IN THE SUPREME COURT OF BELIZE, A.D. 2012

CLAIM NO. 733 of 2010

BLUE SKY BELIZE **CLAIMANT**

AND

BELIZE AQUACULTURE LIMITED **DEFENDANT**

Hearings
2011
30th September
12th October
2nd November
19th December
2012
27th February

Mr. Rodwell R.A. Williams SC and Mrs. Julie Ann Ellis-Bradley for the claimant.
Mr. Eamon H. Courtenay SC and Ms. Pricilla J. Banner for the defendant.

JUDGMENT

LEGALL J.

1. The claimant is a company incorporated in Belize with registered offices at lot 15 Albert Street, Belize City. The defendant is also a company incorporated in Belize with its registered offices at Lot 1

King Street, Belize City. The claimant owns and operates a crude oil separation and blending facility at 2 ½ miles, Spanish Lookout Road, Iguana Creek, Cayo District, Belize, and is in the business of selling blended fuel oil to customers in Belize. The facility uses light fuel oil which is blended with high fuel oil, purchased by the claimant, to produce the end product, blended fuel oil (BFO) which is sold to customers and local business.

2. The defendant owns and operates a fish farm – shrimp and tilapia – at Blair Athol, in the Stann Creek District, Belize and sells shrimp and tilapia for local consumption and for export. The defendant owned a three cylinder Wartsila Power Plant, and made a contract with a company, Wartsila Belize Limited, to operate and manage the Wartsila Power Plant, which included a fuel purification system. The power plant generated power for the defendant's internal use on its fish farm business, and also extra power for sale to Belize Electricity Ltd., (BEL) which was the subject of a written agreement between the defendant and BEL for the sale to BEL of up to 15 mega watts of electric power. The power plant needed blended fuel oil to generate power for the defendant's internal use and for sale to BEL. The system was that the BFO would be purchased from the claimant by the defendant, but the BFO would be actually received by Wartsila Belize Ltd., (Wartsila) for purification in the fuel purification system, and the resulting clean fuel, would be used by the defendant for its business. The BFO purchased by the defendant had to be in accordance with certain specifications agreed to by the parties. The specifications for the quality of the BFO included the viscosity,

density, sulphur content, sediment potential, ash content and water content of the BFO.

3. Around January 2009, the defendant began purchasing BFO from the claimant, and Wartsila received deliveries of the BFO from the claimant for purification in the purification system. The defendant received many deliveries of BFO from the claimant up to May 2009, and the defendant experienced no problems up to that time. On 1st May, 2009, the claimant and defendant entered into a formal written agreement for the sale by the claimant to the defendant of BFO. The agreement stated that the quality of the BFO shall meet the specifications described in an appendix to the agreement. The specifications are given in the appendix to this judgment. Clause eleven of the agreement stated that the agreement was for six months from the date of the agreement. But the parties continued to operate under the terms of the agreement after the expiration of the six months period. It was not disputed by either party that the terms of the agreement continued up to 10th February, 2010 to apply to them. Up to early January, 2010 the defendant experienced no serious problems with the BFO delivered by the claimant, and no problems with its fuel separator. The fuel separator, a part of the fuel purification system, separates water and particles from the fuel on the one hand, and puts out clean fuel on the other. The way the fuel separator works is that there are two outlets or pipes, and the heavy elements of the fuel, such as water and particles, are expelled through one pipe or outlet into a sludge tank, while the resulting clean fuel goes through the other pipe.

The whole process is precisely controlled by an electronic control unit.

4. Between 28th January 2010 and 10th February 2010 the claimant delivered about thirteen truck loads of BFO to the defendant. In early February, 2010, the defendant alleged that it experienced problems with the fuel separator in that it was operating abnormally and shutting down intermittently. The water and particles, according to the defendant, expelled by the fuel separator were viscous and in unusually large amounts causing mechanical and labour problems. The waste particles expelled by the fuel separator were black sludge in large amounts, which amounted to evidence, according to the defendant, that the fuel separator or the fuel purification system was not functioning properly. As a result, according to the defendant, the whole process of purifying the BFO had to cease on 10th February, 2010, due to severe damage to the fuel separator.

5. The defendant, through Mr. Americo Albrigo, the manager of Wartsila, decided to take two samples on 28th January, 2010 of the BFO from one of the claimant's trucks, out of about the thirteen trucks loads of the BFO to the defendant. One of these samples was sent on 9th February, 2010 to a laboratory at La Porte Texas USA, named Det Notske Veritas Petroleum Services (DNVPS) where Dr. Rudolph Kassinger had been a consultant for the past twenty-five years and who was an expert witness called by the defendant. The other sample was kept by Mr. Americo in his office. The findings of the DNVPS lab, after an analysis of the sample, are given as part of

attachment 3 of Dr. Kassinger expert report, which he used for his opinion in his report. We will examine his report below.

6. The defendant also informed the claimant of the above problems with the fuel separator around 10th February, 2010; and the claimant sent one of its employees, Elizabeth Harvey, who took samples of the BFO from the defendant's storage tank, and also samples from the sludge produced by the fuel separator, for testing. A product quality investigation report giving the results of the testing of these samples dated 10th February, 2010 prepared by Elizabeth Harvey was sent to the defendant on 18th February, 2010. The report explained the problem using language as follows:

> "In 2+ years, sediments and water that settled in the bottom of the storage tank and in the Buffer tank, as a normal course of a tank operation. BAL was operating at the end of January with low levels in the storage tank. On receipt of product from BSB, the sediments and water got stirred up into suspension, mixed with the product being delivered, was transferred into the buffer tank and eventually to the centrifuge."

7. On receipt of this report, the defendant protested the findings therein to the claimant. The claimant became aware that the defendant was in possession of the findings by the DNVPS labs, and requested a copy of those findings which was sent to the claimant. The claimant then sent a second product quality investigation report dated 10th March,

2010 of its findings based on the same samples tested by the claimant. In this second report Miss Harvey gave the results of her testing of the samples as follows:

> "Analysis and Results
>
> Water and sediments lab test was conducted; using BSB lab centrifuge and BNE lab centrifuge, (ASTM D-1796-04 and the results confirm that the BFO, have a min % of sediments (0.3%) and 0% water, but what was founded is paraffin. Generally the paraffin has a melting point of 47 to 64C, and the sample removed from BAL centrifuge start liquefies at 50 C; and completely liquefies at 80 C.
> According with the information received from BAL, due to the low viscosity and specific gravity of the product, the heat temperature was decreased in the buffer tank from 90 C to 70 C, causing the separation of the paraffin wax from the product. That's why this problem had never happen before, because the heated temperature was always greater than 80 C."

8. This second report was sought to be tendered, not by the person who prepared it, but by the witness Albert Moore for the claimant, whose occupation was in finance and administration. This second report was emailed on 10th March, 2011 by Harvey to the defendant and copied to Mr. Moore. An objection was made that the second report was inadmissible through the witness Moore, as amounting to inadmissible hearsay evidence. Mr. Moore's connection with the claimant was to

direct the operational accounting of the claimant. He was not an employee of the claimant. He admitted that he was not a scientist of any sort, nor did he visit the defendants premises or participated in any scientific testing of the sample BFO, the results of which he was seeking to tender. He is clearly seeking to tender, as to the truth of it, evidence of a scientific nature based on what he was informed by a person who was not called as a witness in the case. For the claimant, it was argued that both Mr. Moore and Ms. Harvey, the person who did the testing of the BFO, were employees of the claimant company; and since the company was not a human person, it had to speak through its employees, and therefore Mr. Moore's evidence of what another employee in the company said, was admissible. The first problem with this submission is that Mr. Moore admitted he was not an employee of the claimant's company; and secondly he seeks to tender evidence to prove its truth of what another person informed him and that other person was not called as a witness. I therefore ruled that the second report dated 10th March, 2010, entitled Produce Quality Investigation Report prepared by Elizabeth Harvey was inadmissible hearsay evidence through the witness Moore. The claimant relied on this Report to prove that the BFO was in accordance with the agreed specifications. Below I have examined the authorities on hearsay evidence in relation to a similar objection taken by the claimant to evidence of Dr. Kassinger, which are relevant to my ruling above.

9. The defendant, over the period December 2009 to February 2010, received a total of 123,700 gallons of BFO from the claimant. As

mentioned above, initially at least up to early January, 2010, there was no problem with the BFO; but after this period the defendant states that problems arose partly because there was a change of management of the claimant. Since the problems arose, the defendant states that it has not used the BFO remaining in the storage tanks, about 25,000 gallons, which amount has not been used due to severe damage, according to the defendant, to the fuel separator, caused by the BFO delivered to the defendant. The cost of parts to repair the fuel separator, is alleged at US$173,982.98 or BZ $347,965.96. Copies of receipts to support the cost were tendered in evidence.

10. The purchase price of the BFO delivered to the defendant is BZ$490,202.22. Though the defendant has used about 90,000 gallons of the 123,000 gallons, the purchase price of the BFO remains outstanding. The defendant filed a counterclaim against the claimant for $348,016.48 for damage to the fuel separator, and requested that this amount to be set off, if there is any amount payable to the claimant. The claimant's claim against the defendant is drafted as follows:

> "And the claimant claims:
> (1) $490,202.22
> (2) In the alternative damages
> (3) $66,437.49 being the interest at 1.75% per month calculated as at 22nd October 2010 and interest accruing until payment in full.
> (4) Cost. (sic)"

The defendant's counterclaim against the claimant states:

> "And the defendant therefore counterclaim (sic):
> (1) Damages
> (2) Special damages in the sum of $348,016.48
> (3) Interest
> (4) Costs."

11. Some main and difficult questions for the decision of the court are these: Was the alleged damage to the defendant's fuel separator caused by the failure of the claimant to supply BFO consistent with the specifications as agreed; and supplied BFO which was unsuitable for its intended purposes? Or was the alleged damage to the fuel separator caused by the defendant operating the fuel purification system at low temperatures and improperly and without proper maintenance which caused paraffin in the BFO to concentrate and become sludge? For the purpose of assisting the court to answer these main questions, the parties called two experts qualified in the scientific subjects, including chemistry – Mr. Thomas Wellborn MSc in chemical engineering, a chemical engineer with 35 years experience, who was called by the claimant; and Rudolph Kassinger PhD in chemistry with over 52 years experience in the petroleum industry, who was called by the defendant.

12. Though the experts considered the same basic facts, they came to different conclusions and answers to the questions above. Generally Mr. Wellborn was of the opinion that low temperatures in the

defendant's purification system, coupled with poor maintenance, and working the system improperly caused the problems. Dr. Kassinger generally was of the opinion that the BFO supplied was not in accordance with the agreed specifications: it was "off spec," and the diluents, called cutter stocks, used by the claimant in the manufacture of the BFO, were not suitable or were unacceptable; and these matters were the cause of the problems.

13. Dr. Kassinger's explained in his report that BFO is comprised of crude oil residues and diluents, called cutter stocks, which are blended to meet the quality of the BFO required. Therefore, the type of cutter stocks selected is important, because cutter stocks influence the stability, cleanliness, abrasives content, and viscosity and density and flash point of the BFO. Flash point would seem to be a limit set as a safeguard against fire. A very low flash point indicates that the cutter stocks used were unacceptable and likely contributed to high sediment content of the BFO. A low flash point suggests that gasoline or even crude oil was used as cutter stocks to blend the fuel. Based on the analysis of the sample by DNVPS, Dr. Kassinger found that the sampled BFO had extremely low flash points and extremely high sediment, high water which was dirty and unstable and was high in ash content. He then found that:

> "Technical Report
> Extremely high sediment content. In addition this sample also had high water, was dirty and unstable (TSP +0.9% vs. Spec. of 0.1% max) and extremely high in

> ash. The presence of Ca, Zn and P also suggests the possible presence of used automotive lube residues and possibly still other contaminants less easily detected. It is not surprising that this fuel proved to be extremely difficult to centrifuge, producing massive amounts of intractable sludge and ultimately resulted in damage to the centrifuge disc stack rendering it incapable of performing its intended function of cleaning the BFO to make it suitable for diesel engine operation."

14. As a result of his above finding, Dr. Kassinger concluded in his report as follows:

> "In conclusion the fuels supplied to BAL (Defendant) in January – February 2010 period were unsuitable for their intended purposes. . . . . While I am not an expert in centrifuge operation, I am aware of cases where heavy sludge ejected by the centrifuge may not be evenly distributed in the disc stock of the centrifuge. This can lead to an unbalanced loading leading to violent shaking and possible disc stack damage. This is analogous to a home washing machine with an unbalanced load encountering severe shaking in the spin cycle. A centrifuge, operating at a much high rpm would cause the effect to be magnified, and lead to serious damage.
>
> In conclusion, BAL did receive a fuel delivery which significantly exceeded specification in a number of critical parameters. The defective fuel was a

> significant contributor to the problems encountered."

15. By centrifuge, he seems to refer to fuel separator in the fuel purification system. For the purposes of his findings and conclusions in his report, Dr. Kassinger used tests and experiments which were done on the above mentioned sample at the DNVPS labs by persons employed by DNVP labs whose identities are unknown and who had not testified in this case. The tests and analysis which Dr. Kassinger used for his report are in attachment 3 to his report. The claimant has objected to the tendering of the attachment on the basis that the document and assertions contained therein by the DNVPS lab are hearsay and inadmissible as the document is sought to be tendered as proof of its contents without calling the maker or makers of the document. The defendant, on the other hand, submits that in the attachment 3 the test conducted by DNVPS labs is admissible. To support the submission, the defendant using Dr. Kassinger's evidence, explained the process used by staff of DNVPS to produce its lab results as follows:

> ". . . . the DNVPS laboratory employs thirteen technicians who conduct tests on a rotating basis. Upon completion of each test, the technicians enter the fuel sample test results in the laboratory's database, whether for sulphur, water content or other criteria. Once the test results are entered into the DNVPS database the results are then printed from the database and are accessed by Dr. Kssinger himself. The

table at attachment 3 was prepared by Dr. Kassinger using these results."

16. The defendant has submitted that Dr. Kassinger, as an expert, is permitted to express his opinion on the BFO test results which were tested at the DNVPS laboratory where he has been a consultant for the past 25 years, and that although the general common law rule is that an expert cannot make the underlying facts of his opinion evidence in the case unless those facts are independently proved, this does not mean that the expert cannot base his opinion on material or data which may in fact be hearsay and inadmissible. In support of this submission, the defendant relies on ***R v. Abadom 1983 1 WLR 126 and Batings PLC v. Coopers & Lybrand 2001 EWHC 17*** and ***Falmouth Resorts Ltd. v. International Hotels Jamaica 2003 JMSC 18***.

17. In ***Abadom***, the accused was charged with the offence of Robbery in that he and others had broken a glass window of an office, entered and demanded money from the occupants of the office. Evidence for the prosecution was a pair of shoes belonging to the accused which had fragments of glass adhering and imbedded in the shoes, which the prosecution contended were the glass fragments from the broken window. The prosecution called expert witnesses in glass technology who had relied on statistics compiled by others in their field for their opinion that the glass from the shoe was in fact the same glass from the window. The accused was convicted and appealed. The Court of

Appeal ruled that the experts' evidence was not inadmissible as hearsay. Kerr LJ gave the reason as follows:

> "In the context of evidence given by experts it is no more than a statement of the obvious that, in reaching their conclusion, they must be entitled to draw upon material which may be available in their field, and not to draw conclusions merely on the basis of their own experience, which is inevitably likely to be more limited than the general body of information which may be available to them. Further, when an expert has to consider the likelihood or unlikelihood of some occurrence or factual association in reaching his conclusion, as must often be necessary, the statistical results of the work of others in the same field must inevitably form an important ingredient in the cogency or probative value of his own conclusion in the particular case."

18. The "work of others in the same field" to use the words of Kerr LJ above must mean persons with the experience, skill and training in the particular field of the expert testifying, persons perhaps qualified to be experts in the same field; persons who probably published material, or produced literature in the same field. I think these are the persons his Lordship had in mind when he spoke of others in the same field. I do not think his Lordship had in mind a situation where scientific tests were conducted in a lab by unknown persons whose skill, experience and qualifications in field of Dr. Kassinger are unknown. Experts are entitled to consider written material by other experts or by persons

qualified in their field, if those experts or persons' expertise and qualifications are evidence in court. In this case before me, DNVPS had a staff of thirteen technicians, and there is no evidence of the identity or skill or experience or qualifications of these technicians. I do not know which of them prepared the tests in attachment 3 and I do not know whether the tests in attachment 3 were produced by persons qualified skilled and experienced in the same field in which Dr. Kassinger's expertise lies.

19. In ***Barings PLC v. Cooper Leylands***, the applicants sought to strike out the whole or parts of three experts' reports on the subject of "Banking Management and Settlement Issues" filed on behalf of the defendants. Each defendant was given leave by the court to call two experts to give evidence on the subject. But the court subsequently ruled, that the applicants should have the opportunity to see the nature of the expert evidence which the defendants sought to call, before the applicants being put to the cost of answering the evidence. This ruling was designed to give the applicants the opportunity to apply to the court to strike out the whole or any part of such expert evidence of the defendants before answering it. The issue for decision by the court was the application by the applicants to strike out the expert evidence. The applicant submitted that the reports of the experts were inadmissible in whole or in part because the reports, or parts of the reports, dealt with matters which were not properly the subject of expert evidence. In rejecting this submission, the court ruled that three experts reports were admissible under section 3 of Civil Evidence Act 1972 (UK) and that the court "was not prepared, at that

stage, to order that they should not be admitted either in whole or in part. Section 3(1) of the Civil Evidence Act 1972 (UK) stated:

> "3(1) Subject to any rules of Court made in pursuance of Part 1 of the Civil Evidence Act 1968 or this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence …
> (3) In this section "relevant matter" includes an issue in the proceedings in question."

20. The reasons for courts' ruling in ***Barings*** were the courts interpretation of section 3(1) above. The judge said that he "must treat their expert evidence as admissible within section 3 of the Civil Evidence Act 1972": In Belize there is no section, in our Evidence Act, Chapter 95, the same as section 3 above. I am therefore not persuaded that the decision in ***Barings*** should be followed in this matter before me.

21. ***Falmouth Resorts Limited*** was a claim for assessment of damages on the ground that the defendant trespassed, used and occupied the claimant's land. The claimant had earlier obtained a default judgment against the defendant. The claimant called two expert witnesses, a civil engineer and a chartered valuation surveyor, to prove the damages claimed. Objections were taken to the admissibility of the experts' reports on the ground of non-compliance with Rules of Court and that they amount to inadmissible hearsay evidence, in that the

experts relied on information, such as inflation rates for real property, and the replacement cost for structures on the property, but failed to give details of the sources of the information and the qualifications of the person from whom the expert obtained the information.

22. The court ruled in relation to the breach of the Rules that where an expert failed to comply with the Rules, the court had a discretion whether to allow the expert to give evidence. In relation to the submission of inadmissible hearsay evidence, the judge did not make a ruling whether the experts' reports amounted to such hearsay evidence; but simply ruled that, in view of the exercise of his above discretion, the experts' reports were admissible; and that it was for the court to determine what weight to give to the reports, and in making that determination, he would take into account the allegation that the experts relied on information, without giving particulars and details of it. With the greatest respect, it seems to me, that weight to be attached to evidence could only be determined by the court after the issue of admissibility of that evidence has been determined by the court. In ***Falmouth,*** as I understand the decision, the court did not make a prior determination on the submission of inadmissible hearsay evidence before ruling that it would determine what weight to attach to the evidence. Inadmissible hearsay evidence carries no evidential weight and to admit such evidence based on discretion would seem to be contrary to the views of the House of Lords in ***Myers v. DPP 1965 AC 1001*** where it was held that records were not admissible on the ground that "a trial judge has a discretion to admit a record in a particular case, if satisfied that it was trustworthy or that justice

required its admission, for that would be an innovation on the existing law which decided admissibility by categories and not by apparent trustworthiness": see page 1002. For the above reasons, I am not persuaded that I should follow ***Falmouth***.

23. The claimant objected to the admissibility of test results in attachment 3 on the basis that the assertions contained therein amounted to inadmissible hearsay evidence as they are sought to be tendered as proof of its truth without calling the makers of the assertions. The claimants rely mainly on the well known and often cited ***Myers v. DPP*** above where Lord Red in the House of Lords held that entries on cards amounted to inadmissible hearsay because "they were assertions by unidentifiable men who made them, that they had entered numbers which they had seen on the cars" per Lord Reid at page 1022. Lord Morris of Borth-y-Gest in ***Myers*** at page 1026 gives the essence of inadmissible hearsay evidence as follows:

> "However alluringly the language of introduction may be phrased the card is only introduced into the case so that the truth of the statements that it records may be accepted. There is, in my view, no escape from the conclusion that, if the cards are admitted, unsworn written assertions or statements made by unknown, untraced and unidentified persons (who may or may not be alive) are being put forward as proof of the truth of those statements. Unless we can adjust the existing law, it seems to me to be clear that such hearsay evidence is not admissible."

24. The point in ***Myers*** is that evidence would be inadmissible hearsay because "the person who had seen the numbers put on the cards, and who had made the records, were not called as witnesses and the evidence was accordingly inadmissible hearsay evidence": per Lord Godson at page 1030.

25. Dr. Kassinger, who at the date of his expert report was a consultant of DNVPS stationed at New Jersey USA, relied on test of the samples prepared by unknown, unidentified persons who may or may not be alive, but who worked at DNVPS labs in Texas USA, to base the opinion in his report. The skill, expertise, training of these unidentified persons are unknown. From the evidence about thirteen persons worked at the lab at the time. Perhaps one or more of them prepared the test and it is not explained why any of those persons was not called to testify and be cross-examined as to the accuracy of the test. There is no evidence that these unknown persons did not err in conducting the test. In my view the test results contained in attachment 3 are inadmissible hearsay evidence, because the cogency of the evidence depends on what unidentified person or persons said in the attachment 3 who were not called to give evidence. I therefore upheld to the objection to attachment 3.

26. With the fuel analysis by DNPVS, part of attachment 3 ruled inadmissible, and as that was extremely important to his report, Dr. Kassinger said that he could no longer conclude that the HBO was not in accordance with the specifications in the agreement between the parties. Dr. Kassinger who had concluded in his report that the

"defective fuel was a significant contributor to the problems encountered," now, since attachment 3 was ruled inadmissible, testified he could not still maintain that conclusion. In relation to the other matters in his conclusion at paragraph five above of his report, he said he was not an expert on those matters and would have to rely on other experts to advise him.

27. The other expert Mr. Wellborn called by the claimant gave his opinion on the cause of the problems allegedly experienced by the defendant. His evidence is that a fuel purification system is designed to treat all fuels as "contaminated upon delivery" and this is the reason for installing such purification systems. According to him, the purpose of a fuel purification system is to remove solid and liquid contaminants from the BFO. In order to explain the system simply, he gave the following analogy: "My best analogy is orange juice with pulp in it. If you shake the bottle everyday before you drink it you will have consistent pulp in the orange juice when you drink it. If you allow it to sit overnight, the pulp will settle to the bottom. If you just drink the top of the orange juice eventually you will as you drain the level of orange juice down you will get to where there is nothing but pulp at the end. So the purpose of the fuel purification system is to remove the pulp before it goes into the machine. That is my best analogy."

28. The problem, according to Wellborn, came about, first of all, because the defendant operated its fuel purification system in such a way as to cause damage, by not maintaining a high enough temperature in the

system. Industry sources recommend that such temperatures should be 98% C (or 204º F) as the proper temperature at which to operate the system. Since the defendant operated the system at temperatures of 80º C (or 176º F) or below, as shown in the claimant second product quality investigation report above which is attached to Wellborn's report as Exhibit T.W. 4b, this would cause the wax in the BFO to both solidify and crystallize in the system, greatly increasing sludge from the system and plugging its filters. Secondly, states Mr. Wellborn, the sample of BFO, tested and analyzed by DNVPS labs taken from one truck load of BFO, out of a approximately thirteen truck loads, could not be taken as representative of all the BFO in the thirteen truck loads, when there is no evidence that more than one truck load of BFO did not reach the agreed specifications for the BFO. This one sample is not only not representative of the rest of the BFO in the other trucks; but it is well known in the industry, says Mr. Wellborn, that sampling is a major source of error. Further problems with the samples, says Mr. Wellborn, are that it is not clear whether proper methods and procedures consistent with the practice in the industry were used to obtain the samples. Thirdly, says Mr. Wellborn, two certificates of quality of the BFO, exhibit T.W. 2 c-d, and an analysis of BFO also by the claimant between 29th January, 2010, and February 10th 2010, show the BFO to be in accordance with the specifications agreed: see exhibits T.W. c-d and T.W. 3 a, b, c, d to Wellborn's Report. Fourthly, according to Wellborn, the specifications agreed by the parties show in some respects, inconsistencies and incompleteness. Because of these inconsistencies, Wellborn concluded that it would be difficult to determine exactly

what the specifications were for either the buyer or the seller. But he said that the claimant, as a responsible supplier of BFO to its customers, maintained specifications consistent with the standards of the industry as part of its normal quality control and monitoring process.

29. There was also, according to Mr. Wellborn, the likelihood of excessively low levels of BFO in the storage tanks, combined with sediment and water of the BFO, caused the content of impurities in the fuel purification system to exceed the design conditions of the system, and this is one of several explanations for the alleged damage to the fuel purification system, in addition to low temperatures, and the likelihood that the fuel purification system may not have been maintained properly according to maintenance schedules or may not have been operated properly. Mr. Wellborn therefore concluded:

> "(1) The blended fuel oil provided could not have been off the defendant's specification, since multiple analytical reports, with the exception of the one presented by the defendant, show it to be on spec, and of the estimated 115,000 gallons of the fuel delivered, 90,000 was consumed as fuel and 25,000 was left in the tank heel.
>
> (2) The fuel inventory maintained by the defendant was too low, and impurities which accumulated overtime, were not removed from the inventory, thereby creating the appearance that delivered fuel was off spec.

> (3) The fuel purification system was operated in such away as to cause, rather than prevent the equipment damages claimed when not maintaining high enough fuel purification system inlet temperatures. Operating the system at low temperatures caused paraffin in the fuel to concentrate and precipitate as both sludge and crystals in the centrifuge and filter portions of the system, respectively."

30. Mr. Wellborn's above conclusions were largely based on testing done by the claimant including testing of the BFO by Elizabeth Harvey, in the second product quality investigation report, not a witness in this case, which is shown at Wellborn's exhibit T.W. 4 a-b, which I have held to be inadmissible hearsay evidence. It is well known that where there are scientific tests of substances or material, the person conducting the test is called or gives evidence of the tests and having laid that foundation, the expert could then be called to testify that he has examined the tests and gives his opinion thereon. Elizabeth Harvey who prepared T.W. 4a & b was not called nor did she give evidence in this matter and therefore the documents T.W. 4 a & b amounts also to inadmissible hearsay evidence by the witness Wellborn. Mrs. Bradley then sought to have this exhibit tendered as admissible under Rule 32 13(1)(e) of the Supreme Court (Civil Procedure) Rules 2005. But this Rule does not address the admissibility of evidence, and is not relevant to the admissibility of the documents referred to the exhibits.

31. It must be noted that in order to prepare his report, Mr. Wellborn did not visit the claimants nor the defendant's business place. Neither did he see any of the BFO that was the subject of the tests for the purposes of this case. He also testified that he did not see any of the samples taken by the claimant and the defendant nor any sludge that came from the defendant's facility. He also admitted that he did not personally cause any tests or experiments to be done in preparing his expert report. He also admitted that he did not witness any tests or experiments carried out in relation to this case. On being asked in cross-examination whether it would be correct to say that he did not verify any information that was sent to him and that is exhibited to his report, he answered that he used his judgment to determine what he thought was accurate and what was not, based on his experience in the petroleum industry. On it being suggested to him that he assumed the information sent to him was accurate, he replied as follows:

> "I wouldn't say assumed it was accurate. But I would say that I did not contact Det Norske Veritas laboratory, I did not contact Elizabeth Harvey, I did not contact anyone at BAL, I did not contact any former employees of Blue Sky Belize to verify the information."

32. Moreover, Mr. Wellborn admitted in cross-examination that the documents, T.W. 4 a-b, held inadmissible, were important to the work he did in expressing his opinion on this matter. He also said that in relation to the single sample from one truck that if there is a whole

truck load of bad fuel, he would not run through the whole truck load. He would reject it if it is bad fuel. In relation to his evidence-in-chief that the sample from the one truck was not properly done, he said in cross-examination that he had no direct evidence that the sample was taken in an inappropriate or unprofessional way. He said there might be a mistake in taking the sample; but that in the absence of evidence, he could not honestly tell the court that there was a problem in the way in which the sample was taken. All he can say is that there is doubt.

33. In relation to exhibit T.W. 2c & d in his report referred to above Wellborn states he cannot say who prepared these exhibits, and they do not show they relate to fuel delivered to the defendant. He also did not know which fuel T.W. 2(c) referred to and whether it was accurate. And he did not know as a fact that T.W. 2(c) related to fuel delivered to the defendant. He agreed that the same answers above are applicable to T. W. 2(d), but he said he made attempts to verify the data in these exhibits. In relation to exhibits T. W. 3 a, b, c, d, in his report referred to above, Wellborn said he probably did independently verify these exhibits. He did not know which fuel these exhibits referred to and who prepared them. In relation to T.W. 3 b and c they relate to BFO because they state so; but not completely relevant to this case, according to Wellborn with respect to exhibit T.W. 3(d) he had no evidence that it related to the defendant.

34. In relation to the fuel separator or fuel purification system or equipment, Wellborn admitted that he had no information as to how

many hours the equipment or system worked, or whether they were serviced or needed maintenance or servicing, or whether they exceeded the recommended hours for service. In relation to the maintenance of the fuel separator, Mr. Americo had testified that the manufacturers recommendation was four thousand hours service before maintenance, and the defendant fuel separator worked about three thousand hours, so there was no need for maintenance of the separator. But Americo said that minor routine maintenance of filters and strainers, which are not on the separator, was done. On it being suggested to Mr. Americo that the fuel separator was in operation from December 2006 to February 2010 at an average of six hours a day, and that that amounted to over eight thousand hours, requiring maintenance, Mr. Americo stated that that would have been correct if the fuel separator was operating on heavy fuel most of the time, and it was not. He said that prior to April 2009 there was little operation on heavy fuel. He also said that at the time of the problem, he actually read the hours worked by the fuel separator, shown by digital display, and he recalled the reading to be three thousand and three hundred hours.

35. Welllborn admitted in cross-examination that the last sentence in paragraph (e) (i) page 5 of his report, dealing with drainage of the storage tanks, is an assumption. Mr. Wellborn made several assumptions for purposes of his report, and the evidence to support the assumptions is missing. For instance, at paragraph (f) on page 6 of his report, where he wrote that four truck loads of fuel rejected by the defendant and subsequently sold to another customer who made no

complaint that it was "off spec," he admitted in cross-examination that this was an assumption on his part. In relation to paragraph (h) page 6 of his report that the agreed specifications "demonstrate inconsistencies and are incomplete." he eventually agreed in cross-examination that none of the parties were confused in relation to the specifications agreed.

36. Mr. Wellborn said in cross-examination that he did not know, as a fact, what caused the damage to the defendants equipment or fuel separator. He gave evidence that what he said at page 8 paragraph 3 of his report, dealing with low temperature and low level of BFO in the storage tanks, was what could have caused the damage. He said he did not have any evidence to support this. He was given information and based on that information he expressed his opinion.

37. Mr. Americo, the operations manager, testified how the fuel temperature is regulated throughout the processing of the fuel. On being asked, based on assumptions by Mr. Wellborn who relied on the inadmissible T.W. 4a and b, whether the temperature in the separators was modified by the defendant, Mr. Americo replied as follows:

> "No, the temperature in the separators is factory set. There is a narrow margin that can be accepted by the machine itself because it has a low temperature alarm, and it has a high temperature alarm. And if for some reason the temperature is going up or

> down because of excessive heating or lack of heating prior to entering the separator then the separator shut off automatically. But the normal temperature is 98 degrees."

38. The claimant raised several other issues: that the defendant blamed the claimant for the problems, because Wartsila, who was really to be blamed for the problems, was a shell company with no assets and could not compensate the defendants for the problems; that the fuel separator was not working properly due to poor maintenance and normal wear and tear which were not corrected or repaired by the defendant; that the defendant admitted in the bill signed when receiving the fuel, that the fuel was in good order; and that the management and operation by Wartsila of the defendant's power plant was poor and ineffective and resulted in the problems. All the above were denied by Mr. Bowen and Mr. Americo in their evidence. The claimant, on whom the burden of proof lies, has to prove that it delivered BFO to the defendant in accordance with the specifications stated in the agreement and that the BFO was suitable in accordance with the agreement and for the intended purpose. The claimant, in order to prove this, relied on the evidence of Moore and Wellborn, both of whom sought to tender the test results of samples of fuel delivered to the defendant which have been ruled inadmissible. Wellborn, I repeat, did not visit the defendants nor the claimants equipment for purposes of this case, did not test the BFO, and based his expert opinion on certificates and exhibits above, though he did not know who prepared them or which fuel or BFO they referred to,

and made assumptions the basis of which have not been proven to show that the defendants machinery and equipment were not working nor maintained properly. As I said the burden is on the claimant to prove its case on a balance of probabilities. The claimant, to prove its case, relied on the expert Wellborn who not only based his opinions and conclusions in this report on inadmissible hearsay evidence and on unsubstantiated assumptions, and other matters as we saw above, but whose evidence was severely discredited in cross-examination, as we also saw above. I am not therefore on the evidence, satisfied on a balance of probabilities that the claimant has proven that the BFO was in accordance with the agreed specifications and suitable for its intended purpose.

39. The defendant had a duty also to prove, on a balance of probabilities, its counterclaim, that the BFO supplied by the claimant was not in accordance with the specifications agreed to in the agreement; and therefore was unsuitable for its intended purpose and did not have the quality and fitness required. The defendant relied on the expert testimony of Dr. Kassinger who, like Wellborn, did not visit the facilities; did not test the sample fuel, on which his expert opinion was based, but yet relied, for his opinion, on test of the samples done by unknown and unidentified persons, who did not testify in this case, as we saw above. For reasons stated above I have ruled that those tests are inadmissible hearsay evidence by Dr. Kassinger who admitted that those tests were extremely important to his conclusion in his expert report. For all the above reasons, I am not satisfied that the defendant has proven for purposes of the counterclaim, on a balance

of probabilities that the BFO received from the claimant was not in accordance with the specifications agreed and unsuitable for its intended purpose and did not have the quality and fitness required. The witness Bowen and Americo did testify as to the serious problems the fuel separator or fuel purification system experienced after receiving the BFO in January 2010. But neither of them tested the BFO and therefore cannot properly say that it was the BFO that caused those problems.

40. I would think that experts are required to have some practical knowledge in addition to the theoretical knowledge of the subject matter of the case on which they intend to give expert evidence, or on which they intend to express an expert opinion. I do not believe that expert witnesses can lawfully rely on the practical findings of unknown and unidentified persons, not called as witnesses, and whose skill and training and expertise in the relevant field are also unknown, as the basis for their expert reports or opinions. This does not necessarily mean that expert witnesses are not allowed to consult and consider theoretical and academic works of others in their field, including other experts, for purposes of their expert reports. The experts in this case ought to have visited the facilities of the claimants and the defendants, observe the operations and carry out such tests as were required for their report. If they are not minded to carry out the tests personally then cause them to be done by others skilled and qualified in the same field to do so, and lead evidence to this effect; or cause those persons to be called to give evidence of the tests and thereby lay the foundation for the subsequent expert opinion.

41. Questions of arbitration and the Sale of Goods Act were raised in this case. Clause 6 of the agreement contains an arbitration clause as follows:

> "6 Notice of Claims
>
> (a) In the event that Buyer has cause to complain that the quality of Product delivered to it pursuant to this Agreement does not comply with the specifications in Appendix 1 Buyer shall immediately after the date when the non-compliance was discovered or reasonably should have been discovered, but in no event no later than ten (10) calendar days after the loading date, give written notice to Seller specifying the nature of its complaint. The Parties agree to negotiate in good faith in respect of any complaint notified to Seller in accordance with this provision. If the Parties cannot agree on a resolution to a dispute regarding Products quality the dispute shall be resolved by an independent expert mutually agreed to by the Parties on or before thirty (30) days from the date of delivery of the Product in question. The cost associated with the appointment of the independent expert shall be borne equally by the Parties. Both Parties agree that the decision and findings of the Independent expert shall be binding on both parties.
>
> (b) From the time the Buyer gives written notice to the Seller until the resolution of the negotiation or arbitration, the buyer can source its HFO

> requirements from another source at the Buyer's risk and cost."

There is no evidence that both parties agreed to an arbitrator or "independent expert" under clause 6. Both parties had a primary and contractual obligation under the arbitration clause, that fair arbitration be conducted in accordance with the agreement. Both parties have failed in this regard.

42. The claimant further submits that the property in the BFO passed to the defendant under clause 2(d) of the agreement which states:

> "2(d) Title to the products transfers from the seller (claimant) to the buyer (defendant) at the end of the sellers loading hose coupling and into the buyers coupling for fuel storage."

43. Since the evidence is clear that the defendant received the 123,000 gallons of BFO into its storage facilities from the claimant, it was submitted that the BFO passed to the defendant, and judgment ought to be entered for the claimant in the full amount of the claim. Moreover, it was submitted that the defendant signed a bill accepting the BFO. The claimant also relied on clause 6 of the Agreement given above which prescribes a period of ten calendar days for the buyer to make complaints to the seller in respect to the BFO. It was submitted that the complaint was not made within the ten day period by the buyer, the defendant, and therefore this waived the defendant's right

to contest the specifications, and judgment ought to be entered for the claimant in the full amount of the claim.

44. In relation to the submission that the BFO passed to the defendant section 37 of the Sales of Goods Act, Chapter 261 states:

> "37. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them."

There are three situations under the section when the buyer (defendant) is deemed to have accepted the goods, in this case the BFO. Firstly, when the buyer intimates that he accepted the BFO; secondly, when the buyer does any act inconsistent with ownership of the seller; and thirdly after a lapse of reasonable time the buyer retained the BFO without intimating to the seller that he rejected it. In support of the first two situations, the claimant relies on the fact that the defendant signed a bill in relation to the BFO, and the fact that the fuel entered the buyers coupling in accordance with the contract.

45. The mere signing of the bill by the defendant, in my view, is not an intimation to the claimant that he accepted the BFO that he contracted or agreed to purchase from the claimant, especially in a case when he

did not know at the time whether the BFO was in accordance with the agreed specifications. On the facts of this case, the parties agreed to BFO with specific specifications and there ought not to be an intimation of acceptance of the BFO by the defendant without evidence that the BFO met the specifications contained in the contract. Moreover, the receipt of the BFO is not, for the same reason above, an act by the defendant inconsistent with the ownership of the seller. It is also to be noted that section 36(1) states:

> "36.-(1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract."

46. In relation to the third position under section 37, the claimant states that under clause 6 above, the defendant agreed to no later than ten days after the discovery of non-compliance with the specifications in the agreement to give notice to the defendant specifying the nature of the complaint. The claimant states that information or notice came from the defendant 23 days after the defendant began experiencing problems in alleged breach of clause 6 of the Agreement, in that the problems started on 20th January, 2010 and it was not until the 12th February, 2010 that the defendant informed the claimant of the problems. On a careful reading of clause 6, it ought to be apparent that the clause does not state that time with respect to the notice begins to run when the defendant "started experiencing or noticing

problems" with the BFO; but under the clause time begins to run, it seems to me, for purposes of the notice when "the buyer has cause to complain that the quality of Product (BFO) delivered to it . . . does not comply with the specification in appendix 1." The defendant knew from the lab tests that the BFO was allegedly not in compliance with the specifications on February 12th, 2010 the date of the lab results. Notice was sent to the claimant on 12th February, 2010. It is at that date therefore, in my view, that the defendant had cause to complain that the BFO was not in accordance with the specifications. But the clause also speaks of a "loading date" which seems to be inconsistent with the buyer's cause to complain stated in the clause. If the cause of complaint, as in this case, arose after the ten days period, I do not think the intention of the clause is to deem the subsequent notice invalid, resulting in a waiver. I therefore do not accept the submission that the alleged failure to give notice within the time waived the right of the defendant to contest the specifications; and that the BFO passed to the defendant. As shown above, the claimant has failed to prove that the BFO corresponded with the description of it contained in the specifications in the agreement.

47. The defendant says that there was under section 16 of the Sale of Goods Act, an implied warranty or condition as to quality or fitness for the particular purpose of the BFO supplied under the agreement. Section 16 states:

> "16. Subject to this Act, there is no implied warranty or condition as to the quality or

fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

(a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply, whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for such purpose; but in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;

(b) where goods are bought by description from a seller who deals in goods of that description, whether he is the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality, but if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed:

(c) an implied warranty or condition as to qualify or fitness for a particular purpose may be annexed by the usage of trade;

(d) an express warranty or condition does not negative a warranty or

> condition by this Act unless inconsistent therewith."

48. Under clause 1(c) of the agreement, the claimant and the defendant expressly agreed as follows:

> "1(c) The quality of products sold hereunder shall meet the specifications shown in the attached appendix 1 which forms part of this Agreement."

The written agreement or contract by the parties that the quality of the BFO must meet written specifications, which is of a scientific nature, would seem to make the implied requirements under section 16 above unnecessary. But assuming section 16 is applicable, there is some hesitation whether the defendant relied on the claimant's "skill and judgment" as the section requires. In ***Henry Kendall and Sons v. William Lillico and Sons Limited 1969 2 AC 31*** Lord Reid states that by "skill and judgment under section 14(1) (similar to our section 16 (1), "the buyer gets under section 14(1) an assurance that the goods will be reasonably fit for his purpose": see page 41. It is that assurance under section 16(1), that on the evidence, I have some hesitation about. There may, on the facts, be an inference of "that skill and judgment" but an inference does not, in my view, rise to the level of an assurance. But if I am wrong on the above and section 16 is relevant and applicable and there is an implied condition on the facts of this case that the BFO shall be reasonably fit for the purpose for which it was required, it seems to me that the defendant, in order

to succeed on the counterclaim, would still have to go further and prove that, in spite of that implied condition, that the BFO supplied by the claimant was not reasonably fit for that purpose. As shown above, the defendant has failed to prove that the BFO supplied was not fit for its purpose due to the inadmissible hearsay evidence of Dr. Kassinger.

49. In relation to section 16(b), the defendant, as under 16(1), has to prove its counterclaim that BFO turned out to be not of merchantable quality. In other words, the defendant for the reasons above, failed to prove that the BFO sold was not of merchantable quality, fit for its purpose or reasonably capable of being used for the purposes required. It is also said that the BFO supplied by the claimant did not comply with its description, as contained in the specifications in the contract. But the defendant, on its counterclaim, has failed to prove this, due to the inadmissible hearsay evidence of Dr. Kassinger examined above.

50. The experts opinions in this case were important to the respective parties that called them; but the experts seem to not have requested legal guidance with respect to preliminary matters concerning the admissibility of their expert reports and conclusions.

Costs

51. It is well known that costs follow the event. In the circumstance of the case, I make no order as to costs.

Conclusion

52. For all of the above reasons I make the following orders:

(1) The claims in the claim form are dismissed.

(2) The claims in the counterclaim are dismissed.

(3) There is no order as to costs.

Oswell Legall
JUDGE OF THE SUPREME COURT
27th February, 2012

APPENDIX

The Specifications Paragraph 3

P.T.O.