

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP P  
THE HON MRS JUSTICE DUNBAR-GREEN JA  
THE HON MR JUSTICE LAING JA**

**SUPREME COURT CIVIL APPEAL NO COA2022CV00114**

<b>BETWEEN</b>	<b>AREL LIMITED</b>	<b>APPELLANT</b>
<b>AND</b>	<b>X-RAY &amp; DIAGNOSTICS ULTRASOUND CONSULTANTS LIMITED</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>AND</b>	<b>SYBIL NELSON AND BASIL JULIAN SAINT CHRISTOPHER NELSON (Representatives of the Estate of Basil Nelson, Deceased)</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>AND</b>	<b>BASIL NELSON &amp; ASSOCIATES (CONSULTING ENGINEERS) LIMITED</b>	<b>3<sup>RD</sup> RESPONDENT</b>

**Christopher Kelman, Ms Stephanie Ewbank and Ronaldo Richards instructed by Myers, Fletcher & Gordon for the appellant**

**Michael Hylton KC, Weiden O Daley and Miss Shaydia Sirjue instructed by Hart Muirhead Fatta for the 1<sup>st</sup> respondent**

**Garth McBean KC instructed by Garth McBean & Co for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents**

**9, 10, 11, 12 June 2025 and 6 March 2026**

**Tort– Negligence – Duty of care – Whether contractor has a duty to warn the client of a deficiency in design by a third-party contractor – Whether breach of duty – Whether breach caused damage**

**Contract – Verbal contract – Causation – Delay in completion of work – Whether request for an indemnity caused delay – Reasonableness of request – Whether breach of contract due to delay**

## **Civil procedure – Costs – General rule in party and party costs – Whether to depart from general rule and make a Sanderson or Bullock order**

### **MCDONALD-BISHOP P**

[1] I have read, in draft, the comprehensive judgment of Laing JA. I agree with his reasoning and conclusion and endorse the orders he has proposed with nothing useful to add.

### **DUNBAR GREEN JA**

[2] I, too, have read, in draft, the judgment of Laing JA and agree with his reasoning, conclusion and orders proposed. There is nothing I could usefully add.

### **LAING JA**

#### **Background**

[3] The appellant, Arel Limited ('Arel'), is a limited liability company incorporated under the laws of Jamaica. Arel is a heating, ventilation and air conditioning system ('HVAC') contractor that supplies and installs air-conditioning and electrical equipment as a part of its business.

[4] The 1<sup>st</sup> respondent and cross-appellant, X-Ray & Diagnostic Ultrasound Consultants Limited ('X-Ray'), is a limited liability company duly incorporated under the laws of Jamaica. It has been a leading provider of diagnostic radiology services in Jamaica since 2000.

[5] The 2<sup>nd</sup> respondents are the personal representatives of the estate of Basil Nelson ('Mr Nelson'), who was an engineer and the principal of the 3<sup>rd</sup> respondent, Basil Nelson & Associates (Consulting Engineers) Limited ('BNA'). Mr Nelson passed away before judgment was delivered in the court below. For convenience, references to Mr Nelson herein will be to Mr Basil Nelson, the deceased, and to the 2<sup>nd</sup> respondents as his representatives, as appropriate, depending on the context.

[6] The 3<sup>rd</sup> respondent, BNA, was at all material times a company duly incorporated under the laws of Jamaica that provided engineering services.

[7] In or about 2012, X-Ray decided to establish a molecular imaging centre and nuclear laboratory ('the lab') in Jamaica. The primary purpose of the lab was to produce radioactive isotopes using a cyclotron. These isotopes, when introduced into the human body, and used with positron emission tomography ('PET') and CT technology can identify various abnormalities, such as cancer. The lab consisted of four component areas: a room housing the cyclotron, a hot lab, a quality control lab, and an airlock that permitted the passage of people and objects while restricting the escape of radioactive material.

[8] The cyclotron and PET/CT scanner were purchased from General Electric Corporation ('GE'). GE appointed IQ Medical Services ('IQMS'), a United States-based corporation, as its agent to supply and install the quality control lab component and to certify the successful installation and commissioning of the lab, including ensuring that it meets the specifications of the International Atomic Energy Agency and other relevant local and international bodies and authorities. GE and IQMS provided the specifications for the lab, which included, but were not limited to, the required pressures, temperatures, and humidity levels in the various component areas of the lab ('the specifications').

[9] Because operations to be carried out at the lab would utilise nuclear technology, they were potentially hazardous. The lab required 'HVAC' to be consistently maintained to ensure proper functioning of the cyclotron and the lab equipment as a whole, and to reduce the risk of radioactive fallout in the event of a lab accident.

[10] X-Ray engaged Mr Nelson and/or BNA to design the air-conditioning and exhaust systems required for the lab to achieve and maintain the required specifications.

[11] X-Ray engaged Arel to supply, install and commission the HVAC system for the lab.

[12] BNA proposed an HVAC system that would use 100% outdoor or fresh air in the laboratory ('a 100% fresh air system'), and Arel issued a proposal to source and install that system.

[13] After discussions primarily between X-Ray, BNA, and GE, but excluding Arel, a decision was made to change the 100% fresh air system to a system that used recirculated air ('the recirculating air system'). Arel installed the recirculating air system, but it was unable to meet and consistently maintain the specifications.

### **The claim**

[14] Dissatisfied with the installed recirculating air system, X-Ray filed a claim in the Supreme Court against Arel, Basil Nelson, and BNA for damages arising from their alleged negligence and breach of contract.

[15] Arel counterclaimed for the sum of \$6,947,005.88, alleging that X-Ray owed it for services and equipment it had provided.

[16] Ultimately, based on expert evidence and witness testimony before the learned judge, there was no issue joined between the parties that the root cause of the lab's failure to function effectively was the decision to switch from a 100% fresh air system to the recirculating air system. The central issue in the litigation concerns the liability of Arel, Mr Nelson, and BNA, respectively, for that decision and any other factors that may have contributed to the loss alleged by X-Ray.

### **The judgment**

[17] Following a trial, the learned judge entered judgment and made orders in the following terms in a written judgment ('the judgment'):

- "(1) [X-Ray's] claim against [Mr Nelson] is dismissed.
- (2) The counterclaim filed by [Arel] is dismissed.
- (3) Judgment is entered for the [X-Ray] against [BNA] in the sum of **UNITED STATES DOLLARS ONE**

**MILLION NINE HUNDRED AND THIRTY-NINE THOUSAND FOUR HUNDRED AND THIRTY-EIGHT DOLLARS AND THIRTY-SEVEN CENTS (US\$1,939,438.37)** with interest at a rate of interest of 6.95% per annum from May 20, 2019 to September 29, 2022.

- (4) Nominal damages to [X-Ray] in the sum of **FIVE MILLION JAMAICAN DOLLARS (JMD\$5,000,000.00)** to be borne by [Arel].
- (5) Costs awarded to [Mr Nelson] to be paid by [X-Ray], to be taxed if not agreed.
- (6) Costs awarded to [X-Ray] to be paid by [Arel] on the dismissed counterclaim, to be taxed if not agreed.  
  
Costs awarded to [X-Ray] to be borne 80% by [BNA] and 20% by [Arel], to be taxed if not agreed.
- (7) Special Costs Certificate is hereby granted to [X-Ray's] Attorneys-at-Law.
- (8) [X-Ray's] Attorneys-at-Law to prepare, file, and serve Orders made herein.
- (9) Stay of execution granted to November 25, 2022." (Emphasis as in the original)

[18] X-Ray and Arel have both appealed against certain portions of the learned judges' decision.

### **Arel's appeal**

[19] Arel challenges the following details of the judgment:

- a. The counterclaim filed by [Arel] is dismissed.
- b. Nominal damages to [X-Ray] in the sum of **FIVE MILLION JAMAICAN DOLLARS (JMD\$5,000,00.00)** to be borne by [Arel],
- c. Costs awarded [X-Ray] to be paid by [Arel] on the dismissed counterclaim to be taxed if not agreed.

- d. Costs awarded [X-Ray] to be borne 80% by [BNA] and 20% by [Arel], to be taxed if not agreed.” (Emphasis as in the original)

[20] Arel’s grounds of appeal, as set out in the amended notice of appeal filed on 2 June 2023, are as follows:

- “i. The learned Judge below erred in finding Arel in breach of contract and negligent for failing to properly install and commission the HVAC equipment in the Laboratory, in that she failed to determine the nature and scope of Arel’s obligations under the contract and failed to properly consider and resolve the conflicting evidence on this issue, which weighs heavily against such finding, namely:
  - a. Evidence from X-Ray’s principal, Dr. Winston Clarke, that in March 2017 he, for the first time, requested an indemnity from Arel as a condition to access the Laboratory;
  - b. Evidence from Nicholas Wood, witness for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants (‘BNA’), that Arel had an issue getting access to the site, in that they were kicked off the site by Dr. Clarke; and
  - c. Evidence from Arel’s witness, Michael Heron, that:
    - i. On or about from January 23, 2017, X-ray prohibited Arel from accessing the site and demanded an indemnity to regain access;
    - ii. Evidence that Arel required the BMS control sequence which was to be provided by BNA, and which was necessary for Arel to complete programming of the controls;
    - iii. Arel completed installation of its equipment and appurtenances on January 20, 2017, based on instructions given by BNA up to that date; and
    - iv. Arel was not provided the BMS control sequence by BNA until around the middle of 2018 and was only granted site access by X-ray in November 2018.
- ii. The learned judge erred in making an award for damages against Arel when she had no basis on which

to find Arel liable for breach of contract and/or negligence.

- iii. Alternatively, the learned Judge erred in her quantification of nominal damages in that she incorrectly interpreted the relevant principles in the cases **The Owners of the Steamship 'Mediana' v The Owners and Crew of the Lightship Comet** [1900] AC 113, **Greer v Alstons Engineering Sales and Services Ltd** [2002] UKPC 46 and **Ian Lunan v Rohan Sudine** [2015] JMSC Civ 260, applied an erroneous and arbitrary method of calculating nominal damages, and thereby determined an amount entirely 'out of scale' of the range of nominal damages awards locally and in other jurisdictions.
- iv. The learned Judge below erred in dismissing Arel's counterclaim and failed to appreciate the relevant law, in that she:
  - a. Incorrectly found that Arel's counterclaim was brought in equity with no legal basis whatsoever for so finding;
  - b. Incorrectly applied the equitable maxim that '*he who comes to equity must come with clean hands*' as applicable to the counterclaim and as the basis for her determination that Arel is not entitled to the relief claimed on its counterclaim; and
  - c. Failed to appreciate:
    - i. that Arel's counterclaim was based on an invoice for monies owed to Arel by X-ray for services and equipment provided; and
    - ii. the weight of the admission in the witness-box of X-ray's witness, Dr. Clarke, that the amount is still owed to Arel.
- v. The learned Judge erred in ordering that Arel pay 20% of X-ray's costs in the claim since, even if she was correct to find that Arel was liable, she failed to apply the legal principles governing the award of costs in cases where substantial damages are pursued and only nominal damages are awarded the claimant, which indicate that it is the claimant and not the defendant who should be ordered to pay the defendant's costs,

or at least some of those costs.” (Emphasis as in the original)

### **X-Ray’s appeal**

[21] By its amended counter-notice of appeal filed on 11 January 2023, X-Ray challenged the finding of the learned judge in relation to both Arel and Mr Nelson. Mr Garth McBean KC, counsel for Mr Nelson, raised an objection in writing to counsel for X-Ray that its amended counter notice of appeal was irregular in that it purported to commence an appeal against Mr Nelson, which ought properly to have been done by the filing of a notice of appeal. In response, X-Ray filed a notice of application for court orders on 7 February 2023, seeking declarations to rectify that irregularity. On 16 May 2023, the court (F Williams, Harris JJA and Laing JA (Ag)), ordered that X-Ray’s amended counter-notice of appeal stand as a notice of appeal. For purposes of convenience only, X-Ray’s amended counter-notice of appeal against Arel, and the appeal against Mr Nelson will be referred to herein together, as ‘X-Ray’s appeal’, the grounds of which are as follows:

“(1) The learned Judge erred in fact and/or law in making the findings set forth in paragraph 2(a) and paragraph 2(b) above.

#### *The Appellant (Arel Limited)*

- (2) The learned Judge erred in fact and/or law in failing to find that throughout the Project Arel gave technical and professional advice to X-Ray upon suitable and appropriate HVAC equipment and any modifications to be made thereto, and that advice was negligently given.
- (3) The learned Judge erred in law in finding that Arel’s duty was merely to install the HVAC System in accordance with the designs of the engineer.
- (4) The learned Judge erred in fact and/or law in failing to find that:
  - a. Arel had an obligation to supply and install HVAC equipment which is adequate, appropriate and/or fit for the purpose required of attaining

and consistently maintaining the required pressures, temperatures, and humidity in the different component areas of the Laboratory ('the Specifications');

- b. Arel did not supply and install equipment which is adequate, appropriate and/or fit for the purpose required of attaining and consistently maintaining the Specifications;
  - c. Arel knew that the project required a 100% fresh air system not only to enable smooth operation but, more importantly, to enable safe operation because a nuclear laboratory uses radioactive material, and that in the circumstances, Arel clearly had a duty to advise X-Ray against making the change from a 100% fresh air system;
  - d. Arel failed to complete the installation of the control system until November 2018, and did not even install the hardware which it had a duty to do;
  - e. Arel also failed to balance and commission the HVAC system;
  - f. Arel was negligent in supplying and installing an HVAC system that did not and could not work.
- (5) The learned Judge erred in fact and/or law in finding that X-Ray had not shown causation between the loss suffered and Arel's breach of contract and negligence although there was sufficient evidence proving that causation.
- (6) The learned Judge failed to have any or any adequate regard to the uncontradicted evidence that Arel falsely represented to X-Ray that it had completed installing the HVAC equipment at various dates including as at January 2017.
- (7) The learned Judge erred in fact and/or law in failing to find Basil Nelson, BNA and Arel jointly and severally

liable for all the loss and damage X-Ray sustained, or to apportion liability among them.

*The 2<sup>nd</sup> Respondent (Estate Basil Nelson, Deceased)*

- (8) The learned Judge erred in fact in failing to find that Mr Basil Nelson was engaged in his personal capacity, and give negligent advice and service in the design and redesigning of the HVAC system causing X-Ray substantial loss and damage.
- (9) The learned Judge erred in law in failing to award damages to X-Ray against Mr Nelson.

*Damages*

- (10) The learned Judge erred in fact and/or law in finding that there need not be a redesign of the HVAC System and therefore X-Ray ought not to be given an award in that respect.
- (11) The learned Judge erred in fact and/or law in failing to award damages for the costs for engineering redesign and an added Quality Control Lab HVAC Unit.
- (12) The learned Judge erred in fact and/ or law in finding that there is no need for a redesign, and/or law in failing to award damages for X-Ray having redesigned and commissioned the services of Appliance Traders Limited to redesign an HVAC system for the Quality Control Lab.
- (13) The learned Judge erred in fact and/or law in failing to make an award of damages for the mitigation expenses incurred by [X-Ray on] the grounds that there is no distinction between the redesign and the replacement of the HVAC System whereas the uncontradicted evidence is that X-Ray acted reasonably in doing so, and a replacement of the HVAC cannot be properly or sensibly be implemented without a prior redesign of it at considerable expense.
- (14) The learned Judge erred in fact and/or law in failing to award damages for the repairing and servicing of the Laboratory equipment and the air conditioning by not having any or any adequate regard to the fact that X-

Ray has not been able to have the benefit of them commercially.

- (15) The learned Judge erred in fact and/or law in finding that X-Ray has suffered 'no actual loss' as a result of Arel's negligence and breach of contract.

Costs

- (16) The learned Judge erred in fact and/or law in ordering X-Ray to pay Mr Basil Nelson's costs because even if she was correct to find that he was not liable, she should have made no order as to costs in respect of Mr Basil Nelson or should have ordered BNA to pay his costs.
- (17) The learned Judge erred in fact and/or law in ordering BNA to pay 80% and Arel to pay 20% and should have ordered BNA and Arel jointly and severally to pay X-Ray's costs." (Italics and underlining as in the original)

[22] Grounds i and ii of Arel's appeal and grounds (2), (3), (4), (5) and (6) of X-Ray's appeal are related in that they fundamentally challenge the findings of the learned judge in respect of Arel's liability. These grounds may be consolidated and restructured into the following issues:

- a) Whether Arel had a duty of care to X-Ray to X-Ray in the tort of Negligence; and if so
- b) Whether Arel breached its duty of care.
- c) Whether Arel breached its contract with X-Ray.

[23] Both the appeal and X-Ray's appeal challenge the quantum of the learned judge's award of damages against Arel. The award of damages is consequent upon the finding of liability and will follow the determination of the liability issues.

[24] The appeal also raises the issue of whether the learned judge was correct in rejecting Arel's counterclaim for equipment it supplied to X-Ray.

[25] For convenience, I will first address the issues between Arel and X-Ray on the appeal before those subsequently identified as arising between X-Ray, Mr Nelson and BNA on X-Ray's appeal.

## **Liability**

### Arel's submissions on liability

#### (Grounds i and ii of Arel's appeal)

[26] Mr Kelman highlighted that, at para. [162] of the judgment, the learned judge accepted that Arel was hired as the HVAC contractor. She found that Arel's duty was to install the HVAC system according to the engineer's designs, and there was no evidence that Arel was hired as an engineer to assist in the design of the HVAC system.

[27] Mr Kelman referred the court to the learned judge's finding at para. [163] of the judgment, where she accepted the findings of the expert, Mr Hudson, a professional mechanical engineer, that the HVAC system installed by Arel was in accordance with the design given to it by BNA, which was not a 100% fresh air system. Further, counsel noted that, at para. [164] of the judgment, the learned judge expressed the common position of the parties that the HVAC system, as installed, cannot function without significant modifications to meet and maintain the specifications. Counsel noted that the learned judge expressly found that she could not hold Arel liable for the failure of the system to meet and sustain the specifications, since, even if there had been perfect work by Arel, the lab would not have met and maintained specifications, because this failure had to do with the design and not the installation.

[28] Mr Kelman submitted that the learned judge did not adequately address the evidence relating to the issue of the outstanding work, which X-Ray alleged was not performed in a timely manner by Arel. He stated that, at para. [166] of the judgment, the learned judge acknowledged Arel's position that it was prevented from entering the site to complete the testing and commissioning of the HVAC system and that X-Ray unreasonably demanded an indemnity as a precondition to Arel's access. Mr Kelman also

indicated that the learned judge referred to the evidence of Arel's witness Mr Heron that Arel completed its installation of the equipment and its appurtenances on 20 January 2017, according to instructions given by BNA up to that date, and that the HVAC system was started up three days after the installation was completed.

[29] Counsel complained that, notwithstanding these findings, the learned judge held that Arel breached the contract. This conclusion was based on the finding that outstanding work items were not completed in time. Mr Kelman argued that the learned judge did not demonstrate that she fully appreciated that the imposition of an indemnity requirement as a condition to Arel's access was uncontroverted on the evidence and that this contributed to the delay. He noted that at para. [166] of the judgment, the learned judge referred to this as "Arel's position", but he submitted that it was agreed evidence.

[30] Mr Kelman contended that Arel was not solely relying on the indemnity request by X-Ray to justify the delay. However, since it was a factor in the case, the learned judge should have assessed whether the indemnity was reasonable or necessary. If the indemnity request was unreasonable, Arel would have been justified in relying on it to excuse its delay. Counsel emphasised that evaluating the reasonableness of the indemnity was crucial, especially given the lack of a written contract explicitly granting a right to indemnity.

[31] Counsel also submitted that, on the evidence, there was a period between March 2017 and November 2017 during which Arel was not permitted to carry out the work that the learned judge found that it did not do. In November 2017, Arel was granted limited entry for specific tasks, such as ductwork. Mr Kelman specifically referenced the system's programming/sequencing, which required information from the BMS that was not provided to Arel in time. He stated that permission for sequencing was not allowed until 2018, and the works were carried out and continued until November 2018.

[32] In summary, Mr Kelman submitted that the learned judge did not demonstrate the findings that led her to conclude that Arel breached the contract. In particular, the learned

judge did not identify which evidence she considered and which she did not. He argued that the evidence was extensive, including that of Mr Heron of Arel and Mr Nicholas Wood of BNA. He stated that all parties provided evidence regarding the refusal of access to the site. Mr Kelman stated that X-Ray's witness, Mr Frank, admitted that the remedial work was done, and the judge found that it did not matter if it was done earlier.<sup>1</sup>

[33] Regarding Arel's counterclaim, Mr Kelman highlighted para. [173] of the judgment where the learned judge said "[h]owever, it is already my decision that Arel is negligent as they failed to properly install and commission the equipment for the HVAC system for the Laboratory". He submitted that this finding was inconsistent with the learned judge's earlier expressed position that even if there had been perfect work by Arel, the lab would not have attained and maintained the specifications. Mr Kelman argued that causation is a critical component of a finding of negligence, and that none existed on the part of Arel.

[34] Mr Kelman advanced the position that there was never any reliance on Arel for the design or redesign of the HVAC system. He highlighted that at the time the decision was arrived at to modify the HVAC system from a 100% outside air system to a recirculating air system, Arel was not invited to take part in those discussions, and its input was not sought before, during or after the 26 November 2017 meeting that resulted in the decision. Consequently, there was no duty on Arel to volunteer that the recirculating air system was unworkable. Arel had no expertise in nuclear or radioactive engineering. Significantly, counsel noted that the evidence of Mr Hudson in respect of Arel's scope of duty was that it was engaged as an HVAC contractor to supply and install the HVAC equipment, after it was designed and specified by Mr Nelson and BNA.

[35] Counsel urged the court to take into consideration that, for these matters, X-Ray relied on other professionals more competent than Arel to provide it with advice. These included GE and persons affiliated with GE, and ultimately, X-Ray's mechanical engineer,

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<sup>1</sup> Record of Appeal, Volume 2, page 715

BNA. He submitted that cases holding a non-delegable duty to warn involve an assumption of responsibility.

[36] Counsel maintained that there is nothing in the emails which shows Arel assumed that duty, nor is there anything in the emails which can amount to any advice being sought or given by Arel. Mr Kelman argued that the burden of proof lay on X-Ray, and the learned judge found that it was not discharged.

[37] Counsel submitted that the dictum in **Robinson v PE Jones (Contractors) Ltd** [2012] QB 44 at page 62H is applicable to this case, where the court addressed the issue of whether a subcontractor had “assumed responsibility” to its counterparties so as to give rise to duties in the **Hedley Byrne & Co Ltd v Heller & Partners Ltd** [1964] AC 465 sense.

[38] In concluding his submissions in respect of Arel’s appeal, Mr Kelman advanced the position that the reasons given by the learned judge are not satisfactory and appear from the evidence to be insufficient to satisfy this court. The learned judge, he submitted, failed to take proper advantage of having seen and heard the witnesses in the matter. Consequently, the issue of whether Arel breached the contract or was negligent in failing to install and commission the equipment for the HVAC system is at large for this court’s review. He submitted that when properly considered, the more reasonable finding based on the evidence is that Arel is not liable contrary to the finding of the learned judge, and this justifies the entry of judgment for Arel as prayed for in the amended notice and grounds of appeal.

[39] Counsel submitted that if this court accepted his submissions in respect of Arel’s liability, then the issue of the quantum of damages awarded in favour of X-Ray against Arel would not arise.

## X-Ray's submissions on Arel's liability

### (X-Ray's response to Arel's grounds i and ii and its submission in support of grounds (1) to (7) of its appeal)

[40] At the close of the oral arguments made on behalf of X-Ray, Mr Hylton KC sought permission to amend ground 4(e) by adding to the phrase "Arel also failed to balance" the words "and commission" to affirm the findings of the learned judge that there was a breach by Arel. Ms Ewbank resisted the application. However, despite the objection, the application to amend to add the words "and commission" was granted on the basis that the court is conducting a rehearing as the court of first instance. Therefore, the court can identify grounds and ask the parties to submit on them, if it is considered necessary to do so, and in the circumstances, Arel would not have been prejudiced by the proposed amendment.

[41] Mr Hylton submitted that X-Ray's claim against Arel for negligence and breach of contract rested on two main components:

- (1) Arel provided an HVAC system that was unsafe and not fit for the purpose, and in those circumstances, despite its duty to advise X-Ray, it failed to do so; and
- (2) Arel delayed unduly in completing the installation.

King's Counsel submitted that, in the circumstances of this case, the first component carried greater significance.

#### *(1) X-Ray's submissions on Arel's failure to warn*

[42] Mr Hylton contended that the learned judge erred when she did not find in X-Ray's favour on its claim that Arel provided an HVAC system that was unsafe and not fit for the intended purpose. He maintained that the HVAC system could not have worked, a point he argued Mr Spence, the managing director of Arel, accepted.

[43] King Counsel's arguments were rooted in the position that Arel was not merely a supplier and installer of the HVAC system. He noted that Arel and X-Ray had a relationship going back to the 1990's. He indicated that Mr Spence recommended Dr Clarke to GE, who advised X-Ray in 2014, before the contract in question. Mr Hylton traced the origin of the unwritten contract between X-Ray and Arel and submitted that this was concluded in March 2015. He highlighted the minutes of a preconstruction meeting held on 31 March 2015, at which GE made a presentation, and Mr Spence was present.<sup>2</sup> At this meeting, the requirements for the cyclotron were disclosed.

[44] King's Counsel noted that at the outset, it was agreed that a 100% fresh air system was required and would be used. This is common ground between the parties, and he referred to an email from Mr Spence dated 24 June 2015, in which Mr Spence provided detailed comments on the system.<sup>3</sup> Further, Arel provided a quote to BNA based on the 100% fresh air system.

[45] Mr Hylton helpfully summarised the chronology, as evidenced by the email correspondence, as follows: BNA initially recognised that 100% fresh air was required and made this recommendation. There was a discussion between the BNA representative, Mr Wood, and the GE representative, Mr Wentz, following which Mr Wood informed X-Ray that BNA and GE agreed that the full proposed requirement was unnecessary and excessive. There was a discussion with Arel, following which Arel provided a quotation for the new equipment. BNA forwarded the new quotation to X-Ray and recommended that X-Ray accept it and that the parties proceed with the new changes.

[46] Mr Hylton noted that this was a claim for pure economic loss and, consequently, X-Ray needed to show a relationship between the parties, the nature of Arel's expertise, the nature of the problem arising from the use of the recirculating air system, and demonstrate from the evidence that Arel owed a duty to X-Ray to advise it that the HVAC

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<sup>2</sup> Record of Appeal, Volume 3, page 740

<sup>3</sup> Ibid, page 774

system selected was unsafe and not fit for the purpose. He submitted that, based on the evidence before the court, it was clear that Arel had that duty.

[47] To reinforce the evidence of the unsuitability of the recirculating air system Mr Hylton referred the court to the emails from Naeleen Rosario of IQMS in January 2017 asking questions regarding the operation of the new system as envisaged, and in the email dated 17 January 2017, expressly cautioning that “[i]n the Cyclotron room, Hotcells, QC Lab there shouldn’t be recirculating air because this air is contaminated with radioactive particles”.<sup>4</sup>

[48] Notably, Mr Hylton conceded that Arel was not part of the decision to change from the 100% fresh air system, nor did it sanction it. He emphasised that X-Ray’s case was that Arel ought to have known that the new system would not have worked and had a duty to advise X-Ray of that fact. This duty, he argued, was grounded in the fact that Arel was the engineer. Mr Hylton submitted that, in the circumstances as existed at that time in late 2015, Arel, as the engineer retained on the project and who supplied the equipment, ought at least to have advised X-Ray of the unsuitability of the equipment. Arel could not simply state, as it has in its submissions, that it just did what BNA told it to do. Given the relationship and the nature of the problem caused by the recirculating air system, the failure to advise X-Ray breaches this duty.

[49] In developing his argument as contained in para. 47 of X-Rays written submissions, that Arel is not merely a supplier and installer of equipment, Mr Hylton noted that Arel’s witness, Mr Heron, a mechanical engineer and the company’s Director for Air Conditioning Sales and Service, stated in his witness statement that Arel is a multidisciplinary Engineering and Contracting Company.<sup>5</sup> Further, Mr Heron confirmed that Arel advertises on its website that it has experienced engineers and a number of divisions.<sup>6</sup> In response

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<sup>4</sup> Record of Appeal, Volume 3, pages 1117-1119

<sup>5</sup> Record of Appeal, Volume 2, page 456, para. 4

<sup>6</sup> Notes of Evidence, Volume 4, pages 1739-1740

to Arel's stance that it had no expertise in radioactive systems, Mr Hylton argued that Arel had repeatedly and consistently given advice on the project, regardless of its expertise. Moreover, Arel's own expert, Mr Hudson, stated in his witness statement that the recirculating air system was obviously flawed and could not work.

(2) *The delay by Arel*

[50] In relation to the second aspect forming the basis of the assertion of Arel's liability, namely the question of delay, King's Counsel submitted that Arel should have completed the work in January 2017, and the problem of indemnity was relevant between March 2017 and July 2017. However, he later withdrew this position and conceded that November 2017 was the applicable end date. King's Counsel confirmed that the system could be used and had been used, but not as X-Ray intended. Consequently, the delay had occasioned a loss, and it was incorrect for the learned judge to have concluded as she did, in para. [167] of the judgment, that X-Ray suffered no loss because of Arel's actions since the lab would not have attained or maintained specifications even if Arel had completed the installation in a timely manner.

[51] It was submitted that where there are two concurrent causes, each of which is sufficient to cause the claimant's loss, both are regarded as causing the loss. As a result, neither defendant is allowed to plead that the loss would have been suffered in any event as a result of the actions of the other tort-feasor. Section 3(1)(a) of the Law Reform (Tort-Feasors) Act was referred to as being consistent with this common law principle. Mr Hylton also relied on the cases of **Clay v AJ Crump & Sons Ltd and others** [1963] 3 WLR 866 ('**Clay v Crump**') and **Plant Construction plc v Clive Adams Associates and another (No 2)** 69 ConLR 106 ('**Plant Construction**').

Arel's response to X-Ray's appeal on the issue of liability

[52] Mr Kelman responded to Mr Hylton's argument that, as early as March/April 2015, X-Ray purportedly received advice from Arel. He submitted that the correspondence relied on by Mr Hylton pertained to the medical equipment side of the project and had nothing

to do with the HVAC system. Consequently, these emails provide no support for the notion that, at that stage or at any stage, X-Ray was receiving advice on the HVAC system from Arel. Furthermore, Mr Kelman argued that the correspondence did not indicate that Arel ever assumed an advisory role.

[53] As it relates to the issue of whether Arel had a duty to warn X-Ray, Mr Kelman sought to distinguish the case of **Plant Construction**. He noted that, in that case, it was not disputed that the work in dispute, which the subcontractor was advised to perform, was within the scope of the contract. Consequently, the court found it was within its duty to raise the issue of the design's unsuitability. He submitted that, in contrast, in Arel's case, based on the preponderance of the evidence, the initial design and also the redesign of the system were not matters within the scope of the subcontract. For that reason, counsel argued that **Plant Construction** is easily distinguishable and provides no support for the point on which it is being relied by Mr Hylton, namely the duty to warn of an inappropriate design. Mr Kelman also referred to the case of **Clay v Crump** but agreed that **Plant Construction** is more analogous to the facts of the instant case because it involved multiple parties sharing the scope of works.

[54] In replying to X-Ray's appeal in relation to the judge's finding at paras. [166]-[167] of the judgment concerning Arel's position that it was unable to enter the site, Mr Kelman advanced that the matter of the indemnity was not resolved in November 2017 but continued until June 2018. He relied on the evidence of Dr Clarke, who admitted that it was not until June 2018, when Arel's attorneys sent multiple letters to X-Ray's attorneys, that the unit was serviced.<sup>7</sup> He admitted that limited entry was given at different times for specific purposes. For example, Arel was allowed entry in November 2017 to make a duct entry, but permission for the sequencing was not granted until 2018. Counsel

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<sup>7</sup> Notes of Evidence, Volume 3, pages 1252-1253

submitted that the duct modification had nothing to do with the installation but was the result of the redesigned system.

[55] Mr Kelman maintained that unrestricted access was not given. He asserted that numerous other variables contributed to the delay, for example, Mr Heron's witness statement indicates that from around February 2017 to around November 2018, X-Ray continued to prohibit building access for Arel's Building Management System ('BMS') technicians to complete the installation of the BMS. During this same period, X-Ray also failed to provide a dedicated internet line with a static IP address and a desktop computer for the BMS.<sup>8</sup>

#### X-Ray's reply to Arel in X-Ray's appeal

[56] The main point made by Mr Hylton in his reply to Arel's submissions was that nowhere in the judgment is there any indication as to the purpose of the indemnity. However, the correspondence between X-Ray and BNA demonstrates that the indemnity had nothing to do with the loss.<sup>9</sup> King's Counsel posited that initially, it was conceived that the work by Arel was to be done before the cyclotron was installed, so the indemnity was intended to protect against damage to the cyclotron after its installation. The learned judge was, therefore, correct to ignore the indemnity because it was a perfectly reasonable request. For that reason, Arel cannot rely on it to justify its delay.

### **Analysis of the issue of Arel's liability**

#### (a) The standard of review

[57] Both the appeal and X-Ray's appeal challenge the findings of fact of the learned judge. Therefore, it is helpful to begin this analysis with a brief overview of the law governing appellate courts' review of trial judges' findings of fact. The principles outlined in the case of **Watt (or Thomas) v Thomas** [1947] 1 All ER 582 at 587, [1947] AC 484

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<sup>8</sup> Record of Appeal, Volume 2, page 465

<sup>9</sup> Record of Appeal, Volume 3, page 1195-1197

at 487–488 have frequently been referred to and adopted by this court and in particular the following statement of Lord Thankerton:

“I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.

II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.”

[58] In **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd** [2014] 4 All ER 418 (**Beacon Insurance**), an appeal from Trinidad and Tobago, the Privy Council noted that the circumstances entitling the appellate court to conclude that it ought to interfere with the findings of fact of the trial judge has been said to be where the appeal court is satisfied that the judge at first instance has gone “plainly wrong”. The court noted, at para. [12], that this:

“...directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence: *Choo Kok Beng v Choo Kok Hoe* [1984]2 MLJ 165 at 168–169 (Lord Roskill).” (Italics as in the original)

[59] In the more recent case of **Christo Gift and another (Respondents) v Dr Keith Rowley (Appellant)** [2025] UKPC 37, the Board referred to the case of **Volpi v Volpi** [2022] EWCA Civ 464; [2022] 4 WLR 48 ('**Volpi**') which it declared to be the leading recent case on these issues in England and Wales, although highlighting that there are many earlier cases to similar effect. At para. 3 of the judgment, the Board quoted with approval Lewison LJ (with whom Males and Snowden LJJ agreed) as follows:

"(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

(ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

(iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

(iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

(v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

(vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

[60] The Board noted that **Volpi** had been accepted as good law in Trinidad and Tobago by the Court of Appeal in **Marcia Ayers-Caesar v Judicial and Legal Service Commission** Civ App S241 of 2021. However, although this court had not expressly endorsed **Volpi**, the principles enunciated therein have been applied in many cases from this jurisdiction, including **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7, in which Brooks JA (as he then was), at para. [7], stated that “[i]t has been stated by this court, in numerous cases, that it will not lightly disturb findings of fact made at first instance by the tribunal charged with that responsibility”. There is nothing to prevent this court from accepting **Volpi** as providing authoritative guidance on the standard of review to be applied in evaluating a first instance tribunal’s findings of fact.

[61] These cases reinforce the point that the appellate court's reluctance to interfere with a judge's findings of fact at first instance stems from recognition that the judge had the advantage of seeing the parties and witnesses when deciding questions of credibility and making primary factual findings. However, the Board in **Beacon Insurance** at para. [17] refers to the following passage of Lord Bridge of Harwich in **Whitehouse v Jordan** [1981] 1 All ER 267 at 286, which acknowledges that the perceived advantage might vary from case to case. He stated the following:

“[T]he importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision.”

[62] This is important to note because none of the critical conclusions by the learned judge depended on findings of fact arrived at based solely or mainly on the learned judge’s view of the credibility of the evidence of any witness. Her findings were, for the most part, based on conclusions reached by the application of her understanding of the law to the largely undisputed facts. Hence, the appeal and X-Ray’s appeal can be resolved by an analysis of whether the learned judge’s conclusions should be disturbed.

(b) The learned judge's findings

[63] Arel challenges the learned judge's finding at para. [167] of the judgment that it breached the contract. Para. [167] reads as follows:

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

[64] Arel also challenges the finding at para. [173] of the judgment, where the learned judge stated that, “[h]owever, it is already my decision that Arel is negligent as they failed to properly install and commission the equipment for the HVAC system for the Laboratory”.

[65] The allegations of Arel's negligence and breach of contract that resulted in the learned judge's findings are accurately summarised in para. 56 of X-Ray's written submissions as follows:

- “(1) throughout the Project Arel gave professional advice to X-Ray in relation to the HVAC equipment, and that advice was negligently given;
- (2) Arel had an obligation to supply and install HVAC equipment which is adequate, appropriate and/or fit for the purpose of attaining and consistently maintaining the Specifications, and it failed to do so; instead, it installed an HVAC system that did not and could not work;
- (3) Arel knew that the project required a 100% fresh air system not only to enable smooth operation but, more importantly, to enable safe operation because a nuclear laboratory uses radioactive material, and that in the circumstances, Arel clearly had a duty to advise X-Ray against making the change from a 100% fresh air system, and it failed to do so;

- (4) Arel failed to complete the installation of the control system until November 2018, and did not even install the hardware which it had a duty to do;
- (5) Arel also failed to balance [and commission] the HVAC system;”

[66] The learned judge found that Arel was not liable for the HVAC system it installed because it failed to meet specifications. At para. [162], the learned judge made this patently clear and stated that:

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

[67] Para. [164] of the judgment contains an accurate summary of the learned judge’s findings in respect of Arel not being liable for any defect in the HVAC system, and is worth reproducing as follows:

“[164] Therefore, in my judgment Arel did not fail to supply and install equipment which is adequate, appropriate and/or fit for the purpose required of attaining and consistently maintaining the specifications nor did they fail to use reasonable are (sic) and proper steps, methods, procedures or safeguards to ensure that the Laboratory attains and consistently maintains the specifications. I also accept the evidence of Mr. Hudson that the changes made to the initial design was a fundamental and gross error. The HVAC system as installed cannot work without major modifications being made to it in order to attain and maintain the specifications. I therefore cannot hold them liable for the failure of the system to attain and maintain the specifications as the findings of the expert witness shows that the failure of the HVAC System to attain and maintain the specifications was with the design and not the installation. Even if there had been perfect work by

Arel, the Laboratory would not have attained and maintained the specifications.”

[68] Therefore, it is clear that the learned judge’s conclusion that Arel was liable in the tort of negligence and for breach of contract was based wholly on her finding that Arel delayed in completing the installation.

[69] However, Mr Hylton argued that Arel’s liability should also be based on a second and more critical limb, that is “that Arel provided an HVAC system that was unsafe and not fit for purpose, and in those circumstances, despite its duty to advise X-Ray, it failed to do so”.

[70] Having regard to the importance of the issue of delay to the learned judge’s conclusions, I agree with the submissions advanced by Mr Kelman that the learned judge did not adequately engage with the evidence concerning the issue of the outstanding work. At para. [166] of the judgment, the learned judge acknowledged Arel’s position that it was prevented from accessing the site to complete the testing and commissioning of the HVAC system due to X-Ray’s demand for an indemnity as a precondition to access. The judge also referred to the evidence of Mr Heron, who testified that Arel completed the installation of the equipment and its appurtenances on 20 January 2017, in accordance with BNA’s instructions up to that point, and that the HVAC system was started up three days later.

[71] Notwithstanding these findings, the learned judge concluded that Arel had breached the contract because certain items of work remained outstanding and were not completed in a timely manner. In my opinion, the learned judge did not adequately analyse the uncontroverted evidence that X-Ray’s imposition of an indemnity requirement was a material impediment to Arel’s access to the site and completion of the works. While the learned judge referred to this as “Arel’s position”, it was, in fact, admitted in cross-examination by Dr Clarke and stood unchallenged on the record. The learned judge failed to examine whether the request for an indemnity was reasonable and/or permissible, and

to appreciate or properly weigh the effect of the impediment caused by the request in determining whether Arel was in breach.

[72] The learned judge concluded that Arel was negligent without fully considering the factual circumstances that led to Arel having a duty of care to X-Ray, and the specific obligations imposed by that duty. She also failed to examine the extent to which Arel's ability to complete the outstanding work was frustrated by X-Ray's own conduct. Specifically, the learned judge failed to analyse the impact of X-Ray's request for an indemnity on the delay, and whether it was reasonable. In these circumstances, it is permissible and indeed necessary for this court to consider Arel's challenge to the learned judge's findings of fact and determine these issues within the ambit of the tort of negligence.

[73] Similarly, the learned judge's failure to adequately demonstrate the basis for finding that Arel breached its contract due to its delay in performance provides this court with a platform to analyse and determine these issues.

[74] I will address the claims for negligence and breach of contract in turn.

(c) Negligence

[75] It is helpful at this stage to rehearse the essential components of the tort of negligence, which are accurately captured by the authors of Charlesworth and Percy on Negligence eight edition, at chapter 1-25 as follows:

- "1. The existence of a duty to take care, which is owed by the defendant to the complainant:
2. The failure to attain that standard of care, prescribed by the law, thereby committing a breach of such duty; and
3. Damage, which is both causally connected with such breach and recognised by the law, has been occasioned to the complainant."

[76] These three ingredients overlap, and in this case, I consider it most efficient to address the first two together. However, it is also convenient at this juncture to acknowledge that a claim in negligence may also involve a contractual element to the extent that there is a contract between the parties, as in the case before us. Additionally, a duty is usually implied into a contract for professional services for the provider of such service to exercise reasonable care and skill, which is essentially the same duty imposed in the tort of negligence (in the UK this is codified in statute under the Supply of Goods and Services Act 1982, section 13 and section 49 of the Consumer Rights Act).

[77] I am cognisant of the fact that the facts of this case are unusual, given the interplay among the various persons and entities that were involved in the project. In that regard, this case is novel in that despite the vast resources available to counsel, they have not identified for the court any case in which the conduct of the parties raised issues in the same way as they have arisen in this case.

*(i) Analysis of **Plant Construction***

[78] **Plant Construction** bears some parallels with the case before us. Although the facts and issues are not on all fours, it is well worth examining the dispute in that case, as well as the courts' approach to analysing the issues that were raised for consideration. I am attracted to the logical application of the law to the facts of that case, and I will adopt a similar analysis of the relevant law of negligence and contract, while accounting for the factual differences between that case and the case before us.

[79] The facts leading to the dispute in *Plant Construction* are that Ford Motor Co ('Ford') wished to install two engine-mount rigs in pits at the company's research and engineering centre. It engaged Plant Construction plc ('Plant') on a design and build basis and issued a purchase order with conditions that Plant accepted, including a clause that made Plant responsible for the acts or omissions of its subcontractors.

[80] Plant retained Clive Adams Associates ('Adams') as consulting engineers to design and monitor the substructure works and JMH Construction Services Ltd ('JMH') as sub-

contractors in respect of the sub-structure works. However, no detailed written contract was drawn up between Plant and JMH. The agreement between them initially consisted merely of a quotation by JMH, which was accepted by Plant's order. However, the sub-contract agreement was varied, and a term was included stating that the instructions of Mr Michael Furley ('Mr Furley'), Ford's senior engineer, were to be complied with.

[81] During the excavation, JMH removed part of the concrete base supporting the centre's roof and, on Mr Furley's instructions, installed props at specific positions as temporary support for the roof, pending completion of the underpinning.

[82] The roof collapsed. Ford sued Plant, and the claim was settled when Plant paid Ford £1,313,031.00. Plant sued Adams and JMH. Adams admitted liability and paid Plant £250,000.00, which was the limit of its insurance cover. Adams was discharged by the parties' consent, and the claim proceeded only against JMH, with Plant claiming that JMH had been negligent in providing inadequate temporary roof support. JMH contended, inter alia, that the design of that element of temporary work was not its responsibility under the contract.

[83] In the first instance judgment, **Plant Construction plc v Clive Adams Associates and another** [1998] All ER (D) 93, Judge Hicks QC found that the provision of support pending underpinning was within the scope of JMH's sub-contract and was properly to be described as "temporary works". He also found that it was not in dispute that the support actually provided was "inadequate and, so far as that may be relevant, negligently so". The learned judge concluded that although JMH recognised the inadequacy of the propping and warned Plant, what JMH said and did was not enough to discharge its responsibility. However, he found that Plant and its agent Adams were contributorily negligent, and the damages recoverable by Plant from JMH should be reduced by 80%.

[84] JMH raised two main issues on appeal. Firstly, whether it had any duty to warn that the system of supporting the roof, which Mr Furley had instructed, was inadequate

and secondly, having regard to the recognised risk, what steps they should have taken. The Court of Appeal concluded that JMH were under an implied contractual duty to warn Plant about the risks associated with the proposed manner of temporary works as being dangerous and or inadequate, and that the judge was entitled, on the evidence before him, to conclude that JMH were in breach of that duty despite the warning they did give. The court accepted that the issue of causation was raised on the pleadings, and that the learned judge did not expressly find what would have happened if JMH had protested more vigorously. The Court of Appeal concluded that it was not in a position to fill that gap in the judge's judgment, and he had heard extensive evidence, most of which was given orally. In the circumstances, the court remitted the matter to the trial judge to explicitly determine the issue of causation without hearing additional evidence.

[85] On the rehearing on the limited point on which the appeal succeeded, Judge Hicks QC referred to his finding that "[t]he term as to compliance with Mr Furley's instructions could not and did not override JMH's common law and statutory duties to third parties, in particular to take due care for the safety of its employees". He indicated that JMH should have pressed and escalated its objections, including the threat or actuality of reporting to the regulatory authorities, and if necessary, declined to execute what it believed to be an unsafe design if an adequate alternative design was not being pursued. The learned judge, at para. 23 of his judgment, observed as follows:

"23. That a safe design was possible is clear. Even without resort to the general consideration that it is inconceivable that a competent engineer could not have designed such a scheme, findings in the principal judgment and evidence identify specific possibilities."

[86] In consequence, Judge Hicks QC found that causation was established because the consequence of JMH fulfilling its duty would have been that on a balance of probabilities, the collapse of the roof would not have occurred.

[87] There are many material factual differences between **Plant Construction** and the instant case, foremost of these is that ultimately it was a dispute between a contractor

and a subcontractor in respect of which special rules apply. For instance, it was not in issue that the provision of the support fell within the scope of the works of the contract for which JMH was responsible. In contrast, one of the critical issues to be determined in the instant case is the nature and scope of Arel's obligations under the contract with X-Ray, its direct employer. I acknowledge that the performance of these obligations may have been impacted by the separate contractual obligations of other participants in the overall project. However, I do not agree with the submission of Mr Kelman that the contractor and sub-contractor relationship in **Plant Construction** renders that case incapable of assisting this court.

[88] In considering when a term should be implied in a contract extending a duty to warn where the subcontractor knows the works are obviously dangerous, the court in **Plant Construction** examined several cases. It concluded that the authorities do not express a completely unanimous opinion, which, in itself, reflects the difficulty of the subject matter. At page 123, the court suggested a multi-factorial appraisal and stated as follows:

"Any analysis of implied terms in a building contract must start with and take proper account of its express terms. Subject to the express terms, there will normally be an implied term that the contractor will perform his contract with the skill and care of an ordinarily competent contractor in the circumstances of the actual contractor. In my judgment, the factual extent of the performance which this term requires will depend on all relevant circumstances, which may vary enormously. I shall not attempt to make a comprehensive list of possible circumstances. But they may in particular cases include the size, nature and details of the works; the experience and perceived expertise of the contractor; relevant elements of the relationship between the contractor and the employer and of their respective relationships with others, for example, architects, engineers, surveyors, contracts managers, clerks of works, sub-contractors, local authority building inspectors and so forth; and crucially details of the particular parts of the works and other facts which give rise to the question whether the contractor fulfilled the obligation which the implied term imports."

[89] On the facts before it, the court considered the following as being material:

- (a) The nature of the works, in that, these were temporary works, forming part of JMH's sub-contract;
- (b) The fact that the employer (Ford), via Mr Furley, dictated the design/instructions; and these thereby became part of JMH's contractual obligation to Plant;
- (c) The works were dangerous and JMH knew this;
- (d) Plant had the services of a consulting civil engineer;
- (e) Plant and JMH were each to be taken as experienced in respect of their roles; and
- (f) The subcontract between Plant and JMH was unsophisticated.<sup>10</sup>

[90] The court concluded, at page 123, that:

"... These temporary works were, to the knowledge of JMH, obviously dangerous to the extent that a risk of serious personal injury or death was apparent. JMH were not mere bystanders and, in my judgment, there is an overwhelming case on the particular facts that their obligation to perform their contract with the skill and care of an ordinarily competent contractor carried with it an obligation to warn of the danger which they perceived. The fact that no one was injured is irrelevant. The question is, not whether JMH owed a duty of care to some one [sic] who was injured, but what was the scope of the implied contractual term in their subcontract with Plant."

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<sup>10</sup> **Plant Construction Plc v Clive Adams Associates and another (No 2)** 69 ConLR 106, 123 (Court of Appeal judgment)

[91] In assessing whether there was a contractual duty to warn, the court placed great weight on the fact that the works were obviously dangerous and that JMH knew it. These two elements, danger and knowledge, were “crucial” to the scope of the implied obligation in this case. Although Plant had its own consulting engineer (Adams), and Ford’s engineer had given instructions for the design scheme of the supports, those facts did not negate the sub-contractor’s own obligation under the implied term when faced with a manifest risk of serious personal injury or death.<sup>11</sup>

[92] It can, therefore, be advanced that the Court of Appeal articulated the governing proposition that where works are obviously dangerous and known to be such by the sub-contractor, the implied contractual term of skill and care includes an obligation to warn of that danger, notwithstanding (i) the employer’s instructions, and (ii) the presence of a professional designer engaged by the main contractor.

[93] A limitation of the judgment, as applied to our purposes, is that the court expressed reservations, leaving two questions open, one of which may be relevant to Arel's situation. The court reserved for future consideration the scenario where the contractor did not actually know the design was dangerous but arguably ought to have known. This reservation narrows and clarifies the *ratio decidendi* of the case, suggesting that the duty to warn, as recognised by the court, is limited and anchored in actual knowledge of obvious danger. In the instant case, the issue is raised, at the very least tangentially, as to whether Arel knew or ought to have known that the design was dangerous.

*(ii) Did Arel owe X-Ray a duty of care and did it breach that duty?*

[94] Whether a duty of care exists in any given situation is a question of law and will depend on several factors including whether there was reasonable foreseeability of harm to the defendant if the claimant acts or fails to act in a particular way and the proximity

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<sup>11</sup> Ibid, 123-124 (Court of Appeal judgment)

of the claimant to the defendant's act (see **Donoghue v Stephenson** [1932] AC 562 and **Anns v Merton London Borough Council** [1978] AC 728). It is generally accepted that the general concept of foreseeability is a foundational plank of negligence.

[95] I do not think it can be gainsaid that there was sufficient proximity between X-Ray and Arel to ground a claim in negligence if Arel had committed a wrongful act or made a wrongful omission that caused X-Ray damage. For that reason, that ingredient is not problematic.

[96] Determining whether a duty of care exists requires careful consideration, especially in a case such as the one before us, which involves allegations that there was an assumption of responsibility to perform a task which created a legal duty of care to perform that task with reasonable skill and care (outside of a contractual requirement to do so) which was breached by Arel's omission to warn of a danger.

[97] It is common ground that the lab's failure to meet specifications stemmed from the decision to switch from a 100% fresh air system to a recirculating air system. Mr Hylton conceded that Arel was not a party to that decision but maintained that Arel was not merely a supplier and installer of the HVAC but also had engineers. On that basis, King's Counsel argued that it ought to have known that the new system would not have worked and had a duty to advise X-Ray. In failing to so advise X-Ray, Arel breached its duty of care to X-Ray. King's Counsel indicated that he was not suggesting that Arel should usurp GE's advice but was obligated to warn that there might be a problem.

[98] The question is, therefore, whether Arel ought to have known that the system could not have worked and had a duty to advise X-Ray of that fact. The evidence before the learned judge was abundantly clear that the system, as designed, could not have met specifications. However, one must be cautious in interpreting this evidence, as it was given in retrospect with the 20/20 vision of hindsight. It is not entirely clear that the deficiencies in the recirculated air system were readily apparent when the decision was made to change from a 100% fresh air system.

[99] Establishing the lab involved coordination among several individuals and entities. In the absence of a written contract expressly identifying Arel's role, this must be inferred from the factual matrix. The lab required the use of radioactive isotopes, which are inherently dangerous. The cyclotron and PET/CT scanner were purchased from GE. I have not seen evidence of this, but it is well known that GE is a multinational conglomerate with vast resources. IQMS was appointed by GE to, *inter alia*, certify the successful installation and commissioning of the lab, including ensuring that it meets the specifications. It is reasonable to conclude that GE would only have appointed IQMS as its agent with these critical responsibilities if it was satisfied that IQMS was competent to perform those tasks.

[100] Mr Wood of BNA advised Dr Clarke that the unit suggested by Arel in its initial quote was designed to handle large amounts of outdoor air and was "well suited to the application, but is surplus to requirements and will cause an inevitable delay". He confirmed that, based on discussions with Mr Wentz, it was determined that an outdoor air unit was excessive and unnecessary. Therefore, BNA decided to change from the 100% fresh air system following consultation with Mr Wentz of GE. In the absence of any evidence to the contrary, I draw the reasonable inference that they shared the opinion, in good faith, that the new recirculating system could have achieved specifications. The conclusion to be drawn from this is that it was not evident that the lab could, in any event, meet specifications and function effectively with the new system. In other words, the new system would not constitute "an obvious defect" in the functioning of the lab.

[101] I accept that, in principle, an HVAC installer in Arel's position may have a duty to warn the principal if the installer has the requisite expertise to determine that a system it was instructed to install is potentially dangerous. In this case, it appears the installed system may not have met specifications and might have been hazardous because it was unable to remove radioactive particles in the lab. This is evident from the 17 January 2017 email of Naeleen Rosario of IQMS, in which she expressly cautioned that "In the Cyclotron room, Hotcells, QC Lab, there shouldn't be recirculating air because this air is

contaminated with radioactive particles.”<sup>12</sup> Importantly, there is no evidence that Arel had the necessary expertise to make such a determination.

[102] It is reasonable to conclude that Mr Wentz, the representative of GE, and BNA, the engineers retained to design an appropriate system, had determined that the replacement system Arel was instructed to install could meet specifications. It is critical that GE was the supplier of the cyclotron, and its representative, Mr Wentz, ought to have been aware of what HVAC system was capable of meeting specifications. Similarly, BNA were retained to design the HVAC system. Arel was retained to install the system, but not to design it. The evidence is clear that these were two separate responsibilities. I do not accept that because Arel had engineers, then it automatically had a duty to warn X-Ray in this case.

[103] As previously noted, in **Plant Construction**, the English Court of Appeal did not decide on the scenario where the contractor did not actually know the design was dangerous but arguably ought to have known. In this case, it is similarly unnecessary for this court to consider that scenario because there is insufficient evidence to conclude that Arel actually knew or alternatively, ought to have known, that the system was inadequate and possibly dangerous.

[104] There was no evidence that Arel had any specialist knowledge in dealing with radioactive particles. In such circumstances, it cannot be said that an installer of HVAC equipment in the position of Arel “ought to have known” that the design provided to it by BNA could not work when the persons with the requisite specialist knowledge had proposed the recirculating air system as appropriate. The learned judge appreciated the issue of radiation and commented at para. [74] that “... Mr. Heron admitted that he did not know of the dangers associated with radiation technology. He was aware that there were dangers but not what the specific dangers were”.

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<sup>12</sup> Record of Appeal, Volume 3, pages 1117-1119

[105] I am of the firm view that imposing a duty on Arel to warn of the system's deficiency would be to ascribe to it a duty to exhibit specialist knowledge without any basis to do so. Although Mr Heron denied having a duty to warn X-Ray about whether the system was capable of attaining and maintaining specifications and whether it was safe, he demonstrated that he correctly appreciated that there are circumstances in which a duty to warn might arise. The learned judge recorded his response, in para. [75] of the judgment, as follows:

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

[106] I have noted the admission of Arel in para. 6 of its amended defence that: "... it is also the Authorised Distributor for General Electric Healthcare ('GE') in Jamaica and has been engaged by the Claimant from time to time to supply, install and commission GE Medical machines in the Claimant's Molecular Imaging Institute". However, despite there being some evidence of Arel's expertise, I do not accept Mr Hylton's nuanced position that Arel had a duty to warn that "there might be a problem". Imposing an obligation of that nature on Arel, even if only to express a less-than-robust opinion in those terms, would not be reasonable and would amount to Arel challenging or at least questioning the superior expertise of GE and BNA regarding the safe treatment of nuclear particles, a field in which Arel had no specialist expertise.

*(iii) Conclusion on Arel's negligence arising from its failure to warn*

[107] In my opinion, it cannot be said that Arel knew that the design featuring an outside air system was dangerous and/or that the danger was such Arel ought to have recognised it and warned X-Ray. In the circumstances, it was reasonable for Arel to rely on the superior knowledge and expertise of Mr Wentz and BNA without questioning the

soundness of their decision. Accordingly, it cannot be held that Arel failed to exercise reasonable care and skill in discharging its duty to X-Ray by not advising it that the recirculating air system was inadequate. I find that Arel did not breach any duty of care to X-Ray.

(iv) *Could the Arel's delay in installing the system amount to negligence although not being liable for the selection of the wrong system?*

[108] The authorities are clear that a delay in performance that amounts to a breach of contract can constitute negligence. As the authors of Charlesworth and Percy on Negligence stated 1-18:

"In *Brown v Boorman*, [(1844) 11 Cl. & F.1.] The court actually treated breach of contract as negligence but it is now well-recognized that breach of a contractual duty must be dealt with according to the law of contract, and cannot be regarded as the tort of negligence, even though the same facts may in some cases amount to a breach of contract as well as the tort of negligence."

Despite Arel not having a duty of care to X-Ray to advise it of the unsuitability of the recirculating air system, I am of the view that Arel had a tortious duty of care to exercise reasonable skill and care in installing the system as instructed to do, and this necessarily included completing the installation in a reasonable time.

[109] At para. [163] of the judgment, the learned judge accepted Mr Hudson's findings that the HVAC system installed by Arel is in accordance with the design as given to them by BNA. At para. [164], the learned judge made the following findings:

"[164] Therefore, in my judgment Arel did not fail to supply and install equipment which is adequate, appropriate and/or fit for the purpose required of attaining and consistently maintaining the specifications nor did they fail to use reasonable care and proper steps, methods, procedures or safeguards to ensure that the Laboratory attains and consistently maintains the specifications. I also accept the evidence of Mr. Hudson that the changes made to the initial design was a fundamental and gross error. The HVAC system

as installed cannot work without major modifications being made to it in order to attain and maintain the specifications. I therefore cannot hold them liable for the failure of the system to attain and maintain the specifications as the findings of the expert witness shows that the failure of the HVAC System to attain and maintain the specifications was with the design and not the installation. Even if there had been perfect work by Arel, the Laboratory would not have attained and maintained the specifications.”

[110] The learned judge, at para. [165], referred to X-Ray’s claim that:

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

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

- i. install the Trane System Controller;
- ii. install a discharge air temperature sensor;
- iii. install a return air temperature sensor;
- iv. install reheat coils with SCR Controllers or replace Trane VAV with combination Trane VAV and electric reheat; and
- v. complete programming for the entire system.”

[111] At para. [166], the learned judge reproduced Arel’s position as follows:

“Arel’s position is that they were prevented from entering the site to complete the testing and commissioning of the HVAC System and the Claimant unreasonably demanded an indemnity as a pre-condition to Arel regaining access to the site. In fact, it was X-Ray who failed to properly manage the Project and extract and provide information to Arel in a timely manner. Mr. Heron stated that Arel completed its installation of the equipment and its appurtenances on January 20, 2017 based on the instructions given by BNA up to that date. The HVAC System was started up 3 days after Mr. Heron says that

Arel completed its installation. This included turning on the Trane Package A/C Unit, the minor and major exhaust fans on the roof, and the VAV boxes in the ceiling void. He says that checks were done and adjustments made to the conditioned air flow in order to arrive at the desired values. Mr. Heron further stated that the HVAC System was running independently without the completion of the BMS control sequence, which according to Mr. Heron in his examination-in-chief, was to be provided by BNA. Mr. Heron's evidence is that the information was necessary to complete the sequence."

[112] At para. [167], the learned judge concluded that Arel breached the contract. However, the learned judge did not explain why she arrived at that conclusion, especially in light of the evidence that Arel had completed its installation of the HVAC system, which was started up three days after the installation was completed on 20 January 2017. Dr Clarke's evidence was that the lab was functional since January 2017. One can reasonably surmise that the learned judge concluded that Arel had breached the contract because specific works were not completed on time.

[113] Mr Hylton submitted that Arel should have completed its tasks in January 2017, and the evidence of the witnesses suggests that this timeline was agreed. This position is supported by Dr Clarke's evidence under cross-examination, which indicates that X-Ray did not set the opening of the lab for the end of January 2017. However, by the 25<sup>th</sup> of that month, they were scheduled to begin staff training.<sup>13</sup>

[114] In cross-examination by Mr Kelman, Dr Clarke stated that the equipment had been operating since January 2017, albeit for only about 24 hours per month, not daily, and was utilised for just a few hours per month.<sup>14</sup>

[115] It was also noted that Dr Clarke, when asked by Mr Kelman, "[d]o you also agree with me, Dr Clarke that up to the time of completion in January 2017, Arel ha[d] not

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<sup>13</sup> Notes of Evidence, Volume 3, page 1140

<sup>14</sup> Ibid, pages 1253-1254

received the sequence to install the BMS control; do you also agree with Mr. Franks with that?" , admitted that he was copied on an e-mail dated 16 January 2017, and he became aware of the issue.<sup>15</sup> He further stated that "full operation" of the lab started in April 2017, meaning they began seeing patients.<sup>16</sup> Until that time, staff training was in progress to operate the cyclotron, lab instruments, and other equipment.<sup>17</sup>

[116] The important date for assessing the impact of Arel's delay is, therefore, the contractually agreed month of January 2017, as revealed by the evidence. It is not in dispute that there were outstanding items for Arel to complete after this time, but Arel's case was that the unreasonable request for an indemnity prevented it from doing so, and that there were works it needed to perform that depended on other parties performing their obligations.

[117] Mr Hudson's evidence, as supported by Dr Clarke, is that the lab was functional since January 2017, albeit at limited capacity and not in the way it was intended. There is ample evidence that the main cause of the lab's inability to operate in a commercially viable manner is not attributable to any delays on Arel's part. I also accept the unchallenged evidence and Mr Hylton's concession that the effective period of the request for the indemnity was between March 2017 and November 2017. In my opinion, the delay during this period cannot be attributed to Arel.

[118] Further, I accept the opinion expressed in Mr Frank's expert report<sup>18</sup>, on behalf of X-Ray, that the corrective measure would have taken eight months, despite Dr Clarke's suggestion that the report was produced after the event in 2018 and his opinion that a minimum of three weeks' closure of the lab was sufficient to correct the problems as identified by Mr Franks, including the commissioning of equipment.<sup>19</sup> The import of Mr

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<sup>15</sup> Ibid, pages 1136

<sup>16</sup> Ibid, pages 1146

<sup>17</sup> Ibid, page 1148

<sup>18</sup> Record of Appeal, Volume 3, page 470

<sup>19</sup> Notes of Evidence, Volume 3, page 1157

Frank's conclusion is that if proper corrective measures were undertaken after November 2017, the lab would not have been fully functional before July 2018.

(v) *Conclusion on whether the delay in the proper functioning of the lab could be properly attributable to Arel*

[119] The parties agree that the request for indemnity significantly contributed to the delay. This necessitated the learned judge's determination of whether the request was reasonable under the circumstances.

[120] Mr Hylton has argued that it was reasonable because the cyclotron had been installed, making protection necessary in the event of damage by Arel. Although the agreement between Arel and X-Ray was largely unwritten and "unsophisticated", it is of significance that there was no evidence that the contract between them entitled X-Ray to demand an indemnity. Further, there was no exclusion-of-liability provision in the agreement between Arel and X-Ray that would have limited Arel's liability if it had damaged the cyclotron while performing any work in the lab. Consequently, it would have been liable if it had negligently damaged the cyclotron or any of the other lab components.

[121] The unreasonableness of the demand for an indemnity was also compounded by the period over which it persisted, which Mr Hylton conceded is between March 2017 and November 2017. In such circumstances, the request for indemnity was, in my opinion, unreasonable and was responsible for Arel's delay until X-Ray granted it access in November 2017.

[122] To the extent that the total period of delay in respect of all the works to be performed by Arel exceeded November 2017, such delays did not affect the functioning of the lab as designed, although it affected the proper functioning as intended by X-Ray. The fundamental problem affecting the lab's proper functioning was an inherent design deficiency.

[123] In all the circumstances, including the unreasonableness of the request for the indemnity, which lasted for an inordinate period between February and November 2017, Arel's delay did not amount to negligence.

(vi) *The issue of causation*

[124] The learned judge at para. [126] identified that an essential element of negligence must be for the claimant to show causation between the alleged breach and the damage suffered. She referred with approval to Anderson J in the case of **Elita Flickenger (Widow of the deceased Robert Flickinger) v David Preble (T/AS Xtabi Resort Club & Cottages and Xtabi Resort Limited** Suit No CL of 1997/F-013 and Panton P in **The Attorney General v Phillip Granston** [2011] JMCA Civ 1, and several other cases.

[125] For the reason stated in the preceding paragraphs, the damage suffered by X-Ray was not caused by what X-Ray alleged was an inexcusable delay on the part of Arel. It was caused by an incorrect design, and, in all the circumstances, there is no proper basis for finding that Arel was negligent.

**Breach of contract**

(a) The delay

[126] I adopt and repeat my view expressed in my discussion on negligence that X-Ray's request for an indemnity was not reasonable. Since that was the main reason for the delay, the delay as a whole cannot amount to a breach of contract.

(b) The failure to warn of the deficiency in the system

[127] I have previously highlighted that the contract is unsophisticated. It is less detailed than desirable or ideal, given the scope of work and the involvement of other parties in achieving X-Ray's overarching objective of a fully functioning lab. What is clear is that X-Ray agrees that Arel was not contracted to design the HVAC system but was aware of the specifications. In my opinion, there is no basis for concluding that the system's failure

to meet the specifications is due to Arel's breach of contract. There was no express term, whether written or oral, that Arel was required by the contract with X-Ray to advise X-Ray that the recirculating air system was inadequate. For such an omission to ground a breach of contract, the court would have to imply such a contractual duty on Arel to warn X-Ray. The issue then is whether such a term can be implied.

[128] The implication of a term in a contract is a matter of law. The general principle is that this depends on the intention of the parties as deduced from the words of the contract and, in certain cases, the surrounding circumstances. In certain types of contracts, a term may be implied by custom and usage in a particular industry. Unfortunately, the facts of this case do not readily lend themselves to the application of any customary terms in the contract between Arel and X-Ray.

[129] In **Equitable Life Assurance Society v Hyman** [2000] 3 All ER 961 at 970, [2002] 1 AC 408 at 459, Lord Steyn said: "... If a term is to be implied, it could only be a term implied from the language of [the instrument] read in its commercial setting". In the instant case, the absence of a written instrument does not provide the base ingredient that would be interpreted against the background of a wider commercial setting. However, in my view the court should still imply a term into the contract "to give business efficacy to the contract", where the implied term must "go without saying" (see Lord Hoffman in the Privy Council decision of **Attorney General of Belize and others v Belize Telecom Ltd and another** [2009] 2 All ER 1127) as clarified by the UK Supreme Court decision in **Marks and Spencer v BNP Paribas Security Services Trust Company (Jersey) Ltd** [2015] UKSC 72.

[130] In deciding whether a term should be implied, the court is empowered to adopt the approach that the parties are to be understood to have had an overriding intention that the contract into which they entered would function. It is this court's function to ensure that the intention of the parties is not defeated.

[131] In my view, the analysis above, which explains why I am of the view that Arel did not have a duty of care to warn X-Ray, is equally apt. BNA was responsible for designing the system. I do not accept that the common intention of Arel and X-Ray was for Arel to be responsible for assessing the system's efficacy and appropriateness, and to advise X-Ray if Arel concluded it could not achieve the specification. That was not necessary for the business efficacy of the contract, which I find was for Arel to install the HVAC designed by BNA. BNA's responsibility was to design an appropriate system, and there was no need for Arel to provide a professional backstop.

[132] I am fortified in this position for the same reasons I am of the view that Arel does not have a duty of care to X-Ray in negligence. These reasons include the fact that Arel had no expertise in nuclear radiation. Further, the inadequacy of the recirculated air system was not apparent, since Mr Wentz of GE, who had more knowledge of the specifications than Arel and BNA, the designer of the system, evidently believed the system was sufficient. On these bases, I am of the view that the court should not imply a contractual obligation on Arel to warn X-Ray of the inadequacy of the system. I am of the view that Arel did not have expertise in nuclear technology and was not under an implied contractual duty to warn X-Ray. Consequently, such failure cannot ground a breach of contract.

[133] The learned judge found that Arel had breached the contract, and as noted above, this was based on Arel's delay in installing certain components. For the same reasons stated earlier regarding negligence, which I need not repeat, I conclude that causation has not been established, and the delay is insufficient to ground a finding of breach of contract.

#### Conclusion on the issue of Arel's liability

[134] For the reasons expressed herein, I am of the view that Arel succeeds on grounds i and ii. Accordingly, grounds (2), (3), (4), (5) and (6) of X-Ray's appeal are unsuccessful.

## **Damages**

### The challenge to the award of damages - Ground iii of Arel's appeal and X-Ray's appeal grounds (10)-(15)

[135] Whereas grounds i and ii challenge the learned judge's findings that Arel was liable for negligence and breach of contract, Arel's ground iii is framed in the alternative and contests the learned judge's computation of the appropriate quantum of nominal damages in the sum of \$5,000,000.00.

[136] The essence of Ms Ewbank's submissions on the award of damages was that the learned judge's approach of calculating nominal damages at 5% of what the general damages would have been had Arel been found liable is a novel approach, which is entirely unsupported by any legal authority. Counsel relied on several local decisions including **Aaron Dumas v Winston Barrington Rodney** (unreported), Supreme Court, Jamaica, Suit No E336 of 1989, judgment delivered 28 April 1995) in which an award of \$1000.00 was made in April 1995, and \$60,000.00 in **Ian Lunan v Rohan Sudine** [2015] JMSC Civ 260 in October 2015, the latter when updated in September 2022, the date of the judgment, equates to \$84,298.64, which is significantly lower than the \$5,000,000.00 awarded by the learned judge. It was submitted that the award of nominal damages was inappropriate, and in any event was outside the range of and out of proportion to previous awards in Jamaica for nominal damages. She argued that it was a question of the reasonableness of the award, and it was submitted that the award was unreasonable.

[137] As it relates to the quantum of the award of damages against Arel, X-Ray submitted that the learned judge erred in finding that there was no need for a redesign of the HVAC system, and, therefore, X-Ray was not entitled to an award for a redesign.

[138] It was X-Ray's position that the undisputed evidence of Mr Franks was that there needed to be a design system review and replacement with a unit that can properly condition 100% outside air. It was also submitted that this was supported by the evidence

of Arel's expert witness, Mr Hudson. It was, therefore, advanced that the total award should be adjusted to cover the cost of redesign.

#### Analysis and conclusion with respect to damages

[139] Having regard to my view that Arel is not liable to X-Ray in the tort of negligence or for breach of contract, then the grounds challenging the learned judge's finding in respect of the assessment of nominal damages naturally fall away and would only be of academic interest. In the circumstances, I see no need to interrogate them in any detail.

[140] Accordingly, I conclude that ground iii of Arel's appeal succeeds and grounds (10)-(15) of X-Ray's appeal fail.

#### **Costs - Ground iv of Arel's appeal (in respect of its counterclaim)**

##### Arel's submissions

[141] The learned judge dismissed Arel's counterclaim for the cost of the equipment it supplied to X-Ray. Ms Ewbank, in submitting on the reason for the learned judge's decision, noted that the learned judge based it on a claim in equity. Counsel referred to the record of appeal, which shows Arel's claim related to payment under an invoice dated 8 November 2016.<sup>20</sup> Counsel further noted that Dr Clarke, the primary witness for X-Ray, was confronted with this evidence in cross-examination, and he confirmed that monies remained outstanding on the invoice owed to Arel for goods sold and delivered to X-Ray.<sup>21</sup>

[142] Counsel's succinct and cogent submission was that the goods were sold and delivered before there was any dispute between the parties. There was no issue of there being an equitable claim, and the learned judge erred in her analysis, as it was simply a claim for a debt owed.

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<sup>20</sup> Record of Appeal, Volume 8, page 3395

<sup>21</sup> Notes of Evidence, Volume 3, page 1263

### X-Ray's submissions

[143] In relation to Arel's counterclaim, Mr Hylton submitted that it is wholly misconceived and was correctly dismissed by the learned judge. King's Counsel maintained that the amount allegedly owed and claimed as a debt cannot be legally due because the lab is not yet commissioned. The lab cannot be commissioned with the HVAC system that Arel supplied and installed, as it requires certification by IQMS, which depends on its attainment and maintenance of the specifications. In support of this submission, Mr Hylton referred to the words in the "CYCLOTRON CRITICAL LAB SPACES HVAC QUOTATION" dated 18 February 2016, which states "to supply, install and commission new 15 Tons (ACTUAL) Trane packaged unit...) and emphasised the presence of the words "and commission".

### Arel's reply

[144] In responding to X-Ray's submissions on Arel's counterclaim, Ms Ewbank referred the court to the invoice dated 8 November 2016.<sup>22</sup> She asked that the court note that there are four quotations stated here: (1) a chiller for the cyclotron, (2) a packaged unit, (3) an exhaust fan, and (4) a budder tank. Counsel stated that there are no allegations in relation to the equipment at (1), (3) and (4). Counsel argued that the balance of \$6,947,005.88 is a cumulative balance in relation to payments outstanding for all four items, that is, for goods sold and delivered. Ms Ewbank argued that although Mr Hylton submitted that the balance in relation to the units was not payable until the commissioning of the HVAC system and relied on the presence of the words "and commission", that phrase is not written on any other invoice or quotation other than the quotation dated 18 February 2016 on which Mr Hylton relies. She submitted that the quotation does not support the contention that the payment for all the equipment was dependent on the lab being commissioned. She further submitted that, with respect to

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<sup>22</sup> Record of Appeal, Volume 8, page 3395

the terms of payment, a 50% deposit is required, with monthly certificates issued upon completion of work.

[145] Ms Ewbank submitted that there is no dispute that the HVAC unit was installed correctly, and the evidence clearly shows it was installed in accordance with the design of a recirculating air system. The issue with the lab's failure to be commissioned was that the HVAC system failed to meet the 100% outside air specifications required for the cyclotron. This is the gravamen of the entire case concerning the redesign and the flaw therein. This unit would never operate as a 100% outside air unit because it was never intended to do so. Counsel argued that commissioning the AC units and the HVAC system should be distinguished from commissioning the lab.

[146] In summary, Ms Ewbank submitted that the evidence indicated that the lab and HVAC unit had been operating since January 2017. The only issue was that it did not meet the specifications of a system designed for 100% outside air use. So, counsel argued there is no proper basis to say Arel should be deprived of the outstanding balance owed for a unit that it installed, and which was working for the purpose it was intended, that is, a recirculating air system designed by BNA. Accordingly, she argued that there is no sustainable basis in the evidence for asserting that the balance owed was awaiting the commissioning of the lab, as that was never a contractual term. Arel had nothing to do with the HVAC system it installed, which did not meet the requirements for a 100% outside air system. Counsel reiterated that there was no evidence from any witness that the unit was not performing as designed, that is, a recirculating air system.

[147] Counsel referred to Mr Frank's evidence in his expert report, where he opined that Arel failed to balance the system properly.<sup>23</sup> However, when challenged in cross-examination, he agreed that, in light of the evidence, it is impossible for recirculating air systems as designed by Mr Nelson to have the specifications of a 100% outside air system

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<sup>23</sup> Notes of Evidence, pages 308-309

and that, given that impossibility, it was impossible for the balancing of the system as designed to achieve the specification of 100% outside air.

[148] Ms Ewbank argued that Arel was trying to achieve a balance in the system in 2017, but this was unrelated to the unit's non-suitability, an issue that was immaterial to the discussion.

Analysis of ground iv (Arel's counterclaim)

[149] I accept and adopt the submissions of Ms Ewbank, counsel for the appellant, as they accurately reflect the evidence and provide a sound basis for the claim for payment in respect of the parts supplied. Counsel identified four quotations relevant to the counterclaim:

- (1) a chiller for the cyclotron,
- (2) a packaged unit,
- (3) an exhaust fan, and
- (4) a budder tank.

[150] It was submitted that there are no allegations concerning the equipment listed at (1), (3), and (4), and that the outstanding balance of \$6,947,005.88 represents a cumulative amount due for goods sold and delivered across all four items.

[151] Here again, the parties' failure to agree on a detailed, comprehensive written contract makes it difficult to assess what they agreed to. However, I find that the invoices submitted by Arel to X-Ray formed a part of the contract between them and are relevant in assessing what was agreed. Ms Ewbank addressed the contention raised by Mr Hylton, who argued that the payment was contingent upon the commissioning of the HVAC

system and, in that regard, relied on the phrase "to supply, install and commission new 15 Tons (**ACTUAL**) Trane packaged unit"<sup>24</sup> found.

[152] Even in the absence of a written contract, Arel would be entitled to the payment for the equipment supplied on a quantum meruit or equitable basis. X-Ray's refusal to pay is entirely based on the interpretation of these words to exclude its liability in the ordinary course. In my view, these words must be construed in the context of the parties' relationship and Arel's role within the overall scheme of the project. I think it would be against prudent commercial practice for Arel to supply very expensive equipment requested and only be paid upon the commissioning of the lab. The commissioning of the lab was dependent on it meeting specifications, which was not within the control of Arel. I do not find that the words relied on by X-Ray to avoid liability meant, without more, that Arel's right to payment for the equipment was dependent on the commissioning of the lab. I am not prepared to find that such a fundamental condition for the suspension of X-Ray's ordinary payment obligation is included in the contract between the parties, in the absence of the clearest expressed language.

[153] Ms Ewbank correctly noted that this phrase appears nowhere else in the documentation and that the governing terms and conditions instead provide for a 50% deposit with subsequent payments based on monthly certificates for work completed. I have considered this provision as well in construing the words Mr Hylton has relied on. I find that there is no documentary support for the position advanced by Mr Hylton, and in the circumstances, the construction he has advanced is unsustainable.

[154] Further, Ms Ewbank submitted, and I accept, that there is no dispute that the HVAC unit was installed correctly and in accordance with the design specifications for a recirculating air system. The failure to commission the lab stems from the HVAC system not meeting the 100% outside air specification required for the cyclotron. Importantly,

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<sup>24</sup> Record of Appeal, Volume 8, page 3386

Ms Ewbank distinguished between the commissioning of the HVAC system and the commissioning of the lab, noting that the packaged unit was never intended to operate as a 100% outside air unit. In my view, this affected the non-commissioning of the lab, and this result was not attributable to Arel. As previously indicated, I have found Arel not liable to X-Ray in negligence or breach of contract.

#### Conclusion – ground iv

[155] For the reasons expressed above, I find that Arel is entitled to payment for the equipment supplied, as the conditions for payment under the contract were met, and the objections raised do not negate the obligation to pay. Accordingly, Arel succeeds on ground iv of its appeal.

#### **X-Ray's appeal regarding Mr Nelson**

##### **Grounds (1), (8) and (9) of X-Ray's appeal**

[156] Ground (1) of X-Ray's grounds of appeal challenges the finding that Mr Nelson was not engaged in a personal capacity and related findings of law. Ground (8) is related to ground (1) in that it complains of the learned judge's failure to find that Mr Nelson gave negligent advice. Ground (9) is premised on there being merit in grounds (1) and (8) and challenges the failure of the learned judge to award damages to X-Ray against Mr Nelson personally.

[157] The relationship between these three grounds makes it appropriate to address the submissions related to them together.

[158] In examining whether Mr Nelson also owed a duty of care to X-Ray, which he subsequently breached, Mr Hylton contended, as outlined in the written submissions, that BNA provided engineering services through Mr Nelson. It was claimed that sections 8, 9 and 15 of the Professional Engineers Registration Act specify that only an individual, not a company, can be recognised as an engineer in Jamaica, and Mr Nelson was a registered and practising electro-mechanical engineer. Moreover, it was argued that the evidence at

trial was clear that both Mr Nelson and BNA presented themselves as professionals in a highly specialised field.

[159] It was argued on behalf of X-Ray that the learned judge was incorrect when, in para. [143] of the judgment, she relied on the fact that BNA is a limited liability company with Mr Nelson as the managing director, to conclude that there was no need to examine whether he could separately be held liable for damages for negligence and breach of contract.

[160] Mr Hylton relied on the principle of assumption of responsibility affirmed in **Hedley Byrne & Co Ltd v Heller & Partners Ltd** to ground the existence of a duty of care and breach of that duty by Mr Nelson and BNA. In support of his position, Mr Hylton relied on the cases of **Williams v Natural Life Health Foods Ltd** [1998] 1 WLR 830, **Mirant-Asia Pacific Construction (Hong Kong) Ltd and another v Ove Arup & Partners International Ltd and another (No 2)** 97 ConLR 1, **Henderson v Merrett Syndicates Ltd** [1994] 3 All ER 506, and **Merret v Babb** [2001] 3 WLR 1.

[161] The argument articulated on behalf of X-Ray was that both Mr Nelson and BNA assumed responsibility for providing professional services to X-Ray. X-Ray relied on their expertise, and both BNA and Mr Nelson breached their duty of care by failing to exercise reasonable skill and care in providing the services.

#### Submissions on behalf of Mr Nelson in response

[162] In Mr Nelson's written submissions, reference is made to X-Ray's grounds of appeal that relate to Mr Nelson (as stated in para. 3 of X-Ray's appeal), and these are identified as being grounds (1), (8), (9) and (16). Perhaps due to an oversight, ground (7) was excluded, but in the court's opinion, that ground is also clearly relevant.

[163] In the written submissions, Mr Nelson identified the main ground of X-Ray's appeal, which is the learned judge's finding that Mr Nelson cannot be held liable in his personal capacity.

[164] Mr Nelson relies on the established principle that an appellate court will only interfere with or set aside a finding of fact by a judge in the lower court if the finding of fact is shown to be obviously and palpably wrong. They sought support in the case of **Wayne Samuels v R** [2013] JMCA Crim 10.

[165] As it relates to X-Ray's challenge to the learned judge's finding that Mr Nelson was not engaged in his personal capacity, it was advanced on Mr Nelson's behalf that the evidence shows that he was acting in his capacity as Managing Director of BNA. It was submitted that this being a finding of fact, unless it can be shown that this was palpably wrong, the court ought not to interfere with it.

[166] In relation to the submission by Mr Hylton that Mr Nelson was the only professional engineer at BNA, Mr McBean KC argued that this point was never raised in the court below, either in the pleadings or in the evidence. King's Counsel highlighted the learned judge's observation at para. [142] of the judgment, where she stated that:

"... The emails exchanged between Mr. Nelson and the other parties to the Project are all from BNA's company email. Mr. Nelson was not the only one from BNA who was involved in this Project. BNA has sent various representatives on behalf of BNA throughout the duration of the Project. One such person being Mr. Wood who was employed to BNA and represented himself as such."

[167] Mr McBean highlighted that Mr Nelson was not involved in the correspondence during the critical period when the decision was made to switch from a 100% outside air system, and most of the email correspondence was from the engineers that BNA employed, namely Mr Wood, Ms Nickiesha Lawson, and Mr Leighton Facey. King's Counsel argued that these emails supported the learned judge's conclusion.

[168] King's Counsel developed this point in his oral presentation and submitted that in the absence of a written contract engaging Mr Nelson in his personal capacity, there was also no evidence that he assumed responsibility for the obligations of BNA, and the involvement of GE would nullify the assertion that he assumed responsibility. He

submitted that the numerous documents available to the learned judge, including numerous correspondence from BNA, did not provide a basis for a reasonable inference to be drawn that Mr Nelson played a fundamental role in relation to the system. King's Counsel noted that Mr Wood and Nickeisha Lawson sent the initial drawings. He observed that between 2015 and early 2016, there were no emails from Mr Nelson indicating that X-Ray was dealing with him, which counsel posited is curious if his expertise was being relied upon.

[169] Mr McBean submitted that there was not enough evidence from which the learned judge could have drawn an inference that Mr Nelson was a contracting party, or that he had assumed responsibility for the obligations of BNA and thereby breached a contract with, or duty of care owed to X-Ray. King's Counsel further contended that the finding that Mr Nelson was not engaged in his personal capacity was one of fact, and there was nothing to show that the learned judge was plainly and palpably wrong. Therefore, he argued that even if this court would have come to a different conclusion, her decision ought not to be disturbed.

[170] Mr McBean also asked the court to consider that X-Ray did not plead that there was a reliance on the expertise of Mr Nelson or that he was engaged in his personal capacity.

[171] Mr McBean, in his written submissions on behalf of Mr Nelson, included a review of the law relating to actions against persons possessing special skills and the standard of care and skill required of such persons, as outlined in *Charlesworth and Percy on Negligence* at paras. 8-01 to 8-03 and 8-11, and the principles contained therein.

[172] On the issue of costs, counsel submitted that this is a matter in the learned judge's discretion, and she was not compelled to make a Sanderson or Bullock order.

### X-Ray's reply

[173] Mr Hylton referred to the submission regarding the need to plead a statute and asked the court to note X-Ray's amended particulars of claim, where there is an express reference to the Professional Engineers Registration Act.<sup>25</sup>

[174] Mr Hylton also referred to paras. 37-39, 45 and 46 in the witness statement of Dr Clarke, in which he explains that there was reliance on Mr Nelson personally.

[175] Counsel further directed the court's attention to correspondence formally written by Mr Nelson personally<sup>26</sup> as well as other letters written by Mr Nelson on BNA's letterhead.<sup>27</sup>

[176] In responding to the case of **Mulready v JH & W Bell Ltd** [1953] 2 All ER 215, Mr Hylton referred to para. 27 of the Nelsons' skeleton submissions. He submitted that the very passage Mr McBean quotes is against Mr Nelson and indicates why costs should not be ordered.

### Analysis of Mr Nelson's liability

[177] At para. [143] of the judgment, the learned judge relied on the fact that BNA is a limited liability company with Mr Nelson as the managing director to conclude that there was no need to examine whether he could be held liable for damages arising from negligence and breach of contract. The learned judge erred in this regard because, having found BNA liable, she ought to have examined all the evidence to determine whether Mr Nelson was indeed retained jointly with BNA or separately in his own right. It is, therefore, necessary for me to determine that as a factual issue.

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<sup>25</sup> Record of Appeal, Volume 1, page 142, paras, 4-5

<sup>26</sup> Record of Appeal, Volume 3, pages 1176, 1196, 1199 and 1213

<sup>27</sup> Record of Appeal, Volume 8, page 3405-3406

[178] X-Ray relies on sections 8, 9 and 15 of the Professional Engineers Registration Act ('the Act'). Section 15 is in the following terms:

"15-(1) Subject to section 16, with effect from such date as the Minister may, by order, specify, no person unless he is a registered engineer shall, in Jamaica-

- (a) carry on the practice of engineering;
- (b) take or use, in relation to himself, the designation 'engineer' either alone or in conjunction with any other words or initials in such manner as to imply that he is qualified to carry on the practice of engineering in Jamaica;
- (c) take or use, in relation to himself, any designation, title, name, initials or description indicating or implying that he is entitled to carry on the practice of engineering in Jamaica.

(2) A person shall be deemed to carry on the practice of engineering if he practises any branch of the profession of engineering or if, by verbal claim, sign, advertisement, letterhead, card or in any other way, represent himself to be an engineer or, through the use of some other title, implies that he is an engineer or that he is registered under this Act or holds himself out as being able to perform or does perform any engineering service or work."

[179] Mr Hylton submitted that these provisions demonstrate that it is the individual registered as an engineer who may perform the functions of an engineer and be paid for those services.

[180] However, these sections cannot be read without considering section 16 of the Act, which provides as follows:

"16.-(1) No organization-

- (a) shall be entitled to be registered under this Act, except as provided in this section; or

(b) shall engage in engineering work, unless it has a valid certificate of authorization issued pursuant to subsection (2).

(2) The Board may, upon receipt of an application in the prescribed form, direct the Registrar to issue a certificate of authorization to any organization which satisfies the Board that-

(a) the practice of engineering is or will be one of its principal functions; and

(b) the practice of engineering is or will be carried out under the responsibility and supervision of at least one member or full-time employee of the organization who is a registered engineer in the category of engineering work being carried on or to be carried on by the organization.

(3) Every certificate of authorization issued in accordance with this section shall, subject to the provisions of this Act, be valid for a period of two years and shall entitle the holder thereof to carry on the practice of engineering, subject to such conditions as may be imposed by the Board."

[181] The Act defines an organization to mean a partnership, an association of persons or a body corporate. Therefore, it is clear that the intent of the scheme introduced by this Act is to ensure the registration of engineers. It does not void a contract entered into with a body corporate for engineering services, even if that body corporate has not been issued a certificate of authorisation under the Act. Therefore, the issue of whether X-Ray contracted with Mr Nelson is to be determined on the evidence without reference to the Act. Further, there is no evidence that the issue of whether BNA had a valid certification of authorisation factored into X-Ray's decision on whether to contract with BNA or with Mr Nelson personally. It was open to X-Ray to enter into a legally binding contract with BNA for BNA to provide engineering services.

[182] As a practical commercial matter, there was no advantage to be gained by X-Ray retaining Mr Nelson personally in addition to BNA, since his services were available and would be accessed through BNA. It is not disputed that X-Ray retained BNA. As an

evidential matter, although there is correspondence between X-Ray and Mr Nelson, in my opinion, the communication does not indicate a contract between X-Ray and Mr Nelson in his personal capacity.

#### Conclusion on the issue of Mr Nelson's liability

[183] I am of the view that there is ample evidence from which the learned judge could properly have concluded that Mr Nelson was not contractually retained in his personal capacity and is not liable to X-Ray. Accordingly, that being a finding of fact, the basis of which was explained by the learned judge, there is no basis to interfere with her finding. Therefore, grounds (1) - (9) of X-Ray's appeal fail.

#### **Costs – Ground v of Arel's appeal and grounds (16) and (17) of X-Ray's counter-appeal**

[184] The issue of costs is the subject of ground v of Arel's appeal and grounds (16) and (17) of X-Ray's appeal.

#### Arel's submissions on costs

[185] The central point of Arel's appeal on costs was the learned judge's order that the costs awarded to X-Ray were to be borne 80% by BNA and 20% by Arel, to be taxed if not agreed". Ms Ewbank made observations regarding the cases cited by X-Ray in its submissions relating to costs. Ms Eubank submitted that in respect of **George Rowe v Robin Rowe** [2014] JMCA Civ 46, it was not a case in which substantial damages were claimed; it was a case of trespass and ought not to be relied on to determine who should pay costs in this case.

[186] In relation to **H & Q Café Ply Ltd v Melbourne Café Ply Ltd and another (No. 2)** [2022] VCC 1158, Ms Ewbank argued that it is a first instance judgment in which the court in Australia goes against the weight of the UK cases relied on by Arel. However, counsel conceded that there is one similarity, namely that the case holds that where substantial damages are claimed but nominal damages are awarded, the defendant is the winning party. Counsel submitted that in the instant case, X-Ray failed on its substantive

claim, and none of those exceptions identified in that case applies here. She posited that the substance of the appeal presently under consideration is whether Arel was jointly and severally liable for the change in design, and that X-Ray failed in that regard. Thus, if this court upholds the learned judge's findings on this issue of liability, X-Ray should pay Arel's costs.

[187] Counsel further submitted that in a claim for substantial damages, as in this case, where a claimant is awarded nominal damages, the defendant is actually considered the winning party, and, therefore, in the circumstances of this case, it should be the claimant, X-Ray, that is responsible for paying Arel's costs. **Konki Overseas Jamaica Ltd v M&M Jamaica Ltd** [2025] JMCC Comm 14 was relied on in support of this position.

#### X-Ray's submissions on costs

[188] Regarding the costs order in respect of Mr Nelson, Mr Hylton submitted that the learned judge erred in ordering X-Ray to pay his costs. Even if she was correct in finding him not liable, the appropriate order should have been no order as to costs in respect of Mr Nelson. Alternatively, if the learned judge was minded to make a costs order in his favour, the court ought to have made a Sanderson order, utilised in this jurisdiction in several cases, including **Desmond Clarence Bennett v Jamaica Public Service Co. Ltd and Others** (unreported), Supreme Court, Jamaica, Suit No CCL 1999/B-325, judgment delivered 1 May 2009, which established that an unsuccessful defendant, in this case, BNA, should pay the costs of the apparently successful defendant, Mr Nelson, directly.

[189] It was further submitted that the learned judge erred in ordering BNA to pay 80% and Arel to pay 20% of X-Ray's costs since there was nothing in the case to justify a departure from the general rule that, since both BNA and Arel were found liable to X-Ray, they should jointly and severally be liable for X-Ray's costs.

### Analysis of the costs issue

[190] The issue of the learned judge's award of costs forms ground v of Arel's appeal. Having concluded that Arel is not liable, I do not see a proper basis for it to be deprived of a costs order in its favour. Consequently, the general rule should apply that a successful litigant is awarded its costs. For that reason, Arel succeeds on ground v of its appeal against the learned judge's order that it pays 20% of X-Ray's costs.

[191] Mr Nelson has also been successful in defending X-Ray's appeal and should also have the benefit of his costs by virtue of the similar application of the general rule that costs are awarded to the successful party. There is nothing in the circumstances to warrant a departure from the general rule.

[192] The issue that remains on grounds (16) and (17) of X-Ray's appeal is whether X-Ray or BNA should be responsible for the costs of Arel and Mr Nelson. It is settled law that the court has a wide discretion in how it apportions liability among parties to a claim. It is a settled principle of law that where a claimant joins one or more parties to a claim in circumstances that raise a doubt as to which party is liable, the court may order the unsuccessful defendant to pay the costs of the successful defendant to the claimant as part of the costs recoverable by the claimant (known as a 'Bullock Order' - see **Bullock v London General Omnibus Co** [1907] 1 KB 264, CA). The court may also order that the unsuccessful defendant pay the costs of the successful defendant directly to it (known as a 'Sanderson Order' - see **Sanderson v Blyth Theatre Co** [1903] 2 KB 533, CA).

[193] Applying the general principle would mean that the unsuccessful claimant, X-Ray, must pay the costs to the successful defendants, Arel and Mr Nelson, while the unsuccessful defendant, BNA, must pay the costs of X-Ray that succeeded against it. A Sanderson order or a Bullock order constitutes a diversion from this general rule.

[194] In the England and Wales Court of Appeal decision of **Irvine v Commissioner of Police for the Metropolis** [2005] EWCA Civ 129, the court made the following observations:

“22. There is no doubt that the jurisdiction to make a Bullock or Sanderson order has survived the introduction of the CPR, though the exercise of discretion to make such an order must be guided by the overriding objective and the specific provisions of r 44.3. The jurisdiction is a useful one. It is designed to avoid the injustice that when a Claimant does not know which of two or more Defendants should be sued for a wrong done to the Claimant, he can join those whom it is reasonable to join and avoid having what he recovers in damages from the unsuccessful Defendant eroded or eliminated by the order for costs against the Claimant in respect of his action against the successful Defendant or Defendants. However, it must also be recognised that it is a strong order, capable of working injustice to the Defendant against whom the claim has succeeded, to be made liable not only for the Claimant's costs of the action against that Defendant, but also the costs of the other Defendants whom the Claimant has chosen to join but against whom the Claimant has failed.”

[195] The court identified factors relevant to the court's discretion to award a Sanderson or Bullock order, which I find attractive and will adopt. These factors, which I have distilled, include:

- (1) whether the causes of action relied on against the Defendants are connected with each other;
- (2) whether it was reasonable for the claimant to join and pursue a claim against the defendant against whom the claimant did not succeed;
- (3) whether during the trial the defendants tried to shift responsibility onto another defendant; and
- (4) whether the unsuccessful defendant caused the successful defendant to be added to the action.

[196] The evidence that X-Ray contracted with BNA and that BNA was the party liable to X-Ray was overwhelming. There was no necessity to join Mr Nelson, who was a representative of BNA. I consider this to be significant, and primarily for this reason, I

conclude that X-Ray fails at the first hurdle, and the court ought not to make Mr Nelson's estate subject to a Sanderson or Bullock Order.

[197] As regards Arel, the evidence before this court shows that it was not responsible for the defective design of the outside air system. Nevertheless, it was reasonable to join BNA and Arel in a single action to test the possibility that Arel might be liable based on its failure to disclose the unsuitability of the outside air system and/or its delay in performance. However, considering the four factors previously identified, it does not appear that Arel, by its conduct, contributed to X-Ray's decision to bring a claim against any other party. Further, Arel met the case against it at trial as it was reasonably required to do without seeking to deflect blame. In these circumstances, I do not find that this court should exercise its discretion to depart from the general rule that the unsuccessful claimant shall pay the costs of the successful defendants.

[198] For these reasons, grounds (16) and (17) of X-ray's appeal fail.

[199] In light of this, I would propose that an order be made in the usual terms for X-Ray to pay the costs of Arel and Mr Nelson.

### **Dispositon**

[200] For all the reasons articulated herein, I propose that the following orders be made the final orders of the court:

1. Arel's appeal is allowed.
2. X-ray's appeal is dismissed.
3. Orders 1 and 5 of the judgment are affirmed.
4. Orders (2), (4) and (6) of the said judgment are set aside and substituted therefor are the following:

“(2) Judgment entered on the counterclaim for Arel Limited in the sum of \$6,964.705.88.”

“(4) Judgment for Arel Limited on the claim against X-Ray & Diagnostics Ultrasound Consultants Limited.”

“(6) Costs awarded to Arel Limited on the claim and counterclaim against X-Ray Diagnostic Ultrasound Consultants Limited to be taxed if not agreed. Costs to X-Ray on the claim against Basil Nelson and Associates (Consulting Engineers) Limited.”

5. Costs of the appeal to Arel Ltd and Sybil Nelson and Basil Julian Saint Christopher Nelson (Representatives of the Estate of Basil Nelson, Deceased) against X-Ray to be agreed or taxed

## **MCDONALD-BISHOP P**

### **ORDER**

1. The appeal of Arel Ltd is allowed.
2. The appeal of X-Ray & Diagnostic Ultrasound Consultants Limited is dismissed.
3. Orders 1 and 5 of the judgment are affirmed.
4. Orders (2), (4) and (6) of the judgment are set aside and substituted therefor are the following orders:

“(2) Judgment entered on the counterclaim for Arel Limited against X-Ray & Diagnostic Ultrasound Consultants Limited in the sum of \$6,964.705.88.”

“(4) Judgment entered on the claim for Arel Limited against X-Ray & Diagnostic Ultrasound Consultants Limited.”

“(6) Costs awarded to Arel Limited on the claim and counterclaim against X-Ray & Diagnostic Ultrasound Limited to be taxed if not agreed.

Costs to X-Ray & Diagnostic Ultrasound Consultants Limited on the claim against Basil Nelson and Associates (Consulting Engineers) Limited.”

5. Costs of the appeal to Arel Ltd and Sybil Nelson and Basil Julian Saint Christopher Nelson (Representatives of the Estate of Basil Nelson, Deceased) against X-Ray & Diagnostic Ultrasound Consultants Limited to be agreed or taxed.