IN THE SUPREME COURT OF BELIZE, A.D. 2019

CLAIM NO. 549 OF 2019

BETWEEN:

(EMERALD METALS LLC	**CLAIMANT**
(	
(AND	
(	
(LA SIRENE RESORT & SPA LIMITED	**1st DEFENDANT**
(GREG PISARCZYK	**2nd DEFENDANT**
(LUKASZ PISARCZYK	**3rd DEFENDANT**
(BOCA CHICA RESORTS LIMITED	**4th DEFENDANT**

BEFORE THE HONOURABLE MADAM JUSTICE SONYA YOUNG

Decision:

20th February 2023

Appearances:

Mrs. Ashanti Arthurs Martin, Counsel for the Claimant

Mr. Anthony Sylvestre, Counsel for the Defendants

JUDGMENT

1. Emerald Metals LLC says it sold and delivered certain steel products to the first Defendant which was erected on land belonging to the fourth Defendant for which it has not been paid. There was a further agreement between the two that the Claimant would provide additional expert assistance and remedial works if the

outstanding invoices were paid. The Claimant complied but the first Defendant again failed to fulfill its obligation. Accordingly, the Claimant seeks payment of the outstanding sums and damages for breach of contract.

2. As against the second and third Defendants, personally, it seeks damages for fraudulent misrepresentation and/ or deceit as to statements made concerning the ownership of the land on which the structures were erected. The Claimant states it was thereby induced to supply steel to the first Defendant on credit.

3. Finally, it seeks damages for the fourth Defendant's unjust enrichment as the erection of the buildings has increased the value of the property, a benefit which the fourth Defendant ought not to be allowed.

4. The Defendants all deny liability. The first Defendant counterclaimed for damages for breach of contract and misrepresentation citing that the Claimant represented that that the tri coat provided better protection than galvanizing and that it was commonly used for construction in marine onshore and offshore environments.

5. This proved to be false as the product had scratches to the protective coating and developed rust. There were also incomplete welds and misplaced or missing bolt

holes. There was the need for remedial works the cost of which the first Defendant also sought to recover.

THE ISSUES

6. The Issues in dispute in this case have been agreed by the parties as follows:

(1) Whether La Sirene breached the contract for supply of steel and so is liable to pay Emerald Metals the sum of US$207,596.00 being 20% instalment owed for steel supplied for buildings 6 and 13?

(2) Whether Emerald Metals provided an Assembly Tool Kit at La Sirene's request, and so Emerald Metals is liable to pay to Emerald Metals Invoice No. EM.17.677. 0054.FP in the sum of US$1,200.00.

(3) Whether La Sirene requested and agreed to pay for engineering construction support provided by Jlianco, and so is liable to pay to Emerald Metals Invoice Nos. EM18.191.0053 in the sum of US$14,750.00 and EM.129.204.0019 in the sum of US$11,650.00?

(4) Whether Emerald Metals' offer to complete the finish welds and to repair the damage to the protective coat was contingent on La Sirene's payment of the sum of US$207,596.00 owed for steel supplied for buildings 6 and 13?

(5) Whether as a result of La Sirene's failure to meet the contingency and to pay the sum of US$207,596.00 owed for steel supplied for buildings 6

and 13, Emerald Metals has suffered loss which it is entitled to recover as follows:

(a) US$70,503.00 for welding services provided by Belize Admixtures;

(b) US$6,549.61 for additional materials provided;

(c) US$37,000.00 for engineering design work by JLianco.

(6) Whether the 2nd and 3rd Defendants represented to Emerald Metals that La Sirene is the registered proprietor of the property on which the steel Emerald Metals supplied was to be erected?

(7) Whether Emerald Metals was induced by the 1st and 2nd Defendants' representation as to ownership of the property to enter into a contractual relationship with La Sirene and to supply steel to it on credit?

(8) If the answer to Issue 6 is in the affirmative, whether the 2nd and 3rd Defendant' representation as to ownership of the property was fraudulent, in that it was made in the knowledge that property is owned by Boca Chica, or recklessly, the 2nd and 3rd Defendants not caring whether it was true or false?

(9) Alternatively, whether the 2nd and 3rd Defendants made the statement as to ownership of the property knowingly or recklessly, not caring whether it to be true or false, with the intention that Emerald Metals would act on the statement to its detriment?

(10) Whether as a result of their fraudulent misrepresentation and/or deceit, the 2nd and 3rd Defendants are personally liable for the loss and damage sustained by Emerald Metals?

(11) Whether the value of Boca Chica's property has increased by the erection of the steel thereon, so that Boca Chica has been enriched by the receipt of the steel?

(12) Whether Boca Chica's enrichment has been achieved at Emerald Metals' expense, in that Emerald Metals has not been fully paid for the steel supplied?

(13) Whether the retention of the enrichment by Boca Chica is unjust since it was procured through the fraudulent misrepresentation or deceit of the 2nd and 3rd Defendants, who are its directors?

(14) Whether Emerald Metals represented to La Sirene that the tri-coat system provided by Jlianco offered better protection than conventional galvanized steel, and was commonly used for construction in marine, on-shore and offshore environments?

(15) If the answer to Issue 14 is in the affirmative, whether La Sirene was induced by the said representation to purchase steel and steel products from Emerald Metals?

(16) Whether the scratches on the steel supplied by Emerald Metals was a defect, or was caused by transport and La Sirene's handling of the steel during offloading from the shipping container?

(17) Whether the rusting of the steel was a defect or due to the local environment?

(18) Whether La Sirene accepted the steel and so liable to pay for them since the steel was not rejected within 10 days as provided in the Order Confirmation?

(19) Whether La Sirene is entitled to the payment of US$385,234.52 for repainting the steel products, making adjustments to Emerald Metals' material, drilling holes in the steel, purchasing additional beams and bolts, Engineering support, Administrative Expenses, unused steel provided by Emerald Metals and expenses associated with opening the top of the container to remove the steel?

7. The Court will, for efficiency, consolidate many of these issues. They will be divided into three main areas being breach of contract, misrepresentation and unjust enrichment.

8. This matter is understandably heavily evidence based. So before delving into these issues the facts as agreed by the parties in their pretrial memorandum bears restating to give perspective:

1. In November 2017, Emerald Metals agreed to supply La Sirene with steel for the erection of a building in San Pedro, numbered building 13. The parties signed an Order Confirmation dated 23rd November 2017 which set out the terms and conditions of the steel supply.

2. By the terms of the Order Confirmation a 40% deposit was to be paid when the order was placed, a further 40% instalment was to be paid when upon certification of the beams in the fabrication shop, and the final 20% was due after arrival of the material at the port in Belize City. La Sirene was granted 10 days from the vessel arrival to at the port or the job site to inspect the material.

3. On 13th March 2018 the 1st Defendant placed orders for buildings 5 and 6, which were set out in Order Confirmations which were in very similar/identical terms to building 13, save for the cost of the steel for each building.

4. In accordance with the Order Confirmations, the 1st Defendant duly paid the 40% deposit and 40% instalment payment for buildings 5, 6 and 13.

5. In all discussions with the Claimant the 1st Defendant was represented by the 2nd and/or 3rd Defendants, who are both shareholders and directors of the 1st and 4th Defendants.

6. The steel arrived in Belize between May and June 2018 and were erected on the 4th Defendant's property in San Pedro. Invoices were issued for the remaining 20% for buildings 6 and 13 as follows:

(a) Invoice No. EM.17.677.0054.FP for building 13 in the sum of US$100,013.00; and

(b) Invoice No. EM.17.712. 0102.FP for building 6 in the sum of US$107,583.00.

7. Although the 1st Defendant made the final 20% payment for steel supplied for building 5, it failed to pay the above invoices for buildings 6 and 13.

8. The 1st Defendant had obtained an additional Assembly Tool Kit in July 2018 for which Invoice No. EM.17.677. 0054.FP in the sum of US$1,200.00 was issued. The 1st Defendant also failed to pay for the Invoice for the Assembly Tool Kit.

9. In August and October 2018, Jlianco Heavy Industries ("**Jlianco**") provided engineering support to the 1st Defendant. Invoice No. EM18.191.0053 in the sum of US$14,750.00 and Invoice No. EM.129.204.0019 in the sum of US$11,650.00 for the engineering support remained unpaid.

10. The 1st Defendant had complained to the Claimant about incomplete welds which had not been completed by Jlianco, as well as scratches to the protective coating of the steel. The Claimant retained the services of Belize Admixtures Limited to complete the welds and re-coat the steel.

11. The Claimant paid Belize Admixtures US$70,503.00[2] for labor and material that it then invoiced to the 1st Defendant by Invoice No. EM.19.157.0014. The invoice remains unpaid.

12. The Claimant also issued to the 1st Defendant Invoice No. EM.18.319.0119 in the sum of US$6,549.00 for specialized zinc-based coating and sealant oil based paint used by Belize Admixtures in repairing the scratches on the steel. This invoice remains unpaid.

13. Emerald Metals instituted this claim to recover from the Defendants US$112,546.00 owed as follows:

(i)	Invoice No. EM.17.677. 0054.FP	US$100,013.00
(ii)	Invoice EM.17.712. 0102.FP	US$107,583.00
(iii)	Invoice No. EM.17.677. 0054.FP	US$1,200.00
(iv)	Invoice No. EM18.191.0053	US$14,750.00

14. Emerald Metals also claims US$125,702.61 as loss flowing from the breach of contract as follows:

(a) US$70,503.00 paid to Admixtures;
(b) US$6,549.61 for additional materials provided;
(c) US$11,650.00 for engineering construction support provided by Jlianco; and
(d) US$37,000.00 for engineering design work by Jlianco

15. Emerald Metals also seeks against Greg and Lukasz damages for fraudulent misrepresentation and/or deceit, and damages against Boca Chica for unjust enrichment in the sum of US$349,248.61."

Breach of Contract (Issues 1-5):

Issue 1: Whether La Sirene breached the contract for supply of steel and so is liable to pay Emerald Metals the sum of US$207,596.00 being 20% instalment owed for steel supplied for buildings 6 and 13?

9. The Claimant refers to two sections in each Order Confirmation Form which they say gave La Sirene 10 days after arrival at the port of Belize City in which to inspect the product for damage and shortage. After which the remaining 20% became due. Since La Sirene made no complaints or rejected the product within that agreed period, their acceptance and erection of the structures obligated them to pay. Their failure to fulfill this obligation constitutes a breach.

Issue 2: Whether Emerald Metals provided an Assembly Tool Kit at La Sirene's request, and so Emerald Metals is liable to pay to Emerald Metals Invoice No. EM.17.677. 0054.FP in the sum of US$1,200.00?

10. The extra toolkit was admittedly specifically requested by the first Defendant. There was no reason given for non-payment.

Issue 3: Whether La Sirene requested and agreed to pay for engineering construction support provided by Jlianco, and so is liable to pay to Emerald Metals Invoice Nos. EM18.191.0053 in the sum of US$14,750.00 and EM.129.204.0019 in the sum of US$11,650.00?

11. The Claimant insists that it fulfilled its obligation under the Order Confirmation or provision of Engineering support by providing *"one highly trained structural engineer with strong familiarity with the erection process using a bolt system"* – Mr. Zhao Daolei and "one additional technical/translation individual" - Patrick Oboyle

(Emerald Metals Support Staff) and He Qixing (translator). They provided engineering support in Belize between 1st August and 2nd September 2018.

12. Following this the Claimant agreed with La Sirene that if La Sirene would pay its outstanding invoices the Claimant would again send the engineers and hire a local qualified welder to assist La Sirene's construction crew address their issues of minor scratches and incomplete welds.

13. The Claimant complied but La Sirene in breach of the agreed promised condition refused to pay the outstanding invoices.

Issue 4: Whether Emerald Metals' offer to complete the finish welds and to repair the damage to the protective coat was contingent on La Sirene's payment of the sum of US$207,596.00 owed for steel supplied for buildings 6 and 13?

14. The local welder hired was expected to perform a limited set of work over a set period of nine (9) weeks. However, the engineer for La Sirene gave him additional work which extended the period to four months at an increased cost of US$63,539.00 rather than the estimated US$64,125.00. There was also an increased cost for materials of US$6,549.61 as well as for engineering design work from JLianco in the sum of US$37,000.00. Additional expense in the sum of US$65,240.00 was incurred by the Claimant for demurrage charges on the last container delayed until La Sirene paid the overdue progress payment. The Claimant also claimed US$440.00 as consultancy fees paid to George P. Wong who provided support to the engineering team during their second visit.

Issue 5: Whether as a result of La Sirene's failure to meet the contingency and to pay the sum of US$207,596.00 owed for steel supplied for buildings 6 and 13, Emerald Metals has suffered loss which it is entitled to recover as follows:

(d) US$70,503.00 for welding services provided by Belize Admixtures;

(e) US$6,549.61 for additional materials provided;

(f) US$37,000.00 for engineering design work by JLianco.

15. The Claimant therefore billed La Sirene for the above expenses incurred. They opined that these were losses which either flowed naturally from or were incurred because of the breach.

Defendants' submissions:

16. The first Defendant insists that the material supplied was not as agreed or represented and the remedial work was not as promised. The Claimants are therefore not entitled to any sums claimed as damages rather it is the first Defendant who ought to receive an award for both breach of contract and misrepresentation.

17. The steel was defective, and the coating was not tri-coat as represented. Even after receiving the first shipment and experiencing problems (rust and material discrepancy e.g. size of nuts, unlisted beams or incorrect measurement on some beams, one tool kit instead of two) the first Defendant placed further orders (a couple months later) as it relied on a material term of the Order Confirmation that:

"Material with any non-conformance that is repairable will be corrected and delivered under the original terms of this order. Repairable material is not cause for rejection of the order in full or in part. None-repairable material is to be discussed and a resolution decided by mutual agreement." [para 15 Witness Statement 3rd Defendant; pp 763/764]

18. When the first Defendant complained, the Claimant was dismissive of the first Defendant's concerns even after the situation worsened. There was poor welding; increased rusting and beams were not aligning. The Claimant continued to assure

that with new layers of coating applied the rust issue would be completely corrected. Although the Claimant attended to this remedial work the problem persisted. The first Defendant had to resort to engaging third parties to fix the issues and complete the structures. A structural engineer was also engaged.

Court's Consideration:

The Claim:

19. The Order Confirmation Forms for the steel for building 6 and 13 both state that *"After arrival at the port of Belize City and upon Inspection of the arriving material against damage and shortage"* the final payment of the remaining 20% of the cost of the product delivered will be invoiced and becomes due. The forms then inform that: *"To allow for proper inspection of arrived goods, 10 days are granted from the vessel arrival date to access the material at the port of Belize City or the job site."*

20. These are the terms on which the Claimant relies. The first Defendant was well aware of these terms as a report was made following the first delivery which detailed the condition in which the steel arrived, and any discrepancies found. Strangely there is no such report for the remaining deliveries or requests for time in which to make a proper investigation.

21. The Court agrees with the Claimant that the first Defendant had ten days in which to inspect and report any shortage or damage to the steel on arrival. The Court therefore finds that on delivery the steel for buildings 6 and 13 must have conformed in quantity and appearance to what was contracted for by the first Defendant.

22. However, these terms only relate to a physical inspection for shortage or damage and not an inspection as to the overall quality of the product which the first

Defendant has raised. Any proposition that a determination on the overall quality of the product was to and could have been done in ten days from delivery is squarely rejected.

23. The Defendant says it did not pay the outstanding invoices because there had been a misrepresentation made to it concerning the quality of the product. This issue will be considered below. For this reason, the Court will refrain from making a general ruling on Issue 1 at this time.

Issue 2:

24. The first Defendant admitted to requesting and receiving this Assembly Tool kit in their Defence. There is no reason why payment of the US$1,200.00 should not be made and it is so ordered. This has absolutely nothing to do with the contract for the purchase of steel.

Issue 3:

25. The Court finds that the Claimant did fulfill its obligations under the Order Confirmation dated 10th May 2018 for Engineering and other support. The sum of US$14,750.00 is due and owing to the Claimant.

26. The Court could find no evidence of any further agreement between the Claimant and the first Defendant that if the above invoice was not paid then some further cost, i.e., payment for further engineering support, would be incurred for the breach. This certainly formed no part of the original contract. The first Defendant has no obligation to pay Invoice EM. 19.204.0019 in the sum of US$11,650.00.

Issues 4 and 5:

27. There is no doubt that the Claimant did extensive work in trying to remedy the problem. Belize Admixture testified that they did significant repair work to areas of rust. They also did significant welding.

28. I could find nothing in the agreement between the Claimant and the first Defendant which provided that all welds were to be done in the shop before shipment. The clause on which the first Defendant sought to rely said nothing of the sort. It stated, *"All welding to be done at the fabrication yard in China by fully certified and approved welders."* This guaranteed the quality of all the welding which would be done in the shop and nothing more. This Court can make no determination on whether or not the welds which were done in the shop were 100% UT because again there was nothing presented which the Court could properly consider.

29. Be that as it may and even with the Claimant seeming to be well aware of that there was no agreement that all welds were to be done in China, Mr. Bernard Arlt nonetheless stated at paragraph 60 that *"In order to resolve the issues of the incomplete welds and painting, the Claimant offered to retain the services of a qualified welder to complete the welds to the building, on the condition that La Sirene would settle the outstanding invoices."*

30. However, again I could find no evidence whatsoever which demonstrated that there was some new agreement reached between the Claimant and the first Defendant that the Claimant would address the first Defendant's issues with the condition of the product and/or the construction only if the first Defendant agreed to pay the outstanding invoices. Bernard Arlt says this offer was accepted by Greg. He offers no date or any other circumstances surrounding the new agreement. So other

than his bald statement there is nothing evidencing this offer and acceptance as there is for the other arrangements between the parties.

31. The Court would have expected to at least see some reference to it in that email from Bernard Arlt to Greg and Lucas dated August 27th, 2018. Rather it states: *"As we have promised, we will provide all necessary materials and apply respectively re-apply TRI COAT to all areas necessary, either by our own team or by a subcontractor team that we supervise and pay for."*

32. Even the document referred to as evidencing that particular agreement was simply a proposal presented by the Claimant to the first Defendant after the remedial works had been carried out. There could have been no such agreement as alleged by the Claimant as no consideration had been agreed prior to carrying out the remedial work.

33. No consideration at all had been given by the first Defendant either since they were already obligated to pay the outstanding invoices as far as the Claimant was concerned. What is even more glaring is that there seemed not to have been any agreement that the first Defendant would have to pay for this service if they afterwards refused to pay the outstanding invoices and this is significant.

34. As far as this Court is concerned there was no variation to the original agreement or creation of any new agreements either. The offer to hire a qualified welder formed part of the resolution attempts outlined in the Order Confirmation Form that *"Material with any none* (sic) *- conformance that is repairable will be corrected and delivered under the original terms of this order. Repairable material is not cause for rejection of the order in full or in part. None* (sic) *-repairable material is to be discussed and a resolution decided by mutual*

agreement." "All goods remain the property of Emerald Metals LLC until full payment of invoice(s) has/have been made."

35. The Claimant also raised that Belize Admixture did more than it was supposed to have done. This is even more alarming since the agreement for Belize Admixture to carry out certain work was made with the Claimant and not the first Defendant. It remains unclear why the Claimant paid for more than had been agreed and on what basis it now seeks to recover this sum from the first Defendant.

36. As to the engineering design drawings this is an even worse attempt since the drawings were done even before any agreements were made between the parties and seemed to be all part of the enticement package offered by the Claimant to get the first Defendant to do business with it. There was no mention of what the cost would be for these drawings at the time this supposed agreement was being made. This claim must also fail.

37. The sum of US$207,596.00 is rejected as there is no legal basis for payment.

Misrepresentation:

(6) Whether the 2nd and 3rd Defendants represented to Emerald Metals that La Sirene is the registered proprietor of the property on which the steel Emerald Metals supplied was to be erected?

(7) Whether Emerald Metals was induced by the 1st and 2nd Defendants' representation as to ownership of the property to enter into a contractual relationship with La Sirene and to supply steel to it on credit?

(8) If the answer to Issue 6 is in the affirmative, whether the 2nd and 3rd Defendant' representation as to ownership of the property was fraudulent, in that

it was made in the knowledge that property is owned by Boca Chica, or recklessly, the 2nd and 3rd Defendants not caring whether it was true or false?

(9) Alternatively, whether the 2nd and 3rd Defendants made the statement as to ownership of the property knowingly or recklessly, not caring whether it to be true or false, with the intention that Emerald Metals would act on the statement to its detriment?

(10) Whether as a result of their fraudulent misrepresentation and/or deceit, the 2nd and 3rd Defendants are personally liable for the loss and damage sustained by Emerald Metals?

(14) Whether Emerald Metals represented to La Sirene that the tri-coat system provided by Jlianco offered better protection than conventional galvanized steel, and was commonly used for construction in marine, on-shore and offshore environments?

(15) If the answer to Issue 14 is in the affirmative, whether La Sirene was induced by the said representation to purchase steel and steel products from Emerald Metals?

(16) Whether the scratches on the steel supplied by Emerald Metals was a defect, or was caused by transport and La Sirene's handling of the steel during offloading from the shipping container?

(17) Whether the rusting of the steel was a defect or due to the local environment?"

38. The Claimant's claim in misrepresentation is brought against the 1st, 2nd, and 3rd Defendant. They postured that the 2nd and 3rd Defendants represented that the 1st Defendant owned the property on which the steel was to be constructed. This statement, which they either knew to be false or were reckless as to its truth, was intended to be acted upon and it did induce the Claimant to enter into the Contract

with the first Defendant. They are therefore liable for any loss and damage suffered by the Claimant.

39. In response the Defendants deny any misrepresentation whatsoever. The Claimant had never enquired as to ownership of the property or that this was material in determining whether or not to enter into the contract. Even if there was a misrepresentation found the first Defendant was a separate legal entity from its shareholders and directors. There was no reason established for the piercing of the corporate veil necessary to find the second and third Defendants personally liable.

40. The first Defendant also counterclaimed that it was induced to enter into contract based on the representations made by the Claimant that the tri coat was a superior alternative, an improved though similar product, to the galvanized steel which the first Defendant initially intended to purchase. Additionally, that it was *"commonly used for the protection applications including marine, on shore and offshore steel structures……"* with the third layer being an *"anti-corrosive paint* [which] *protects the steel with superior weatherability."*

41. They insist that it was the Claimant that offered and promoted this alternative. to the hot galvanized steel which the Claimant originally intended to purchase. Based on the Claimant's representations (that this was an improved coating system offering better protection than conventional galvanized steel) and expertise the first Defendant was sufficiently swayed. The Claimant promised a better-quality product produced faster for the same price of that initially requested and the first Defendant acted upon this and suffered loss.

42. To this the Claimant says that it made nothing more than a suggestion of the tricoat product and then provided the first Defendant with information about it including reports, samples and testimonials which could have assisted the decision-making process. The Claimant also invited them to use it on the two extensions only so that they could have real world experience before applying it to the other three buildings. If there was to be any finding of a misrepresentation the damages should be limited to the two extensions only.

The Court's consideration:

43. It is settled and needs no real discussion or support that a misrepresentation is an untrue statement or representation of fact, made through words or conduct by either a party to the contract or its agent prior to entering into contract. This statement need not be the sole inducement, but it must have induced the innocent party to enter into contract. Such a statement may have been made innocently, fraudulently or negligently but with the intention that the other party would act. It must also be proven that the other party did act upon it causing damage.

The Claim:

44. It is clear to this Court that the ownership of the property was never a material factor or essential component, and it did not in fact induce the Claimant to enter into contract. Had it been as material as the Claimant impresses now, efforts would have been made to ensure that the first Defendant was contracting as owners of the property. The ownership only became important when there was no payment.

45. This is particularly so because the Claimant was contracting in a jurisdiction with which it lacked general familiarity and with an entity it had just encountered. The Claimant is an international distribution and trading company engaged in the sale of

steel products. This could not have been its first contract of this type having been in business since 2003. The Court finds that the Claimant had not been induced to enter into any contract because it was represented that the first Defendant owned the property. The claim for misrepresentation whether fraudulently or otherwise is rejected.

The Counterclaim:

46. There is no doubt in my mind that the Claimant introduced the first Defendant to and promoted the tricoat product. The Claimant made certain representations to the Claimant that this product was in fact superior to the galvanized steel which it originally intended to purchase through *"our guy Alex in China"* and assured that it had been commonly used for the protection applications including marine, onshore and offshore steel structures.

47. Implied in that statement of the common use of the three coats is the guarantee that the TRI COAT would be able to withstand the weather in San Pedro. And this Court is convinced that this was what the Claimant intended and what the first Defendant understood. It must not be forgotten that both Sean O'Boyle and Bernard Arlt had visited San Pedro prior to entering into the contract for the supply of steel. They visited the site and saw first-hand the environmental conditions which existed there. They knew that whatever product they sourced would be expected to withstand the harsh salt environment.

48. The Claimant stood in that special position as an international distribution and trading company engaged in the sale of steel products, where it had the requisite knowledge and skill in relation to the subject matter of agreement. Its view was not presented as an opinion but rather as one of fact intended to be acted upon. The

Claimant made the recommendation, provided the information which the first Defendant could consider in making a decision and gave its unreserved indorsement of the product as *"a good opportunity for LAS."*

49. The first Defendant acted on what had been stated by the Claimant. The Claimant cannot now attempt to hide behind its invitation for limited use (on the extensions only) in the first instance where it knew time was important to the first Defendant (evidenced by its insistence for efficiency in the preparation and delivery). Nor can they seek to blame the first Defendant's need for efficiency as some seeming cause for making the statements it made.

50. It is the Claimant which instigated the use of the tri coated steel and the statements made as to the quality and common use of the product did entice the first Defendant to enter into contract. What remains to be determined is whether what the Claimant told the first Defendant in this regard was indeed untrue.

51. The Court begins by stating that notwithstanding the volume of evidence presented there was a dearth of what was really required to make a finding less difficult.

52. Both the Claimant and the first Defendant contracted as enthusiastic novices to some extent. The Claimant had never done business in Belize - specifically San Pedro and the first Defendant had never constructed a structure with steel coated in the material provided by the Claimant. The Claimant was excited at the opportunity or possibility of breaking into an entirely new market and the first Defendant was intrigued at the prospect of innovation and efficiency.

53. They both have opposing views of the quality of the product but neither of them sought to have an expert appointed to assist the Court in reaching a determination on this important issue.

54. The first Defendant presented a report from some uncertified entity whose credentials and abilities were unknown. The material which was used for the testing was also unknown as far as the Court was concerned and the results were rejected wholesale. Another report was presented which was done by an employee of the first Defendant again the precise nature of the material tested or the efficacy of the test itself again remains unknown so that those findings are also unreliable.

55. The Court, therefore, considered that both the Claimant and the first Defendant acknowledged that there was rust on the product. The Claimant also accepted that the first shipment was not in the most appropriate container, and this accounted for some of the damage which the shipped product sustained. Full payment was made for same and different containers were used thereafter.

56. The Claimant's maintain that the exposure of the products to the weather or their submergence in water or mud caused the material to rust in places where there had been damage to the protective layers. The first Defendant insists that the rusting went beyond the damaged areas and was caused through a defect in the product itself.

57. It would appear from what had been provided to the first Defendant by the Claimant that the tri coating ought to have protected the steel sufficiently. So not only would the water bead off the *"really effective"* (Sean O'Boyle's email of March 8th, 2018) outer coating but the other two layers (corrosion protection and scratch

protection and strengthened) would ensure that there would be no rusting whatsoever unless that tri coating was altogether removed.

58. The way in which the product was being stored on site was originally agreed by the Claimant to be *"not perfect but sufficient and appropriate"* and they offered a few avenues for improvement. Their agent saw first-hand where and how it was stored and made a contemporaneous report of it. From the Claimant's photographs the product was stored in color coded piles outside and uncovered.

59. There is evidence from witnesses for the Claimant that after that report they witnessed that the first Defendant's workers did not know how to handle steel properly. They dragged them, dropped them on each other and stored them in mud, salt spray and rain. It has not gone unnoticed that the material was similarly stored when storage was originally found to be sufficient and appropriate.

60. This would mean that the Claimant's agent must have realised that they would be exposed to the weather and soil. In any event, in ordinary construction those same products must be exposed to the weather for some period of time before they are encased in a building. If the product could not withstand the weather prior to construction, then how could it withstand the weather during construction.

61. More importantly, if this product was commonly used in marine settings on shore and offshore then the weather of San Pedro would have been a common setting for its use, and it ought not to have deteriorated in the way in which it did.

62. However, the dragging, dropping and colliding was the factor which caused this Court concern. There is a video which distinctly shows the way in which the steel

was being handled and the likelihood of the layers being removed seemed quite a distinct possibility.

63. The Claimant began offering advice on the handling of the steel by using nylon straps instead of steel wire, covers over the forklift and crowbars and stacking the steel in a particular way with wooden spacers. While the Court is of the view that this information should have been shared from the onset, this forms no part of the first Defendant's complaint and is certainly not in issue here.

64. The Court could only consider what is properly before it. There is no evidence which gives the Court the ability to compare the galvanized steel with the tri coated steel to make a determination of whether one was inferior to the other. There is perhaps the issue of cost where the tri coated was offered at the same price as the galvanized for the initial buildings but was to increase afterwards. But that by itself is not determinative. Since I am, myself, no expert, I would not dare attempt to make such a determination without the proper evidence. That ground surely must fail.

65. Then if this Court is to make a determination on the quality of the steel so as to say whether it was defective or not again even using the circumstantial evidence before it, there is a distinct difficulty in overlooking the way in which the steel had been treated. There was more than a slight chance that the coating had been removed in places and those were the places which began to rust. It has also not gone unnoticed though that Mr. Arlt himself informed that it would take a very hard and very sharp object (i.e., a chisel) and great force to scratch off the epoxy layer or let alone the zinc primer.

66. The Court also notes that while the first Defendant prepared and issued a report about the first shipment of steel it did nothing in regard to the remaining ones. There was an obligation on the first Defendant to inspect against damage and shortage within ten days of arrival. The Court finds that the first Defendant's silence means that there were no shortages or damage to the product when initially inspected. This would mean that any damage must have come after inspection.

67. However, the Claimant made much about all the remedial work which had been undertaken by Belize Admixture and the products used to do this. It also sent engineers and others to assist with the construction and they also volunteered information about the proper handling of the steel. Why then did the rusting persist to that disclosed in the photographs of the first Defendant's report of the 8th February, 2019.

68. In those photographs the rust seemed to have eaten through and through the steel. This was not steel lying on the ground but steel which had been used in the structure and which to my mind had been attended to by either the Claimant's supplier (at factory) or agent (Belize Admixture).

69. The Court is of this view because Mr. Arlt's own email also stated *"Please note, the application of TRI COAT repair/completion works is best and easiest done when the whole building has been erected. So, any damages caused by rough handling during erection process can also be taken care of."*

70. Reasonably, there was no way that steel which had been treated to withstand the weather present in San Pedro should have reached such a stage of deterioration.

71. The Court also considered the evidence of Mr. Carlton Young that the same buildings and extensions which used the Claimant's steel displayed rusting. He could certainly not attempt to say why they were rusting but his evidence supported the first Defendant's assertion that it was the Claimant's steel that continued to rust notwithstanding treatment by the Claimant and his agents or suppliers.

72. This Court finds on a balance of probability that there was some defect with the product. Accordingly, the statement that it had been commonly used in onshore and offshore marine environments certainly could not be true as that is the precise environment which San Pedro has. There had in fact been a misrepresentation made by the Claimant and the Court so finds. This is a full defence to the Claimant's claim for breach of contract above.

73. The product cannot be returned as it had been put to use whether entirely or partially and affixed to property owned by a third party. The remedy of recission is therefore barred. The first Defendant claims damages. The first Defendant has not pleaded fraudulent misrepresentation, so the Court is allowed to award damages where there has been a negligent or innocent misrepresentation. The damages awarded must place the first Defendant in the financial position they would have been in had the misrepresentation not been made and must be reasonably foreseeable. This is different to damages for breach of contract.

74. The first Defendant in his submissions only stated that the representation as to the quality of the steel by its strength and importance became a term of the contract (**Bannerman v White (1861) 10 CB NS 844**). This court rejects this contention at this stage as it had never been pleaded. In fact, the first Defendant's claim for breach of contract was so badly pleaded that even now the Court is uncertain what precisely

it entailed beyond the absence of certain welds which has been dealt with sufficiently above. In fact, even a consideration of the list of issues agreed by the parties reveals this glaring gap.

Damages:

75. The first Defendant claims damages in the sum of US$385,234.52. This sum, while it was pleaded it had not been particularized as a loss already incurred by the time of trial, which in the nature of special damages it ought to have been. This is so both the counter Defendant, and the Court are able to determine precisely what is being claimed and why. These damages must also be proved. In evidence the first Defendant alleged that this sum had increased to $474,917.08.

76. There are no receipts provided, just a spreadsheet prepared by one of the first Defendant's employees who had been given information by another employee. There was no distinction made between what was spent on preparatory work to the steel and what was spent on erecting the structure. This was made obvious under cross examination of Mr. Galvez.

77. A proper assessment using the spreadsheet could not be undertaken. The Court will award a figure for nominal damages bearing in mind that there had not been full payment for the steel supplied.

Unjust enrichment:

(11) Whether the value of Boca Chica's property has increased by the erection of the steel thereon, so that Boca Chica has been enriched by the receipt of the steel?

(12) Whether Boca Chica's enrichment has been achieved at Emerald Metals' expense, in that Emerald Metals has not been fully paid for the steel supplied?

(13) Whether the retention of the enrichment by Boca Chica is unjust since it was procured through the fraudulent misrepresentation or deceit of the 2nd and 3rd Defendants, who are its directors?

78. The Claimant submits that the fourth Defendant has been unjustly enriched by the construction of the structures on its property using the steel supplied by the Claimant. The Claimant continues to be owed for this steel by a *"shell company with no assets."* The fourth Defendant should not be allowed to retain this benefit.

79. In **MacDonald v Costello [2011] EWCA Civ 930** the Defendant Company contracted for the construction of houses on its shareholders and director's land. When the company failed to meet its liability, the Claimant sued the shareholders and directors and sought restitution for unjust enrichment claiming they had benefitted unjustly. While successful at the High Court this Claimant failed at the Court of Appeal since any other finding would undermine the contractual arrangements between the parties to the contract. There was no basis in law for providing one party to a contract a remedy against a third party because of the Company's breach.

80. Similarly, this Court will not undermine the contractual relationship between the Claimant and the first Defendant. The fourth Defendant is a third party and had no part in that arrangement. It cannot now be called upon to give up a benefit for which it never contracted and was therefore, not unjustly enriched. The issues of whether the property has increased in value etc. are mute.

81. This claim fails in its entirety.

Costs:

82. Both parties have seen some level of success the Defendants have seen far more. Rather than award cost on the Claim the Court will make a BZ$10,000.00 deduction from the BZ$80,000.00 agreed by the parties and simply award cost to the Defendants in the sum of BZ$70,000.00.

Disposition:

1. Judgment on the Claim against the first Defendant in the sum of US$1,200.00 being payment for the toolkit and US$14,750.00 for Engineering and other support agreed by Order Confirmation Form dated 10th May 2018.
2. The remaining Claim against the first Defendant and the Claims against the second, third and fourth Defendants are dismissed.
3. Judgment on the Counterclaim to the first Defendant.
4. Nominal Damages are awarded for misrepresentation in the sum of US$50,000.00.
5. Costs to the Defendants in the sum of BZ$70,000.00.

SONYA YOUNG

HIGH COURT JUDGE