COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION
2018/CLE/gen/No.00129

BETWEEN

SHELLY ANN MERRIMAN LARODA

Plaintiff

AND

RODNEY HANNA

Defendant

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

Appearances: **Ms. Myra E. Russell for the Plaintiff**

Mr. Clinton Clarke for the Defendant

Judgment Date: **6th April, 2023**

JUDGMENT

BACKGROUND

1. On 16th March 2015 by Bill of Sale and Promissory Note (dated 18th March 2015) ("**Promissory Note**"), Shirley Ann Merriman Laroda ("**Plaintiff**") and Rodney Hanna ("**Defendant**") entered into an agreement where the Defendant agreed to purchase and the Plaintiff agreed to sell a 1992 55ft Defender Fishing Trawler with Registration No. NP-05065/FDC382, Engine No. 1XDETROIT/DIESEL 8926M Fishing Boat called "Destiny" ("**Destiny**") for $75,000.00 ("**Purchase Price**"). The material express terms of the agreement were set out in a promissory note dated the 18h March 2015 ("The Promissory Note").
2. They included:-
    1. The Purchaser made a good faith deposit of $1,000.00 towards the purchase.
    2. Destiny required repairs and after repairs were completed, monthly payments of $4,000.00 were to be made by the Defendant to the Plaintiff.
    3. That $40,000.00 was to be paid towards the Purchase Price from the Defendant's sale of his own vessel which was to be sold within 12 months.
    4. Should the vessel not be sold within 12 months, the monthly payments would increase to $6,000.00.

5. If the monthly payments lapse for 3 consecutive months, the contract would be terminated.

6. Should the Purchaser or the Defendant die prior to the completion of the payment of the purchase price, the Defendant's estate would be entitled to complete the sale and the Plaintiffs estate would be entitled to receive the balance of the payments.

3. The full terms of the promissory Note were:-

> **"By a Bill of Sale dated 16th day of March 2015, Captain Rodney Hanna of the Southern District of the Island of New Providence (hereinafter called the Purchaser") of the one part agreed to Purchase a 1992 55ft Defender Fishing Trawler, Registration No. NP-05065FDC382, Engine No. 1XSETROIT/DIESEL 8926M Fishing Boat called Destiny from SHIRLEY ANN MERRIMAN-LARODA also if the Southern District of the Island of New Providence (hereinafter called "the Vendor") of the other part for the sum of Seventy Five Thousand Dollars ($75,000.00) (hereinafter called "the said sum")**
>
> **1. That the Purchaser has made a good faith deposit if One Thousand Dollars to ($1,000.00) to the Vendor.**
>
> **2. That the said Boat will need repairs to become sea worthy. That upon completion of the said repairs the Purchaser agrees to make monthly payments of Four Thousand Dollars ($4,000.00) to the Vendor starting one month after the said repairs until the purchase sum is liquidated.**
>
> **3. That the Purchaser shall pay a lump sum of Forty Thousand Dollars ($40,000.00) on the purchase price from the sale of his present Vessel, which must be sold within Twelve (12) months.**
>
> **4. That Failing the sale of the Purchaser's Vessel within Twelve (12) months, the monthly payments will increase to Six Thousand Dollars ($6,000.00)**
>
> **5. Should the monthly payments lapse for three (3) consecutive months, this contract should be terminated.**
>
> **6. That should the Purchaser or vendor become deceased before the completion of the payment, the Purchaser's Estate would become liable to complete the sale and the Vendor's Estate would be entitled to receive the balance of the payment.**
>
> **7. That this Promissory Note is made in accordance with the Laws of the Commonwealth of the Bahamas."**

The promissory note was signed by the Defendant.

4. In compliance with clause 1 of the Promissory Note, the Defendant paid the deposit of $1,000.00 and also made subsequent payments intermittently.

5. Subsequently, the Defendant received a phone call from the Plaintiff's attorney, Ms. M. Russell advising that he owed $51,100.00 in relation to the purchase of the Destiny. Thereafter, the Defendant had a cashier's cheque in the amount of $51,000.00 issued in the name of Ms. Russell and the Plaintiff. A receipt was provided by Ms. Russell to the Defendant which was dated the 8th February 2018.

6. The Defendant then received a demand letter dated the 26th January 2018 from Ms. Russell demanding $51,100.00. He sought legal advice once served with the letter.

7. The receipt further stated that $87,000.00 remained outstanding. The receipt was signed by Ms. Russell. No further payment was made toward the purchase of the Destiny.

8. By a Writ of Summons filed 09th February 2018, the Plaintiff commenced this action against the Defendant for damages for breach of contract and negligence in failing to pay the sum owed for the Destiny. In paragraph 4 of the Statement of Claim the following implied terms are pleaded:

> **"4. The Following were, inter alia, implied terms**
>
> a) **Captain Rodney Hanna is to purchase "Destiny" "as is";**
>
> b) **On commencement of the contract Shirley Ann Merriman Laroda is to deliver possession of "Destiny" to Captain Rodney Hanna;**
>
> c) **Captain Rodney Hanna is to be responsible for ensuring that "Destiny" is seaworthy;**
>
> d) **"Destiny" is to be constructed, outfitted, manned, and in a ll respects fitted for avoyage at sea.**
>
> e) **Shirley Ann Merriman Laroda would be responsible for inspections and examinations of the said work done to "Desiny";**
>
> f) **Shirley Ann Merriman Laroda is to be given access to "Desinty" to conduct an inspection or examination fo the said work done to "Desiny" to ensure that repairs were conducted on "Desitny";**
>
> g) **Shirley Ann Merriman Laroda is to be given access to "Desiny" to conduct an inspection or examination fo the said work done to "Desiny" to ensure that "Desiny' is seaworthy;**
>
> h) **Access to "Desinty" is to be given to Shirley Ann Merriman Laroda with Twenty Four (24) hour notice to Captain Rodney Hanna;**
>
> i) **Captain Rodney Hanna is responsible for ensuring that "Desinty" is insured;**
>
> j) **Captain Rodney Hanna agrees to pay for damage and/or loss that may be suffered by "Destiny";**
>
> k) **Captain Rodney Hanna is to sell "Adventurer ll";**
>
> l) **Captain Rodney Hanna would be responsible for securing the sale of his present vessel "Adventurer ll";**
>
> m) **Captain Rodeny Hanna is to give notice of Shirley Ann Merriamn Laroda of the sale of Adventure ll;**
>
> n) **Notice of the sale of Adventurer ll is to be given as soon as is practicable;**

o) **The lump sum payment under Clause Three (3) of the contract was to be made by cheque payable to the Plaintiff for the sale of the Defendant's present vessel, "Adventurer II";**

p) **Payments under Clause Two (2) of the contract were to be made the beginning of the month by cheque or chase payable to the Plaintiff;**

q) **Payments under Clause Four (4) of the contract were to be made the beginning of the month, by cheque or chase, payable to the Plaintiff."**

9. The particulars of negligence were pleaded as:-

a) **Failed to give the Plaintiff access to "Destiny" to conduct an inspection or examination of the said work done to "Destiny" to ensure that repairs were conducted on "Destiny";**

b) **Failed to give the Plaintiff access to "Destiny" to conduct an inspection or examination of the said work done to "Destiny" to ensure that "Destiny" is seaworthy";**

c) **Failed to make any or any reasonable or timely inspection of examination of the said works done to "Destiny";**

d) **Failed to sell "Adventurer II" within Twelve (12) months;**

e) **Failed to give notice of the sale of the "Adventurer II" in a timely manner or at all;**

f) **Failed to take action or any sufficient action in the sale of the Defendant's present vessel, "Adventurer II" in a timely manner or at all;**

g) **Failed to make the payments under Clause Two (2) of the contract, to be made at the beginning of the month, by cheque or cash, payable to the Plaintiff;**

h) **Failed to make the payments under Clause Four (4) of the contract, to be made at the beginning of the month, by cheque or cash, payable to the Plaintiff; and**

i) **Failed to deliver possession of "Destiny" to the Plaintiff immediately, as the monthly payments lapsed for Three (3) consecutive months and the contract was terminated.**

10. The alleged particulars of damage suffered were:-

"PARTICULARS OF DAMAGE

1. **Balance of monies due and owing after the Defendant failed to sell his present vessel, "Adventurer II', within twelve (12) months after the signing of the promissory note on 18th March, 2015."**

11. The Defendant filed a Defence on 06th January 2020 denying all allegations made by the Plaintiff and claims that the terms of the Promissory Note had been fulfilled and full payment of the Purchase Price was given to the Plaintiff as of 08th February 2018.

12. Subsequently, by an Amended Writ of Summons filed on 30th November 2020 paragraph 4 of the original Writ of Summons was amended to include:

> **" r) Should the monthly payments lapse for Three (3) consecutive months, and the contract terminated possession of "Destiny" is to be delivered to Shirley Ann Merriman Laroda immediately"**

13. Further, the Plaintiff pleaded the following and provided particulars of the breach of contract:

> **"5 Pursuant to the contract aforesaid, the Defendant purported to commence making payment of Four Thousand Dollars ($4,000.00) on 5th June 2015, after the said works to "Destiny" were completed. The Defendant proceeded as far as making Five (5) subsequent payments. On about the 8th February, 2018, the Defendant made a part payment on the purchase price of "Destiny" from the sale of his present vessel "Adventurer II", and part payment of the arrears under the contract, to the Plaintiff by cheque.**

6 In breach of the said terms of the contract the Defendant:

a) **Failed to give the plaintiff access to "Destiny" to conduct an inspection or examination of the said work done to "Destiny" to ensure that repairs were conducted on "Destiny";**

b) **Failed to give the Plaintiff access to "Destiny" to conduct an expectation or examination of the said work done to "Destiny" to ensure that "Destiny" is seaworthy;**

c) **Failed to make any or any reasonable or timely inspection or examination fo the said works done to "Destiny";**

d) **Failed to sell "Adventurer II" within Twelve (12) months;**

e) **Failed to give notice of the sale of "Adventurer II" in a timely manner or all;**

f) **Failed to take action or any sufficient action in the sale of the Defendant's present vessel, "Adventurer II" in a timely manner or at all;**

g) **Failed to make payments under Clause Two (2) of the contract, to be made the beginning of the month by cheque or chase, payable to the Plaintiff;**

h) **Failed to make the payments under Clause Four (4) of the contract, to be made the beginning of the month, by cheque or cash, payable to the Plaintiff;**

i) **Failed to deliver possession of "Destiny" to the Plaintiff immediately, as the monthly payments lapse for Three (3) consecutive months and the contract was terminated.**

7 The contract was repudiated on 26h August 2017, when the Defendant failed to make a subsequent monthly payment to the plaintiff.

8 As a result of the Defendants actions in delaying the sale of his present vessel, "Adventurer II" and non-payment of the sums so stated in Clauses Four (4) of the contract, the monthly payments lapsed for Three (3) consecutive months and the contract was terminated on 26th October, 2017.

9 Pursuant to clause 2 of the Promissory Note, the Defendant was to pay $4,000.00 per month together with any sums paid toward the purchase price. In other words, the $4,000.00 per month was a part of the agreement of the Defendant to keep the boat until the $75,000.00 was paid. If the Defendant failed to sell his boat within twelve (12) months, then the payment of Four Thousand Dollars ($4,000.00) was to increase to Six Thousand Dollars ($6,000.00). Therefore, the Defendant now owes the Plaintiff Forty-Eight Thousand Dollars ($48,000.00) for the period of March, A.D., 2016 to March A.D. 2017 and Seventy-Two Thousand Dollars ($72,000.00) for the period of March A.D., 2017 to March A.D. 2018. Hence the Defendant owes a total sum of One Hundred and Twenty Thousand Dollars ($120,000.00) on the Promissory Note. The Plaintiff claims the sum of One Hundred and Twenty Thousand Dollars ($120,000.00) owed on the Promissory Note."

ISSUES

14. The Plaintiff's issues are:

    (i) Whether the Defendant owes the Plaintiff One Hundred and Twenty Thousand Dollars ($120,000.00) pursuant to the Promissory Note for late fees;

    (ii) Whether the Plaintiff is entitled to late fees pursuant to the Promissory Note;

    (iii) If the answer to question 2 is in the affirmative, what sum is the Plaintiff entitled to for the late fees; and

    (iv) Whether the Defendant's part-payment of Fifty-One Thousand Dollars ($51,000.00) satisfied the entire debt owed to the Plaintiff under the Promissory Note.

15. The Defendant's issues are:

    (i) Whether the Defendant did comply with the terms of the Bill of Sale and Promissory Note by paying the whole of $75,000.00 to the Plaintiff?

    (ii) If the answer to Issue 1 is yes, can the Plaintiff now seek to claim a sum higher than that which was agreed to in the Promissory Note for the payment of the whole $75,000.00 which represented the purchase price?

    (iii) Is the Defendant entitled to recover cost owing to the fact that the Plaintiff aided by Counsel abused the Court process by litigating a matter that was clearly settled on the payment of the $51,100.00?

EVIDENCE

The Plaintiff's Evidence

16. The Plaintiff in her witness statement sets out the history leading up to the execution of the Promissory Note which embodied the terms of the sale of the "Destiny" and which is the contract in issue.

17. The contract was prepared at the law offices of Messrs. Vincent Peet and Co the then counsel for the Defendant. The Plaintiff accepted that the Promissory Note was the contract governing the sale and purchase of the Destiny.

18. The Plaintiff and her husband, attempted to repossess the Destiny when the Defendant failed to make payments in accordance with the Promissory Note on 26th July 2017 and again on 26th October 2017, but their efforts were unsuccessful.

19. The Defendant made intermittent payments, the last payment being 08th February 2018 in the sum of $51,000.00 and at all of which were accepted by her.

20. The Promissory Note was not reinstituted by the $51,000.00 payment.

21. The Plaintiff filed a supplemental witness statement where she stated that $120,000.00 was owing to her by the Defendant under the terms of the Promissory Note and she provided receipts evidencing what payments were made by the Defendant for the purchase of the Destiny.

22. The Plaintiff was cross-examined at length and admitted that she was not certain of the sums owing under the Promissory Note.

23. She also maintained that the Destiny was sea worthy when she sold it but the Defendant wanted to carry out certain repairs to which she agreed.

24. She also stated that the Defendant had been given all the paperwork for the Destiny.

The Defendant's Evidence

25. The Defendant produced (a) an unrecorded Promissory note dated 18th March 2015; (b) the recorded version of the Promissory Note; (c) a demand letter from Ms. Russell to the Defendant dated 26th January 2018; (e) a Copy of the Commonwealth Bank Draft and Draft Receipt prepared and issued by the Defendant to the Plaintiff and Ms. Russell respectively; (f) A Receipt No. 433410 from Ms. Russell to the Defendant; (g) Payment Receipts from the Defendant; (h) a letter from the Defendant's counsel to the Plaintiff's counsel.

26. By his witness statement filed on 11th February 2021 he stated that: (i) he purchased the Destiny in compliance with the Promissory Note; (ii) the terms of the agreement to purchase Destiny are contained in the Promissory Note; (iii) he received a demand letter on 26th January 2018 from Ms. Russell demanding payment of $51,100.00 representing the outstanding balance for the purchase of Destiny (iv) he made payment of $51,000.00 to Ms. Russell on 08th February 2018 and subsequently paid the $100.00.

27. Under cross examination, the Defendant maintained that the purchase price never changed from $75,000.00 He also maintained that there was no agreement to pay late

fees or interest. He admitted to being late on the payments, however he was resolute that he had paid $75,000.00 for the Destiny.

SUBMISSIONS

The Plaintiff's Submissions

28. The Plaintiff submitted that she is entitled to damages for both breach of contract and negligence. She maintains that the test established in **Dunlop Pneumatic Tyre Co. Ltd v New Garage and Motor Co. Ltd [1915] A.D. 79, 86-88** is applicable, when determining whether or not a sum stimulated in a contract is a penalty or liquidated damages. Lord Dunedin had stated therein:-

> **"(1) Though the parties to a contact who use the words 'penalty' or 'liquidated damages' may prima facie be supposed to mean what they say, yet the expression used in not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages.....**
> **(2) The essence of a penalty is a payment of money stipulated as in terrorem of the offending party the essence of liquidated damages is genuine pre-estimate of damage.**
> **(3) The question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of at the time of the making of the contract, not as at the time of the breach.**
> **(4) To assist this task of construction various tests have been suggested which, if applicable to the case under construction, may prove helpful or even conclusive. Such are:**
>
> **a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss which could conceivably be proved to have followed from the breach.**
> **b) It will be held to be a penalty if the breach consists only in not paying of a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid....**
> **c) There is a presumption that (but no more) that it is a penalty when 'a single' lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage.**
>
> **On the other hand:**
>
> **d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between parties"**

29. Further she maintains that as held in **Pinnel's Case (1602) 5 Co.**

"A Payment of a lesser sum on the day in satisfaction of a greater sum cannot be any satisfaction for the whole."

30. The contract was for the sale and purchase of the vessel Destiny according to the terms set out in the Promissory Note. The Defendant agreed the terms of the contract in his oral evidence. Consideration passed on the payment of the deposit which was accepted by the Plaintiff.

31. The Plaintiff submitted that the Promissory Note specifically entitled the Plaintiff to charge late fees in the event of a breach without being required to prove actual damage or for acting in good faith.

32. This agreement was further supported by the evidence of both sides that the parties had had oral discussions on the sale prior to the execution of the Promissory Note.

33. The Promissory Note was the Defendant's contract as it was drafted by his lawyer and the fact the he signed it meant he understood and agreed all the terms.

34. The Defendant admitted that there was no force, duress or offer to sign the Promissory Note.

35. The Plaintiff continued to accept the payments because the Defendant assured her that he was trustworthy.

36. The Plaintiffs further submitted that the agreement was breached by the Defendant for his failing to pay the Purchase Price (in the amount of $48,000.00) between March 2016 to March 2017 along with $72,000.00 representing funds owed between March 2017 and March 2018 totaling $120,000.00.

37. The Defendant did not sell his boat within twelve months and Clause 4 was thereby invoked. He accepted that the payments would be increased to $6,000.00 per month as a result although he maintained that the purchase price did not change.

38. The Plaintiff maintained that Clause 5 also governed the contract. This clause allowed the contract to be terminated if monthly payments lapsed for three consecutive months. The Plaintiff maintained that the Plaintiff was entitled to have the boat back when the Defendant defaulted on the payment.

39. The requirement to pay $6,000.00 was a late fee.

40. The Plaintiff submitted that she asked for the return of the boat and that the contract was automatically terminated because of the arrears for three consecutive months.
41. The Plaintiff submitted that she is entitled to late fees as well as interest thus entitling her to $120,000.00 plus interest.

42. The Plaintiff further submits that the payment of $51,000.00 was not the final payment and that it was not in compliance with the 14 day stipulation.

The Defendant's Submissions

43. The Defendant accepted that there was an agreement for the purchase and transfer of the vessel Destiny by a Bill of Sale dated 1st March, 2015 and the Promissory Note dated 15th March 2015.

44. The Bill of Sale and Promissory Note confirmed the purchase and outright transfer of the Destiny to him with the promise by him to pay the balance owed on the purchase price of $75,000.00.

45. The Defendant made the requisite deposit of $1,000.00 on the $75,000.00 purchase price together with subsequent payments leaving a balance of $51,100.00.

46. The Defendant received a telephone call from attorney Myra Russell on behalf of the Plaintiff who said that the Defendant owed a balance of $51,000.00 whereby the Defendant obtain a cashier cheque in the amount of $51,000.00 which was delivered to the Plaintiff's attorney. Shortly thereafter he received a letter in the mail which prompted him to seek legal advice.

47. On the 26th January, 2018 the Plaintiff through her lawyer made a formal written demand for the balance of $51,100.00 to be paid in full to complete the past due purchase of the boat.

48. The letter was sent by Registered Mail and upon seeing the letter the Defendant took advice which caused him to realize that he in fact still owed $100.00 on the sum which had been paid by Managers Cheque. The Defendant then instructed his Attorney to remit the balance of $100.00 which was done.

49. On the 8th February, 2018 the Defendant received a receipt for $51,000.00 from Myra Russell but on the receipt the account balance was stated as $138,000.00 of which $51,000.00 was paid and $87,000.00 was owing. The receipt was not signed by the Defendant but by Myra Russell.

50. The Defendant's submitted that he purchased the Destiny for $75,000.00 and did in fact pay the total of $75,000.00 and which fact is undisputed.

51. The Defendant maintains that notwithstanding the terms of the Promissory Note as to mode or frequency of payments, he did honor the ultimate terms by paying over the balance of the purchase price when he was demanded to do so both orally by Attorney Myra Russell and subsequently by the demand letter.

52. Despite the payments not being paid on time, the Promissory Note had no penalties for an uplift in price or provision for payment of interest or otherwise save that Clause 5 of the Promissory Note stated that should monthly payments lapse for three (3) consecutive months, the contract should be terminated and as per Clause 6 of the Promissory Note should the Purchaser or Vendor become deceased before the completion of the payment, the Purchaser's Estate would become liable to complete the sale and the Vendor's Estate would be entitled to receive the balance of payment.

53. The Plaintiff never demanded or gave notice of termination of the contract but rather the Plaintiff demanded the balance of the purchase price which the Defendant paid to extinguish the debt.

54. The Plaintiff accepted the terms of the agreement as embodied in the Promissory Note and accepted all of the payments made under the agreement.

55. The Plaintiff accepted the payments of $51,000.00 which was paid on demand by the Defendant. The cheque had a notation that it was the final payment. The cheque was issued for $51,000.00 as a result of the telephone conference with the Plaintiff's counsel. Upon receipt of the demand letter he recognized that the balance was $51,100.00 and that he owed $100.00 which he subsequently paid.

56. The Defendant submits that the claim is based purely in contract and relies on Section 84,85 and 89 of the Bills of Exchange Act which provide:-

> **"84. (1) A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.**
> **(2) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is endorsed by the maker.**
> **(3) A note which is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof. (4) A note which is, or on the face of it purports to be, both made and payable within The Bahamas is an inland note. Any other note is a foreign note.**
>
> **85. A Promissory note is inchoate and incomplete until delivery thereof to the payee or bearer.**
>
> **89. The maker if a promissory note by making it – (1) engages that he will pay it according to its tenor; (2) is precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse. "**

57. The Defendant avers that only $100.00 was not paid within the time fixed in the demand letter and which sum was subsequently paid.

58. He submits that the Plaintiff's claim is an abuse of the Court's process as the full amount due under the terms of the Promissory Note was paid to the Plaintiff.

59. The Defendant further submitted that the payment of the $51,100.00 completed the terms of the contract once and for all and that no other sums are owing from the Defendant to the Plaintiff.

DECISION

60. The Plaintiff had previously obtained a judgment in default against the Defendant which was set aside and had applied for an order for committal of the Defendant which was dismissed.

61. The issues to be determined in this action will be grouped together.

(i) Whether there are implied terms which ought to be incorporated in the Promissory Note and which include a provision for late fees (ii) Whether the Plaintiff is entitled to late fees? (iii) Whether the Defendant owes $120,000.00 to the Plaintiff under the promissory note for late fees.

62. These issues are all related and will be addressed together. At paragraph 14 of the Amended Writ of Summons, the Plaintiff pleaded that several terms were implied. 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. The 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)."

63. Accordingly, in order to determine whether there were implied terms in the Promissory Note, one must review the document and the surrounding circumstances to ascertain the intention of the parties to the contract. 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.

64. Applying the test to the present case along with considering the evidence, Destiny was purchased 'as is' can be implied. By Clause 2 of the Promissory Note it expressly stated that repairs were necessary for the boat to become seaworthy. From this, it can be readily understood that Destiny was not seaworthy at the time of purchase and that it was to be purchased in its present unrepaired state.

65. With respect to the second pleaded implied term – "On commencement of the contract, Shirley Ann Merriman Laroda was to deliver possession of the "Destiny" to Captain Rodney Hanna" – is also accepted. The initial $1,000.00 was paid to the Plaintiff and the Defendant took possession of the Destiny thereafter and was given the papers for the vessel. At trial this implied term was accepted by both sides.

66. Regarding the implied term "Captain Rodney Hanna is to be responsible for ensuring that "Destiny" is seaworthy" also can be gleaned from the agreement. The Defendant in his evidence accepted that it was his responsibility. Further the fact that no payments were required to be made until the repairs were completed, supports this implied term that the Defendant was responsible for the repairs and that it was understood and agreed that the repairs were at the cost of the Defendant.

67. With respect to the implied terms pleaded at (d) and (e) there is no evidence that these were necessary and it is in fact debatable whether it was an obligation of the Defendant to make the determination that the ship was repaired only once done to commence payments within one month thereafter. Nowhere in the Plaintiff's evidence did she aver that it was her obligation to approve the repairs of the Destiny or that it was to be constructed, outfitted and manned in all respects for a voyage at sea. In fact, the Plaintiff in her evidence averred that the vessel was seaworthy when she sold it to the Defendant. These terms are not necessary to give business efficacy to the contract and therefore cannot be implied.

68. With regard to the implied terms (f) through (j), (o), (p) and (q) pleaded at paragraph 4 of the Amended Writ of Summons, there is no evidence to support the necessity for these implied terms. Such terms, if the Plaintiff wished for them to form a part of the agreement, should have been expressly incorporated as these terms would not be readily understood by a bystander, nor are they required for business efficacy. Accordingly, the Court is not prepared to incorporate these into the Promissory Note.

69. With regard to the implied terms pleaded at (k) to (n) of the Amended Writ of Summons, as these deal with the sale of the Defendant's vessel, it can readily be understood that he was wholly responsible for its sale. It is also understood that the Defendant was responsible for notifying the Plaintiff once the sale was complete and are therefore accepted as implied.

70. With respect to the implied term under clause (r) of paragraph 4 of the Amended Writ of Summons, this term cannot be implied. It must be noted, that the time when the installment payments were due and owing, the Plaintiff kept accepting intermittent payments from the Defendant for the purchase of the boat. This is evidenced by the receipts which were tendered in evidence and relied on by both parties. Further, to imply this term would be to contradict the express term in the Promissory Note. Consequently, the Court accepts this action of accepting the payments by the Plaintiff as acquiescence/waiver of the breaches of contract by the Defendant and the Promissory Note remained in force. It was not until the 26th January 2018 letter from Ms. Russell to the Defendant did it appear that noncompliance with the Promissory Note was noted unequivocally. If the Plaintiff wished to terminate the contract, the decision would require some act on her part to take possession of the vessel not to require the Defendant to deliver the vessel to her.

71. The subsequent sum of $51,100.00 was paid by the Defendant to Ms. Russell as required for the purchase of the Destiny. The breaches of contract and subsequent forgiveness support the fact that the Promissory Note remained in force. The Plaintiff accepted the payment of $51,100.00. She did not demand the return of the vessel only the payment of the balance outstanding.

72. The issue whether there was a penalty fee, or late fee expressed or implied in the agreement must be considered according to the law on implied terms as, on a review of the express terms, there is no express language stating that any penalty fees – or liquidated damages - would attach to the Promissory Note. In the Plaintiff's submissions, she argued that clause 4 of the Promissory Note is the penalty fee clause as the $4,000.00 owed monthly was to be increased to $6,000.00 monthly if the Defendant was unable to sell his vessel within 12 months of the Promissory Note's execution. At no time, did the Defendant's evidence waiver in his denial of this implied or express term. He remained resolute and consistent in his evidence. Under cross-examination he stated:-

> **"Q. I put it to you, Mr. Hanna, that the increase from $4,000.00 to $6,000.00 was in addition to what you were supposed to pay on the purchase price.**
>
> **A. No ma'am. The only thing from 4 to 6 was for me to pay the $75,000.00 much quicker, but there was no change."**

73. Though the Plaintiff stated numerous times during her cross-examination that she was owed more than the $75,000, the Court found that her evidence consistently changed with respect to the precise amount owed in total. It appeared she was unclear what exact funds were owed to her and even admitted that there was a receipt missing evidencing a payment made by the Defendant.

74. In cross-examination the Plaintiff reflected her uncertainty where she stated:

> **"A. I did tell her to presence a retraction on the numbers, I recall that.**
>
> **Q. But you don't recall if it was $104,000.00?**
>
> **A. I don't recall – I recall that the numbers were being worked out, but I don't recall the numbers."**

75. The inconsistencies throughout the Plaintiff's evidence rendered her testimony unreliable. In any event as established in the **Mark and Spencer** test along with the evidence, I accept and find that no penalty fee was expressed or implied in the agreement and only $75,000.00 in total was owed to the Plaintiff under the terms of the Promissory Note. I accept that the increase of the monthly sum was to facilitate the Plaintiff receiving the purchase price in a more timely fashion bearing in mind that the Plaintiff had not received the $40,000.00 from the sale of the Defendant's personal vessel. To imply a late fee would be to contradict the clear express terms of the Promissory Note.

76. The Plaintiff is not entitled to $120,000.00 under the contract for late fees or as a penalty or liquidated damages.

(iii) Whether the Defendant is in breach of the Promissory Note? (iv)Whether the Plaintiff is entitled to damages? (v) Whether the payment of $51,100.00 satisfied the entire debt owed to the Plaintiff.

77. These issues will be considered together as they all, when distilled, raise the same questions for determination namely what was the Defendant required to pay under the Promissory Note and whether he did pay that sum.

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78. The purpose of damages is to put the aggrieved party in the position as if the breach of contract never occurred. As held in **Victoria Laundry v Newman [1949] KB 528 at page 539**:

> **"(1.) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: (Sally Wertheim v. Chicoutimi Pulp Company (1)). This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognized as too harsh a rule. Hence,**
> **(2.) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at**

the time of the contract reasonably forseeable as liable to result from the breach.

(3.) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.

(4.) For this purpose, knowledge "possessed" is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the "ordinary course of things" and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the "first rule" in Hadley v. Baxendale (2). But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the "ordinary course of things," of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the "second rule" so as to make additional loss also recoverable."

79. If the court finds that there is a breach of contract; the Plaintiff is not to be put in a better position upon receiving an award of damages. She is only to be placed in the position she would have been in if the breach had never occurred: **Nippon Yusen Kaisha vs Acme Shipping Corporation [1972] 1 W.L.R 74 CA.** Accordingly, the Court must determine whether the Plaintiff received what was due her under the terms of the Promissory Note.

80. The purchase price was $75,000.00. There was no provision for late fees. The Plaintiff agreed this document and premised her case on the same.

81. The Plaintiff in her evidence accepted that no interest was payable on the purchase price.

82. Based on the evidence led and a review of the receipts, the following payments were made by the Defendant:-

"a) 18th March, 2015	**$ 1,000.00**
b) 8th February 2016	**$ 400.00**
c) 11 March 2016	**$ 4000.00**
e) 16th May 2016	**$ 2,500.00**
d) 26th September, 2016	**$ 2,000.00**
f) 26th July, 2017	**$10,000.00**
g) 8th February, 2018	**$51,000.00**
h) -	**$ 100.00**

83. A payment of $4,000.00 is missing from the receipts as confirmed by the Plaintiff in her evidence as well as by the receipt issued by the Plaintiff on the 11th t March 2016 which stated that $9,400 had been paid to date. When adding the sums paid to 11th March 2016 as reflected above, the total was $5,4000.00 which reflects a $4,000.00 payment not accounted for. When all of the sums are totaled inclusive of the missing receipt for $4,000.00 the payments equal $75,000.00, which was the purchase price.

84. None of the receipts had any stipulations to reflect that penalties had to be paid for late payments and no interest was payable.

85. Accordingly I find that there was no breach of the promissory note or breach of the contract.

Whether the $51,100.00 satisfied the debt owed to the Plaintiff

86. Upon a review of payments made above, it is clear that the demand letter demanded what was in fact outstanding on the purchase price and the payment made by the Defendant settled the debt.

Claim for Negligence

87. Even though the Plaintiff pleaded a case of negligence, nowhere in her submissions or in her evidence, were any elements of negligence advanced, discussed or proven. The case centered solely on a breach of contract. Accordingly, that aspect of the case is dismissed.
88. I find that the Plaintiff has not proven her case against the Defendant. In fact, I find that the Defendant paid the Plaintiff what she agreed was due her prior to the commencement of this action. Accordingly her case is dismissed.

89. The Defendant is entitled to his costs to be taxed if not agreed.

Dated this 6th day of April, 2023

Justice G. Diane Stewart