

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2005 HCV05512

<i>BETWEEN</i>	<i>FUN SNAX LIMITED</i>	<i>1ST CLAIMANT</i>
<i>A N D</i>	<i>MIDEL DISTRIBUTORS LIMITED</i>	<i>2ND CLAIMANT</i>
<i>A N D</i>	<i>THE SHELL COMPANY (W.I.) LIMITED</i>	<i>DEFENDANT</i>

Appearances

Mr. J. Graham and Mr. G. Mellish instructed by John Graham and Company for the Claimants.

Mr. A. Earle, Miss A. Gracie and Miss T. Jeffery instructed by Rattray, Patterson, Rattray for the defendant.

Heard: September 23, 24, 25 & 29, 2008; March 31, April 1, 2 & 3, 2009 & February 25, 2010

P. A. Williams, J.

1. Fun Snax Limited (the 1st claimant) is a company which would be loved by most children. They manufacture and process snack foods such as: corn grits; potato chips; rice balls; sweet corn ball and ice cream cones. Midel Distributors Limited (2nd claimant) distributes the products manufactured by the 1st claimant.
2. Shell Company W.I Limited entered into an agreement with the claimants to supply them with the gas to be used in their manufacturing process.

3. In the latter part of 2000 the claimants allege they began receiving an unusual number of complaints about the quality of their products and significant quantities of these products were returned. The claimants felt that the goods were being undercooked and retaining more moisture than was acceptable. They suspected that these problems were due to the LPG being delivered by the defendant.
4. This matter was commenced by way of Claim Form dated December 15, 2005. At the commencement of this trial on September 23, 2008 permission was sought and granted for the claimants to amend their claim and amended claim form and third further amended particulars of claim filed on September 15, 2008 were permitted to stand.
5. In its claim, the claimants are seeking to recover damages for negligence and/or breach of contract and/or consequential losses arising from the supply by the defendant to the claimants of an incorrect and inadequate Liquid Petroleum Gas as a result of which the claimants suffered loss and damages and incurred expenses.
6. Their claim was for inter alia : (1) recovery of the sum of \$107,315,353.00 (2) damages for negligence and/or breach of contract (3) aggravated damages.
7. In particularizing their claim the following was outlined:-

- a. Failing to take any or any appropriate steps to ensure that the product supplied by it to the claimants was propane.
- b. Failing to take any or any appropriate steps to protect its deliveries of LPG from contamination of any kind.
- c. Supplying to the claimants any product which it knew or ought to have known was not propane and was in fact butane.
- d. Failing to take any steps within a reasonable time to assess that the product supplied by it to the claimant was butane.
- e. Failing to accede to the claimants reasonable request to have an independent evaluation of the defendant's product within a reasonable time
- f. Supplying to the claimants a product which was unfit for the purpose for which it knew or ought to have known it was being supplied.
- g. Failing to take any or any suitable or appropriate measures in light of the claimants numerous complaints to ensure that LPG propane was supplied by it to the claimants.
- h. Failing to have any or any due regard whatsoever for the effect the supply of butane would have on the claimants manufacturing process and business of which it knew or ought to have known
- i. Failing to employ any or any appropriate standards of manufacturing in order to ensure that its product was suitable for the claimants' use

- j. Failing to appropriately diagnose the problem and consequently requiring the claimant to carry out rectification at its expense which were not the cause of the problem.
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- 8. The defendant was permitted to amend its defence in response to the amended particulars of claim as filed on September 15, 2008 and did so by way of further amended defence filed on September 29, 2008.
 - 9. The defendant admitted being engaged in the sale and distribution of Liquid Petroleum Gas “LPG”; and asserted that by letter dated 27th March 2000 the defendant proposed to share the supply of LPG equally with the 2nd claimants other supplier Petcom and this proposal was accepted on or about April 7, 2000. Thereafter by a contract dated July 22, 2002 it agreed to supply the 1st claimant with LPG. They maintain that at no material time did they contract to supply either claimants with propane.
 - 10. The defendant contend that it was an express or implied condition of its contract with the first claimant that they would provide the equipment manufacturers specification in order for the defendant to supply product which correspond to the equipment specifications. They were never supplied with these specifications.
 - 11. Having received complaints commencing in or around November 2002, the

defendant maintain that they acted promptly in an attempt to identify and resolve the problems. Further they never refused independent testing of any LPG which it delivered to the claimants as all such LPG originated from the local Petrojam refinery.

12. In essence therefore, the defendant substantially denied the assertions of the claimant and refuted there being any negligence or breach of contract. They aver and state that the claimants have consistently thrown figures at the court and put them to strict proof as to their loss of profits and value of alleged returns which they were being called upon to prove were in fact cripples.

13. It is proposed to consider the issues against the general principles of law arising in this claim. The evidence will be reviewed with the objective of making factual findings relative to the issues. An application of the law to those facts found will determine if the claimant has proven their case. If they have, the appropriate measure of damages will then be addressed.

The Law

14. Generally a breach of contract is held to have occurred when one party, without lawful excuse refuses or fails to perform what is expected from him under the contract or performs the contract defectively or incapacitates himself from performing.

The nature of this matter requires that provisions of the Sales of Goods Act sec. 15 relative to implied conditions as to quality or fitness needs be borne in mind.

This section states inter alia:-

Subject to the provision of this Act and of any statute in that behalf, 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.....
- b.
- c. an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of the trade.
- d.

15. For a general definition of negligence, the dictum of Lord Wright in **Lockgelly**

Iron and Coal Co. Ltd. v. McMullan [1934] A.C. 1 at page 25 proves useful

“.....in strict legal analysis “negligence” means more than needless or careless conduct, whether in omission or commission, it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing”.

The Issues

16. Against these general principles it would appear that for a determination of this matter, there are two (2) fundamental issues which must be resolved.

Firstly, what product was the defendant contracted to supply to the claimant.

Secondly, what product did they in fact supply.

Arising from this second issue some collateral matters will need to be addressed-

- (a) was the product supplied incorrect and inappropriate Liquid Petroleum Gas as described by the claimant
- (b) did the product supplied affect the claimant's manufacturing process and if so how did any perceived problem manifest itself
- (c) ultimately did the product supplied affect the goods manufactured by the claimant.

This latter question would provide the basis for determining if there was indeed loss or damages suffered by the claimant.

The evidence

17. Mr. Earle David Delgado stated that he has been the chief executive officer of the claimants – of the 1st claimant since 2000 and of the 2nd claimant since 1990.

18. He explained that in the manufacturing of their products, all baking and frying utilized LPG – Propane for the production process which is computer controlled.

19. He said Petrojam was their supplier of LPG – Propane 95% or higher for about two (2) or more years prior to April 7, 2000. He acknowledged that he

dealt with a Mark Williams; a sales representative of the defendant; and subsequently accepted the defendant's proposal to supply them with LPG. This he did by way of a letter dated March 27, 2000.

20. From this correspondence Mr. Delgado, on behalf of the 2nd Claimant, was prepared to give the defendant 50% of all business at an agreed credit period of fifteen (15) days.

The defendant offered the introduction of the state of the art LPG Tank Telemetry System; free replacement of LPG tanks; annual pressure testing of gas lines and other LPG equipment; annual training and certification of staff in the safe handling and usage of LPG.

21. Mr. Delgado maintains that in the preliminary discussions he had with Mr.

Williams, he had made him aware that Petrojam had supplied them with LPG propane 95% or higher. To this Williams had indicated that that percentage was not available anymore but that the defendant could deliver a blended mixture 70% or higher propane and 30% or less butane.

He advised Williams that 70% propane would be their border line minimum and even with this they would have to adjust the residential time of the products in the ovens.

22. Mr. Williams however asserted that to the best of his knowledge at no time was there ever any agreement for the defendant to specifically deliver LPG propane to the claimants. He said that it was a practice for the defendant to supply propane

to its manufacturing customers based on the equipment specifications for that industry.

Further he maintained the defendant was never supplied with these specifications.

23. In his witness statement/evidence-in-chief he asserted that Mr. Delgado acting on behalf of the 2nd claimant did in fact request that it be supplied with propane and as they had previously been supplied by an LPG supplier with propane being the standard supplied in that industry, the defendant would have complied with this request.

24. Under cross-examination Mr. Williams agreed that he would have taken notes of his discussions with Mr. Delgado but was unable to account for their whereabouts.

He insisted he never asked Mr. Delgado what percentage of propane he was accustomed to getting but the plan was to supply the mixture with 70% propane based on their experience with other bakeries which used predominantly LPG commercial propane mixture.

25. It was through Mark Williams for the defendant that it was first explained that LPG is comprised primarily of a mixture of propane and butane gases. A mixture with greater than 70% propane is accepted in the industry as commercial propane, while a mixture with greater than 70% butane accepted as commercial butane.

26. In any event, Mr. Delgado accepted that in neither the initial correspondence, nor

the contract eventually signed between the 1st claimant and the defendant is there any mention specifically to propane – just LPG

27. He said that; in addition to the items already outlined as being in the initial agreement of 27th March, 2000; the defendant would install 2 tanks USG (or 8400 liters approximately) total capacity, all safety valves, one way pressure regulators/gauges adjusted to 11.5 PS I, all pipings to their main plants line with safety lock-of valves and they would fill the tanks to 80%; capacity pressure test and leak test.

28. He said the tanks were installed and were filled on the 21st of June 2000 –this was done in his presence and that of Mark Williams and the defendants installation and fill crew.

He observed the flame was yellow instead of blue to which he was accustomed and was told this was because of the 70% / 30% propane/butane ratio.

Significantly, Mr. Williams adamantly denied being present when this filling took place.

29. In another challenge to Mr. Delgado's recollection of what had taken place; the defendant's assertion was that only 1-2000 US gallon capacity tank was supplied. It was noted that in correspondence between the parties in September 2003 and in the initial test report from the Bureau of Standards dated May 2003 reference was made to a single tank.

It was however admitted by Mr. Delgado that “the shell tank” was padlocked but he insisted he was not responsible for locking it.

30. It was on the 4th of August 2000 that Mr. Delgado said he first called Mark Williams and advised him that there may be a gas problem since the flame was on the yellow side.

Further he then explained he was getting complaints and returns of his products due to their getting soft in a short time-meaning they had a short self life.

Mr. Williams countered that at no time between 7th April 2000 and August 2001 did he receive any complaints about the LPG which was supplied.

In fact he pointed out that in August 2001 he ceased being a sale representative but during the time he was and the 2nd claimant was his customer, as far as he was concerned they were happy.

31. Mr. Delgado sought to support the fact that he had made Mr. Williams aware of the problem by exhibiting memos which he said he had sent.

Mr. Williams denied getting them.

It was pointed out that these memos were on Fun Snax letter head although it was not until April of 2003 that the claimant had notified that all business would be done through the 1st claimant.

Further it was noted that one of the memos was dated August 7, 2000 which was a public holiday.

32. It was therefore suggested to Mr. Delgado that no discussions were had with Mr.

Williams and no memo sent to him about the problems with the gas. Further it was suggested that his first complaint was in November of 2002.

Mr. Delgado denied these suggestions.

33. Mr. Delgado in any event went on to say Mr. Williams and a Mr. Shan visited his factory “within a short time” of his complaint and initial tests revealed a leak on the underground line which was causing pressure to drop. All affected lines were replaced and tested. This failed to improve the colour of the flames or increase the oven temperature.

34. Acting on further recommendations from the defendant’s personnel Mr. Delgado said he reluctantly installed new propane burners and temperature controllers. The defendant supplied and installed new low pressure regulators. There was no change in the flame or temperature.

35. The defendant assert that the 2nd claimant made them aware of suffering losses due to their products not being baked properly as a result of LPG butane being supplied instead of propane gas in a letter dated November 1, 2002.

36. Prior to this however, complaints had indeed been received by the defendant. Mr. Carlyle Anderson, who was then the defendant’s LPG dispatcher, said that in response to a series of complaints from Mr. Delgado in 2002, he had visited the site and done informal density/specific gravity test.

He explained that the specific gravity for the propane is 0.51 to 0.58. Butane is the heavier gas.

The test revealed that the product supplied was LPG-propane.

37. Mr. Anderson further said that in or around August of 2002, the complaints were in relation to difficulties on the claimant's cooking operation. Based on these complaints and upon Mr. Delgado's insistence the shell tank was purged.

However subsequent to this, the complaints continued so a technician Dean Harriot attended the factory and made adjustments to the burners. The problem was solved temporarily.

38. The letter of November 2002 was referred to Mr. Rohan Ambersley, he being the sales representative who had assumed responsibility for the claimants account.

He said an investigation was launched immediately to determine whether or not propane had in fact been supplied.

Mr. Anderson assisted Mr. Ambersley in the investigations.

39. Route sheets were checked to determine what was supplied for the period. Mr.

Anderson explained these sheets indicated where deliveries were made and the type of product delivered.

The sheets were prepared by batching together customers according to their location and the type of product being delivered.

Also Mr. Anderson checked certificates of quality from Petrojam to further verify what was delivered.

Mr. Anderson exhibits copies of the defendant's route sheets, invoice and Petrojam loading rack tickets for the deliveries made by the defendants. Between June 22, 2000 to May 26, 2003 over eighty were made.

40. The conclusion arrived at from these checks was that the only LPG product supplied to the 1st claimant was LPG commercial grade propane.

Mr. Ambersley was further satisfied as to the product supplied as there were no complaints from any other customer on the route sheets who had in effect received the same product.

41. On December 18, 2002, Mr. Ambersley wrote to the 2nd claimant advising of the results of the investigations.

Mr. Delgado was also advised that there could have been a number of reasons why he was experiencing the problems.

He also indicated that they were still awaiting specifications for their equipment and the gas deemed compatible for usage therewith so as to evaluate whether it corresponds with the specifications for LPG supplied in Jamaica and if so to ensure that the gas supplied correspond to these specifications.

42. Mr. Delgado conceded that he never supplied the defendant with the specifications

for the baking equipment but instead supplied them with the name of the manufacturers of both the burners and the oven.

The defendant denied receiving any such information.

43. In the letter of December 2002 the 2nd claimant's indebtedness to the defendant was outlined. It was in the sum of \$349,102.11.

An offer was made to the 2nd claimant which was done "as an expression of the value placed on their business and in anticipation of continued partnership."

The offer was for 5000 liters of LPG which when calculated amounted to over eighty-seven thousand dollars, which amount would offset retroactively against some invoices. Further the defendant gave a credit note for the gas evacuated.

The indebtedness was reduced by 50%.

44. By January 2003 Mr. Delgado had suggested to Mr. Ambersley that propane may have been delivered in trucks that had butane thus causing contamination. In a letter dated January 1, 2003 Mr. Ambersley explained that the defendant does not cross-load i.e. trucks carrying butane would not be used to carry propane and vice versa.

45. Once again there was a request for specifications of the equipment. It was stated, "we again emphasize that it is paramount that your equipment specifications for LPG we requested in our previous communications be supplied so that we can

conduct necessary evaluations and ensure that what we are delivering is in line with these specifications”.

46. Mr. Egbert Shand, a plumber and pipe fitter was contracted to the defendant to do preventative maintenance. He spoke of visiting the claimant's site three (3) to four (4) times.

Firstly to install the shell LPG 2000 US gallon tank and thereafter in response to complaints from Mr. Delgado that there was not enough heat from the burners. He confirmed that Mr. Delgado complaint was that the flame was weak i.e not getting required heat and the flame was yellow.

47. He it was who cleaned the burners and adjusted the regulators in an attempt to improve the quality of the flame. He also replaced the pipes from galvanized steel to black iron as when the former got heated, the coating strips off the pipe may block the pipeline.

48. He explained that despite the checks and adjustments he was unable to resolve the problems. However after cleaning the orifices, changing the pipes and adjusting the regulators there was an improvement in the flame.

49. Under cross-examination Mr. Shand was unable to recall the dates of these visits to the factory. He however, recalled that a Mr. Lelland Martin accompanied him on one early visit.

His working relationship with the defendant was explored and he explained how he billed them for some of the work he did but did not bill for what he called service calls.

He admitted that during the period 1973 to 2006 he worked solely for the defendant but was not paid on a monthly basis.

He claimed that Mr. Delgado was always there when he visited the factory but was never in agreement with his feeling the problem was solved.

He did not recall ever telling the defendant about Mr. Delgado not being happy nor that they had not been able to agree.

50. Mr. Lelland Martin is an engineer who worked with the defendant from March 1990.

He admitted to being the person who in April 2000 supervised the contractor Mr. Shand in installing the tank. He also explained that the tank was fitted so that LPG could be used to fill cylinders to operate the claimants forklift – LPG propane in particular was required for this purpose.

51. He explained that the tank was installed with a regulator to reduce the pressure of the LPG leaving the tank from 11.5 psi – 12.5 psi to 10 psi and a second regulator at the factory end further reducing the pressure to the equipment from 10 psi to 0.5 psi – burners require 11” water volume or 0.5 psi.

52. It needs be noted here that Mr. Delgado spoke to only one pressure regulator on the

tank side – a high pressure regulator. He further spoke to several low pressure regulators fitted, as when the main line goes into the plant it branches to various equipment so a low pressure regulator was needed for each branch.

He also said the pressure at this stage would be in the region of 12.5 psi to 13 psi.

Further pressed under cross-examination as to whether the regulator which was installed meant the gas flowing into the equipment could not exceed an overall pressure of 0.5 psi. Mr. Delgado admitted he could not speak to that issue.

53. Mr. Martin however also confirmed that Mr. Delgado had complained about

problems. His recollection was that Mr. Delgado had been experiencing problems with the flames while being supplied by Petcom and prior to the defendant's return in 2000 at which time the defendant's assistance was sought in correcting the problem.

He went on to state that prior to sales people agreeing to supply the product, engineers would have to assess the needs. It was during one such preliminary visit that Mr. Delgado advised him there was a problem with product from the existing supplier as there was yellow flames and soot. Work was done cleaning the burners prior to the commencement of delivery of the defendant's product at the location.

54. Mr. Martin explained that sufficient air was required to get to the burner in order for the flame to burn cleanly (blue) with a yellow flame being indicative of incomplete combustion.

This problem could be corrected by increasing the airflow to the burner or by reducing the amount of LPG flowing to the burner to match the available airflow.

He made adjustments but “nothing significant occurred”.

He explained further that butane required more airflow than propane but either the airflow or LPG can be adjusted on properly designed equipment to obtain a blue flame.

He concluded that his belief was that Mr. Delgado’s problem was the way the equipment was designed – he opined that the air shutter was either not big enough or there was some other defect preventing the obtaining of the optimal air /LPG mixture.

55. Under cross-examination he maintained that despite this conclusion he was not saying the equipment was not properly designed. However the design did not mean that no adjustments could be made to the burner.

He expanded on the issue with the colour of the flame explaining that if the gas coming into the burner had sufficient air there would be a blue flame. At a higher pressure there would be more gas and by adjusting the pressure the result would be compressing the gas to get more volume.

56. Apart from the problems he had with the colour of the flame and insufficient heat from the ovens, Mr. Delgado also spoke to the problems he had with a sanitizer and forklifts.

He indicated that neither of these items could function efficiently when connected to the defendant's tank.

The forklift started properly when propane was bought from a Portmore gas filling station. The sanitizer worked on a 30lb propane filled cylinder also purchased from an outside source at Daytona.

57. Mr. Mark Williams under cross-examination had agreed that he has assisted Mr.

Delgado to obtain a 50lb cylinder of propane gas to power the sanitizer but denied knowing that this was because the sanitizer did not work with gas from the tank. As far as he was aware this smaller sized cylinder was necessary to accommodate movements with the portable sanitizer.

He explained that propane cylinders cannot be obtained from persons who sell gas – butane is normally put in cylinders. However, arrangements were made for propane to be put in cylinders for the claimants.

58. Mr. Martin also spoke to the issue with the sanitizer and said he advised Mr.

Delgado that the pressure required for the sanitizer was higher than that coming through the pipeline and hence he was provided with cylinders with the appropriate pressure.

Mr. Shand confirmed that he did assist in the installation of a sanitizer. This was the first time he had worked on one and he has not worked on it since.

He admitted that it did not work properly when first connected but got it working when it was connected to high pressure gas. He confirmed a 30lb cylinder was used.

59. In any event Mr. Delgado indicated that it was when they changed their gas suppliers on the 13th June, 2003 that the problem resolved itself.

He was unable to recall definitely if complaints about the forklifts had been made or to whom they may have been made.

60. Mr. Delgado was insistent that from March 2001 he had requested of Mark Williams that the gas with which he was supplied be tested. Mr. Williams denied this assertion.

In any event Mr. Delgado said he called the Bureau of Standards directly requesting a test on the LPG propane at their site and offered to pay for this certification. He was advised that only the marketing company can request such a test.

Mr. Delgado said he spoke with a Mr. Cochrane of the Bureau. A Mr. Horace Cochrane gave evidence for the defendant but he was not asked about this conversation alleged by Mr. Delgado.

61. Petrojam was also called Mr. Delgado said, and he spoke with a chief chemist who also advised him that only the marketing company can request testing.

He therefore continued to ask the defendant to do the testing. He said he spoke with a Clifton Mesquita and Sharon Sterling in October 2002.

Another request was made on November 29, 2002 to Sterling and Mr. Rohan Ambersley and again it was refused.

In March 2003 he spoke with Miss Sterling yet again and indicated that after all that had been done; only the gas was left to be certified with all parties i.e. representative from the Bureau of Standards, chief chemist of the refinery, the defendant's representative and himself being present.

62. In April of 2003 Mr. Delgado contacted Barnaby Engineering with a request that a mechanical evaluation report of his plant equipment and in particular their baking equipment be done.

Mr. Dave Barnaby a mechanical engineer and managing director of Barnaby Engineering and Testing Services Limited gave evidence for the defendant and confirmed being contacted by Mr. Delgado.

The report he said Mr. Delgado made was that the flame from the burners was poor (yellow flames) and there was uncertainty as to whether propane was in fact being supplied.

He asserted that the problem did not sound like a LPG problem but more like a fuel/air mixture problem. He opined that regardless of the type of LPG supplied, if there was insufficient air a yellow flame would be produced.

63. Mr. Delgado said a Neville Walker employee of Barnaby Engineering visited the

site. He discussed with him specific tasks namely:-

- a) evaluate oven efficiency mechanically
- b) evaluate burner efficiency
- c) evaluate and confirm the integrity of the gas supply and connections at ovens
- d) evaluate and confirm cause of sooting, heavy yellow flame at oven
- e) evaluate and report the cause of low heat in ovens
- f) to take pictures of flames at oven

64. Mr. Neville Walker was a mechanical engineer contracted to Barnaby

Engineering and Testing Services Ltd. He too gave evidence for the defendant.

He agreed that he went to the site but he said he went there with Mr. Barnaby and they were escorted by Mr. Delgado.

Both Walker and Barnaby spoke to what they did at the site. To ensure a thorough investigation was done, they started from the source – the tank. They noted that the vapour pressure was 125 psi indicative of propane.

Barnaby explained the relative pressure for propane was 115 psi to 125 psi whilst butane has a pressure of 35 to 45 psi, which pressure varies based on atmospheric rate.

They noted that the temperature of the tank was on par with the atmospheric temperature.

65. Mr. Barnaby said that the claimant's burners were inspected and it was noted that the nozzles were self-aspirating i.e air to the burner was operated on a natural draft not mechanically. These types of nozzles have a recommended gas pressure of 31 psi (10 inches of water)

66. Both men spoke of observing a red regulator on the tank and a neighbouring tank from Petcom.

Mr. Walker said they walked along the gas lines and followed it into the factory and were able to verify that there was inadequate heatings from the burners.

They took photographs of the flame and it was agreed that samples would be taken from the defendant's tank.

67. Mr. Delgado said he was advised by Walker of the need to test the gas as a part of the evaluation. He advised them he could not authorize the test since the tank was the defendant's property and he had already requested of the defendant that a test be done. He felt that any gas test would not be credible or acceptable if all the parties were not present.

Mr. Delgado said Mr. Walker responded that as an engineering firm they can test anything in order to complete their job. Further Walker said they did a lot of work for defendant who were also one of their large clients so he would be making arrangements for the gas to be tested.

68. Mr. Barnaby said it was in order to comply with Mr. Delgado's request for testing

that the services of the Bureau of Standards and Petrojam were engaged.

Mr. Walker explained that the company did not have the machinery to conduct the test and hence the Bureau of Standards was contacted. They in turn advised that the Bureau usually outsourced the testing to Petrojam.

Mr. Gladston Ivy of Petrojam and Mr. Horace Chrocann of the Bureau of Standards accompanied Mr. Walker to the claimant's site on the 28th and 29th of April, 2003 and two (2) samples were taken.

69. Mr. Walker said the first sample was invalidated as the machine was not appropriately calibrated resulting in an inconclusive result.

Upon calibration of the machinery the single sample tested and the analysis revealed LPG in the tank had 78. 63% propane content and as such would be regarded as commercial propane.

70. Mr. Delgado's recollection of these events differed from Mr. Walker. He said he reminded them of his concerns when the men came to see him on April 28th and remained in his office when the tests were done.

He said Walker returned to him and informed him the test showed butane. He said further Walker could not understand this result and left to clean the equipment and do another test.

Mr. Delgado said later that same day Walker advised him a second gravity test after cleaning the equipment showed butane. Mr. Walker said he would be replacing the testing equipment and do another test.

71. On the 30th of April, Mr. Walker returned to his office and informed him a third specific gravity test revealed propane. Mr. Delgado said he questioned Mr. Walker as to these three different test and questioned their integrity.

He also queried the fact that he had not been given a cause or cure for his oven baking problem. The response he got was that there may be too little oxygen surrounding the oven. Fans were used to blow air around the burners but this did not result in a change to the colour of the flame or the heat.

72. Mr. Delgado pointed out that on the 29th of April a delivery was made by the defendant of some 900 liters of propane – this was evidenced by a delivery ticket #10529013 BI

73. In any event Mr. Delgado ultimately refused to pay for this test on the gas which he said he had not requested.

74. Mr. Barnaby expressed the view that based on the vapour pressure and the test result, he was satisfied the product in the defendant's LPG tank was propane. In his opinion there was a "natural draft combustion at the burners nozzles and this could have been as a result of the positioning of so many burners in one location. Thus the burners could be consuming the air faster than it was being replenished naturally and thereby lowering the quality of combustion".

Mr. Walker said that in an attempt to adjust the air/LPG mixture to the burners a large fan was indeed placed in the factory to increase the air supply but this only marginally improved the situation.

75. Both Mr. Barnaby and Mr. Walker indicated that more tests were needed but Mr.

Delgado declined to allow them to carry on any further investigation.

Mr. Delgado rejected the findings, was adamant the LPG supplied was not propane and refused to settle the invoice.

76. Mr. Barnaby indicated that if their investigations had continued; apart from

investigating the gas pressure at the nozzle, they would have checked the manufacturers specifications of the nozzle in terms of the type of LPG required; recommended the gas pressure, and determined whether it was force or natural draft nozzle.

Mr. Walker said they wished to have had the opportunity to adjust the air to determine the air/fuel mix and examine the orifice sizes of the burners if the situation did not improve.

77. Under cross-examination Mr. Barnaby said he was a part of the discussion about

the need for samples to be taken to do the test and admitted the defendant was not contacted for access to the tank.

He confirmed that the defendant was their client and had been among their customers for over twenty (20) years.

78. Mr. Horace Cochrane, another mechanical engineer, gave evidence on behalf of the defence. He had been employed to the Bureau of Standards between October 8, 2001 to the 1st of June, 2006 in the capacity of Unit Head for Flow and Volume Metrology.

79. He recalled that “in or around 2003” he was contacted on two separate occasions to oversee the testing of the products in the defendants tank located on the claimant’s site at White Marl. He explained he was there to witness the testing as an unbiased observer.

As such, he visited the site on the 28th and 29th at which time two (2) samples were taken. No representative of the defendant was present but Mr. Delgado, he said, was.

One sample was used to conduct a density test with a hydrometer to determine whether the LPG was propane or butane. This sample recorded a specific gravity/density of .522 which was consistent with propane.

The second sample was used to conduct a gas chromatography test to provide a profile of the LPG constituents by percentage volume or percentage mass. This test revealed the LPG had 78.063% propane content and as such could be regarded as commercial propane.

80. He said another test was conducted in November 2003 commissioned by the defendant through Mr. Carlyle Anderson.

A similar procedure was followed as before and this time the density/specific gravity of LPG was recorded as .57 5 and the result of the gas chromatography tests showed 85.9% butane making the product LPG butane.

81. Under cross-examination he was not challenged as to his presence but as to the failure to have a representative from the defendant present.

He insisted that the presence of both parties in a dispute at the time of the sampling was not necessary in all cases.

He admitted knowledge of a machine not being calibrated which caused one sample not to be used and conceded that this was not in any report.

82. He was questioned about his knowledge of a delivery being made by the defendant on the 28th of April, 2003. He had no such personal knowledge and was confronted with the relevant delivery receipt showing a delivery was made on April 28, 2003 at 3:39 p.m.

He eventually conceded that given that fact, there was in reality no test result as to what was in the tank prior to this delivery.

83. In May of 2003 the defendant suspended delivery to the claimants. The last one was on the 26th of May, 2003.

They did this as there were outstanding payments due to them by the claimants for products supplied to them.

84. Mr. Delgado explained that he closed the tank valves, locked the cover and closed all down stream valves on the defendant's bulk tanks and effectively ceased the usage of gas from the defendant's storage.

In June 1003 the claimants entered into an agreement with Petcom for them to supply LPG propane having indicated their need for LPG propane 95% or higher.

85. Mr. Ambersley explained that despite the debt on the claimants part, the defendant still stood prepared to purge the tank again. This position was put in a letter to Mr. Delgado on the 1st of September, 2003.

Mr. Delgado refused this offer and maintained that any purging to be done should be done after tests of the contents be done in the presence of personnel from the defendant, the 1st claimant and the Bureau of Standards and be certified by Petrojam and the Bureau of Standards.

86. Mr. Delgado said on Monday, November 3, 2003, Mr. Ambersley did another sample testing of the gas in the tank. The parties he had requested be present were not, but was done by the defendant's staff alone. The test revealed 57.3% butane and 42.2% propane.

Mr. Ambersley was not questioned about this but the test result was exhibited – it spoke to C3 Hydrocarbon % being 42.2% and C4 Hydrocarbon % being 57.3. The former is propane and the latter butane. This result was over the signature of a chief chemist from Petrojam Limited.

87. On November 13, 2003 with all parties present another test was carried out. As indicated earlier by Mr. Cochrane this test revealed the contents were LPG butane.

88. Mr. Delgado was asked if he had himself put or had made arrangements for butane to be delivered into the defendant's tanks between May 26th, 2003 and the 3rd November, 2003. he denied this.

He further denied doing it for the period November 3 to November 13, 2003.

89. The significance of the results of these tests were raised to Roy Porter a lecturer in the department of Chemistry at the University of the West Indies who gave evidence on behalf of the claimants.

Under cross-examination he disagreed that this increase in the butane percentage was indicative of the introduction of butane to the tank.

He opined that with a single cylinder containing both propane and butane, with time, more propane would leave the tank leaving a higher percentage of butane.

90. He went on to explain that since the vapour pressure of propane was higher, as time passes it was expected to have less propane. Further while expecting the percentage propane and butane to change he would not expect significant change. He agreed that the change noted here from 57.3% to 85.9% was significant.

He further agreed that if there was not significant fluctuations in temperature, mere use of a LPG product comprised of butane and propane would not make a significant difference in the LPG constituent when tested.

He explained that whereas temperature would affect change in the composition over time even when the original mixture was homogeneous, normal temperature changes as exhibited in Jamaica from 19 degrees Celsius up to 30 degrees Celsius would not make of significant change.

91. Paul Bancroft Reece, called by the defendant, gave his opinion on this issue. He too is a chemist and was then a professor of bio-chemistry and sub-dean of the faculty of Pure and Applied Sciences at the University of the West Indies.

When he was referred to the results of the test done in November 2003, ten (10) days apart, he opined that the tank had to have been filled with butane after the first analysis.

92. As to the difference between the test in April and that of November 13, 2003, he concluded that the propane in the tank at the time of the first test had been replaced by butane.

He stated that there is no known process by which propane will be converted to butane under the conditions in a storage tank nor is it likely propane will preferentially be released over butane from a cylinder charged with a propane/butane mixture.

93. These two (2) chemists also commented on the issues as it involved using propane as opposed to butane.

Dr. Porter said that for efficient combustion both propane and butane need an adequate supply of oxygen. Propane needs 5 moles of oxygen per mole of propane

for complete combustion where butane needs 7.5 moles or approximately 50% more oxygen.

Under cross-examination he conceded making a mistake in his calculations and in fact butane needed 6.5 moles or 30% more oxygen.

94. He spoke to his examination of the equipment being used by the claimants in 2006.

He described them as having non-adjustable burners set by the manufactures for a specific fuel air mixture to suit the burning of propane gas. The use of any other gas would result in incomplete combustion and if that other fuel was butane a higher air/fuel ratio would be necessary.

Under cross-examination he maintained the amount of gas going through the nuzzle could be adjusted but not the air pressure.

95. He explained that as a result of the incomplete combustion the caloric or heating

value would be lower than expected with a baking operation requiring a longer time for completion. Products withdrawn from the oven at the usual time normally spent for baking would result in more moisture than the product could accumulate.

He disagreed with the assertion that butane gas had a higher caloric value than propane. However, he agreed that the heating value of butane was 102600 BTU per gallon in its gaseous state whereas propane's caloric/heating value is 96500 BTU per gallon.

He also admitted that if there was too much moisture in the product prior to baking this could cause more moisture at the end of the baking assuming a fixed residential time in the oven with all other conditions remaining constant.

96. Professor Reece also explained that the presence of sufficient air can cause both gases to completely combust to give carbon dioxide and water vapour. Propane would produce 530.6 kilocalories per mole where as butane yield 687.4 kilocalories per mole (22.4 liters).

He stated that one mole of butane would generate 30% more heat than the same volume of propane. Hence it was his opinion that more heat would be produced if propane used for domestic use was replaced by butane and foods would be cooked in a shorter time.

He too explained that one volume of propane required 25 volume of air or 5 volume of oxygen while 1 volume of butane needed 32.5 volume of air or 1.5 volume of oxygen to properly combust.

97. He expressed the view that if the combustion was not complete, the normal blue flame would appear yellow. The heat output would be lower regardless of whether the gas being burned was propane or butane.

98. It was also the opinion of Mr. Dave Barnaby that the colour of the flame was an indication of the temperature of the flame and the quality of the combustion. A yellow flame would give off a lower temperature than a blue flame.

Mr. Walker had said a yellow flame was proof of insufficient air getting to the burner.

Mr. Martin had explained that insufficient oxygen would result on the production of carbon monoxide and eventually would lead to the production of carbon and attendant sooting. A yellow flame would be indicative of incomplete combustion and more air would be required.

99. Under cross-examination Mr. Delgado was questioned as to why he had not discontinued the contract with the defendant from the time the problem was first noted as he claimed in August 2000. His explanation was that since he had no proof it was the gas causing the problem, he kept honouring the agreement as he did so as not to be sued for breach of contract.

He said the defendant kept delivering the gas on their own through the tank telemetry system.

100. Indeed Mr. Williams had spoken of the installation of this system whereby the defendant could monitor levels on the tank from their offices. He however asserted that this system only worked for between three or six months but that the 2nd claimant was never made aware of this fact while he was their sales representative. Mr. Anderson however said the system worked for approximately one (1) year and thereafter ceased working due to maintenance issues.

101. Under cross-examination Mr. Delgado admitted that a suit had been filed against

Jamaica Edible Oil and Fats Company Limited in December 2003 claiming damages for goods spoilt due to the supply of rancid oil which was used in the manufacture of their goods.

102. He agreed further that the services of Technological Solutions Limited had been used to conduct tests on the oil products supplied by Jamaica Edible Oil and Fats Company Limited and it was thus established that the oil was rancid. This was in particular for the purchase of oil for the period of about March 2002 or about the 21st of June 2002.

As a result of the use of this rancid oil the products sold to the claimant's customers were returned and some cases of products were recalled from the market.

Mr. Delgado further explained that his company suffered loss of profits as a result for period up to November 2003 and continuing.

This suit was settled on November 9, 2009. The claim for an amount in excess of thirty million dollars was settled in the amount of \$13.5 million.

103. On being invited to make comparisons between that suit and this claim against the defendant, Mr. Delgado admitted that some particulars of loss and expenses of the claimants were identical in the two.

The amount claimed in that suit was \$31,615,075.39 and in the demand letter to the defendants was \$30,764,435.81.

He conceded that the same year he settled with Jamaica Edible Oils he made the demand on the defendant and commenced this action within months of that settlement.

104.Mr. Delgado acknowledged that the rancid oil sold to the 2nd claimant by Jamaica Edible Oils had excess moisture. Ultimately he accepted that rancidity could have resulted in the shortening of the shelf-life of his products.

105.Mr. Delgado said that in May 2003, upon deciding that there had to be a change as their losses were humongous and unbearable, discussions were held with a representative of Petcom and ultimately an agreement was entered. In the discussion Mr. Delgado made known the need for LPG Propane of 95% or higher and not a mixture. He said he was told that for commercial bulk deliveries only propane was available and hence the agreement was for supplies of LPG propane 95% or higher.

Petcom commenced delivery on the 12th of June, 2003.

The defendants last delivery was the 26th of May, 2003 – this Mr. Delgado said was on the telemetry system.

106.Mr. Delgado said he was contacted by a Roger Bryan a representative of the defendant, about an outstanding debt owed to the defendant of \$350,000.00 and they had a meeting in August 2005.

He asserted that Mr. Bryan stated that the defendants telemetry system had indicated that they had stopped using the defendant's gas and it was Mr. Bryan's desire to regain the claimant's confidence.

Mr. Delgado refuted the suggestions that this visit and any alleged conversation never took place.

107. The defendant eventually removed their tank from the claimant's premise in March of 2005.

The submissions on the evidence

108. After reviewing the facts and identifying some undisputed facts, Mr. Andre Earle for the defendant began his submissions by referring to **Bornington Castings Ltd. v. Wardlaw 1956 1 All ER 615** for the principle – he who asserts must prove.

He submitted that the claimants needed to establish on a balance of probabilities that the provision of LPG Propane was a term of the contract which had been breached and resulted in the claimants sustaining a loss caused by the defendant's breach.

109. Further he submitted that both contracts concluded by the parties did not specifically provide for the LPG Propane and in any event the defendant supplied propane and hence was not in any breach.

He highlighted the defendants submitting invoices, delivery tickets and Petrojam loading tickets which verified that LPG propane was supplied to the claimants.

He highlighted the fact that there was no evidence of any complaints from any other customers who received delivery from the same truck as the claimant. Hence if there was a change in the type of LPG supplied then all customers receiving deliveries from the truck would have had the same problem.

He contended that all the documents disclosed that propane was delivered and most significantly he pointed to the fact that it was even suggested to Mr. Cochrane that LPG propane was delivered on the 28th of April, 2003 – the day before the only gas chromatography test taken during the subsistence of the contract.

This test had in fact disclosed a greater than 70% propane content.

110. As regards the tests, Mr. Earle acknowledged that there were three conflicting gas chromatography test results to be considered. Further to this he argued that the court will have to determine what accounts for the change in the composition of the LPG in the defendant's tank six months after the contract was terminated.

In his outline of the facts he noted that the tank had remained in the claimant's possession for those months and pointed out that the claimant had sole access to the tank.

He urged that the court should consider the evidence of its expert Professor Paul Reece which together with the evidence as to the deliveries should lead to the inescapable inference that someone introduced butane into the defendant's tank. This he stressed was done to dishonestly attempt to defraud the defendant, a large multinational company.

111.Mr. Earle also addressed the issue as to the complaints which were made to the defendant and questioned when they began. He urged that the 1st November, 2002 was when the first written complaint was made. He described as recent fabrications the memos Mr. Delgado produced dated 7th August, and 20th August, 2000.

He pointed out that a memo would be an unlikely means of communication between Midel Fun Snax and a non-employee Mark Williams. Further they were on the stationary of a company that did not commence trading till 2003 i.e Fun Snax Limited. He went on to point out that the e-mail address as printed on the memo was through C&W Jamaica and not Telecommunication of Jamaica and the claimants were unable to produce any facsimile cover sheet or log of the transmission

Also he pointed out the letters were not attached to nor mentioned in particulars of claim. He noted that the complaints actually started when the claimants began failing to settle their bill with the defendant.

112.Mr. Earle went on to submit that the claimants had a causation problem. He noted that the evidence disclosed that the introduction of moisture will result in the product quality being significantly reduced.

He placed reliance on the report prepared by Technological Solutions Limited which attributed the supply of rancid oil to the problems experienced by the claimants over the relevant period.

113.On the issue of negligence, Mr. Earle opined that the propane was supplied based on

the defendant's knowledge of the LPG utilized in the industry and not due to any specific representation made by the claimants.

Further the defendant did not hold out that it was an expert in the field of baking nor was it aware of the LPG required by the claimant's equipment. The specifications of the equipment was never supplied to the defendant despite their request.

Mr. Earle argued that the claimant had been supplied with the only Jamaican industry standard propane (i.e. 70% or more propane) and failed to give to the defendant its equipment specifications in order that there could be determination as to the type of LPG required and whether the defendant could in fact supply the LPG required.

114. It was ultimately submitted that the claimant had failed to surmount the hurdle of establishing whether there was in fact a breach of the duty of care owed by the defendant.

If there was a duty of care owed, the claimant had failed to establish the causation between any alleged loss and any breach of duty.

It was also submitted that the claimants ought properly to fail as not only are they unable to establish a breach of contract, but they were unable to establish the defendant was responsible for the claimant's losses.

He characterized the 2nd claimant as a cold calculating deceptive dishonest company going after the deep pockets of the defendant and had manufactured a claim to get money.

115.Mr. Graham for the claimants noted that the case for the defendant was primarily rooted in a conspiracy theory with the contention that the claimant had conspired to concoct a story about bad gas.

He submitted that given that the claimants were never made aware that the Telemetry system was not working, they would have not willingly have attempted to introduce something to the tank. They would have thought any such interference would have been noted on the defendant's monitor.

116.He recognized that a finding of fact had to be made as to when the complaints started and the persistence of it. However, whenever the complaints commenced, the continued business relationship between the parties could be seen as the claimant giving the defendant opportunity to remedy the situation.

117.He submitted that the defendant had sent a representative to the claimants site prior to the commencement of the contract i.e Lelland Martin. Hence the defendant should have been aware that the gas that was purporting to have been supplied should have been such to enable the claimant to do their business.

He opined that the defendants knew the equipment they were dealing with and if they knew the gas couldn't work with this customer they should have "let go".

He urged the court to note the failure of Mr. Mark Williams to produce records of the initial discussions with Mr. Delgado which should have noted their specific needs – whether there had in fact been a request for LPG 95% propane or more.

Ultimately, Mr. Graham urged, the gas which was supplied was not fit for the claimants' business.

Application of the law to the evidence

118. Was there a breach of contract?

It cannot be disputed there was no mention of the word propane in either of the documents exhibited establishing the parameters of the agreement between these parties.

The proposal letter and its acceptance refers to LPG only. The contract finally reached between the parties was also silent as to what type of LPG was required.

It is also duly noted that whereas the sales representative, Mr. Mark Williams who initiated the contract between the parties admitted to making pertinent notes as to the requirements and specifications of the 2nd claimant, these notes were not presented to support the assertion that the claimant never discussed the need for LPG - Propane 95% or higher.

However, what is apparent from Mr. Delgado's recollection of any discussions is that he was made aware that the defendant would be supplying LPG – Propane 70% and entered into the contract knowing this.

Further Mr. Williams admitted that LPG propane was the standard LPG supplied in the baking industry and was what the defendant would have been supplying to the claimant.

It would appear that the defendant was satisfied that the LPG they were going to supply satisfied the requirement that it would be fit for the purposes of the claimants' business.

119. Ultimately there is no dispute therefore that the defendant agreed to supply and the claimants agreed to accept “LPG – Propane” from the defendant. It is also apparent that the claimant accepted the LPG mixture which was 70% propane and 30% butane.

Prima facie the important issue to be resolved is what was in fact supplied. The claimants claim that inappropriate and incorrect LPG was supplied. They do not seek to define what was meant by inappropriate and incorrect.

120. The claimants assert that they were not supplied with propane but butane. They point to

the colour of the flame as an indicator that they were getting butane.

The evidence of the experts, including those who actually investigated the problem at the request of the claimants, suggest that the colour of the flame cannot conclusively prove what gas was supplied. They opined that the colour of the flame had more to do with the sufficiency or otherwise of air/oxygen and the quality of combustion.

The claimant’s expert Dr. Porter agreed that for an efficient combustion both propane and butane need an adequate supply of oxygen. In his words

“theoretically” a heating apparatus such as an oven should be
able to burn either gas so long as the amount of air which can
reach the burners can be adjusted to suit the gas being used”

Dr. Porter’s evidence to my mind, when considered against the unchallenged evidence of the various experts who spoke to this issue on behalf of the defendant, does not establish on the balance of probabilities that it must have been butane.

121. One would have anticipated that the gas chromatography test would have been able to firmly establish the contents of the defendant's tank

Frankly the results have caused more confusion than clarity. The assertions of the claimants representative Mr. Delgado that there were three tests on the first occasion which revealed butane twice and then propane was not used to challenge the evidence of either Mr. Cochrane or Mr. Neville Walker that the one result showed propane.

The increase in the butane component in the mixture in the tank between November 3 and November 13 would be considered dramatic by even a lay person. Dr. Porter to my mind has not proffered any clear explanation as to how this could have happened. On the other hand Professor Reese's evidence is clearer and also unchallenged that the increased amount suggests butane was added to the tank.

122. The point made by Mr. Graham that the claimants remained throughout the contract period in the belief that any addition to the tank would be known to the defendant given the installation of the telemetry system is well made. The defendants' representative admits the claimants' were never advised that the system had malfunctioned and was not operational.

This does not ultimately assist in resolving the issue.

123. The documentary evidence produced by the defendant establishes the system by which LPG was delivered to the claimants. It is clear on the face of it that the LPG from Petrojam was delivered along a specific route to various customers including the claimant and that what was delivered was LPG commercial propane.

Indeed the claimants in seeking to challenge the reliability of the tests done in April 2003 acknowledged through suggestions to Mr. Cochrane that propane was supplied the day prior to the test.

If this single delivery was propane and the test then proved this; the question arises how then can results done in April and November 2003 speak to what was being delivered from June 2000 to May 2003.

The malfunctioning of the sanitizer and the forklift was spoken to by witnesses for the defendant as being caused more by incorrect pressure levels that “improper” gas. In any event Mr. Delgado could not challenge the suggestion that in fact he could not say for sure what was in the tanks from which he ultimately had the pieces of equipment functioning efficiently.

124.Mr. Delgado assertion was that the problem to products was caused by insufficient heat in his oven causing them to be undercooked.

The witnesses who examined the oven agreed that there was insufficient heat but attempt to explain that this in and of itself should not be attributed to butane being supplied.

There is evidence that by spending increased time in the oven the goods would have been sufficiently baked.

There is also evidence that by making adjustments and adjusting the airflow the heat could have been accordingly made sufficient for the baking process.

125.There can be no denying that the evidence of the proven and admitted role of the

supply of the rancid oil from Jamaica Edible Oils in the spoilage of the claimant's products, significantly weakens the claimant's assertion that it was the supply of butane that caused their loss.

It was accepted by Mr. Delgado that the increased moisture caused by the rancid oil would have resulted in increased time for complete baking of the products. This would have caused reduction on the shelf-life of the product. Hence it cannot be said ipso facto that the fact that there was this spoilage of the products meant that there was incorrect and inappropriate gas supplied.

126. The claimants has therefore failed to establish to the required standard that the defendant breached their contract by supplying anything other than what they had been contracted to supply.

127. Was there negligence on the part of the defendant?

Implicit in this consideration is the question whether the defendant failed in their duty of care in supplying the claimants with LPG and failed to address the claimant's concerns and problems.

128. The issue of when the complaints were first made must impact on the credibility of the claimant's assertion that for two (2) years from 2000 to 2002 their problem went unaddressed by the defendant.

There was indeed no mention of any written complaint being made before November 1, 2002 in their particulars of claim and the points made by Mr. Earle relative to the memos of August 2000 are well made.

I find that no reliance can be had on these documents. One would be forced to wonder why for two (2) years these written complaints went with no response when the one the defendant admittedly received in November 2002 resulted in action.

129. The claimants admit that the defendant engineers visited the factory and made

recommendations as to how to improve the quality of the flame.

They admit that when the recommendations made were complied with and failed to produce significant changes, more recommendations were made.

This admission would refute the allegations that the defendant failed to take any suitable or appropriate measure to address the claimant's complaints.

130. Further the claimants admitted failure to supply the defendant with the requested

equipment specifications to facilitate verification of whether the gas was compatible for usage therewith, means that any possible failure of the defendant to completely diagnose the problem was not their fault.

Conclusion

After a careful analysis, I find that the claimants have failed to establish to the requisite standard that the defendant breached their contract or were negligent. Further they have not proven that the losses they suffered were due to the defendant supplying the LPG they had contracted to provide.

Accordingly there is judgment for the defendant with special cost certificate to them for three counsel to be taxed if not agreed.