

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. ANUHCV 2014/0462

BETWEEN:

EDMOND MANSOOR

Claimant

and

ANTIGUA PUBLIC UTILITIES AUTHORITY

Defendant

Before:

The Hon. Mde. Justice Rosalyn E. Wilkinson

Appearances:

Ms. Megan Samuel-Fields and with her Ms. Michelle Sterling for the Claimant
Mr. Lenworth Johnson and with him Ms. Latoya Letlow for the Defendant

2017: July 5th
September 21st

JUDGMENT

[1] **WILKINSON J.:** Dr. Mansoor filed his claim form and statement of claim on 19th August 2014, and therein he sought against the Antigua Public Utilities Authority (hereinafter “APUA”) the following relief: (i) the sum of \$15,962.00 being the cost to replace and install a new motor mechanism and electronic control unit on his automatic transfer switch; (ii) general damages for distress and inconvenience suffered by him and his family, (iii) interest on the sum of \$15,962.00 at the rate of

10 percent from the date of claim to judgment; (iv) interest pursuant to statute; (v) such further or other relief as the Court deems just; (vi) costs.

- [2] Dr. Mansoor grounds his suit in breach of contract in that he says that APUA failed to provide a stable and consistent supply of electricity, and negligence in that APUA permitted a surge or over-voltage in electricity to occur which damaged his automatic transfer switch.
- [3] APUA denies all liability for any damage to Dr. Mansoor's automatic transfer switch and says that based on APUA's experience, the ATI brand of switches were known to APUA to be problematic.
- [4] There was a witness summary prepared for Dr. Mansoor's witness, Mr. Lewis Elder, the general manager of Exel Engineering Limited ("Excel Engineering"). He failed to appear at the trial. Dr. Mansoor sought by way of oral application at the trial an adjournment of the trial after his evidence to facilitate the appearance of Mr. Elder. The Court refused the application for adjournment after observing (a) the conflict in reasons given for Mr. Elder not signing his witness summary and the affidavit in support for an extension of time to file Mr. Elder's witness summary, (b) that although the Court's predecessor in office had granted the extension of time for Mr. Elder to file his witness statement, there were no reasons stated in the affidavit in support of the affidavit for the extension, and (c) if Dr. Mansoor had apprehended that Mr. Elder was a reluctant witness and if he wished for him to appear then he could have sought the assistance of the Civil Procedure Rules 2000 ("CPR") rule 33.3 – a witness summons.

The Issues

- [5] (i) The first issue is whether APUA breached its contract to provide a stable and consistent supply of electricity to Dr. Mansoor's home.
- (ii) The second issue is whether APUA was negligent when it returned the supply of electricity and so allowed a surge of electricity to occur and which surge ultimately destroyed Dr. Mansoor's automatic transfer switch ATI 400.

(iii) The third issue is whether Dr. Mansoor's statements that (a) Mr. Richard's confirmed that the damage was due to the actions of APUA and (b) Mr. Richard's instructions to submit his invoices to APUA, were sufficient to hold APUA liable in any event.

The Evidence

- [6] The primary facts are largely uncontested. Dr. Mansoor is a practicing medical doctor who together with his family resides at Paradise View Drive in the parish of Saint John. He is a customer of APUA and by this arrangement APUA provides electricity to his home. In addition to the provision of electricity to his home by APUA, Dr. Mansoor has installed at his home a standby electricity generator and it is only utilised when there is no electricity supplied by APUA. The standby electricity generator is turned "On" and "Off" by way of an automatic transfer switch and so by this automatic transfer switch system, Dr. Mansoor is not required to manually switch "On" or "Off" his standby electricity generator. The automatic transfer switch system when it senses that there is no electricity flowing through the APUA line to Dr. Mansoor's home, it turns "On" the standby electricity generator and so switching the electricity source within Dr. Mansoor's home from APUA's electricity to that of the standby electricity generator. When the automatic transfer switch system senses that APUA's electricity is available, then the automatic transfer switch turns "Off" the standby electricity generator and Dr. Mansoor's home returns to using electricity supplied by APUA. According to Mr. Roache of APUA, the switch would only occur when a certain voltage of electricity is present from APUA.
- [7] Dr. Mansoor's standby electricity generator was manufactured by F.G. Wilson and the automatic transfer switch was manufactured by and brand ATI and of a 400 model ("ATI 400").
- [8] Dr. Mansoor has owned his standby electricity generator for approximately 6 years and on cross-examination he said that he owned the ATI 400 for approximately 2 -3 years. On average, his standby electricity generator is used about 3 times per week and this is mostly at nights. The Court observed that there was no explanation given for the difference in ages of the standby electricity

generator and the ATI 400 since Dr. Mansoor had on cross-examination suggested that the 2 items were bought and installed as a package.

[9] Historically, Dr. Mansoor was familiar with both the F.G. Wilson electricity standby generator and the automatic transfer switch by ATI because he had lived in a property prior to his present home where identical brand and model items had been installed by Exel Engineering Limited. He said that he conducted some research before settling on his purchase of an F.G. Wilson standby electricity generator and the ATI 400. His research led him to believe that the best fitting automatic transfer switch for his F.G. Wilson standby electricity generator was the ATI 400. When a breakdown of his research was sought on cross-examination, Dr. Mansoor said his research was limited to due to diligence being carried out on Exel Engineering. He admitted to not having carried out any research on any of the ATI models including ATI 123 and ATI 400. His F.G. Wilson standby electricity generator and ATI 400 were recommended, purchased and installed by Exel Engineering.

[10] On 21st May 2013, at around 9.30a.m when Dr. Mansoor was departing his home for work the state of things were that there was no electricity being supplied by APUA and his home was being supplied electricity by his standby electricity generator. The standby electricity generator had been activated by his ATI 400. On his drive away from home along the Paradise View Drive, Dr. Mansoor observed employees of APUA planting new poles and replacing high tension wires.

[11] Dr. Mansoor's observation was confirmed by Mr. Stedroy Roache, APUA's customer service engineer who said that APUA was carrying out some planned maintenance work in the Paradise View Drive area and which included replacing rotten poles, and reinstating the 11,000 volt distribution circuit. According to him, APUA's electricity had been shut off from between 9.00am - 10.00 am for about 5 1/2 hours and restored around 2.30p.m.

[12] Dr. Mansoor returned to his home at approximately 12.30p.m for lunch and as he drove towards his home he observed that APUA's employees were still working along Paradise View Drive. At his home he found that there was still no electricity from APUA and his electricity generator was still "On" and supplying electricity to his home. After having lunch Dr. Mansoor returned to his office.

[13] During the course of the afternoon Dr. Mansoor became aware that there was no electricity at his home from either APUA or his standby electricity generator. He contacted his electrician who visited his home that afternoon. It was found that the ATI 400 was damaged. Dr. Mansoor then contacted Exel Engineering

[14] Mr. Elder visited Dr. Mansoor's home the said afternoon of 21st May 2013. He thereafter delivered to Mr. Mansoor a report on his findings. The report was disclosed to APUA upon its request of Dr. Mansoor that he provide a report and invoices to support his claim. Mr. Elder wrote:-

"Dr. Edmond Mansoor

....

21st May 2013

RE: FG Wilson Model ATI 400 Automatic Transfer Switch Damage and Repairs

TO WHOM IT MAY CONCERN

Following a telephone call from Dr. Edmond Mansoor on the morning of Tuesday 21st May 2013, I received a report stating that there was no electricity being supplied to Dr. Mansoor's residence. I proceeded to the residence in question and found that the Automatic Transfer Switch was not functioning as designed and that also there was a very strong smell of electrical burning coming from the transfer switch. I immediately shut off all sources of electricity and proceeded to remove the cover of the transfer switch to investigate the source of the smell. It was immediately apparent that the 'motor-mechanism' of the transfer switch was badly burnt internally and was still very hot to the touch. I made an attempt to rotate the motor manually using the supplied manual handle but the motor was seized and would not turn. I then removed the electronic control unit, which sits directly above and is electronically connected to the motor-mechanism and is

also responsible for controlling the motor-mechanism as this too was extremely hot and smelling of electrical burning. I then was able to remove the motor-mechanism itself from the transfer switch.

In order to effect a repair, I had to replace the Electronic Control Unit,

On inspection of the burnt motor-mechanism and electronic control unit, it is, in my professional opinion, apparent that these units were damaged as a result that is consistent with a high over-voltage being applied to them. (My emphasis)

Yours respectfully,

Lewis Elder
General Manager
Exel Engineering Ltd.”

- [15] Between 21st May 2013, and 29th May 2013, Dr. Mansoor said that he attempted to talk to other experts to make sure that there were no other issues arising in his electrical room.
- [16] On 29th May 2013, being 8 days later, Dr. Mansoor telephoned APUA and spoke with Mr. Stedroy Roache about the damage to his ATI 400. Mr. Roache promised to send Mr. Patmore Richards of APUA to visit his home and inspect the ATI 400.
- [17] On 31st May 2013, Mr. Richards visited Dr. Mansoor’s home together with another APUA employee. Dr. Mansoor’s recollection of the visit was that he saw Mr. Richards and the other employee carry out checks at the street level where his electricity meter is located, carry out checks in his electrical room and which included inspection of his main breaker panel, inspection of the 2 damaged ATI 400 components which were on the floor in the electrical room, and of the ATI 400 itself. Mr. Richards and his colleague then returned to the street and appeared to look at the high voltage transformer that supplies his home. He thought that Mr. Richards and his colleague returned once more to his electrical room where they carried out a further inspection of the ATI 400 parts on the floor. The visit according to Dr. Mansoor lasted approximately 45 minutes.

- [18] According to Dr. Mansoor, after the various inspections, Mr. Richards confirmed to him that the damage was due to the actions of APUA and asked him to submit his invoices to APUA. He sent the first invoice to Mr. Richards by email dated 31st May 2013, and then the second followed. On cross-examination he said that it was indicated to him to go ahead and submit a claim for the damaged parts to APUA.
- [19] There was a second visit by APUA to Dr. Mansoor's home. Mr. Roache was part of the team on this occasion. According to Dr. Mansoor, on the second visit, the damaged equipment was still in the electrical room. He saw inspection being carried out of the grounding rods and once again the electrical room. There was almost a repeat of the first inspection except for the addition of the grounding rods. Mr. Roache on that occasion told Dr. Mansoor that APUA would be returning on a third occasion because they needed a piece of equipment to run tests. The third visit never occurred.
- [20] Over several questions on cross-examination it was put to Dr. Mansoor that Mr. Richards merely confirmed that he detected an odour, that the parts were burnt, to submit a claim for the damaged parts to APUA and that Mr. Richards did not say to him that the damage was due to the actions of APUA. Dr. Mansoor responded that at the end of the inspection that he was told by Mr. Richards very clearly to submit a claim to APUA and reiterated vehemently that Mr. Richards admitted a high voltage surge burnt out his ATI 400. He said that there was no ambiguity in his mind as to what Mr. Richards said to him as it said in the "Queen's English".
- [21] On cross-examination it was put to Dr. Mansoor that the request to submit a claim was not an admission. Dr. Mansoor responded that Mr. Richards was aware that APUA was planting poles on the main road, had suppressed electricity to plant the poles and the poles carried high tension wires.

- [22] On cross-examination it was suggested to Dr. Mansoor that it was standard procedure to require the submission of a claim to APUA. Dr. Mansoor responded that he did not know what the standard procedure at APUA was, he only knew what transpired in relation to him on 31st May 2013.
- [23] On cross-examination, Dr. Mansoor agreed that when APUA turned off electricity in his neighbourhood that a couple dozen homes along the ridge where he resides were affected. However, he did not accept when it was put to him that, as a lay person, when the power was reconnected to the area that if there was a surge in electricity, then the other high voltage transformers and the equipment in other homes would have been affected.
- [24] On cross-examination, Dr. Mansoor said that there was a high voltage transformer at the relevant time serving his home and he was the only person connected to that particular high voltage transformer. He admitted that he did not know how many homes were connected to high voltage transformers, but he knew there to be several in the Paradise View Drive area.
- [25] On cross-examination it was put to Dr. Mansoor that his ATI 400 was affected because it was defective, he denied this and said that he had owned his ATI 400 for between 2-3 years and that it was working fine until 21st May 2013, when APUA turned back on its electricity.
- [26] According to Mr. Roache, on the second APUA visit he examined the damaged parts of the ATI 400 which were on the ground in the electrical room and the ATI 400 itself. He observed that the switch was in the transition position and this meant that the switch was therefore transiting power from the standby generator to APUA. This position of the switch he said would only occur if the ATI 400 controller sensed a stable voltage from APUA. The position of the switch he said indicated that APUA's electricity supply was within the acceptable voltage settings of the ATI 400 when APUA's electricity was turned on. It was his opinion that there was no issue of over voltage.
- [27] Mr. Roache said that APUA had owned several ATI manufactured automatic transfer switches which were purchased for use with F.G. Wilson standby electricity generators. APUA experienced

problems with the ATI switches. It was found that the gears for the motor mechanism developed a problem that lead to the motor mechanising ceasing up and becoming immobile and this in turn lead to the burning of the motors. This state of affairs he said was confirmed by emails between APUA and F.G. Wilson's agent which had supplied the ATI switches. APUA's ATI switches were subsequently replaced free of cost with another brand of automatic transfer switch.

[28] Mr. Roache was asked what was the difference between an ATI 125 and an ATI 400? He responded that the only difference is the rating factor in that one is 125 AMP and the other is a 400 AMP¹ but the functionality of both were the same as there was a motor, a control system and gears.

[29] Mr. Roache also said that in comparing the ATI 125 and the ASCO 185 automatic transfer switch which APUA now used, the difference was the motor mechanism. The ASCO does not have a motor mechanism whereas the ATI has a motor mechanism. In Mr. Roache's opinion and which was based on his experience and knowledge, the ATI switches were not of a high quality.

[30] On cross-examination it was put to Mr. Roache that nowhere in his witness statement did he say that he asked Dr. Mansoor to submit a written claim. Mr. Roache agreed that he had not asked for a written claim and added that the mere fact that Dr. Mansoor made an assertion of damage to his ATI, he was making a claim and so APUA arranged for Mr. Richards to conduct an inspection. Under normal circumstances he said, anyone person with a complaint was first required to submit a written claim by way of letter and then APUA would conduct an inspection. In Dr. Mansoor's case he handled things a little differently because Dr. Mansoor had communicated directly with him and he made the arrangement for inspection based on the oral complaint. APUA staff were instructed by him to always request a letter when there was a complaint because it was on a letter that a complaint became official. The request for a claim to be in writing could be made when the complaint was made or after APUA had gone to the customer's premises.

¹ The Random House College Dictionary, Revised edition 1975 amp is electrical ampere; amperage is the electricity strength of an electric current measured in amperes; amperes is the meter-kilogram second unit of electric current, equal to the current that passes in a resistance of one ohm when a potential one volt is applied.

- [31] On cross-examination it was put to Mr. Roache that it did not make sense for Mr. Richards to request that Dr. Mansoor submit invoices if Mr. Richards was of the view that APUA had nothing to do with the burnt out ATI 400. To this he responded that generally when a person submits a written claim, APUA would advise them to submit a technical report with findings together with an estimate of costs for repair. All of this material he said went into APUA's investigation and assessment to determine liability. Such requests he maintained, did not mean that APUA accepted liability.
- [32] On cross-examination, Mr. Roache agreed that none of the ATI switches referred in the disclosed emails between APUA and the F.G Wilson agent were of the 400 series.
- [33] On cross-examination Mr. Roache was asked how could he rely on the string of emails disclosed in relation to the ATI 400? He responded that, as stated prior, the composition of the switch functionality was the same in both the 400 and 125 series and so they worked the same way; it was only the rating difference that labelled them model 400 or 125.
- [34] Mr. Roache said that in the past generally when a purchaser such as APUA bought an F.G Wilson standby electricity generator it was usual paired with an ATI automatic transfer switch. However, now on purchase of an F.G. Wilson standby electricity generator it is not paired with an ATI switch. The ATI switch he said was voltage sensitive and this meant that it had high and low voltage settings and so if the electricity was in the low range then the automatic transfer switch would move to the generator and when APUA's power returned and was stable it would reverse.
- [35] APUA disclosed a string of emails exchanged between Mr. Alejandro Tejada of F.G. Wilson Latin America & the Caribbean office and Mr. Reuben Richards of APUA, and pertaining to the automatic transfer switches manufactured by ATI.
- [36] The disclosed emails started with an email from Mr. Berchel Andrew dated 22nd October 2011, to Mr. Reuben Richards and wherein he states that the ATI switches which were installed at New Field, All Saints were installed at May 2008 and failed at May and July 2009, BBC and Fig Tree were

installed at May 2008 and failed at September and October 2009, Jennings was installed at March 2009 and failed at March 2010, and Pares was installed at February 2010 and failed at January 2011.

[37] Between 24th October 2011 and 16th November 2011, several emails were exchanged between Mr. Reuben Richards and Mr. Tejada. The emails are instructive. By the email of 24th October 2011, Mr. Richards told Mr. Tejada that APUA's standby electricity generators were F.G. Wilson and the automatic transfer switch were ATI brand model 125. Over the course of the emails exchanged, Mr. Tejada attempted to deflect any failure for the ATI switches about which APUA complained but Mr. Richards pursued the matter and eventually on 16th November 2011, Mr. Tejada said: "As a gesture of good faith and to avoid a negative impact on our relationship, please send us a motor from one of the failed transfer switches on our DHL account...."

[38] Approximately 5 weeks later, on 21st December 2011, Mr. Tejada emailed Mr. Richards stating the following:

"Good morning Reuben,

We've come to the conclusion that the motors failed due to the internal gears breaking. This is why the switch would not transfer automatically or manually. Because the motors were broken, the switch couldn't "lock" into either generator or utility position. (My

emphasis)

As a gesture of goodwill, we will be providing you with 5 x 185 series 100 AMP ASCO transfer switches. The transfer switches have been ordered. We will be out of office from the 23rd December and returning on the 3rd January.

The switches will be dispatched to you in January but you will be responsible for the freight costs from Miami to Antigua. ...

Thanks.

Alejandro Tejada

Sales & Customer Support| FGW Latin America and Caribbean.”

[39] According to Mr. Roache, after considering all the facts and circumstances at Dr. Mansoor’s home and that no other persons in Dr. Mansoor’s neighbourhood had suffered any damage, APUA declined to compensate Dr. Mansoor because it did not consider that the damage to Dr. Mansoor’s ATI 400 was caused by a surge or over-voltage on APUA’s part. APUA issued a letter dated 8th April 2014, to Dr. Mansoor informing him of its decision.

[40] APUA’s second witness was Mr. Patmore Richards. Mr. Richards was the supervisor of the electricity business unit, a position he has held since 1991.

[41] Mr. Richards confirmed that he visited Dr. Mansoor’s home as stated prior on 31st May 2013. According to him, he found that the motor mechanism and electronic control unit had already been removed from Dr. Mansoor’s ATI 400. He detected an odour which indicated to him that the parts were burnt and he confirmed this to Dr. Mansoor but at no time did he admit that the damage was the fault of APUA.

[42] Mr. Richards subsequent to the visit prepared a report which was titled “General Liability Claim/Report Form.” Therein recorded were the following details: (i) Dr. Mansoor’s name, (ii) the date of the report being 31st May 2013, (iii) cause of damage as being “power interruption, (iv) service information under which was recorded (a) service type to be 103, which Mr. Richards said meant that Dr. Mansoor had single phase 3 wire -220 voltage service, (b) wire size to meter was ‘CT Metering” and which Mr. Richards described as APUA being required to install electricity transformers to break the electricity down to a level that can be read by the meter, and in Dr. Mansoor’s case, they installed a 300 amp service, (c) wire size to distribution panel was 350 MCM and according to Mr. Richards this referred to the size of the cable that Dr. Mansoor had from the distribution transformer into his home; (d) supply voltage from APUA was recorded as 233.1-122.01 – 121.1, according to Mr. Richards these were the voltages measured at the time by APUA and this related to Dr. Mansoor 3 phase wiring and so Dr. Mansoor was getting 230 volts, 2x 100

volts, and 1 x 220 volts. These measurements were within acceptable the tolerance levels for APUA.

[43] There was also prepared a memo by Mr. Richards and which read as the following:

“Inspection at the home of Dr. Edmond A. Mansoor

On Friday 31st May, 2014² an inspection was done at the home of Dr. Edmond A. Mansoor after a complain(t) was made of damages to his Automatic Transfer Switch. The electrical installation is in accordance with company’s standard.

The damage(d) parts are the motor mechanism for an Automatic transfer Switch (ATI 400 series) and the electronic control unit.

These parts were already out of the circuit upon inspection. What was obvious at the time was the smell which is common with burnt electrical part.

Mr. Patmore Richards
C/C Supervisor APUA.”

[44] On cross-examination Mr. Richards admitted that he knew in advance of his visit to Dr. Mansoor’s home that Dr, Mansoor was making a claim, and that the rational for the visit was to see if there was any merit to the claim.

[45] On cross-examination it was put to Mr. Richards that one cause or possibility of the burnt odour was voltage overload which burnt the electrical equipment. Mr. Richards responded that he was unable to answer that question as he was not an expert on the automatic transfer switch.

[46] On cross-examination Mr. Richards was asked what did he inspect at Dr. Mansoor’s home? He responded that where there was a claim, the procedure was (i) a visit to the customer’s property,(ii) a check of the customer’s distribution panel in terms of the amount of circuits and also

² Should read 2013.

the size of the various breaker amperage – this controls the various breaker circuits, (iii) check of the conductor size from the transformer to the main disconnect, and (iv) on the occasion of Dr. Mansoor’s inspection, he observed that the parts had an odour and this told that this meant that they were burnt.

[47] On cross-examination it was put to Mr. Richards, that if he was not an expert on automatic transfer switches then how was he able to complete the report for his supervisor? Mr. Richards responded that in Dr. Mansoor’s case his work was limited, he had to go and verify the circuits and let his supervisor know that he had examined the parts and that in his opinion they were burnt.

[48] The Court inquired of Mr. Richards if he was a person with authority to accept liability on behalf of APUA and he responded that he was not one of the persons able to make that sort of decision.

[49] The Court inquired of Mr. Richards, who would be able to make the decision on liability and he responded that normally after his report was presented to his supervisor, his supervisor would have a discussion with the supervisor’s boss and they would make the decision.

[50] APUA’s final witness was Mr. Pagget Messiah. Mr. Messiah was the power maintenance coordinator in APUA’s telecommunication side of its business unit.

[51] Mr. Messiah said that during his tenure with APUA he had become familiar with the ATI switches which were supplied by F.G. Wilson. According to him, APUA had over 70 mobile and stationary communication sites and all of them had F.G Wilson standby electricity generators. The generators originally came with ATI switches but most of the switches had to be changed due to problems and defects which occurred within the ATI switches and caused many of their motors to burn.

[52] On cross-examination Mr. Messiah was asked on what basis was he relying on to say that most of the ATI switches had to be changed due to problems, flaws or defects? He replied that he relied on his personal knowledge from years of working experience with the switches.

- [53] On cross-examination it was asked of Mr. Messiah, when he said most ATI switches, how many did he mean by most? He replied 80 percent of them. He added that he had said that there were over 70 sites, his responsibility was to maintain the sites and the ATI 125 and 300 series that came with the F.G Wilson generators, over time, revealed the problems and defects.
- [54] On cross-examination, Mr. Messiah was asked how many ATI 400 series APUA owned and he responded that APUA did have the 400 series. He was asked if he had any problems with ATI 400 series which resulted in burning and he responded that APUA did.
- [55] On cross-examination Mr. Messiah was asked to elaborate on the defects and flaws. He responded that in his experience the problem developed during the course of transmit from emergency source i.e. standby electricity generator to APUA power. With that issue there would develop over time wear and tear on the mechanism and this would lead to a jamming of the mechanism which resulted in destruction.

The Law

- [56] Dr. Mansoor grounds his case on 2 causes of action. The first being breach of contract to provide a stable and consistent supply of electricity and the second being negligence.
- [57] The **Public Utilities Act** Cap. 359 provides at section 5 that APUA shall have the exclusive right to generate, distribute, supply and sell electricity within Antigua and Barbuda and to perform services incidental thereto. At section 8(2) it is provided that APUA's powers include the power to do all acts and things necessary for developing, controlling, generating, distributing, selling electricity for public and private purposes, to undertake electrical wiring installation and servicing of electrical equipment and to provide electricity to industrial, commercial and residential premises.
- [58] While the Court could find no provision in the **Public Utilities Act** and the regulations or order made thereunder or in the **Consumer Protection and Safety Act** Cap. 97 under which there are no regulations published as yet, the Court believes that at common law it would be reasonable

to imply that APUA was at a minimum under a duty to supply electricity that was fit for purpose in that it was regular and efficient and would not expose consumers to personal injury, damage to their electrical appliances and equipment, fire or other dangers that could arise on the supply of electricity.

[59] In regard to the second cause of action, to prove negligence, the locus classicus **Donoghue v. Stevenson**³ requires Dr. Mansoor to (i) set out the duty owed by APUA to him, (ii) show the breach of that duty, and (iii) the damage which occurred as a result of the breach.

[60] It is noted at this time that the implied duty under contract of fitness for purpose will align itself with the duty in negligence.

[61] Dr. Mansoor also relies on the doctrine of **res ipsa loquitur**. According to **Halsbury's Laws of England**⁴ para. 665, the maxim *res ipsa loquitur* applies only where the causes of the accident are unknown but the inference of negligence is clear from the nature of the accident. If the causes are sufficiently known the case ceases to be one where the facts speak for themselves and the court has to determine whether or not, from the known facts, negligence is to be inferred. Where the defendant does give evidence relating to the possible cause of the damage and level of precaution taken, the court may still conclude that the evidence provides an insufficient explanation to displace the doctrine.

Findings and Analysis

[62] It is a fact that Dr. Mansoor is a customer of APUA and is so pursuant to a contract whereby at a minimum the consideration between the Parties would be electricity for payment demanded. On payment of course, the common law principle of fit for purpose would be applied.

³ [1932] AC 562

⁴ 4th Edition Reissue Vol. 33

[63] To start and to put the evidence in context on whether ATI 125 or 300 or 400 is different, the Court at the outset recalls APUA's experience with various models of the ATI switches and its position on the motor mechanism of the ATIs as stated by both Mr. Roache and Mr. Richards and which is that while the ATIs might have differing amp, however, the functionality across the models was the same in that there was a motor, a control system and gears. This statement was not contradicted by Dr. Mansoor.

[64] Addressing the first issue, APUA's breach of contract by failing to provide according to Dr. Mansoor, a stable and consistence supply of electricity, a supply free of surges or over-voltage. Since the **Act** does not set out a specific duty such as pleaded by Dr. Mansoor and also relevant to APUA's

customers in general, the Court is of the view that any such breach would be a failure by APUA to meet its common law duty of supplying electricity fit for purpose. The burden is on Dr. Mansoor to prove the failure of the fitness for purpose test

[65] Dr. Mansoor being absent when his ATI 400 suffered damage and he not being an electrical expert, relies on Mr. Elder's report which was submitted to APUA and which states: "On inspection of the burnt motor-mechanism and electronic control unit, it is, in my professional opinion, apparent that these units were damages as a result that is consistent with a high over-voltage being applied to them." The problem with Mr. Elder's report as the Court sees it, is that Mr. Elder failed to appear at the trial so that his theory of how the damage occurred could be tested on cross-examination and this was particularly important because of APUA's counter position and which was that the ATI switches were faulty switches. Further, APUA backed up its position with the emails from F.G. Wilson and wherein F.G. Wilson's agent at 21st December 2011, some one and a half (11/2) years earlier had stated: "We've come to the conclusion that the motors failed due to the internal gears breaking. This is why the switch would not transfer automatically or manually. Because the motors were broken, the switch couldn't "lock" into either generator or utility position."

- [66] Indeed the Court also observes that Mr. Elder says in regards to his testing of the switch that: “I made an attempt to rotate the motor manually using the supplied manual handle but the motor was seized and would not turn.” It appears to the Court that this description is not too dissimilar to the problem described by the F.G. Wilson’s agent, Mr. Tejada some one and a half (1 1/2) years earlier when he said: “We’ve come to the conclusion that the motors failed due to the internal gears breaking. This is why the switch would not transfer automatically or manually. Because the motors were broken, the switch couldn’t “lock” into either generator or utility position.”
- [67] At this junction the Court also recalls Mr. Roache’s observation and what it meant, he said that he saw the switch was in the transition position and this meant that the switch was transiting power from the standby generator to APUA’s electricity and this position of the switch would only occur if the ATI 400 controller sensed a stable voltage from the supplier, APUA. In his opinion, once the transitioning started this was evidence that APUA’s electricity supply was within the acceptable voltage settings of the ATI 400 when APUA’s electricity was turned on.
- [68] Added to this, there does not appear to have been any measurement of voltage carried out and recorded by Mr. Elder on the day in issue. While voltage was measured by Mr. Richards, it was some 9 days later and delayed because Dr. Mansoor had only called APUA some 8 days later.
- [69] Having regard to these matters, the Court is of the view that on a balance of probability, the burning and subsequent failure of Dr. Mansoor’s ATI 400 was not as a result of a surge or over voltage from APUA’s supply of electricity on its return but rather as a result of the faulty mechanism within the ATI 400 as it attempted to transition one more time from the backup electricity generator to APUA electricity.
- [70] The Court believes that most persons would have experienced a situation where they have been switching on a particular light for some time and then one day, it simply flickers and is gone. Perhaps this was the situation with the ATI 400 on 21st May 2013. .
- [71] The Court therefore finds that Dr. Mansoor has not proved that APUA breached its contract to supply him with a stable and consistent supply of electricity and one free of surges and over-voltage.

- [72] Moving to the second issue, whether APUA was negligent in the supply of electricity to Dr. Mansoor's home. It is undoubted that APUA owed Dr. Mansoor a duty not to be negligent in the supply of electricity to his home, no surges or over-voltage and which negligence could result in damage.
- [73] The Court though looking at the facts, and recalling its statements above on the duty under contract, is of the view that Dr. Mansoor cannot succeed in a claim of negligence against APUA because while he can establish the duty owed, the Court is of the view that he had not proved that a surge or over-voltage as opposed to a faulty motor within his ATI 400 was responsible and caused the damage to his ATI 400. Mr. Tejada's email of 21st December 2011, some 11/2 years earlier, is very telling.
- [74] The Court is therefore of the view that Dr. Mansoor has not discharged the burden of proving that APUA failed to supply a stable and consistent supply of electricity.
- [75] Finally, Dr. Mansoor rest his case on statements he said that Mr. Richards made on his first visit to his home after carrying out an inspection and which statements were in summary that APUA's surge or over voltage caused the destruction of the parts of his ATI 400, and so APUA accepted liability. The statements between Mr. Richards and Dr. Mansoor are contested by Mr. Richards. Dr. Mansoor being adamant that Mr. Richards in the "Queen's English" stated that APUA was responsible, and Mr. Richards being adamant that he only asked Dr. Mansoor for matters of bills and a report that would start a claim.
- [76] On this issue the Court also recalls the form and memo prepared by Mr. Richards at or after inspection of Dr. Mansoor's ATI. Nothing in them suggest that APUA was to accept liability. Further, there is no suggestion by Dr. Mansoor that on the second inspection whereat Mr. Roache was present, that there was going to be acceptance of liability by APUA.

[77] On a question from the Court about whether or not he could accept liability for APUA, Mr. Richards said unequivocally that he was not involved in the decision making process about whether or not APUA would accept liability in any claim, this was the responsibility of his supervisor and another.

[78] In all organisations it is usual and reasonable to expect that while certain personnel can bind an organisation because of their level seniority within the establishment, that there will be others, who cannot do so.

[79] The Court accepts Mr. Richard's position on his authority or rather lack of authority to bind APUA on matters of liability. For this reason, Dr. Mansoor must fail on this issue as well.

[80] In conclusion, the Court finds that Dr. Mansoor has not proved his case in either contract or negligence and will strike out the claim.

[81] Court's order:

- i. Dr. Mansoor's claim is struck out.
- ii. Dr. Mansoor is to pay APUA prescribed costs within 30 days.

Rosalyn E. Wilkinson
High Court Judge

By the Court

Registrar