[2022] JMCC COMM 29

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2019CD00196

BETWEEN	**X-RAY & DIAGNOSTIC ULTRASOUND CONSULTANTS LIMITED**	**CLAIMANT**
AND	**BASIL NELSON**	**1ST DEFENDANT**
AND	**BASIL NELSON & ASSOCIATES (CONSULTING ENGINEERS) LIMITED**	**2ND DEFENDANT**
AND	**AREL LIMITED**	**3RD DEFENDANT**

IN OPEN COURT

Mr. Michael Hylton Q.C., Mr. Weiden Daley and Ms. Melissa Mayne instructed by Hart Muirhead Fatta for the Claimant

Mr. Garth McBean Q.C. and Ms. Dian Johnson instructed by Garth McBean & Company for the 1st and 2nd Defendants

Mr. Christopher Kelman and Ms. Stephanie Ewbank instructed by Myers Fletcher & Gordon for the 3rd Defendant

Dates Heard – June 1, 2, 3, 7, 8, 9, 10, 14, 15, 16, 17, 21, 22, 23, 24 & 29, July 1 & 29, September 29, 2021 and September 29, 2022

Civil Practice and Procedure – Professional Negligence – Whether the Defendants owed a duty of care to the Claimant – Whether the Defendants breached the alleged

duty of care – Whether the Claimant suffered loss by this breach – Breach of Contract – Quantum of Damages – Nominal Damages – Civil Procedure Rule 64.12 (3) – Special Costs Certificate

PALMER HAMILTON, J.

[1] I wish at the outset to note that at the time when this trial was heard and the judgment was being written Mr. Hylton and Mr. McBean were Queen's Counsel in the matter. However, since the passing of Her Majesty Queen Elizabeth II and the accession of His Majesty King Charles III to the throne of the United Kingdom and Commonwealth Realms, the title of Queen's Counsel (Q.C.) changed to King's Counsel (K.C.). Nonetheless, both Counsel will be referred to as Queen's Counsel throughout this judgment.

BACKGROUND

[2] The Claimant, hereinafter referred to as X-Ray, initiated a claim against the Defendants, hereinafter referred to as Mr. Nelson, BNA and Arel respectively, by way of a Claim Form and Amended Particulars of Claim. X-Ray sought the following Orders:

> *(a) Damages for negligence;*
>
> *(b) Damages for breach of contract;*
>
> *(c) Special damages;*
>
> *(d) Interest pursuant to the Law Reform (Miscellaneous Provisions) Act at a commercial rate, or at such a rate and for such a period as to this Honourable Court seems just;*
>
> *(e) Costs;*
>
> *(f) Attorney's costs;*
>
> *(g) Such further and other relief(s) as this Honourable Court seem just.*

[3] X-Ray claimed inter alia that in or about 2012 they decided to establish a molecular imaging centre and nuclear laboratory, hereinafter referred to as 'the Laboratory' at 3 Ripon Road, Kingston 5 in the parish of Saint Andrew. The name of the Laboratory is 'The Molecular Imaging Institute (Jamaica)', hereinafter referred to as 'the Project.' As a result, in or about March 2015 X-Ray engaged the services of BNA, whose principal was at all material times was Mr. Nelson, to design an air conditioning and exhaust system for the Laboratory. This system is referred to as a HVAC system, which means Heating, Ventilation and Air-Conditioning System. X-Ray engaged the services of BNA as they relied on the expertise of Mr. Nelson and on the understanding that he would execute the work. In or about November 2015, X-Ray engaged the services of Arel to provide equipment, installation and commissioning services in respect of the heating, ventilation and air conditioning for the Laboratory. X-Ray alleges that the Defendants were all aware that the Laboratory had to meet and consistently maintain certain specifications in order to operate. The said specifications were provided by General Electric Company, hereinafter referred to as 'GE.' Due to the negligence and/or breach of contract of the Defendants, the Laboratory has never attained or maintained the specifications and as a result X-Ray has been prevented from operating the Laboratory in a commercially viable manner thereby causing loss and damage.

[4] The particulars of negligence of BNA and Mr. Nelson was outlined as follows:

> *(a) Failing to design and/or to redesign the HVAC system for the Laboratory so that it attains and consistently maintains the specifications;*
>
> *(b) Failing to ensure that the equipment and service supplied by Arel for the HVAC system for the Laboratory were proper and adequate so as to ensure that the Laboratory attains and consistently maintains the specifications;*
>
> *(c) Failing to specify in the design and/or redesign of the Laboratory, or to utilize any or any proper steps, methods, procedures or safeguards to ensure that the Laboratory attains and consistently maintains the specifications; and*

(d) Failing to discharge its non-delegable responsibility of supervising the said works by Arel or the Project.

[5] The particulars of negligence of Arel was outlined as follows:

(a) Failing to supply and install equipment which is adequate, appropriate and/or fit for the purpose required of attaining and consistently maintaining the specifications;

(b) Failing to install at all or properly install and commission the equipment for the HVAC system for the Laboratory; and

(c) Failing to use reasonable care and proper steps, methods, procedures or safeguards to ensure that the Laboratory attains and consistently maintains the specifications.

[6] Mr. Nelson and BNA filed a Defence disputing the allegations laid out by X-Ray. Their defence is that they were not provided with all the details of the specifications that need to be met and consistently maintained by the Laboratory. They laid out that they were not negligent nor did they breach their contract as it was X-Ray and GE who instructed them to make changes to their design which resulted in the specifications not being met.

[7] Arel also filed a Defence disputing the allegations laid out by X-Ray against them. Their defence is that they were instructed by BNA on behalf of X-Ray to supply and install equipment based on BNA's design of the air conditioning and exhaust system for the Laboratory. They maintained that they did supply and install the equipment as was required by the designs by BNA and as such they were not negligent nor did they breach their contract. Arel is also counterclaiming against X-Ray for monies owed by X-Ray in respect of services and equipment provided by Arel to X-Ray.

THE EVIDENCE

[8] I have chosen not to detail all the evidence which was elicited from the examination-in-chief and from the cross-examination of each witness but I will highlight the relevant aspects of the examination-in-chief and cross-examination. Nevertheless, I assure all parties that I carefully considered all the evidence on

both examination-in-chief and cross examination whether they have been referred to or not.

Evidence for X-Ray

[9] X-Ray called several witnesses. They called seven (7) ordinary witnesses and 2 expert witnesses.

Mr. Clint Franks (Expert Witness)

[10] Mr. Clint Franks, who was also appointed as an Expert Witness on the 7th day of July, 2020, was the first witness to be called on behalf of the Claimant. His findings are contained in a report dated March 31, 2021. Mr. Franks' report lists his relevant qualifications as follows: NEBB Certified professional, certified to practice HVAC Testing Adjusting and Balancing of Environmental Systems, Building Systems Commissioning of HVAC and Fire Protection, and Sound and Vibration Analysis.

[11] He exhibited his resume which is four (4) pages long and lists work experience since 1993 to 2021, the time when the report was prepared. Mr. Franks further stated that he was contacted by Counsel for X-Ray to provide his opinion regarding the design and functionality of the HVAC system and whether the Laboratory has attained and/or maintained the specifications.

[12] Mr. Franks made a site visit in 2018, prior to the request of Counsel for X-Ray, and completed a report of his findings at that time. During that visit he found that the original design indicated a dedicated 100% outside air unit which was not installed. Instead there was a light commercial unit which was not designed to be a 100% outside air unit. He found other issues which were mentioned in the said report of the 2018 site visit. He made several recommendations, including that a new engineer should be hired for a system design review and that the unit which was installed needs to be replaced.

[13] In his report dated the 31st day of March, 2021 he concluded that BNA, Mr. Nelson and Arel all share responsibility of the failure of the system design and installation. He states that this is based on his 2018 site visit and the review of the documentation provided by Counsel for X-Ray. He further stated that, *"Mr. Nelson bears the most responsibility as he is the design engineer who makes the final decision on his design."* Mr. Franks' report goes on to say that Mr. Nelson heavily relied on the recommendations of GE and Arel and that is what resulted in the failed design of the system. He also stated that GE provided the specifications and it was Mr. Nelson who was responsible for providing a system to meet that requirement. Mr. Franks also noted that Arel failed to fulfil their obligations to X-Ray as they failed to complete the control systems, installing the correct exhaust fans, and properly balancing the system.

[14] Mr. Franks concluded his finding in his report by saying that,

> *"In the end, the Claimant has a building with a HVAC system that does not have the ability to meet the requirements for a functioning laboratory in a safe, comfortable and viable manor. There was a lack of detailed direction, documents, and specifications for the installing contractor, Arel Ltd. This information should have been provided by Basil Nelson and Associates. There was a continuous redesign of the systems as things progressed throughout the entire project. Opinions and suggestions kept changing as issues arose. There were too many individuals involved in making design decisions when only one person is ultimately responsible, the design engineer."*

[15] On cross-examination, by Queen's Counsel Mr. McBean, Mr. Franks maintained that it would be the design engineer's responsibility to work with GE and IQMS to collect the information needed to design the HVAC system. Mr. Franks further maintained that Mr. Nelson should not have relied on the expertise of GE and IQMS when it was his design.

[16] Mr. Kelman, Learned Counsel for Arel, on cross-examination, asked Mr. Franks about his experience in designing and having designed a HVAC. That line of questioning went as follows:

> *Mr. Kelman: ...what I have asked you is to show me in your resume your experience in designing, having designed a HVAC, not you experience in receiving training 20 years ago but an item in your several page report where you have actually designed a HVAC system*
>
> *Mr. Franks: I did not have that spelled out on my resume*
>
> *Mr. Kelman: I thought so. Now, show me also in your resume where you have actually acted as a HVAC Contractor to install a HVAC system*
>
> *Mr. Franks: I was never a HVAC Contractor but I have installed HVACs…*

[17] Mr. Franks also admitted on cross-examination that this case was the first time he was professionally engaged in Jamaica and that he has never designed or installed a HVAC system in Jamaica. It also came out in cross-examination by Mr. Kelman that it was based on the documentation provided by Counsel for X-Ray that Mr. Franks understood construction practices in Jamaica. Counsel then suggested to the witness that he was not qualified to express opinions on designing and installing HVACs in Jamaica to which Mr. Franks disagreed.

[18] Mr. Franks agreed with Mr. Kelman who asked him if he agreed that in construction projects the building owner and employer is the decision maker on matters including cost of equipment. Mr. Franks also agreed that X-Ray was the building owner and employer on the project regarding the Laboratory. Mr. Franks also agreed with Mr. Kelman that X-Ray was party to the decision to move from a 100% fresh air system to a less than 100% recirculated air system. However, Mr. Franks was unable to show where in his report he had taken into consideration that X-Ray was party to the decision.

[19] However, on further cross-examination of the witness by Mr. Kelman, he agreed that Arel was not provided with the requisite sequence to complete the control system. This information should have been provided by BNA. Learned Counsel

Mr. Kelman suggested to the witness that he has not been an impartial witness, that Arel properly installed the HVAC system, and the said HVAC system met the designed specification set out by the engineer in his drawings, to which Mr. Franks disagreed.

[20] Mr. Franks agreed with Mr. Kelman that it would have been impossible for recirculatory air systems as designed by Mr. Nelson to have specifications of 100% outside air system and it would therefore be impossible for the balancing of the system as designed to achieve the specification of 100% outside air. However, Mr. Franks noted that even though there was not a written control sequence, the products that were to be installed were not installed. Mr. Kelman made the point that Arel installed the system as designed and the design was a matter for BNA to which Mr. Franks agreed.

Dr. Winston Clarke

[21] At all material times, Dr. Clarke was the Managing Director of X-Ray. Dr. Clarke is a Medical Doctor and Diagnostic Radiologist. In his evidence-in-chief, he stated that X-Ray is recognized as a major provider of diagnostic radiology services to Jamaica and the English-speaking Caribbean utilizing cutting-edge technologies in both equipment and procedures. In 2014, X-Ray took steps to start the Project. GE and IQ Medical Services, hereinafter referred to as 'IQMS,' provided the specifications and drawings for the Project.

[22] He stated that the Managing Director of Arel, Mr. Earle Spence, was involved in the design and implementation discussions and played a critical role in implementing the Project from as early as 2012. Representatives from Arel attended every project meeting, every virtual meeting and every site meeting for the Project. He further stated that it was Mr. Spence who introduced him to the Regional Manager of GE.

[23] Dr. Clarke gave a breakdown of the total equipment costs for the Laboratory as follows:

Equipment	***Cost***
Hotlab equipment, Fastlab, Radiopharmacy	
Trace Centre equipment	*US$1,009,800.02*
Cyclotron	*US$827,000.00*
PET/CT scanner	*US$1,150,000.00*
TOTAL	***US$2,986,800.02***

[24] X-Ray received funding from the Bank of Nova Scotia funded by the Development Bank of Jamaica by way of a loan financing of US$586,250.00, which at the material time converted a rate of US$1.00 to JMD$114.20. X-Ray has been paying the said loan since August 2017 over 7 years at an interest rate of 10% per annum. That money went to the purchase of the cyclotron. GE and Export-Import Bank of the United States also provided loans to X-Ray in the amounts of US$614,600.00 and US$1,371,283.00 respectively. These monies went towards the development of the Laboratory. X-Ray has been repaying the said loans since March 2017 at an interest rate of 3.5% per annum in respect of the GE loan and at an interest rate of 2.5% per annum over 7 years on the US Exim Bank loan. X-Ray also incurred the following additional expenses funded from their own resources:

(a) US$144,733.00 paid to US Exim Bank for the loan facility;

(b) Deposit in the sum of US$560,400.00 towards the purchase of all the said equipment for the Project;

(c) Construction and related costs in respect of the Project in the sum of JMD$66,288,507.31;

(d) Supply and installation of Panasonic VRF Air Conditioning System in the sum of JMD$8,8718,491.18;

(e) Process Chiller and Cyclotron Laboratory Chiller for JMD$23,190,216.06; and

(f) Finishing costs in the sum of JMD$18,000,000.00.

[25] In addition to engaging the services of BNA to design the required air conditioning and exhaust system for the Laboratory, they were to ensure the proper functioning and storage of the cyclotron, which is one of the machines that was purchased to be used in the Laboratory, and the Laboratory equipment as a whole. They were also to guarantee safety and to reduce the risk of radioactive fallout in the event of an accident in the Laboratory. X-Ray relied on the professional expertise, advice and representation on all electro-mechanical matters for the Project.

[26] GE did not assume any responsibility for designing the HVAC system and it was the responsibility of BNA and Mr. Nelson to do so. IQMS had no management or oversight role for the Project. On April 8, 2015, GE supplied to Mr. Spence, the representative of Arel and several persons all the requirements and specifications of the Cyclotron and other areas of the Laboratory. GE and IQMS provided to each Defendant and the Claimant the specifications for the Laboratory. These specifications included the required pressures, temperatures and humidity in the different component areas of the Laboratory.

[27] In March of 2015, a preliminary all day meeting was held to discuss the project of designing, installing, building out and commissioning the Laboratory. Mr. Nelson, Mr. Spence and Ms. Sharda Spence representatives of Arel, and representatives from X-Ray, GE and IQMS were present at this meeting. However, Dr. Clarke, on cross-examination by Mr. Kelman, apologized and agreed with Counsel that no representative from Arel was present at that preliminary meeting.

[28] Various site meetings were held at which BNA was present at most, if not all the meetings. On the other hand, out of the 10 meetings that were held, Arel was only present at 4. In fact, it was not until the 6th meeting that Arel was present. Dr. Clarke stated that BNA and Mr. Nelson accepted the responsibility and at all material times owed to X-Ray a duty of care to design the appropriate air conditioning system for the Project.

[29] Dr. Clarke stated that Arel accepted the responsibility and all material times owed to X-Ray a duty of care which included the duty to provide the equipment and services and to deliver to X-Ray an air conditioning system for the Project for use of 100% outside fresh air as designed by Mr. Nelson and BNA and to ensure that the specifications are duly attained and consistently maintained.

[30] Having had oral and other discussions in relation to the cost associated with the HVAC equipment including electricity cost of using 100% fresh air, X-Ray enquired of the possibility of identifying alternative less costly HVAC equipment for the Laboratory. Mr. Nicholas Wood, representative of BNA, raised the possibility of using a HVAC system for the Laboratory that uses less than 100% fresh air. Mr. Richard Wentz of GE agreed with Mr. Wood of the possibility. Dr. Clarke maintained that X-Ray did not direct or advise Arel, Mr. Nelson or BNA on any specific or unspecific changes which should be made to the design of the HVAC for the Laboratory. He also maintained that at no time did Arel, Mr. Nelson or BNA advise X-Ray that any design or redesign would or may result in it being impossible for the specifications to be attained and maintained.

[31] Due to the failure of the Laboratory to meet the specifications, various machines and equipment that was bought by X-Ray are now damaged which caused them to incur expenses. The failure of the Laboratory to meet the specifications has also caused X-Ray to redesign and substantially replace the HVAC system that was designed and installed.

[32] Although it was not in dispute, it came out in cross-examination by Queen's Counsel Mr. McBean that there was no written formal contract with Mr. Nelson and BNA on the one hand and X-Ray on the other, and no written contract between Arel and BNA. In fact, Dr. Clarke admitted that there was no formal written contract with any of the other parties that participated in the Project, save and except for a formal written contract with Graham's Construction and Guttering Limited.

[33] Dr. Clarke was extensively cross-examined on the contents of the documents filed in the Court proceedings in the United States of America. I am choosing not to embark on that line of questioning. However, I will say that the documents filed in the United States of America solely blamed GE for the failure of the Laboratory meeting the specifications. Learned Queen's Counsel Mr. McBean asked Dr. Clarke about the accuracy of those documents and he admitted that the information contained in the said documents filed in Florida were not true and he spoke to his Attorneys in the United States regarding same.

[34] Dr. Clarke admitted on cross-examination that BNA sought feedback from GE on their drawings and it was not met with approval. Mr. McBean Q.C. suggested to Dr. Clarke that Mr. Wentz, representative of GE, was the Project Manager after taking the witness to an email which described Mr. Wentz as 'General Electric Project Manager.' Dr. Clarke disagreed with this suggestion. Queen's Counsel brought various documents to the attention of Dr. Clarke where it was said that Mr. Wentz and/or GE was the one who initiated and recommended the change from 100% fresh air system. Dr. Clarke agreed with Queen's Counsel that there is no evidence refuting that Mr. Wentz and/or GE was the one who initiated the change.

[35] Dr. Clarke agreed with Learned Counsel Mr. Kelman that X-Ray always had a concern about cost in relation to the project. He also maintained on cross-examination that X-Ray did not have overall authority for the Project and that they always relied on their experts. In fact, Dr. Clarke did not agree with evidence that was elicited from his own expert witness, Mr. Clint Franks.

Mr. Ronald Graham

[36] Mr. Graham, a Businessman and Building Contractor, stated that his company, Graham's Construction & Guttering Imaging Limited, was engaged by X-Ray to, *"retrofit, add to and renovate a building at 3 Ripon Road, Kingston 5, St. Andrew, with a view to X-Ray taking steps to establish a molecular imaging centre and nuclear laboratory…"* Graham's Construction retrofitted and renovated the building

strictly in accordance with the computer-aided design drawings prepared by Mr. Dennis Morrison which were based on the design of BNA.

[37] Mr. Graham also stated in his evidence-in-chief that he was aware that after he completed the work he was engaged to carry out at 3 Ripon Road, there were various issues including excess humidity and condensation and also temperature and pressure issues. He concluded that these issues have resulted from technical errors by BNA or Arel who supplied a HVAC system since the Laboratory was finished in accordance with the design of the electro-mechanical engineer BNA. He further stated that there was no lack of oversight by his company, or any faults or issues in respect of the building envelope according to the electro-mechanical design. He also stated that there were no further cracks in the building.

[38] Counsel for BNA and Arel objected to the conclusion put forward by Mr. Graham on the basis that he was not appointed as an expert witness in the matter. However, it is for me to decide what weight, if any, to attach to the evidence given by Mr. Graham. A witness may give an opinion with respect to his or her level of experience and again, it is for the Court to decide what weight will be attached to the evidence given. Mr. Hylton Q.C. proceeded to question the witness on his experience as a Building Contractor. Mr. Graham's response was that he was in the business for approximately thirty-seven (37) years and he worked as a child with his father doing construction. He studied construction at the University of Technology and has been the sole director of his company since 2008.

[39] On cross-examination, Queen's Counsel Mr. McBean suggested to Mr. Graham that there were faults and issues in respect of the building envelope which he described as the perimeters. He defined the perimeters as being the four walls of the building. Mr. Graham stated that as far as he is concerned, all air cracks in the building envelope were sealed.

Dr. Collie Miller

[40] Dr. Miller is a Medical Physicist by profession. He stated that he has no experience in electro-mechanical engineering and it was not his responsibility to ensure that the Laboratory was designed so as to guarantee safety and reduce any risk of radioactive fallout in the event of an accident in the Laboratory. He also maintained that he never advised BNA or Mr. Nelson on any electro-mechanical matters regarding the Project nor did they consult him. Electro-mechanical engineering is not his area of expertise. It is also his evidence that he was not involved in the construction of the Laboratory or the installation of the HVAC System.

[41] Dr. Miller was cross-examined by Queen's Counsel Mr. McBean and he clarified that his involvement with the International Atomic Energy Agency was as Principal Medical Physicist for the Ministry of Health to establish a legislative framework.

[42] Dr. Miller was not cross-examined by Mr. Kelman as he gave no evidence against his client.

Mr. Dennis Morrison

[43] Mr. Morrison is an architect by profession and has been a registered architect in Jamaica since 2002. He was engaged by X-Ray in respect of preparing drawings for and in respect of expanding, retrofitting, improving and renovating the building for the Project. His role in the Project was to ensure the proper design of the building for the Project. His evidence was that he sent computer-aided drawings to GE and they made amendments to same and it was one of those designs that Graham's Construction implemented.

[44] Learned Queen's Counsel Mr. McBean suggested to Mr. Morrison on cross-examination that there were recurring problems with the building envelope and that he was aware of the problems with the building envelope. Mr. Morrison was not in agreement with these suggestions. Queen's Counsel showed documentary

evidence to Mr. Morrison to demonstrate that he was aware of the defects and problems with the building envelope.

[45] This witness was also not cross-examined by Learned Counsel Mr. Kelman as he too gave no evidence against his client.

Mr. Delvert Wallace

[46] Mr. Wallace is a Quantity Surveyor and he was engaged in or about April 2015 by X-Ray to provide Quantity Surveying services in respect of the Project. He attended and chaired various site meetings in respect of the Project. He took notes during the course of the meeting.

[47] He was cross-examined by Learned Queen's Counsel Mr. McBean. Learned Counsel Mr. Kelman did not cross-examine this witness as he gave no evidence against his client.

Mr. Lockland Dunkley

[48] Mr. Dunkley is a Biomedical Technician and Electrical Technician since 1978. His evidence regarding the HVAC System as installed was that the reliability of it was brought into question as it failed to operate in a chained controlled system. His evidence is that he arrived to this conclusion after making various observations and carried out inspections of the HVAC System. Mr. Dunkley noted that on December 7, 2018 the HVAC System failed in that there was moisture (from condensation) on the walls and surfaces of equipment, temperatures and pressures were high and outside acceptable ranges of the specifications.

[49] It was also Mr. Dunkley's evidence that as a result of multiple and persistent failures to meet the specifications X-Ray consulted with Mr. Franks to identify the causes of these failures and recommending possible solutions. He, however, admitted on cross-examination that he was aware that the system design of a recirculated air system was the reason why the HVAC System did not meet the

specifications. On cross-examination Mr. Dunkley admitted that he had never designed a HVAC System nor had he ever installed one. It was also clear that he had never installed or programmed the Building Management Systems control of a HVAC System and he agreed that the Building Management Systems does not affect the inability of the HVAC System to meet the specifications.

Ms. Sonia Brown

[50] Ms. Brown is the Business Manager of X-Ray since 2000. She was aware that X-ray engaged in 2015 the services of BNA as the electro-mechanical engineer and Arel to provide, install and commission the equipment. She attended various meetings, including the virtual meetings, and took handwritten notes at same. On cross-examination by Mr. McBean Q.C. she admitted that persons present at the meeting would not have checked the accuracy of the handwritten notes.

[51] During examination-in-chief she stated in relation to the change from the initial design of the HVAC System that Dr. Clarke had expressed concerns about the cost and asked whether there was a less expensive alternative. She made it clear that Dr. Clarke's concern was not about the 100% fresh air but about a less expensive cost. She said the statement of Mr. Francis, where he says in his expert report that *'the business plan was prepared with largely no independent data to support its contents,'* was inaccurate. She was the one who prepared the Business Plan and she did so with data from Arel through Mr. Spence, IQMS and GE.

[52] She also admitted on cross-examination that the GE Project Manager was Mr. Wentz and he played a role in the Project.

Mr. Andre Sutherland (Expert Witness)

[53] Mr. Andre Sutherland was appointed as an Expert Witness by this Court on the 7th day of July, 2020. His findings are contained in report dated February 26, 2020. Mr. Sutherland prepared two supplemental reports dated April 13, 2021 and May 31, 2020. He is a Chartered Accountant by profession and a member of the

Association of Chartered Certified Accountants and a Chartered Business Valuator. Mr. Sutherland has a Bachelor of Science in Applied Accounting from Oxford Brookes University and he has experience in valuation services and litigation support and investigative services.

[54] His Expert Report focused on quantifying any potential economic damages, such as lost profits suffered as a result of the alleged actions of the Defendants. It is important to note that he did not provide his opinion on liability. In his report, Mr. Sutherland relied on the Business Plan. This Business Plan was prepared and given to him by X-Ray. Mr. Sutherland gave evidence that he reviewed it and tested it for reasonableness. On cross-examination, Mr. Sutherland admitted to not being a member of the Institute of Chartered Accountants of Jamaica and he has worked outside of Jamaica since earning his degree from the Oxford Brookes University. He also admitted on cross-examination that he was unaware of who prepared the Business Plan and unaware of their qualifications.

[55] On examination-in-chief, Mr. Sutherland stated that in calculating the loss he excluded X-Ray's optimistic scenarios from his analysis and he incorporated discounts and applied risk adjustments.

[56] Mr. Sutherland told Mr. Kelman during cross-examination that the information he relied on in calculating lost profits was a document which is used in common practice for Certified Public Accountants around the world and not just for American Practices.

Evidence for Mr. Nelson and BNA

[57] Mr. Nelson and BNA called two (2) witnesses, one of which was an expert witness. Their evidence is summarized below.

Mr. Horace Nelson (Expert Witness)

[58] Mr. Horace Nelson was appointed as an Expert Witness on the 4th day of March, 2021. I will refer to him as Mr. Horace Nelson so as to not cause confusion with the 1st Defendant, who is referred to as Mr. Nelson throughout this judgment. His findings are contained in an Expert Report dated April 15, 2021. He is a Consultant Engineer in Jamaica and has a Bachelor of Science in Mechanical Engineering from the University of the West Indies.

[59] In his report he stated that:

> *"Had the installer been given sufficient time to commission the unit (that is to get it working to the required specifications) after installation, all required parameters would have been achieved, namely Humidity, Pressure and Temperature."*

On cross-examination by Mr. Hylton Q.C. he clarified that the installer mentioned in the paragraph above is referring to Arel.

[60] Mr. Horace Nelson further stated that he consulted the website dedicated to HVAC for cyclotronic machines by GE and it stated that the room can either be 100% fresh or recirculated air. He noted that the cyclotron room at X-Ray is not architecturally designed for 100% fresh air and this he blames on the gypsum ceiling and other openings in the wall.

[61] During examination-in-chief, Mr. Horace Nelson, while commenting on the Expert Report of Mr. Franks stated that the admission of inexperience in the nuclear medicine field is nonsense because when you have an equipment that is affected by environmental conditions the original manufacturer usually gives information about the specification of what is required for that equipment to work properly. He goes on to note that there are factors in the design criteria that take into consideration everything in relation for the equipment to work. He also stated that you will get technical specifications with the equipment and it is those technical specifications that will be used as a guideline to design the equipment.

[62] Mr. Horace Nelson also stated in examination-in-chief that the HVAC equipment that he saw, *"…has more than enough capability of meeting the requirement of the space and the equipment and the people that would be occupying that space."* He does not agree with Mr. Franks' conclusion that the HVAC System does not have the ability to meet the specifications.

[63] Mr. Hylton Q.C. asked Mr. Horace Nelson on cross-examination whether he was aware that the International Atomic Energy Agency's position regarding the HVAC System is that recirculatory air is contaminated with radioactive particles. Mr. Horace Nelson's response was that he was aware but it depends on the filter that is used to recirculate the air. Queen's Counsel asked of Mr. Horace Nelson whether he was aware of the International Atomic Energy Agency's position and not whether he was aware that the air is contaminated. His response was that he was not aware of their position. Mr. Horace Nelson also stated, during cross-examination, that based on his research, recirculated air can be used for the Project as long as you use a filter.

Mr. Nicholas Wood

[64] Mr. Nicholas Wood was at all material times employed by BNA as an Engineer. He is an Engineer by profession since 2014. He was integrally involved in the Project and was in constant communication with representative(s) from X-Ray, GE and IQMS. His evidence is that when X-Ray engaged the services of BNA, both BNA and Mr. Nelson made it clear to Dr. Clarke that they would not be engaged to guarantee safety and reduction of radioactive fallout in the event of an accident at the Laboratory. It was Dr. Clarke who agreed that the responsibility for ensuring same rested with GE, IQMS and Dr. Collie Miller. At this time, Dr. Clarke also said that representative from GE and IQMS were the overseas experts who had implemented the system on numerous occasions and had knowledge of associated systems and requirements and would therefore provide the requisite expertise and oversight in the implementation of the Project.

[65] It was he who designed the initial HVAC System, that is the system that used 100% fresh air. In his examination-in-chief, he stated that it is totally inaccurate to say that he was the one who raised the possibility for the Laboratory using less than 100% fresh air. He went further to say that it was Mr. Wentz of GE who raised that possibility. On examination-in-chief-, Mr. Wood stated that he was told by Dr. Clarke, Ms. Sonia Brown and Dr. Collie Miller to review and change the design of the HVAC System. Mr. Wood's evidence is that BNA changed the design from 100% fresh air to a recirculatory air system.

[66] On cross-examination by Queen's Counsel Mr. Hylton, Mr. Wood stated that he did not play any role at all in decision or directive to change the initial design from 100% fresh air and it was Dr. Clarke who expressed explicitly to him to make the change to the initial design and he executed the design as requested.

[67] Mr. Wood told Mr. Hylton Q.C. that he did his own independent research in relation to the Project and was aware of the International Atomic Energy Agency. However, he did not agree with the evidence of Mr. Horace Nelson that he was able to find the specifications online. He also stated during cross-examination that during his research he found little to no deviation from 100% fresh air system.

[68] Queen's Counsel Mr. Hylton suggested to Mr. Wood that the correspondence between BNA and GE does not show that GE gave BNA directives or orders. Mr. Wood disagreed with this suggestion.

Evidence for Arel

[69] Arel called three (3) witnesses and only one (1) was an ordinary witness. The evidence of the witnesses is summarized below.

Mr*. Michael Heron*

[70] Mr. Michael Heron is a Mechanical Engineer by profession and has been working in the HVAC industry for the past 33 years. He worked at Arel as a Mechanical

Engineer designing and selling air conditioning systems and is currently Director for Air Conditioning Sales & Service. He said that Arel was involved in the Project in 2 aspects. Firstly, in their capacity as local Authorized Distributor for GE Healthcare to supply and install medical equipment for use at X-Ray. Mr. Heron claims that he was not involved in this aspect of the Project and in any event, this aspect is not the subject of the claim before this Court. The second aspect and the one relevant to the claim before this Court is for the supply and installation of HVAC equipment per BNA's drawings and specifications.

[71] It was based on BNA's drawings and specifications that Arel proceeded to prepare quotations on the various types of HVAC equipment as requested by BNA. Initially Arel sent BNA quotations for a unit that used 100% fresh air. However, they were instructed by Mr. Wood to send instead, quotations for a unit with a return air system. After that quotation was sent, BNA accepted the revised quote and instructed Arel to commence the installation of the HVAC System.

[72] Mr. Heron stated that BNA was the only HVAC Consulting Engineer and Arel was sub-contracted to handle the installation of the system. He maintained that Arel's role in the Project was strictly to supply and install what was designed, specified and shown on the mechanical drawings by BNA.

[73] Mr. Heron maintained in examination-in-chief that Arel was not party to the decision to change from a 100% fresh air system and in fact, they had little interaction with Mr. Wentz of GE. Arel interacted mainly with BNA.

[74] On cross-examination by Mr. Hylton Q.C, Mr. Heron admitted that he did not know of the dangers associated with radiation technology. He was aware that there were dangers but not what the specific dangers were. He was also not concerned with the risks as the portion of the Project that he was involved in would be to supply and install the equipment and he *"would be leaving right after that."*

[75] Mr. Hylton Q.C. asked Mr. Heron if it was his position that if BNA said to make a change, Arel would make it regardless of the consequence of health, safety or business. Mr. Heron's response was, *"Not quite Counsel. If it is obvious to me as the lead engineer on this Project, if it is obviously, abundantly obvious that it is going to reflect a health of the operating parties then I would be so disposed to bring to the attention of the Consultant the need to relook at the choice of the equipment or devices."*

[76] Mr. Hylton Q.C. suggested to Mr. Heron that Arel had a duty to ascertain whether the system it was supplying and installing was capable of attaining and maintaining the required specifications and whether it was safe. Mr. Heron disagreed with that suggestion. Mr. Heron also disagreed with the suggestion by Queen's Counsel that Arel had a duty to advise X-Ray having ascertained whether the system was capable of attaining and maintaining the required specifications and whether it was safe.

Mr. Eric Hudson (Expert Witness)

[77] Mr. Hudson was appointed as an Expert Witness on the 4th day of March, 2021. His findings are contained in an Expert Report dated the 21st day of April, 2021. Mr. Hudson is a Professional Mechanical Engineer with 50 years of experience in the field. He has a Bachelor of Science in Mechanical Engineering from Liverpool Polytechnic in England and is currently a member of the Jamaica Institution of Engineers. His report lists him as having experience in the maintenance, designing, specifying and supervising the installation of and commissioning of HVAC Systems.

[78] In his professional opinion the HVAC Contractor is not the one to advise on the design of the HVAC System. HVAC Contractors are to install the system that has been designed by the Engineers. He concluded that the HVAC System purchased and installed by Arel was adequate in capacity and therefore would have been appropriate and fit for the purpose of the HVAC System as specified by BNA and

Mr. Nelson. Mr. Hudson also opined that the management of the coordination of the input of GE, IQMS, BNA and Arel of the designing, specifying, procuring, installing, modifying, testing and commissioning of the required HVAC System was not properly done. He goes on to state that the responsibility of same was on X-Ray.

[79] Mr. Hudson also stated that the changes made to the HVAC System was a *"a fundamental and gross error."* The HVAC System as installed could not and will not work. He further states that makeshift and ad hoc changes will not be sufficient to transform the HVAC System as installed to attain and maintain the specifications. However, on cross-examination by Mr. McBean Q.C. he admitted that if major modifications were made then the HVAC System could be converted to 100% fresh air.

Mr. Trevor Francis (Expert Witness)

[80] Mr. Francis was appointed as an Expert Witness and he prepared 2 Expert Reports dated April 16, 2021 and June 4, 2021. He is a Fellow Chartered Accountant in Jamaica and is duly licensed by the Institute of Chartered Accountants of Jamaica. He is also a certified Public Accountant in the United States of America. He has over 23 years of experience as a practicing accountant and has a Bachelor of Science in Accounting from DeVry University.

[81] Mr. Francis in preparing his expert report did not rely on X-Ray's Business Plan even though he admitted in cross-examination that the American Institute of Certified Public Accountants published guidance listed it as one of the things to be considered. He heavily criticised the expert report of Mr. Sutherland and stated that, *"In my opinion, the extensive use by Mr. Sutherland of the Claimant's 7-year-old Business Plan (dated May 2013) as the primary basis for his calculation of the alleged "economic" damages is a major error."* He went on to state that there is no disclosure in Mr. Sutherland's report that the Business Plan was prepared by an independent third party or that it was prepared by an independent professional.

Mr. Francis also criticised the use of Mr. Sutherland's report where he used the 'but for' basis in calculating the loss.

[82] He maintained throughout his evidence that the Mr. Sutherland's report is based on projections and profitability from the prior performance of X-Ray and these are based on the audited financial statements preceding the Business Plan. He stated that he used third party primary source information to estimate X-Ray's share of the market.

[83] In calculating X-Ray's loss Mr. Francis stated that he took into consideration that all of X-Ray's audited and unaudited financial statements contain significant and material omissions. He nevertheless with the material that he had analysed and in his opinion arrived at the quantum of loss of profits allegedly suffered by X-Ray.

SUBMISSIONS

[84] I wish at this time to thank all Counsel involved in this matter for their very helpful written submissions which provided invaluable assistance to the Court in deciding the issues raised in this claim. I also wish to make it known that I carefully considered all the submissions and authorities before me whether they have been referred to or not.

CLAIMANT

[85] X-Ray's position is that all the Defendants owed them a duty of care, all the Defendants breached that duty of care and the Defendants are all jointly and severally liable to pay damages. Queen's Counsel submitted that:

> *(a) Mr. Nelson and BNA owed X-Ray a duty of care which included designing a HVAC which is adequate for the purpose of attaining and consistently maintaining the specifications;*
>
> *(b) Arel owed X-Ray a duty of care which included supplying and properly installing a HVAC which is adequate for the purpose of attaining and consistently maintaining the specifications;*

(c) The Defendants all breached their duty to X-Ray;

(d) The Defendants are jointly and severally liable to pay the Claimant damages in the amounts of $US1,765,000.00, US$191,500.00, US$261,833.24 and JMD$2,140,570.56;

(e) Interest at a rate of 6.95% per annum should be awarded on the said sums of $US1,765,000.00, US$191,500.00, US$261,833.24 and JMD$2,140,570.56 from 20th May, 2019 to the date of judgment;

(f) Arel's counterclaim should be dismissed, or, alternatively, set off against the damages awarded to X-Ray; and

(g) Costs should be awarded to X-Ray on the claim against the Defendants jointly and severally, and the counterclaim against Arel, with a certificate for 3 counsel.

[86] Mr. Hylton Q.C. contended that the Florida proceedings and its pleadings are irrelevant to the present case and ought to be ignored. As such the Court should only consider the statements of case and evidence before it.

[87] Queen's Counsel Mr. Hylton also submitted that the root cause of the problem was the decision to change the HVAC system to a recirculated air system. They maintain that it was not their client who brought up, made or initiated this change. Learned Queen's Counsel also submitted that Mr. Wentz was not Project Manager for the Project.

[88] The first issue argued by Queen's Counsel Mr. Hylton was that Mr. Nelson and BNA held out themselves as professionals in a highly specialized field. He further argued that BNA and Mr. Nelson assumed the responsibility to provide these professional services and X-Ray relied on this. The relationship between the parties was sufficient, without more, to give rise to a duty on the part of the persons providing the services to exercise reasonable skill and care in doing so. They relied on the case of **Mirant-Asia Pacific Construction (Hong Kong) Ltd an another v Ove Arup & Partners International Ltd and another** [2004] All ER (D) 12 (Oct) where the court held, applying the House of Lords' judgment in **Henderson v Merrett Syndicates Ltd** [1994] 3 All ER 506, that where a person assumed

responsibility to perform professional or quasi-professional services, they are in the same position as bankers, solicitors, surveyors, valuers and accountants. Therefore, where such a responsibility is assumed for another who relied on those services, the relationship between the parties was itself sufficient, without more, to give rise to a duty on the part of the person providing the services to exercise reasonable skill and care in doing so.

[89] Mr. Hylton Q.C submitted that regardless of whether anyone directed BNA to change the design, BNA and Mr. Nelson were negligent in changing it. They relied on the evidence given by Mr. Hudson and Mr. Heron. Counsel further submitted that even if BNA and Mr. Nelson had been advised or directed to change the design they would still be liable. They relied on the case of **Equitable Debenture Assets Corporation Ltd v William Moss Group Ltd** [1984] 2 ConLr 1 to show the principle that a professional cannot delegate his responsibilities.

[90] In respect of Arel, Queen's Counsel submitted that the same principles in relation to BNA and Mr. Nelson apply to Arel as well. Arel has sought to downplay its involvement in the Project but the evidence contradicts that. The documentary evidence demonstrates that Arel was directly and centrally involved in the Project long before its services were engaged. In fact, on cross-examination, Mr. Heron admitted that he personally gave advice on behalf of Arel regarding temporary solutions for the Laboratory and it is in those circumstances that Queen's Counsel submitted that Arel owed a duty of care to X-Ray.

[91] Queen's Counsel contended that Arel was not merely a supplier and installer of equipment. Arel was aware that the Project required 100% fresh air system and Mr. Heron admitted that he was aware that the system design was important due to the nature of the Laboratory. Arel had a duty to advise X-Ray against making the change. Instead Arel confirmed to X-Ray that the redesigned unit was appropriate causing X-Ray to sign off on it.

[92] Queen's Counsel further contended that Arel was negligent or in breach of contract in two other respects, namely failing to complete the installation of the control system and failing to balance the HVAC system.

[93] Submissions were also made in respect of damages and interest. They relied mainly on the evidence given by the Expert Witnesses. These submissions are further dealt with in issues (f) and (g) of this judgment.

[94] Queen's Counsel also relied on the following cases: **Villienevue and another v Gaillard and another** [2011] UKPC 1; **Pfizer Limited v Medimpex Jamaica NMF Pharmaceuticals Limited (Trading as Mac's Pharmaceuticals and Lasco Distributors Limited** [2017] JMSC Civ. 162; **Tate & Lyle Food & Distribution Ltd v Greater London Council & Anor** [1981] 3 ALL ER 716; **British Caribbean Insurance Company Limited v Delbert Perrier** (1996) 52 WIR 342; **Peter William (Snr.) et al v United General Insurance Company Limited** SCCA No. 82 of 1997, delivered 30th November 1998 (unreported); **Casilda Silvest & Anor v Rupert Ellis & Anor** [2015] JMSC Civ 63; **B.P. Exploration Co. (Libya) Ltd v. Hunt (No. 2)** [1983] 2 A.C. 352; **Gordon Stewart v Goblin Hill Hotels Limited & Ors** [2016] JMCC COMM 39; and **Day v Day** [2006] EWCA Civ 415.

1ST & 2ND DEFENDANT

[95] Queen's Counsel Mr. McBean outlined several issues to be determined by the Court. Firstly, he submitted that the credibility of X-Ray's main witness and their case as a whole has been severely undermined and discredited by the evidence of the US lawsuit and the evidence given. He contended that the statements of the lawsuit in the USA are inconsistent with the statements in the instant suit and those statements should be treated as inconsistent statements under sections 16 and 17 of the Evidence Act. The evidence relating to the US lawsuit shows that X-Ray is blaming the GE companies solely for negligence and breach of contract in relation to the inability of the Laboratory to attain and maintain the specifications. The lawsuit describes GE as being the Project Manager and it was the representatives

of GE that directed or suggested the change from 100% fresh air system. On cross-examination by Mr. Kelman, Dr. Clarke agreed that the documents were inconsistent and there were contradictions between them. However, Learned Queen's Counsel argued that Dr. Clarke's explanation in cross-examination regarding the inconsistencies is not plausible and highly improbable. Having regard to that, Mr. McBean Q.C. submitted that X-Ray's case has been so discredited on material issues. X-Ray has failed to prove its case to the required standard and there ought to be judgment in favour of his clients.

[96] Notwithstanding that, it was contended by Mr. McBean Q.C. that the evidence shows that the change in the design of the HVAC system was made or directed by GE with the consent of X-Ray. Queen's Counsel relied on email correspondence to show that X-Ray had controlled and facilitated the exchange of information between key participants in the Project, particularly between his clients and GE. They relied on the evidence of Mr. Wood where he admitted that he was not the one who commented or recommended the change to the HVAC system and it was Mr. Wentz who raised the possibility of the change. They also relied on the evidence of the Expert Witnesses, particularly Mr. Franks, who on cross-examination agreed that the building owner X-Ray would have been the decision maker on matters including cost and equipment.

[97] Secondly, Queen's Counsel submitted that the evidence shows that GE was the Project Manager and with X-Ray's consent, GE assumed responsibility for the management and oversight of the Project. It was further submitted that IQMS provided expertise on radiation control and safety with the consent of X-Ray. Learned Queen's Counsel relied on the evidence of Mr. Wood, which is outlined at paragraphs 64-68 of my judgment.

[98] Thirdly, it was argued that Mr. Nelson is not liable in his personal capacity as the evidence shows that communication was between BNA and X-Ray and not between Mr. Nelson personally and X-Ray. It was further argued that in any event, X-Ray's position is that Mr. Wood is the one who initiated the change to the HVAC

system and there is no allegation that Mr. Nelson did so in his personal capacity. Learned Queen's Counsel relied on the case of **Bolam v Friern Hospital Management Committee** [1957] 1 WLR 582 to show that in any event, Mr. Nelson did not hold himself out as competent in relation to a nuclear laboratory and as such he should not be held liable for negligence or breach of contract.

[99] Submissions were also led by Learned Queen's Counsel regarding the principle of non-delegable duties. It was submitted that the principle does not apply as neither Mr. Nelson or BNA were engaged by GE and IQMS as independent contractors and it was Dr. Clarke who engaged and directed GE to be Project Manager and it was GE who initiated and directed the change from 100% fresh air system.

[100] Learned Queen's Counsel submitted that it was never his clients' responsibility or duty to issue instructions to the architect and contractors in relation to the building, as same falls outside of their purview of expertise and responsibility on the project. X-Ray's assumption of the role of Project Manager therefore vested in them, that is X-Ray, the authority, responsibility and duty to ensure proper coordination and communication among all parties on the Project.

[101] Queen's Counsel also argued that the inability of the HVAC System to meet the specifications was caused by factors other than the negligence or breach of contract on the part of his clients. Those factors he submitted would be the problems/defects in the building envelope.

[102] Queen's Counsel submitted that Mr. Nelson and BNA ought not to be found liable for negligence or breach of contract and judgment should be entered in their favour. Counsel made further submissions on damages in the event that the Court has to consider same. Those submissions are dealt with under issues (f) and (g) of this judgment.

[103] Queen's Counsel also relied on the following cases: **Meridian Global Funds Ltd v Securities Commission** [1995] 2 AC 500 PC; **Global Development v Beverley**

McNaughten, Keith Lumsden, Louis Douet and Construction Developers Associates Limited [2011] JMCA Civ 26; **Woodland v Swimming Teacher's Association** 2014 A.C. 537; **Management Corporation Strata Title v Tiong Aik Construction Pte Ltd** 2016 4 SLR 521; and **Mears Ltd v Costplan Services (South East) Ltd & others** [2019] EWCA Civ. 502.

3RD DEFENDANT

[104] Counsel for Arel invited the Court to make the following findings of fact:

(a) Arel did not assume any responsibility for the designing of the HVAC system in the Claimant's Laboratory;

(b) From the start of the project, the Claimant has costs concerns about the 100% fresh air system which was initially designed;

(c) Arel was not party to the decision to change from 100% fresh air design to return air design;

(d) The decision was made at a meeting on November 26. 2015, between Richard Wentz and Nicholas Woods, at which Arel was not present;

(e) The change from 100% fresh air design to a return air design was the cause of the failure of the Claimant's Laboratory to meet the specifications, and by extension, the Claimant's losses claimed;

(f) The Claimant was party to the decision to change the system design;

(g) Arel installed the correct exhaust fan;

(h) Arel was not provided with the requisite sequence to complete the Building Management Sequence (BMS) control system;

(i) It was impossible for Arel to balance the HVAC system that was designed by the 2nd Defendant and installed by Arel to achieve the specifications of a 100% fresh air system;

(j) Arel was not responsible for advising on the building envelop;

(k) Arel's engagement was limited to supplying, installing and commissioning the HVAC system designed by the 1st and 2nd Defendants;

(l) Arel was engaged to supply, install and commission a return air system; and

(m) The Claimant owes the sum of $6,964,705.88 for equipment supplied and services provided by Arel per its counterclaim.

[105] Counsel for Arel submitted that in order to prove that Arel was negligent, X-Ray must show on a balance of probabilities that, all 3 elements listed below must be established:

(a) Arel owed a duty of care to the Claimant;

(b) Arel breached the duty of care; and

(c) A breach of duty by Arel caused X-Ray's loss.

[106] It was submitted that there is no dispute that his clients owed X-Ray a duty of care in its installation of the equipment which his clients were engaged to install. Such a duty, they further submitted, is implied in the contract between the parties. However, they contend that Arel's duty of care is a limited one as they were engaged solely in the capacity of a HVAC contractor to supply and install equipment in accordance with the designs prepared by Mr. Nelson and BNA. The evidence does not show that Arel assumed any duty to advise X-Ray in relation to the design of the HVAC system. The evidence does not show that there was prior dependency or reliance on Arel for the change in the HVAC System. BNA and Mr. Nelson were the ones who were engaged as Consultant Engineers for the Project and Arel received all instructions regarding equipment supplied from them. Counsel contended that a non-delegable duty of care to the public and to X-Ray does not arise on Arel's part.

[107] Counsel contended that Arel was not engaged as a professional by X-Ray and therefore had no duty not to cause pure economic loss. X-Ray's pleadings are only for economic loss as there are no allegations of personal injury, physical loss or even damage.

[108] Mr. Kelman argued that in any event, the standard of care that ought to be applied in respect of his clients would be one of an ordinary HVAC Contractor. Although Arel has a multi-disciplinary company of engineers they were only engaged in that respect. This capacity does not fall within the meaning of "professions" in law and therefore they are to be held to that standard of care. Nevertheless, Learned Counsel Mr. Kelman submitted that the principles and standards applied in professional negligence cases are useful. He relied on the cases of **Bolam v Friern Hospital Management** and **Millen v University Hospital of the West Indies** 23 JLR 76.

[109] Counsel further submitted that based on the principle from **Sansom v Metcalf Hambleton & Co** [1998] 2 EGLR 103; 57 Con LR 88 at 95 as applied by the Privy Council in **Caribbean Steel Co Ltd v Pricewaterhouse (a firm)** [2013] 4 All ER 338 at 346, the Court should be slow to find a professionally qualified or skilled person guilty of negligence without expert evidence from those within the same profession or skill or trade as to the standard properly to be expected in the relevant circumstances. He argued that Mr. Franks is not an engineer and having never acted as a HVAC Contractor is not in the same profession or skill or trade as Arel and therefore there was no reliable evidence that any act or omission of Arel was something that an ordinary HVAC Contractor would and should not have done. He goes on to argue that the evidence of Mr. Hudson and Mr. Nelson established that Arel's performance did not fall below the standard of care and skill that could be reasonably expected of an ordinarily competent HVAC Contractor in Arel's position at the relevant time. Accordingly, no breach of duty on the part of Arel has been made out in the evidence.

[110] However, Counsel also made submissions in the event that the Court establishes that Arel breached their duty of care. He contended that even if a breach is established, causation is certainly not. Mr. Kelman relied on the text Halsbury's Laws of England, Damages (Volume 29 (2019) which outlined the *prima facie* test for causation, that is the 'but for' test. Under this test a head of damage is caused

by the Defendant's wrong if and only if it would not have happened but for the latter. If it would have occurred in any case, the Defendant is not liable for it. Counsel argued that the sole cause of the failure of the Laboratory to meet the specifications is the design to change from 100% fresh air. The evidence indicates that Arel was not party to the decision and there is no evidence that Arel advised X-Ray to change the design of the system. X-Ray's loss would have occurred regardless of the installation of the HVAC System as the evidence shows that it was impossible for the system to achieve the required specifications.

[111] Mr. Kelman also made submissions in respect of damages, which are dealt with under issues (f) and (g) of this judgment.

[112] Learned Counsel also relied on the following cases: **Robinson v PE Jones** [2011] EWCA Civ; **Woodland v Swimming Teacher's Association and others** (supra); **Henderson v Merrett Syndicates Ltd** (supra); **Pantelli Associates Ltd v Corporate City Developments Number Two Ltd** [2010] EHWC 3189; **Carol Blake v University Hospital Board of Management** [2018] JMSC Civ 95; **Cheavela Smith v The University Hospital Board of Management** [2018] JMSC Civ 108; **Dr. Veon Wilson v Victor Thomas** [2020] JMSC Civ 28; **Investors in Industry Commercial Properties v South Bedfordshire DC** [1986] 1 All ER 787; and **ZF Meritor, LLC v Eaton Corp** 696 F.3d 254 (3d Cir. 2012).

ISSUES

[113] The following issues arise for determination:

(a) What effect, if any, does the claim brought by the Claimant against General Electric Company and GE Healthcare Inc in the United States of America have on this present claim;

(b) Whether the 1st Defendant can be held liable to the Claimant for damages for negligence arising from the agreement between the Parties;

(c) Whether the 2nd Defendant can be held liable to the Claimant for damages for negligence arising from the agreement between the Parties;

(d) Whether the 3rd Defendant can be held liable to the Claimant for damages for negligence and/or breach of contract arising from the agreement between the Parties;

(e) The validity of the 3rd Defendant's counterclaim;

(f) What is the quantum of damages payable to the Claimant by the 2nd Defendant?;

(g) What is the quantum of damages payabe to the Claimant by the 3rd Defendant?;

(h) What is the appropriate interest rate to be applied to the quantum of damages payable to the Claimant by the 2nd Defendant?;

(i) What, therefore, is the appropriate costs order to be made?; and

(j) Is the Claimant entitled to a Special Costs Certificate?

LAW & ANALYSIS

A. *What effect, if any, does the claim brought by the Claimant against General Electric Company and GE Healthcare Inc in the United States of America have on this present claim?*

[114] Counsel for BNA and Mr. Nelson argued that the credibility of X-Ray's main witness, Dr. Clarke, and the Claimant's case as a whole has been, *"…severely undermined and discredited by the evidence of the US lawsuit and the evidence given…the statements of the Claimant company in the lawsuit in the USA which are inconsistent with the statements in the instant suit should be treated as inconsistent statements under section 16 and 17 of the Evidence Act…"*

[115] Counsel for BNA and Mr. Nelson further submitted that the evidence relating to the lawsuit in the USA solely blames GE for negligence and breach of contract in relation to the inability of the Laboratory to attain and maintain the specifications required. Counsel further noted that the lawsuit expressly stated that GE was the project manager and it was the representatives of GE that directed or suggested the change from 100% fresh air system to a recirculatory air system.

[116] I note here that on cross-examination, Queen's Counsel Mr. McBean asked Dr. Clarke about the inconsistences with the instant case and the lawsuit in the USA. However, I am of the view that I need not embark on that line of questioning as the court proceedings in the United States of America are irrelevant to the matter before me.

[117] It is my view that the Court proceedings in the United States of America are irrelevant to these proceedings and therefore has no effect on the case before me.

Professional Negligence

[118] It is trite law that in order for a claim in negligence to succeed, the Claimant must show that a duty of care was owed to them by the Defendant and the Defendant breached that duty which resulted in damage to the Claimant. The Court of Appeal in **Delroy Howell v. Royal Bank of Canada and others and Ocean Chimo Limited v. Royal Bank of Canada & others** Supreme Court Civil Appeal Nos 123 & 124/2015 agreed with the conclusion set out by the trial judge itemising the principles gleaned from the case of **Hedley Bryne & Co Ltd v Heller & Partners Ltd** [1964] AC 465. The trial judge discerned six (6) principles from the said case as follows:

> *(a) If a person possessed of a special skill undertakes to apply that skill to assist another person who relies on that skill, a duty of care will arise.*
>
> *(b) If a person gives advice or information to or allows such advice or information to be passed on to another who he knows or ought to know will rely on it in circumstances where the advisor is in such a*

position that others could reasonably rely on his judgment, skill or abilities to make careful inquiry, a duty of care will arise.

(c) Special relationships which may give rise to a duty of care is not only restricted to contractual relationships but also includes relationships where there is an assumption of responsibility, in circumstances where but for the lack of consideration there would have been established a contract.

(d) In that regard there may be an expressed undertaking or warranty or an implied undertaking or warranty.

(e) It is a responsibility that is voluntarily accepted or undertaken generally in a general relationship such as banker/customer, solicitor/client or specifically in relation to a particular transaction.

(f) If a service is performed, even if performed gratuitously, an action in tort may succeed if it is performed negligently.

[119] I found the case of **Bolam v Friern Hospital** (supra) to be instructive. This case has been accepted in our jurisdiction and the principles applied numerous times. The test is not confined to medical professionals and it has been used to determine issues of liability where professionals or persons with professional skills are concerned. In that case the Court considered the standard of care required of a medical professional. The test to be applied to determine whether there has been negligence or not in a situation which involves the use of some special skill or competence is the standard to be applied to the ordinary skilled man exercising and professing to have that special skill. One does not need to possess the highest expert skill as it is well established that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.

[120] The author in the text of **Charlesworth & Percy on Negligence**, 12th Edition, termed it the *"Bolam test."* I found the text to be useful, in particular chapter 9. I found the following paragraphs and excerpts to be useful:

"9-01 The "Bolam" test. If a task requires special skill, a reasonable man will not attempt it unless he possesses the skill in question. If he undertakes it is reasonable to expect that he display the same level of expertise as an ordinarily competent practitioner in the relevant specialty. The standard is reasonableness: "Every person who enters into a learned profession undertakes to bring to the exercise

of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill, there may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable and competent degree of skill.

9-02 … It follows that where a person holds himself out to be competent to do some special kind of job, an action for negligence will lie for damage which has been caused by any failure to exercise due care and skill, either by proving that the defendant did not possess the requisite skill or by showing that, although the skill may have been possessed, it was not exercised.

9-03 The standard of care and skill. In order to decide whether, on particular facts, the standard of care and skill of a person of ordinary competence in the relevant calling was achieved, it will be necessary to refer to professional practice or opinion in that expertise…

9-05 Expert Evidence. In deciding whether an appropriate standard of care and skill has been displayed, the opinions of experts, skilled in the calling in question, are admissible in evidence. The Court controls the reception of such evidence and has a duty to restrict it to that which is reasonably required to resolve the issues. An expert witness enjoys a privileged position. He or she is entitled to give evidence not simply of the facts of the case, where they are within knowledge, but also to express an opinion as to the significance of the facts. But with privilege comes responsibility. The expert must not usurp the position of the judge. Impartiality is essential even where it leads to conflict with the interests of the party giving instructions. In expressing an opinion, the expert must take into account the range of views which experts of like discipline could reasonably hold as to the facts.

9-06 In receiving evidence as "reasonably required" to resolve a dispute about proper professional practice the court is not concerned to hear practising members of the professions in question say what they personally would or would not have done in the circumstances.

9-07 The duty of a court receiving evidence from experts on matters within their expertise is to examine it in a critical way to ensure it has a logical and defensible basis. Where one expert opinion is preferred to another, a court should support its preference with reasons.

9-08 Generality of the duty. The duty to exercise reasonable care and skill is applicable generally to everyone whose calling involves professional expertise including…engineers…"

[121] Mr. McBean Q.C. relied on the case of **Global Development** (supra) to show that the **Bolam case** has been cited with approval in our jurisdiction. He also relied on sections of paragraphs 60 and 87 which state that:

> *"[60] … In circumstances in which a professional person is employed to carry out work which is within his expertise, the law, by implication imposes a duty on him to employ reasonable care in the course of his employment….*
>
> *[87] … It was the duty and responsibility of the architect and the engineer in their supervisory role to have ensured that the works had been correctly carried out. No liability in negligence ought to be assigned to the contractor."*

[122] The civil standard of proof still applies, that is, the Claimant must prove his case on a balance of probabilities. Paragraph 9-11 of the text **Charlesworth & Percy on Negligence**, states that the burden of proving professional negligence normally rests on the Claimant. However, the author goes on to note that there is a general duty of care and failure to take a recognised precaution, followed by damage of the kind which that precaution was designed to prevent, an evidential burden shifts to the Defendant to show either that there was no breach of duty or that the damage was not caused by the breach.

[123] It is for the Court to decide whether the Defendants acted in a manner that is expected from a person of ordinary care and skill engaged in the type of activity in which the Defendants was engaged.

[124] The principle relating to the duty of care owed by a professional or quasi professional was seen in the well-known case of **Henderson v Merrett** (supra). Where a person assumed responsibility to perform professional or quasi-professional services for another who relied on those services, the relationship between the parties was itself sufficient, without more, to give rise to a duty on the part of the person providing the services to exercise reasonable care in doing so. The House of Lords found that a tortious duty of care arises where there is an assumption of responsibility by a person rendering professional services or quasi-professional services coupled with a co-existing reliance by the person for whom

the services were rendered. This duty of care arises irrespective of whether there was a contractual relationship between the parties.

[125] The principle emanating from **Henderson v Merrett** was applied in the case of **Mirant Asia-Pacific Construction** (supra). In that case, the Claimants had contracted with the Defendants for the construction of a coal fired power station. The Claimants brought a claim for breaches of contract against the Defendants for economic losses relating to design errors of the foundation. The Court held that the Defendants owed a duty of care to exercise due care and skill in the design of the foundations of the power stations and they had not taken reasonable care in exercising the duty of care owed. Consequently, the Defendants were held liable for the economic losses suffered by the Claimant.

[126] An essential element of negligence must be for the Claimant to show causation between the alleged breach and the damage suffered. Anderson J in the case of **Elita Flickenger (Widow of the deceased Robert Flickinger) v. David Preble (T/AS Xtabi Resort Club & Cottages and Xtabi Resort Limited** Suit No. C.L. of 1997/F-013 stated that the Claimant must, as a matter of law, establish a causal connection between the injury suffered and the conduct of the Defendant. Anderson J quoted Lord Hoffmann, writing in the Law Quarterly Review ([2005] LQR 592 at 596-597) as follows:

> *"First, it is usually a condition of liability that not only should one have done, or been responsible for, some act which the law regards as wrongful, but that there should be a prescribed causal connection between that act and damage or injury -. for which one is held liable. There may be other conditions as well, such as that the harm should have been foreseeable. But some prescribed causal connection is usually required. Secondly, the question of what should count as a sufficient causal connection is a question of law..."*

[127] Panton, P in **The Attorney General v Phillip Granston** [2011] JMCA Civ 1 opined that: -

> *"It is trite law that the burden of proof of negligence is on a claimant and also, as a matter of law, the onus of proof of causation is on the claimant. That is, the claimant must establish on the balance of probabilities, a causal connection between his injury and the defendant's negligence. For him to succeed he must show that the [tortious] act materially contributed to his injury…"*

[128] This causal connection is known as the "but for" test. In other words, but for the Defendant's action the injury would not have occurred. A Defendant therefore cannot be held liable where the Claimant is unable to prove that on a balance of probabilities injury would not have occurred but for the Defendant's action. This is the hurdle that X-Ray must therefore cross. X-Ray has to prove, on a balance of probabilities, that but for Mr. Nelson, BNA and Arel's actions they would not have suffered damage.

[129] I also found the case of **Equitable Debenture v William Moss Group and Others** (supra) to be useful. His Honour Judge John Newey QC held that a term should be implied into the contract between the Defendant, who was an architect, and the Plaintiff that, the contractor should report design defects known to him. The facts of the case are that one of the Defendants, Morgan, was appointed as architects to build an office block. Sub-contractors were also hired and they negligently designed the curtain walling. Nothing was said before or when the contract was made to exclude or restrict the term normally to be implied in contracts for the engagements of architects that the defendant would exercise the skill and care of reasonably competent architects. In the absence of agreement to the contrary, architects cannot escape their liability by delegating their duties to others. Morgan was held liable for breach of contract and negligence in respect of defective design, inspection and supervision. The Court also found that even if there has been perfect workmanship, the design of the curtain walling would have resulted in it leaking.

[130] In the case of **Sansom v Metcalf** (supra) it was held that a Court should be slow to find a professionally qualified man guilty of a breach of skill and care towards a client without evidence from those within the same profession as to the standard expected on the facts of the case and the failure of the professionally qualified man to measure up to that standard. The Court in this case had to consider whether they were entitled to make a finding of professional negligence against a chartered surveyor based on the evidence of a structural engineer. The Court of Appeal found that the trial judge did not have the evidence upon which he would have been able to make a finding of professional negligence.

[131] This principle can be seen in the case of **Investors in Industry Commercial Properties v South Bedfordshire** (supra). In that case a claim for negligence was brought against a firm of architects who were engaged to design 4 warehouses. A firm of structural engineers was also engaged to design the foundations of the warehouses. The expert evidence before the trial judge was given by 3 engineers and 1 architect. The Court of Appeal held that expert evidence from suitably qualified professional persons is admissible to show what competent architects in the position of the architects in the matter before them could reasonably have been expected to know and do in their position at the relevant time. The Court also held that unless there was appropriate expert evidence to support the allegation that the architects conduct fell below the standard which might reasonably be expected of an ordinarily competent architect, then the Court could not condemn them for professional negligence. Little reliance was therefore placed on the evidence of the 3 engineers, as the evidence given by them related to profession other than their own.

[132] Similarly, in **Pantelli Associates** (supra) it was held that where an allegation of professional negligence is to be pleaded, that allegation must be supported in writing by a relevant professional with the necessary expertise. It cannot be asserted that action by the Defendant was something that an ordinary professional

would and should not have done if no professional in the same field had expressed such a view.

[133] This principle was applied in the Jamaican case of **Caribbean Steel Co v Price Waterhouse** [2012] JMCA App 7; [2013] UKPC 18. The trial judge in this case preferred the evidence of the expert witness who did not have expertise in the particular area before him. The trial judge accepted the evidence in place of that of the professionals in the specific field. The decision of the Court of Appeal was that the trial judge fell into error in doing so. This decision was upheld by the Privy Council.

Non-Delegable Duty of Care

[134] In the case of **Woodland v Swimming Teacher's Association and Others** (supra) the Supreme Court held that are two broad categories of case in which a non-delegable duty of care arises. The author of the text, Tort: The Law of Tort (Common Law Series), 3rd Edition lists those categories as:

(a) The first being a large, varied and anomalous class of cases in which the defendant employed an independent contractor to perform some function which was either inherently hazardous or liable to become so in the course of his work; and

(b) The second category which comprised cases where the common law imposed a duty upon the defendant which had three critical characteristics. First, it arose not from the negligent character of the act itself but because of an antecedent relationship between the defendant and the claimant. Second, the duty was a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and not simply a duty to refrain from acting in a way that foreseeably caused injury. Third, the duty was personal to the defendant. The work

> required to perform such a duty might well be delegable, and usually was. But the duty itself remained the defendant's.

The author gives the following example: NHS hospitals owe their patients non-delegable duties of care which cannot be evaded by relying on skilled health care providers even if the negligent treatment is provided by an independent contractor NHS hospitals owe their patients non-delegable duties of care which cannot be evaded by relying on skilled health care providers, even if the negligent treatment is provided by an independent contractor.

Law of Contract

[135] The same circumstances that give rise to a cause of action against a professional in tort, may also give rise to a cause of action in contract. The author in the text **Charlesworth & Percy on Negligence** notes at paragraph 9-13 that in contract the duty arises from the agreement of the parties, while in tort the duty is independent of the agreement and is imposed upon the parties by law. It follows that an action in contract lies only between the parties to an agreement. Failure of completing the works which one has been employed to do may be evidence of negligence on the part of the person so hired.

[136] In the absence of an express term in a contract, there is an implied term that the professional or other skilled person will exercise reasonable care and skill in rendering the service contracted for.

[137] Even though it is not in issue, I wish to make the distinction between the cause of action that arises both under contract and tort. The Court in **Henderson v Merrett** held that where liabilities arise concurrently in tort and in contract it was open to the Claimant to emphasize the cause of action that was to his advantage. The existence of an underlying contract does not automatically exclude the general duty of care which the law imposes on those who voluntarily assume to act for others. The nature and terms of the contractual relationship between the parties

will be determinative of the scope of the responsibility assumed and can in some cases exclude any assumption of legal responsibility to the plaintiff for whom the defendant has assumed to act. In the case before me, on the pleadings the particulars of negligence is laid out against all the Defendants. However, they are claiming against Arel for a breach of contract.

[138] Similar to tort, causation in contract is governed by the 'but for' test. The Claimant must establish that but for the breach of contract he would not have suffered the loss. The Court must be satisfied that on the balance of probabilities the Defendant's actions caused the relevant harm. The breach of duty will not be a cause of the harm if the harm would have been suffered in any event.

B. *Whether the 1st Defendant can be held liable to the Claimant for damages for negligence arising from the agreement between the Parties*

[139] Both the 1st and 2nd Defendants are connected as the 1st Defendant was at all material times the Managing Director of the 2nd Defendant. They are also both represented by the same law firm. The issues surrounding liability of both Defendants are dealt with together in the submissions on behalf of X-Ray on the one hand and Mr. Nelson and BNA on the other. However, I chose to deal with both parties separately.

[140] This issue raises a sub-issue and that is whether Mr. Nelson, was engaged by X-Ray in his personal capacity and therefore can be held liable to X-Ray for damages for negligence and breach of contract.

[141] On X-Ray's pleadings they maintained that they relied on the expertise of Mr. Nelson and on an understanding that he would execute the work. However, Queen's Counsel for Mr. Nelson and BNA submitted that even though they do not dispute that his clients were engaged, Mr. Nelson was not liable in his personal capacity. It was further submitted that the documentary evidence in relation to critical issues shows communication by and with the 2nd Defendant Company and

not with Mr. Nelson in his personal capacity. Counsel made reference to paragraph 77 of the Witness Statement which he submitted shows that Mr. Nelson did not in his personal capacity initiate the change as it was Mr. Wood, an engineer employed to BNA, who was at the meeting when the change to the design was brought up.

[142] I agree with Counsel for BNA and Mr. Nelson that Mr. Nelson was not engaged in his personal capacity. The evidence shows that Mr. Nelson was acting in his capacity as Managing Director of BNA. The emails exchanged between Mr. Nelson and the other parties to the Project are all from BNA's company email. Mr. Nelson, was not the only one from BNA who was involved in this Project. BNA has sent various representatives on behalf of BNA throughout the duration of the Project. One such person being Mr. Wood who was employed to BNA and represented himself as such.

[143] BNA is a limited liability company and as such it is a separate legal entity from all individuals involved in the company (shareholders, owners, managers or directors). This is a well-established company law principle arising from the case of **Salomon v Salomon and Company** [1997] AC 22. Therefore, in my judgment, Mr. Nelson cannot be held liable in his personal capacity. At all material times, he was the Managing Director of BNA and acted as such throughout the duration of the oral agreement between the parties. There is no need for me to embark on whether Mr. Nelson can be held liable for damages for negligence and breach of contract.

[144] The Court at this time acknowledges the unfortunate passing of Mr. Nelson, who died on the 22nd of June 2022. The Court extends its condolences to his family and friends. However, I wish to assure all Parties that my decision was and is not based on sympathy as a result of the passing of Mr. Nelson.

[145] Subsequent to his death a Notice of Application for Court Orders to Appoint Representatives of the Estate of Basil Nelson (Deceased) was filed on the 2nd day

of September, 2022. Barnaby J on the 19th day of September, 2022 granted the application and ordered that Sybil Nelson and Basil Julian Saint Christopher Nelson be appointed as representatives of the estate of Basil Nelson in this claim.

C. *Whether the 2nd Defendant can be held liable to the Claimant for damages for negligence arising from the agreement between the Parties*

[146] The elements that X-Ray therefore needs to prove in order to succeed with respect to their claim for damages for negligence are that:

(a) BNA owed them a duty of care;

(b) BNA breached that duty of care; and

(c) They, being X-Ray, suffered damage as a result of the breach of that duty of care owed by BNA.

X-Ray's claim for negligence must therefore fail if they are unable to prove one or more of those three (3) elements.

[147] It is not in dispute whether or not BNA owed to X-Ray a duty of care. Even though there exists no written agreement or contract between the parties, there is sufficient documentary evidence which shows that an oral contract existed between the parties. X-Ray and BNA both agree that X-Ray engaged the services of either BNA in or about March 2015. I agree with Counsel for X-Ray that BNA are professionals in a highly specialized field, that is, they are electro-mechanical engineers. As such, BNA professes some special skill. Therefore, BNA must not only exercise reasonable care and skill, they must measure up to the standard of proficiency that can be expected from persons of such a profession.

[148] A duty of care therefore arises on BNA's part. Being a consulting engineer firm hired to provide electro-mechanical services to X-Ray, BNA ought to have known that X-Ray would rely on whatever advice or information they may give.

[149] BNA's position is that they were not in charge of the Project. They were to rely on information from GE, IQMS and X-Ray. They maintained throughout the trial and in their submissions that Dr. Clarke was the one who directed them to make the change and it was GE who told them that designing a system that does not use 100% fresh air could work and it was X-Ray who approved such design. Evidence from all the Expert Witnesses show that the system that was originally designed by BNA, that is the HVAC system which is to use 100% fresh air, would have been the appropriate HVAC system for the Project to attain and maintain the specifications. Mr. Wood himself said on cross-examination that he did independent research regarding the specifications which showed that the HVAC System for the type of works to be done at X-Ray used a 100% fresh air system.

[150] I accept the evidence of Mr. Franks and Mr. Hudson who both said that ultimately the decision in the redesign from 100% fresh air system to a less than 100% fresh air system ultimately rests with the design engineer. It is my opinion that the evidence of Mr. Hudson, outlined at paragraphs 53 and 54, in respect of this issue is more compelling. In my view, Mr. Hudson is the most qualified expert witness having had experience with the practices in Jamaica and having worked on similar projects that required the installation of a 100% fresh air HVAC System.

[151] BNA is the specialist in that regard and the final decision ought to have been theirs. X-Ray might have been party to the decision as it is their Project, however, BNA ought to have taken reasonable care and skill in advising X-Ray of the consequences of the said redesign.

[152] Mr. Woods himself admitted under cross-examination that it is the engineers who make the final decision on a design and it would be for both the engineer and the client to approve the design. Even if Mr. Wentz was the Project Manager, he was not employed as the electro-mechanical engineer to design the required HVAC system. There is no evidence to show that he was qualified as such or even engaged by X-Ray as such. The evidence shows that BNA was the electro-mechanical engineer hired to design the HVAC System.

[153] BNA, being the company possessing a special skill, owed a duty of care to X-Ray to ensure that the HVAC System they designed could attain and maintain the specifications given to them by GE. In fact, they had designed such a system in the first instance. BNA being the engineers hired to design the HVAC system ought to have brought it to the attention of X-Ray that any change in the design from 100% fresh air could result in the Laboratory not attaining and maintaining the specifications. Even though X-Ray may have approved the redesign of the HVAC system, they were not electro-mechanical engineers on the Project. They engaged the services of BNA to carry out work that they could not have done themselves. In my view, BNA breached the duty of care owed to X-Ray.

[154] As a result of the Laboratory not attaining and maintaining the specifications they have not been able to use it as intended. In fact, some of the services offered at the Laboratory are only operated a few times a month. I agree with X-Ray that the Laboratory is not operating in a commercially viable manner causing X-Ray to suffer damages.

[155] It is clear from the evidence that had the initial design of the HVAC System been installed, that is the design that used 100% fresh air, the Laboratory would have attained and maintained the specifications. Therefore X-Ray has established causation between the breach and the damage. In my view, but for the change in the initial design of the HVAC System, X-Ray would not have suffered any damage.

[156] In light of the reasoning above, I am of the view that BNA failed to exercise due care and skill and can therefore be held liable for damages for negligence.

[157] X-Ray contended that in the alternative that if BNA and Mr. Nelson had been advised to make the change, they would still be liable. On the other hand, BNA and Mr. Nelson argued that a non-delegable duty of care does not arise. I find merit in the arguments put forward by both X-Ray and BNA. The principle regarding non-delegable duty is related to vicarious liability and therefore in my view, it does not

arise in this case. The principle of non-delegable duty imposes liability on a Defendant for the negligence of another person to whom the Defendant "delegated" or entrusted the performance of their duties on their behalf. The categories as laid out in the case of **Woodland v Swimming Teacher's Association and Others** (supra) does not apply. There is no evidence that any of the Defendants in this present case imposed their liability on a third party to perform their duties on their behalf.

[158] However, the cases do show that where a professional is engaged by another he owed a duty of care to exercise due care and skill in carry out the services they were so engaged to do. Therefore, BNA cannot then say that they were advised to make the change and they acted in accordance with such advice when they were the electro-mechanical engineers so engaged by X-Ray. They owed a duty of care to X-Ray to ensure that their designs of the Laboratory should be able to attain and maintain the specifications and they breached that duty by changing their initial design.

D. *Whether the 3rd Defendant can be held liable to the Claimant for damages for negligence and/or breach of contract arising from the agreement between the Parties*

[159] In relation to Arel, the elements are the same. X-Ray in order to succeed with respect to their claim for damages for negligence, need to prove the following elements:

(a) Arel owed them a duty of care;

(b) Arel breached that duty of care; and

(c) They, being X-Ray, suffered damage as a result of the breach of that duty of care owed by Arel.

[160] It is not in dispute whether or not Arel owed a duty of care to X-Ray. The position of Arel is that they did not breach the duty of care owed to X-Ray as they were only hired to install the HVAC Contractor as designed by BNA. Learned Counsel Mr. Kelman relied on the case of **Robinson v PE Jones** (supra) where it was held that the builder of a building does not by reason of his contract to construct or to complete a building assume any liability in the tort of negligence in relation to defects in the building giving rise to pure economic loss.

[161] I accept the evidence of Mr. Hudson regarding the role of HVAC Contractors. He has the experience in installing HVAC Systems as is evidenced by his Curriculum Vitae that is exhibited to his Expert Report. I accept his evidence over that of Mr. Franks who admitted that he has no experience installing HVAC Systems and over that of Mr. Horace Nelson who maintained that the system as installed is capable of working.

[162] In any event, it is already my judgment that BNA is the one who ought to have exercised due care and skill regarding the design of the HVAC System and the Laboratory in attaining and maintaining the specifications. Even though, Arel has been a part of the Project since its inception, being the HVAC Contractors, their duty is to install the HVAC System in accordance with the designs of the engineer. There is no evidence to show that Arel was hired as an engineer to assist in the designing of the HVAC System.

[163] One of Mr. Hudson's findings was that the HVAC System as installed by Arel is in accordance with the design as given to them by BNA. I accept Mr. Hudson's findings in this regard. Mr. Horace Nelson's findings did not have any mention of the HVAC System being designed in accordance with the design of BNA. The evidence shows that Arel did in fact install the system as designed by BNA, that is they installed a HVAC System that did not use 100% fresh air.

[164] Therefore, in my judgment Arel did not fail to supply and install equipment which is adequate, appropriate and/or fit for the purpose required of attaining and

consistently maintaining the specifications nor did they fail to use reasonable are and proper steps, methods, procedures or safeguards to ensure that the Laboratory attains and consistently maintains the specifications. I also accept the evidence of Mr. Hudson that the changes made to the initial design was a fundamental and gross error. The HVAC system as installed cannot work without major modifications being made to it in order to attain and maintain the specifications. I therefore cannot hold them liable for the failure of the system to attain and maintain the specifications as the findings of the expert witness shows that the failure of the HVAC System to attain and maintain the specifications was with the design and not the installation. Even if there had been perfect work by Arel, the Laboratory would not have attained and maintained the specifications.

[165] X-Ray is also alleging that Arel failed to install at all or properly install and commission the equipment for the HVAC system for the Laboratory. I note here that the HVAC equipment as installed by Arel was manufactured by Trane Inc. X-Ray is claiming that an investigation that X-Ray recently commissioned found that:

(a) Arel neither installed nor programmed the main controller for the HVAC System, and without the said main controller the other three (3) controllers, which all depend on the main controller to function, cannot function if at all;

(b) The Trane controls do not work, and in order for these controls to work it is clear that Arel must do at least the following;

i. install the Trane System Controller;

ii. install a discharge air temperature sensor;

iii. install a return air temperature sensor;

iv. install reheat coils with SCR Controllers or replace Trane VAV with combination Trane VAV and electric reheat; and

v. complete programming for the entire system.

[166] Arel's position is that they were prevented from entering the site to complete the testing and commissioning of the HVAC System and the Claimant unreasonably demanded an indemnity as a pre-condition to Arel regaining access to the site. In fact, it was X-Ray who failed to properly manage the Project and extract and provide information to Arel in a timely manner. Mr. Heron stated that Arel completed its installation of the equipment and its appurtenances on January 20, 2017 based on the instructions given by BNA up to that date. The HVAC System was started up 3 days after Mr. Heron says that Arel completed its installation. This included turning on the Trane Package A/C Unit, the minor and major exhaust fans on the roof, and the VAV boxes in the ceiling void. He says that checks were done and adjustments made to the conditioned air flow in order to arrive at the desired values. Mr. Heron further stated that the HVAC System was running independently without the completion of the BMS control sequence, which according to Mr. Heron in his examination-in-chief, was to be provided by BNA. Mr. Heron's evidence is that the information was necessary to complete the sequence.

[167] In my judgment, Arel breached the contract. I see no loss suffered by the Claimant as a result of Arel's actions. The Laboratory would not have attained and maintained the specifications even if Arel had completed the installation in a timely manner. In my view, X-Ray has not shown causation between the loss suffered and Arel's actions.

[168] Nevertheless, Arel still breached their contract. As such, while I have concluded that X-Ray suffered no actual loss from Arel's actions, X-Ray can and will only be awarded nominal damages. The issue of nominal damages is dealt with at issue (g) of this judgment.

E. *The validity of the 3rd Defendant's counterclaim*

[169] Arel's counterclaim is for monies owed by X-Ray to them in respect of services and equipment provided by Arel to X-Ray. The monies remain outstanding to date as per Arel's invoice dated November 8, 2016. Counsel for X-Ray submitted that the amount allegedly owing cannot be due since the Laboratory is not yet commissioned and IQMS has not yet certified and declared it ready for use which requires attaining and maintaining the standards. They further submitted that in the alternative, if the Court is so minded to find in favour of Arel on this counterclaim, the sum allegedly owing should be set off against sums due to X-Ray pursuant to its claim. However, Arel is contending that the Parties did not agree to any term and condition allowing X-Ray to withhold any amount due pending the commissioning of the Laboratory by third parties.

[170] Section 48 (g) of the **Judicature (Supreme Court) Act** vests the Court with the jurisdiction to determine matters and to grant remedies to a party once it appears to arise on their cause or matter. It states that:

> *"The Supreme Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it shall grant either absolutely or on such reasonable terms and conditions as it seems just, all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter; so that as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and multiplicity of proceedings avoided."*

[171] Arel has not mentioned that their counterclaim is being brought in equity. This however does not restrict the Court from providing a party with equitable relief. Carr J in **Carmen Williams v Muriel Johnson (By her son and next friend Kevin Johnson)** [2022] JMSC Civ 96 was of the view that the Court has the jurisdiction to determine whether a Claimant can obtain a remedy in equity even if it is not specifically pleaded. Carr J relied on Phillips J.A. dicta in the case of **Medical and Immuniodiagnostic Laboratory Limited v Dorett O'Meally Johnson** [2010] JMCA Civ 42.

[172] I am satisfied that I have the jurisdiction to determine whether an equitable relief is available in circumstances where it has not been specifically pleaded.

[173] Arel is counterclaiming against X-Ray for monies owed. However, it is already my decision that Arel is negligent as they failed to properly install and commission the equipment for the HVAC system for the Laboratory. The maxim of equity which states that he who comes to equity must come with clean hands is in my view applicable. This maxim of equity requires the Court to deny equitable relief to a party who has violated good faith with respect to the subject of the claim.

[174] The Fifth (5th) Edition of the **Halsbury's Laws of England** in relation to this maxim states that a court of equity refuses relief to a claimant whose conduct in regard to the subject matter of the litigation has been improper. The maxim does not mean that equity strikes at depravity in a general way; the cleanliness required is to be judged in relation to the relief sought, and the conduct complained of must have an immediate and necessary relation to the equity sued for; it must be depravity in a legal, as well as in a moral, sense.

[175] It is my judgment that Arel is not entitled to the relief claimed on their counterclaim as they have not come to equity with clean hands. They did not complete the services that they were to carry out in a timely manner and as such their counterclaim against X-Ray ought to be dismissed.

F. *What is the quantum of damages payable to the Claimant by the 2nd Defendant?*

[176] For tortious breaches, the Claimant is to be put in as good a position as he would have been had the tort not been committed in so far as can be achieved by a monetary award. The Claimant ought to be restored, so far as he can, by money, to the position he would have been in, had a breach of duty not occurred.

[177] Counsel for X-Ray submitted that the award for damages ought to be:

1. Financial Losses	
(a) Sutherland's Report – estimate of losses	
(i) Past Lost Profits	US$972,000.00
(ii) Future Lost Profits (2021-2024)	US$793,000.00
TOTAL	**US$1,765,000.00**
2. Cost of Correcting Problem per Mr. Clint Franks	
Cost to correct the problem per Mr. Clint Franks	US$80,000.00
New DOAS	US$2,500.00
New Exhaust Fans	US$50,000.00
Controls	US$4,000.00
VAVs	US$15,000.00
Duct Modifications	US$10,000.00
Commissioning Services	US$10,000.00
Testing, Adjusting and Balancing Services	US$20,000.00
Engineering Designs	
	US$191,500.00
3. Mitigation & Servicing Expenses	
(a) - Mitigation Expenses:redesign & replace HVAC system	*US$67,394.87*
- Purchasing of replacement vacuum & water panel from Arel	*US$2,938.37*
TOTAL (USD – items 2 & 3 (a)	**US$261,833.24**
(b) - Mitigation Expenses: redesign and replace HVAC system	J$708,850.80
- Repairing & servicing Laboratory equipment & A/C system	J$1,431,719.76
TOTAL	**J$2,140,570.56**

[178] Mr. Francis, based on his analysis of the information and materials available to him, in his Expert Report stated that the quantum loss of profits allegedly suffered by X-Ray amounts to **JMD$6,375,160.00** or **USD$48,418.00**. In my view, the figures put forward by Mr. Francis are woefully inadequate.

[179] Mr. Hylton Q.C. submitted that Mr. Sutherland is more than suitably qualified and has vast relevant experience. He applied the industry accepted principles, best practices and considerations. Queen's counsel also submitted that Mr. Francis' report does not take into account the Business Plan even though Mr. Francis acknowledged under cross-examination that the American Institute of Certified Public Accountants listed a business plan as the frirst thing to be considered because it is a new business.

[180] Mr. McBean Q.C. contended that the accounting standards used in Jamaica are the ones relevant to the case and should be used. Therefore, the evidence of Mr. Sutherland is not of much useful assistance to the Court in addressing and quantifying the loss suffered by X-Ray. He further contended that the reports and evidence of Mr. Francis ought to be more persuasive and of more assistance to the Court. Queen's Counsel also submitted that Mr. Sutherland's report fails to take into consideration the 100% fresh air system that was initially designed and would therefore limit the extent to which X-Ray is entitled to compensation. He further submitted that based on Mr. Horace Nelson's and Mr. Hudson's findings there is no need to redesign as the current system may be remodified to meet the specifications.

[181] Mr. Kelman submitted that Mr. Sutherland's reports lack independence, objectiveity and impartiality. Counsel further submitted that the lack of Mr. Sutherland's experience regarding Accounting Practices in Jamaica and his reliance on the Business Plan to quantify the loss suffered by X-Ray is flawed. On the other hand Mr. Francis' qualifications shows that he is experienced regarding Acccounting Practices in Jamaica and therefore his evidence is entitled to greater weight and ought to be preferred to that of Mr. Sutherland's. Mr. Kelman relied on the case of **Z.F. Meritor v Eaton Group** (supra) to show that the United States Court of Appeals found that the District Court (the trial court) was correct in excluding the expert opinion on damages on the basis that it was not sufficiently reliable as the expert relied on a business plan.

[182] In the said case, even though the Court of Appeal found that the District Court acted in its discretion in determining that the expert report on damages ought to be exlcuded as the core of the experts damages analysis was based on the business plan of Z.F. Meritor. The District Court held that although the expert used methodologies regularly employed by economists, his opinion nevertheless failed the requirements of Daubert and the Federal Rules of Evidence. His evidence was compared to the evidence of the Plaintiff's expert which considered the

Defendant's internal projections for growth but also closely examined the market conditions including past performance of competitors. I note here that the requirements of Daubert is a rule of evidence in the United States Federal Law used by judges to determine if an expert witnesses methodology is scientifically valid and whether it is admissible. In my view this is not an appropriate precedent to rely on. Therefore, no weight will be given to this aspect of Mr. Kelman's submissions.

[183] BNA has already designed a 100% fresh air HVAC System and the Expert Report of both Mr. Franks and Mr. Nelson show that the HVAC System already designed would have worked so in my view there would be no need to redesign. Notwithstanding that, there would still be no need to redesign the HVAC System. The evidence given by Mr. Horace Nelson and Mr. Hudson shows that the system in place can work with modifications being made to same.

[184] I agree with Mr. Sutherland that Mr. Francis was limited when considering the market size that would use the services of the Laboratory. Mr. Francis himself admitted in cross-examination that a person who was already diagnosed with cancer might seek the services of the Laboratory again in the future. Which based on his report he did not account for. Mr. Sutherland in caluculating the losses for future losses found the mid-point of the indicated damages under the most likely and the worst case scenario.

[185] Mr. Francis heavily critcised Mr. Sutherland's use of the 'but for' method in calcultating damages. I found no favour with that aspect of his expert report. The Court in **Pfizer v Medimpex** (supra) was tasked with assessing the damages suffered by the Defendants as a reuslt of an injunction that was granted to the Claimant under its undertaking as to damages. The Court had before it several expert reports which calculated damages using the 'but for' method. The Court accepted the reports applying the 'but for' method and even reconstructed the hypothetical market 'but for' the injunction. The 'but for' method has been adopted in our jurisdcition and I accept Mr. Sutherland's use of the 'but for' method.

[186] I found favour with the evidence of Mr. Sutherland in relation to his estimate of the losses suffered by X-Ray. Not only did he assess X-Ray's business plan, he included in his report an analysis of the local market living with the cancer, which is something that Mr. Francis did not account for. I am therefore prepared to awarded the sum of **US$1,765,000.00** for the losses suffered by X-Ray as calculated by Mr. Sutherland.

[187] In relation to the figures given by Mr. Franks, that Learned Queen's Counsel Mr. Hylton has outlined under item 2 of the table at paragraph 177, I am prepared to accept the following:

(a) cost of a new designated outside air system for USD$80,000.00;

(b) cost of a new exhaust fan for USD$2,500.00;

(c) cost of new controls for USD$50,000.00;

(d) cost of new variable air volume for USD$4,000.00;

(e) cost of duct modifications for USD$15,000.00;

(f) cost of commissing services USD$10,000.00; and

(g) cost of testing, adjusting and balancing services USD$10,000.00.

[188] Mr. Franks' report also contained costs for engineering redesign and an added Quality Control Lab HVAC Unit. I am not prepared to make an award in relation to those sums. Firstly, I am of the view that there need not be a redesign of the HVAC System and therefore X-Ray ought not to be given an award in that respect. Secondly, X-Ray redesigned and commissioned the services of Appliance Traders Limited to redesign a HVAC system for the Quality Control Lab and similarly I am of the view that they ought not be given an award as there is no need for a redesign.

[189] I am also not prepared to make an award for the mitigation expenses outlined by Mr. Hylton Q.C. as there is no distinction between the redesign and the

replacement of the HVAC System. There will also be no award for the repairing and servcing of the Laboratory equipment and the a/c as those are expenses which X-Ray would have incurred whether or not the Laboratory attained and maintained the specifications.

[190] However, I am prepared to make an award for the purchasing and replacement of a water vaccum for Arel as the evidence shows that had the Laboratory attained and maintained the specifications this machinery would not have been damaged.

[191] Therefore, in my judgment, the quantum of damages payable to the Claimant by the 2nd Defendant is **USD$1,939,438.37.**

G. *What is the quantum of damages payabe to the Claimant by the 3rd Defendant?*

[192] The author in the 16th edition of **McGregor on Damages** gave the following guidance when assessing damages:

> *"The starting point in resolving a problem as to the measure of damages for breach of contract is the rule that the Plaintiff is entitled to be placed so far as money can do it, in the same position as he would have been in had the contract been performed. The rule is limited first, but not substantially, by the principles as to causation; the second and much more far reaching limit is that the scope of protection is marked out what was in the contemplation of the Parties. When damages is said to be too remote in contract it is generally this latter factor that is in issue."*

[193] Since no actual loss has been suffered by X-Ray, I am of the view that an award of nominal damages would be appropriate. Brooks JA in the Court of Appeal case of **George Rowe v Robin Rowe** [2014 JMCA Civ 46 at paragraph 62 cautioned that: -

> *"trial judges must be mindful, however, that if they are of the view that only nominal damages are merited, there should be compliance with the principle explained in The Mediana".*

[194] In the case of **The Owners of the Steamship 'Mediana' v The Owners, aster and Crew of the Lightship 'Comet'** [1900] AC 113, The Earl of Halsbury LC in explaining the meaning of nominal damages said that:

> *"'Nominal damages' is a technical phrase which means that you have negative anything like real damage but you are affirming by your nominal damages that there is an infraction of a legal right, which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your right has been infringed. But the term "nominal damages" does not mean small damages."*

[195] The Privy Council in **Greer v Alstons Engineering Sales and Services Ltd** [2003] UKPC 46; (2003) 63 WIR 388, cautioned that courts have a duty to ensure that awards are not *"out of scale."*

[196] Edwards J in the case of **Aaron Dumas v Winston Barrington Rodney** Suit No. E336 of 1989 awarded the applicant nominal damages in the sum of $1,000.00 for breach of contract occasioned by the delay in completion of a contract. More recently, Anderson J in the case of **Ian Lunan v Rohan Sudine** [2015] JMSC Civ. 260 made an award of $60,000.00 for nominal damages after he found that the Defendant breached the lease agreement between the parties. Such an award from 2015 works out to be about 5% of what the general damages award would have been had the defendant been found liable for damages. In applying a similar 5% ratio in the case before me is estimated to be about **JMD$15,000,000.00**. However, in the circumstances I do not believe that the nominal damages ought to be in excess of **JMD$5,000,000.00.**

[197] Guided by the above principles and having regard to the nature of the claim and the business that X-Ray is involved in I am of the view that that an appropriate award for nominal damages in this case would be **$5,000,000.00** and I so award.

H. *What is the appropriate interest rate to be applied to the quantum of damages payable to the Claimant?*

[198] It is settled law that the purpose behind an award of interest on a judgment sum is to put the Claimant in the position in which he would have been had he not suffered this loss/deprivation as occasioned by the Defendant. Section 3 of **the Law Reform (Miscellaneous Provisions) Act** gives the Court the power to award interest on debts and damages. It gives the Court the discretion to award interest

at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.

[199] Queen's Counsel Mr. Hylton submitted that X-Ray is not claiming for pre-judgment interest on the remediation expenses as they have not yet been paid. However, they are claiming interest on the other sums from the date of the service of the claim. He relied on the case of **B.P. Exploration Co** (supra) where the House of Lords upheld the trial judgment of fixing the interest period to run from when the Defendant first became fully aware of the intention to bring a claim against him. Queen's Counsel also submitted that the applicable interest rate should be commercial in nature since the instant case is a commercial case and was tried in the Commercial Division.

[200] I found the case of **British Caribbean Insurance Company v Delbert Perrier** (supra) to be very useful. Mr. Hylton Q.C. relied on same. Carey J.A. stated in relation to the applicable interest rate in commercial cases that:

> *"This leads me to venture the rate which a judge should award in what may be described as commercial cases. It seems to me clear that the rate awarded must be a realistic rate if the award is to serve its purpose. The judge, in my view, should be provided with evidence to enable him to make that realistic award. In the case just cited* (Motor & General Insurance Co Ltd v Gobin (1986) 34 WIR 199) *evidence was in fact led by the Plaintiff; but I can see no objection to documentary material being properly placed before the judge to enable him to ascertain and assess an appropriate rate. If, as suggested in Long Young (Pte) Ltd v Forbes Manufacturing & Marketing Ltd (1986) 40 WIR 229, it is desirable that a claim for interest should be included in the prayer, that would remind the parties that evidence can be adduced at the trial. In summary, the position stands as thus: (i) awards should include an order for the defendant to pay interest; (ii) the rate should be that on which the plaintiff would have had to borrow money in place of the money wrongfully withheld by the defendant; and (iii) the plaintiff is entitled to adduce evidence as to the rate at which such money could be borrowed. Having regard to the evidence led before the trial judge, viz the contents of the statistical digest published by the Bank of Jamaica, he was entitled to fix the rate at which he did…"*

[201] Campbell J in the case of **Casilda Silvest** (supra) discussed the aim of awarding interest. He stated at paragraphs 19-20 that:

> *"[19] The aim of awarding interest is not to punish the Defendants. Forbes J, in the case of Tate & Lyle Food & Distribution Ltd v Greater London Council & Anor [1981] 3 All E.R. 716 at page 722, is apposite. He said:*
>
> > *"… I do not think the modern law is that interest is awarded against the defendant as a punitive measure for having kept the plaintiff out of his money. I think the principle now recognized is that it is all part of the attempt to achieve restitutio in integrum. One looks, therefore, not at the profit which the defendant wrongly made out of the money he withheld (this would indeed involve a scrutiny of the defendant's financial position) but at the cost to the plaintiff of being deprived of the money which he should have had. I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the plaintiff would have had to borrow the money to supply the place of that which was withheld. I am also satisfied that one should not look at any special position in which the plaintiff may have been; one should disregard, for instance, the fact that a particular plaintiff, because of his personal situation, could only borrow money at a very high rate or, on the other hand, was able to borrow at specially favourable rates. The correct thing to do is to take the rate at which the plaintiffs in general could borrow money."*
>
> *[20] The applicable rate may be determined by adducing oral or documentary evidence. The rate so determined would naturally contemplate the vagaries of the money market, as it applies to the plaintiffs generally. In British Caribbean Insurance Company Limited v Delbert Perrier, at page 354, Carey J.A, laid down the following important guidelines. He said:*
>
> > *"this leads me to venture the rate which a judge should award in what may be described as commercial cases. It seems to me [to be] clear that the rate awarded must be a realistic rate if the award is to serve its purpose. The judge, in my view, should be provided with evidence to enable him to make that realistic award. In the case just cited, evidence was in fact led by the plaintiff, but I can see no objection to documentary material being properly placed before the judge. Statistics produced by reputable agencies could be referred to the judges to enable him to ascertain and assess an appropriate rate."*

[202] In the case of **Peter William v United General Insurance** (supra), the Court in ascertaining the rate of interest and the time from which it ran on the principal sum awarded to the applicant, striked a rough average for the commercial bank rate from the Bank of Jamaica. The Court of Appeal awarded interest at that rate from the date the statement of claim was filed to the date of the judgment.

[203] From the authorities cited above, I accept that the aim of interest is not to punish the Defendants. I have been provided with evidence which would assist me in making a realistic award. Mr. Hylton Q.C. has provided me with the interest rates from the Bank of Jamaica regarding Commercial Banks' Foreign Currency Loan Rates for the period 2019-2021. I find merit in Mr. Hylton's Q.C. submissions and accept the House of Lord's decision in the case of **B.P. Exploration Co**.

[204] I therefore exercise my discretion and I am prepared to grant an award of interest at 6.95% per annum from the date of service of the claim form to the date of judgment. I believe same is reasonable in the circumstances.

I. *What, therefore, is the appropriate costs order to be made?*

[205] Section 47 of the Judicature (Supreme Court) Act, which states *"In the absence of express provisions to the contrary, the costs of and incident to every proceeding in the Supreme Court shall be in the discretion of the Court".* However, it is well recognized that the exercise of this discretion should be pursued in a judicial manner. The aim in relation to costs is to make an order that reflects on the overall justice of the case.

[206] The general rule relating to costs is contained in Part 64 of the Civil Procedure Rule 2002, as amended (the CPR). Rule 64.6(1) states: *"If the Court decides to make an order about the cost of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party".* Rule 64.6 (2) goes on to say that the Court may order a successful party to pay all or part of the costs of an unsuccessful party.

[207] However, in doing so the court must have regard to all the circumstances which include:

> *(a) the conduct of the parties both before and during the proceedings;*
>
> *(b) whether a party has succeeded on particular issues, even if that party has not been successful on the whole of the proceedings;*
>
> *(c) any payment into court or offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Parts 35 or 36;*
>
> *(d) whether it was reasonable for a party:*
>
> *i. to pursue a particular allegation and/or*
>
> *ii. raise a particular issue*
>
> *(e) the manner in which a party has pursued:*
>
> *i. that party's case;*
>
> *ii. a particular allegation or*
>
> *iii. a particular issue.*

[208] Counsel for X-Ray submitted that Rule 64.6(1) of the CPR is applicable in this case as there is no reason to depart from it. Counsel relied on the cases of **Gordon Stewart v Goblin Hill Hotels Limited & Ors** (supra) and **Day v Day** (supra). Counsel for BNA and Arel made no submissions in this regard. Nonetheless I invite them both to advance oral and/or written submissions on costs.

[209] I am therefore minded to make 2 costs orders. Firstly, in relation to the 1st Defendant, Mr. Nelson, who was successful in case, I am of the view that there is no need to depart from the general rule relating to costs. The second costs order is in relation to the 2nd and 3rd Defendants. I am also of the view that there is no need to depart from the general rule relating to costs. I am therefore minded to make the following provisional orders:

(a) Costs awarded to the 1st Defendant to be paid by the Claimant, to be taxed if not agreed.

(b) Costs awarded to the Claimant to be borne equally by the 2nd and 3rd Defendants, to be taxed if not agreed.

[210] The parties all filed written submissions in relation to the issue of costs. Those submissions are dealt with below.

[211] Learned Counsel for X-Ray submitted that BNA and Arel are the only paying parties under the judgment as to damages and are therefore clearly the unsuccessful parties. Learned Counsel, in addition to the abovementioned cases, relied on **Travellers' Casualty v Sun Life** [2006 EWHC 2885 (Comm) and **A L Barnes Ltd v Time Talk (UK) Ltd** [2003] EWCA Civ 402.

[212] Learned Counsel for X-Ray further submitted that Rule 64.6(1) of the CPR is wholly inapplicable in respect of Mr. Nelson as there is every reason to depart from the general principle that in litigation the unsuccessful party is to pay the costs of the successful party. Learned Counsel contended that the provisional order in relation to Mr. Nelson would effectively result in X-Ray not having any order for costs at all against BNA since X-Ray would be required to pay the pay the costs of the joint representation and defence of Mr. Nelson and BNA on the one hand and BNA would be required to pay X-Ray's costs on the other hand. Learned Counsel contended that this would involve exposing X-Ray to the extraordinary injustice of BNA being unwilling or unable to pay. Learned Counsel submitted the appropriate costs order to be made in respect of Mr. Nelson should be either no order as to costs in respect of the claim against Mr. Nelson or a Sanderson Order that BNA shall pay to Mr. Nelson his costs, to be taxed if not agreed. Learned Counsel further submitted that BNA is Mr. Nelson's alter ego and he was in charge of the Project from the outset and throughout. The documents filed on behalf of Mr. Nelson were also the same documents filed on behalf of BNA and they have had the same representation throughout. Learned Counsel relied on the cases of **Beaumont v Senior and Bull** [1903] 1 K.B. 282, **Treton Pty Ltd v HM Australia Holding Ply Ltd and Lei Lei Lu (No. 2)** [2011] QSC 87, **Sanderson v Blyth Theatre Co** [1903]

2 KB 533 CA, and **Desmond Clarence Bennett v Jamaica Public Service Co. Ltd and Others** (unreported, delivered 1st May 2009).

[213] Learned Queen's Counsel Mr. McBean submitted on behalf of Mr. Nelson that the provisional order in favour of Mr. Nelson is the appropriate order to be made. He further submitted that Mr. Nelson has succeeded on all the issues relating to him and he had not been guilty of any conduct which would deprive him of his costs. Mr. McBean Q.C. contended that Mr. Nelson was sued in his personal capacity and he was not sued on the basis that he was the alter ego of BNA. The same documents that were filed on behalf of both Mr. Nelson and BNA is understandable and ought not to be used as a basis to depart from the general rule that costs follow the event. It was further contended that it would be unrealistic to make a Bullock or Sanderson Order in the circumstances where the defendants had the same legal representation and one is the sole director of the other **(Treton Pty Ltd v HM Australia Holding Ply Ltd and Lei Lei Lu (No. 2)).**

[214] I find merit in Mr. McBean's Q.C submissions. The fact that both Mr. Nelson and BNA had the same legal representation and filed the same documents should not be used against them. The case of **Treton Pty Ltd v HM Australia Holding Ply Ltd and Lei Lei Lu (No. 2)** outlined the circumstances where it would be unrealistic to make a Sanderson Order and I accept those circumstances. I accept that Sanderson Orders have been made in several cases in our jurisdiction. However, I see no basis to depart from the general rule. Mr. Nelson was sued in his personal capacity and not as his alter ego. It is the finding of this Court that the claim against him is dismissed. Mr. Nelson's estate is therefore entitled to recover his costs in these proceedings.

[215] Mr. Hylton Q.C. submitted in relation to BNA that there is nothing in this case to permit consideration of departure from the general rule that BNA is liable for X-Ray's costs. Mr. McBean Q.C. made no submissions in relation to this aspect. BNA is therefore liable to X-Ray for their costs in these proceedings.

[216] In relation to Arel, Mr. Hylton Q.C. submitted that the provisional costs order is not appropriate. Learned Queen's Counsel contended that costs should be awarded to his client against Arel. He further contended that the provisional order does three important things. First, it makes only Arel liable for the costs of its dismissed counterclaim. Secondly, it makes Arel liable for X-Ray's costs of the claim having been found liable to X-Ray for breach of contract and thirdly, not all costs incurred by X-Ray in respect of the Defendants (Mr. Nelson and BNA on the one hand and Arel on the other hand) were the same. Therefore, for either set of the Defendants to pay one-half of the Claimant's costs regardless of in respect of whom they were incurred would not be appropriate or just.

[217] Learned Counsel Mr. Kelman submitted that when a defendant is only ordered to pay nominal damages, the Court should assess who is the real successful party. Learned Counsel relied on the case of **Clack v Wrigleys Solicitors LLP** [2013] All ER (D) 83 (Apr) paragraph 18 where Mr. N Strauss QC (sitting as a Deputy Judge) stated that:

> *"… The authorities, both pre and post CPR, establish that a defendant who is held liable only for nominal damages will ordinarily be regarded as the successful party (unless the claimant had a legitimate reason for seeking to establish liability only), and that in such a case (a) the claimant will not ordinarily be awarded any costs but (b) the defendant will not necessarily recover all his costs, especially and to the extent that (i) they have not been incurred in relation to an issue which should have been conceded and (ii) they would not have been incurred anyhow in revolving issues on which the defendant has succeeded."*

[218] Mr. Kelman compared the circumstances of this case with the circumstances in the case of **Mappouras v Waldrons Solicitors** [2002] EWCA Civ 842. In that case the court considered where costs should lie in a case where nominal damages is awarded. Kay LJ stated that the Court is to look and see what it was that the parties were in effect seeking in the proceedings that were brought before the judge. The appellant was seeking substantial sums of money and he did not succeed in that way. Similarly, X-Ray was seeking substantial damages for losses arising from the inability of the HVAC System to meet the specifications. Arel having been found

not to have caused any of those losses was effectively successful in these proceedings. Learned Counsel Mr. Kelman submitted that as a result of that, the Court should order X-Ray to pay Arel's costs. Mr. Kelman contended that although X-Ray succeeded on an aspect of its breach of contract claim against his clients, it does not warrant any reduction in the costs award that should be made to his clients. The issue that X-Ray succeeded on is a narrow one compared to the overall claim, hence only a very small proportion of the costs were incurred in relation to this issue alone. Learned Counsel Mr. Kelman further contended that even if his clients had conceded liability on the narrow breach of contract issue that succeeded, the overall case and trial length would not have been shortened or narrowed. Mr. Kelman also contended that the issues raised on their counterclaim comprised a mere one-tenth of the issues in the overall case and it took up no more than a miniscule fraction of the evidence adduced in the case. He submitted that there should be a reduction in the percentage of the proposed costs awarded to Arel. A proportionate reduction by 10% was submitted to be fair and reasonable, that is, an order for X-Ray to pay 90% of Arel's costs.

[219] Learned Counsel Mr. Kelman distinguished the case of **Texaco Limited v Acro Technology Inc** [1989] Lexis Citation 1193. In that case the Court dealt with the issue of costs in relation to a plaintiff who had recovered only nominal damages. Phillips J concluded that –

> *"Where a plaintiff makes a claim for substantial damages in respect of a breach of contract or duty, which the Court holds has caused him none, he has, effectively lost the action. I do not speak of the exceptional case where establishing liability is a legitimate end in itself. Where a plaintiff recovers only nominal damages the defendant should ordinarily be awarded costs on the basis that he has reasonably been required to incur them in defending himself against an unjustified claim. The Court should always be concerned to consider, however, whether the costs incurred by the defendant have reflected a reasonable reaction to the claim. Where a defendant chooses to raise a discrete head of defence, which is not part of or connected with the traverse of the matters relied upon by the plaintiff, and that head of defence fails, it may well be appropriate to make a special order which, one way or another, leaves the defendant to bear the costs of both sides attributable to that issue.*

[220] The plaintiff brought an action to recover damages and they failed in that regard. Phillips J held them plainly to be the losing party, albeit they succeeded on liability. Prima facie they should pay the defendants costs, however on the facts of the case the Judge found it appropriate to make a special order affording the plaintiff some relief. Learned Counsel Mr. Kelman submitted that the Court awarded costs to the defendant, save that it was reduced by 20% for a discrete issue raised in the defence. In contrast, these factors justifying a reduction in costs do not apply in the present case, as Arel's evidence on the completion of the installation was not discrete and it in fact completely overlapped with the evidence it adduced to defend X-Ray's overall claim.

[221] In Blackstone's Civil Practice at para 66.10, it was stated that *"a claimant who has claimed substantial damages, but has only recovered nominal damages, will normally be ordered to pay the defendant's costs".* Mr N Strauss QC (Sitting as a Deputy Judge) in the case of **Clack v Wrigleys Solicitors LLP** did not think there was any such normal order or general rule in relation to costs in a nominal damages case.

[222] I find merit in Learned Counsel Mr. Kelman's submission that the counterclaim raised a very narrow issue and was miniscule in regard to the evidence adduced. I also find merit in Learned Counsel Mr. Hylton's Q.C. submission that the characterization of the award as nominal damages does not make a difference to the appropriateness of the award of costs against Arel. However, costs does follow the event and it is my judgment that X-Ray ought to recover their costs for the dismissed counterclaim.

[223] I am also of the view that Arel should still be liable to pay X-Ray's costs as it was reasonable for X-Ray to pursue the allegations against Arel. Given the earlier findings of this Court in relation to Arel not causing any financial loss, I am minded to make an order that is reflective of my decisions in this matter. The claim is for a substantial amount of money and Arel, although not liable for same, was still found

to be liable for breach of contract. It is therefore my judgement that Arel should be liable to pay 20% of the costs on the claim.

J. *Is the Claimant entitled to a Special Costs Certificate?*

[224] Mr. Hylton Q.C. relied on CPR Rule 64.12 (3) regarding a Special Costs Certificate. He submitted that X-Ray retained 3 Counsel and acted reasonably in doing so considering the circumstances. Counsel for X-Ray had to address the defences of multiple Defendants and trial lasted a total of twenty (20) days and had a total 10 witnesses including 5 expert witnesses. Queen's Counsel also submitted that there were more than 4,000 pages of documents.

[225] Rule 64.12 (3) of the CPR empowers the Court to grant what is known as a special costs certificate. Rule 64.12 states:

> *(1) When making an order as to the costs of an application in chambers the court may grant a 'special costs certificate'.*
>
> *(2) In considering whether to grant a special costs certificate the court must take into account –*
>
> *(a) whether the application was or was reasonably expected to be contested;*
>
> *(b) the complexity of the legal issues involved in the application; and*
>
> *(c) whether the application reasonably required the citation of authorities and skeleton arguments*
>
> *(3) The court, having regard to the matters set out in rule 65.17(3), may direct that the costs of the attendance of more than –*
>
> *(a) one attorney-at-law on the hearing of an application; or*
>
> *(b) two attorneys-at-law at the trial,*
>
> *be allowed.*

[226] Rule 65.17 (3) includes what the Court must take into account in deciding whether it would be reasonable to direct costs for the attendance of more than one Attorney-at-Law. The rule states that:

> *(3) In deciding what would be reasonable the court must take into account all the circumstances, including –*
>
> *(a) any orders that have already been made;*
>
> *(b) the conduct of the parties before as well as during the proceedings;*
>
> *(c) the importance of the matter to the parties;*
>
> *(d) the time reasonably spent on the matter;*
>
> *(e) whether the cause or matter or the particular item is appropriate for a senior attorney-at-law or an attorney-at-law of specialised knowledge;*
>
> *(f) the degree of responsibility accepted by the attorney-at-law;*
>
> *(g) the care, speed and economy with which the matter was prepared;*
>
> *(h) the novelty, weight and complexity of the matter; and*
>
> *(i) in the case of costs charged by an attorney-at-law to his or her client –*
>
> *i. subject to section 21 of the Legal Profession Act, any agreement that may have been made as to the basis of charging;*
>
> *ii. any agreement about the seniority of attorney-at-law who should carry out the work;*
>
> *iii. whether the attorney-at-law advised the client and took the client's instructions before taking any unusual step or one which was unusually expensive having regard to the nature of the matter."*

[227] Three Counsel were on record for the Claimant including a Queen's Counsel and a junior counsel. I find merit in Queen's Counsel Mr. Hylton's submissions regarding the circumstances of the case. Even though the issues, both factual and legal, involved in this matter were not complex, the matter was a voluminous one with a number of cases. There was a lot of evidence to be examined. I appreciate the fact that Counsel on all sides prepared extensively for the matter, seeing that the trial had a total of 10 witnesses, including 5 expert witnesses and lasted for almost one month. The matter was, in my view, one that required the services of 3 counsel.

[228] It is my judgment, having regard to the factors outlined in the abovementioned rules and in light of the reasoning set out above, that the matter deserves a grant of special costs certificate.

ORDERS

[229] Having regard to the forgoing, these are my Orders:

(1) The Claimant's claim against the 1st Defendant is dismissed.

(2) The counterclaim filed by the 3rd Defendant is dismissed.

(3) Judgment is entered for the Claimant against the 2nd Defendant in the sum of **UNITED STATES DOLLARS ONE MILLION NINE HUNDRED AND THIRTY-NINE THOUSAND FOUR HUNDRED AND THIRTY-EIGHT DOLLARS AND THIRTY-SEVEN CENTS (USD$1,939,438.37)** with interest at a rate of 6.95% per annum from May 20, 2019 to September 29, 2022.

(4) Nominal damages to the Claimant in the sum of **FIVE MILLION JAMAICAN DOLLARS (JMD$5,000,000.00)** to be borne by the 3rd Defendant.

(5) Costs awarded to the 1st Defendant to be paid by the Claimant, to be taxed if not agreed.

(6) Costs awarded to the Claimant to be paid by the 3rd Defendant on the dismissed counterclaim, to be taxed if not agreed.

Costs awarded to the Claimant to be borne 80% by the 2nd Defendant and 20% by the 3rd Defendant, to be taxed if not agreed.

(7) Special Costs Certificate is hereby granted to the Claimant's Attorneys-at-Law.

(8) Claimant's Attorneys-at-Law to prepare, file and serve Orders made herein.

(9) Stay of execution granted to November 25, 2022.