify any sums during his examination in chief, an exhibit listing the particulars of his losses suggest that he spent a total of \$11,052.52 on marketing and advertising expenses. The breakdown of those expenses was stated in the exhibit to be as follows:

<b><i>Costs Associated with Marketing of Benjamin Moore Paint</i></b>	
<i>Bda Broadcasting between Aug 2010 to Nov 2010 (100%)</i>	<i>\$ 6002.85</i>
<i>Bda Yellow Pages (50% of \$2,148-added Benj Moore &amp; logos)</i>	<i>\$ 1,074.00</i>
<i>Emoo Directory (50% of \$800 - added Benj Moore &amp; logos)</i>	<i>\$ 800.00</i>
<i>Graphix Signs advertising &amp; signage for Benjamin Moore &amp; logos (100%)</i>	<i>\$ 1,210.00</i>
<i>The Royal Gazette (100% for August ads promoting Benjamin Moore (100%)</i>	<i>\$ 375.00</i>
<i>Personal advertising, creating &amp; sending local flyers by email, snail mail &amp; hand Distribution</i>	<i>\$ 600.00</i>
<i>Nobel Directory Art (50% of \$550- added Benj Moore &amp; logos to this Real Estate</i>	

<i>Directory for Bda Properties Century 21 brochure)</i>	\$ 275.00
<i>Anthony &amp; Co Inc for paint supplies like (sticks/stirrers/hats, etc) marketing the new Smooth &amp; Easy Hamilton store &amp; Benjamin Moore products (100%)</i>	<u>\$ 715.67</u>
	<u>\$11,052.52</u>

53. In closing arguments for the Defence case, Mrs. Smith correctly pointed out that the Plaintiff did not produce any invoices or other documentation showing payment on any of these transactions.

**Evidence of Loss incurred for Professional (Legal) Fees**

54. The Plaintiff also claimed \$950.00 representing loss incurred for legal fees arising out of the drafting of the Agreement and related advice. He also claimed \$2,325.00 for his payment of ‘advices to date in connection with Benjamin Moore Dispute’.

55. While the Court heard about the professional services provided to the Plaintiff by Ms. Hoskins, no direct evidence was placed before the Court evidencing the sum spent on legal costs.

56. Without going so far as to suggest that the Plaintiff received free legal services or services at a discount, Mrs. Smith queried Mr. Wolffe as to whether he and Ms. Hoskins had a relationship beyond a professional nature. In reply Mr. Wolffe described Ms. Hoskins as his lawyer and friend.

**The Law on Misrepresentation in Contract Law**

57. Neither Mr. Bailey nor the unrepresented Defendant addressed the Court on the relevant principles of law. However, I consider it important to outline the legal groundwork on which the facts of this case must stand.

58. Unlike in the United Kingdom, misrepresentation under contract law in Bermuda is compiled of rules and principles in common law and equity only. While the English statute law position is embodied in the Misrepresentation Act 1967, Bermuda has no such sibling acts.

59. In my previous judgment in *Capital Security Ltd v Woodruff [2018] Bda LR 46* I considered the common law duty of care which might arise out of a negligent misstatement of fact:

29. *Established principles on the law as it relates to a negligent misstatement was surmised by Lord Morris in Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465 PC at 503:*

*“Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.”*

### **The Law - Where the Misstatement is also a Term of the Contract**

60. Before examining the elements of what constitutes a misrepresentation, it is necessary to first determine whether the misrepresentation in question was made prior to the making of the contract or whether the misstatement is in fact a contractual term. Under modern English statute law, a contractual term is capable of amounting to a misrepresentation.
61. Under the old English common law principles, on the other hand, the law relating to misrepresentation does not apply to representations which have been built in as a term of the contract.
62. Para 7-004 of Chitty:

*“Misrepresentation and contractual terms. Before the Misrepresentation Act was passed, the law relating to misrepresentation was generally concerned solely with misrepresentations made before the contract was entered into, and not to misrepresentations which actually constituted contractual terms. Although word “misrepresentation” is literally applicable to a contractual term which consists of a false statement of fact (as opposed to a promise of future conduct) the term was commonly confined to misrepresentations which did not constitute contractual terms, simply because the law relating to the contractual terms (whether promises as to future conduct or misrepresentations of fact) differed from the law relating to misrepresentations which were not contractual terms. Moreover, there was also some authority for the proposition that if a misrepresentation was made before a contract was entered into, and the misrepresentation was subsequently incorporated into the contract as a contractual term, the law relating to misrepresentation was not applicable, and the case had to be dealt with as one involving a contractual term and nothing else (ftn Pennsylvania Shipping Co v Compagnie Nationale de Navigation [1936] 2 ALL E.R. 1167, 1171 and Leaf v International Galleries [1950] 2 K.B. 86)...”*

### **Remedies –Fraudulent Misstatements / Negligent Misstatements v Innocent Misstatements**

63. At paras 39-41 in Capital Security Ltd v Mark Woodruff I observed the nexus between fraudulent misrepresentation in contract law and the tort of deceit:

*28. The Plaintiff’s claim in this case is contractual and principally founded on a claim for fraudulent misrepresentation. In Pitt & Co Ltd and BGA Ltd v White and White [2014] Bda LR 16 Hellman J recognized this Court’s longstanding tradition of paralleling the elements of fraudulent misrepresentation in contract law with the tort of deceit. Judicial analysis of this parity was made in Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd [2011] 1 CLC 701, HC, where Hamblen J linked the ingredients of fraudulent misrepresentation and deceit.*

29. At paragraph 39 of Pitt et al Hellman J stated:

*“As stated by Rix LJ in AIC Ltd v ITS Testing Services (UK) Ltd (“The Kriti Palm”) [2007] 2 CLC 223, EWCA, at para 251:*

*“The elements of the tort of deceit are well known. In essence they require (1) a representation, which is (2) false, (3) dishonestly made, and (4) intended to be relied on and in fact relied on. Each of those elements may of course require further elaboration.”*

30. At paragraph 48:

*“...fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.”*

64. The preamble to the Misrepresentation Act 1967 under English law reads: *“An Act to amend the law relating to innocent misrepresentations and to amend sections 11 and 35 of the Sale of Goods Act 1893.”*

65. Section 1 expressly contemplates circumstances where a party is entitled to rescind a contract without having alleged a fraudulent misrepresentation:

*Removal of certain bars to rescission for innocent misrepresentation*

*Where a person has entered into a contract after a misrepresentation has been made to him- and*

*(a) the misrepresentation has become a term of the contract; or*

*(b) the contract has been performed;*

*or both, then, if otherwise he would be entitled to rescind the contract without alleging fraud, he shall be so entitled, subject to the provisions of this Act, notwithstanding the matter mentioned in paragraphs (a) and (b) of this section.*

66. Under English statute law, damages may be awarded by a Court as a remedy for non-fraudulent misrepresentation. However, (as observed by the learned Mr. Justice Stephen Hellman at paragraph 53 in *Caletti v Deilva and Wakefield Quin Ltd [2017] Bda LR 102* in his recital of Longmore LJ in *Salt v Stratstone Specialist Ltd [2015] 2 CLC; [2015] EWCA Civ 745 at para 24*) the normal remedy for misrepresentation is rescission, and the court should award it if possible.

67. At common law, rescission is usually the only remedy available for an innocent misrepresentation. Damages, of course, would be available to a litigant suing for breach of contract where the misrepresentation is integrated in the terms of the contract. The learned editors of Chitty on Contracts Volume 1 (Thirty Second Edition) (“Chitty”) at para 7-001 state:

*“...the position broadly speaking was that a misrepresentation which induced a person to enter into a contract gave the representee the right to rescind the contract, subject to certain conditions, but generally gave him no right to damages unless the misrepresentation was fraudulent, or, in some cases, negligent, or unless the representation amount to a term of the contract...”*

68. Unsurprisingly, an innocent misrepresentation will not always give rise to rescission. At paragraph 29 in *Capital Security Ltd v Mark Woodruff I* said:

*29. An innocent misrepresentation which has induced the representee to enter a contract must be a material one before the Courts will find that the contract is void and liable to*

rescission (see *Pan-Atlantic Insurance Ltd v Pine Top Ltd [1994] 1 AC 501, at 533*). While there are instances where a material misstatement on an opinion may give rise to a misrepresentation on the facts by implication and thereby justifying an avoidance of the contract; traditionally, the misrepresentation must be a false statement of fact, whether it be in relation to the past or present.

### ***Remoteness of Damage / Causation of Loss***

69. The rule on remoteness of damage was stated in simple terms by Lord Hope in *Transfield Shipping Inc. v Mercator Shipping Inc. [2009] 1 AC 61 at 73G*: “whether the loss was the type of loss for which [the Defendant to the claim...] can reasonably be assumed to have assumed responsibility”. This test was cited with approval by Kawaley J (as she then was) and later the Court of Appeal in *Knight v Warren [2010] Bda LR 73*.

70. Sitting in the High Court of Justice in the Eastern Caribbean Supreme Court, Ms. Agnes Actie Master in *Nixon Jawahir v Isabella Shillingford [2019] ECSC J0114-2* provided a helpful synopsis on the subject of remoteness of damage at para 16:

*“The court, in a claim for breach of contract, is required to conduct an enquiry into the loss actually sustained by the claimant as a result of non-performance subject to the issue of remoteness of damages. The foreseeability and remoteness of damage rule depends on the degree of relevant knowledge held by the defaulting party at the time of the contract. The defendant will only be held liable for the claimant’s losses if they are generally foreseeable or if the claimant tells the defendant about any special circumstances in advance.”*

71. In *Nixon Jawahir v Isabella Shillingford* the Defendant contended that the sums claimed by the Claimants were too remote as they should have taken action to mitigate their loss. The Master cited the remarks of Toulson LJ at para 43 of the English Court of Appeal decision in *Siemens Building Technologies FE Ltd v Supershield Ltd [2010] EWCA Civ 7*:

*“Hadley v Baxendale remains a standard rule but it has been rationalized on the basis that it reflects the expectation to be imputed to the parties in the ordinary case, i.e. that a contract breaker should ordinarily be liable to the other party for damage resulting from his breach if, but only if, at the time of making the contract a reasonable person in his shoes would have had damage of that kind in mind as not unlikely to result from a breach...If, on the proper analysis of the contract against its commercial background, the loss was within the scope of the duty, it cannot be regarded as too remote, even if it would not have occurred in ordinary circumstances.”*

### ***Duty to Mitigate Loss***

72. It is trite law that a Plaintiff who has suffered loss has a duty to take all reasonable steps to mitigate avoidable loss. In McGregor on Damages (sixteenth edition) at paragraph 285 the duty to mitigate one’s losses is succinctly summarized as follows:

*“The first and most important rule is that the plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendant’s wrong and cannot recover damages*



*for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid. Put shortly, the plaintiff cannot recover for avoidable loss.”*

73. Delivering his judgment in Frederick Meens v Desmond Richardson [2018] the learned former Chief Justice, Hon. Mr. Ian Kawaley, cited with approval Moore-Bick LJ of the English Court of Appeal in Uzinterimpex JSC v Standard Bank plc, 12 August 2008, Times Law Reports:

*“why should a person deprived of his property not be expected to take reasonable steps to recover it, and so reduce the loss he would otherwise suffer? ...in principle the claimant ought to take all reasonable steps to ensure that his losses from being deprived of his property, whether temporarily or permanently, were kept to a minimum...”*

74. The remaining consideration falls to the meaning of reasonable steps for discharging the duty to mitigate loss. In this case, the Plaintiff’s evidence is that the first occasion on which he acquired knowledge of the Defendant’s breach was on 13 June 2011. Did the Plaintiff have a duty to accept the Defendant’s repudiation of contract and sue for damages sooner than the date on which he filed the Specially Indorsed Writ? No, in the general sense, he did not. A Plaintiff is under no general duty to mitigate his loss by discontinuing his or her contractual performance and suing for damages. At paragraph 303 the learned editors of McGregor on Damages (sixteenth edition) state:

*Nor, it seems, need a plaintiff take steps to mitigate loss, even after the defendant’s performance of the contract which he has repudiated falls due, by accepting the repudiation and suing for damages. He may instead, where he can do so without the defendant’s assistance, perform his side of the contract and claim in debt for the contract price. Even if this involves incurring expense in the performance of the contract which, in the face of the defendant’s repudiation, is rendered useless, the plaintiff is not required to minimise the loss by accepting the repudiation and suing for damages.*

75. While this overview is supported by Lord Reid’s judgment in White and Carter v McGregor [1962] A.C. 413 (and the subsequent decision in Anglo-African Shipping Co. v Mortner [1962] 1 Lloyd’s Rep. 81) there is still a vacant space assigned for the duty to mitigate loss under more uncommon circumstances. Lord Reid himself remarked in *obiter*:

*“It may well be that, if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to addle the other party with an additional burden with no benefit to himself...”*

### **The Law on Limitation Period for Contract Claims**

76. Section 7 of the Limitation Act 1984 (“the 1984 Act”) bars an action founded on simple contract from being brought after the expiration of 6 years from the date on which the cause of action accrued.
77. Part II of the 1984 Act contains provisions for the extension or exclusion of ordinary time limits. Section 29 applies to circumstances involving persons under a disability and section 30(1)-(4) enables a limitation period to be extended in actions for the recovery of land or

personal property under the right of a mortgagee. Under section 30(5) payment or an acknowledgment of a liquidated pecuniary claim by the liable person is capable of reviving a time-barred remedy.

78. Section 33(1) concerns actions based on fraud; concealment or mistake. It states:

***Fraud; concealment; mistake***

*33 (1) Subject to subsection (3), where in the case of any action for which a period of limitation is prescribed by this Act, either—*

- (a) the action is based upon the fraud of the defendant; or*
- (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or*
- (c) the action is for relief from the consequences of a mistake,*

*the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.*

*Reference in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.*

79. With the exception of cases of personal injury or death, the Court is not bestowed with any discretionary powers to extend a time limit prescribed by the 1984 Act.

***Judgment Interest at the Statutory Rate***

80. Sections 9-11 at Part IV of the Interest and Credit Charges (Regulation) Act 1975 provide:

*Judgment debts*

9. *All sums of money due or payable under or by virtue of any judgment, order or decree of any court shall, unless that court orders otherwise, carry interest at the statutory rate from the time the judgment is given, or as the case may be, the order or decree is made, until the judgment, order or decree is satisfied, and such interest may be levied under a writ of execution, or otherwise recovered in the same manner and by the same process as the principal may be recovered.*

*Courts may award interest on debts and damages*

10. *In any proceedings tried in any court for the recovery of any debt or damages, including proceedings in respect of personal injuries to the plaintiff or any other person, or in respect of a person's death, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at the statutory rate on the whole or any part of the debtor damages for the whole or any part of the period between the date when the cause of action arose and the date of judgment:*

*Provided that nothing in this section-*

- (a) shall authorize the giving of interest on interest; or*
- (b) shall apply to any debt upon which interest is payable as of right whether by virtue of any enactment or otherwise; or*
- (c) shall effect the damages recoverable for the dishonor of a bill of exchange.*

*Calculation on interest payable*

11. *When interest is payable at the statutory rate under this Part it shall be calculated at the current rate from time to time prevailing from the date on which interest is first payable until the judgment, decree or order is satisfied.*

81. Under the interpretation section, the statutory rate is said to mean 3.5% resulting from an amendment made effective as of 2 June 2017.

## **Analysis and Decision**

### **Analysis and Decision on Liability**

82. I will briefly dispose of the limitation argument first. The Defendant would argue that the relevant periods for assessment are either:

- (i) from 31 March 2010 when the Agreement was made to 30 May 2017 when the Specially Indorsed Writ was filed; or
- (ii) from the 13 May 2011 when Mr. Zoldessy emailed Ms. Hoskins stating that Benjamin Moore was unaware of any exclusivity agreement to 30 May 2017 when the Specially Indorsed Writ was filed

83. Further above, I outlined the relevant sections of the Limitation Act 1980. Applying section 7, which bars an action founded on simple contract from being brought after the expiration of 6 years from the date on which the cause of action accrued, the Plaintiff would be out of time if the relevant dates are those stated at (i) above.

84. Under section 33(1), however, the timeline for actions based on fraud; concealment or mistake, is kick-started once the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

85. This case more concerns an allegation of concealment by the Defendant. The alleged concealment is that the Defendant deliberately concealed the fact that he never possessed exclusive BM rights. This is clearly a fact relevant to the Plaintiff's right of action.

86. On the Defendant's argument, the 13 May 2011 email evidences the point at which the Plaintiff first discovered the alleged concealment. However, the Plaintiff says that the 13 May 2011 gave him cause for concern that the Defendant had been untruthful with him, but his concern was not confirmed until 13 June 2011 when he first discovered that Rowe Spurling would be granted a supply arrangement. I accept Mr. Wolffe's evidence on this point as truthful and reasonable.

87. I should, of course, further address my mind as to whether the Plaintiff's knowledge would have commenced earlier by the exercise of reasonable diligence. In my judgment, the Plaintiff cannot be faulted for lack of reasonable diligence for the steps he took through his attorney to inquire about the possibility of the Defendant's concealment. I also accept that the

confirmation of the concealment came at the Plaintiff's point of discovery that Rowe Spurling would be receiving a supplier's contract with Benjamin Moore.

88. For these reasons, I find that the relevant period for calculation was from 13 June 2011 to 30 May 2017. This falls just shy of the 6 year maximum period and allows the Plaintiff to have proceeded with his claim without having been statute-barred.
89. I now turn to the Plaintiff's claim for a declaration that the Agreement is void. Both parties in this case made fair criticisms of the other and the resolve of the various sub-disputes proved to be neither smooth nor easy. The triple Rs for my consideration are now 'rescission'; 'repudiation' and 'relief'.
90. While the Plaintiff did not specifically plead misrepresentation as a cause of action or claim rescission as part of its relief, it is clear enough on the face of the pleadings and it was obvious throughout the trial that the Plaintiff seeks to rescind the Agreement for misrepresentation of a material fact on the grounds that the Agreement is void *ab initio*.
91. In the absence of a modern statutory scheme akin to the English Misrepresentation Act, the common law and principles of equity apply to Bermuda law on misrepresentation. This means that the a misstatement which was incorporated as a term of the contract gives rise to a cause of action based on breach of contract and not rescission arising out of misrepresentation.
92. In this case the Defendant's misstatement that he possessed exclusive BM rights and would pass them on to the Plaintiff in consideration for the Agreement was a clear term of the Agreement. For this reason, I find that the correct cause of action is purely for breach of contract.
93. This Court observed and listened carefully to the *vive voce* evidence of Mr. Wolffe and Mr. Richardson on their conflicting versions on how the Agreement came to be made. I found Mr. Wolffe's evidence to be truthful and believable on a balance of probabilities. I accept his evidence that Mr. Richardson caused him to reasonably believe that (i) he, Mr. Richardson, had exclusive BM rights and (ii) that he would transfer these exclusive BM rights in consideration for Mr. Wolffe's payment of the price of the Agreement.
94. I also accepted Mr. Wolffe's evidence that the signed Agreement he produced before the Court was an authentic document containing the terms agreed between the parties. In my judgment, the Plaintiff's version of how the Agreement came to be made is to be preferred. I found Mr. Wolffe's evidence on this to be more truthful and coherent, withstanding Mrs. Smith's cross-examination. On my assessment, it was far less plausible that the Agreement would have been executed in the manner described by Mr. Richardson while both parties had instructed senior and experienced practicing attorneys to prepare the Agreement.
95. I find that on a balance of probabilities, Mr. Richardson inserted or caused to be inserted the handwritten references to '*Bonsal, Tramco*', the two overseas supplier brands which were known well only to him and his daughter, Mrs. Smith. It was clear from Mr. Richardson's evidence on the stand that he intended to convey to Mr. Wolffe some measure of benefit from Triple R's past relationship with these two additional brands. I have also accepted Mrs.

Smith's evidence that she witnessed her father's signature on the Agreement evidence by her own signature.

96. I reject any suggestion or implication that Mr. Richardson was somehow unaware or tricked on the contents of the Agreement he signed. It seems far more likely to me that Mr. Richardson, knowing that he was and had long been the sole supplier of Benjamin Moore paint products, caused and allowed Mr. Wolffe to believe that this meant that he had exclusive BM rights, which he did not. It is clear from the express references to "exclusive" in the party's pre-Agreement correspondence and the Agreement itself, that the parties intended the exclusive BM rights to be a term of their contractual arrangement.
97. There can be little to no doubt that the Defendant breached the Agreement by failing to pass the Plaintiff exclusive BM rights which were expressly required as a term of the Agreement.
98. Did the breach of contract justify a repudiation of contract? The answer to this question is of little assistance because the Plaintiff clearly accepted the breach (if it was indeed a repudiatory breach) by continuing to operate as a Benjamin Moore supplier from 2011 to 2013 and in retaining the other benefits passed to him under the Agreement.
99. For these reasons, I find that the appropriate remedy is damages and not rescission of contract. Accordingly, I refuse to make any declaration that the Agreement is void.

#### **Analysis and Decision on Quantum**

100. The Plaintiff's payment of \$50,000 for the Agreement and \$27,000 in rent post-Agreement is undisputed on the evidence and accepted by this Court as unchallenged evidence.
101. The Defendant contended as an alternative case on its pleadings that the Plaintiff's recovery for loss should not be without regard to *any profit or benefit gained from the purchase of Triple R*. Mr. Wolffe volunteered in his evidence that he sold 12 five-gallon drums of base mix at distributor-pricing value at a cost of \$110.30 each. This brings forth a total of \$1,323.60. Save the paint drums, Mr. Wolffe denied receiving any other resale profits from his receipt of the 'dormant' business.
102. Mrs. Smith cross-examined Mr. Wolffe on the 1827lbs total reported poundage of Triple R stock for September 2009. This stock report was put before the Court to rebut Mr. Wolffe's description that Triple R was a dormant business when Mr. Wolffe visited the shop. No evidence of an inventory showing or suggesting the monetary value of any stock in the store at the time of the Agreement was put before the Court.
103. The Defendant, on the other hand, averred that the Plaintiff profited from the supply arrangements with the Bonsal and Tremco brands. Of course, it was for the Defendant to prove his assertion. He did not. Apart from the oral evidence of Mr. Richardson simply asserting the superior value of these brands, no evidence was placed before the Court to support an inference that Mr. Wolffe made gain from the supply of either of these brands. In fact, there was no evidence before the Court that Mr. Wolffe at any stage received or entered into a distributorship agreement with either Bonsal or Tremco. Thus, it is not open to this Court to find that the Plaintiff profited from any supply arrangement with either brand. Accordingly, I reject this part of the Defendant's set-off claim.

104. The Defendant also invited the Court to consider ‘*the value of the Goodwill of Triple R at the time of purchase*’ as part of its claim for a set-off. Under the Agreement, ‘Goodwill’ was defined to include the Plaintiff’s exclusive right to use the trade name Triple R (or any previous trade name used by that business). Additionally, the contractual term ‘Goodwill’ referred to the benefit begotten by the Plaintiff in representing itself as carrying on its business in succession to the Defendant’s operation of Triple R. On the Plaintiff’s evidence, the Defendant’s goodwill was of no meaningful value. In my judgment, it was for the Defendant to establish the value of the goodwill in support of its claim for a set-off. This was not done.

105. I now turn to the disputed areas of the Plaintiff’s claim for loss. The most significant category of loss (second to the \$50,000 claim for loss) arises out of the Plaintiff’s demand for \$11,052.52 in recovery of his marketing costs. However, no supporting documentation was put before the Court by the Plaintiff evidencing these expenses.

106. Curiously, no explanation was offered by the Plaintiff during his evidence lending some understanding as to why he did not have any invoices or bank statements to prove the very specific figures claimed. It would be regrettable indeed if this came down to an oversight in the presentation of the Plaintiff’s claim. In any case, it is not for this Court to engage in speculation. The reality is that this Court has heard nothing beyond a mere assertion that the loss in marketing costs came to \$11,052.52. Notwithstanding, Mr. Wolffe’s oral evidence that he spent a significant sum on marketing costs was persuasive and came across truthful. In the circumstances, I see it fair and just to attach a nominal value of \$1000 representing loss incurred on marketing fees.

107. The Plaintiff is in a similar predicament in relation to its claim for the recovery of professional fees. No invoices or other like documents were produced as proof of the \$3,275.00 claim for professional fees. However, the Court did hear evidence that Ms. Christine Hoskins assisted the Plaintiff in the negotiating and drafting of the Agreement in addition to the correspondence with the Benjamin Moore representatives sent on behalf of the Plaintiff. This Court is also able to take notice that in 2011, Ms. Hoskins was a practising attorney of some notable experience who would have likely billed at an hourly rate not below \$500. Having regard to these factors and the nature of the services provided, I accept that on a balance of probabilities the Plaintiff’s legal fees did total the sum claimed.

108. For these reasons, I find that the Plaintiff has proven its losses for the \$50,000 initial set-up; the \$27,000 in rent; a nominal \$1000 in marketing fees and the \$3,275.00 in professional legal fees. This brings about a total sum of \$78,000 in proven losses. What now follows is a discussion as to whether the Plaintiff’s proven losses were caused by the Defendant’s breach of contract.

***Analysis and Decision on Remoteness of Damage / Causation of Loss***

109. A just and equitable determination of the recoverable losses also calls for some analysis as to what the Plaintiff’s position would have likely been had the Defendant in fact conveyed exclusive BM rights, as the Plaintiff initially believed he had.

110. At paragraph 7 of Mr. Wolffe's witness statement, which he adopted as part of his evidence, he said that Triple R was 'pretty much dormant' and that 'there were very few old customers requiring Benjamin Moore paint'. This description from Mr. Wolffe applied to the timeframe during which Triple R was in fact the only distributor of the Benjamin Moore line. Mr. Wolffe said that Mr. Richardson had given him notice to quit the premises and that everything in the Hamilton store had been relocated to Warwick (Parish) prior to his discovery that Rowe Spurling was going to be granted a distributorship.
111. Mr. Wolffe emphasized that the crucial issue for consideration was whether he would have entered the Agreement had he known that he was not being granted the exclusive BM rights. My provisional view at the hearing was that he was likely to be correct. However, with the benefit of further reflection and careful review, it is plain to see that the real question is whether the loss the Plaintiff suffered was consequential on Rowe Spurling's impending contract or any other competitor being granted a distributorship. What was the real cause of the Plaintiff's loss?
112. In reality, it was open to the Plaintiff to trade under the Triple R name from 31 March 2010 and he did this up until 27 June 2011 or thereabouts. The Plaintiff had a clear opportunity (whether seized or not) to be the sole (as opposed to exclusive) distributor of the Benjamin Moore line from April 2010 until June 2013 or thereabouts. On the Plaintiff's case, it was under the misapprehension that it had exclusive BM rights during this period and operated accordingly. Thus the loss of \$27,000 in rental payments cannot be reasonably attributed to the subsequent opening up of the Benjamin Moore supply market in Bermuda, which is essentially the effect of the breach under examination. For these reasons, I find that the ancillary rental costs expended by the Plaintiff were too remote to be caught by the rule on causation. The Defendant cannot reasonably be held responsible for rental costs or other unfortunate commercial losses incurred during a period when the Plaintiff had no competition from other local competitor suppliers.
113. However, the same is not so for the marketing expenses. The Defendant's breach of contract clearly caused the Plaintiff's loss for the Smooth & Easy marketing costs advertising the exclusive BM rights. In incurring these costs, the Plaintiff obviously intended for the general public to understand that Smooth & Easy would be the only location where Benjamin Moore paint products could be purchased. While the Plaintiff never claimed loss for any reputational damage, it is evident that the loss on marketing expenses (no matter the timeframe during which such expenses were incurred) was consequential to the Defendant's contractual wrong.
114. I hold the same in respect of the Plaintiff's legal costs for Ms. Hoskins' services which were spent on preparing the Agreement and making inquiries on the Plaintiff's behalf as to the non-existence of the exclusive BM rights. Reasonably, the fault must lie with the Defendant for this.
115. Did the Defendant's breach cause the Plaintiff to lose the \$50,000 payment price for the Agreement? To answer this question, I must first determine what consideration was received by the Plaintiff in exchange for the \$50,000 payment. While the Plaintiff would attach the full value of his \$50,000 payment to the BM exclusive rights he never received; the fact is that other assets passed to him in consideration.

116. The Plaintiff received a reputable business (Triple R) and the right to use its trade name generally and for the non-exclusive supply of Benjamin Moore, Bonsal and Tremco ('the Goodwill'). Those benefits must be somehow counted as part of the consideration given for the \$50,000 payment. How is this to be achieved without the benefit of expert valuation evidence? In my judgment, a conservative approach calls for a clean split down the middle. A \$25,000 value should be assigned to the transfer of the business and the Defendant's 'Goodwill'. The other \$25,000 value may reasonably attach to what the Plaintiff thought he was spending on the BM exclusive rights.

117. It then begs to question whether the Defendant's breach of contract caused the loss of the Plaintiff's \$25,000 payment for the BM exclusive rights. In my judgment, it did. The Defendant clearly caused the Plaintiff to spend \$25,000 for BM exclusive rights never received. For this reason, it is clear to me that the Defendant should assume responsibility for this \$25,000 loss, subject to the Plaintiff's duty to mitigate his loss.

#### **Analysis and Decision on whether the Plaintiff discharged Duty to Mitigate Loss**

118. The next matter for resolve is whether the Plaintiff had any opportunity to take reasonable steps in mitigation of its \$25,000 loss once it discovered that Rowe Spurling was to be granted a distributorship arrangement with Benjamin Moore. Mr. Wolffe cannot be properly accused of having failed to mitigate his losses by his prolonged attempts to keep his business running without bringing a legal action against the Defendant. The law is clear enough on this point. The only suggestion made by the Defendant in this regard was that the Plaintiff ought to have ordered more stock from Benjamin Moore in order to have stayed in the game, so to speak. However, it cannot be said with any degree of certainty that larger BM orders would have assisted the Plaintiff in softening his losses once it was discovered that Rowe Spurling was to become a competitor. In my judgment, there is no good reason on the evidence why the Plaintiff ought not to be compensated for his \$25,000 loss.

#### **Order for Judgment Interest at the Statutory Rate**

119. The Plaintiff claims judgment interest at the statutory rate which is incorrectly stated in the Writ to be at an annual rate of 7% without regard to the 2017 amendment to the Interest and Credit Charges (Regulation) Act 1975.

120. Pursuant to Part IV of the 1975 Act, I award interest at the statutory rate of 3.5% per annum on the total judgment sum of \$29,275 commencing from the date of this judgment until the judgment is satisfied.

#### **Conclusion:**

121. The Plaintiff's claim for rescission of contract fails on the basis that I have found that the Defendant is liable for breach of contract and not misrepresentation.

122. The breach of contract does not give rise to a repudiation of contract. The appropriate remedy is in the form of damages in the total sum of \$29,275 (\$1000 for nominal marketing costs + \$3,275.00 for legal costs for drafting the Agreement and corresponding with



Benjamin Moore + \$25,000 in consideration for exclusive BM rights) plus interest at the statutory rate of 3.5% per annum commencing from the date of this judgment until the judgment is satisfied.

123. Unless either party files a Form 31D to be heard on costs within 14 days of the date of this Judgment, I award 50% of the Plaintiff's costs on a standard basis, to be taxed if not agreed. The partial costs award is intended to reflect the Plaintiff's partial success.

Monday 23 September 2019

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**HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS  
PUISNE JUDGE OF THE SUPREME COURT**