COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCivApp No. 28 of 2022

BETWEEN

CLEMENZA LTD

First Appellant

AND

JAMAL NIXON

Second Appellant

AND

THE ATTORNEY GENERAL OF THE BAHAMAS

First Respondent

AND

THE ROYAL BAHAMAS DEFENCE FORCE

Second Respondent

Before: **The Honourable Sir Michael Barnett, P**
The Honourable Mr. Justice Evans, JA
The Honourable Madam Justice Charles, JA

Appearances: **Mr. Murrio Ducille KC with Mr. Bryan Bastian, Counsel for the Appellants**
Mr. Rashied Edgecombe, Counsel for the Respondents

Hearing Dates: **10 October 2023; 6 February 2024**

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Civil Appeal –Negligence – Duty of care – Res Ipsa Loquitur – Damages –Whether the trial judge properly analysed the evidence- Whether the findings of the trial judge are devoid of

reasons – Whether the trial judge erred in law when she found that the respondents are not liable in damages –Foreseeability –Immunity- Pleadings
Evidence of expert unchallenged – Rejection of expert evidence – No reason given - Duty of judge to determine what evidence/opinion to accept or reject

On or about October 4, 2014, the Royal Bahamas Defence Force (the RBDF) arrested the vessel "Miss Keffie" and its fishing crew. The fishing crew faced charges under the Fisheries Resources (Jurisdiction and Conservation) Act, Chapter 244 ("the Fisheries Act") and were arraigned in the Magistrate Court. Since 2014, "Miss Keffie" has been held at the Coral Harbour base by the RBDF. In 2016, the vessel sank while docked at the base. The sinking went unnoticed initially due to poor lighting in the area. The vessel was refloated in 2017 but sustained significant damage. In 2018, the appellants commenced legal action against the first respondent (the Attorney General) under section 12 of the Crown Proceedings Act and the second respondent (the RBDF) which they alleged was negligent in the sinking of "Miss Keffie." On 27 January 2022, the Court dismissed the appellants' claim against the respondents for malicious prosecution and negligence. The appellants filed a Notice in the Court of Appeal on February 16, 2022, seeking to overturn the judgment. The appellants present eight grounds of appeal which address, inter alia, whether the respondents maliciously prosecuted the second appellant (Mr. Nixon), whether they were immune from liability, and whether they were negligent in the sinking of "Miss Keffie." At the hearing before us, the appellants conceded that they were not pursuing the malicious prosecution claim.

Held: The appeal is allowed, the decision of the learned judge is set aside and the matter is to be remitted to the Supreme Court to be retried before another judge. The parties shall bear their own costs of the appeal and in the court below.

The vessel "Miss Keffie" was stored at the RBDF base from its arrest in 2014 until it sank in 2016. There is no denying that it was in the custody, care and control of the RBDF. The key question is whether the respondents were negligent in securing and storing the vessel which calls for a critical evaluation of the testimonies of Captain Henry Daxon and Captain Herbert Bain. Captain Daxon, a witness of fact with considerable experience, provided firsthand knowledge about the storage of vessels. Captain Bain, an expert witness with extensive experience, was cross examined on the vessel's condition and associated costs but not on his opinion regarding proper storage. As the judge found the respondents not negligent, it must be that she rejected the expert evidence of

Captain Bain as to the proper procedure for the permanent storage of a vessel. Having done so, it was incumbent on her to give a reason or reasons for her rejection of his evidence given that he was the only expert called in this matter and his evidence was uncontroverted.

This omission is an error in law, as Captain Bain was the sole expert witness~~,~~ and his evidence was unchallenged. To assess negligence in securing and storing the vessel, the judge should have considered all the evidence, especially Captain Bain's unchallenged expert testimony. The appellants' submission that the respondents had a duty to prevent damage or loss caused by the vessel's sinking and their failure to timely refloat it was not pleaded in their Statement of Claim. Parties are bound by their pleadings.

In view of the errors of law made by the learned judge, the Court has concluded that a new trial is necessary. Allowing the judgment to stand would result in greater injustice to the parties given the judge's lack of clarity on the status of the two critical witnesses i.e. Captain Daxon and Captain Bain and her failure to explain the basis for preferring the evidence of Captain Daxon over the expert evidence of Captain Bain. Further, the learned judge did not discuss the relevance of Captain Bain's expertise or lack thereof to her decision.

Gabrielle Volpi and Anor v Matteo Volpi [2022] EWCA Civ 464
Griffiths v Tui (UK) Ltd [2022] 1 WLR 973
Stapley Gypsum Mines Ltd [1953] AC 663
Tui v Griffiths [2023] UKSC 48
Browne v Dunn (1893) 6 R.67 H.L
Bahamas Ferries Limited v Charlene Rahming SCCivApp & CAIS No. 122 of 2018

JUDGMENT

Judgment delivered by the Honourable Madam Justice Charles, JA:

Introduction

1. On 27 January 2022, the Honourable Madam Justice Bowe-Darville (Retired) ("the learned judge") dismissed the appellants' claim against the respondents for malicious prosecution and negligence. By way of Notice of Appeal filed on 16 February 2022, the appellants have called upon this Court to set aside the entirety of the judgment. They assert eight grounds of appeal which raise three broad issues namely: (1) whether the respondents and/or their

servants intentionally and/or maliciously instituted criminal proceedings in the Magistrate Court against the second appellant ("Mr. Nixon"); (2) whether the respondents are immune from liability under Section 210 of the Defence Act and (3) whether the respondents are liable in negligence for the sinking of the vessel, "Miss Keffie" (interchangeably "the vessel" or "Miss Keffie").

2. At the hearing before us the learned President unambiguously inquired of Counsel for the appellants, Mr. Ducille, KC, as to whether he was still pursuing the claim of malicious prosecution. In response, Mr. Ducille said "No, my lord." Following this concession, the only live issues before us are issues (2) and (3).

Background

3. The first appellant ("Clemenza") is a company incorporated in accordance with the laws of The Bahamas. Mr. Nixon is a citizen of The Bahamas and a Director of Clemenza. Clemenza owns a vessel called "Miss Keffie" which is a fibre hull boat measuring about 50 feet, containing Twin Detroit 871 engine and furbished with an Isuzi 21 KW generator. The vessel was registered and licensed with the Port Department for 2014.

4. On or about 4 October 2014, "Miss Keffie" was arrested by the Royal Bahamas Defence Force ("the RBDF") patrol vessel "HMBS Leon Livingston Smith" with a fishing crew on board. The fishing crew on board were arrested, charged and arraigned before the Magistrate Court in relation to offences under the Fisheries Resources (Jurisdiction and Conservation) Act, Chapter 244 ("the Fisheries Act").

5. Since 2014, "Miss Keffie" was seized and detained by the RBDF at the Coral Harbour base. In or about August 2016, the vessel sank completely whilst still docked at the Coral Harbour base. Due to the location of the vessel and the poor lighting in that area, "Miss Keffie" was not immediately observed to be taking in water. Around mid-2017, the vessel was refloated. It was badly damaged.

The pleadings

6. Relative to the negligence claim, in their Statement of Claim filed on 18 January 2018, the appellants sued the first respondent ("the Attorney General") pursuant to section 12 of the Crown Proceedings Act. The second respondent ("the RBDF") is alleged to have caused the negligence in the sinking of the vessel. In their Statement of Claim, the appellants alleged that:

> **"16. At all material times, the "Miss Keffie" boat was seized by the RBDF and detained at the RBDF Coral Harbour base.**
>
> **17. During the securement of the "Miss Keffie" at the RBDF base, the "Miss Keffie" was tied to an old decrepit sinking boat.**
>
> **18. That on or about 2016, the Second Plaintiff observed that the "Miss Keffie" was sinking as a result of being tied to the other boat and informed officers of the RBDF regarding the same.**
>
> **19. That no action was taken by the RBDF as a result of the negligence of the RBDF and/or its officers the "Miss Keffie" sank and suffered damages to the point that the "Miss Keffie" has been deemed to be written off.**
>
> **PARTICULARS OF NEGLIGENCE**
>
> **a. Failing to adequately secure the "Miss Keffie";**
>
> **b. Attaching the "Miss Keffie" to a derelict sinking boat;**
>
> **c. Failing and/or refusing to take notice of Second Plaintiff's warning regarding the improper storage of the "Miss Keffie".**
>
> **20. As a result of the Defendant's negligence, the First Plaintiff has suffered loss and damage.**
>
> **PARTICULARS OF LOSS**
>
> | | |
> |---|---|
> | **a. Destruction of "Miss Keffie"** | **$ 250,000.00** |
> | **b. Loss of earnings** | **$1,615,887.00"** |

7. At paragraphs 16 to 21 of their Amended Defence filed on 16 December 2020, the respondents respond to the allegation of negligence in the sinking of the vessel. At paragraph 16, the respondents admit that the RBDF seized and detained the vessel at its Coral Harbour base. The respondents deny paragraph 17 of the Statement of Claim and, in reply thereto, state:

"PARTICULARS

a. The members of the RBDF discharged their due diligence in ensuring both "Lil Lamb" (ship Keffie was docked alongside) and "Miss Keffie" were both seaworthy and devoid of any leaks.

b. That the boat "Lil Lamb" was neither sinking or (sic) decrepit.

c. <u>That it is not unusual to dock boats beside each other where there is no space to otherwise dock them</u>."[Emphasis added]

8. The respondents also deny paragraph 18 of the Statement of Claim and put the appellants to strict proof thereof. In relation to paragraph 19 of the Statement of Claim, the respondents deny that the RBDF caused the negligence to the vessel and, in reply, state:

"PARTICULARS

a. On or around 2016, the boat "Lil Lamb" was purchased from the government on auction by a businessman named Abner Charlot.

b. Subsequent to Mr. Charlot purchasing the vessel, he boarded same, on occasion, with the view of carrying out works to the vessel.

c. Because of works being carried on to the vessel damage resulted and "Lil Lamb" sank.

d. "Miss Keffie", being still docked alongside "Lil Lamb", was partially sunken.

e. <u>During the period, construction and dredging of the dock at the Defence Force Base prevented Defence Force personnel from being able to immediately access "Miss Keffie" with the necessary resources to refloat the same; the boat was later refloated</u>.

f. The RBDF were not negligent in their conduct concerning Miss Keffie. [Emphasis added]

9. At paragraph 20 of their Amended Defence, the respondents deny that they were negligent and that Clemenza suffered loss and damage due to their negligence. At paragraph 21, they allege:

> **"Notwithstanding that the Defendants maintain that they were not negligent in their duties surrounding "Miss Keffie", the Defendants say that they acted bona fide in the manner in which they conducted their duties. As such the Defendants say that they are immune from suit in the instant case pursuant to section 210 of the Defence Act of the Bahamas Chapter 211."**

10. On 21 December 2020, the appellants filed a Reply. In relation to the issue of immunity, the appellants say that the immunity afforded by Section 210 of the Defence Act is not absolute. Alternatively, they say that the respondents did not act *bona fide* in the manner in which they conducted their duties and further, the respondents, their servants and/or agents did not exercise caution and/or diligence to be expected of a reasonably competent defence force officer and/or of an honest person of ordinary prudence.

Judgment in the court below

11. The learned judge having heard the evidence from both sides dismissed the appellants' claim in its entirety. In her analysis of the evidence on the claim for negligence, she made some findings of fact and of law at paragraphs 40 to 45 of the Judgment. Having applied the correct law with respect to whether a particular act or omission was incidentally connected or casually irrelevant or the crucial cause of the damage claimed, she stated:

> **"40. With regard to the claim for negligence in the sinking of "Miss Keffie", this Court takes note of the arguments and evidence as already stated above. The Court should determine whether a particular act or omission was incidentally connected or causally irrelevant or the crucial cause of the damage claimed, but Courts in the past have admonished the common law tradition that *what was the cause of a particular occurrence is a question of fact which "must be determined by applying common sense to the facts of each particular case*" per Lord Reid in *Stapley Gypsum Mines Ltd [1953] AC 663* as cited by Mason CJ in the Australian High Court of *March v E&MH Stramer Pty Limited (1991) 1717 CLR 506.* <u>The Court also does not find that the Plaintiffs' damages would (sic) have been suffered but for the negligence of the RBDF. There was no action or inaction by the RBDF that demonstrated that the vessel's sinking was very likely to happen or was almost inevitable as it were.</u>"** [Emphasis added]

12. At paragraphs 41-42, the learned judge dealt with the doctrine of *novus actus interveniens* which does not concern us since there is no appeal from this aspect of her finding.

13. At paragraph 43, the learned judge addressed the issue of immunity and found that the members of the RBDF acted *bona fide* and did enjoy the immunity prescribed by Section 210 of the Defence Act, Chapter 2011.

14. At paragraph 44, she held that the claim for negligence failed because the Court did not believe that any acts or omissions of the respondents caused the sinking of the vessel and that the appellants did not establish foreseeability. We quote the entirety of that paragraph:

> **"44. In all the circumstances, <u>the Court did not find Captain Bain's evidence reflected a proper calculation of a fair market value for "Miss Keffie". In any event the claim for negligence fails. This court does not believe that any acts or omissions of the Defendants were the effective cause of the sinking of "Miss Keffie". Foreseeability was not established by the Plaintiffs. The sinking of two vessels in the manner in which the boats sank were remote and not in the contemplation of the RBDF. Additionally, this Court was persuaded that there were</u>**

> **extraneous factors that prevented the immediate refloating of the vessels being mainly the dredging that took place in the waterway at the RBDF base at the time."** [Emphasis added]

15. Additionally, the learned judge stated at paragraph 44 (above) that she was persuaded that there were extraneous factors that prevented the immediate refloating of the vessel being mainly the dredging that took place in the waterway at the RBDF base at the time. This finding, although comprehensively argued before us and in the Court below, appears not to be properly pleaded and, significantly, is not a ground of appeal. We will return to it momentarily.

16. At paragraph 45, the learned judge dismissed the appellants' Writ of Summons and awarded costs to the respondents to be taxed if not agreed.

17. The appellants not only criticized the learned judge's findings of law but primarily her findings of fact which, according to the appellants, were unreasoned, devoid of proper analysis and evaluation and unsupported by the evidence.

Role of appeal court: appeals on fact

18. The issue of whether the trial judge's conclusions on primary facts should be interfered with by an appellate court was considered in **Gabrielle Volpi and Anor v Matteo Volpi** [2022] EWCA Civ 464. Lord Justice Lewison said the following at paragraphs 2, 4 and 5 of the Judgment:

> **"2. The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:**
>
> **i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.**
>
> **ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty,**

that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

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

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

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

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

4. Similar caution applies to appeals against a trial judge's evaluation of expert evidence: *Byers v Saudi National Bank* [2022] EWCA Civ 43, [2022] 4 WLR 22. It is also pertinent to recall that where facts are disputed it is for the judge, not the expert, to decide those facts. Even where expert evidence is uncontroverted, a trial judge is not bound to accept it: see, most recently, *Griffiths v TUI (UK) Ltd* [2021] EWCA Civ 1442, [2022] 1 WLR 973 (although the court was divided over whether it was necessary to cross-examine an expert before challenging their evidence)….”

5. Tribunals are free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense. Whether any positive significance should be attached to the fact that a person has not given evidence, or to the lack of contemporaneous documentation, depends entirely on the context and particular circumstances: *Royal*

***Mail Group Ltd v Efobi* [2021] UKSC 33, [2021] 1 WLR 3863.** [Emphasis added]

19. In [4] above, Lewison LJ cited the Court of Appeal Judgment in **Griffiths v Tui (UK) Ltd** [2022] 1 WLR 973 relative to whether it was necessary to cross-examine an expert before challenging his evidence. In the UK Supreme Court judgment in **Tui v Griffiths** [2023] UKSC 48 delivered on 28 November 2023, the Supreme Court unanimously rejected the approach of the majority in the Court of Appeal that "*I can see nothing which is inherently unfair in seeking to challenge expert evidence in closing submissions….The judge cannot be prevented for considering the quality of such evidence in order to determine whether the burden of proof is satisfied just because it is uncontroverted. As Judge Truman stated, the court is not a rubber stamp:*" per Nugee LJ with whom Asplin LJ agreed.

20. Lord Hodge, in delivering the Judgment, explained that a decision by a judge not to follow an opinion expressed by an expert who has not been cross-examined (an "uncontroverted" opinion) will usually render a trial unfair. Unless uncontroverted expert's evidence is incredible, it must be accepted. It is not simply a matter of weight, in part of the overall assessment of whether the plaintiff has proved its case, on the balance of probabilities.

21. Lord Hodge reasserted that the rule in **Browne v Dunn** (1893) 6 R.67 H.L remains one of the rules integral to a fair trial. He also emphasized that it was the task of the Judge in conducting a trial in an adversarial system to make sure that the trial is fair. He identified and endorsed the statement of one such long established rule as set out in *Phipson on Evidence* (20th ed.) (2022) at 12-12:

> **"42. It is the task of a judge in conducting a trial in an adversarial system to make sure that the trial is fair. It is the task of the judiciary in developing the common law, and the makers of the procedural rules, to formulate rules and procedures to that end. One such long-established rule is usefully set out in the current edition of *Phipson on Evidence* 20th ed (2022). Bean LJ quoted the previous edition, which was in materially the same terms, at the start of his dissenting judgment. At para 12-12 of the 20th edition the learned editor states:**
>
> > **"In general a party is required to challenge in cross-examination the evidence of any witness of the opposing**

party if he wishes to submit to the court that the evidence should not be accepted on that point. The rule applies in civil cases … In general the CPR does not alter that position.

This rule serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross-examine on a particular important point, he will be in difficulty in submitting that the evidence should be rejected."

This statement is supported by case law, some of which I discuss below, and has often been cited with approval by the Court of Appeal…."

22. Having reviewed the relevant case law, Lord Hodge stated at paragraph 70:

"70. In conclusion, the status and application of the rule in *Browne v Dunn* and the other cases which I have discussed can be summarized in the following propositions:

(i) The general rule in civil cases, as stated in *Phipson*, 20th ed, para 12-12, is that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which he or she wishes to submit to the court should not be accepted. <u>That rule extends to both witnesses as to fact and expert witnesses.</u>

(ii) In an adversarial system of justice, the purpose of the rule is to make sure that the trial is fair.

(iii) The rationale of the rule, ie preserving the fairness of the trial, includes fairness to the party who has adduced the evidence of the impugned witness.

(iv) Maintaining the fairness of the trial includes fairness to the witness whose evidence is being impugned, whether on the basis of dishonesty, inaccuracy or other inadequacy. An expert witness, in particular, may have a strong professional interest in maintaining his or her reputation from a challenge of inaccuracy or inadequacy as well as from a challenge to the expert's honesty.

(v) Maintaining such fairness also includes enabling the judge to make a proper assessment of all the evidence to achieve justice in the cause. The rule is directed to the integrity of the court process itself.

(vi) Cross-examination gives the witness the opportunity to explain or clarify his or her evidence. The opportunity is particularly important when the opposing party intends to accuse the witness of dishonesty, but there is no principled basis for confining the rule to cases of dishonesty.

(vii) The rule should not be applied rigidly. It is not an inflexible rule and there is bound to some relaxation of the rule, as the current edition of *Phipson* recognizes in para 12.12 in subparagraphs which follow those which I have quoted in para 42 above. Its application depends upon the circumstances of the case as the criterion is the overall fairness of the trial. Thus, where it would be disproportionate to cross-examine at length or where, as in *Chen v Ng*, the trial judge has set a limit on the time for cross-examination, those circumstances would be relevant considerations in the court's decision on the application of the rule.

(viii) There are also circumstances in which the rule may not apply: see paras 61-68 above for examples of such circumstances."

23. To sum up, the Supreme Court case of **Griffiths** restates some fundamental and uncontroversial principles, specifically, in most cases, a well-reasoned expert opinion which is uncontroverted by other evidence or cross-examination is unlikely to be rejected by the

court but given that the trial judge's function is to evaluate all the evidence in the case, the court is not even bound by an expert's conclusions and remains the ultimate arbiter of the weight to attach to that opinion.

The appeal

24. The appellants advanced eight grounds of appeal. Grounds 1 and 2 relate to the issue of malicious prosecution which has already been disposed of consequent upon Mr. Ducille's concession. Ground 2 touches on the issue of negligence since the appellants submit that the learned judge erred in her analysis of the evidence particularly with respect to the evidence of their expert witness, Captain Bain, who was the only expert to testify. Grounds 3, 4, 6, 7 and 8 also relate to the negligence issue. Ground 5 concerns the immunity issue.

Discussion

Ground 5: The immunity issue

25. We address Ground 5 firstly because, if the respondents succeed, then it is the end of the matter.

26. The issue which falls to be determined under this Ground is whether Section 210 of the Defence Act immunes the RBDF from any cause of action in negligence for a breach of duty to take care of a vessel which is in their custody and control.

27. In paragraph 43 of the Judgment, the learned judge said:

> **"With respect to the submission that the RBDF is protected by immunity in this matter, this Court was persuaded in the circumstances of this case that its members acted bona fide and do enjoy the immunity prescribed by section 210 of the Defence Act."**

28. The respondents argue that the RBDF is immune from liability by virtue of section 210 of the Defence Act which provides:

> **"No action shall be brought against any member of the Defence Force in respect of anything done by him while in the execution of his duty as such, provided that such member acted bona fide in the execution of his duty."** [Emphasis added]

29. Mr. Edgecombe contends that it is a defence to an action in negligence since the RBDF acted in good faith in the manner in which they stored the vessel and its eventual refloating in 2017.

30. We agree with the appellants that the issue of protection by immunity is a non-starter since no defence force officer is sued personally as a respondent in this matter. The claim is instituted against the Royal Bahamas Defence Force as a government body. Additionally, pursuant to Section 12 of the Crown Proceedings Act, the Attorney General is joined as a party. It follows that the claim is against the Government of The Bahamas relative to the conduct of its active agents. In our opinion, since no defence force officer has been sued personally, to suggest that immunity in the context of Section 210 needs to be invoked and/or relied on in the defence of the actions complained of, is a red herring.

31. In our judgment, this ground of appeal is allowed.

Discussion
Negligence issue: Grounds 2, 3, 4, 6, 7 and 8

32. Grounds 2, 3, 4, 6, 7 and 8 are connected and it is convenient to examine them together under this head.

> **"<u>Ground 2:</u>**
> **The learned judge erred in fact and/or law when she did not sufficiently and/or properly interpret, analyze or weigh the evidence before her, as a consequence her decision is severely flawed.**
>
> **<u>Ground 3:</u>**
> **The learned judge erred in fact and/or law when she stated at paragraph 40 of her written decision, "*The Court does not find that the Plaintiffs' damages would have been suffered but for the negligence of the RBPF. There was no action or inaction by the RBDF that demonstrated that the vessel's sinking was very likely to happen or was almost inevitable as it were*" in the face of uncontroverted evidence that the vessel was, at all relevant times, in the care, custody and control of the RBDF.**
>
> **<u>Ground 4</u>:**
> **The Learned Judge erred in fact and/or law when she found at paragraph 44 of her written decision that the sinking of the two vessels in the manner in which they sank were *"remote and not in the contemplation of the RBDF" inter***

***alia,* in the face of uncontroverted evidence that the vessel in question was, at all relevant times, in the care, custody and control of the RBDF.**

<u>Ground 6:</u>
The decision of the Learned Trial Judge does not demonstrate that she adequately addressed her mind to the Appellants' position on the matters before her therefore her decision amounts to a one-sided decision in the Respondents' favour."

<u>Ground 7</u>:
The decision of the Learned Trial Judge did not in any way make a distinction between the First and Second Appellants as each Appellant has their own legal personality.

<u>Ground 8:</u>
That the decision of the Learned Trial Judge is unreasonable in all the circumstances of the case.

33. On behalf of the appellants, Mr. Ducille KC firstly submits that the learned judge's findings on the negligence claim are flawed and unreasoned in that she merely regurgitated the submissions of Counsel rather than analyzing and evaluating the evidence which was before her. According to him, the learned judge having relied on Lord Reid's dicta in **Stapley Gypsum Mines Ltd** [1953] AC 663 at paragraph 40 of the Judgment, properly expressed that "***<u>the Court should determine whether a particular act or omission was incidentally connected or casually irrelevant or the crucial cause of the damage claimed</u>, but Courts in the past have admonished the common law tradition that what was the cause of a particular occurrence is a question of fact which "<u>must be determined by applying common sense to the facts of each particular case</u>*".** [Emphasis added]. However, she proceeded to do nothing in her Judgment to show that any common sense was applied because immediately following, she said:

> "**The Court also does not find that the Plaintiffs' damages would (sic) have been suffered but for the negligence of the RBDF. There was no action or inaction by the RBDF that demonstrated that the vessel's sinking was very likely to happen or was almost inevitable as it were."**

34. Secondly, says Mr. Ducille, the learned judge had a duty to properly assess the evidence since the appellants' claim went far beyond the fact that the vessel sank while in the custody, care and control of the RBDF. According to him, it was also the appellants' case that, even after the vessel sank, no active agent thought it necessary to refloat the vessel with alacrity so as to prevent any and/or further damage. Mr. Ducille argues that the learned judge failed to make any mention of the active agent's failure to refloat the vessel. In a nutshell, the appellants maintain that the failure of the RBDF to prevent the sinking of the vessel as well as its refloating are negligent acts on the part of the respondents.

35. Thirdly, Mr. Ducille submits that the learned judge fell into error because her finding was not determined based on the totality of the evidence in that even if there was a dispute as to the extent of damages to the vessel and the costs of its repairs and/or replacement, there was no dispute, at the time the vessel sank, that it was in the custody, care and control of the RBDF and they did nothing to refloat it promptly to avoid further damage.

36. Fourthly, Mr. Ducille argues that, while the learned judge alluded to the proper approach to be applied, she proffered no reasons for arriving at the finding that the respondents were not negligent and there is not a shred of evidence to support her finding that *there was no action or inaction by the RBDF that demonstrated that the vessel's sinking was very likely to happen or was almost inevitable as it were."* Moreover, the learned judge failed to apply the entire test which she relied upon since it was not solely a matter of likelihood or inevitability but rather, whether the sinking and/or failure to refloat the vessel with alacrity caused the damage in accordance with the doctrine of *res ipsa loquitur* which both parties relied upon but which the learned judge vaguely mentioned at paragraph 21 of the Judgment and totally ignored in her analysis and disposition of the action. Mr. Ducille contends that this is yet another example of the failure of the learned judge to properly weigh the competing interests before her and/or to demonstrate that the appellants' submission was even considered before she arrived at her finding that the RBDF was not negligent.

37. Fifthly, says Mr. Ducille, it cannot be denied that the respondents owed a duty of care to the appellants and they also owe the duty of care to secure and store the vessel properly at their base pending trial in the Magistrate Court. He submits that the respondents breached the duty

of care by tying "Miss Keffie" to another vessel "Lil Lamb" which, according to their expert witness, Captain Herbert Bain, whose evidence was uncontroverted, it is not normal or an acceptable procedure to tie a boat alongside another boat for permanent storage. Mr. Ducille further submits that nowhere in the Judgment did the learned judge offered any reason for preferring the evidence of the respondents over that of the appellants specifically the evidence of Captain Bain (the only expert witness in the trial) whose evidence and opinion are not the same as that of Captain Daxon (not an expert witness) and which evidence formed a significant feature of the negligent claim.

38. Sixthly, Mr. Ducille argues that in paragraph 19(b) and (c) of their Amended Defence, the respondents pleaded:

> (b) Subsequent to Mr. Charlot purchasing the vessel (Lil Lamb), he boarded same, on occasion, with the view of carrying out works to the vessel.
>
> (c) **Because of works being carried on to the vessel damage resulted and "Lil Lamb" sank.**" [Emphasis added]

39. However, during the trial, the respondents failed to adduce any evidence whatsoever to bolster their assertions with respect to Mr. Charlot in whole or in part and even if "Lil Lamb" sunk as a result of something that a third party did, it was the RBDF who would have permitted Mr. Charlot to enter the RDBF base to carry out unsupervised work on "Lil Lamb" when it was still tied to "Miss Keffie." The appellants argue, quite forcefully and correctly, that it was the respondents who owed the duty of care to them; not any third party. Notwithstanding, the appellants' principal contention is that "Miss Keffie" ought not to have been tied to "Lil Lamb" since that was not a proper way to store and secure a vessel for permanent storage as asserted by their expert witness, Captain Bain.

40. The appellants also contend that, even considering the opinion proffered by Captain Daxon (which he ought not to give since he was not an expert witness) that it is not unusual for one vessel to be berthed alongside another, Captain Daxon clarified it by saying that it was done because of the shortage of berthing space. In effect, says Mr. Ducille, he acknowledged that this was not the best way to store vessels but it was done because of shortage of berthing space due to the dredging which was ongoing at the time.

41. In addition, Captain Daxon testified that "Miss Keffie" was stored in an area where the lighting was poor and that was one of the reasons why the RBDF was unable to refloat it expeditiously because they did not see it right away. Captain Daxon lamented about the lack of proper lighting at the base for the last forty (40) years.

42. Finally, Mr. Ducille criticized the learned judge for ignoring the evidence of Mr. Nixon and Mrs. Ferguson-Johnson. Mrs. Ferguson-Johnson testified that, on or about the first quarter of 2015, several motor vessels were re-located into the Flamingo Waterway by the RBDF on the opposite side of her property. On or about August 2016, she noticed that "Miss Keffie" was attached to another vessel which sunk. Subsequently, "Miss Keffie" was also dragged down with the boat. She did not see any activity by the RBDF to move or refloat the 2 vessels. During the middle of 2017, Miss Keffie was refloated and appeared to be in a deteriorated state.

43. On behalf of the respondents, Mr. Edgecombe submits that the learned judge correctly found that there was no action or inaction by the RBDF that could be deemed negligent and that the RBDF conducted themselves in a proper manner through their interaction with the vessel. He further submits that the learned judge clearly agreed that the vessel was not improperly docked or stored beside another vessel which after assessment was determined to be sea worthy. He also contends that the learned judge considered and agreed that the vessel having been docked on the northern side of the water way which was under construction could not be saved by the RBDF when it sank due to its position.

44. Mr. Edgecombe further submits that, as the sinking of the vessels ("Lil Lamb" and "Miss Keffie") was not in the contemplation of the RBDF, they cannot be held liable for the loss which the appellants suffered. Accordingly, the learned judge was correct in finding that the sinking of the vessels in the manner in which they sank was *"remote and not in the contemplation of the RBDF".* He relies on the evidence of their principal witness Captain Daxon on this aspect of the negligence claim. Captain Daxon's evidence in chief was that the vessel was checked every day by the duty officer of the day to ensure that it was safe and secure. The vessel sank overnight and when it dawned on the RBDF that the vessel was

partially sunken it could not be refloated because it was on the other side of the waterway and the necessary equipment could not be transported there.

45. There is no denying that the "Miss Keffie" was stored at the RBDF base between its arrest in 2014 and until the time that it sunk in 2016. There is also no denying that it was in the custody, care and control of the RBDF. In **Western Air Limited** [supra], Conteh JA had this to say on the test for determining the duty of care:

> **"16. The test for determining the duty of care is set out in the celebrated case of Donoghue v Stevenson [1932] A.C. 560 where Lord Atkin formulated the general principle in these words:**
>
> > **"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who, then, in law is my neigbour? The answer seems to be-persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."**
>
> **17. Lord Atkin went on to explain that there were two elements in the formulation of the test. <u>The first was the test of reasonable foresight. A duty would exist only where injury was reasonably foreseeable. The second was the neighbour principle, namely that the duty was limited to "*persons so closely and directly affected*" by the defendant's acts that they should be in his contemplation</u>.**
>
> **18. "*It is therefore never sufficient to ask whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless...*" (see Caparo Industries Plc v Dickman [1990] 1 All E.R 568 at 581), per Lord Bridge:**
>
> > **"<u>The question is always whether the defendant was under a duty to avoid or prevent that damage or loss, but</u>**

> **<u>the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it:</u> (see Lord Oliver in (1990) 1 All E.R 568 at 560 quoting from Sutherland Shire Council v Hyman (1985) 60 ALR 1 at page 48."** [Emphasis added]

46. On that premise, it cannot be disputed that the respondents owed a duty of care to the appellants. The next question which arises is whether the respondents were negligent?

47. The appellants submit that their claim in negligence is premised on two limbs. Firstly, that the respondents were negligent in the securing and storing of the vessel and secondly, the respondents were under a duty to avoid or prevent the damage or loss caused by the sinking of the vessel and their failure to refloat it timeously.

Whether the respondents were negligent in storing the two vessels together

48. In our opinion, the issue of whether the respondents were negligent in the securing and storing of "Miss Keffie" which was tied to another vessel calls for a critical examination and analysis of the evidence of Captain Henry Daxon and Captain Herbert Bain.

49. Captain Daxon, the Commander of the RBDF, was called as a witness by the respondents. He has been employed with the RBDF for nearly 40 years. His duties entail all administrative duties and assisting with the Defence Force's financial management. He was not called as an expert witness although it appears that he has considerable experience in matters dealing with boats. That said, as a witness of fact, he could only testify about his first-hand knowledge of the facts of the case unlike an expert witness who can provide his/her professional expert opinion. In his witness statement, Captain Daxon stated:

> **"15. Subsequent to the arrest, the vessel was stored alongside Coral Harbour Base as per the normal practice….**
>
> **16. [T]he vessel was checked every day by the duty officer of the day to ensure that it was safe and secured.**
>
> **17. <u>It is normal procedure that if for any reason during the day or night, it is discovered that a vessel was compromised (had taken</u>**

on water) pumps are then provided to ensure that the vessel stays afloat….

18. This was done in the instant (sic) of Ms. Keffie, which is evidenced by the fact that the boat was safely stored during hurricane Joaquinn (sic) in October 2015 (subsequent to the arrest)….

19. However, between October 2014 and August 2017, a dredging exercise was carried out….

20. As a result, the finger piers, which are usual (sic) used to secure the vessels on the Southern Side of the water way were no longer there and vessels had to be stored along the northern side of the water way.

21. It was not unusual that the Ms. Keffie was birthed alongside another vessel (The Lil Lamb) since both ships were inspected and deem sea worthy (able to remain afloat). This was done since there was a shortage of birthing space in the water way due to the dredging.

22. At the time that the vessels sank, the owner (Mr. Abner Charlot) of the Lil Lamb (which was a steel hull vessel) along which the Ms. Keffie was birthed, was cleaning the vessel and repairing the same to remove it from the Coral Harbour area. After Lil Lamb sank and Ms. Keffie Partially sank, Defence Force Divers conducted an underwater inspection of the vessels which revealed that the hull of the Lil Lamb was not compromised. This suggests that Mr. Charlot must have left a valve open resulting in the intake of water and the vessel eventually sinking; dragging down Ms. Keffie.

23. Due to the location of Ms. Keffie and the poor lighting in that area, the boat was not immediately observed to be taking on water. As a result of the dredging, the pumps which are on land on the southern side of the water way at Coral Harbour base were not immediately used to refloat Ms. Keffie once it was discovered to have sank (sic)….”

50. Under cross examination, Captain Daxon stated that, in October 2014, he was the Commanding Officer of the HMBS Leon Livingstone Smith vessel and, as commanding officer, he was required to go out to sea. That ended in January 2015. He further stated that he would not have been at the base dealing with storage issues because that was part of the security department. Post-2015, he was assigned to the Sandy Bottom project which involved the development of the base at Coral Harbour, Matthew Town and Gun Point, Ragged Island. However, he was required to be at Coral Harbour base. His assignment with the project was from 2015 to the latter part of 2017. He was then assigned to the Defence Force Headquarters at Coral Harbour from the latter part of 2018 to mid-2020 when he moved to John F. Kennedy Drive. He said that he did not have any personal dealings with "Miss Keffie" when it was stored at the Coral Harbour base other than when he gave instructions to have it moved during the development process. He said that, having responsibility for the Sandy Bottom project, there were vessels that were berthed alongside HMBS Coral Harbour that had to be periodically repositioned because of the development of the project being done. There were times when instructions would have been given to the persons who had responsibility for moving those vessels and there were times when "*we would have given specific instructions as to where to secure those vessels. So I would have been privy to where they would have been stored and how they would have been stored alongside."* He said that he had visual sight of where the vessels were being stored because "*we would have given instructions as to where they need to be stored in order for the development to proceed.*" He admitted that "Miss Keffie" and "Lil Lamb" were tied together when "Lil Lamb" sank. The learned judge intervened and asked whether the vessel just sunk on its own accord to which Captain Daxon answered affirmatively.

51. Under further cross examination, it was suggested to Captain Daxon that it is not correct that vessels are to be tied to each other. Captain Daxon said that "*they have to be tied to each other – that is the only way we can secure the vessels alongside.*" He also stated that because of the construction work which was ongoing at the time, all of the utilities that would have been in place were not in place. He lamented that, up to the present time, the entire Defence Force base has yet to be lighted from the last 40 years.

52. Mr. Edgecombe re-examined Captain Daxon about the boats being tied together. The re-examination went this way: see Transcript of Proceedings dated 28 January 2021 at page 36 lines 15-26:

> **"Q: Now, you were asked about the boats being tied together and you answered they had to be tied together.**
>
> **A: Because of the work that was being done at the time at HMBS Coral Harbour, and because of the number of he (sic) vessels that had been arrested, <u>we had insufficient waiting (sic) space at Coral Harbour for the vessels to be secured individually, so a number of those vessels had to be secured alongside each other because of the limited space at Coral Harbour. And that would be a normal practice depending on the number of vessels that are arrested and are secured at Coral Harbour.</u>"** [Emphasis added]

53. Captain Daxon also clarified what he meant by not having any personal involvement in the storage of "Miss Keffie". He said at page 38, lines 7-13 of the Transcript of Proceedings, 28 January 2021:

> **A: It means that the movement of the vessel from one location to the other, I wasn't physically involved in the movement but I would have given instructions to the individual who had responsibility for the movement of the vessel to accommodate the development work and ensuring that at the end of the day, it was moved to the location that it was directed to be moved to."**

54. Captain Daxon was not asked any questions by the learned judge.

55. The appellants called Captain Bain, a Marine Surveyor with a Master of Science Degree in Maritime Affairs from the World Maritime University in Sweden. He has full membership with the Society of Naval Architects and Marine Engineers (SNAME). He is also the holder of an A Class Captain's License (or Master's License) from the Bahamas Port Department and he is the holder of an International Master's Certificate from the Bahamas Maritime Authority in London, England. He is also an approved Nautical Inspector for the Bahamas Maritime Authority in London. Together with his qualifications, Captain Bain has been a Captain for 35 years having spent 29 of those years at the RBDF retiring at the rank of

Lieutenant Commander. He was deemed an expert witness but the specific area of his expertise was not identified by the learned judge.

56. In his witness statement filed on 26 April 2019, he stated:

> **"Opinion on Proper Storage of Boats**
>
> **4. In relation to the mooring and storage of a boat, there is a proper way that this should be done. A boat is supposed to be secured to a pier or to the dock. There are four (4) to six (6) basic lines that are supposed to be tied to the dock to properly secure a boat. If storage took place during 1st July and 30th November in a year which is hurricane season, properly securing a boat is even more important because of the inclement weather associated with this time of the year.**
>
> **5. It is not normal or acceptable procedure to tie a boat alongside or to another boat for permanent storage. Permanent storage is anytime a boat is going to be left unattended for any time where persons are not going to be onboard to look after the vessel.**
>
> **6. *The decision in itself to permanently store a boat next to or attached to another boat would be a poor one because that is not normal in that whatever effects one boat would invariably effect the other boat. Particularly another vessel that was admittedly under repairs.***
>
> **7. *That decision would not be in keeping with prudent seamanship*.**
>
> **8. Further, I am aware and familiar with the dredging operation that was carried out at the Royal Bahamas Defence Force base during the time the Miss Keffie was there. I have been to the Royal Bahamas Defence Force base on several occasions during the dredging operation due to my profession and my association with the Royal Bahamas Defence Force for twenty-nine (29) years.**
>
> **9. Where the Miss Keffie was moored was not close to where the dredging took place during this time and there was no visible impediment hindering access to the boat or that would cause improper storage of the boat."**

57. He then went on to give an opinion on the condition of "Miss Keffie" and its replacement value being in the region of $250,000.00 to $300,000.00.

58. Captain Bain was extensively cross examined on the condition of "Miss Keffie" and the cost associated with its repair and/or replacement but he was not asked any question relative to his opinion on proper storage of the vessel. It was not even put to him that his opinion is different to what Captain Daxon asserted. In addition, although the learned judge asked Captain Bain a litany of questions, not one question concerned the proper storage of the vessel and whether tying the "Lil Lamb" to "Miss Keffie" was an acceptable procedure since Captain Bain said it is not normal or acceptable to tie a boat alongside another boat for permanent storage.

59. In the present case, given the learned judge's finding that the respondents were not negligent, it must be that she rejected the expert evidence of Captain Bain as to the proper procedure for the permanent storage of a vessel. Having done so, it was incumbent on her to give a reason or reasons for her rejection of his evidence given that he was the only expert called in this matter and his evidence was uncontroverted.

60. In order to determine whether the respondents were negligent in the securing and storing of "Miss Keffie" after it was detained at the RBDF base pending trial, it was important for the learned judge to evaluate all the evidence of all the witnesses particularly Captain Bain whose expert evidence was not challenged. Mr. Edgecombe fought hard to justify the learned judge's finding that the respondents were not negligent but he was at pains to demonstrate to us where, in the Judgment, the learned judge stated whose evidence and/or opinions she preferred and her reasons for doing so; the standard being on a balance of probabilities.

61. On the principles adumbrated in **Griffiths** (supra), we find that the learned judge erred in law.

Whether the respondents were negligent in failing to refloat the vessel timeously after it had sunk?

62. The appellants submit that the respondents were under a duty to avoid or prevent the damage or loss caused by the sinking of the vessel and they failed to refloat it timeously.

63. Although this issue was extensively argued in the Court below and also before us, the appellants did not plead it in their Statement of Claim. Further, in their Statement of Agreed Facts and Issues filed on 17 October 2019, the parties agreed that there were 6 issues to be determined by the Court. Issue 5 was the only issue dealing with negligence. It reads: "*Whether the Defendants were negligent in their storage of the Miss Keffie*". This was the case that the respondents had to meet. There was no allegation that the respondents were negligent in failing to refloat the vessel timeously after it had sunk.

64. It is trite law that parties are bound by their pleadings. The purpose of pleadings in civil cases is to identify the issue or issues that will arise at trial. This is in order to avoid the opposing parties and the court taken by surprise. The pleadings must be precise and disclose a cause or causes of action. In **Bahamas Ferries Limited v Charlene Rahming** SCCivApp & CAIS No. 122 of 2018, this Court, differently constituted, held that the starting point must always be the pleadings. At paragraphs 29-33 and 37-39 of the judgment, Sir Michael Barnett JA (as he then was) stated:

> **"29. The real difficulty in the judgement of the court below is that the finding of negligence was not one that was pleaded by the respondent. This is ground 10 of the appellant's grounds of appeal.**
>
> **30. <u>The trial judge rejected the particulars of negligence pleaded and founded liability on a ground not pleaded in the statement of claim</u>.**
>
> **31. <u>In our judgment this is not proper and manifestly unfair to the appellant</u>.**
>
> **32. Negligence was clearly pleaded and particularised as set out in paragraph 6 above.**
>
> **33. That was the case the appellant had to meet. There was no assertion that it was negligent in failing to delay boarding because of the rain. If that had been the case the appellant may have been able to**

lead evidence explaining why it did not delay further the boarding process or stop the respondent from attempting to board.
…..

37. This is not an arid pleading point.

38. In Nada Fadil Al Medenni vs. Mars UK Limited [2005] EWCA Civ 1041 Dyson LJ giving the decision of the English Court of Appeal said:

> **"It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by each other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting then in certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness."**

39. The starting point must always be the pleadings. In Loveridge and Loveridge v Healey [2004] EWCA Civ. 173, Lord Phillips MR said at paragraph 23:

> **"In *Mcphilemy vs Times Newspapers Ltd. [1999] 3 ALL ER 775* Lord Woolf MR observed at 792-793:**
>
> > **'Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader.'"** [Emphasis added]

65. At paragraph 40 of the Judgment, Sir Michael went on to state:

> **"It is on the basis of pleadings that the party's decide what evidence they will need to place before the court and what preparations are necessary for trial. Where one party advances a case that is inconsistent with his pleadings, it often happens that the other party takes no point on this. Where the departure from the pleadings cause no prejudice, or where for some reason it is obvious that the court, if asked, will give permission to amend the pleading, the other party should be entitled to insist that this is not permitted unless the pleading is appropriately amended. That then introduces, in its proper context, the issue of whether or not the party in question should be permitted to advance a case which has not hitherto been pleaded."**

66. In the present case, we find that the respondents cannot be liable on the issue of refloating which was not pleaded.

67. Additionally, we observe that the appellants did not challenge the learned judge's findings at paragraph 44 of the Judgment where she stated:

> **"Additionally, this Court was persuaded that there were extraneous factors that prevented the immediate refloating of the vessels being mainly the dredging that took place in the waterway at the RBDF base at the time."**

68. There is no appeal from the above finding.

69. For all of the above reasons, we hold that the judgment entered by the learned judge in not stating the reason as to why she preferred Captain Daxon's evidence over the unchallenged expert evidence of Captain Bain was plainly wrong and cannot be sustained.

Disposition

70. Rule 25(1) of the Court of Appeal Rules provide that:

> **"25. (1) On the hearing of any appeal the court may, is it thinks fit, make any such order as could be made in pursuance of an application for a new trial or to set aside a verdict, finding, or judgment on the court below."**

71. Accordingly, this Court has the power to set aside the orders made by the learned judge and order that a new trial takes place.

72. That said, we are mindful that to order a retrial should be the last resort particularly in circumstances where the matter is of some vintage. However, in view of the errors of law made by the learned judge, we have concluded that a new trial is necessary. Allowing the judgment to stand would result in greater injustice to the parties since, on the negligence issue, the learned judge did not adequately clarify the status of the two critical witnesses, i.e. Captain Bain and Captain Daxon. She did not state the basis upon which she preferred the evidence of Captain Daxon over that of Captain Bain nor did she discuss the relevance of Captain Bain's expertise or lack thereof to her decision. As already stated, it is accepted that a trial judge is not obligated to accept even the uncontroverted evidence of an expert but, if Captain Bain's expert evidence is rejected, it is expected that some cogent reasons for doing so ought to have been given.

73. A retrial could also resolve issues such as Captain Bain's expertise and experience vis-à-vis Captain Daxon and that information can then be applied to a proper assessment of their evidence. Additionally, in a retrial the parties will be at liberty to apply to the trial judge for orders regarding the pleadings and the management of the case including directions on expert evidence particularly regarding the area of expertise of Captain Bain which was not evident from the Records of Appeal before this Court.

74. Finally, it should be obvious from the difficulties outlined in this Judgment that a retrial will further delay the resolution of this matter. We therefore encourage the parties to consider alternative dispute resolution with a view to settling this matter.

Order

75. We would therefore allow the appeal, set aside the decision of the learned judge and direct that the matter be remitted to the Supreme Court to be retried before another judge.

76. The parties shall bear their own costs of the appeal and in the court below.

_____

The Honourable Madam Justice Charles, JA

_____

The Honourable Sir Michael Barnett, P

_____

The Honourable Mr. Justice Evans, JA