COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2021/CLE/gen/00949

B E T W E E N

ESTHER MILLER

1st Plaintiff

AND

JAMES MILLER

2nd Plaintiff

AND

GREGORY HIGGS
(Trading as G & H Enterprises)

Defendant

Before: The Honourable Chief Justice Sir Ian R. Winder

Appearances: Byran Woodside for the Plaintiffs
Richette Percentie for the Defendant

Hearing date(s): 13 July 2023

JUDGMENT

WINDER, CJ

[1.] This is an action for breach of contract in connection with the purchase and use of a 2007 Mack Garbage Truck with chassis no. 1M2K195C77M034318 and registration no. MV 3291 (the "Mack Garbage Truck").

Background

[2.] The Plaintiffs filed a specially indorsed Writ of Summons on 24 August 2021 claiming *inter alia*:

> 4. In early 2019, the Defendant approached the Plaintiffs to purchase the [Mack Garbage Truck] for the purpose of his said business which is garbage collection. The Plaintiffs agreed and the Defendant identified the [Mack Garbage Truck] that the Plaintiffs subsequently purchased for that specific purpose.
> 5. At the material time of the Plaintiffs handing over the [Mack Garbage Truck] to the Defendant, the [Mack Garbage Truck] was in very good working condition, fully serviced and had new tyres.
> 6. On the 6th day of February, A.D. 2019, the Plaintiffs entered into a Collateral Agreement ("the said Agreement") with the Defendant for the use of the said truck for the purpose of garbage collection for the period from the 6th February, A.D., 2019 to the 28th February, A.D., 2023.
> 7. By the said Agreement:
> ... The Defendant was to pay the Plaintiffs the sum of $5,000.00 per month on or before the 28th day of each month commencing on the 28th February, 2019 and ending on the 28th September, 2019.
> ... Upon the 8th Month being 28th of September, 2019, the Defendant was to pay the Plaintiffs Four Thousand Dollars (B$4,000.00) per month or before the 28th day of each month commencing on 28th day of October, 2019 and ending on the 28th day of February 2023; ...
> 8. The Agreement also provided that the Defendant was responsible for ensuring that the [Mack Garbage Truck] was properly maintained and serviced.
> 9. On the 6th February A.D., 2019, at the time of the signing of the said Agreement, the Plaintiffs executed a Bill of Sale with the Defendant for the sale of the [Mack Garbage Truck] for the sum of $50,000.00. The Defendant also executed a Bill of Sale for the sale of the [Mack Garbage Truck] to the Plaintiffs, the said Bill of Sale to be held in escrow for the duration of the said Agreement.
> ...
> 12. Subsequent to the signing of the said Agreement, the Defendant paid the Plaintiffs the sum of monies in accordance therewith from the 28th February, A.D., 2019 to the 28th December, 2019.
> 13. On the 30th January, A.D., 2020, the Defendant paid the sum of $2,000.00 and made no further payment since that time despite repeated demands by the Plaintiffs.
> ...
> 15. On the 7th February, A.D., 2021, the Defendant took the [Mack Garbage Truck] back to the Plaintiffs and refused to pay any further sum in accordance with the terms of the Agreement.
> 16. Upon having a physical inspection carried out on the [Mack Garbage Truck], it was discovered that the Defendant failed to maintain the [Mack Garbage Truck]. Hence the Plaintiffs has carried out the following repairs:
>
> - Mechanical repairs - $1,000.00
> - Welding - $1,300.00
> - 7 Tyres @ 545.00 - $3,815
>
> 17. The Plaintiffs are still unable to make any use of the [Mack Garbage Truck] as further mechanical repairs is required [sic] and they spent significant sums to acquire the [Mack Garbage

Truck]. Further, the Plaintiffs tried to lease the same but as it was designed specifically for garbage collection, they have been unable to do the same to date.
18. As a result of the aforementioned, on the 28th February, 2021, the Plaintiffs made a demand for payment but the Defendant has failed and/or refused to make any payment. Despite repeat requests for payment, the Defendant has failed and/or refused to make any further payments to date.
19. By reason aforesaid, the Plaintiffs have therefore suffered tremendous loss, as reflected in the table below:

NO.	DATE	ITEM	AMOUNT
2020			
1	28/1/20	Monthly Payment	$4,000
2	28/2/20	Monthly Payment	$4,000
3	28/3/20	Monthly Payment	$4,000
...	...	...	...
38	28/2/23	Monthly Payment	$4,000
GRAND TOTAL			$150,000

20. The Plaintiffs continue to suffer significant loss and damage.
AND THE PLAINTIFFS CLAIM:
1. The sum of $150,000.00 being the monthly instalments outstanding as at the 23rd August A.D., 2021; further interest and cost up to Judgment;
2. The sum of $6115.00 being the sum spent to date to repair the truck.
3. Interest pursuant to the Civil Procedure (Award of Interest) Act, 1992, from the date of Judgment to the date of payment.
4. Costs; and
5. Such further or other relief as the court deems just.

[3.] The Defendant filed a Defence and Counterclaim on 27 October 2021 denying the allegations in the Statement of Claim and counterclaiming for the sum of $106,800, interest, costs and such other relief as the Court deems fit. The Defence and Counterclaim states:

2. The Defendant avers that he is a Bahamian Businessman carrying on various business ventures including operating heavy equipment and trucking services throughout the Island of New Providence.
...
4. ...The Defendant avers that at all material times he was approached by the Second Plaintiff only and was advised that the Second Plaintiff had a contract for services ("the said contract for services") with the Ministry of Works. On this basis, it was orally agreed between the Defendant and the Second Plaintiff that the Defendant would operate the [Mack Garbage Truck] and would perform the said contract for services as well as the work of the Defendant.
5. Further, the Second Plaintiff advised the Defendant that he only had $25,000 which the First [Plaintiff] paid towards the purchase of the [Mack Garbage Truck]. The Defendant later paid the balance of $3,000.00 and then the sum of $1,800 for freight.
6. The Second Plaintiff later advised that he did not get the said contract for services and it was therefore agreed between the Plaintiffs and the Defendant that the Defendant would purchase the [Mack Garbage Truck] for the sum of $50,000 which represents the cost of the [Mack Garbage Truck] as well as the customs duties outstanding.
7. Paragraph 5 of the Statement of Claim is denied. The Defendant avers that when the [Mack Garbage Truck] was handed to him by the Second Plaintiff he advised the Second Plaintiff that the [Mack Garbage Truck] was inoperable and needed work. Therefore, the Defendant carried out and was responsible for various repairs to the [Mack Garbage Truck] including "skinning the entire

floor and resheeting the bottom." The Defendant paid approximately $9,000.00 for labour and materials.
8. Save and except that the Defendant admits to executing an agreement sometime in or about May 2019 which was dated 6th February 2019, paragraph 6 of the Statement of Claim is denied. The Defendant avers that the said Agreement was void and/or voidable.
9. Paragraphs 7-8 of the Statement of Claim are neither admitted nor denied.
10. As to paragraphs 9-11 of the Statement of Claim the Defendant repeats paragraphs 4-6 herein. The Defendant also states that on or about 6th February 2019 the First Plaintiff executed a Bill of Sale ("said Bill of Sale") with the Defendant for the sale of the [Mack Garbage Truck] for the sum of $50,000.00. That it was orally agreed between the parties that the Defendant would pay the balance of the price for the [Mack Garbage Truck] over a period of time.
11. As to paragraph 12 of the Statement of Claim the Defendant admits that he paid the Second Plaintiff sums of monies but the Defendant avers that the sums of money were paid for the purchase of the [Mack Garbage Truck] and represented monies due and owing in accordance with the said Bill of Sale.
12. The Defendant admits paragraph 13 of the Statement of Claim but avers that he discontinued making payments to the Plaintiffs because it became apparent to the Defendant that the monies were being extorted by the Plaintiffs who continued requesting monies even after the [Mack Garbage Truck] was paid for in full.
...
14. Save insofar as the Defendant admits that the Plaintiff took the [Mack Garbage Truck] back as alleged by the Plaintiffs the Defendant avers that the [Mack Garbage Truck] was fully paid for by the Defendant hence there was no need for further payment.
15. The Defendant does not admit paragraphs 16-19 of the Statement of Claim...
18. The Defendant claims the sum of $106,800 which represents sums paid to the Plaintiffs for the purchase of the [Mack Garbage Truck].
19. The Defendant claims that as a result of the Plaintiffs' dishonourable handling of this matter and their continued attempts to extort monies from the Defendant, the Defendant has suffered loss and damage in the sum of $106,800.00.
AND THE DEFENDANT claims as against the First Plaintiff:
(1) Payment of the Sum of $106,800.00
(2) Interest pursuant to the Civil Procedure Rules (Award of Interest) Act
(3) Costs
(4) Such other relief as the court deems fit.

[4.] The Plaintiffs filed a Reply and Defence to Counterclaim on 7 February 2022 in which they made the following material averments:

2. ...it was the Defendant who contacted the Second Plaintiff sometime after he was awarded a contract from The Bahamas Government in respect to sanitation services. Thereafter, the Defendant was referred to the First Plaintiff by the Second Plaintiff to be considered for financial assistance because the Defendant was unable to purchase a garbage truck and he could not secure the government contract without having such a truck. The Plaintiffs deny there was a verbal agreement between the parties and avers that there existed only a written contract, which was agreed between the parties.
3. The Defendant had full knowledge of the said contract as he was given a copy of the same before signing to consult upon with his attorney.
...
5. ... the Second Plaintiff at no time made a bid to obtain a government contract for garbage contract for garbage collection and nor did he seek to secure a contract of such type from The Bahamas

Government, as the trucking business is not in the nature of his livelihood. The Defendant travelled to Miami Florida…where he selected and inspected the [Mack Garbage Truck] prior to it's (sic) purchase. The Defendant approached the First Plaintiff, whom he had provided the details about the [Mack Garbage Truck] so that the funds were released for the purchase.
6. The first Plaintiff had also travelled to Miami Florida to deliver payment for the [Mack Garbage Truck]. At the material time when questioned by the First Plaintiff he responded that he was satisfied with the selection of the [Mack Garbage Truck] that he had chosen.
7. The Plaintiffs denies paragraph 7… upon completion of payment to The Bahamas Customs Department, the Defendant took possession of the [Mack Garbage Truck] and drove it from the Arawak Cay port to his compound situated on Tonique Williams Darling Highway formerly Harold Road. The Defendant had notice of the defects when he selected and inspected the [Mack Garbage Truck] prior to it's [sic] purchase. The Defendant is put to strict proof that he carried out and was responsible for various repairs including "skinning the entire floor and reseeding the bottom" resulting in him having paid approximately $9,000 for labour and materials.
8. As to paragraph 10 the Plaintiffs avers that no oral agreement was made between the parties and the only agreement that did exist between them was a written agreement which the Defendant signed acknowledging the nature and contents of the contract.
9. As to paragraph 11 of the Defence, the Plaintiffs avers [sic] that the sum of monies paid to them by the Defendant related to payment in respects to another matter with him for a previous business venture where the Defendant was granted a loan of monies from the Second Plaintiff in the amount of $17,900.00. This loan was to enable the Defendant to make payment for customs duties owed in respect to an imported excavator machine which at the time was being held by The Bahamas Customs Department.

Issues

[5.] Having reviewed the pleadings and reviewed the respective statements of facts, the issues which arise for determination are:

(i) Whether the Collateral Agreement dated 6 February 2019 (the "Collateral Agreement") is a valid agreement, voidable or void?

(ii) Whether the Collateral Agreement was breached by the Defendant failing to pay the Plaintiffs in accordance with the terms of the Collateral Agreement?

(iii) Whether the Defendant paid the Plaintiffs in full via cash and/or cheque for the purchase of the Mack Garbage Truck?

(iv) Whether or not the Plaintiffs miscalculated the amount of funds they received from the Defendant for the purchase of the Mack Garbage Truck?

(v) Whether the Defendant verbally terminated the Collateral Agreement in or about October 2020?

(vi) Whether the Defendant's verbal termination of the Collateral Agreement and the Plaintiffs' collection of the Mack Garbage Truck effectively terminated the Collateral Agreement?

(vii) Whether or not the Defendant owes the Plaintiffs the sum of $150,000 in accordance with the terms of the Collateral Agreement together with $6,115 to repair the Mack Garbage Truck?

(viii) Whether the Plaintiffs owe the Defendant the sum of $106,800 as sums paid to the Plaintiffs for the purchase of the Mack Garbage Truck or whether the Mack Garbage Truck should be returned to the Defendant?

Evidence and Findings

[6.] In advance of trial, the parties filed an agreed bundle of documents on 16 November 2022. At the trial of this matter, each of the parties gave oral evidence and no other witnesses were called. The parties' respective witness statements stood as their evidence in chief. Each party was subject to cross-examination. I will not prolong this brief judgment with a summary of what was said by each witness. I will instead simply record that I have reviewed the witness statements and the transcript of the hearing on 13 July 2023.

[7.] Having considered all of the evidence, and from my observation of the witnesses under cross-examination, I preferred the evidence of the Plaintiffs to the evidence of the Defendant with limited exceptions. Neither the Plaintiffs nor the Defendant gave entirely satisfactory evidence but the Plaintiffs impressed me as being more truthful and sincere than the Defendant. The Plaintiffs evidence was easier to believe than the Defendant's and more consistent with the arrangement documented by the Collateral Agreement and associated documents. The Plaintiffs' evidence was inconsistent with their statement of claim in certain respects but I attributed this more to the pleader than the Plaintiffs. The facts as I find them are set out below.

[8.] The Second Plaintiff (James), a Chief Superintendent of the Royal Bahamas Police Force, and the Defendant, a businessman, are childhood friends of some 46 years, fellow parishioners and occasional business associates. In 2018, the Defendant approached James to become a "partner" with him in a garbage collection business after he had been approved by the Department of Environmental Health Services ("DEHS") to conduct residential waste collection services but he did not have a garbage truck at the time.

[9.] Further to the terms of an approval letter from the DEHS dated 10 December 2018 granted to him, the Defendant needed to present a truck to the DEHS for inspection and approval by 31 January 2019 as a precondition to being awarded a contract. The Defendant lacked the funds to purchase the garbage truck which he required. James, who had not been in the garbage business before, also did not have the funds necessary. James therefore consulted the First Plaintiff (Esther), his wife, a retired police officer, about assisting the Defendant, as she had received a lump sum of money on her retirement.

[10.] The Plaintiffs agreed to assist the Defendant using some of Esther's retirement money. The Plaintiffs thought that the opportunity represented a good business opportunity for them. Esther's money would be staked on the arrangement; James would play the role of intermediary; and the Defendant would operate his garbage collection business using a Mack Garbage Truck and would pay the Plaintiffs from his revenues. It was not intended that the Mack Garbage Truck would be sold absolutely to the Defendant.

[11.] The Defendant identified the Mack Garbage Truck as a truck that was suitable for his intended use after inspecting it in person in the United States of America. James had insisted that the Defendant identify a truck that he was satisfied with and would be fit for its intended purposes. The Plaintiffs relied on the Defendant's acumen and advice about the fitness of the Mack Garbage Truck and did not personally inspect it. The Plaintiffs did this because James regarded the Defendant as a "decent certified mechanic" (the Defendant described himself as a "Heavy Equipment owner and renter" and therefore was experienced with heavy equipment).

[12.] The Defendant approved the purchase of the Mack Garbage Truck and did not tell the Plaintiffs that the Mack Garbage Truck required any further inspection. In early January 2019, Esther travelled to the United States of America and visited the dealership at the referral of the Defendant to purchase the Mack Garbage Truck. On 10 January 2019, Esther purchased the Mack Garbage Truck for the sum of $26,000.[1] The Defendant paid the freight to ship the Mack Garbage Truck to The Bahamas in the amount of $1,800. The Defendant claimed that he paid $3,000 towards the purchase price consisting of a deposit of $2,000 and a further cash payment of $1,000 but this was not substantiated by any supporting documentation.

[13.] The Mack Garbage Truck landed in The Bahamas by 5 February 2019. In order to clear Customs, Esther entered into an agreement dated 5 February 2019 with the Customs Department for the payment of customs duties in the amount of $20,883.37. The Defendant did not contribute to the customs duty. When the Mack Garbage Truck was released from Customs, it was handed to the Defendant with the approved clearance documents and keys and he drove it to his "compound" to deploy it for his purposes. At the time it was released from Customs, the Mack Garbage Truck was superficially in good condition and the Defendant did not mention to the Plaintiffs that it needed repair. The Defendant subsequently discovered issues with the rear of the Mack Garbage Truck which he had not noticed when he inspected it in the United States because of hydraulic issues. The Defendant carried out repairs to the truck with the assistance of a welder, including "skimming the entire floor and resheeting the bottom", but there were no receipts or invoices in

[1] The First Plaintiff claimed in her witness statement at para [2]: "...On 10 January 2019 I purchased the F.C. Equipment through AMB Motors... for the mount of Sixteen Thousand and Five hundred dollars. I am now shown and produce the copies of the Bill of Sale, Motor Vehicle Title Assignment and Commonwealth Bank US$ money draft marked and exhibited as 'EM-2'". However, the F.C. Equipment invoice exhibited to her witness statement is issued in the amount of $26,000.

evidence substantiating the Defendant's claimed repair cost. The Defendant did not attempt to bill the Plaintiffs for the work done.

[14.] The Mack Garbage Truck was initially titled in Esther's name. However, as the Defendant needed the Mack Garbage Truck to be title in his name or in the name of his company to show he had a garbage truck to qualify for a DEHS contract, Esther signed an "Automobile Bill of Sale" drawn by the Defendant on 6 February 2019 to transfer it into his name so he could obtain the anticipated contract with the DEHS. The Defendant licensed the Mack Garbage Truck in his name and obtained a contract from the DEHS (the "DEHS contract"). The DEHS contract was the Defendant's only "garbage" contract. The Defendant claimed that the DEHS contract paid $8,000 per month but the DEHS contract was not in evidence and, in the absence of a copy of it, I am not prepared to take the Defendant's word.

[15.] To "protect their investment in the Mack Garbage Truck", the Plaintiffs had the Defendant sign a Collateral Agreement dated 6th February 2019 (the "Collateral Agreement) drawn by the Plaintiffs' attorneys, which James told the Defendant to seek legal advice in relation to before he signed it, and related documents, namely (i) a Bill of Sale dated 6 February 2019 for the sale of the Mack Garbage Truck to the Defendant for the sum of $50,000 and (ii) a Bill of Sale dated 6 February 2019 for the sale of the Mack Garbage Truck for the sum of $10 to James which was intended to be held in escrow for the duration of the Collateral Agreement. The Collateral Agreement provided for the Defendant to use the Mack Garbage Truck from 6 February 2019 to 28 February 2023, assuming its terms were performed, in exchange for monthly payments to the Plaintiffs.[2]

[16.] Esther admitted that the documents drawn by her attorneys were not signed on 6 February 2019 as expressed on their face but the documents were "made up on that date". The Defendant admitted to signing the Collateral Agreement after 6 February 2019 and did not deny the authenticity of the Collateral Agreement or the Bills of Sale which were signed along with it. The Defendant claimed that the documents were brought to him by James at his "compound" while he was in the middle of work and he signed them without reading them as he relied on James, whom he trusted, and proceeded on the basis that they memorialized what they had previously orally agreed. When asked whether it did in fact reflect the terms of their agreement, the Defendant said "not to this extent".

[17.] That the Defendant signed the Collateral Agreement without reading it in any detail, at his compound, was essentially uncontroverted but it was not pleaded or contained in the Defendant's witness statement and it was never put to James for comment. The Defendant's account of events made no reference to the Justice of the Peace who witnessed his signature and, in the absence of

[2] It follows that the Defendant did not make payments to the Plaintiffs for the purchase of the Mack Garbage Truck. The position was, as the Plaintiff expressed it in cross-examination: "Mr. Higgs was not paying off the value of the truck. He was paying off the value of the contract agreement that he signed…".

any evidence that the Defendant habitually acted in such a manner in the conduct of his business affairs, it is doubtful that a businessman would sign a seven-page collateral agreement, Bill of Sale in his favour and Bill of Sale in favour of James for $10.00 without at least seeking to obtain a cursory understanding of what had been or was to be agreed, even with a friend. It would have been obvious to a reader on even a cursory examination that what was contemplated was not a simple sale of the Mack Garbage Truck; this is particularly so as the Defendant had already received a Bill of Sale for the Mack Garbage Truck. I therefore rejected the Defendant's account of events.

[18.] The Collateral Agreement provided *inter alia*:

> This Collateral Agreement is made this 6th day of February, A.D., 2019 by and BETWEEN JAMES AND ESTHER MILLER of Yamacraw Shores of the Eastern district of the Island of New Providence on the Islands in the Commonwealth of The Bahamas (hereinafter called "the Vendors") of the one part and Gregory Higgs Trading as G&H Enterprises of Theodore Lane, New Providence aforesaid (hereinafter called "the Purchaser") of the other part.
> The Vendors has sold and the Purchaser Purchases the Chattel described in the schedule hereto (hereinafter called "the said Chattel") subject to the provisos of this Agreement but otherwise free from all encumbrances.
> The date for completion of the above sale shall be on or before the 1st of May, A.D., 2004 (hereinafter referred to as "the completion date"):
> Definitions:
> Bill of Sale: means the Bill of Sale signed by the Vendor and Purchaser by which the Purchaser transfers his ownership interest in the Chattel to the Vendor.
> Contract Days: means two days per calendar week where Purchaser shall have free and full use and financial benefit of the Chattel. The Purchaser shall advise the Vendor of the two days per week which shall constitute the Contract Days.
> Other Days: means the remaining five days of each calendar which shall be subject to revenue sharing as provided for in item 1.3 of this Agreement.
>
> ITEM 1
>
> PAYMENT
> Section 1.1 Purchaser shall pay the Vendors the sum of Five Thousand dollars (B$5,000.00) per month on or before the 28th day of each month commencing on 28th day of February, 2019 and ending on the 28th day of September, 2019;
> Section 1.2 Upon the 8th Month being 28th of September, 2019, the Purchasers shall pay the Vendors Four Thousand Dollars ($4,000.00) per month or before the 28th day of each month commencing on 28th day of October, 2019 and ending on the 28th day of February 2023;
> If payment is not received within 5 days of its due date, there will be an additional $150.00 late fee charge added to that month's payment. It is agreed that the payment represents a genuine estimate of the loss to the Vendor and shall not constitute a penalty.
> Section 1.3 It is agreed that in addition to the monthly payment the Purchaser shall pay to the Vendors 50% of net earnings from the use of the Chattel which for any work done using the Chattel on the Other Days. The Purchaser shall on a monthly basis submit a list of all jobs undertaken on the Off Days and remit the 50% of the net earnings for the period to which the list relates.
> Section 1.4 Upon the 49th Month being 28th of February 2023, the Vendors shall pay the Purchaser the Sum of Ten Dollars (B$10.00) upon which the Bill of Sale shall be released from escrow and the title of the Chattel shall vest in Vendor.
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> ITEM 2
>
> TAXES AND ASSESSMENTS:

The Purchaser shall pay the annual License, taxes levied, assessed or accruing on the Chattel during his possession of the Chattel.

ITEM 3

INSURANCE:

The Purchaser shall insure and keep insured (up to their replacement value) at the cost of the Purchaser the Chattel against all insurable risks with a Reputable Insurance Company with the Vendors noted thereon as Loss Payee. In the absence of the Purchaser effecting such insurance Policy, the Vendors may terminate this Agreement upon giving 5 days' notice to the Purchaser or at his option take out such insurance with the cost of the premiums being for the Purchaser's account.

ITEM 4

MAINTENANCE OF THE CHATTEL:

The Purchaser shall bear pay and discharge all costs and expenses associated with the licensing, maintenance and use of the vehicle including but not limited to fuel and servicing.

...

ITEM 6

ALTERATIONS TO THE CHATTEL

The Purchaser shall not without the previous consent in writing of the Vendors (such consent not to be unreasonably withheld) make any mechanical changes and alterations to the Chattel or otherwise effect any major repairs.

If written approval is given to by the Vendor, the Purchaser shall indemnify and hold the Vendor harmless against from liability for any and all expenses or damages resulting from any repairs or alterations to the Chattel by the Purchaser his agents or assigns.

...

ITEM 9

POSSESSION

The Purchaser shall be entitled to possession of the Chattel from the date hereof to shall continue to have possession of the Chattel for so long as he is not in default in the performance of this Agreement.

ITEM 10

DEFAULT CLAUSE:

The payment of all monies becoming due hereunder by the Purchaser and the performance of all covenants and conditions of this Agreement are to be kept and performed by the Purchaser are conditions precedent to the performance by the Vendors of the covenants and conditions of this Agreement to be kept and performed by the Vendors.

In the event, the Purchaser shall fail for a period of THIRTY (30) days after they become due to pay any of the sums in this Agreement agreed to be paid by the Purchaser, either as installments or on account of interest, taxes, or insurance, or should the Purchaser fail to comply with any of the covenants or conditions of this Agreement on his part to be performed, or should any action or proceeding be filed in any court to enforce any judgment on or claim against, the said hereditaments seeking to reach the interest of the Purchaser, then:

1. The Bill of Sale shall be released from Escrow and the title of the Chattel shall vest in the Vendors.
2. The Purchaser agrees to forfeit all rights to said hereditaments inclusive of any improvements made to property, fixtures added to property, any monies paid either through down payment or monthly payments or other payments and rights to the possession commencing on the 31st day of default.
3. The Vendors shall have a right to retake possession of said property after the 31st day of default.
4. Notwithstanding the foregoing, the Vendors, at his option, may declare by Notice to the Purchaser, any unpaid balance of specified in this Agreement to be due and payable, may by appropriate action, in law or in equity, proceed to enforce payment thereof.

5. Any rights, powers, or remedies, special, optional or otherwise, given or reserved to Vendors by this paragraph shall not be construed to deprive the Vendors of any rights, powers or remedies otherwise given by law or equity.
6. Any and all legal fees incurred resulting in default of this Agreement by the Purchaser shall be due and payable from the Purchaser.

ITEM 11

NO REPRESENTATIONS:

The Purchaser agrees with, and represents to the Vendors that the Chattel has been inspected by him and that he has been assured by means independently of the Vendors or of any agent of the Vendors of the truth of all facts material to this Agreement, and that Chattel, as it is described in this Agreement, is as a result of such inspection or investigation and not by or through any representation made by the Vendors, or by an agent of the Vendor.

...

ITEM 15

ADDITIONAL COVENANTS BY THE PURCHASER:

To keep the Chattel in good condition (fair wear and tear damage by fire, hurricane, storm, or tempest and damage which results from inherent or structural defect or decay excepted).
To Service the Chattel regularly and to keep it in good mechanical condition.

ITEM 16

MISCELLANEOUS PROVISIONS

...

The Parties each represent, acknowledge and agree that each of them have carefully read and understands all of the terms and conditions hereof and is entering into this Deed freely and voluntarily.

[19.] On the matter of payment under the Collateral Agreement, the Plaintiffs' evidence was that:

(i) between the period 28 February 2019 and 28 September 2019, the Defendant paid the Plaintiffs the sum of $16,000 instead of the $40,000 required by the Collateral Agreement;

(ii) between the period 28 October 2019 to December 2019, the Defendant paid the Plaintiffs the sum of $6,000 instead of the $12,000 required by the Collateral Agreement; and

(iii) between the period of January 2020 to December 2020, the Defendant paid the Plaintiffs the sum of $24,000 instead of the $48,000 required by the Collateral Agreement, because the Defendant had paid $2,000 per month instead of $4000 per month.

[20.] In cross-examination and re-examination, Esther maintained that the Defendant paid her in cheques of $2,000 and (after being forced to change her position when confronted with the cheques in the agreed bundle of documents) that on more than one occasion, because the Defendant was in breach of the contractual schedule, the Plaintiffs received cheques drawn in amounts larger than $5,000.

[21.] The Defendant testified that he made monthly lump sum payments to the Plaintiffs in cash and cheque towards the purchase of the Mack Garbage Truck via cheques in the amount of $2,000-

$10,000 and various cash payments including $13,000 and $16,000 to James. The Defendant said that he was instructed by the James to make the cheque payments to Esther and all cash payments were to be made to James. The Defendant testified that he did not require or receive receipts from the Plaintiffs for the cash payments, which were paid in the US dollars to James at his request. The Defendant testified that he did not find the irregular cash payments requested by James odd because they had a contract which spoke clearly to the payments which the Defendant was to make to the Plaintiffs because that was the extent of their friendship. The Defendant also confirmed that he had been involved in previous business ventures with James including one in which the Defendant was granted a loan to purchase an imported yellow Kamatsu excavator.

[22.] The evidence of what the Defendant paid the Plaintiffs and when in connection with the arrangement under consideration was unfortunately lacking, particularly when considered in the context of a background where the Defendant and James appear to have had various business dealings not limited to the Mack Garbage Truck and the Collateral Agreement. Notably:

(i) The agreed bundle contained cheques from the Defendant in favour of one or other of the Plaintiffs dated between 22 May 2018 (before the Bills of Sale and Collateral Agreement) and 4 December 2020, totaling $34,000 and being in the individual amounts of $9,000 (22 May 2018), $7,000 (7 April 2019), $5000 (12 May 2019), $10,000 (12 September 2019), $2,000 (30 October 2019), $2,000 (4 December 2020).

(ii) The Defendant appeared to only touch upon the $9,000 cheque paid on 22 May 2018 in his witness statement, which he dated as having been paid "in or about 2017" and said it related to hurricane windows which he never received. The cheques were only touched upon by Esther in cross-examination briefly. Very little was put to her about the cheques, other than that they exceeded the amounts she claimed the Defendant paid her. The cheques were not addressed by James.

(iii) The Plaintiffs pleaded, and the Defendant admitted in his Defence and Counterclaim, that the last payment made by the Defendant to the Plaintiff was on 30 January 2020. However, there is a cheque in the agreed bundle in the amount of $2000 dated 4 December 2020 and Esther stated in her witness statement that the last payment made by the Defendant was $2000 on or about 30 January 2021. James corroborated the evidence of Esther (albeit he gave the payment date of, on or about 3 January 2021).

(iv) While the Plaintiffs attempted to quantify the total amount they had been underpaid by the Defendant under the Collateral Agreement by the end of January 2021, which can be worked out to be $54,000, the Defendant made no attempt to specify in his witness statement the total amount that he allegedly paid to the Plaintiffs. His witness statement stated at para. [11]:

> That I made monthly and lumpsum payments to the Plaintiffs in cash and cheque towards the purchase of the garbage truck. However, I was instructed by the Second Plaintiff to make the cheque payments to the First Plaintiff, (his wife) and all cash payments were to be made to the Second Plaintiff. I made monthly payments by way of cheque to the First

Plaintiff in the range of $2,000.00 - $10,000.00 and various cash payments including $13,000.00 and $16,000.00 to the Second Plaintiff.

It is impossible to work out from this that the Defendant paid the Plaintiffs $106,000, the figure claimed in the Defendant's counterclaim, or any other exact amount.

(v) If Esther's evidence that the Defendant made payments under the Collateral Agreement exclusively by cheque were true, there has been no explanation proffered as to why there are not copies of all cheques paid by the Defendant to the Plaintiffs in evidence. In his written closing submissions, at para [11], Counsel for the Plaintiffs in fact adopted the Defendant's position that payments were made by cash and cheque.

[23.] Nonetheless, I am prepared to accept the Plaintiffs' evidence that the Defendant made his last payment to the Plaintiffs in connection with the Collateral Agreement on 30 January 2021 in the amount of $2,000 and that, between February 2019 and December 2020, the Defendant underpaid the Plaintiffs in the total amount of $54,000. I have reminded myself that the standard of proof that applies is the balance of probabilities. The Plaintiffs gave evidence corroborative of one another,[3] the Defendant admitted to making monthly payments to the Plaintiffs (which I accepted that the Defendant occasionally paid late) and the Defendant did underpay the Plaintiffs relative to the Collateral Agreement by paying $2,000 a month instead of $4,000 per month as demonstrated by the cheques in the agreed bundle dated 30 October 2019 and 4 December 2020.

[24.] The Plaintiffs never assessed penalties on the Defendant or exercised any remedies under Item 10 of the Collateral Agreement because of the friendly relationship between the parties notwithstanding the Defendant made payments outside of the contractual due dates on more than one occasion. He consistently paid less to the Plaintiffs than the amounts stated to be due under the Collateral Agreement, and sometimes "made up for" missed payments by making larger payments. The Plaintiffs admitted that no formal, written notice of breach was ever served on the Defendant in accordance with the Collateral Agreement when he breached it. The Defendant had been given verbal notice of breach on every occasion he was late in making payment.

[25.] The Defendant did not verbally terminate the contract between himself and the Plaintiffs in October 2020 and did not request that James collect the Mack Garbage Truck in December 2020. The Defendant had purchased two additional garbage trucks in 2020 and had no need to continue with the agreement with the Plaintiffs because he had his own trucks. In or about February 2021, the Defendant called James while he was in Bimini and told him to send someone to collect the Mack Garbage Truck as he had not used it in December 2020 and did not need it anymore. James reminded the Defendant that he had signed a contract and advised him to take his contract to his lawyer. However, James sent his brother to collect the truck on 7 February 2021 as he took the Defendant's request to mean the Defendant did not wish to do business anymore.

[3] I readily acknowledge that proof is not a matter of merely counting heads in support of a proposition and heads against it.

[26.] Following the collection of the Mack Garbage Truck, the Defendant made no further payments to the Plaintiffs in connection with the Collateral Agreement. The Defendant maintained in his witness statement that he felt the Plaintiffs were extorting money from him as they kept demanding payments and he had already paid the full value of the Mack Garbage Truck but he admitted to never reporting the alleged extortion to the Royal Bahamas Police Force in cross-examination. On 28 February 2021, the Plaintiffs made a verbal demand for payment under the Collateral Agreement but this proved to be unfruitful.

[27.] The Mack Garbage Truck was not in a state of disrepair when it was collected by James' brother such that it required repair work, welding and new tyres. There is no photographic evidence of the Mack Garbage Truck in the state that it was returned in when it was collected by James' brother nor any evidence from the Second Plaintiff's brother or any person that carried out the work nor are there any invoices or receipts in evidence demonstrating the repair costs that the Plaintiffs allegedly incurred but it is reasonable to assume that such invoices or receipts existed. I therefore did not accept the Plaintiffs' evidence that the Defendant failed to maintain the Mack Garbage Truck and the truck required $6,115 in repair work, welding and new tyres.

[28.] The Plaintiffs loaned the Mack Garbage Truck for use in 2022 for a period of four or five months and earned $27,000 gross and a profit of about $8,000 after labour and diesel costs. The Plaintiffs sold the Mack Garbage Truck in or about June 2023 after the DEHS refused to give them permission to use the truck to provide garbage collection services.

Analysis and Disposition

Whether the Collateral Agreement is a valid agreement, voidable or void?

[29.] Addressing the first issue, the Defendant failed to properly articulate or particularize any recognizable defence or ground of contract avoidance to impugn the validity or enforceability of the Collateral Agreement in his Defence and Counterclaim or closing submissions. The most that can be said is that the Defendant pleaded that the Collateral Agreement was "void and/or voidable" and that he came to believe he was being "extorted" by the Plaintiffs.

[30.] The issue of whether the Collateral Agreement was valid, voidable or void must therefore be taken to have been abandoned by the Defendant. The Defendant presumed the validity of the Collateral Agreement in his closing submissions by submitting that it reflected an earlier oral agreement between the parties which had been reduced to writing (albeit not "to that extent") and by submitting that the Defendant had validly terminated it by providing verbal notice to the Second Plaintiff that he was terminating it, which was reasonable notice in the absence of a termination clause in the Collateral Agreement.

[31.] In the premises, it follows that the Defendant is bound by the terms of the Collateral Agreement, which he signed and sealed before a Justice of the Peace. The starting point and end

point, on the Defendant's case, is that a man is bound by his signature on a document which he knows is intended to have legal effect. In **Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd** [2006] EWCA Civ 386, at para [43], *Moore-Bick LJ* remarked about English law in terms that are equally apt to apply to the laws of the Commonwealth:

> ...a person who signs a document knowing that it is intended to have legal effect is generally bound by its terms, whether he has actually read them or not. The classic example of this is to be found in L'Estrange v Graucob [1934] 2 KB 394, 103 LJKB 730, [1934] All ER Rep 16. It is an important principle of English law which underpins the whole of commercial life; any erosion of it would have serious repercussions far beyond the business community. ...
>
> [Emphasis added]

Whether the Collateral Agreement was breached by the Defendant failing to pay the Plaintiffs in accordance with the terms of the Collateral Agreement?

[32.] The Defendant breached the Collateral Agreement by failing to pay the Plaintiffs in accordance with its terms both as to amount and as to timing. On the Plaintiffs' evidence, which I accepted, the Defendant paid the Plaintiffs $54,000 less than what was due to them under the Collateral Agreement up to 30 January 2021 and made payments after their contractual due dates. By the date that the Mack Garbage Truck was collected, the amount of $54,000 remained outstanding and it has not been paid by the Defendant. The Defendant has not established the unenforceability or invalidity of the Collateral Agreement. Agreements which are neither contrary to law nor fraudulently entered into, must be honoured.

Whether the Defendant's verbal termination of the Collateral Agreement and the Plaintiffs' collection of the Mack Garbage Truck effectively terminated the Collateral Agreement?

[33.] In his closing submissions, the Defendant resisted the Plaintiffs' claim principally on the basis that the Defendant gave reasonable notice of termination of the parties' contractual relationship on October 2020 which the Plaintiffs accepted by collecting the Mack Garbage Truck, effectively terminating the contractual relationship and discharging the Defendant from its prospective obligations under the contract.

[34.] For their part, the Plaintiffs contended that the Defendant unilaterally terminated the Collateral Agreement and therefore the Plaintiffs were obliged to protect the Mack Garbage Truck by collecting it from the Defendant's premises.

[35.] In support of the position taken by him, the Defendant relied on **Anheuser-Busch International Inc. et al v Commonwealth Brewery Limited** [2022] 1 BHS J No 32. In that case, Anheuser-Busch International Inc. and Cerveceria Nacional Dominicana, S.A attempted to terminate an informal distribution agreement with Burns House Limited ("Burns House") by letter dated 12 August 2015 providing about 3.5 months' notice of termination. Burns House immediately ceased payments and litigation ensued between the parties as to whether the

distribution agreement had been wrongfully terminated. *Charles Sr J* (as she then was) held that the distribution agreement, which was not in writing and contained no defined terms of termination, could be terminated on reasonable notice. *Charles Sr J* held that what is "reasonable notice" is fact-sensitive and, on the facts, a reasonable period of notice was 15 months' notice and not the 3.5 months given.

[36.] I did not accept the Defendant's evidence that he attempted to terminate the contractual relationship between the parties in October 2020. This is fatal to the Defendant's argument. However, even if I was wrong in that view, I am satisfied that **Anheuser-Busch International Inc.** is distinguishable. Distilled to its essentials, the Collateral Agreement required the Defendant to make monthly payments between 28 February 2019 to 28 February 2023 during which time the Defendant could use the Mack Garbage Truck but was responsible for all licence fees, taxes, insurance and maintenance. The Collateral Agreement contemplated that, on 28 February, 2023, upon the payment of $10.00 to the Defendant, the Bill of Sale in favour of the Second Plaintiff would be released from escrow and title to the Mack Garbage Truck would vest in the Second Plaintiff. The implication of a term enabling the Defendant to terminate the arrangement at any time prior to 28 February 2023 on reasonable notice would defeat, rather than give effect to the intentions of the parties as expressed in the Collateral Agreement.

[37.] Counsel for the Defendant, relying on **Vitol S.A. V Norelf Ltd** [1996] AC 800 and **Roscoe Thompson (T/A Thompson's Heavy Equipment) v The Attorney General of The Bahamas** [2020] 1 BHS J No 111, further submitted that, when the Second Plaintiff sent his brother to collect the Mack Garbage Truck, he affirmed the termination of the contract between the parties, which effectively terminated it.

[38.] In **Vitol S.A. V Norelf Ltd** [1996] AC 800, buyers of a cargo of propane under a c.i.f contract sent a telex, while the vessel was still loading, rejecting the cargo and repudiating the contract on the ground that the vessel was not likely to complete loading within the contractual time. The vessel completed loading and sailed but neither party took any further step to perform the contract. The sellers claimed for their loss on reselling the cargo. The House of Lords affirmed that (i) acceptance of repudiation requires no particular form provided the aggrieved party clearly and unequivocally demonstrates to the repudiating party that he is treating the contract as determined and (ii) a failure to perform is capable of signifying to a repudiating party an election to treat the contract as at an end in appropriate circumstances.

[39.] In **Roscoe Thompson (T/a Thompson's Heavy Equipment) v The Attorney General of The Bahamas** [2020] 1 BHS J No 111, the Government purported to terminate seven written contracts entered into with the plaintiff for the operation and maintenance of waste disposal sites in Eleuthera pursuant to express termination clauses providing for either party to terminate the contracts at any time on two weeks' notice. The efficacy of the Government's termination letters was disputed on the basis they did not comply with the notice period stipulated by the terms of the

contracts. In considering the validity of the notices, *Klein J* commented that an acceptance of repudiation may be indicated by conduct which clearly shows that the aggrieved party is treating the contract as at an end citing **Vitol SA v. Norelf Ltd** [1996] AC 800.

[40.] In my judgment, the correct characterisation of what transpired between the parties is that the Defendant repudiated the Collateral Agreement in or about February 2021 when he informed the Plaintiffs that he had purchased his own trucks, he had no more use for the Mack Garbage Truck and therefore they ought to collect it. In doing so, the Defendant made clear that he would no longer be performing the Collateral Agreement and had no intention to continue to be bound by its terms. The Plaintiffs accepted the Defendant's repudiation of the Collateral Agreement on 7 February 2021 when James' brother collected the Mack Garbage Truck. I will address the effect of this in considering the next issue.

Whether or not the Defendant owes the Plaintiffs the sum of $150,000 in accordance with the terms of the Collateral Agreement together with $6,115 to repair the Mack Garbage Truck?

[41.] Counsel for the Defendant submitted that an effective termination of contract results in the parties being discharged from further performance under the contract, citing **Cheshire, Fiffoot & Furmston's Law of Contract** (15th edn) where the learned authors of that work stated:

> If an innocent part elects to treat the contract as discharged, he must make his decision known to the party in default. Once he has done this, his election is final and cannot be retracted. The effect is to terminate the contract for the future from the moment when the acceptance is communicated to the party in default. The breach does not operate retrospectively. The previous existence of the contract is still relevant with regard to the past acts and defaults of the parties. Thus the party in default is liable in damages both for any earlier breaches and also for the breach that has led to the discharge of the contract, but he is excused from further performance.

[42.] Counsel for the Defendant also commended the case of **Boston Deep Sea Fishing Ice Co v Ansell** [1866-90] All ER Rep 65, in which an employer summarily dismissed their managing director who sued them for one quarter of the salary due as well as commission in respect of sales by the company and it was held that he could not recover the salary (which had not accrued due as of the date of his dismissal) but could recover the commission on sales (which had accrued due as of the date of his dismissal).

[43.] I readily accept the correctness of the principles quoted above from **Cheshire, Fiffoot & Furmston's Law of Contract** (15th edn). It is supported by high authority. In **Heyman v Darwins Ltd** [1942] AC 356, for example, *Lord Macmillan* stated at page 373:

> Repudiation, then, in the sense of a refusal by one of the parties to a contract to perform his obligations thereunder, does not of itself abrogate the contract. The contract is not rescinded. It obviously cannot be rescinded by the action of one of the parties alone. But, even if the so-called repudiation is acquiesced in or accepted by the other party, that does not end the contract. The wronged party has still his right of action for damages under the contract which has been broken, and the contract provides the measure of those damages. It is inaccurate to speak in such cases of

> repudiation of the contract. The contract stands, but one of the parties has declined to fulfil his part of it. There has been what is called a total breach or a breach going to the root of the contract and this relieves the other party of any further obligation to perform what he for his part has undertaken.

[44.] To my mind, the quote above exposes the fatal flaw in the Defendant's position (quoted at para [33] above). While the Defendant was excused from future performance of his primary obligations under the Collateral Agreement when the Plaintiffs accepted his repudiation of the Collateral Agreement, he became and remains liable to pay damages to the Plaintiffs for the loss sustained in consequence of his nonperformance in the future.

[45.] The measure of damages for which the Defendant is liable is such damages as are necessary to put the Plaintiffs in as good a position as if the Collateral Agreement had been performed. In **Moss v Bahama Reef Condominium Association** [2011] 1 BHS J. No. 16, *Evans J* (as she then was) conveniently reviewed some pertinent authorities at [76] to [78]:

> 76 Parke, B, in Robinson v Harman supra stated what has become the general rule at common law, that: "where a party sustains loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same position with respect to damages as if the contract had been performed" and Alderson B opined: "where a person makes a contract and breaks it, he must pay the whole damage sustained." (365).
> 77 The rule in Robinson v Harman supra has been approved and re-stated in several cases, some of which were cited by counsel for the plaintiff, including Johnson v Agnew [1979] 1 All E.R. 883 where the Court at page 896 opined that "the general principle for the assessment of damages is compensatory, i.e. that the innocent party is to be placed so far as money can do so, in the same position as if the contract had been performed" and in British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd [1912] AC 673, where Viscount Haldane, L.C., at page 689, after stating that the quantum of damages is a question of fact and that the only guidance the law can give is to lay down general principles said,:
> "Subject to these observations I think there are certain broad principles which are quite well settled. The first is that as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed. The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach.
> 78 It is, of course, for the plaintiff to prove both the fact, and the amount, of the damage (McGregor on Damages, 16th Ed. Para 357) and, as I understand the authorities, he is not to be placed in a better or worse position than he would have been in had he been permitted to fulfill his part of the contract. Further, the plaintiff must prove, on a balance of probabilities, that his expectation of a certain outcome, as a result of performance of the contract, had a likelihood of attainment rather than being mere expectation. (Commonwealth v Amann Aviation Pty Limited (1991) 174 CLR 64).

[46.] An issue that arises is that the Defendant testified under questioning by the Court that the DEHS contract was cancelled in about September 2021, following 2021 General Election. Counsel for the Defendant submitted that the existence of the DEHS contract was the foundation of the Defendant's contract with the Plaintiffs and, on the termination of the DEHS contract, it would have been impossible for the Defendant to perform or fulfil the terms of the contract and, therefore, the claim made by the Plaintiffs suggesting that the Defendant owes them monies for the years 2021, 2022 and 2023 is unsustainable.

[47.] This submission raises the issue of frustration. In **National Carriers Ltd v Panalpina (Northern) Ltd** [1981] AC 675, Lord Simon explained at page 700 that:

> Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.

[48.] In **Edwinton Commercial Corporation and another v Tsavliris Russ (Worldwide Salvage and Towage) Ltd; The Sea Angel** [2007] 2 All ER (Comm) 634, *Rix LJ* made the following observations about the doctrine of frustration at paras [112] and [113]:

> [111] In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as 'the contemplation of the parties', the application of the doctrine can often be a difficult one. In such circumstances, the test of 'radically different' is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances.
>
> [112] What the 'radically different' test, however, does not in itself tell us is that the doctrine is one of justice, as has been repeatedly affirmed on the highest authority. Ultimately the application of the test cannot safely be performed without the consequences of the decision, one way or the other, being measured against the demands of justice. Part of that calculation is the consideration that the frustration of a contract may well mean that the contractual allocation of risk is reversed. ... Since the purpose of the doctrine is to do justice, then its application cannot be divorced from considerations of justice. Those considerations are among the most important of the factors which a tribunal has to bear in mind.

[49.] The intervention of a future event which would have frustrated the contract can be taken into account when computing damages for a repudiatory breach of contract which has been accepted. In **Golden Strait Corporation v Nippon Yusen Kubshika Kaisha** [2007] 2 AC 353, *Lord Scott* adverted to this when he said at para [35]:

> Take the case of a three-year contract for the supply of goods and a repudiatory breach of the contract at the end of the first year. The breach is accepted and damages are claimed but before the assessment of the damages an event occurs that, if it had occurred while the contract was still on foot, would have been a frustrating event terminating the contract, e.g. legislation prohibiting any

> sale of the goods. The contractual benefit of which the victim of the breach of contract had been deprived by the breach would not have extended beyond the date of the frustrating event. So on what principled basis could the victim claim compensation attributable to a loss of contractual benefit after that date? Any rule that required damages attributable to that period to be paid would be inconsistent with the overriding compensatory principle on which awards of contractual damages ought to be based.

[50.] I have given anxious consideration to whether the cancellation of the DEHS contract would have frustrated the Collateral Agreement had it continued in force and whether it would be unjust to reduce the Plaintiffs' damages on the basis of a finding that the DEHS contract was cancelled in about September 2021. The cancellation of the DEHS contract (or frustration) was not pleaded nor mentioned in the Defendant's witness statement and the Defendant failed to adduce any documentary evidence supporting the allegation in advance of trial. On the other hand, Counsel for the Plaintiffs did not seek an adjournment to challenge the Defendant's evidence nor did Counsel for the Plaintiffs make any objection to it being taken into consideration on the basis of prejudice.

[51.] After weighing the competing procedural considerations and considering the relevant legal requirements, I have come to the conclusion that the Plaintiffs' damages ought not to be reduced on the footing that the DEHS contract was cancelled in about September 2021 and, had the Collateral Agreement not been repudiated, it would have been discharged from that date. The Collateral Agreement itself contemplated the possibility of the Defendant undertaking multiple "jobs" in clause 1.3. Furthermore, it was perfectly possible for the issue of frustration and the cancellation of the DEHS contract to be raised well in advance of the trial. The Plaintiffs must, however, give credit for the profit earned from the leasing out of the Mack Garbage Truck.

[52.] In the result, the Plaintiffs are entitled to $111,990 computed as follows: $24,000 (the amount of arrears between January 2020 and December 2020 on the First Plaintiff's evidence) + $98,000 (the amount of arrears between January 2021 and January 2023) - $8000 (the Plaintiffs' profit on leasing out the Mack Garbage Truck in 2022) - $10.00 (the amount due under clause 1.4 of the Collateral Agreement) on 28 February 2023. As this loss was not proven, the Plaintiffs cannot recover the $6,115 which they claim for the repair of the Mack Garbage Track.

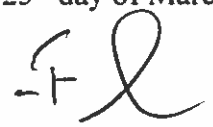
Whether the Plaintiffs owe the Defendant the sum of $106,800 as sums paid to the Plaintiffs for the purchase of the Mack Garbage Truck or whether the Mack Garbage Truck should be returned to the Defendant?

[53.] The Defendant in his pleadings alleged that he paid the Plaintiffs $106,800 for the purchase of the Mack Garbage Truck but this was not admitted by the Plaintiffs and the Defendant (upon whom the burden of proof rested) did not substantiate the allegation at trial. The Defence and Counterclaim does not include a claim for the return of the Mack Garbage Truck to the Defendant, and the Defendant did not seek to amend his Defence and Counterclaim. Further, and in any event, no cogent basis for the return of the monies paid by the Defendant or the Mack Garbage Truck was

advanced in the Defendant's closing submissions. The Defendant is therefore entitled to neither relief.

[54.] In all the circumstances, I find the Plaintiffs are entitled to judgment in their favour in the amount of $111,990. Interest shall run at the statutory rate of 6.25% from the date of judgment to the date of payment. The Plaintiffs shall have their costs. I intend to fix the costs of the action on the papers. The Plaintiffs are to lodge and serve a statement of costs within fourteen days. The Defendant is at liberty to lodge and serve any representations on quantum they may wish to have the Court consider within seven days thereafter. The Plaintiffs may reply within seven days of service of those representations.

Dated the 25th day of March 2024



Sir Ian R. Winder
Chief Justice