

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

SUIT NO. 0222/2008

BETWEEN:

DONNA STERLING

Claimant

and

**GERARD KRAAKMAN
(d.b.a the Woodshop)**

Defendant

Appearances:

Lewis Hunte Q.C. with Richard Arthur of Hunte & Co for the Claimant

Gerard St. C. Farara Q.C. with Tamara Cameron of Farara Kerins for the Defendant

2009: 15th, 16th, 22nd December

2010: 5th March

Catchwords- Sale of goods- Windows and exterior doors to be manufactured – Whether goods in conformity with the contract description- Whether goods reasonably fit for the purpose - Whether buyer entitled to reject goods after payment of full purchase price - Sale of Goods Act Cap. 298 considered.

JUDGMENT

[1] **Joseph-Olivetti J:** The Claimant, Mrs. Donna Sterling and her husband were building a house at Long Bay, Tortola in the Territory of the Virgin Islands, in the true tradition of the Territory's wealthy inhabitants whose grandiose homes can be seen sprawled on the forbidding hillsides and shorelines of these islands. Mrs. Sterling contracted with the Defendant, Mr. Gerard Kraakman, the owner of a well established woodshop at Baughers Bay to manufacture the doors, windows and frames for their home. Mrs. Sterling duly paid the full balance of the purchase price in accordance with the contract and took a first

delivery of five doors. However, she was dissatisfied with the doors and rejected them and subsequently she also rejected the remainder of the goods after examining them at the woodshop. She now seeks a refund of the full purchase price of \$50,517.00 on the main basis that the goods were of poor workmanship and not in conformity with the contract. Mr. Kraakman accepts that some of the goods were defective but he claims: (1) that these were only minor defects which could be remedied and were covered by the one year warranty as per contract and (2) that Mrs. Sterling accepted the goods by paying for them and so could not properly reject them. He in turn counterclaimed, inter alia, for storage of the goods at his workshop.

Issues Arising

- [2] The main issues for determination, having regard to the issues identified by the parties are as follows:- (1) Were the goods fabricated by Mr. Kraakman in accordance with the agreement and, in particular, the measurements and other specifications set out in the agreement? (2) Did Mrs. Sterling accept the goods by payment of the full balance of the purchase price and thus lost her right to reject? (3) Were the goods reasonably fit for the purpose for which they were intended? (4) Is Mrs. Sterling entitled to damages of \$910.40 for hinges she supplied? (5) Is Mrs. Sterling entitled to interest on any sums found due and owing to her? (6) In the event that Mrs. Sterling's claim fail, is Mr. Kraakman entitled to charge for storage of the goods at his workshop after Mrs. Sterling failed to collect them and, if so, at what rate?

ISSUE 1 -Were the goods fabricated by Mr. Kraakman in accordance with the agreement and, in particular, the measurements and other specifications set out in said agreement?

- [3] An initial matter arose as to what documents constituted or evidenced the contract. Mr. Hunte Q.C, counsel for Mrs. Sterling pleaded her case on the basis that the contract relied on is dated 1st February 2007 whilst Mr. Farara Q.C., counsel for Mr. Kraakman, contended that this contract was varied by an email dated 7th May 2007.

- [4] I have considered the evidence of the parties and the documents each relied on. It is clear that the initial agreement was that reflected in the e-mail of 1st February 2007 from Mr. Kraakman to the Sterlings'. It is headed, "Quote Doors and Frames #11052." The price for the several items quoted was \$52,682.00. Both parties signed the quote and it is common ground that Mrs. Sterling paid \$15,666.50 on the 1st February 2007. It is also not in dispute that the parties applied to the contract price the sum of \$10,674 which she had paid on 13th October 2006 on an earlier quote, #10051. See Defendant's Supplemental Documents Tab 6.
- [5] I find that changes were made to Quote 11052 having regard to the emails from Mr. Kraakman to Mrs. Sterling of 10th April 2007 and 7th May 2007. The email of 10th April enclosed (i) the new schedule of exterior doors and windows, "as you made some adjustments on our original Quote #11052" and the new schedule of interior doors with the change of D 11 with 3 24" doors and Jequitiba frames. It referred to making the Jequitiba frames 2x6 with rebate and joints and not putting them together but leaving that for Mr. Mason (Mrs. Sterling's builder) to install. The email of 7th May attached a solid Jequitiba (mahogany) interior door schedule that Mr. Kraakman ordered and an excel sheet with the locations of the doors in the residence with an estimate of the costs of the doors and frames in both Jequitiba and Andrioba. Mr. Kraakman therein indicated, among other, things that he awaited a decision on the type of wood to be used and asked for a \$10,000 deposit for the doors and frames. The new price was \$55,655.00.
- [6] Mrs. Sterling in cross-examination readily acknowledged receipt of the 7th May 2007 email and accepted the contents and that she had requested and the parties had agreed on the changes reflected therein. The fact that she did not sign the emails is therefore of no moment. Accordingly, I find that amendments as detailed in those emails were agreed on and that therefore the contract of February 1st 2007 was varied in accordance with those two emails. However, it is noted that the changes that were made did not affect the measurements and the general terms and conditions stated and agreed on in Quote #11052. In addition the evidence reveals that Mrs. Sterling cancelled item "D5 utility doors" resulting in a reduced contract price of \$49,610.00. And the parties agreed that Mr.

Kraakman would supply a number of screens at costs. However, it is not disputed that the total sum paid by Mrs. Sterling was \$50,517.00 as claimed.

- [7] Now to the substantive issue which, in the main, revolves around whether or not the goods conformed to contract specifications and in particular the measurements. The contract specified the measurements of the doors, windows and frames, gave a description of the items and the type of wood to be employed. It also provided paint/varnish work and all hardware (except hinges) transport and installation was not included in the price.(That last was varied as Mrs. Sterling supplied all hinges). The woodwork was warranted for one year and the work was to be scheduled to suit both parties and a delivery schedule was to be agreed on. And, it stated specifically-“after deposit is made a delivery schedule will be agreed on and a storage fee will be determined.”
- [8] It is helpful to bear the law in mind. As Mr. Farara correctly submitted, a seller is bound to deliver goods and the buyer is bound to accept and pay for them in accordance with the terms of the contract. See section 28, the Sale of Goods Act, Cap. 298 (the “SGA”). And, where goods are sold by description, section 15 provides; “where there is a contract for the sale of goods by description there is **an implied condition** that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.” Emphasis added.
- [9] First, I find that this was a contract for the sale of future goods¹ and a sale by description .I note that in most cases all sales of future goods is, in law, a sale by description. See **Benjamin’s Sale of Goods** 5th edn. para.11-008. Section 15 of the SGA therefore imposed an obligation on Mr. Kraakman to supply goods that corresponded with the contract description. Did Mr. Kraakman meet this obligation?

¹ See s.2 SGA “-future goods” means goods to be manufactured or acquired by the seller after the making of the contract of sale.

- [10] The court heard from Mr and Mrs. Sterling, Mr. Mason and Mr. Edmund Hayde, a cabinet maker, on the one hand and Mr.Kraakman and Mr.Rabindra Persaud on the other hand. On the balance having seen and heard the witnesses I must say that I preferred the evidence of Mrs. Sterling and Mr. Mason where they conflicted with that of Mr. Kraakman and there was no documentary evidence, as they struck me as more candid and credible even though at times Mrs. Sterling was a little overwrought. The following represents my findings.
- [11] Mr. and Mrs. Sterling are Americans no longer in their first spring who were in the process of constructing a costly house in Tortola. Mrs. Sterling put the value at about \$6 million dollars. She visited Mr. Kraakman's workshop and, obviously impressed by the quality of his products, first commissioned him to build three kitchens for their home and then subsequently contracted with him to build the doors, windows and their frames. There were protracted negotiations prior to contract as it appears that Mrs. Sterling was particular and wanted to ensure the best for her home and that Mr. Kraakman wanted to maximize on this opportunity to sell his products. The parties eventually agreed and signed Quote # 11052 which they subsequently varied in some respects as I have found at para. 8.
- [12] I accept that Mrs. Sterling supplied Mr. Kraakman with the measurements set out in the contract. However; I do not accept Mr. Kraakman's evidence that he took no measurements at all at the house except those relating to the kitchens. He sought to buttress this by saying that there were no external walls on the occasions when he went to the house. This is curious as if there were no external walls it would have been extremely difficult if not impossible to take any measurements be it for kitchens, doors or windows. To my mind, Mrs. Sterling's evidence that the exterior walls had been built at the time is more credible and I find that Mr. Kraakman visited the house and also took measurements most likely to verify those he had been given. However, nothing turns on this as the measurements agreed on were specified in the contract.
- [13] Mr. Kraakman, an experienced carpenter, made templates of the doors and windows and gave them to his employee Mr. Persaud and his team to make the items in accordance

with the templates. He also gave templates so made to Mr. Mason as guides for building the apertures in which the goods were to be installed and Mr. Mason built the apertures in accordance with the templates, and plaster finished them in anticipation of installing the goods. He did so because the doors and windows were of a kind which, as he testified, had to be bolted in place rather than plastered into the walls. He thus anticipated no problems in installation as the templates fitted the apertures. I do not accept that Mr. Kraakman told Mr. Mason not to plaster the openings. If that were so I have no doubt that such an important requirement would have been conveyed in writing to Mrs. Sterling having regard to how Mr. Kraakman went about his business by documenting important matters.

[14] There is no evidence that Mr. Kraakman supervised Mr. Persaud and his team mates to ensure that the goods were made in strict conformity with the templates. In fact, Mr. Persaud was noticeably silent when Mr. Hunte posed a direct question on cross-examination as to who supervised him.

[15] Mrs. Sterling paid the full balance of the purchase price on 7th July 2007 and on 10th July, 2007 arranged to have five doors collected. Mr. Mason attempted to fit the doors into the apertures made for them and none of them fitted although all the templates fit the finished apertures. This was borne out by Mr. Hayde who also spoke to defects in the items.

[16] I have no hesitation in finding that Mr. Persaud and his co-employees were not supervised when they did this order and that the items varied from the templates supplied and thus the items varied from the contract measurements. Mr. Farrara's contention that Mrs. Sterling has failed to establish non conformity with contract measurements simply because she did not call evidence to show that the goods were measured and compared, with the contract measurements, and found wanting has no merit. In these circumstances it was not necessary for her. I also must bear in mind the standard of proof in civil cases that is proof on the balance of probabilities.

- [17] Mr. Farara's other submission that because Mr. Mason had the openings plastered or finished that that in some way affected the fit of the goods has no basis likewise. To my mind, if the windows and doors were intended to be bolted on as they were and not plastered into the walls then I fail to see how that would affect the fit once the apertures confirmed with the templates as I find that they did. The reasonable inference to be drawn from this having accepted the evidence as to how the templates were made is that the doors were not made in accordance with the templates and so not in accord with contract measurements.
- [18] In addition, as Mr. Mason, Mrs. Sterling and Mr. Hayde testified, the workmanship of the products was poor. I find that the arches of the doors and frames were not elliptical; the doors did not even fit into the frames that Mr. Kraakman made or in the openings ; the joints of the doors and frames were open; some joints were crooked and did not fit squarely; glue , white epoxy and wood filling were visible all over the joints of the doors and panels; the laminated glass was badly glazed and damaged from sanding; the panels of the doors were not properly joined neither were they in line with the corners and the special hinges which Mrs. Sterling had supplied and were sanded, thus resulting in the removal of the manufacturer's protective coating and finally the hinges themselves had been incorrectly fitted.
- [19] Mrs. Sterling immediately called Mr. Kraakman. He attended at the premises with two employees, examined the items, apologized and admitted that he had not checked them thoroughly before they were collected. He then tried to fix the defects on the spot but was unable to do so. Eventually, he told Mrs. Sterling that he would have to take them away to repair or remake them. He did so and never returned them.
- [20] Mrs. Sterling visited the workshop shortly after. She found the doors were in the same condition and she noticed defects on the other items which she detailed at para 10 of her witness statement. In particular the bottom edge of the main door was sliced off, small pieces of wood were between the joints of the doors to fill in the crevices and the louvers in some of the windows did not fit properly.

- [21] Mrs. Sterling told Mr. Kraakman that she would not accept the goods as they were. The parties seemed to have had a far from amicable meeting. Finally, Mr. Kraakman told Mrs. Sterling that he could do no better and that she had to take the goods and if not he would charge her storage until she went broke.
- [22] A few days later Mr. Mason and Mr. Sterling visited the woodshop and found the doors in the same condition. Mr. Mason saw the other items and said that they were defective .I accept that the glass panel on some of the doors were sanded and cracked. Mr. Mason was of the view that they were unfit for use in any house. They took one window away with them to see if it would fit and this window was too small for the aperture even though the aperture too had been built to a template supplied by Mr. Kraakman. They did not return the window but informed Mr. Kraakman of this.
- [23] It would appear that subsequently Mr. Sterling agreed to collect the other items and then failed to do so without any explanation. However, Mr. Sterling is not a party to the contract and his actions cannot bind Mrs. Sterling without more. She had made it clear to Mr. Kraakman that she was rejecting the goods.
- [24] Accordingly, having found that the items did not conform to the contract measurements it follows that Mr. Kraakman was in breach of the implied condition that the goods must correspond with the description imported into the contract by section 15 of the SGA.
- [25] I must now consider what remedy is available for such breach. The SGA is silent on a specific remedy for breach of section 15. However, the breach we are concerned with is breach of an implied condition as distinct from an implied warranty. At common law breach of a warranty gave rise to a right to damages and breach of a condition gave rise to a right to reject the goods. And See Benjamin op. cit. para. 12-022 where the authors discuss the effect of failure to perform and noted –“Another way of putting it is to say that a total failure of performance discharges the innocent party by implication of the common law; a partial failure does so where upon the court's or upon a statutory construction of the

contract the parties' intentions are deemed to have regarded a term as so important to the transaction that any breach of it is to be regarded as having the same effect, viz. as a condition. Under this second rubric the Sale of Goods Act (England) specifies the terms any breach of which, however slight, may release the innocent party, by designating them as conditions. Thus for the purpose of this chapter "failure of performance" will cover the supply of goods not conforming with description, not of satisfactory quality, not reasonably fit for their purpose or not conforming with sample in quality." This rationale is equally applicable to the SGA when one considers its terms.

- [26] The SGA has retained the distinction between warranty and condition as can be seen on perusal of the Act as a whole. In particular section 13 (1) which provides that where the contract is subject to any condition to be fulfilled by the seller the buyer may waive the condition or may elect to treat the breach of such condition as a breach of warranty and not as a ground for treating the contract as repudiated. See also section 53 which deals with remedies for breach of warranty.
- [27] Mrs. Sterling therefore, had an option to claim damages or to reject the goods for breach of this implied condition and, having regard to all the circumstances she unequivocally exercised her right to reject.
- [28] Further, I must reiterate that one does not need to determine whether there has been substantial compliance with the contract measurements or contract description as the law is well established- any variance from the description gives rise to the right to reject. This is well illustrated by **Arcos, Ltd. V E.A. Ronaasen & Son** (1933) AC.470.p.3 para. 7(a case relied on by Mr. Farara). And see also **Benjamin op.cit. 11-018**.
- [29] **Arcos** concerned a sale of goods by description. There was a contract for staves of $\frac{1}{2}$ in. thick. Only about 15 per cent conformed to this requirement, but the rest were nearly all less than $\frac{9}{16}$ in. thick. Despite a finding that the goods were commercial within, and merchantable under, the contract specification and that they were reasonably fit for their purpose (which was the making of cement barrels), the buyers were held entitled to reject.

[30] The court held that the fact that the goods were merchantable under the contract is no test proper to be applied in determining whether the goods satisfied the contract description .And, that if the article purchased is not in fact the article that has been delivered, the buyers are entitled to reject it, even though it is the commercial equivalent of that which they have bought.

[31] This brings us to the next issue of whether Mrs. Sterling lost her right to reject the goods.

Issue 2 - Did Mrs. Sterling accept the goods by payment of the full balance of the purchase price and thus lost her right to reject?

[32] Mr. Farara submitted that Mrs. Sterling accepted the windows and doors when she inspected the goods on 9th July 2007 and paid the balance of the purchase price and so property in them passed and she could not reject them afterwards. Alternatively, that she lost the right to reject when she agreed for Mr. Kraakman to remedy the defects as this was an act inconsistent with Mr. Kraakman's title in the goods. Counsel relied on sections 35 and 36 of the SGA.

[33] Section 35 (1) provides: " Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

[34] Section 35 (2) states: "Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract".

[35] Section 36 reads: "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him he does any act in relation to them which is inconsistent with the ownership of the seller, or

when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them”.

[36] To my mind having regard to the nature of the goods, property in them was not intended to pass on payment of the purchase price but only after Mrs. Sterling had a reasonable opportunity of inspecting them after taking delivery.

[37] On the evidence I find that Mrs. Sterling visited the workshop on or about 9th July 2007 and paid the full balance of the purchase price. Her husband seems to recall the visit and accepts, as was put to him in cross-examination, that they inspected the goods. But, having heard his evidence I find that he was not sure at all and that Mrs. Sterling had a better recall. I therefore believe her evidence that she did not inspect the goods. In any event if she did see any of the goods at the woodshop when she went in to make the final payment, which is more than likely, would that amount to an inspection or a reasonable opportunity to inspect for the purposes of Section 35 of the SGA? I think not. In saying this I bear in mind that this visit took place after she and her husband had gone to lunch in a nearby restaurant and that this visit was not specifically for the purposes of inspecting the goods.

[38] Further, the specific purpose for the inspection as expressly stated in Section 35 is to enable the buyer to inspect the goods to ensure that the goods are in compliance with the contract. The only reasonable opportunity Mrs. Sterling had to inspect the items for that purpose was when she took the goods to her home and attempted to have them fitted. She could not have been able to determine whether the goods conformed to the contract measurements merely by looking at them in the workshop and there is certainly no evidence that she had a measuring tape with her or that this exercise could properly have been carried out there. This argument that she inspected and paid and so accepted the goods, therefore has little merit.

[39] Counsel for Mr. Kraakman submitted in the alternative that by allowing Mr. Kraakman to take the doors away to effect repairs Mrs. Sterling did an act inconsistent with Mr.

Kraakman's property in the goods and so is deemed to have accepted by virtue of section 36 and to have lost her right to reject.

- [40] First, in my view Mrs. Sterling in all the circumstances in which Mr. Kraakman took away the doors cannot be said to have allowed him to do so as she had made it clear that she was not prepared to accept the doors in that condition. In any event even if she can be said to have allowed him to make repairs that is not such an act as would be inconsistent with his reversionary interest in the goods as it does not involve conversion of the goods by Ms. Sterling. See Benjamin op.cit. para.12-047. This argument too must therefore fail.

Issue 3 - Were the goods reasonably fit for the purpose for which they were intended?

- [41] First, the law. Section 16 of the SGA stipulates – “ subject to the provisions of this Act and of any other statute on that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows-

" (a) where the buyer, expressly or **by implication, makes known to the seller** the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;(emphasis added)

(b) (implied condition that the goods shall be of a merchantable quality-not relevant).

- [42] There is no doubt that the question of whether an article sold is of 'merchantable quality' or is 'reasonably fit' for a relevant purpose in terms of s. 14 (3) is a question of fact. See Roskill L.J. in *Cehave N.V. v Bremer m.b.h.* [1975] 3 W.L.R. 447 at p. 468 referred to in *Millars of Falkirk v Turpie* 1976 SLT (Notes)66., cited by Mr. Farara. The case is not strictly relevant as it concerned the issue of whether or not the goods, a new motor vehicle

with minor defects (oil leaks which could be easily remedied) was of merchantable quality which it was held to be.

- [43] The primary question is whether any particular purpose had been expressly or by implication been made known to Mr. Kraakman. On its face, the contract refers to doors and frames and windows. No particular purpose is expressly stated. However, the SGA speaks to a particular purpose being made known by implication to the seller and therefore there may be notice of it from extrinsic communications. See **Benjamin** op.cit. para. 11-07.
- [44] Having regard to the factual matrix that emerged from the evidence of both parties it is beyond question that Mrs. Sterling and her husband were building a costly home and that Mr. Kraakman knew that. And, he knew also that Mrs. Sterling was relying on his expertise to fabricate exterior doors and windows reasonably fit for installation in that particular house. Also, Mr. Kraakman was in the business of manufacturing doors and windows. He therefore had an obligation to supply goods reasonably fit for that particular purpose as provided for in section 16(a).
- [45] Mr. Farara submitted in oral argument that “a door is a door” once it can be used for the usual purpose a door is used for and likewise a window and that the court should have no regard to the fact that Mrs. Sterling’s home cost approximately \$5m. This is patently absurd if it is not to be classed as facetious. The issue is one of fact and the court in determining whether the goods were reasonably fit for the purpose intended must have regard to the use contemplated which must mean that the court must consider the nature and type of the building involved as contemplated in the contract and to the price and all the other relevant factors contained in the contract, e.g. that they were to be custom built, made of fine wood not plyboard or wood veneer which could easily be picked up at any D.I.Y. store. Otherwise, we can end up with the situation where a door suitable for use at Bomba Shack, the Virgin Islands renowned shanty on the beach at Apple Bay much loved by holidaymakers bent on draining the cup of pleasure to the dregs, somewhat like Socrates his hemlock, will be held to be suitable for the Governor’s residence. A patently untenable position in my view. Mr. Kraakman testified that he did not know the exact cost

of the house, granted, but he knew the nature of the residence as he was commissioned first to manufacture not one but three kitchens and had visited the building on several occasions.

[46] I have found that all the goods were defective and that the defects were of such a nature that they could not be remedied at the premises by Mr. Kraakman and his workmen. Now, Mr. Kraakman accepted many of the defects as identified by Mrs. Sterling, but he termed them, "minor defects" which as far as he was concerned could be remedied under the one year warranty provided for in the contract. If I understand the argument of Mr. Farara in this respect, it is that Mrs. Sterling could not reject the goods because the defects could be dealt with under the warranty. However, by virtue of section 16(d) of the SGA an express warranty or condition does not negative a warranty or condition implied by the Act unless it is inconsistent with it. This warranty does not purport to exclude Mrs. Sterling's rights under the Act and it is certainly not inconsistent with the Act. Therefore, Mrs. Sterling is not precluded by that express warranty on relying on her rights under the SGA.

[47] Having regard to the nature of the defects found in the doors which Mrs. Sterling took delivery of and to the particular purpose for which those goods were intended, namely, installation in a costly residence, and to the costs and nature of these goods, I am of the view that they were not reasonably fit for the particular purpose and therefore that Mr. Kraakman breached the implied condition imposed by section 16(a) of the SGA. This breach gives rise to a right to reject the goods which Mrs. Sterling has exercised.

[48] A collateral issue arose which is whether Mrs. Sterling was entitled to reject the other goods which she had not taken delivery of. Again on the basis of my findings as to how these items were manufactured and to the defects found in them by Mrs. Sterling both at the house and at the workshop I am of the view that she was not obliged to incur the costs of taking delivery of every item and measuring and inspecting each minutely but was entitled to reject the lot without incurring further expense as she could reasonably infer from her inspection of some of the items that they were not reasonably fit for the particular

purpose and did not meet the contract description. Mrs. Sterling is therefore entitled to a full refund of the purchase price as claimed.

Issue 4- Is Mrs. Sterling entitled to damages in the sum of \$910.40 for the hinges supplied?

[49] This aspect of the claim relates to the hinges supplied by Mrs. Sterling. Mrs. Sterling bought 16 pairs of hinges at \$56.90 a pair and gave them to Mr. Kraakman to be fitted on the doors. The hinges were sanded and the protective coating damaged or destroyed by Mr. Kraakman's employees. Mr. Kraakman has admitted to what he again calls minor damage to some of the hinges and is agreeable to repairing all such damage. I note the special coating has to be ordered from abroad.

[50] However, I find that the protective coating was removed or damaged by Mr. Kraakman or his employees and though strictly speaking that does not by itself render the hinges unusable the fact that the protective coating has gone means that the metal has been exposed to the elements and in all the circumstances must be deemed to have suffered damage and thus cannot be satisfactorily repaired. Accordingly, Mrs. Sterling is entitled to be compensated for them in the sum of \$910.40 as claimed even though she did not produce any documentary evidence of the price paid as I accept her evidence on price and it was not challenged.

Issue 5- Is Mrs. Sterling entitled to interest on any sums found due?

[51] Mrs. Sterling claims pre-judgment interest on any sums found to be due to her. Mr. Farara submitted correctly that a claim for interest must either be based on statute or in contract. He contended that the agreement does not provide for the payment of interest and that there is no applicable legislation. Counsel submitted that the only statute which deals with interest is the Judgments Act which speaks to interest post judgment.

[52] Mr. Hunte could point to no contractual provision or legislation but relied on CPR 2000 Rule 8.6 (4). This provides that a claimant who is seeking interest must say so expressly in the claim form and what is more must include details of the basis of entitlement, the rate

and the period for which it is claimed. Clearly, this rule does not assist as it does not confer any entitlement but just says how to go about pleading a claim if an entitlement exists.

- [53] I find this lacuna in our law incomprehensible as in most of the other jurisdictions the respective Supreme Court Act makes provision for some form of pre-judgment interest in the discretion of the court. However, I heard no arguments on importing English law and practice to remedy the lacuna and therefore can make no ruling on that. It follows that the claim for interest cannot succeed in the absence of any contractual or statutory entitlement. In passing I remark section 54 of the SGA which provides that nothing in the Act shall affect the right of the buyer or seller to interest or special damages in any case where by law such is recoverable.

Issue 6- Costs

- [54] Costs lie in the discretion of the court. However, the general rule is that costs follow the event and that Mrs. Sterling would be entitled to her costs unless there is good reason for not awarding her costs or part thereof. During the course of the trial, indeed just as the witness was about to be called for the Defence Mr. Hunte objected to the calling of two witnesses and the court upheld the objection but indicated that as the objection was taken at such a late stage that this would be reflected on a costs order if Mrs. Sterling were successful.
- [55] Mr. Hunte in his written submissions, which were intended to encapsulate his oral closing argument lodged subsequently with leave, argued that the court should revisit that order on the basis that the Defence had itself transgressed the rules by seeking to cross-examine on drawings that Mr. Kraakman had not disclosed and to introduce another undisclosed document. To my mind those matters did not have the same significance on Mrs. Sterling's case as the successful objection to his witnesses at the ninety-ninth hour did on Mr. Kraakman's case. Those witness statements were filed far in advance of trial and counsel ought to have been aware of them and fairly ought to have made known his objections well ahead of trial to give the other side an opportunity to rectify what in reality was a procedural matter which could have been corrected on a timely application. By

leaving it so late in the day he deprived Mr. Kraakman of any opportunity to apply to remedy the procedure. This cloak and dagger style of litigation has had its heyday and is no longer welcome in these courts. Accordingly, the court's displeasure will be reflected in the costs' order.

- [56] The court is empowered when determining costs to take account of all the circumstances including the manner in which a party has pursued her case. See CPR 2000 Part 64.5 and 64.6. In my judgment this is a fit occasion to reduce costs of the successful party for the reasons given. Accordingly, Mrs. Sterling is to recover two-thirds of her prescribed costs to be calculated in accordance with Part 65.5 and Appendix B.

Issue 7- Counterclaim - Right to storage fees.

- [57] Having regard to my ruling that Mrs. Sterling is entitled to reject the goods it must follow that Mr. Kraakman's counterclaim for storage must be dismissed. It is noted that at the commencement of trial that Mr. Farara Q.C had indicated that on the counterclaim his client was only pursuing the claim for storage. The subject of the counterclaim was only a relatively insignificant aspect and was inherently bound up with the claim and I will make no separate order as to costs.

Conclusion

- [58] For the foregoing reasons Mrs. Sterling is entitled to recover from Mr. Kraakman the full purchase price paid for the goods of \$ 50517.00 in addition to the monies she expended on the hinges in the sum of \$910.40 and, she is awarded two-thirds of her prescribed costs for the reasons set out in para. 54-56. The counterclaim is dismissed.

.....

Rita Joseph-Olivetti

Resident Judge, Virgin Islands