COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION
2019/CLE/gen/01104

BETWEEN

GREAT LAKES INSURANCE SE
(as Subrogee of Mt. Daufuskie Charters Inc)

Plaintiff

AND

BRILAND GAS AND OIL COMPANY LIMITED

Defendant

Before: **The Hon. Madam Justice G. Diane Stewart**

Appearances: **Tara Archer-Glasgow, Audley Hanna and Mr. Trevor Lightbourn for the Plaintiff**

Ms. Rodger Outten for the Defendant

Judgment Date: **14th April, 2023**

JUDGMENT

1. By a Specially Endorsed Writ of Summons filed 2nd August 2019, the Plaintiff seeks special damages in the sum of $162,761.67 or alternatively damages for breach of contract, breach of duty and breach of statutory duty to be assessed, in addition to interest pursuant to the Civil Procedure Act 1992 **(the "Writ")**.

2. In support of the Plaintiff's claim against the Defendant they relied on the following written and oral evidence.

   - Mark Messier;
   - Doug Wager;
   - Michael Grant;
   - Floyd Friloux; and
   - Alexander Mark Thomas.

3. The Plaintiff also filed a Reply to the Defendant's Amended Defence defending certain averments raised therein.

4. By an Amended Defence filed 13th April 2022 the Defendant denied that the Plaintiff was entitled to damages or any other relief. They also averred that inter alia the Plaintiff's vessel obtained contaminated fuel in San Salvador and not Harbour Island. Further they denied that the insurers settled the claim for $146,000.00. Finally they averred that there

were no other complaints by customers in Harbour Island of having purchased contaminated fuel.

5. The Defendant relied on the following written and oral evidence:-.
   - Jordan Alexander Brown;
   - Andrew Pike;
   - Boyd Reise-Ward; and
   - Donovan Cleare

6. By the Agreed Statement of Facts and Issues filed 19th February 2021, the parties agreed the following facts and issues: -

Agreed Facts

- Mt. Daufuskie Charter Inc. **(the "Assured")** is, and was at all material times, the owner of a motor vessel being the M/V Wani Kanati (VKY55936D99) a 1999 55' Viking **(the "Vessel")**. The Vessel enjoyed insurance coverage for marine insurance being policy number CSRYP/167701.

- At all material times, Briland Gas and Oil Company Limited, the Defendant, was a company incorporated under the laws of the Commonwealth of The Bahamas. The Defendant was engaged in the business of selling fuel, including diesel, on the Island of Harbour Island, one of the Islands of the Commonwealth of The Bahamas.

- On or about 25th June 2018, the Vessel, while being navigated by Captain Richard Hellmuth, docked at the Government Dock situated Harbour Island. Captain Richard Hellmuth purchased 750 gallons of diesel fuel from the Defendant in the sum of $3,870.90.

- Between 28th and 29th June 2018, the Defendant was advised of alleged damage.

- The Vessel was subsequently towed to its home port at Lighthouse Point, Florida via Spanish Wells and Bimini during 1st and 3rd July 2018.

- The Vessel's usual mechanic inspected the engine on or about early July 2018.

- On 9th July 2018, Wager & Associates (W&A) advised counsel for the Defendant that the fuel was responsible for the damage to the Vessel. Counsel for the Defendant did not respond to the invitation of W&A to take part in the Vessel's inspection until 30th August 2018.

Agreed Issues

- Whether there was a contract between the Defendant and the Assured for the sale of fuel?

- If there was such a contract of sale, whether it contained an express or implied term that the fuel sold by the Defendant to the Assured would be reasonably fit for its purpose and of satisfactory quality.

- Whether the fuel sold by the Defendant to the Assured contained contaminates/harmful substances to a degree sufficient to cause harm.

- If there was such an express and/or implied term of the contract that the fuel would be reasonably fir for its purpose and of satisfactory quality, whether there was a breach of the express and/or implied term.

- If there was such a contract of sale, whether there is an implied warranty or condition as to the quality or fitness for a particular purpose of the fuel supplied pursuant to section 16(a) and/or 16(B) of the Sale of Goods Act.

- If there was such an implied warranty or condition, whether there was a material breach of the warranty or condition by the Defendant.

- Whether the Defendant had a duty to sell to the Assured fuel that was fit, proper and/or free of contaminants/harmful substance to a degree sufficient to cause harm.

- If there was such a duty, whether there was a material breach of the duty on the part of the Defendant.

- Whether there is an implied warranty in relation to the fuel sold by the Defendant to the Assured pursuant to subsection 24(4) of the Consumer Protection Act 2006.

- If there was such an implied warranty, whether there was a material breach of the warranty by the Defendant.

- Whether the fuel sold by the Defendant to the Assured caused damage to the Vessel.

- Whether there were alternate causes, inclusive of the purchase of fuel from Riding Rock Marina, and/or contributing factors, including the seaworthiness of Vessel that directly contributed to the alleged damage to the Vessel; and

- Whether the Defendant is liable to make such good damages generally and/or pursuant to a statutory obligation under subsections 25(1) and (2) of the CPA.

7. The Defendant also sought the determination of a further issue, whether the Plaintiff was entitled to bring the action against the Defendant Company in the capacity of Subrogee.

Plaintiff's Submissions

8. The Plaintiff submits that the most germane issue is whether the fuel sold by the Defendant to the Assured caused the damage to the Vessel M/V Wani Kanati (**"the Vessel"**).

9. They maintain that the Plaintiff must in a civil case prove its case on a balance of probabilities. In **Re B [2009] AC 11**, Lord Hoffman stated:-

> **"Lord Nicholls was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities."**

10. In support of their contention they relied on the evidence of Mr. Messier the owner of the vessel to attest to the seaworthiness of the Vessel and the honesty of the Captain Hellmuth.

11. The reports of Captain Hellmuth (who had died prior to the commencement of the trial but whose documentary evidence was admitted by the court) spoke of the sequence of events in his emails and provided photographs of the damaged parts that he saw in the Vessel.

12. Mr. Doug Wager, a licensed accredited surveyor and adjuster, confirmed that
    i. the day following the purchase of the diesel from the Defendant, white smoke emanated from its engine exhaust ports
    ii. the Racor fuel filters/water separators were full of water
    iii. the Vessel was inoperable and required towing out of the jurisdiction and
    iv. that a diesel sample sent for further testing to Ring Power Cat indicated high bacteria and fungus contamination.

13. Mr. Michael Grant as a Surveyor gave evidence as to the nature and extent of engine damage sustained due to water in the fuel tanks and fuel system. He confirmed that:-
    i. the fuel filters initially had water visible in the bowls;
    ii. there was visible evidence of significant water as well as algae/mold growth;
    iii. there was evidence of water at the fuel injector pump fuel line fittings and at the injector fuel line fittings;
    iv. the cylinder walls contained rust;
    v. the generator cylinder showed evidence of rust and/or water at the injector port for each cylinder;
    vi. 6 cylinder heads appeared to have rust and/or evidence of water damage in a location that would be consistent with water entering the combustion chamber through the injectors;
    vii. rust was on 12 cylinder walls, namely: (i) Port Inboard Numbers 1, 3, and 4; (ii) Port Outboard Numbers 1 and 2; (iii) Starboard Inboard Numbers 1, 3, 4, and 6; and (iv) Starboard Outboard Numbers 3; 4; and 6; and

viii. water contamination was in the fuel injector pump and injectors

14. Mr. Floyd Friloux, the owner of the laboratory where the diesel sample was sent maintained that given the visual evidence of water in the sample, the contamination was obvious. He maintained that the sample tested consisted of two ounces of diesel and five ounces of salty water. He further opined that such a large proportion of water in the fuel was not normal and rendered the fuel incapable of use.

15. None of the Defendant's witnesses inspected the Vessel or the diesel to form a professional view.

16. The Plaintiff's factual witnesses evidence was grounded in industry knowledge and verified by two independent laboratories.

17. They submit that Mr. Brown's evidence for the Defendant is pure speculation and motivated by "hatred" for Mr. Messier who had spoken with him harshly. Mr. Brown averred that the contaminated diesel came from San Salvador, but the evidence was refuted by Mr. Grant, who averred that the Vessel could not have travelled the distance from San Salvador to Harbour Island with the levels of contaminated fuel. The averment by Mr. Brown that black smoke was indicative of water contamination was not based in science as the scientific evidence led showed that white smoke is indicative of water contamination.

18. The evidence of Mr. Boyd Reise-Ward did not provide any probative evidence to the issue at hand. He spoke to purchasing diesel from the Defendant five days prior to their receiving a new shipment of fuel from Rubis and eight days before the Assured obtained the contaminated fuel.

19. Ms. Lindsey Aranha as the Managing Director of the Defendant had no direct evidence of the event which transpired. Her evidence was hearsay and based on Mr. Brown's account. She averred that the Defendant was denied of a sufficient opportunity to inspect the Vessel and that the Captain made up the story for financial gain.

20. Mr. Donovan Cleare as the Manager of the Defendant admitted that the Defendant had a duty to its customers to sell diesel reasonably fit for its purpose and of a satisfactory quality. He admitted that the Defendant did not conduct frequent fuel testing nor did it keep a record of the alleged fuel tests. The letter from Rubis nor the letter from the Ministry of Public Works offered any direct evidence of the state of the diesel which they sold at the time of the sale.

Defendant's Submissions

21. The Defendant avers that the Vessel was insured by the Plaintiff under a marine policy which document included by reference the "Concepts Special Risk Commercial Yacht Insuring Agreement" known as SYP/8/COM. The Insuring Agreement, the Policy Schedule and the completed application forms comprised the legally binding insurance

contract between the Assured and the Insurer. The policy became effective on April 28th 2018 and expired one year later.

22. The Defendant was made aware of the alleged damage to the Vessel arising from the purchase of fuel on the 29th June 2018.

23. The Assured in October 2018 accepted US$75,000.00 from the Underwriters in partial payment, satisfaction and compromise of all of the claims. In March of 2019 the Assured, the Plaintiff and the Insurers entered into a Settlement Agreement for US$146,000.00 for the satisfaction of the purported loss attributed to damage incurred.

24. The Plaintiff commences the action in August 2019 as subrogree of the Assured alleging that the damage occurred to the Vessel after the June 25th purchase.

DECISION

25. Accepting the agreed facts, the Assured made a claim to its insurers for the damages it suffered as a result of what it alleges was the purchase of contaminated fuel from the Defendant. The Plaintiff and the Assured entered into a settlement agreement and the Assured's claim was settled in the amount of US$146,000.00.

26. I am satisfied that the Plaintiff is entitled to bring this action as a subrogee, and I respectfully adopt the finding of Winder J in **Great Lakes Reinsurance (UK) PLC (as Subrogee of Modrohono's Bimini Place Limited) v RAV Bahamas Ltd. 2011/CLE/gen01561**, where he held that because the Plaintiff had settled the claim for the loss of the Vessel and became the subrogee of the claim of the owner, it was entitled to the damages claim. Accordingly, I find that the Plaintiff has the requisite standing to bring the claim against the Defendant.

27. The Defendant's submission that the Plaintiff's action is out of time as the limitation period for making a claim under the insuring agreement is one year is without merit. The clause relied on by the Defendant speaks to when the Insurer and the Assured have a dispute over the settlement of a claim and not to the right of the Insurer as subrogee to bring an action against a third party to recover the damages settled.

28. I accept that the limitation period applicable to this case is the same as it would be if the Assured were the Plaintiff, which is six years for actions based on contract or tort. The incident took place in 2018 and the action was commenced in 2019 well within the limitation period.

29. I also accept that the Insurance Plaintiff was not a mere volunteer by making the partial payment. The evidence clearly showed that there was a final settlement offer and payment made which was accepted by the Assured which indemnified the Assured who subrogated its rights to the Plaintiff.

30. The issues between the parties can be encompassed in four issues.

- Whether there was a contract between the Assured and the Defendant which contained an express or implied term to provide clean fuel and if so whether there was a breach of that contract by the provision of harmful fuel which caused damage to the Vessel?

- Whether there is an implied warranty or condition as to the quality or fitness for a particular purpose of the fuel supplied pursuant to section 16(a) and/or 16(b) of the Sale of Goods Act and if so whether there was a material breach of the warranty or condition by the Defendant which caused damage to the Vessel?

- Whether there is an implied warranty in relation to the fuel sold by the Defendant to the Assured pursuant to Section 24 subsection (4) of the Consumer Protection Act 2006 and if so whether there was a material breach of the warranty by the Defendant which caused damage to the Vessel?

- Whether there were alternate causes, inclusive of the purchase of fuel from Riding Rock Marina, and/or contributing factors, including the seaworthiness of Vessel that directly contributed to the alleged damage to the Vessel?

ISSUE ONE - Whether there was a contract between the Assured and the Defendant which contained an express or implied term to provide clean fuel and if so whether there was a breach of that contract by the provision of harmful fuel which caused damage to the Vessel?

31. Both parties agree that there was a contract between the Assured and the Defendant for the sale and purchase of 750 gallons of diesel for the Vessel. The Defendant however submits that the contract was a basic one by which the Defendant offered to sell the Assured 750 gallons of diesel fuel and the Assured who agreed to and in fact purchased the same at a total price of $3,870.90. Other than the quantity and price of the fuel, there was no evidence of any other terms of mutual agreement. The Plaintiff submits that it was an implied term that the fuel would be of good quality.

32. The Plaintiff submitted that with the creation of this contract certain key terms were automatically implied to give the contract business efficacy of which the diesel's reasonable fitness and satisfactory quality are examples. They rely on **Trollope and Colls Ltd. v North West Metropolitan Regional Hospital Board [1973] 2All ER 260** where Lord Pearson stated:-

> ***"An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract."***

33. By the Defendant's own evidence, Mr. Donovan Cleare, the Defendant's manager agreed that the Defendant had an obligation to sell diesel fit for the operation of a vessel

which should be of a satisfactory quality. The Defendant also admitted these implied terms in their Defence.

34. The law governing implied terms in a contract is succinctly set out in **Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd 2015] UKSC 72** ("**Marks and Spencer**") which I adopt. This case involved a tenant claiming that, under the terms of a lease, certain funds were impliedly owed to him upon termination of the lease. Lord Neuberger stated :-

> **"[15] As Lady Hale pointed out in Geys v Société Générale, London Branch [2012] UKSC 63, [2013] 1 All ER 1061, [2013] 1 AC 523(at para [55]), there are two types of contractual implied terms. The first, with which this case is concerned, is a term which is implied into a particular contract, in the light of the express terms, commercial common sense, and the facts known to both parties at the time the contract was made. The second type of implied terms arises because, unless such a term is expressly excluded, the law (sometimes by statute, sometimes through the common law) effectively imposes certain terms into certain classes of relationship.**
>
> **[16] There have, of course, been many judicial observations as to the nature of the requirements which have to be satisfied before a term can be implied into a detailed commercial contract. They include three classic statements, which have been frequently quoted in law books and judgments. In The Moorcock (1889) 14 PD 64 at 68, [1886–90] All ER Rep 530, Bowen LJ observed that in all the cases where a term had been implied, 'it will be found that ... the law is raising an implication from the presumed intention of the parties with the object of giving the transaction such efficacy as both parties must have intended that at all events it should have'. In Reigate v Union Manufacturing Co (Ramsbottom) Ltd [1918] 1 KB 592, [1918–19] All ER Rep 143, Scrutton LJ said that '[a] term can only be implied if it is necessary in the business sense to give efficacy to the contract'. He added that a term would only be implied if 'it is such a term that it can confidently be said that if at the time the contract was being negotiated' the parties had been asked what would happen in a certain event, they would both have replied ' "Of course, so and so will happen; we did not trouble to say that; it is too clear"'. And in Shirlaw v Southern Foundries (1926) Ltd [1939] 2 All ER 113, [1939] 2 KB 206, MacKinnon LJ observed that, '[p]rima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying'. Reflecting what Scrutton LJ had said 20 years earlier, MacKinnon LJ also famously added that a term would only be implied 'if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common "Oh, of course!" '.**
>
> **[17] Support for the notion that a term will only be implied if it satisfies the test of business necessity is to be found in a number of observations made in the House of Lords. Notable examples included**

Lord Pearson (with whom Lord Guest and Lord Diplock agreed) in Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board [1973] 2 All ER 260, [1973] 1 WLR 601, and Lord Wilberforce, Lord Cross, Lord Salmon and Lord Edmund-Davies in Liverpool City Council v Irwin [1976] 2 All ER 39, 47, 50 and 53, [1977] AC 239, 258, 262 and 266 respectively. More recently, the test of 'necessary to give business efficacy' to the contract in issue was mentioned by Lady Hale in Geys at para [55] and by Lord Carnwath in Arnold v Britton [2015] UKSC 36, [2016] 1 All ER 1, [2015] 2 WLR 1593(at para [112]).

[18] In the Privy Council case of BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977) 52 ALJR 20 at 26, Lord Simon (speaking for the majority, which included Viscount Dilhorne and Lord Keith) said that:

'[F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.'

[19] In Philips Electronique Grand Public SA v British Sky Broadcasting Ltd [1995] EMLR 472 at 481, Sir Thomas Bingham MR set out Lord Simon's formulation, and described it as a summary which 'distil[led] the essence of much learning on implied terms' but whose 'simplicity could be almost misleading'. Sir Thomas then explained that it was 'difficult to infer with confidence what the parties must have intended when they have entered into a lengthy and carefully-drafted contract but have omitted to make provision for the matter in issue', because 'it may well be doubtful whether the omission was the result of the parties' oversight or of their deliberate decision', or indeed the parties might suspect that 'they are unlikely to agree on what is to happen in a certain ... eventuality' and 'may well choose to leave the matter uncovered in their contract in the hope that the eventuality will not occur'. Sir Thomas went on to say this (at 482):

'The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong. [He then quoted the observations of Scrutton LJ in Reigate, and continued] [I]t is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual

solution or that one of several possible solutions would without doubt have been preferred ...'

[20] Sir Thomas's approach in Philips was consistent with his reasoning, as Bingham LJ in the earlier case Atkins International HA v Islamic Republic of Iran Shipping Lines, The APJ Priti [1987] 2 Lloyd's Rep 37 at 42, where he rejected the argument that a warranty, to the effect that the port declared was prospectively safe, could be implied into a voyage charter-party. His reasons for rejecting the implication were 'because the omission of an express warranty may well have been deliberate, because such an implied term is not necessary for the business efficacy of the charter and because such an implied term would at best lie uneasily beside the express terms of the charter' (emphasis added)."

35. The test as stated in **Marks and Spencer** is summarized as:- (1) it ("the implied term") must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

36. Applying the test to these facts, I therefore find that there was a contract between the Assured and the Defendant for the sale and purchase of diesel fuel on the 25th June 2018 for the Assured's vessel, and that there were implied terms in that contract that the fuel would be reasonably fit for the purpose and of a satisfactory quality.

37. This then leads to whether the Defendant breached the contract by providing contaminated fuel to the Vessel. The Plaintiff submits that the fuel was contaminated with harmful substances which caused harm to the Vessel as it was contaminated with water, fungus and bacteria. The evidence of Floyd Friloux revealed that after testing the diesel sample there was visual evidence of water contamination and it also contained two ounces of diesel and five ounces of salty water which was not normal and rendered the fuel incapable of use in an engine.

38. The evidence of Doug Wager also revealed that a diesel sample was sent for testing to Ring Power Cat which test report indicated that the sample contained high bacteria and fungus contamination. Additionally, there was the evidence of Captain Hellmuth that there were other customers complaining about receiving bad fuel. Mr. Grant averred that the Vessel could not have made it from San Salvador to Eleuthera on fuel with that level of contamination.

39. The bottoms of the fuel tanks of the Defendant were below sea level. The evidence of Mr. Grant, an independent marine surveyor whose profession is to survey the Vessel and form an opinion as to the cause of any damage, is the only evidence which speak directly to examining the vessel immediately after the issue with the Vessel arose. Mr. Grant inspected the engine and generators and obtained fuel samples which he was instructed had been taken from the racors and sent them to the testing facility. He also spoke with the Captain and obtained a report from him prior to his death.

40. Mr. Grant, based on his investigation, ascertained that the problem with the Vessel was as a result of the fuel purchased from the Defendant which had levels of salt water in it. Mr. Andrew Pike, the Defendant's expert accepted upon reviewing the photographs of the storage tanks of the Defendant that the bottoms were below sea level.

41. I also note that the Defendant did not collect any evidence of its own from the Vessel despite being invited to do so.

42. The samples which were sent by Mr. Grant to the two laboratories resulted in findings of contaminates in both samples. It was the test result from Lubriport Laboratories Inc. ("Lubriport") which confirmed salt water in the sample tested.

43. The Defendant challenged the Plaintiff as to the manner of collecting the sample sent to Lubriport for testing, as Mr. Grant had obtained the samples from a bucket located in the machinery space adjacent to the fuel filter separators which contained the fuel which had been drained from the racor filters. The inference was whether or not the sample could or could not have been genuine or altered. This was a legitimate challenge however the Defendant's own evidence revealed that there was water in the Defendant's diesel storage tanks. I would have placed considerable weight to this challenge were it not have been for the Defendant's own evidence which revealed water in the storage tanks in question at the material time .

44. The Defendant's current inventory report on three of its tanks revealed water in the tanks on the day before the Assured purchased fuel. Further on the actual day of purchase two of the tanks had water in them. The Manager of the Defendant admitted in his cross-examination that the diesel purchased by the Assured came from one of these tanks.

45. The evidence of the Defendant's witness, Mr. Ward confirmed seeing Mr. Cleare test the fuel and the test revealed water in the tank albeit a miniscule amount. It is accepted that it is usual to have a small level of water in a tank but the irrefutable fact confirmed was that all evidence led on the issue confirmed that the Defendant's tanks had water at a level which was more than miniscule which I accept.

46. The Defendant's expert Mr. Andrew Pike also accepted that two gallons or five gallons of water in a fuel tank could contaminate the fuel. The Plaintiff challenged Mr. Pike's expertise as to fuel testing for contaminants yet his statement concurred with that of Mr. Friloux, the Plaintiff's expert.

47. Mr. Pike when questioned by the court admitted to not being an expert in fuel analysis and accordingly. I find that he is unable to provide expert evidence on fuel analysis to assist the court on whether the level of water in the fuel was of a quantity to cause damage or not. I also accept that Mr. Pike did not conduct an inspection of the Vessel and relied solely on the witness statement of Mr. Brown.

48. Having considered all of the evidence and submissions I accepted that the diesel fuel purchased contained salty water and bacteria which caused the damage to the Vessel.

49. The Plaintiff maintained that the Defendant breached its contractual, statutory and general duties owed to the Defendant when it sold contaminated fuel.

50. The Defendant submits that the diesel fuel was capable of being used for operation in other diesel engines. A meter reading of the Defendant's Dock Sheets on 25th June 2018 showed that an additional 172.50 gallons of diesel was sold that same day to a variety of customers. The evidence of Captain Hellmuth that there were other customers who received bad fuel was uncorroborated nor was the evidence of the Defendant that there were no complaints of any other customers.

51. Moreover, the Defendant submits that the Assured had not provided any evidence that it expressly or impliedly communicated any particular purpose which the diesel fuel was to be used and that there were no steps taken prior to the purchase of the fuel to place reliance on the Defendant's skill and judgment to select diesel fuel. Mr. Boyd Riese-Ward, another of the Defendant's customers purchased fuel the same week but before the Plaintiff and that none of his vessels experienced any damage. The court accepts that there was a delivery of diesel to the Defendant after the purchase by Mr. Reise-Ward. The court also finds that the Defendant did not have the fuel examined after it received the delivery of fuel.

52. The Plaintiff relies on **Scott v London and St. Katherine Docks Co (1865) 159 ER 665** where Erie CJ stated:-

> ***"Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care"***

53. The Plaintiff maintains that the Defendant's Managing Director accepted the implied terms and that the presence of water is evidence of a breach of the contractual duty to sell diesel fuel fit for the purpose and of a satisfactory quality. I note and accept that the Defendant did not obtain independent testing of the diesel fuel retrieved from the Assured's Vessel when faced with the allegations of water contamination, nor did they conduct regularly scheduled tests of its fuel and tanks, particularly when the tanks in question were beneath sea level.

54. The Defendant in its submissions accepted the implied term that goods are sold which are reasonably fit for the need of that particular trade without any uncharacteristic qualification on their use.

55. I accept that the Defendant breached the implied terms of the contract to provide satisfactory fuel to the Plaintiff and which breach caused damage to the Vessel. The bad fuel causing damage to the Vessel was a foreseeable consequence and was not remote as confirmed by the Plaintiff's witnesses Floyd Friloux and Michael Grant.

56. There was a valid contract between the Assured and the Defendant which contained implied terms that the fuel provided should be of satisfactory quality and fit for the purpose. The quality of the fuel was bad and not fit for the purpose and caused damage to the Vessel.

Issue Two - Whether there is an implied warranty or condition as to the quality or fitness for a particular purpose of the fuel supplied pursuant to section 16(a) and/or 16(b) of the Sale of Goods Act and if so whether there was a material breach of the warranty or condition by the Defendant which caused damage to the Vessel?

57. **Section 16 of the Sales of Goods Act ("SOGA")** states: -

> **"Subject to the provisions of this Act and of any Act in that behalf, there is no implied warranty or condition as the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows —**
>
> **(a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose: Provided that in the case of a contract for the sale of a specified article under the patent or other trade name, there is no implied condition as to its fitness for any particular purpose;**
>
> **(b) where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality: Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;**
>
> **(c) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;**
>
> **(d) an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith."**

58. The Plaintiff submitted that the SOGA makes no distinction as to the medium of the contract and acknowledges oral contracts pursuant to section 5. Section 3(1) of the Act defines a contract of sale of goods as one where the seller transfer or agrees to transfer the property in goods to the buyer for a money consideration called the price. The oral contract between the Assured and the Defendant for the purchase of 750 gallons of diesel for $3,870.00 fell within the ambit of the Act.

59. In **Oldham v Maura's Marine Ltd. [1997] BHS J. No. 21**, Strachan J considered the interpretation of Section 16 of the Act: -

> **"5. About the first statutory provision, reasonable fitness for the purchaser's purposes, I note that the pleadings omit to specify the purpose (s) but as gathered from the evidence, they were primarily commercial and secondarily pleasure, with**

emphasis on the boat being capable of doing manouevres popularly referred to in the evidence as "spins". Plainly therefore a less than substantially seaworthy and otherwise functional boat would not do. What is relied on as rendering the boat less than reasonably fit for the disclosed purpose(s) are principally, overheating of the engine and a maintenance-free battery "going dead", that is, malfunctioned sooner than two months and after and, while the boat was still under warranty. The causes for these undisputed failings must be identified and evaluated.....

11. What is meant by the expression merchantable quality, the essential part of the allegation now for consideration has been much debated. Mindful that no single judicial pronouncement can apply to every kind of case, there are some which appear to be more widely applicable. See, for examples, [it] means that the good must be suitable for any of the purpose for which they are normally used, (Cammell Laird and Company, Limited v. The Manganese Bronze and Brass Company, Limited 1934 AC 402); they need not be perfect. Hence,

> "... the fact that a defect is repairable does not prevent it from making the res vendita unmerchantable if it is of a sufficient degree delivery".

12. However, whatever the true meaning of the expression in a given set of facts and circumstances, there is settled authority for saying that whether goods are of merchantable quality is a question to be determined at the time of sale."

60. In **Meadows v. Quality Auto Sales Ltd. [1988] BHS J. No. 61**, Smith J also considered the provisions of the Act.

> "4 As the Plaintiff has specifically referred to section 16(a) of the Sale of Goods Act (Chapter 110) ("the Act") in his Statement of Claim, and giving a reasonable interpretation of the pleadings, I feel that a sufficient allegation is imported into the pleadings by that reference and I shall therefore examine the section in its entirety to see what assistance can be gleaned from it.
>
> 5.....
>
> 6.....
>
> 7 Under the Sale of Goods Act 1893 of England, it was incumbent upon the Plaintiff to allege in his Statement of Claim the fact that he relied on the skill or judgment of the Defendant and that he purchased the goods, or agreed to purchase them for a particular purpose. Once this was shown, the onus, albeit only an evidential one, then shifted to the Defendant to show that the goods were, at the time of sale, fit for the purpose for which they were sold. The provisions of the Act as quoted above are substantially the same as in the English Act.
>
> 8.....
>
> 9.....
>
> 10 In Preist v. Last (1903) 2 K.B. 148 the facts of which were, as gleaned from the headnote, that a buyer had gone to a retail chemist's shop and asked for a hot-water bottle and an article was shown to him as such. He asked whether it could hold boiling water, was told "No" but it could hold hot water. He bought it and some days later his wife was scalded when the bottle burst while she was using it. The buyer sued for breach of warranty.
>
> 11 The jury found that the bottle was not fit for the purpose and that was the cause of its bursting and the trial judge, with the consent of the parties, found that the buyer had, when purchasing the bottle, made known to the Defendant the particular purpose for which it was required so as to show that the case therefore

came within subsection 14(1) of the English Sale of Goods Act 1893 and there was consequently an implied warranty that the bottle was fit for the purpose of holding hot water of which warranty there had been a breach.

12 In this case, there is no evidence of an express reliance by the Plaintiff on the skill or judgment of the Defendant in purchasing the car and indeed such reliance will seldom be expressed.....

13 In Grant v Australian Knitting Mills Ltd. [19367 A.C. 85 at p. 99 Lord Wright, delivering the advice of the Privy Council and referring to section 19 of the South Australian Sale of Goods Act 1895 which is identical with section 14 of the 1893 Act in England and therefore with section 16 of the Act said -

> "... the first exception if its terms are satisfied, entitles the buyer to the benefit of an implied condition that the goods are reasonably fit for the purpose for which the goods are supplied, but only if that purpose is made known to the seller so as to show that the buyer relies on the seller's skill or judgment'. It is clear that the reliance must be brought home to the mind of the seller, expressly or by implication. The reliance will seldom be express: it will usually arise by implication from the circumstances: thus to take a case like that in question of a purchase from a retailer, the reliance will be in general inferred from the fact that a buyer goes to the shop in the confidence that the tradesman has selected his stock with skill and judgment. The retailer need know nothing about the process of manufacture: it is immaterial whether he be a manufacturer or not: the main inducement to deal with a good retail shop is the expectation that the tradesman will have bought the right goods of a good make: the goods sold must be, as they are in the present case, goods of a description which it is in the course of the seller's business to supply: there is no need to specify in terms the particular purpose for which the buyer requires the goods, which is nonetheless the particular purpose for which anyone would ordinarily want the goods."

14 The above quotation, I think, would be an apt interpretation of the provisions of section 16(a) of the Act and, applying that interpretation to the facts of this case I find that there was an implied term that the car was bought for the purpose of transportation of the Plaintiff and that it would be reasonably fit for that purpose and that in purchasing the car the Plaintiff was relying on the skill or judgment of the Defendant.

15 I shall deal later with the question whether there was a breach of that implied condition.

16 There is also the question as to whether or not when the car was sold on 25th March, 1981, it was of merchantable quality as required by section 16(b) of the Act.

17 The term "merchantable quality" is not defined in the Act and under earlier legislation in England and elsewhere in the Commonwealth, that term was the cause of much litigation. Some guidance may therefore be gleaned from a reference to cases on the interpretation of that term in other Commonwealth jurisdictions. Two examples will suffice:

18 In Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association [1969] 2 A.C. 31 at p. 75, referring to section 14 of the English Act, Lord Reid said -

> "I take first subsection (2) because it is of more general application. It applies to all sales by description where the seller deals in such goods. There may be a question whether a sale of a particular article is not really a sale by description but that does not arise here: these are clearly sales by description. Then it is a condition, unless excluded by the contract that the goods must be of merchantable quality. Merchantable can only mean commercially saleable. If

the description is a familiar one, it may be that in practice only one quality of goods answers that description - then that quality and only that quality is merchantable quality. Or it may be that various qualities of goods are commonly sold under that description - then it is not disputed that the lowest quality commonly so sold is what is meant by merchantable quality: it is commercially saleable under that description."

19 In Grant v Australian Knitting Mills Ltd. already cited, Lord Wright continued at page 99:

"The second exception in a case like this in truth overlaps in its application the first exception: whatever else merchantable may mean, it does mean that the article sold, if only meant for one particular use in ordinary course, it is fit for that use."

26 Section 37 of the Act reads as follows:-

"The buyer is deemed to have accepted that goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

27 In this case the Plaintiff has, even after he said he discovered defects, retained the car and drove it for 5,000 miles.

28 The Plaintiff had had the car stored for many months at apparently no inconsiderable expense to himself when, in fact he was under a duty to mitigate any loss which could be attributed to the fault of the Defendant.

29 The cumulative effect of these actions by the Plaintiff amount, in my view, to acceptance of the car within the meaning of section 37 of the Act."

61. By the Plaintiff's Writ they claim that:-

> **"11. Further, Briland Gas was negligent when it sold the Fuel to the Assured and acted in breach of its statutory duties which it owed under the provisions of: (i) the Sale of Goods Act, 1904 of the laws of the Commonwealth of The Bahamas; and (ii) the Consumer Protection Act, 2006 of the laws of the Commonwealth of The Bahamas."**

62. In the Particulars of Breach of Statutory Duty the Plaintiff sets out the particulars of their claim pursuant to Section 16 (a) and (b) of the Sales of Goods Act and section 24 (4) of the Consumer Protection Act. The Plaintiff alleges that by Section 16 (a) there is an implied warranty or condition of fitness in any contract of sale and that the Defendant, in breach of that provision, failed to provide the Plaintiff with good fuel. The burden they maintain then shifts to the Defendant to refute this allegation.

63. The Defendant on the other hand maintains that there is no implied warranty or condition as to the quality of the goods sold nor as to their fitness for any particular purpose except in certain circumstances where:-
    1) the buyer makes known to the seller the particular purpose for which the goods are required
    2) if the buyer makes it known to the seller that he is relying on the skill or judgment of the seller, or
    3) the goods are of a description which is in the course of the business of the seller to supply.

64. The Defendant further maintains that the only implied warranty or condition under **Section 16** is an implied condition as to title, description, satisfactory quality and fitness for purpose and transfer of a sample.

65. The Defendant relies on **Henry Kendall & Son (A Firm) and William Lillico & Co [1969] 2 A.C. 31** which set out an analysis of **Section 14** of the **UK Sale of Goods Act** which is equivalent to **Section 16** of the **SOGA** which provided:-

> "**When construing Section 14 both sections must be considered together**
>
> 1. **and that,** ***it is for the buyer to prove all the conditions necessary to bring the subsections into operation. (See page 20, at referenced page 54).***
>
> 2. **Section 14 (1) has a narrower scope than section 14(2) because it** ***requires that the buyers shall have required the goods for a particular purpose,*** **and** ***that purpose shall have been made known to the seller,*** **and that it shall have been made known to him** ***in such circumstances that he realised or ought to have realised that the buyer was relying on his using his skill or judgment*** **to select goods** ***fit for that purpose. (See page 39, at referenced page 79).***
>
> 3. **The degree of precision or definition which makes a purpose a particular purpose** ***depends entirely on the facts and circumstances of a purchase and sale transaction.*** **It will be a** ***question of fact whether the buyer has sufficiently stated his purpose in such a way or in such circumstances that showed that the buyers were relying on the sellers to show skill and judgment so that they would supply what was reasonably fit for the buyer's need. (See page 48, at referenced page 93).***
>
> 4. **The question whether goods are saleable or reasonably fit for one or more of their ordinary purposes has to be tested,** ***and can only be tested in the light of all the knowledge available at the date of the trial.***

66. They further rely on **Wallis v Russell [1902] 2 I.R. 585** where it was established that to hold that there was an implied term under the statute **"the purchase, being made for a definite purpose known to the seller, has been made in reliance on his skill and judgment to select or to supply goods for that purpose"** They submit that the court must assess whether a particular purpose has been made known to the seller by the buyer such that could be shown that the buyer relied on the seller's judgment. Further there must be an assessment of all the facts surrounding the contract of sale.

67. The Defendant submits that there is no evidence that the Assured or the Captain of the Vessel made known to the Defendant the purpose of the purchase of the diesel at the time of the sale. They maintain that in order to invoke the implied condition the purpose for which the goods obtained is specifically required and not may be required. Diesel is a multi-purpose item which can be used in a variety of ways. The Defendant did not know the required purpose of the diesel and as such the Plaintiff cannot rely on the Defendant's judgment or skill.

68. The Defendant contended that because of the nature of its business the average customer was not allowed to inspect goods at the time of sale. It sold diesel for multiple purposes that day and it could not be said that the diesel was of no use and lacked merchantable quality. There were no other complaints that day and there was no material breach of the implied condition that the diesel sold to the public would not be of

merchantable quality.

69. Diesel was not an only purpose item which if so could invoke the implied condition. The Defendant relies on the "other sales" to support the multi-purpose use of diesel.

70. In further reliance on **Kendall** they submit:-

> ***"If the description in the contract was so limited that goods sold under it would normally be used for only one purpose, then the goods would be unmerchantable under that description if they were of no use for that purpose. But if the description was so general that goods sold under it are normally used for several purposes, then goods are merchantable under that description if they are fit for any one of these purposes: if the buyer wanted the goods for one of those several purposes for which the goods delivered did not happen to be suitable, though they were suitable for other purposes for which goods bought under that description are normally bought, then he cannot complain. He ought either to have taken the necessary steps to bring subsection (1) into operation or to have insisted that a more specific description must be inserted in the contract."***

71. The Defendant submits that the Plaintiff has not met the basic requirements of making known the need for the diesel and placing reliance on the seller's judgment as required under Section 16 of the SOGA.

72. The Defendant further relies on evidence that the Vessel had inter alia a history of insurance claims, the engines had a history of mechanical problems and that the fuel tanks had not been pressure tested as recommended in a 2017 Survey Report, as well as the evidence of the First Mate that the owner and the Captain conspired to obtain new engines. All of these facts show that the case was brought to establish an insurance claim and that the Defendant could not have known the reason for the purchase.

73. Finally the Defendant averred that the type of diesel fuel sold was a particular type of diesel which would invoke the proviso to Section 16 (a).

74. Having considered the evidence and submissions of both parties I am satisfied that the fuel was purchased and directly placed in the fuel tanks of the Vessel, therefore it was obvious the purpose for which the fuel was being purchased and required. There was no ambiguity as to the purpose of the diesel. Once the purpose was obvious there was the implied condition arising as to the diesel being fit for the purpose of running an engine on a boat and the act of agreeing to purchase the diesel would automatically invoke the reliance on the seller's skill and judgment that the item purchased would meet that requirement. In fact the Defendant's submission as to the quality of the diesel sold by it supports the finding that it was exercising a seller's judgment in the choice of marine diesel being sold to its customers to ensure that engines had leading edge technology and was designed to keep engine parts clean. This was not a simple contract. The Defendant knew the purpose for the diesel and accordingly I find that the exception contained in Section 16 (a) of the SOGA applies to this case.

75. The proviso in Section 16(a) is not applicable as the Assured did not seek to purchase a particular article or item under a patent or trade name. It sought to purchase diesel fuel fit to operate the Vessel.

76. The Defendant is the seller of diesel fuel for the purpose of operating sea crafts. As the evidence shows, if the fuel is bad, the sea crafts would not operate which would defeat the purpose of its use. The Defendant was known to provide the fuel and it was implied that the fuel would be of a good quality to prevent the damage to the vessel. Any other implication would be unrealistic as sea crafts cannot operate with fuel of poor quality.

77. The Assured paid the Defendant for the fuel received. The provision of the fuel is a service in addition to the fuel being a good received. The service of providing the fuel caused the Assured loss. Therefore, I find that the Defendant is liable for paying to the Plaintiff all reasonable costs incurred as have been set out in the Writ.

78. The Defendant relied on an assessment of the water in the fuel tanks as insignificant and incapable of causing the damage alleged. They maintain that the level of water was less than 1% of the storage volume and within acceptable limits, as it is accepted that the tanks will always have some water in them.

79. They maintained that there were significant protective measures in place, at each stage in the chain of custody of the diesel's delivery, receipt and storage. The Defendant had installed a probe in its storage tanks attached to its Veeder Root System for careful monitoring of the condition of its fuel tanks. The said system was equipped with an alarm to shut down the fuel tanks if it became contaminated or there was an exposure to an unacceptable amount of water.

80. They maintain that the level of water found by the Lubriport lab as compared to the Rubis report could not be reconciled. The levels found by the lab would support the likelihood of salt water intrusion from another source, or that the Vessel lacked functioning water separators or functioning water filters.

81. They also maintain that the evidence of the bacteria is not conclusive as the probability existed that it was compromised because of the circumstances surrounding its extraction. Even the Plaintiff's adjuster recognized the inadequacy.

82. Despite the submissions of the Defendant as to probable causes for certain findings there is no other evidence led by the Defendant to support or corroborate their various submissions. The Defendant had an opportunity to examine the Vessel, to examine the fuel, to extract their own sample, but did not and accordingly their submissions cannot be given much weight as there is no evidence to support them. Further the standard of proof is on a balance of probabilities and not an absolute standard but it must be based on the evidence led.

83. I am satisfied that on the balance of probabilities that there was an implied condition that the fuel was of a merchantable quality. I adopt the definition of Justice Gonsalves-Sabola in **Debarros v Quality Auto Sales Ltd. [1990] BHS J No. 29.61**:-

"In the case of Cehave N.V. v. Bremer Handelsgesellschaft m.b.H The Hansa Nord (1976) 1 Q. B. 44, 62 Lord Denning addressed the statutory definition of merchantable quality' which was introduced by the English Supply of Goods (Implied Terms) Act 1973. Although that statutory definition was never enacted in the Bahamas, I am persuaded that it holds good for purposes of the local Sale of Goods Act, because, as Lord Denning reasons it -

"For myself, I think the definition in the latest statute is the best that has yet been devised. It is contained in section 7(2) of the Supply of Goods (Implied Terms) Act 1973. But the definition seems to me appropriate for contracts made before it. It runs as follows:

Goods of any kind are of merchantable quality within the meaning of this Act if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all other relevant circumstances; and any reference in this Act to unmerchantable goods shall be construed accordingly.

In applying that definition, it is as well to remember that, by the statute, we are dealing with an implied condition, strictly so called, and not a warranty. For any breach of it, therefore, the buyer is entitled to reject the goods: or, alternatively, if he chooses to accept them or has accepted them, he has a remedy in damages. In these circumstances, I should have thought a fair way of testing merchantability would be to ask a commercial man: was the breach such that the buyer should be able to reject the goods? In answering that question the commercial man would have regard to the various matters mentioned in the new statutory definition. He would, of course, have regard to the purpose for which goods of that kind are commonly bought."

84. I accordingly find that in breach of sections 16 (a) and (b) of the Act, the Defendant sold the Assured fuel that was not of the quality required for the proper operation of the Vessel. I also find that the Plaintiff did not accept the quality of the fuel purchased as it took action to remedy the damage to the Vessel by having the Vessel examined and the fuel tested, soon after it was discovered that the Vessel had issues.

85. I also accept the Assured did not know at the time of purchase that the diesel was contaminated such that it would cause damage to the Vessel. The Assured relied on the Defendant's knowledge and skill and purchased the diesel and accordingly the Assured is entitled to a remedy in damages which entitlement is subrogated to the Plaintiff.

86. The Plaintiff also submitted that the Defendant owed the Assured a duty of care as a result of the contract, that the Defendant breached that duty of care and caused damage to the Vessel. They rely on **Lays Transportation Ltd. v Meadow Lake Consumer's Co-Operative Association [1982] SJ No. 440** and **United Farmers of Alberta Co-Operatives Ltd v Economy Carriers Ltd. [1981] A.J. No. 440** and **Kwong Wing Hing International Ltd v Kin Hing Hong Petroleum Products Co. Ltd [1994] HKCU 62** where the court found

> **"the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered**

damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise

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

87. The Defendant maintains that the Plaintiff had not proven causation in negligence and submitted that there were other possible causes. They rely on **Binnie v Rederji Theodoro BV (1993) SC71** and **Sands and others v Marsh Harbour Boat Yard Limited (2011) CLE/gen/1154** where Barnett CJ stated that causation is a question of fact to be applied by common sense to the facts of the case.

88. I accept this statement by the then Chief Justice and find that the only evidence led showed that there was contaminated fuel and further the only evidence led showed that there was a purchase of fuel from the Defendant the day before the damage was discovered. I am satisfied that the "but for" test was met.

89. I am satisfied that there was a sufficient relationship of proximity which arose from the contract for the sale and purchase of the diesel fuel that if there was an act on the part of the Defendant which could be construed as lacking in care towards the purchaser as a result of the performance of the contract and damages were suffered by the Assured, that act would constitute negligence. The Plaintiff need not prove knowledge or intention to satisfy this cause of action. Accordingly, I find that the claim for negligence against the Defendant has been proven.

Issue Three - Whether there is an implied warranty in relation to the fuel sold by the Defendant to the Assured pursuant to subsection 24(4) of the Consumer Protection Act 2006 and if so whether there was a material breach of the warranty by the Defendant which caused damage to the Vessel?

90. The Plaintiff maintains that the Consumer Protection Act ("**CPA**") mandates that an implied warranty attaches to a transaction in the absence of an express warranty. **Section 24(5) of the CPA** states:-

> **"In the absence of an explicit warranty which shall be at the discretion of the provider, an implied warranty of six months on parts and labour shall, subject to the standard conditions of warranties attach to the transaction."**

This provision only entitles the injured party to damages on a breach of the implied warranty, whereas a breach of the implied condition entitles the injured party to terminate a contract and claim damages.

91. The Defendant maintains that Section 24 only applied to implied warranties of used goods and to the repair of those goods hence there was no implied warranty as the diesel was not "used goods".

92. I am satisfied that Section 24 of the CPA speaks to various types of warranties. Each subsection is distinct from the other. Section 24(5) is not limited to used goods but speaks specifically to an implied warranty on parts and labour for a period of six months whether used or not. By virtue of this Section if a part required replacing or repairing within six months, then this Section would apply in the absence of an explicit warranty. I am not satisfied that this Section assists the Plaintiff as I find that this speaks to parts belonging to an item sold or purchased, not damaged as a result of a negligent introduction of a contaminant.

93. **Section 25 (1) (c)** and **Section 25 (2)(a)** of the CPA provides:-

> **"Subsection (2) applies in any case where a provider –**
>
> **(c) inadvertently causes bodily injury or pecuniary loss to be sustained by the consumer, independent of all other causes or contributory negligence"**
>
> **2 The provider shall, upon presentation of a substantiated claim by the consumer-**
>
> **(a) undertake to pay the consumer all reasonable costs incurred or to be incurred by the consumer in correcting the damage so caused"**

This Section simply provides that the seller would make the consumer whole for any pecuniary loss as in settle any damages which would naturally flow from the pecuniary loss. This although applicable does not bestow any greater or additional benefit on the Plaintiff that what would flow from the established negligence, or the contractual or statutory breaches previously established.

94. I have found that the diesel fuel taken from the Vessel contained salty water. I also accept the evidence of Mr. Wager that Captain Hellmuth told him that the Vessel was emitting white smoke.

95. I also accept the evidence of Mr. Grant, an independent surveyor as to his findings of
    1) Rust and/or water at the injection port of each injector
    2) Rust on the cylinder walls
    3) Rust on 10 cylinder heads with 6 having evidence of water damage which would be consistent with water entering through the injectors.

96. I also find that the Defendant did not lead any evidence other than the receipts from San Salvador to prove their assertions as to other causes. The Defendant's expert report is based solely on the evidence of Mr. Jordan Brown. His expertise is limited to the technology of small crafts and naval architecture. He maintained that he is an expert in fuel analysis as this field was covered under naval architecture which he studied at university. He admitted to not seeing the evidence of the Plaintiff's witnesses nor did he speak to any of their witnesses or Mr. Brown. He admitted to not inspecting the tanks or the engine. He admitted that the bottoms of the Defendant's tanks were below sea level. He also admitted that even two or five gallons of water in the fuel tank could contaminate the fuel.

97. Under re-examination Mr. Pike admitted that he is not a fuel analysis expert but relies on fuel analysis done by labs. Upon being shown photographs, he admitted that the evidence of corrosion is evidence of contamination in the fuel.

98. I found Mr. Pike's evidence in fact supportive of the Plaintiff's case. It was limited in scope and weight in that there was no direct evidence as to his examining the samples, or the engines or the Vessel itself so as to form an expert opinion as to his findings. As an expert in naval architecture, an examination of the vessel would have provided him with direct evidence of the state of the vessel, inclusive of the engines to determine if there were other causes for the damage suffered. He did not avail himself of this opportunity. He did opine that the photographs showed corrosion which could only happen if there was contaminates in the fuel. He also accepted the findings of the adjuster.

99. I accept that the evidence of Captain Hellmuth could not be tested, however the only challenge to his character was the evidence of Mr. Brown who I accept was motivated by his dislike of Mr. Messier. He admitted that was why he was giving evidence in the matter. This admission strikes at the heart of the veracity of his evidence and as such the weight given to it must be seen from that perspective.

100. Mr. Wager determined that the fuel purchased from the Defendant was contaminated with salt water and when ingested in the engine resulted in the damage to the Vessel.

Issue Four - Whether there were alternate causes, inclusive of the purchase of fuel from Riding Rock Marina, and/or contributing factors, including the seaworthiness of Vessel that directly contributed to the alleged damage to the Vessel?

101. No other evidence was led of any contaminated fuel from any other source. The email from the Captain was contemporaneous as to the sequence of events immediately after the purchase of the diesel from the Defendant and I accept it. This email was sent to the Defendant's Manager as well as to the owner of the Vessel. The Defendant had knowledge of the potential claim immediately.

102. Despite relying on the receipts from San Salvador as an alternate source of contaminated fuel, no witnesses were called or evidence led by the Defendant to support its allegation and verify that the receipts relied on were for fuel for the Vessel. Further, no samples or reports of contamination of fuel purchased in San Salvador at the time in question were produced by the Defendant.

103. I also accept the evidence of Mr. Grant that if the contaminated fuel came from San Salvador it would have been apparent early in the trip to Harbour Island which was a 160mile trip, as water is more dense than diesel and would have been injected first into the engine. The Vessel sailed to Harbour Island without incident. I therefore accept that there was no evidence of any contaminated fuel obtained from San Salvador.

104. The Defendant relied on the failure of the Assured to have the fuel tanks inspected during the survey obtained in 2017 and accordingly maintained that they could not rely

on the soundness of the tanks to aver that it was contaminated fuel which caused the damage and not a leaking fuel tank. I accept the only evidence led by the Defendant of the condition of the boat, that of Mr. Brown who admitted that the boat was in good condition. I am satisfied that he would have indicated to the contrary if there was any evidence that the boat was not in good condition. I accept his honest statement.

105. The damage sustained by the Vessel included top end damage to the engines, damage to the injector pump and injectors, damage to all 24 cylinders, rust, discoloration, salt and moisture damage on the cylinder walls and pistons.

106. The Assured incurred costs to replace and repair the above damage and accepted the sum of $146,000.00 from the Plaintiff by virtue of a Final Settlement Agreement. The settlement agreement also spoke to settling a claim for a damaged hose which the Plaintiff's witness Mr. Thomas said was valued at $15,000.00. This claim was unrelated to the sale and purchase of diesel fuel.

CONCLUSION

107. Having reviewed all of the evidence and submissions of the parties, I find that the Defendant sold the Assured contaminated fuel which caused damage to the Assured's Vessel.

108. The sale was in breach of contract, in breach of the statutory implied conditions under the SOGA and also under Section 27 of the CPA.

109. I also find that the contract gave rise to a duty of care owed to the Assured which was breached negligently by the Defendant.

110. The damages suffered by the Assured resulted in expenses incurred which were settled at $131,000.00, which is the balance of the settlement figure less the claim for the damaged hose.

111. The Plaintiff as subrogee is awarded the sum of $131,000.00 to be paid by the Defendant.

112. Interest is awarded on the judgment sum at the statutory rate until the date of payment.

113. The Defendant shall pay to the Plaintiff the costs of the action to be taxed if not agreed.

Dated this 14th day of April 2023

Hon. Madam Justice G. Diane Stewart