[2016]JMSC Civ 180

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007HCV01486

BETWEEN	**X – RAY & DIAGNOSTIC ULTRASOUND CONSULTANTS LIMITED**	**CLAIMANT**
AND	**CAC 2000 LIMITED**	**DEFENDANT**

Mr. William Panton and Mr. Kristopher Brown instructed by DunnCox for the claimant

Mr. Patrick Foster Q.C. and Mrs. Kerry-Ann Sewell instructed by Nunes Scholefield, DeLeon & company for the defendant

December 7, 8, 9& 10, 2015 and February 9 and October 21, 2016

Professional Negligence–liability of a repairer

SIMMONS J

[1] The claimant is a company in the business of providing x-ray and diagnostic services with premises located at 1 Ripon Road, Kingston 5 in the parish of Saint Andrew (the premises).

[2] The defendant is a company in the business of supplying, installing and servicing/maintaining air conditioning units.

[3] On the 11th day of May 2003 there was a fire at the premises which resulted in damage and destruction of part of the premises and items of equipment essential to the claimant's business.

[4] The claimant has asserted that the fire originated from an air conditioning unit (the unit) that was being maintained by the defendant under a Service and

Inspection Contract. It has also alleged that the unit caught fire as a result of the negligence and/or breach of contract by the defendant, its agents or servants. Consequently, it has filed a claim seeking damages for the loss occasioned by those breaches.

[5] The particulars of the defendant's negligence are stated to be:

(i) Failing to provide any or any adequate maintenance of the unit

(ii) Failing to inspect or test the unit in particular the fan coil properly or at all as part of its service contract

(iii) Failing to discover or observe that the unit and in particular the fan coil was not functioning properly

(iv) Failing to give any warning to the claimant that any malfunctioning air conditioning unit was dangerous

(v) Acting as aforesaid although knowing that the unit would be used on a daily basis and knowing that it was located within close proximity of the claimant's sensitive equipment

[6] The particulars of breach of contract were outlined as follows:

(i) Failing to provide any or any adequate equipment service or maintenance of the unit

(ii) Failing to inspect or test the unit in particular the fan coil properly or at all as part of the service contract

(iii) Failing to discover or observe that the unit and in particular the fan coil was not functioning properly

[7] The claimant has claimed damages for the replacement of certain items of equipment, the customs charges associated with their importation, repairs and clean-up costs and loss of earnings.

[8] In its further amended particulars of claim dated March 30, 2007 which were filed on October 8, 2014 it has also claimed interest at a commercial rate of 9.25% on the sum of United States five hundred and eighty six thousand one hundred and sixty five dollars and twenty one cents (US$586,165.21). Interest at a commercial rate of 14.13% has also been claimed on the sum of Jamaican one million fifteen thousand one hundred and seventy one dollars and thirty eight cents (J$1,015,171.38). That figure, represents the amount allegedly spent to effect the necessary repairs and to meet the customs duties associated with the importation of various items of equipment to replace those lost in the fire.

[9] By way of a further Amended Defence dated and filed on July 21, 2008 the defendant stated that under the service contract it was required to service the unit at regular intervals and on an as needed basis when problems occurred.

[10] The defendant stated that in January 2003 it serviced the unit as well as the claimant's other air conditioning units. It was further stated that the defendant responded to a problem call and replaced defective parts on the external component of the unit on February 13, 2003 and that since that date, the claimant has not contacted the defendant with respect to any complaints or concerns regarding the unit or any of the other air conditioning units.

[11] The defendant has also alleged that at the material time the claimant was the owner of a Nuclear Gamma Machine (the camera) which had a long start up time and when not in use, was left in the on position and covered in plastic. It was stated that in such circumstances the camera would have been conducting electricity. It was also alleged that it was positioned directly below the unit.

[12] The defendant averred that on May 11, 2003 the camera became overheated and ignited. It said that the fire spread to the unit and burned its exterior.

[13] It has denied responsibility for the fire and stated that the fire and any consequent damage was caused solely and or mainly contributed to by the claimant's own negligence.

[14] The particulars of the claimant's negligence were outlined as follows:

(i) Operating the camera in a manner which it knew or ought to have known was dangerous and against specification

(ii) Placing the camera under a plastic cover while the machine was still on and conducting electricity

(iii) Failed to have any or any adequate regard for the safety of its own premises and equipment

(iv) Leaving the camera on and conducting electricity in its building throughout a weekend period and while the said building was unoccupied and unmanned so that no-one was present to monitor the machine, especially since it was covered by plastic; and

(v) Placing the camera in the manner and condition that the claimant knew or ought to have known would increase the risk of a fire in the event that it overheated

[15] The defendant also denied that it was in breach of its service contract with the claimant and stated that the unit was serviced on a regular basis and in accordance with the service contract. The defendant also stated that it did not receive any service calls from the claimant in the weeks immediately preceding the fire.

[16] In order to determine whether the defendant is liable four questions arise for the court's consideration. They are:-

(i) What was the source of the fire?

(ii) What was the cause of the fire?

(iii) Whether the fire occurred because of the negligence of the defendant, its servants or agents?

(iv) Whether the defendant, its servants or agents breached its obligations under the service contract?

The evidence (cause and source of the fire)

[17] The evidence in relation to these issues came from the claimant's experts Mr. Basil Nelson and Mr. Lockland Dunkley and the defendant's expert Mr. Mark Hook.

[18] Mr. Nelson's findings are contained in five reports. The witness is an Electrical Engineer and has taken courses in air conditioning systems as part of his continuing education. He has been a member of the American Society of Heating, Refrigerating & Air Conditioning Engineers since 1992. Mr. Nelson also stated that he has investigated over one hundred fires of varying origins during his training and work as an engineer and consultant.

[19] The reports that were prepared by Mr. Nelson are dated May 29, 2003, October 28, 2003 and June 18, 2004. He was appointed as an expert witness in March 2009 and gave two further witness statements/reports dated the 30th October 2009 and the 5th June 2015, respectively.

[20] Mr. Nelson in his evidence in chief stated that on the 12th May 2003 he was contacted by Dr. William Clarke, the Managing Director of the claimant, who asked him to investigate a fire that had occurred at its offices the previous night. His evidence is that he visited the scene that very week.

[21] In his report dated the 29th May 2003 he stated that the fan coil unit of the unit was completely destroyed by fire and the slag from its melted PVC enclosure had fallen on the camera which was situated immediately below the unit. He also

noted that only the end of the electrical cable that was close to the unit was severely burnt.

[22] Based on the above observations he concluded that the fire originated in the unit that was mounted on a wall in the room which housed the camera.

[23] The second report which was prepared after he had received the Fire Report of The Jamaica Fire Brigade, states that he agreed with their opinion that the fire started in the unit. He stated specifically that its origin was in the fan coil unit and that the most likely cause was a malfunction of the electrical control system.

[24] The report of the 18th June 2004 was prepared after Mr. Nelson received correspondence from the claimant requesting a more detailed report on the cause of the fire. The letter states in part:-

> *"Our attorney, Dennis Morrison Q.C. has asked for us to get to the 'micro' level with reference to the cause of the fire.*
>
> *Unfortunately, the insurance company BCIC has decided not to pursue the matter through their forensic expert, as was originally proposed by them."*

[25] That letter also stated that during the life of the unit it would frequently appear *"as a block of ice"* and there were times when *"water would be pouring from the unit and onto the gamma camera".* The writer also stated that as a result of the situation, a tarpaulin was used to cover the camera.

[26] Mr. Nelson in his report of the 18th June 2004 opined once again, that the fire was due to the malfunctioning of the electrical controls of the unit. He explained that this would cause the fan in the fan coil unit or evaporator to stop while the condenser continued to function. When that occurred ice would be formed which would cause water to drip from the unit. He further stated that the malfunctioning of the controls is a sign that something should be done to address the problem. He also stated that where electrical and electronic controls are frequently exposed to a *"frozen envelope"* they will deteriorate due to the corrosion of

critical parts. This deterioration he said, would have resulted in sparks and *"sparks will cause fire".*

[27] His further witness statement/report dated the 30th October 2009 was prepared after he received the report of Mr. Mark Hook. In response to a section of that report which referred to one prepared by Mr. Stanley Sutherland, who stated that there was evidence of a short circuit on the electrical supply wiring to the unit, Mr. Nelson went back to the scene on the 21st October 2009. He indicates that he went there to carry out *"another detailed inspection of alleged short circuit described by Stanley Sutherland".* He also indicates that he had received three additional photographs from Dr. Clarke.

[28] Mr. Nelson made the following observations:-

(i) That the power supply from the panel board to the isolator which was located on the outside wall where the evaporator was installed, was effected by the use of three core flat insulated cable. This cable was passed through a hole in the wall and connected to the isolator;

(ii) A metal plate was used on the inside wall to support the unit's evaporator. This plate was installed between the flat cable and the wall. He said that this was done without allowing enough slack on the cable.

(iii) The metal plate had a hole through which the cable, the supply and return copper pipes, the condensate water drain pipe and the power cable that had been installed by the claimant's electrician were routed. That hole he said had been widened and now had sharp or jagged edges.

[29] He stated that the presence of these sharp or jagged edges was unacceptable in the absence of the installation of some form of protection for the electrical cables, such as a poly (vinyl chloride) (PVC) sleeve. He also said that the failure to provide enough slack between the wall and the cable was unacceptable.

[30] The report also states that the copper conductors were broken in such a way that he formed the opinion that it was due to an electrical fault. He buttressed that opinion by reference to the presence of a build-up of copper oxide which was evidenced by the presence of a green patina on the conductors. In his opinion, this signified that burning had been taking place for some time. He also said that there was a gradual cutting into the insulation of the electricity supply cable due to vibrations caused by the compressor when it cycled.

[31] He stated that if the cut through the insulation and the copper conductor affected both live lines there would have been an immediate short circuit which would have resulted in the tripping of the circuit breaker in the unit's panel board. He opined that the deterioration was on one of the live lines and that this would have caused an intermittent earth fault. This in turn would have been evidenced by lower voltages which would result in higher currents which in turn, would cause the malfunction, overheating or burning of items such as the compressor motor, fan motor and control circuit board.

[32] Mr. Nelson concluded that *"the experiences of freezing evaporator, burnt compressor and fan motor and defective Control Circuit Board are all due to the intermittent nature of the fault. Over time this intermittent fault caused further weakness in the electrical supply cable which finally resulted in an instantaneous 'short circuit' which resulted in an explosion which initiated fire."*

[33] In his final report, Mr. Nelson reiterated his opinion that the fire started in the unit and made the point that he, the fire fighters and others who had visited the premises shortly after the fire were in a better position to provide an opinion as to its source unlike Mr. Hook who went there five (5) years later. He also stated that in 2003 he had noted that the tarpaulin that had been used to cover the camera was only burnt in places where the melted plastic from the evaporator had fallen on it. He opined that if the fire had started in the camera it would have been severely scorched or burnt and the tarpaulin would have been consumed by the fire.

[34] He stated again, that in his opinion the fire was initiated by an electrical fault in the evaporator. He also disagreed with Mr. Hook's assertion that several of the electrical power supply cords and plugs to the medical equipment were located near to the evaporator.

[35] In conclusion, he stated :-

> *"My approach in investigating the source of the fire was by a process of elimination. Having determined that it was an electrical fire, I concentrated on related electrical and electromechanical components in the air conditioning system, initially both condenser (outdoor) and evaporator (indoor). Finally, I concentrated on the evaporator circuit board and power supply cable. The problem was found to be the electricity supply cable within the evaporator."*

[36] In cross examination, the witness indicated that he did not examine the manual for the unit when he was preparing his first report and only did so when the matter became a litigious one. He also said that that report was not as detailed as it should have been but stressed that he was not operating as an expert at that time and his first mandate was to identify the source of the fire. He described himself at that time as *"an ordinary engineer doing something for a client".* When it was suggested that he was doing a favour for the claimant at that time, he agreed that that was the case. He also indicated that it was his belief at the time that the matter would have been settled and that he returned to the scene in 2009 when it became necessary.

[37] Where his conclusion that the fire was due to an earth fault is concerned, Mr. Nelson pointed out that he had raised the possibility of an earth fault as the cause of the fire in his Expert Statement dated the 4th September 2009. When pressed he admitted that unlike his earlier assessment the earth fault mentioned in his final report was not caused by water but by the chafing of wires. He stated that the earth fault would have caused the voltage to fluctuate.

[38] He also stated that his last visit to the scene was prompted by Mr. Hook's reference to the Sutherland Report which had raised the issue of a short circuit. The witness indicated that he went back to the premise in order to put himself in a position to comment on that report.

[39] Mr. Nelson when shown the relevant photograph was also not able to identify the jagged edge which he said caused the wires to chafe and ultimately emit sparks which caused the fire.

[40] He stated that he did not see the green patina on the wires in 2003 and only noticed it in 2009 when the evaporator had been cleaned up. He said that in 2003 it had been covered in soot and he was careful not to disturb the scene, as it was his understanding, that other persons would also be conducting investigations. Mr. Nelson did however admit that the patina could have been caused by humidity, salt air or acidity. He also indicated that it could have been created by the fire or oxidation after the fire as well as sparking prior to the fire.

[41] He however maintained that due to chafing, a live wire came in contact with the earth wire which resulted in an earth fault. He also maintained his view that too many wires had been put through the metal plate and that due to the vibration of the compressor and the fan there was chafing. He said that whenever there was a vibration there would be burning which would cause the destruction of the PVC which was used as insulation. This according to Mr. Nelson, was evidenced by the blue patina. He said that he was unable to state the extent of the vibration but later in his evidence indicated that it would have been minimal. He also indicated that the first time that he saw the patina was in 2009 when he was presented with some photographs.

[42] Dr. Clarke also gave evidence that from time to time the unit would malfunction. He said it would "freeze up" and there would be ice on the filter. Water would also drip from the unit or pour out of it onto the camera's console. He stated that in February 2002 the unit was found to have a defective circuit board. It was

replaced but the problem of water dripping or pouring from the unit continued. He said that the defendant's representative told him that the unit would be replaced. As a result of the problem the claimant decided to cover the camera with tarpaulin in the nights and on weekends. Dr. Clarke also indicated that the camera was not turned on, on weekends.

[43] In cross examination, Dr. Clarke stated that he had a service contract with the defendant until 2003. The contract provided for the servicing of the claimant's air conditioning units and for repairs where necessary. The cost of the repairs was billed separately.

[44] He indicated that he did not generally interact with the defendant's technicians but would "pop into" the room to see what was happening whenever they visited the premises.

[45] Where the temperature of the room which housed the camera is concerned, he stated that the crystals in the camera were required to be kept at a certain temperature in order for it to function efficiently. He also stated that the camera was not prone to getting hot.

[46] He confirmed that the unit was last serviced in January 2003 and the compressor replaced in February that same year. Dr. Clarke also stated that ice would form on the filter at times and it would sometimes look like a block of ice. This, he said occurred shortly after its purchase in 1998. He also said he would call the defendant's office and speak to Mr. Roberts whenever he had a problem.

[47] He also maintained that Mr. Roberts had told him that the defendant had stopped distributing Fujitsu mini split air conditioning units because they were unreliable. He also indicated that he could not confirm whether anyone had lodged a complaint with the defendant between January and May 2003 that the unit was freezing up. He did however maintain that such a complaint was made at some point.

[48] Mr Robert Ellis who is a technical assistant employed to the claimant, gave evidence that he was responsible for switching the machines on and off. He stated that each morning he would turn on the various pieces of equipment, clean them and then under the supervision of Dr. Clarke ensure that they were properly calibrated. In the evenings he would place the machines in standby mode.

[49] He also indicated that he would cover the camera in the evenings because the unit would "freeze up" and then drip water onto the camera which was situated below. He said that this problem had persisted for some months. His evidence is that in the evenings he would move the control panel of the camera approximately eighteen (18) inches away from the wall.

[50] Mr. Ellis further stated that it was he who would call the defendant about the unit generally and whenever it malfunctioned. He indicated that he would speak to Mr. Roberts, Mr. Haye or Mr. Nembhard. His evidence is that on one occasion the defendant removed a part from the unit in order to determine the cause of the problem. The part was reinstalled but the problem persisted. He also stated that the defendant worked on the unit on more than one occasion.

[51] The witness stated that after the fire he observed that the back portion of the camera was burnt as well as the unit and the wires around it. He described the unit as *"completely gone".* He said that the plastic had burnt up and there was a large pile of ash behind the camera.

[52] Mr. Mark Hook, who is a Registered Professional Engineer, Certified Fire Investigator and Certified Fire and Explosion Investigator, provided two reports. They are dated the 3rd July 2008 and the 17th March 2009.

[53] In his first report Mr. Hook stated that he was unable to determine the origin and cause of the fire based on the documentation and photographs that had been submitted to him for review. At that time, he had not inspected the scene of the fire.

[54] He referred to the report of Mr. Craig Moodie in which the writer indicated that he was unable to state *"categorically"* how the fire started. Reference was also made to Mr. Sutherland's report in which the author stated that due to the time which had elapsed between the fire and the date of his inspection he was unable to determine the cause of the fire. He also referred to the section of that report in which it was stated that there was evidence of a short circuit on the electrical supply to the unit which may have been present before the fire or was caused by the fire.

[55] Mr. Hook also stated in his report, that the detailed installation, parts and service manuals for the unit should be obtained from the manufacturer in order to facilitate the inspection and valuation of the claimant's air conditioning system. He said that the reported icing of the unit could be considered a malfunction but he saw no record of this being the subject of a service call. He also stated that the icing could have been caused by dirty evaporator coils, the setting of the thermostat and continued operation of the unit at a very low temperature setting or low Freon within the system.

[56] He indicated that an examination of the service records indicated that servicing was done on the 25th February 2002 (call sheet # 03087), 2nd June 2002 (call sheet #03651), 1st August 2002 (call sheet # 03977) and on an unspecified date between 1st August 2002 and January 2003 (call sheet # 04439) and in January 2003 (call sheet #06693).

[57] The report also states that the unit was serviced and a defective circuit board replaced on July 31, 2002 (call sheet # 04024). On the 13th February 2003 a compressor was replaced (call sheet # 06776). He said that customer call sheet #06801 indicates that servicing was done after the 13th February 2003. He opined that since the fire did not originate in the outdoor unit the replacement of the compressor did not cause the fire. He also expressed the view that the workmanship of the defendant when it replaced the circuit board was not likely to

have caused or contributed to the fire since the unit *"apparently"* ran without incident from July 2002 to May 2003.

[58] Mr. Hook's second report was prepared after he had the opportunity to examine the unit and some of the damaged equipment. However, he was still unable to say whether the fire originated in the unit or that it was damaged as a result of its exposure to the fire.

[59] He also said that even if it is assumed that the fire started in the unit there are multiple potential failures that could have occurred without any warning.

[60] In cross examination he stated that the he could not determine the source or the cause of the fire due to the improper preservation of the scene. He also gave evidence that the burning of a compressor is electrical and could also be caused by a lightning strike, age or low Freon. Mr. Hook also stated that where a compressor burned the technician would not necessarily record the cause of that phenomenon.

[61] The witness also described the information contained in the defendant's Call Out Logs as "sparse".

[62] He also indicated that where a compressor burns a Megger Test could have been used to determine the cause.

[63] Mr. Patrick Roberts who is an electrical engineer and a director of the defendant gave evidence that in August 2000 the defendant acquired the assets of Conditioned Air and Associated Contractors Limited (CAAC) from the ICD group of companies. The claimant, he said, is a customer of the defendant and was a former customer of CAAC.

[64] He stated that wall mounted air conditioning units are comprised of two parts. The part on the inside of the building is called the fan coil or evaporator and the condenser that is situated on the outside. He described the compressor as the

"engine" of the unit. The compressor and the condenser are both housed in an enclosure on the outside of the building.

[65] Where the issue of maintenance is concerned, he indicated that the defendant had offered various types of service contracts to its customers and the unit was the subject of a Service Inspection Contract (SIC). That contract was renewed by the defendant and was in force at the time of the fire.

[66] He further stated that under the SIC the defendant was required to do the following:-

(i) Inspect the control panels and unit casing making recommendations if any;

(ii) Check electrical components…..and record current rating of motors and compressors;

(iii) Check suctions and discharge pressure, supply and return air temperature at the evaporator coils;…

(iv) Test run all equipment.

Mr. Roberts indicated that the claimant's units were serviced every three months and at that time the tasks noted above would be carried out.

[67] He stated that work was done on the unit as follows:-

(i) May 2001 – defective isolator replaced;

(ii) July 2002 – burnt circuit board replaced;

(iii) January 2003 – general servicing;

(iv) February 2003 –burnt compressor replaced.

The witness stated that the unit was left in good working order in February 2003 and the defendant received no further service calls from the claimant between April 25 and May 9, 2003. Mr. Roberts also stated the repairs involved among other things, the removal of the defective compressor, cleaning of the refrigerant circuit, installation of the new compressor, checking the circuit board and compressor amperages. He did however give evidence that the information contained in the defendant's service records was "sparse". He said that there were not a lot of "breakdowns" in those records.

[68] Mr. Roberts also gave evidence that the unit could not be programmed to come on and off each day of the week as indicated by Dr. Clarke and Mr. Ellis. He said that it could only be programmed for one single on and off event per day and would have to be reset if there was a loss of power. He also said that there was no record of the unit being programmed in that way. Mr. Roberts also indicated that at the time of the installation of the unit he was employed to CAAC as its Chief Technical Officer. He said that he worked with units of a larger capacity and was not aware of the circumstances of the installation of the unit.

[69] He also denied speaking with Dr. Clarke about the reliability of the unit and any problem with it "freezing up".

[70] In cross examination, the witness stated that he has known Dr. Clarke from the late 1990s and that Dr. Clarke would call him from time to time about issues pertaining to the air conditioning units at the premises. Mr. Roberts stated that he worked with Dr. Clarke on the installation of equipment that was larger than ten tons.

[71] He repeated that the timer for the unit could not be programmed to take into account the various days of the week. He did however state later in his evidence, that he had supplied a gadget to the claimant which permitted the programming of air conditioning units for each day of the week albeit not in relation to the unit.

[72] Mr. Roberts maintained that he had no record of any complaint from Dr. Clarke or Mr. Nelson that the unit was “freezing up”. He said that whenever Dr. Clarke called he would make a record and that when a technician is sent to a location the job ticket must be signed by the client. Mr. Roberts also indicated that there was no record of what had caused the compressor to burn but it was not unusual for a five year old unit. He further stated that there were three water leaks over a six years period.

[73] The witness stated that it was he who recommended the placement of the unit but later said that he gave no advice in relation to the unit.

[74] He also said that he did not know what had become of CAAC in which he and Mr. Marston had held forty nine per cent (49%) of the shares.

[75] With respect to earth faults, he indicated that he was familiar with that phrase. He said that it occurs when current leaks to the earth and that it can result in circuit board failure and the unit shutting down. He said that there was no frequency of failure of the unit which suggested that there was a problem. He never felt that there was anything needed by way of recommendation. He also said that the problem with the leaking of water was resolved three months prior to the fire. The witness indicated that the complaint of the 11th March 2003 that the unit was still leaking referred to the unit in the front office. He did however indicate that the unit was located near the front of the building. He said that he understood it to mean that the central unit was leaking.

Claimant’s Submissions

[76] Mr. Panton submitted that Mr. Nelson’s evidence as to the cause and source of the fire is credible and ought to be accepted. It was submitted by Counsel for the claimant that the Court should have regard to the fact that Mark Hook was the last of several experts retained by the defendant’s Insurance Company to report on the cause of the fire. It was submitted that having instructed at least five (5)

other experts to investigate the cause of the fire, Mr. Hook was brought in for the sole purpose of shifting responsibility for the fire from the defendant.

[77] Counsel pointed out to the Court that Mr. Hook's 1st and 2nd report were prepared for the exclusive use of the British Caribbean Insurance Company and were dated July 3, 2008 and March 17, 2009 respectively, well after the filing of the claim on March 17, 2007.

[78] It was submitted that Mr. Hook did not appreciate or understand the requirements of Part 32 of the ***Civil Procedure Rules, 2002*** and this, it was argued, was reflected in his statement that the reports were for the exclusive use of the insurance company whilst litigation was ongoing and he may have been required to act as an independent expert.

[79] It was submitted that Mr. Hook's approach to establishing the probable origin and cause of the fire was seriously flawed. Counsel then emphasised portions of Mr. Hook's report which spoke to 'information regarding the specific cause of the fire', 'precise cause and origin of the fire' and an inability to 'conclusively' determine where the fire originated.

[80] Mr. Panton argued that the preponderance of opinions, particularly the experts who attended on the day of the fire, or shortly thereafter, is that the fire started in the unit.

[81] Counsel submitted that the unit had a chequered service history and that Mr. Nelson's evidence is entirely credible and his conclusions entirely probable. He argued that the concentration of the patina in a particular area is consistent with the evidence of Mr. Nelson.

[82] Counsel referred to a portion of Mr. Hook's report, where Mr. Hook stated that:

> *"the service agreement includes the washing of filters and cabinets and checking the suction and discharge pressures. Dirty coils and*

low Freon would not be considered likely causes for the icing of the coil when those items are checked on such regular basis".

[83] Mr. Panton argued that the work sheets produced by the defendant do not set out in any detail the work undertaken by the service technicians employed by the defendant consequently Mr. Hook was not in a position to comment on how often the items mentioned were checked by the technicians.

[84] It was also submitted that the service and inspection contracts also required the defendant to check electrical components, relays, motorized value and record current ratings of motors and compressors. Mr. Panton further submitted that the checking and recording of the current ratings must have been intended to inform the proper functioning and servicing of the unit. He argued that there is no evidence of the defendant checking and recording of the current ratings of the motor and compressors. It was submitted therefore that the defendants were clearly negligent and in breach of contract by failing to carry out these checks and recording the values.

[85] Counsel submitted that Mr. Hook's statement that he used a process of elimination to determine what would be the cause of the fire appears to be an afterthought because no such process can be discerned from any of his reports.

[86] He submitted that the suggestion by Mr. Hook that the camera could not be ruled out as a cause of the fire was contradicted by Mr. Dunkley's evidence that he was certain that it had not malfunctioned or overheated.

[87] In highlighting the evidence of Mr. Robert Ellis, counsel noted that Mr. Ellis' evidence as to the consistent problems with the unit is corroborated by the evidence of Dr. Winston Clarke as well as the Call Out Logs and dispatch records.

[88] Counsel argued that since the logs are scant on details about the reason for the calls out and what was actually done by the technician, any uncertainty as to

what the logs relate, should be resolved in favour of the claimant who maintains that the unit was always giving problems.

[89] Mr. Panton stated that the available records show, on analysis, that despite quarterly servicing, calls were made to the service centre about problems. Counsel also stated that the documents produced by the defendant show that not every dispatch log had a corresponding work ticket and vice versa and were therefore, not reliable sources of information.

[90] Counsel submitted that the defendant ought to have kept proper records as it was under a contract to service the unit.

[91] Counsel then addressed his mind to the evidence of Mr. Colin Roberts. Mr. Panton argued that Mr. Roberts would not have any knowledge of the unit being programmed for weekends and out of hours because his oral testimony was that he had no involvement with the fitting of the unit because he only deals with units that are ten (10) tons or larger.

[92] Counsel submitted that Mr. Roberts' evidence that his company supplied one programmable gadget which allowed programmes setting different start and finishing times demonstrates that the defendant's records are not reliable. He stated that the fact that such a gadget exists tends to support the claimant's case that the unit was in fact fitted with a timer and programmed in the way described.

[93] Counsel argued that whatever opinion the court may arrive at as to the root cause of the fire given by the experts, the fact remains that there was deficient servicing and maintenance on the part of the defendant.

[94] Counsel submitted that a repairer may owe a duty not only to carry out the stipulated repairs with due skill but also to point out to the owner any dangerous defects that have become apparent. He cited the case of ***Nicholson v John Deere*** (1989) 34 DLR (4^{th}) 639 as the authority for such a proposition.

[95] Counsel also relied upon the case of ***Trans-Canada Forest Products Limited v Heaps Waterous Ltd et al*** [1954] S.C.R 240 where it was stated that:

> *"if a mechanic who is doing work upon a piece of machinery finds a condition which is likely to cause danger, he is under a duty to report it to the owners, even though he is not employed to remedy that specific condition."*

[96] He further brought the court's attention to a passage in ***Haseldine v Daw*** [1941] 2 KB 343 where Lord Goddard LJ said:

> *"Where the facts show that no intermediate inspection is practicable a repairer of chattels stands in no different position from that of a manufacturer and does owe a duty to a person who, in the ordinary course may be expected to make use of the thing repaired"*

[97] Counsel submitted that the service and inspection contract required the defendant, its servants or agent to, among other things, "inspect the control panels and unit casing making recommendations if any". Resultantly, counsel submitted that the defendant was obliged to make recommendations even if the ordinary skilled man exercising that special skill would not have made them.

[98] Counsel contended that the defendant is in breach of contract and was negligent having failed to make any recommendations about the problems experienced with the air conditioning unit.

[99] Counsel argued that the presence of water marks on the wall below the drain pipes from the evaporator portion of the air conditioning system supports the claimant's evidence that the system not only dripped water but would freeze up from time to time. It was contended that the defendant's evidence about not being notified of the "freezing up" is not credible.

[100] Mr. Panton referred to Mr. Hook's report and noted where he (Mr. Hook) indicated that the unit should have a coil temperature sensor that "should detect a freezing condition and through the control board turn off the outdoor unit so that the coils have a chance to defrost".

[101] He submitted that Mr. Hook's evidence confirms two important facts. Firstly, that the unit was prone to freezing up. Secondly, that a coil temperature sensor should have been fitted to detect the freezing condition and through the control board turn off the outdoor unit so that the coils would have a chance to defrost. Counsel argued that the defendant was negligent in not fitting such a sensor to the unit. Alternatively, it was submitted that the defendant breached its service contract by failing to recommend the fitting of a coil temperature sensor.

[102] Counsel submitted, that Mr. Nelson's evidence ought to be preferred over that given by Mr. Hook, as he, unlike Mr. Hook, had the opportunity in May 2003 to investigate and observe the very matters which were not available to Mr. Hook five (5) years after the fire. Mr. Nelson stated clearly that the cause of the fire was an earth fault.

[103] Counsel cited the case of ***Dawson v Murex*** [1942] 1 All ER 483 when addressing the standard of proof. Counsel contended that in a case of this kind the claimant is not required to establish his case with a degree of exactitude. Counsel then reiterated his earlier submission that it is clear from the expert evidence of Mr. Nelson and the others whose reports have been summarised in Mr. Hook's report, that the cause or origin of the fire lay within the air conditioning unit which was being serviced by the defendant.

[104] Regarding loss and damage, it was submitted that Mrs. Nesbeth-Dunn's expert evidence remains unchallenged. It was further submitted that there is no dispute as to the claimant suffering a loss of earnings due to the fire, as the defendant did not put forward an alternative amount and did not properly challenge the formula used in the calculation, the expert evidence of Mrs. Nesbeth-Dunn must be accepted.

[105] Counsel referred to Dr. Clarke's evidence that as a result of damage to the diagnostic equipment the claimant was unable to operate as efficiently as it did

prior to the fire. Counsel submitted that having to turn away patients resulted in a loss of the claimant's goodwill and adversely affected its reputation.

[106] It was further submitted that in the assessment of general damages the principle of restitution is applicable both in contract and tort.

Defendant's Submissions

[107] Counsel for the defendant submitted that as the claimant's action is against a defendant who has special skills in the servicing of air conditioning units, the test of negligence is different from that which would apply to the ordinary man. It was contended that the standard of care and skill required is that possessed by a person of ordinary competence exercising the same calling. The case of ***Bolam v. Friern Management Committee*** [1957] 1 WLR 582 was cited in support of that submission.

[108] Where the claim for breach of contract is concerned, it was submitted that in the absence of an express term there is an implied one that a professional or other skilled person will exercise reasonable care and skill in rendering his services in respect of which the client has agreed to pay a reasonable fee. Counsel cited the case of ***Midland Bank Trust Co Ltd v. Hett Stubbs & Kemp*** [1979] Ch 384 in support of this argument.

[109] Learned Queen's Counsel also stated that whether the claim is for negligence or breach of contract, the defendant's conduct is to be measured against the skills of a responsible, normally competent and careful practitioner.

[110] When addressing the cause of the fire, counsel referred to the following portion of the Fire Brigade's report dated May 11, 2003, which states:-

> *"the fire started in the AC unit which came in contact with other combustible material causing the fire to spread"*

He noted that although the report concluded that the fire was as a result of overheating of the unit it did not state the basis on which that determination was made.

[111] It was submitted that the statement is opinion evidence which can only be given by an expert appointed by the court and certified in accordance with the ***CPR***. Counsel submitted that having not been certified as experts, the opinion of the Fire Brigade is of no weight whatsoever in assisting the court in determining the cause of the fire. It was further submitted that the court has no choice but to disregard the opinion of the Fire Brigade as to the cause of the fire as that opinion is spurious and outlines no factual basis from which it has arrived at its conclusion.

[112] Learned Queen's Counsel argued that Mr. Nelson's evidence ought to be rejected as he has had no formal training in the area of fire investigation and his grasp of the relevant issues and depth of analysis appears to be tenuous.

[113] It was submitted that it would have been prudent for Mr. Nelson to consult the manual for the unit or seek to examine a similar unit to ensure that some factual foundation existed to support his water based theories. It was further submitted that the fact that Mr. Nelson advanced water based theories in the absence of these critical checks is indicative of either his incompetence or his bias.

[114] It was also submitted that Mr. Nelson's final theory that the fire was caused by an intermittent earth fault ought to be rejected and that the court ought to find that he is not a credible witness. It was also contended that the evidence of Mr. Mark Hook ought to be preferred to that of Mr. Nelson and the court should find that the cause of the fire has not been determined.

[115] Counsel argued that the unit was not installed by the defendant and that any loss or damage which flowed from the negligent installation should not be attributed to it. It was submitted that the claimant has not proved on a balance of probability

that the fire was caused by an earth fault which resulted from the negligent installation of the unit.

[116] It was also argued that there is no allegation in the claimant's pleadings that the defendant negligently installed the unit therefore any allegation of improper installation must fail.

[117] Counsel for the defendant contended that the main thrust of the claimant's pleadings is that the defendant negligently maintained and/or serviced the air conditioning unit and/ or failed to advise the claimant that the unit had become dangerous. It was then submitted that the evidence led does not support the assertions by the claimant.

[118] Counsel submitted that there is no evidence that the unit was leaking just before the fire and that this was reported to the defendant who failed to repair the unit. Counsel then referred to Mr. Roberts' evidence that six call outs in three years for a machine which was nearly five years old was not unusual and was not cause for concern. He also referred to Mr. Roberts' evidence that he did not programme the unit to turn on and off and that he did not tell Mr. Clarke that the Fujitsu air conditioning units were unreliable. Counsel submitted that the court should accept Mr. Roberts' evidence on these issues.

[119] It was argued that the behaviour of the claimant does not suggest that the unit was one which malfunctioned often and/or posed a threat to the claimant's business. Counsel argued that as the camera could be moved if the unit constantly dripped and/or froze up, threatening the safety of an expensive piece of medical equipment that was essential to the claimant's operation it would be reasonable to expect that the claimant would have either permanently moved it to another location in the room or sought to replace the problematic unit.

[120] Counsel contended that because the claimant continued its business relationship with the defendant until 2010 the claimant itself was not of the view that the fire was caused by the defendant's negligence and or breach of contract.

[121] Counsel submitted that in light of all the evidence the claimant has failed to prove its case against it, therefore judgment should be entered for the defendant against the claimant with costs to be agreed or taxed.

[122] Counsel also made submissions on damages in the event that the defendant was found liable. Counsel submitted that the measure of damages in both contract and tort is restitution. That is, the claimant must be put in the position he would have been had the contract been performed or the tort not committed. Counsel cited the case of ***Southampton Container Terminals Ltd v. Schiffahisgesellsch "Hansa Australia" MGH and Co (The Maersk Colombo)*** [2001] 2 Lloyd's Rep 275 in support of his submission. Counsel argued that the essential principles which govern an award of damages are restitution and reasonableness.

[123] Reference was also made to the case of ***Voaden v. Champion (The "Baltic Surveyor" and "Timbuktu")*** [2002] 1 Lloyds Rep 623.

[124] When addressing the loss of profits claim advanced by the claimant, it was submitted that the claimant did not sustain losses for the years 2003 and 2004 as claimed but in fact made a profit from its core business during this period.

[125] It was submitted that the figures arrived at by Ms. Ouida Nesbeth-Dunn (the claimant's expert witness) do not reflect an accurate assessment of the profit or loss sustained by the claimant for the period under review. Counsel argued that due to the unreliability of the calculations the claimant has failed to prove that it sustained losses as claimed. Counsel contended that the failure to prove its loss ought to result in no award being made to the claimant in this regard.

[126] It was further submitted that if the court is so minded to make an award in respect of this claim then there should be a reworking of the accounts to make allowance for particular deductions.

[127] Mr. Foster Q.C. submitted that fixed costs such as salaries and statutory deductions were not deducted from the income earned by each department in calculating the loss claimed and only variable costs such as purchases were deducted.

[128] He also submitted that Mrs. Nesbeth-Dunn in calculating the loss of income, failed to take into account, the annual five (5) weeks vacation period when no work would have been done even if the fire had not occurred. It was also argued that the income for the year ought to be determined using a fifty (52) weeks financial year and not limited to forty seven (47) weeks as was done. Counsel also made the point that despite the closure of the claimant's offices during the vacation period, fixed expenses such as salaries would have been incurred.

[129] In relation to the loss of goodwill claim, it was contended that the claimant led no evidence towards the proof thereof.

[130] It was submitted that any award for damages should not exceed:-

(a) the sum of United States one hundred and twenty five thousand six hundred and fifty seven dollars and sixty cents. (US $125,657.60) and the sum of two hundred and seventy eight thousand eight hundred and seventy four dollars and ninety nine cents ($278,874.99) for the cost of repairs and of replacing the machines as well as the cost of clean-up;

(b) the sum of Jamaican four million, four hundred and two thousand nine hundred and nineteen dollars and eighty six cents (J$4,402,919.86) for loss of profits.

Discussion

What was the source of the fire?

[131] I have found it necessary in this case, to make a distinction between the source of the fire and the cause of the fire. In informal spheres, the phrase *"cause of the*

fire" is often used broadly but in a case such as this, it is my view that the distinction is important and ought to be made. According to the eighth edition of the ***Concise Oxford English Dictionary*** the word '*source*' denotes *"a place, person or thing from which something originates"* and the word "*cause"* is defined as *"that which produces an effect, or gives rise to an action, phenomenon or condition".* It is therefore clear that the question as to where the fire originated must be addressed separately from that pertaining to its cause.

[132] The claimant has relied on Mr. Basil Nelson and Mr. Lockland Dunkley as expert witnesses while the defendant relied on Mr. Mark Hook. Mr. Nelson is an electrical engineer. Mr. Dunkley is a Biomedical Engineer as well as an Electrical Engineer and Mr. Hook is a trained fire investigator. The qualifications of these gentlemen are not in dispute.

[133] The claimant's case is that the fire originated in the unit. Mr. Nelson was quite firm in his conviction that the unit was in fact, the source of the fire. He formed this opinion quite early and maintained that position. Mr. Nelson based his opinion on his observations that:-

(i) The fan coil unit was completely destroyed by the fire when compared to other items in the room;

(ii) The slag from the melted PVC enclosure had fallen on the camera that was situated immediately below the unit.

[134] Mr. Dunkley who was responsible for servicing the camera said that there was no short circuit within the equipment and that it appeared that *"any burning would have been external and spread to the equipment"* and that it was *"apparent that the fire did not start there".*

[135] The defendant through its expert, Mr. Mark Hook has stated that it could not be conclusively determined whether the fire started within or adjacent to the base cabinet of the camera and progressed upwards and engulfed the unit or

originated in the unit and spread to the camera. Mr. Hook however, indicated that he was handicapped in his assessment based on the fact that the tarpaulin which had been used to cover the camera was not preserved after the fire and thus was not available for inspection. He said that the tarpaulin" *could have contained burn damage patterns that might have provided valuable information regarding the origin of the fire and the direction from which the fire progressed"*. The witness also said that *"the failure to maintain that tarpaulin as evidence prohibited the evaluation of any burn damage patterns that may have been present on the tarpaulin".*

[136] The defendant has alleged that a possible source of the fire was the camera and Mr. Hook's evidence contemplates such a possibility. However, it is my opinion that the evidence of the claimant's witnesses in respect of this issue is more compelling. Mr. Dunkley's evidence in particular withstood the rigors of cross examination. I accept his evidence that he was familiar with the manual for the camera and that he serviced it three (3) to four (4) times per year and had done so in 2003 sometime before the fire.

[137] Mr. Dunkley's evidence excludes the camera as being the source of the fire.

[138] He stated that in May 2003, after the fire, he examined the camera as well as the claimant's other machines. He found that there was no blown fuse or breaker which would indicate that there had been any short circuit within the camera. Mr. Dunkley also stated that if there had been any disturbance of the power supply to the camera it would first affect the fuses and then the breaker. He also observed that the power cord for the camera which was situated directly below the unit had been burnt. Mr. Dunkley's evidence is that the said cord was of a larger capacity than the main breaker on the equipment and as such any short circuit would have tripped the breaker instead of destroying the power cord.

[139] He also noted that there was no distortion of the panels or covers which would have been indicative of an internal fire. He also stated that the camera was

equipped with a hospital plug that would prevent the cord from short circuiting or igniting in the event that it came in contact with water.

[140] Mr. Dunkley also gave evidence that although the power supply to the crystals in the camera was required to be kept on in order to keep them stable, this required a very low level of energy. In addition, he observed that that section of the camera was *"intact and untouched"* by the fire. The witness also indicated that he saw no evidence to suggest that the camera overheated due to the limited damage to that machine. He also opined that covering the camera with the tarpaulin could not affect its cooling.

[141] Mr. Hook, the defendant's witness did not exclude the possibility that the fire originated within the evaporator assembly of the unit and 'dripped' or 'fell' onto the camera's base/control cabinet. Mr. Nelson also gave evidence regarding the melting of the PVC enclosure of the unit and the slag falling onto the tarpaulin that was used to cover it when it was not in use. The report of the Jamaica Fire Brigade also speaks to flames emanating from the unit.

[142] Mr. Hook's evidence though quite comprehensive, states that the source of the fire could not be determined. His evidence therefore, does not take the matter much further. It does however, put the court on enquiry as to whether the evidence of the other expert can be relied on in respect of this issue.

[143] Having assessed the evidence and observed the witnesses for the claimant I am of the view that they are honest, competent and reliable. I accept their evidence in relation to this issue.

[144] In light of the above, I find on a balance of probabilities that the source of the fire was the unit.

What was the cause of the fire?

[145] Where the cause of the fire is concerned, the evidence takes on a more dynamic shape. Mr. Nelson who from all indications was the first of the experts to visit the

scene, made his first assessment of the cause of the fire in a letter written to the claimant dated October 28, 2003. Prior to that he had opined that it had started in the unit. The cause of the fire was not addressed in that assessment. In the October 2003 report, Mr. Nelson again stated that the fire started in the fan coil unit. He also theorized that the fire was caused by the malfunctioning of the electrical control system of the unit.

[146] In his report of the 18th June 2004 he endorsed his earlier opinion that the fire was caused by the malfunctioning of the electrical controls. He said: *"We are now firm in our conviction that the fire which started in the fan coil unit of the air conditioning system originated in the electrical or electronic controls."*

[147] Mr. Nelson's report of the 4th September 2009 maintained that the fire started in the fan coil of the unit. He also pointed to a possible malfunction of the unit's circuit board which would have been evidenced by the "freezing" of the unit and the dripping of water. He theorized that when the circuit board was replaced it may have come in contact with water. This he said would have led to a short circuit which caused sparks and ultimately fire.

[148] His second theory was that water came in contact with the electrical supply to the fan motor or the circuit board which resulted in sparks and fire. He said:-

> *"I have observed that the electrical isolator for this air conditioning system is located outdoors. This means that the electrical circuit for the fan motor/circuit board must be routed through the back of the fan coil unit close to the condensate drain system.* ***Failure by the installer or maintenance personnel to ensure adequate insulation at the points of connection would cause condensate water to come in contact with the electricity supply causing a short circuit or earth fault resulting in sparks****."*
>
> [My emphasis]

[149] In the report dated October 30, 2009, Mr. Nelson expressed a somewhat different opinion than those previously advanced. In that report he stated that the

method of installation was less than desirable and had caused chafing of the wires which led to an earth fault.

[150] He however maintained that the fire was caused by an electrical fault. He also stated that having determined that the cause of the fire was electrical he embarked on his investigation using a process of elimination. The defendant's expert Mr. Hook also indicated that that is the methodology which is employed in the investigation of fires. He said: *"To properly and accurately determine the cause of a fire, all potential causes must be considered. The fire cause determination requires the development, testing and confirmation or elimination of all potential causes of a fire in order to conclusively determine that cause".*

[151] In cross examination he said:-

> *"When we are looking at determining the cause of the fire we must consider every item that could have potentially caused the fire. That includes all of the sub components in the area of the origin of the fire."*

[152] Where the opinions of the other persons who gave reports are concerned, Mr. Hook stated that they had a better opportunity to examine the scene than he did. He said:-

> *"Potentially, all that handicapped me would have been available to them."*

[153] Having heard the evidence of both Mr. Nelson and Mr. Hook, it is clear that the investigation of fires is not an exact science. Mr. Nelson was subjected to rigorous cross examination and maintained his finding that the fire was electrical in nature and originated in the evaporator of the unit. He however changed his opinion as to the cause of the electrical fault. The question which arises is whether that change of opinion makes his evidence unreliable?

[154] Mr. Hook on the other hand maintained that due to the improper preservation of the scene, he was unable to make any determination as to the origin and cause

of the fire. He also disagreed with Mr. Nelson's opinion that the vibration of the compressor caused the chafing of the wires from the main power supply to the isolator. He stated that there are several components or connections in the system that would either reduce or eliminate the vibrations from the compressor. Like Mr. Nelson he said that any vibrations would be minimal. Mr. Hook also expressed the view that *"until the precise cause of the fire is identified the responsibility, if any, of CAC personnel cannot be determined".*

[155] In this matter both parties have presented expert evidence. Their evidence must therefore be carefully considered in order to determine whether the claimant has proved its case.

[156] I do not take issue with the fact that Mr. Nelson changed his opinion. Counsel for the defendant emphasised that Mr. Nelson moved from theory to theory and in fact it is admitted in the claimant's submissions that he did advance a number of theories. It must however be borne in mind, that an expert is entitled to change his opinion. In fact, the ***CPR*** envisages such a scenario because it states that an expert should inform the Court if his opinion changes. I am however, also mindful of the fact that, a change of opinion must be treated with care, as in some instances, it raises questions as to the competence of the expert or the degree of care exercised by him when carrying out his functions.

[157] In ***Dawson v. Murex*** [1942] 1 All ER 483 the Court of Appeal was concerned with a case in which the court at first instance had relied on the evidence of experts who had advanced various theories as to how the accident occurred. It was held on appeal, that in an accident case, the claimant is not required to prove precisely how the accident happened. It was also held that *"where the plaintiff by competent evidence shows that his explanation of what happened is the more probable one, the judge is entitled to accept his case and find in his favour."*

[158] In the instant case, the claimant's expert Mr. Nelson concluded that the fire was caused by an earth fault. He explained that when the unit was installed, the hole in its evaporator mounting plate was widened to accommodate the various electrical connections and the water drain pipe. This he said created sharp or jagged edges in the plate which caused the wires to chafe over time. Mr. Hook, who gave evidence on behalf of the defendant, indicated that he did not observe any jagged edges and the photographs of the plate that were presented to the court, did not take the matter any further. When pressed in cross examination, Mr. Nelson said that the jagged edge that he was referring to was the metal plate. He explained that too many items had been passed through the opening and that as a result, the installer had to create a bigger space.

[159] I understand Mr. Nelson to be simply saying that the edges of the larger hole that was created to accommodate those items or connections were not smooth.

[160] Mr. Nelson also said that a section of the supply cable insulation was burnt and the copper conductors were broken in such a manner that he formed the opinion that it was caused by an electrical fault. He said that the build-up of copper oxide or green patina was indicative that the burning had been taking place for some time.

[161] He also expressed the view that the jagged edges and the failure of the installer to provide the necessary "cable slack" combined with the vibrations of the compressor whenever it cycled the stage was set for the gradual cutting into the insulation of the electrical supply cable. He stated that the defendant's service personnel ought to have checked the voltage reading, having been faced with a burnt fan motor and circuit board. The defendant's Call Out logs are regrettably of little or no assistance as the information contained in those logs is quite sparse.

[162] Mr. Nelson stated that deterioration was on one live line as an intermittent earth fault which caused voltage swings below 220 volts and 110 volts which he

described as standard voltages. He said that lower voltages cause higher currents which result in malfunctioning, overheating or burning of items such as the compressor motor, fan motor and control circuit board. He opined that the experiences of the freezing evaporator, burnt compressor and fan motor and defective circuit board were all due to the "initial intermittent nature of the fault". He further stated that with the passage of time the intermittent fault caused further weakness in the electrical supply cable which led to an explosion which initiated the fire.

[163] Mr. Hook disagreed with Mr. Nelson. He said that the appearance and configuration of the damaged copper conductors prohibited a conclusive determination as to whether they were damaged before or during the fire. He also stated that the presence of copper oxide did not indicate that burning was taking place over a long period of time. He said that the copper oxide or green coloured residue results when bare copper is exposed to moist oxygen or air and can be accelerated by exposure to an acidic environment. Such an environment may result when PVC burns or melts. In conclusion he stated:-

> *"Fire investigation guides and publications note that the colour appearance* ***alone*** *of copper conductors after a fire cannot produce meaningful insight into any role that the copper conductors may have had in the origin and cause of a fire".*
>
> [My emphasis]

[164] Mr. Hook also said that the mere presence of electrical arc damage to the electrical supply conductors to the unit was insufficient to identify an electrical failure or malfunction as the conclusive cause of the fire.

[165] He also expressed the view that due to the time that had elapsed between the failures of various components a technician would not necessarily form the view that there may be a problem with the electrical supply conductors and/or their insulation. He also went on to state that he could not comprehend how Mr.

Nelson arrived at his opinion when he had not seen many important pieces of the unit as well as other items.

[166] Mr. Nelson countered by pointing out that Mr. Hook did not visit the scene until five years after the fire and would therefore not have had the same opportunity to make an informed assessment as to its source and cause. He also made the point that Megger tests of electrical installations are used to determine whether a circuit is defective or ready to be connected to the power supply. He stated that *"Mr. Hook's opinion does not reflect the standards of enquiry required of electrical engineers and contractors"* and that the Megger test is used *"every day to test electrical installations".* He said that *"the Megger is an indispensable equipment used by all persons carrying out works on electrical circuits".*

[167] Mr. Nelson also referred to various items that had informed his opinion which he said Mr. Hook had not seen.

[168] Having reviewed the evidence of Mr. Hook, it is clear that he was severely handicapped by the lapse of time between the fire and his visit to the scene. He constantly asserted that the scene had not been properly preserved and as such hindered his ability to make a proper assessment. In fact, his disagreement with some of Mr. Nelson's conclusions, seem to be based on his assumption that Mr. Nelson had not seen some of the components which were vital to the investigation. In those circumstances, I do not find Mr. Hook's evidence to be reliable. His assertions and opinions to my mind would have had more weight had he visited the scene contemporaneously with the fire. Five years is quite a long time. By way of comment, the court is mindful that the claimant was running a business and could not reasonably have been expected to keep its premises in the same state as it was after the fire for five years. I also bear in mind the following statement by Lord Greene, M.R. in ***Dawson v. Murex Limited*** (supra at 487):-

> *"In dealing with a case of this kind where, as Walker said (indeed, it is not disputed) the possible combinations are legion, it is not*

> *possible for anyone to assert with confidence that some particular combination existed which led to the accident, nor is the burden of proof upon the plaintiff in a case of this kind so severe as to require him to establish his case with that degree of exactitude. He points to circumstances, as explained by competent evidence, which point to a probability that his explanation is the more reasonable one".*

[169] In deciding what weight to accord to the expert evidence in this case I must consider the methodology which each one has employed. This was the approach of the court in ***Korpach v. Klassen*** 2000 CanLII 19612 (SK PC). In that case which concerned crop damage sustained as a result of cattle getting into a canola field, the plaintiff's expert measured off twenty eight (28) separate plots throughout the field. In each plot, he physically counted all broken stems, pods on the ground, number of seeds in each pod, number of pods, and other visible damage. He provided a sketch showing the seven plot locations he finally determined as representative of the loss. Additionally, he did plant counts in at least four undamaged plots and a visual inspection by walking throughout the field. The court found his approach to be meticulous and his evidence was accorded great weight. On the other hand, the defendant's expert looked at the field and proceeded a short distance into it. He did not do any plant counts. He took numerous photographs of the field from a position near the fence. His visual observations, which were essentially a "global" view without a "hands and knees" look at actual damage throughout the field, were accorded significantly less weight than the plot-by-plot count and the roaming of the field that the plaintiff's expert undertook.

[170] It is clear from the above, that where the court finds that one expert's methodology is sounder, the opinion of that expert may be accorded more weight. In this case, Mr. Nelson in my view having had a "hands and knees" look at the scene had a better opportunity to make an assessment and give a more informed opinion. Mr. Hook, by his own admission was somewhat handicapped in that regard.

[171] In the circumstances I prefer the evidence of Mr. Nelson and accept his evidence that the fire occurred as a result of an earth fault.

Whether the fire occurred due to the negligence of the defendant

[172] In order to establish negligence the claimant must prove on a balance of probabilities that:-

(1) The defendant owed a duty of care to the claimant;

(2) There was a breach of that duty, that he failed to measure up to the standard set by law;

(3) That the defendant's careless conduct caused damage; and

(4) That the particular kind of damage suffered claimant is not so unforeseeable as to be too remote.

[173] The test of whether a duty of care exists in a particular case was formulated by Lord Bridge of Harwich in the leading case of ***Caparo Industries plc v. Dickman*** [1990] 1 All ER 568. The learned Judge stated:-

> *"What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other."* [1]

In the instant case, the defendant was engaged to provide a service to the claimant. In my opinion therefore it can hardly be denied that this created a situation which gave rise to a duty of care. It was the duty of the defendant,

---

[1]Pages 573 - 574

through its servicemen, to inspect and service the air conditioning unit every three months and fix particular issues that were reported to it between scheduled servicing.

[174] In order to ascertain whether there was a breach of that duty, it must be determined if the defendant's conduct failed to measure up to the standard set by law. The leading case in this area is ***Bolam v. Friern Hospital Management Committee*** [1957] 2 All ER 118. In that case which dealt with medical negligence, McNair J, said:-

> *"Before I turn to that, I must explain what in law we mean by "negligence". In the ordinary case which does not involve any special skill, negligence in law means this: Some failure to do some act which a reasonable man in the circumstances would do, or doing some act which a reasonable man in the circumstances would not do; and if that failure or doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case it is generally said, that you judge that by the action of the man in the street. He is the ordinary man. In one case it has been said that you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man. But where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."*[2]

[175] It seems to me, that that the standard of care and skill to be demanded of the defendant's agents and/or servants must be the degree of care and skill to be

---

[2]Pages 121 - 122

expected of a reasonably competent air conditioning unit serviceman/ technician doing the work in question.

[176] In this matter the following facts are not in dispute:-

(a) The fire occurred on a Sunday;

(b) The unit was purchased for around the clock use;

(c) The claimant's other machines were either off or in their stand- by mode;

(d) The unit was severely damaged by fire; and

(e) Only the end of the electrical cable of the camera was severely burnt.

The court must consider the evidence in its totality and decide whether on that evidence there ought to be a finding of negligence. Was the defendant careless?

The Service History of the unit

[177] Evidence was given that the unit was to be serviced quarterly and that its last scheduled servicing was in January 2003.

[178] Customer Call Sheet no. 03045 indicates that on February 14, 2002 the indoor unit was checked following a customer complaint and it was discovered that the circuit board was defective. The circuit board was removed and repaired. It was noted that the unit was left working.

[179] Subsequently, Customer Call Sheet no. 04024 indicates that on July 31, 2002 another complaint was made regarding the indoor unit. The unit was again checked and it was discovered that the circuit board was defective. The circuit board was replaced with a new one and the unit was left working.

[180] On February 13, 2003 customer call sheet no.06776 indicates that the outdoor unit was checked and it was discovered that the compressor was burnt. It was

noted by the technician that the compressor was removed and a new one was installed.

[181] These are the only sheets which specifically mention the unit.

[182] The defendant in its bid to negative the assertion that it has been negligent asserted that the unit was last serviced in January 2003. Customer Call Sheet no.06693 was relied on in support of that statement. However it states the 'make' of the units serviced as 'Carrier' and 'General' and refers to a particular model number which does not correspond with the unit's model number.

[183] The records kept by the defendant clearly have gaps. If the unit was serviced quarterly then there should be three records of servicing for every contractual year.

[184] The state of the defendant's records makes it virtually impossible for the court to accept its contention that the unit was being regularly serviced in 2002. Many of the customer call sheets submitted by the defendant for that year, from all indications, do not relate to the unit.

The dispatch logs

[185] A highly contentious issue in this case was whether the claimant frequently experienced incidences of the air conditioning unit freezing up and dripping water. Unfortunately, the dispatch logs were not, in my opinion, created with the intent that one should be able to retrieve detailed information from them.

[186] The logs reveal that on June 25, 2002 a technician was dispatched to the claimant's premises because of complaints about a buzzing sound coming from a window unit as well as water leaks.

[187] On December 20, 2002 it is stated that a technician was dispatched to the claimant's premises because a ten thousand (10,000) Btu air conditioning unit

had tripped on the new building. On December 24, 2002 the log revealed another dispatch to the claimant's premises because of a pipe that was still leaking.

[188] On March 10, 2003 the log indicated that the front office air conditioning unit was not working and on March 11, 2003 it was stated that the air conditioning unit was leaking.

[189] How I ought to treat with this evidence has not been an easy determination. The claimant's evidence is that the unit regularly froze over and dripped water. The defendant's dispatch logs reveal that complaints were in fact made about an air conditioning unit that was leaking. There is also evidence that the defendant serviced approximately sixteen air conditioning units for the claimant.

[190] Mr. Ellis' evidence seems to indicate that he is only aware of the central air conditioning and the unit. He said:

> *"In 2003 the air conditioning unit in question was the only split unit in the building. There was another building to the back but there was no air conditioning unit around there. There was a big central unit. The two (2) buildings had central units".*

The documentary evidence presented by the defendant does however, refer to other makes, models and serial numbers.

[191] Mr. Ellis when cross examined, stated that between February, when the unit was serviced and date of the fire, he could not agree that no complaint was made about the unit freezing up. However he was unable to recall precisely when in 2003 he called the defendant to make the complaint. Mr. Ellis also stated that he had more than one discussion with the defendant's servicemen about the unit freezing up and that it was he who would call the servicemen. When counsel suggested to the witness that he never made any calls to any technicians of CAC 2000 Limited about the unit freezing up, he responded by saying "can't say no and can't say yes".

[192] During the trial it was suggested to Dr. Clarke that no one, on his behalf, made any complaints to the defendant or its representatives about the unit freezing up before February and May 2003. Dr. Clarke in response said “I can’t confirm”.

[193] Dr. Clarke did however give evidence that the claimant had to take the precaution of purchasing a tarpaulin to cover the top of the camera at nights and on weekends to avoid the frequent and unpredictable occurrence of water dripping or pouring out of the unit.

[194] It therefore boils down to whose evidence is to be preferred. The claimant’s evidence is that complaints were made to the defendant that the unit was freezing up and dripping water. That has been denied but given the paucity of the defendant’s records there is no other evidence which refutes that assertion.

[195] The references to ‘window unit’ and ‘front office’ air conditioning unit in the logs are not, in my opinion, very helpful. I have been able to glean that there were service contracts in respect of the Old Building and the New Building. The service contract number for the old building was SIC037 and the service contract number for the new building was LSIC11. The service contract number for the unit bears a different number (SIC21094).

[196] Mr. Dunkley gave evidence that the original building had to be remodelled to accept the camera and it is undisputed that the unit was located in the room which housed the camera. Mr. Ellis said that there was another building to the back but there was no air conditioning unit there. Some of the invoices submitted suggest that the Front Building is the Old Building. However, in light of Mr. Ellis’ evidence, I am of the view that the unit was located in the Old Building which is located at the front of the claimant’s premises.

[197] Dispatch Log dated March 10, 2003 which indicates that an air conditioning unit in the front office was not working does not provide any further information as to the nature of the problem. There is also no indication of the serial number of the unit in question.

[198] The Dispatch Log for the following day does however, refer to a complaint that a particular air conditioning unit was leaking but does not provide the serial number of that unit or its location. In both logs, Mr. Ellis is stated to be the contact person.

[199] The evidence of both Dr. Clarke and Mr. Ellis indicate that reports were made about the unit dripping water. However, Mr. Ellis said that he could not recollect when in 2003 he called the defendant to say that the unit was freezing up. So there is no indication as to the time when the problem would have been reported to the defendant by the claimant.

[200] Interestingly, Dr. Clarke's witness statement indicated that the unit was purchased in or about January 2002. However, during cross examination Dr. Clarke said that the unit was purchased in about 1998 when the defendant was CAAC and it was serviced on a number of occasions throughout its lifetime. Dr. Clarke said that the claimant experienced problems with the unit shortly after it was purchased.

[201] The critical question is whether the defendant was made aware of the problem and the frequency with which it occurred. Whilst the Customer Call Sheets do not reveal that any complaint was made that the unit was leaking water, at least one of the Dispatch Logs clearly indicates that the defendant was aware of the problem with water leakage from an air conditioning unit at the claimant's premises. One would have expected that there would have been some co-relation between the Dispatch Logs and the Customer Call Sheets.

[202] The deficient state of the defendant's records is disappointing. The claimant's evidence is that calls were made to the defendant pertaining to the unit leaking water. Where the frequency of those calls is concerned, the claimant has given evidence that a number of calls were made to the defendant. The defendant has denied this.

[203] I have found the claimant's witnesses to be more reliable and I accept the claimant's evidence that the unit leaked water. I also accept its evidence that the

defendant was made aware of the problem and that it was not resolved. The claimant's evidence that the unit had to be covered with tarpaulin when not in use was not challenged by the defendant. In fact, it was relied upon to suggest that it was the cause of the fire. The evidence also revealed the presence of watermarks on the wall in the Nuclear Room.

[204] Having accepted its evidence that the complaints were made, this must be considered in conjunction with the undisputed evidence that the circuit board and compressor had to be replaced. There is also no evidence that the unit was regularly serviced in 2002.

[205] In his report dated October 30, 2009 Mr. Nelson stated that it was his opinion that the service personnel should have made checks regarding the voltage reading due to the fact that on different occasions the circuit board had been burnt and had to be repaired or replaced. He asserted that those complaints should have alerted the defendant that there may be a problem with the voltage.

[206] In Mr. Hook's witness statement dated March 28, 2015 and filed on April 1, 2015 he stated as follows:

> *"A repeated failure of the same component over a short time period (hours, days, or possibly even a few weeks) after repair would be more indicative of an electrical conductor failure, defect, or deficiency that would warrant specific inspection or testing of the entire Fujitsu air conditioning electrical supply system components and connections to attempt to identify the cause of the repeated failures"*

[207] Mr. Hook also gave evidence that the circuit board is not typically serviced or inspected and its typical life was ten (10) years.

[208] However, the indoor unit had circuit board problems twice within what I consider to be a short time period (although Mr. Hook's evidence doesn't seem to regard months as a short time period). In spite of this, there is no evidence that the

components of the electrical supply system for the unit were checked by the defendant.

[209] Mr. Hook also stated that the problem of water leakage could be as a result of the air conditioning unit being used for long periods under high humidity conditions and as Mr. Hook stated 'a technician cannot fix high humidity'. I have no reason to doubt his opinion. However the fact still remains that the dispatch logs indicate that complaints were made about water leakage.

A causal connection between the defendant's careless conduct and the damage

[210] In the 19th edition of ***Clerk & Lindsell on Torts*** at page 44 it was stated as follows:-

> *"In the majority of torts the claimant must show that the defendant's wrongdoing caused him actual damage…the claimant must establish that 1. the defendant's conduct did in fact result in the damage of which he complains and 2. the damage is not in law too remote a consequence of the defendant's wrongdoing."*

It was also stated that:

> *"Factual causation is concerned with establishing the physical connection between the defendant's wrong and the claimant's damage. What evidence exists to link the defendant's wrongdoing to the damage, and is that sufficient to persuade the court that causation is established?"*

[211] When the claimant's evidence that the unit was leaking water, that the defendant was aware of the problem and that it was not resolved is considered in conjunction with the lack of any indication as to whether any attempt was made to address it, it is my opinion that the defendant breached its duty of care to the claimant.

[212] I have accepted Mr. Nelson's evidence as to the source and cause of the fire and his opinion that in light of the problems being experienced the voltage readings

ought to have been checked, In ***Haseldine v. C.A. Daw and Son Limited and Others*** Goddard LJ said, obiter:-

> *"If the repairers do their work carelessly, or fail to report a danger of which they as experts ought to be aware, I cannot see why the principle of Donoghue v Stevenson should not apply to them"*

[213] In the circumstances, I am of the opinion, that the claimant has proved on the balance of probabilities that the defendant's negligence was a cause of the damage suffered.

[214] The doctrine of *res ipsa loquitur* was also raised in this matter. In the 19th edition of ***Clerk and Lindsell on Torts***, at page 497 it was stated that the doctrine is only applicable where:-

(i) the occurrence is such that it would not have happened without negligence; and

(ii) the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control; and

(iii) there must be no evidence as to why or how the occurrence took place.

[215] However, having accepted the claimant's evidence in respect of the cause of the fire there is no basis on which to invoke the doctrine.

Did the defendant breach its service contract with the claimant?

[216] Under the Service and Inspection Contract the defendant was required to perform the following obligations in respect of the unit:

(i) Inspect the control panels and unit casing, making recommendations if any;

(ii) Check electrical components (contractors), relays, motorized value etc and record current ratings of motor and compressors;

(iii) Check suctions and discharge pressure and supply and return air temperature at the evaporator coils;

(iv) Adjust belts, temperatures and timer setting as necessary;

(v) Grease bearings and check for signs of wear and tear;

(vi) Wash filter, coils and clean cabinets; and

(vii) Test run all the equipment

[217] In paragraph eleven (11) of his witness statement Mr. Roberts stated that all of the aforementioned obligations were performed whenever general servicing was done. However, Mr. Hook gave evidence that all services listed in the contract would not be necessary for every piece of Heating, Ventilation and Air Conditioning equipment located at the facility. Mr. Hook's evidence is more credible. Unfortunately, Mr. John Nembhard, the technician at the time was not able to come to court to testify about the work that was actually done on the air conditioning unit.

[218] Counsel for the claimant submitted that the defendant breached the contract by its failure to inspect the control panels and unit casing of the unit and make recommendations as to how to address the problems being experienced with the unit.

[219] It was also contended that the defendant breached its contract when it failed to detect the defects and warn the claimant.

[220] Clearly this submission was advanced based on Mr. Nelson's finding that there was chafing of the wires leading to the unit which ultimately caused an earth fault due to the fluctuation in voltage. This fluctuation in voltage he said could have been detected by a Megger Test.

[221] I accept his opinion that when the problem with the water leakage and the burnt circuit board are viewed as a whole that should have alerted the defendant that there may have been a problem with the electrical system. There is no evidence that the defendant checked the electrical components or that it made a record of the current ratings of the motors and compressors. It is therefore not surprising, that no recommendations were made in respect of the unit.

[222] In addition, there is no evidence that the air conditioning unit was regularly serviced in 2002. I therefore find that the defendant has breached the service contract.

[223] However to recover damages for losses the claimant must again bear the burden of causation and satisfy the Court that its loss was one which resulted from a breach of contract by the defendant.

[224] Mr. Nelson's evidence is that the problems being experienced with the unit ought to have alerted the defendant to the possibility that there was a problem with the voltage. In effect he is saying that the earth fault could have been detected and the fire prevented.

[225] Having accepted Mr. Nelson's evidence that the chafing of the wires to the unit was the root cause of the fire, I find that the defendant's breach caused the claimant's loss.

Damages

[226] The claimant has claimed damages as follows:-

Item	**Purchase price ($US)**	**Customs charges ($J)**
Gamma Camera	208,000.00	200,000.00
Mammographic System	64,315.21	82,586.82
Phillips iU22 Ultrasound Imaging System	233,500.00	319,617.40

Phillips HDi 5000	67,750.00	123,067.16
Comtronic Computer	14,600.00	200,000.00
Repair & clean-up costs		89,900.00
	586,165.21	**1,015,171.38**

[227] Loss of earnings has also been claimed in the sum of Jamaican seven million seventy seven thousand eight hundred and forty seven dollars (J$7,077,847.00). The claimant has also included a claim for damages for loss of goodwill and the adverse effects to the claimant's reputation. Interest has been claimed at a commercial rate of 9.25% on the sum of US$586,165.21 from May 11, 2003 to March 30, 2007 (US$ 211, 147.20) and thereafter US $ 148.80 per diem to the date of judgment. Interest at a commercial rate of 14.13% on the sum of J$1,015,171.38 from May 11, 2013 to March 30, 2007 amounting to J$ 557,667.00 and J$393.00 per diem thereafter to the date of judgment. The defendant has not raised any objection in relation to the interest that has been claimed.

[228] Where the replacement cost of the machines is concerned, counsel for the defendant has not challenged the sums that the claimant paid for the machines or the customs duties. The cross examination of the claimant's witnesses was centred around the issues of whether there was a second market from which machines of similar vintage and specifications could have been sourced and if not, whether the machines that were acquired resulted in the claimant being placed in a better position than it had been in before the fire.

[229] There has also been no challenge to the sum claimed in respect of the cost of repairs.

[230] Dr. Clarke gave evidence that the camera, a mammography machine and two ultrasound machines were damaged. He also said that an attempt was made to repair all except the camera which was irreparably damaged. He also stated that although the replacement machines were all equipped with newer technology, in

some instances, they had a shorter lifespan and did not have as many features as the older models.

[231] Dr. Clarke gave evidence to the effect that the claimant had no choice but to purchase the replacement machines with the new features as those were the only ones that were available at the time.

[232] It was pointed out that the software that the new Nuclear Gamma Camera uses is more current and the machine has different peripherals. One of these new peripherals is an open gantry which gives more automation in the use of the machine.

[233] The Phillips iU22 Ultrasound machine was said to possess a more advanced imaging system which produces clearer images. This new machine is equipped with a high end seventeen (17) inch monitor and increased storage capacity. It was also stated to be more software driven and possesses a one touch optimisation feature.

[234] The new mammography machine has an extended imaging system which was not present in the old one. The old machine used cassette technology to store the images which had to be developed in a dark room while the new machine prints directly to a printer.

[235] In general terms therefore, it can be said that the replacement machines had newer technology and additional features when compared to the older damaged machines, although they performed the same functions.

[236] It is well established, that when damages are being assessed against a tortfeasor or someone who has broken a contract, those damages shall be such as will, so far as money can, put the claimant in the same position as he would have been had the tort or breach of contract not occurred. Such damages must however, be reasonable. The principle was stated again in ***Southampton Container Terminals Ltd. V. Schiffahrisgesellsch "Hansa Australia" MGH & Co (the***

MV "Maersk Colombo") [2001] EWCA Civ 717. In that case Clarke LJ adopted the following passage from the judgment of May J in ***CR Taylor (Wholesale Ltd) v. Hepworths Ltd.*** [1977] 2 All ER 784:-

> *"…whenever damages are to be awarded against a tortfeasor or against a man who has broken a contract, then those damages shall be such as will, so far as money can, put the plaintiff in the same position as he would have been had the tort or breach of contract not occurred. But secondly, the damages to be awarded are to be reasonable, reasonable that is as between the plaintiff on the one hand and the defendant on the other."*[3]

[237] The facts in ***the MV "Maersk Colombo"*** are as follows:-

In February 1995 the defendant's container vessel Maersk Colombo entered the port of Southampton to berth alongside the claimant's container terminal. As she was manoeuvring alongside the berth with the assistance of tugs, she struck one of the claimant's cranes, causing it to fall over and collapse. Before the trial the defendant admitted that the Maersk Colombo had been handled negligently and admitted liability for the damage to the crane, subject to an allegation of contributory negligence.

[238] The principal issue at trial was the correct measure of damages to be awarded to the claimant for the damage to the crane. The claimant submitted that it was entitled to recover damages based on the costs of reinstatement of the crane of £2.6 million, including the costs of purchasing and modifying a second hand crane in the United States of America and transporting it to Southampton. The defendant asserted that that the correct measure of damages was the considerably lower resale value of the crane because the crane had not in fact been replaced and the claimant had ordered larger cranes for the berth prior to the collision.

---

[3]Paragraph 40

[239] The trial judge found that the claimant had continued a satisfactory operation in the period between the collision and the arrival of the new cranes and that although the loss of the crane had caused the claimant inconvenience, there had been no loss in capacity or flexibility that was measurable in financial terms. The trial judge held that in those circumstances the cost of reinstatement by reference to the transportation and modification costs would have been unreasonable in relation to the benefit obtained and held that the correct measure of damages was the resale value.

[240] The claimant appealed, submitting, inter alia, that it was entitled to the value of the chattel as a going concern at the time and place of the loss without any requirement of reasonableness.

[241] It was held that the appeal should be dismissed. The Court of Appeal ruled that where the court was considering whether the reinstatement value was the correct measure of damages for the tortious destruction of a chattel, it had to be both reasonable to reinstate and the amount to be awarded as damages had to be objectively fair between the claimant and the defendant. On the facts of the case, the costs of reinstatement by reference to the transportation and modification costs had not been and would not be incurred. It would have been unreasonable to incur those costs when they could not fairly be described as caused by the defendant's tort in circumstances where the absence of the crane had no financial effect on the claimant's business. Accordingly, if the claimant were to receive the reinstatement value of the crane, it would have received a substantial gratuitous benefit for which the damages had not been intended to provide.

[242] The court also accepted the following principles:-

(i) The question of damages is largely one of fact, subject only to the most general guiding principle. The relevant principle in the law of tort is restitution in integrum

(ii) Common to the law of tort and contract are the principles that a loss is only recoverable if (i) it is caused by the breach of duty or contract complained of; and (ii) it could not have been mitigated

(iii) Damages are only recoverable if they are reasonable. If damages are unreasonable then they were not caused by the breach or should have been mitigated, and are irrecoverable

(iv) In particular, where replacement costs exceed market value, they will only be recoverable if shown to be reasonable

(v) Whether or not a claimant has an intention to replace the item is relevant to the question of reasonableness

(vi) Whether the dispute arises in the commercial context, or whether the dispute involves questions of personal preference is relevant to the question of reasonableness.

(vii) The essential question is as follows: what loss did the appellants really suffer? This is a question of fact and degree. If it is unreasonable in a particular case to award the cost of reinstatement it must be because the loss sustained does not extend to the need to re-instate.

[243] Clarke LJ also approved the following propositions regarding the destruction of a chattel:

(i) On proof of the tortious destruction of a chattel, the owner is prima facie entitled to damages reflecting the market value of the chattel “as is”

(ii) He is so entitled whether or not he intends to obtain a replacement

(iii) The market or resale value is to be assessed on the evidence, there being no standard measure applicable to all circumstances

(iv) If the claimant intends to replace the chattel, and if the market or resale value as assessed is inadequate for that purpose, then the higher replacement value may, in the event, be the appropriate measure of damages

(v) When and if replacement value is claimed, the claimant can only succeed to the extent that the claim is reasonable; that is, that it reflects reasonable mitigation of the loss.

(vi) The claim will ordinarily be reasonable if it is reasonable to replace the chattel and the replacement cost is reasonable.

[244] Counsel for the defence argued that where as in this a case the claimant replaced damaged machines with new ones that are more advanced, it would be in a better position that it was prior to the fire. However, in the case of ***Peglar Ltd. v. Wang*** 2000 WL 191142 which was relied on by the claimant, Judge Bowsher QC stated the principle to be as follows:-

> *The mere fact that a party purchasing a substitute product acquires something with a longer life span, or which is more modern, or has additional features than the original would have had does not require an allowance for betterment, still less recovery limited to the financing cost of acquiring the replacement early: Harbutt's Plasticine v Wayne Tank; Bacon v Cooper (Metals) Ltd [1982] 1 All ER 397; Dominion Mosaics & Tile Co Ltd v Trafalgar Trucking Co Ltd [1990] 2 All ER 246, [1989] 22 EG 101. In particular, where there is no ready second hand market for goods, or where there might be uncertainty as to the reliability of such goods, no credit need be given for the fact that a new and up-to-date replacement has been purchased."*[4]

[245] Mr. Panton submitted that based on the principles in that case it is clear that the purchase of something new does not automatically mean there has been

---

[4]Paragraph 249

betterment. He argued that any increase in the efficiency of the claimant's operations achieved by the purchase of new machines, does not necessarily amount to betterment in a practical sense. He said that it was for the defendant to show how the newer models' ability to operate more efficiently conferred any direct quantifiable benefit to claimant in the operation of its business.

[246] Mr. Panton also submitted that the uncontroverted evidence is that the new machines have shorter life spans than the original machines and in some cases the original machines had more features than the new ones although the technology is more modern.

[247] It was further submitted that the evidence of Dr. Clarke provides justifiable grounds for the court to accept that the sum paid by the claimant for purchase of replacement diagnostic machines was entirely reasonable and should be recovered.

[248] Mr. Foster Q.C. relied on the case of ***Voaden v. Champion (The "Baltic Surveyor" and "Timbuktu")*** [2002] 1 Lloyds Rep 623 in support of his contention that an award of the replacement costs of the machines would result in the betterment of the claimant. He stated that the machines which were acquired by the claimant after the fire were more advanced in technology and therefore more efficient. He also submitted that in those circumstances the court should discount the cost of the new machinery to reflect the betterment which would accrue to the claimant.

[249] In ***Voaden v. Champion (The "Baltic Surveyor" and "Timbuktu")*** the claimant, who was the owner of the vessel the Baltic Surveyor sued the defendant who was the owner of the vessel the Timbuktu, whose mast pierced the hull of the former vessel and caused it to sink. The pontoon at which she was moored was totally lost and the mooring badly damaged.

The judge held that the claimant was entitled to recover a total (plus interest) of £122,900, made up of: (i) the value of Baltic Surveyor (£82,000); (ii) the loss of

the pontoon (£16,000); (iii) reinstatement of the mooring (£24,000); and (iv) pilotage (£900). The claimant appealed in respect of (i) and (ii), contending that the judge had erred in his assessment of the value of Baltic Surveyor.

[250] In arriving at a reasonable sum for the pontoon the learned judge used the life expectancy of the old one (8 years) and the new one (30 years) along with the replacement value of £60,000.00. Eight thirtieths of that sum amounted to £16,000.00.

[251] In respect of item (ii), the claimant submitted on appeal, that the judge had erred in not valuing the pontoon at its replacement cost. Instead the judge had discounted the figure on the basis that a replacement pontoon would last for 30 years whereas the lost pontoon only had a remaining life of 8 years.

[252] The claimant submitted that no 'new for old' deduction should have been made against the replacement cost, since only full replacement would have afforded her complete indemnity. She further contended that the value of Baltic Surveyor plus interest from the time of loss would not compensate her for her loss of the extensive personal use she had made of the vessel, and therefore sought an additional sum to reflect that personal loss.

[253] It was held that the appeal would be allowed in part. The court also stated the principles that are to be applied when assessing damages for the loss of a chattel. It was stated that although the trial judge had not explicitly adopted a test of reasonableness in valuing the pontoon, it was clear that he had all the relevant principles in mind and had adopted the correct approach. The learned Judge also stated that when assessing a total loss the starting point is *"the capital value of that which has been lost, whereas in the case of damage to property, subject to principles of acting reasonably to mitigate loss, the starting point is reinstatement".*

[254] The Court of Appeal also ruled that there was nothing in the authorities to justify an award of damages for the loss of personal use in addition to the value of the

vessel. The appropriate measure of damages was the value of the ship to her owner as a going concern at the time and place of her loss. The appeal in respect of the claim for personal loss additional to the value of the vessel was therefore dismissed.

[255] Mr. Foster Q.C. argued that the court has to consider whether an award of damages based on the cost of reinstatement is reasonable. In assessing reasonableness, the claimant's attempts to mitigate its losses are critical factors. He submitted that the claimant has a duty to mitigate its losses and in an effort to do so it must seek to replace the destroyed equipment with ones which are similar in age and capability if they are available and subtract the value of the salvage if any.

[256] He stated that that no evidence had been presented as to the market value of the machines at the time of their destruction or damage and as such there can be no determination as to the reasonableness of the cost of replacement vis a vis the reinstatement cost. It was further submitted that the replacement cost of the machines would be the better method of assessment as the claimant not only intended to replace the destroyed machines but did in fact replace them.

[257] It was also submitted that the machines that were being used by the claimant at the time of the fire were outdated and it would be unreasonable for it to recover the full cost of acquiring cutting edge technology to replace outdated and possibly obsolete machinery.

[258] Mr. Foster Q.C. submitted that the cost of the new machines should be discounted as follows:

(i) The camera-there should be a 100% discount to the claimant on the cost of the camera. Counsel submitted that the camera should be discounted in such a way because the machine was at least twenty six (26) years old at the time of its destruction and was therefore well past its life expectancy and due for replacement at the time of the fire.

(ii) The HDi3000- a discount of eighty percent (80%) of the cost of the HDi5000 should be made in favour of the defendant, i.e. 2/10 x US$65,750=$52,600. Therefore the claimant should recover $13,150.00. It was submitted that the HDi 3000 should be discounted in such a way because it is likely that it was purchased in the mid 1990s with a useful life of possibly eight (8) to ten (10) years. Therefore, it was scheduled to be replaced in or about 2003, two years after the fire. This machine was replaced with the HDi 5000.

(iii) Phillips iU22- It was submitted that the reasonable course of action for the claimant to have taken would have been to acquire a refurbished HDi 5000 to replace the one that had been damaged.

(iv) Mammography machine- a fifty percent (50%) discount should be applied to the cost of acquiring a new machine. Counsel acknowledged that there was no evidence regarding the time when the machine was bought. However, it was his submission that Mr. Dunkley confirmed that the technology of the old machine was old and outdated. He stated that in the circumstances, the value should be discounted accordingly.

(v) Comtronic Computer- It was submitted that there is no evidence that this machine existed prior to the fire or was damaged by the fire and as such no award should be made in respect of this item.

[259] The cases of ***Pegler Ltd. v. Wang*** and ***Voaden v. Champion (The "Baltic Surveyor" and "Timbuktu")*** at first appear to be diametrically opposed. However, on a closer examination, they can be distinguished.

[260] In ***Pegler Ltd. v. Wang*** the court was concerned with the assessment of damages payable by the defendants arising from their admitted breach of a contract to supply computer hardware and software and associated services. The claimant installed its own Sales Order Processing Software and made various improvements to what the defendant had delivered. They also decided to buy a

new system. Damages were claimed for a sum in excess of £22.8 million which included the cost of the new system.

[261] The issue arose as to whether the claimant was entitled to be compensated for the cost of the new system. The court held that the claimant was not presumptively entitled to the cost of what the defendant had failed to provide. The learned Judge stated:-

> *"What Pegler is entitled to is that it 'is so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed'…That is not necessarily the cost of obtaining what Wang agreed to provide…reinstatement is only the appropriate basis for assessment where it is shown to be reasonable. It is for the claimant to show that it is reasonable for him to insist on reinstatement. It is not right to say that there is a presumption in favour of reinstatement with the burden on the defendant to show that it would not be reasonable. It is for the claimant to show reasonableness".*

[262] Judge Bowsher Q.C also expressed the view that the issue of what constitutes a party's loss is a "question of fact and degree". In order to arrive at his determination he considered the objective of the contract and concluded that:

> *"The objective of this contract was that Pegler should be provided with hardware, software, training, advice and maintenance in accordance with the written contract including the ITT and Response. The terms of the contract show that its objective was to provide a system which would be maintained working and upgraded in a suitably modified form for 5 years, which I construe as 5 years from the date of completion. In addition, there was an expectation that the system would last much longer than 5 years".*

[263] He also bore in mind the pace at which computer technology was advancing and stated as follows:-

> *"….it would have been impossible as well as commercially nonsensical for Pegler to buy a system which had not been advanced technically beyond the system sold to them some years*

> *earlier by Wang. The pace of computer development has been so fast that one simply cannot buy new computers built to old specifications. Moreover, it would have been an act of madness for Pegler to buy a second hand computer and no one has suggested that they could or should have done so. When buying a replacement computer, Pegler was inevitably going to get something better than the 1994 FACT…"*[5]

The learned Judge also said:-

> *"Mr. Stevens said that it would not have been possible in 1997 to obtain a package which did not offer some advantages over the Wang system, because of changes in technology and because no two systems are identical in what they offer. That accords with commonsense and my experience. Mr. Stevens also said that some competing packages would not have offered some features offered by the original Wang contract while at the same time offering other features not in the Wang contract. It would not be possible to get a match of all the features. That again is only to be expected. Equally, when considering TROPOS in comparison to its competitors, some competitors would not have offered some features offered by TROPOS while at the same time offering other features not offered by TROPOS. Because of that sensible approach, I prefer the evidence of Mr. Stevens that, 'Whilst TROPOS is superior to FACT, the additional functionality is 'standard' in a medium package in today's market. The scope of the identified betterment is due primarily to current market requirements which are taken account of in most modern systems".*[6]

[264] Judge Bowsher Q.C was of the view that it was reasonable for Pegler to spend money on consultants to ensure that the replacement system related to emerging developments.

---

[5]Paragraph 242
[6]Paragraph 249

[265] The unique features of this case should not be cast aside. In ***Pegler,*** Judge Bowsher Q.C looked at the objective of the contract between the parties and declared that it had been demonstrated that some of the features of the replacement system were in fact promised by Wang or would have been provided as part of the promised upgrades. In light of this, the claim of betterment was not viewed favourably.

[266] Furthermore, the Judge regarded the evidence supporting the allegation of betterment as being wholly unsatisfactory. He stated as follows:

> *"The evidential burden of establishing betterment is on the defendant:* Oswald v. Countrywide Surveyors Ltd. (1996) 50 Con L.R. 1 at 6, Skandia Property (UK) Ltd. v. Thames Water Utilities (1997) 57 Con. L.R. 65 at p.80. *Wang have not satisfied that burden and accordingly I make no allowance for betterment".*[7]

[267] In ***Voaden v. Champion (The "Baltic Surveyor" and "Timbuktu")*** the principle was stated to be as follows:-

> *"85. (2)* ***It follows that cases where a claimant recovers more than he has lost, as will happen where betterment occurs without a new for old deduction, ought as a matter of principle to be exceptional.*** *Recognised examples of such exceptions, again whether in contract or in tort does not seem to matter, are cases of the repair of chattels (The Gazelle, Bacon v. Cooper) and also the destruction of buildings provided that a replacement building is necessary to prevent the collapse of a business or loss of profits (Harbutt's Plasticine, Dominion Mosaics v. Trafalgar Trucking). …I suspect, however, that the true principle is that in the relevant cases the betterment has conferred no corresponding advantage on the claimant. Take the ordinary case of the repair of some part of a machine. Where only a new part can be fitted or is available, the betterment is likely to be purely nominal: for unless it can be posited that the machine will outlast the life left in the*

[7]Paragraph 245

damaged part just before it was damaged, the betterment gives the claimant no advantage; and in most cases any such benefit is likely to be entirely speculative. So in the case of replacement buildings: the building may be new, but buildings are such potentially long-lived objects that the mere newness of a building may be entirely by the way. Of much more importance to a business owner is whether the replacement answers the needs of his business. Even where the replacement is of a moderately bigger size (Dominion Mosaics v. Trafalgar Trucking), in the absence of any reason for thinking that the bigger size is of direct benefit to the claimant, he has merely mitigated as best he can. If, however, it were to be shown that the bigger size (or some other aspect of betterment) were of real pecuniary advantage to the claimant, as where, for instance, he was able to sublet the 20% extra floor space he had obtained in his replacement building, I do not see why that should not have to be taken into account. It is after all a basic principle that where mitigation has brought measurable benefits to a claimant, he must give credit for them: see British Westinghouse v. Underground Electric Railways, where defective machines were replaced by new machines of superior efficiency.

86. (3) ***Where in the case of a second-hand chattel there is no market to replace what has been lost, a problem of betterment will often arise because there is no automatic market mechanism for measuring the loss. In physical terms, the only way to replace the loss is to buy new. But the basic principle is not physically to replace what the claimant has lost but to replace it financially, to make him whole in financial terms. If he is given the price of a new chattel, he will be made more than whole****. …****The authorities suggest that prima facie such a case is not within the range of exceptional situations where betterment is ignored. On the contrary, the proper approach appears to be to make a fact specific review of what the claimant has lost and then attempt to put a financial figure on it as best one can****: The Harmonides approved in The Liesbosch; Sealace Shipping v. Oceanvoice approved in Ruxley v. Forsyth….*

88. (5) In such circumstances the test of reasonableness has an important role to play. This role goes further than the proposition that replacement from new has to be absurd for it to be rejected as

> *the measure of loss.* ***The loss has to be measured, and where what is lost is old and second-hand and coming towards the end of its life, it is not prima facie to be measured by the cost of a brand-new chattel, even where the market cannot supply a closer replica of what has been lost; and where such a measure would not be a reasonable assessment of what has been lost, it should not be used.*** *As May J said in Taylor v. Hepworths, cited with approval in Dominion Mosaics v. Trafalgar Trucking and (at 356G and 369G) in Ruxley v. Forsyth,* ***damages ought to be reasonable as between claimant and defendant.*** *I do not see why in the realm above all of remedies the common law cannot mould its principles flexibly to the needs of the situation, and as so often the test of reasonableness lies to hand as a useful tool. It may also be possible to speak in terms of proportionality, a closely analogous but not necessarily identical test: see Lord Lloyd in Ruxley v. Forsyth at 367B and 369H."*
>
> [My emphasis]

[268] If the object of an award of damages is to put the claimant back into the position it would have been in had the contract not been broken or the tort performed then it seems to me that the starting point must be the market value of the machines at the time of the destruction. However, no such evidence was provided to the court. I am therefore in agreement with counsel for the defendant that the determination of the reasonableness of the replacement is somewhat inhibited because of the absence of this evidence.

[269] There is however evidence that equipment of the same age and specifications was not available. How then is the court to ensure that the damages awarded are in keeping with the principle of reasonableness?

[270] It seems to me that based on the principles in ***Voaden,*** if there is no second-hand market for the chattel and the claimant is forced to buy a new chattel then discounting the figure is the correct approach. The trial Judge summarized the principle as follows:-

> *"There can, however, be no question of the recoverable damages being the full cost of such a replacement, for if they were, the claimant would, in effect, be receiving compensation for providing herself with a pontoon of possibly 50 years' life in replacement of one with a life expectancy of eight years.* ***Her loss is not the cost of replacing the lost property by a substantially more valuable pontoon, but the capital value of that which has been lost at the time and place of the loss. In a case where there is no market for similar old pontoons, as here, the relevant notional value may have to be arrived at by inference and extrapolation from the value of similar new pontoons simply by asking the question, if one would pay £x for a brand new pontoon with a life expectancy of possibly as much as 50 years, what would one pay for an old and well-worn pontoon in the last few years of its life."***
>
> [My emphasis]

[271] Where the camera is concerned, Dr. Clarke gave evidence that it was purchased in 1989 and had a useful lifespan of approximately twenty to twenty five years. There is no evidence of the life expectancy of a new machine.

[272] Mr. Lockland Dunkley gave evidence that whilst he was aware that there was a second market for parts for Nuclear Gamma Cameras, he could not say whether a machine of the same age and specifications as the camera could have been acquired in 2003. He explained that the claimant's camera was a 2nd generation model whereas, the new one was a 3rd generation model with a more sophisticated electrical system. He said that it was more efficient than the old one and had an open gantry unlike the old one where a patient would be required to lie on a table. He was unable to say whether the images that it generated were clearer but he did indicate that it had a digital imaging system which facilitated the electronic transmission or sharing of patients' data.

[273] It was learned Queen's Counsel's submission that there should be a one hundred percent (100%) discount to the claimant on the cost of the Camera because it was at least twenty six (26) years old at the time of its destruction and

was therefore, well past its life expectancy and due for replacement at the time of the fire. I do however bear in mind that it is the defendant's duty to prove betterment and to satisfy the court that the figure the defendant propounds is more reasonable. To simply state that the machine was way past its prime is, in my opinion, not sufficient.

[274] According to the claimant's evidence, the camera was purchased approximately fourteen years prior to the fire. In light of the evidence as to its useful lifespan, the claimant would have expected to benefit from its operation for another eleven years. The evidence is that it was irreparably damaged. There is no evidence that a second market existed for Nuclear Gamma Cameras.

[275] I also bear in mind that the claimant at the time of the fire from all indications, had a fully functioning Nuclear Gamma Camera. In light of the evidence given by Dr. Clarke it appears that the claimant had enjoyed approximately fifty percent (50%) of the life of the camera. There is however, no evidence of the lifespan of the newer model. I am therefore unable to apply the formula that was used in the ***Voaden*** case.

[276] In assessing the value of what was lost, I bear in mind that the core principles which are to be applied are *restitutio in integrum* and reasonableness. The formula used by Coleman J in the ***Voaden*** case was in my view, an attempt to rationalize the process in circumstances where the evidence of the value of the item lost was less than desirable. The court should therefore be flexible in its approach in keeping with the circumstances in each case.

[277] In this matter the only evidence of the value of the camera is that of its newer replacement. In order to ensure that the sum awarded is reasonable there must be some discount for depreciation if the sum awarded is to be reasonable. If one considers that the camera according to the claimant's evidence had reached approximately fifty percent (50%) of its lifespan a similar discount may be deemed to be appropriate. However, that is not the only factor which must be

considered. The lifespan of the camera's replacement has not been established. I am therefore of the view that in such circumstances, a thirty per cent (30%) discount of the sum claimed would be appropriate. The claimant is awarded the sum of United States one hundred and forty five thousand six hundred dollars (US$145,600.00) for its replacement. The customs duty paid is also discounted by thirty percent (30%).

[278] Where the mammography and ultrasound machines are concerned, the uncontradicted evidence is that the claimant attempted to repair those machines. Dr. Clarke stated that the claimant used parts from the damaged Phillips HDi 3000 to repair the damaged Phillips HDi 5000 which worked for a while. A refurbished Phillips HDi 5000 was bought to replace the HDi 3000 and a Phillips iU22 to replace the damaged Phillips HDi 5000.

[279] Mr. Dunkley stated that the Phillips HDi 5000 ultrasound machine was between one (1) and two (2) years old at the time of its destruction and the Phillips HDi 3000 was approximately three (3) years old. He gave evidence that at the time of the fire there was a second market from which those machines could be sourced. The witness also stated that the lifespan for the older machines was ten (10) to twelve (12) years whilst the new ones have a lifespan of approximately five (5) years. Mr. Foster Q.C. submitted that in order to assess the replacement cost of the Phillips HDi 3000, the cost of a new Phillips HDi 5000 ought to be discounted by eighty percent. He stated that it is likely that it was purchased in the mid 1990s and had a useful life of eight (8) to ten (10) years. He concluded that it was scheduled to be replaced about two years after the fire.

[280] I have accepted Mr. Dunkley's evidence as to the age of the Phillips HDi 3000. He also stated that the HDi 3000 was "a lower scale machine" than the Phillips HDi 5000. However, Dr. Clarke's evidence, which I accept, is that the latter machine was a refurbished unit. I also bear in mind that at the time of its destruction the Phillips HDi 3000 had a useful life of approximately seven more

years, having been acquired three years before the fire. It was in my view, relatively new.

[281] In the circumstances I award the claimant the sum of United States sixty seven thousand seven hundred and fifty dollars (US$67,750.00) as claimed.

[282] Where the Phillips iU22 is concerned, it was submitted that the reasonable course of action for the claimant to have taken would have been to acquire a refurbished Phillips HDi 5000 to replace the one that was damaged.

[283] That machine was acquired at a cost of United States two hundred and thirty three thousand five hundred dollars (US$233,500.00). The cost of a refurbished Phillips HDi 5000 was United States sixty seven thousand seven hundred and fifty dollars (US$67,750.00). Dr. Clarke's evidence is that when compared with the Phillips HDi 5000 it was a significant upgrade in technology but not in utility. His evidence is that it was more software based but had less features than the Phillips HDi 5000. He described the latter as having "every possible function". I accept his evidence.

[284] However, I am of the view that the damaged Phillips HDi 5000 ought to have been replaced with one of the same age and specifications or a new unit if it was not possible to do so. The Phillips iU22 was far more expensive than the refurbished Phillips HDi 5000. The claimant's evidence is that the machine which was destroyed was approximately one (1) to two (2) years old and in my view, relatively new especially bearing in mind its usual lifespan of ten (10) to twelve (12) years. No evidence of the cost of a new Phillips HDi 5000 was presented to the court. It is however, my view that it would not be reasonable to award the sum claimed. There must be some discount.

[285] I am mindful of the view expressed by Harrison J.A. in ***Appleton Hall Limited v. T. Geddes Grant Distributors Limited*** (unreported), Court of Appeal, Jamaica, [2011] JMCA Civ 30, judgment delivered 29 July 2011, that *"Liability and loss having been established, damages must be assessed".* In that case the appellant

suffered damage to its papaya crop as a result of the application of a fungicide sold to it by the defendant. The trial Judge found that there was insufficient evidence on which to assess damages. The Court of Appeal whilst it agreed that the evidence was insufficient remitted the matter to the Supreme Court for damages to be assessed on the evidence.

[286] In the circumstances, I award the sum of United States one hundred and sixteen thousand seven hundred and fifty dollars (US$116,750.00) which represents fifty percent (50%) of the cost of the new Phillips iU22. The sum paid for customs duties is also reduced by fifty percent (50%).

[287] Where the mammography machine is concerned, Mr. Dunkley gave evidence that the unit that had been destroyed was manufactured in the 1970s to the late 1980s and was equipped with second generation technology. The replacement that was acquired by the claimant utilizes third generation technology and has extended imaging capabilities. However, the machine that was destroyed had an approximate lifespan of fifteen (15) to twenty (20) years. The newer models have a lifespan of approximately five (5) years.

[288] Dr. Clarke indicated that there was no second market for mammography machines in Jamaica. He stated that the claimant purchased a basic machine from General Electric through its local agent, Ariel Limited, for United States sixty thousand dollars (US$60,000.00) and acquired the additional technology at an additional cost which is not included in the claim. I have accepted his evidence.

[289] Mr. Foster Q.C. submitted that the claimant was only entitled to fifty percent of the value of a new machine. Whilst he acknowledged that there was no evidence of the time period when the old one was bought, he stated that based on Mr. Dunkley's evidence the technology of the machine that was destroyed was old and outdated. He said that in the circumstances the discount was appropriate.

[290] It is clear from the evidence, that the newer model which was acquired by the claimant was equipped with more modern technology. In keeping with the

principle that an award of damages must be reasonable, I have applied a discount of thirty percent (30%). The claimant is awarded the sum of United States forty two thousand dollars (US$42,000.00). The sum claimed for reimbursement of customs duties is similarly discounted.

Loss of earnings

[291] The claimant has claimed damages for loss of earnings in the sum of J$7,077,847.00. The loss is itemized as follows:-

Nuclear Medicine:	$5,297,563.00
Mammography:	$840,717.00
Ultrasound/X-Ray/Bone Density:	$939,567.00

[292] Mrs. Ouida Nesbeth-Dunn who was certified as an expert gave evidence of the claimant's loss of earnings. Counsel for the defendant submitted that the figures presented by Ms. Nesbeth-Dunn do not represent an accurate assessment of the profit or loss sustained by the claimant for the period under review. Counsel for the defendant argued that due to the unreliability of those calculations, the claimant has failed to prove that it sustained losses as claimed.

[293] Mr. Foster Q.C. submitted that if the court is minded to make an award in respect of this claim then there should be a reworking of the accounts to make allowance for particular deductions.

[294] Mrs. Nesbeth-Dunn is the only expert who gave evidence in relation to the claimant's loss of earnings and the method of calculating its loss. During cross-examination counsel for the defendant proposed a number of calculations however, Mrs. Nesbeth-Dunn simply stated that while she could not say that the mathematical results proposed were incorrect she did not agree with the methodology employed in arriving at those results.

[295] In ***Caribbean Steel Co Ltd v Price Waterhouse (a firm)*** [2013] UKPC 18, which was an appeal from a judgment of the Court of Appeal of Jamaica, the Privy Council stated that there must be a sound reason for rejecting the opinion of an expert.

[296] Having considered the reasons given by Ms. Nesbeth-Dunn for reaching her opinion I have found no basis for rejecting her evidence. She has given reasonable explanations as to the method she has used and her evidence is unchallenged by other expert evidence. I accept her evidence.

[297] Where the claim for damages for loss of goodwill is concerned, it was submitted that as a result of damage to the diagnostic equipment the claimant was unable to operate as efficiently as it did prior to the fire and it had to turn patients away. This resulted in a loss of the claimant's goodwill and adversely affected its reputation.

[298] Goodwill has been defined by Lord MacNaghten in the House of Lords case of ***The Commissioners of Inland Revenue v Muller & Co's Margarine Limited*** [1901] AC 217 at page 223-224 of the judgment as:

> *"...It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade..."*

[299] It seems to me that like an action for passing off it must be shown that the business had acquired a reputation in the jurisdiction and that as a result of the breach of contract and/or negligence of the defendant that reputation was injured.

[300] It is my opinion that merely stating that the claimant had to turn away patients is insufficient to establish loss of goodwill. No evidence has been put forward that the claimant lost the benefit and advantage of its good name or reputation. Therefore, I am of the opinion that there should be no award of damages in respect of this part of the claim.

Conclusion

[301] Damages are assessed as follows:-

(1) US $372,100.00 and J$568,186.64 comprised as follows:-

Item			Customs Duties
i.	Gamma Camera	US$145,600.00	J$137,600.00
ii.	Mammographic System	US$42,000.00	J$57,810.78
iii.	Phillips iu22 Ultrasound Imaging System	US$116,750.00	J$159,808.70
iv.	Phillips HDi 5000	US$67,750.00	J$123,067.16
v.	Repairs & clean up		J$89,900.00

(2) Loss of profits in the sum of J$7,077,874.00

(3) Interest at a commercial rate of 9.25% per annum on the sum of US$372,100.00 from May 11, 2003 to the date of judgment.

(4) Interest at a commercial rate of 14.13% per annum on the sum of J$568,186.64 from May 11, 2003 to the date of judgment.

(5) Costs to the claimant to be taxed if not agreed.