

JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L. 2000/ I-004
CIVIL DIVISION

BETWEEN INDUSTRIA PETROQUIMICA CLAIMANT
DOMINICANA C&A

AND MOTIVATION PROCESSORS LIMITED DEFENDANT

Mr. Christopher Kellman instructed by Myers Fletcher & Gordon for the Claimant.
Mr. Garth McBean for the Defendant.

Heard: 28th June, 10th August, 1st October 2007 and April 25 2008.

Mangatal J:

1. This is a claim by the Claimant "Petroquimica" against the Defendant "M.P.L." for the sum of US \$ 18,554.03, being the balance due on the price of water boots sold and delivered to M.P.L.
2. M.P.L. has denied liability to pay Petroquimica the sum claimed, principally on the basis that the boots were not in accordance with the relevant purchase order, were not of merchantable quality and were substantially defective. The **Sale of Goods Act** of Jamaica will therefore arise for consideration. In a Defence and Amended Counterclaim M.P.L. has counterclaimed in excess of US \$ 600,000.00 for breach of contract.
3. I thank the Attorneys who appeared for the parties for the industry and thoroughness they displayed in presenting their respective cases. I also apologize for the delay in delivering this judgment.
4. Each party called a number of witnesses to give evidence on their behalf.

5. Petroquimica's Case

Miss Denis Acra in her witness statement dated 30TH January 2007 indicated that she is employed to Petroquimica as Manager for International Marketing and Sales, having commenced working with Petroquimica in May 2004. She states that she has reviewed all of Petroquimica's International Sales department's files and studied the documentation relating to M.P.L. and has full knowledge of the case.

Miss Acra states that Petroquimica sells a wide range of products in a variety of countries in Central America and the Caribbean and that they currently export to the United States, Puerto Rico, Guatemala, El Salvador, Nicaragua, Honduras, Haiti, St. Lucia, St. Vincent and Guadeloupe.

6. At the time the dispute first arose Petroquimica's Sales Director, Mrs. Florida Roa, first made contact with M.P.L. through Caricom Channel Limited, an import and trading company based in Kingston, Jamaica.

7. In July 2000 the International Sales Department of Petroquimica received a Purchase Order dated the 10th day of July 2000 for 620 pairs of Goliat water boots from the Director of Motivation Processors, Mr. Edward Logan. Although her Witness Statement said 620 pairs, it is clear from the relevant Invoice and documentation that it is 620 dozen pairs. The order was for different styles and sizes and the boots were sold as water boots i.e. for use in situations where water is present. This transaction was not the first transaction involving Goliat water boots between the parties; it was the fourth. The first transaction was July 1999, the second was in November 1999, third in April 2000, and the last in July 2000, the subject of the instant lawsuit. The boots were duly delivered to M.P.L. in Jamaica in August 2000. The amount due for these goods was U.S. \$29,368.80 as per invoice which Miss Acra described as being dated 8th November 2000. However the Invoice itself, exhibit "D2" to Miss Acra's Affidavit, actually says "DATE 8/11/00". Based on the date of the transaction itself, and indeed reference made to the Invoice in Petroquimica's letter to M.P.L. dated November 14 2000, part of exhibit "D3", it is clear that the date of the Invoice is not the 8th day of the 11th Month, i.e. 8th November 2000, but

rather the 11th day of the 8th Month, i.e. August 11th 2000. In September 2000 when Petroquima's Sales Department contacted Mr. Logan requesting payment he promised that the outstanding amount would be paid by September 15 2000. No payment was received and so Petroquima wrote the letters dated October 9th 2000 and again on November 14th 2000. After various calls and collection efforts M.P.L. sent a cheque for US \$10,000.00 on November 28th 2000.

8. According to Miss Acra, in December 2000 Mr. Logan started to make complaints about alleged defects in the quality of the goods which had been supplied and accepted since August 2000.

9. As a courtesy to M.P.L. and in the interest of customer satisfaction, Ms. Roa and Petroquimica's Production Manager Mr. Freddy Barnichta visited Jamaica on January 23rd 2001 to inspect the boots and the alleged defects. On the 24th and 25th January 2001 Mr. Barnichta inspected the water boots.

10. On January 26th 2001, and upon Mr. Barnichta's recommendation, Petroquimica wrote to M.P.L. offering a credit note for US \$750.93 which represented the price for 191 pairs of water boots which Mr. Barnichta recommended be discounted because of minor aesthetic defects. However, Miss Acra states that there still remained 7,249 pairs which to date have not been paid for in full. Upon Petroquimica's offer, M.P.L. replied in a letter stating that it would be rejecting and repudiating the contract of sale, maintaining a position of refusal to effect payment. Miss Acra states that the sum of U.S. \$ 18,555.26 still remains outstanding.

11. In cross-examination, Miss Acra agreed that in letter dated January 10 2001 from Petroquimica to M.P.L. Petroquimica had acknowledged that 25 - 50 dozen, or 300-360 pairs of water boots had gone out to M.P.L. with a problem. This letter was written before Mr. Barnichta carried out his inspection. Miss Acra agreed that this transaction between the parties was for sale of boots which were water proof. She agreed that if the boots were not water proof they would be defective and would therefore have no value on the market. Whilst there were complaints made by Mr. Edward Logan on behalf of M.P.L. before

December 2000, there were no complaints as to the quality of the boots. Miss Acra agreed that Mr. Logan had in October 2000 and January 2001 sent samples of boots from the September 2000 shipment back to Petroquimica in order for these samples to be tested. The witness agreed that a second set of samples were sent in January 2001 because the samples sent in October 2000 were lost.

12. The next witness for the Claimant was Mr. Freddie Barnichta. In his witness statement which was ordered to stand as Mr. Barnichta's examination-in-Chief, he stated that he is the Manufacturing Director of Petroquimica and he has been with the company since January 1999. Mr. Barnichta holds a Bachelor of Science Degree in Chemistry and a Bachelor Degree in Industrial Engineering, with specialization in statistical control of processes. He is also a certified auditor for quality assurance under ISO 9001 standards.

13. Mr. Barnichta states that Petroquimica has manufactured and sold a wide range of plastic and rubber products for over 50 years. Among the PVC products which Petroquimica sells are waterproof boots, PVC plastic sandals, shoes, soles, rubber sheets and vinyl laminates.

14. Mr. Barnichta's position with Petroquimica is that of production manager for a number of different products. He supervises five lines of manufacture: injection, mixing (chemicals), pressing, assembly and sandal workshop. Petroquimica has its own quality control department and a chemical and quality control laboratory. Every product from the company's production line is inspected by quality control and submitted to quality tests such as visual, PVC hardness, elongation and tensile strength. The products are then certified and warehoused.

15. Mr. Barnichta claims that Petroquimica's boots, shoes and sandals are bestsellers in the national as well as international markets and he concurs with Miss Acra regarding the territories in which the company's products are successfully sold. Petroquimica is among the few factories in the Dominican Republic for shoes, which also produces its own PVC and has a chemical laboratory to monitor the quality of its raw material.

16. Petroquimica uses top of the line machinery, they use Italian injection machines which according to Mr. Barnichta assures them of an excellent and varied product line.

17. Pursuant to a purchase order from M.P.L. in July 2000, the company manufactured 620 dozen pairs of plastic water boots, consisting of the sole and outer covering made with PVC and an internal liner made with cotton fabric. Mr. Barnichta states that these boots were manufactured under his supervision and in accordance with the company's standard procedures and quality control. These boots in particular were to be water proof only, and not suitable for activities such as industry, in which oil, solvents and other similar substances are used. According to Mr. Barnichta, when a client desires a specific quality for the boots (oil, solvent, or acid proof) they so request it and the boots are made to the client's specifications.

18. The boots were shipped to M.P.L. in Jamaica on August 13th 2000, and were received in good order and condition, according to the shipping documents. In response to complaints received from M.P.L. Mr. Barnichta was instructed to go to Jamaica in January 2001 and inspect the water boots in order to determine the extent, if any, of the defects alleged by M.P.L.

19. Mr. Barnichta carried out the inspection in the presence of Mr. Logan. A complete shipment of 7440 pairs of water boots, which had been deemed defective by M.P.L. was inspected. This shipment had been stored along with previous shipments and M.P.L. had sold indiscriminately from the shipment in particular and from previous stock.

20. On the basis of his inspection of the water boots from the August 2000 shipment which were still in M.P.L's possession, Mr. Barnichta noticed some to have small aesthetic irregularities , such as small portions of cotton liner visible, but otherwise fused with the PVC, in very small surfaces of the boots. In total, 191 pairs had small indications of the plastic covering leaving some parts of the boots visible:

21. Mr. Barnichta concluded that these inconsistencies were negligible at the most. The boots' performance and their fitness of purpose in repelling water is

in no way affected by the miniscule scratches and bits of lining showing over the upper. According to Mr. Barnichta, in all cases examined the PVC upper when injected into the mold, was completely fused over the liner and thus did not leak any water. However negligible these visible lines and liner were, Mr. Barnichta recommended that 191 pairs be considered defective, on a purely aesthetic basis, and suggested that they be credited to the client in the interest of preserving customer satisfaction. Mr. Barnichta goes on to state that small imperfections are common in the rubber industry, such as liner inconsistencies, scratches, lines on the uppers, and these in no way affect the overall performance of PVC boots. None of the boots examined, even those with bits of liner exposed, would leak water since the PVC is covering the liner.

22. Mr. Barnichta saw 5454 pairs, some were not available for his inspection. Mr. Barnichta said that notwithstanding the allegations made by M.P.L., he has not been shown any water boots supplied by M.P.L. to its customers which have been returned to them as defective. Having inspected the company's shipment and production records for the year 2000, Mr. Barnichta testified that the company received no other complaints in respect of the water boots which were manufactured that year.

23. Mr. Barnichta stated that the company uses a specific PVC for water boots. If one wants boots that are waterproof, one has to use PVC with that characteristic. If one wants boots that are oil resistant, then you have to use PVC with that characteristic.

24. Mr. Barnichta was cross-examined. He indicated that he did not do a leakage test on the boots, which involves immersing the boots in water. He said that the lining on the inside is made of cotton and is not water proof because it is there to make the inside of the boots more comfortable. The purpose of putting the PVC in is to make the boots waterproof. If the cotton lining is exposed, i.e. there is no PVC over it, water cannot go through because the cotton liner and the PVC are melded together. He stated that if you take a water boot and you can see the lining it means that there is no PVC over the lining at that point. Mr. Barnichta did not agree that it is a good way to

determine if the water boot leaks by immersing it in water because if you can see the liner over the PVC that does not mean that there is leakage. He agreed that immersing the boots in water is one of the tests but said that there are other methods to test. When the company sent Mr. Barnichta to inspect the boots he was instructed to inspect the boots that were in plastic bags and boxes. He could not recall whether there were any water boots outside of plastic bags. Mr. Barnichta looked at the boots pair by pair but he did not take the boots out of the plastic bags, he checked them through the plastic. He agreed that in a general way it would be better to take the boots out of the plastic bags to inspect them but he stated that any boots not in plastic bags would be the responsibility of Mr. Logan and M.P.L. Mr. Barnichta agreed that he did not inspect any boots that were not in the plastic. He said that the boots came to Jamaica in plastic bags and boxes and there was no reason for him to inspect boots which were not in the plastic bags and boxes.

25. Mr. Barnichta said 191 pairs of the boots showed lining on the top of the boots but these boots could not be described as poor because the boot performs. Normally one can see some part of the lining and this does not mean that the boot is defective.

26. The next witness for the Claimant was Mr. Marco Cabral. Mr. Cabral indicated that he is Petroquimica's Managing Director and his Witness Statement dated the 26th January 2007 was ordered to stand as his examination-in-chief. In his witness statement Mr. Cabral indicated that he has been working with Petroquimica since 1997. He holds a Degree in Industrial Engineering and a Master's Degree in Business Administration. His work as Manufacturing Director mainly consists of planning and running the production of the plant. He also speaks of the company's products and experience over a 50-year period on the national Dominican Republic and international markets.

27. As head of manufacturing, Mr. Cabral is the head supervisor and planner for all the products made in Petroquimica's plant, including PVC water boots. As part of their quality control, every product is inspected by the

company's quality control department and submitted to quality control tests such as visual inspection, PVC integrity, elongation, and tensile strength. The products are then certified and warehoused.

28. The goods in relation to this case were inspected in Jamaica by Mr. Barnichta in 2001. Afterwards, by way of a court order for inspection of the boots, Mr. Cabral visited Jamaica and participated in an inspection of the boots, to verify the conditions they were in and the place they were being stored in. Mr. Cabral states that Mr. Logan allowed him a visual inspection and he Mr. Cabral confirmed Mr. Barnichta's earlier assessment that the problem was merely an aesthetic one and that it would not otherwise affect the performance of the boots.

29. According to Mr. Cabral the performance of the boots is not affected by the small traces of liner shown on the PVC uppers, since these small portions are actually covered or fused over with PVC. Therefore they do not leak water in any way. Mr. Cabral states that the cases which have lining showing are just small aesthetic inconsistencies which sometimes happens when the PVC is injected in the mold at high pressures and temperatures, but the liner fabric catches small particles of PVC which do not allow the PVC to uniformly cover the mold. They have no material effect whatsoever in the performance of the PVC water boots.

30. Mr. Cabral was cross-examined. He said that he has heard of the leakage test. The leakage test is to determine whether air or any liquid, water, is coming in or out of a certain place, in this case the water boots. Mr. Cabral did not conduct any leakage test in relation to the water boots in 2004.

31. Mr. Cabral indicated that when one manufactures the boots one does not intend to manufacture them so you can see the cloth lining. If you can see the cloth lining, it is considered a cosmetic defect. Mr. Cabral agreed that the term "cosmetic defect" would depend upon how large the exposure is, if big, but in this case, they were not big, they were lines. When he came in 2004 he could see the lining through the PVC in several boots. Mr. Cabral did not necessarily agree that a better visual inspection would take place if the boots are taken out

of the plastic bags because the bags are transparent. The job of visual inspection can be done through the plastic.

32. Mr. Cabral indicated that quality control is done randomly, on some of the products only. Only a percentage is inspected, if there are 7,000, quality control would inspect about 20%. Mr. Cabral indicated that in a consignment of 620 dozen, 7440 pairs, he would not expect a customer to inspect every single pair upon receiving them.

33. The Claimant Petroquimica called as its next witness Mr. Cordel Samuels. Mr. Samuels Witness Statement filed June 5 2007 was ordered to stand as his examination -in-chief. Mr. Samuels indicated that he is by training an Economist and Agricultural Scientist. He holds a Masters in Business Administration specializing in Marketing and Finance. He currently operates his own business.

34. In the 1980's he was employed to Agro- Grace Limited as Market Development Manager. He was also employed to Hardware and Lumber Agri and Marine Company between 1989 and 2003 as a Market Development Manager. As a former marketing executive of both Agro-Grace and Hardware & Lumber and Agri and Marine, his responsibilities at the time included examining the needs of the agricultural market, determining its size, selecting appropriate products, including agricultural products such as cutlasses, water boots, pesticides, seeds and equipment among other things and launching them into the market.

35. Mr. Samuels says that he knows the Claimant Petroquimica. While he was at Hardware and Lumber Agri and Marine in October 2000, the company purchased Goliath water boots from Petroquimica. The boots were purchased through an International Distributing Company operating out of Puerto Rico named Renwick Incorporated. The water boots were delivered to Hardware and Lumber Agri and Marine and sold. Documentation was exhibited to Mr. Samuels' Witness Statement in substantiation of the transaction. The sales went very well and were to customers throughout Jamaica and Mr. Samuels says that his sales persons were very satisfied with the product.

36. Hardware and Lumber was also very satisfied with the Goliat water boots and found them to be of a very high quality. The boots were durable and did not crack, which is a common feature of some brands of water boots. Mr. Samuels considered the water boots to be of a higher quality than most brands of water boots that were being sold on the local market at that time. Mr. Samuels states that no complaints of dissatisfaction with the water boots were received. Mr. Samuels confirmed Hardware and Lumber's satisfaction with the water boots in an e-mail to Petroquimica dated the 8th day of December 2000, which reads as follows:

...The response to the boots has been good. The only concern is that there are many customers who still have stocks from your previous shipments that they need to dispose of, there are many suppliers of boots in the market but I believe that we will compete effectively.

37. In cross-examination Mr. Samuels stated that Hardware and Lumber did not have a quality control department. Mr. Samuels said that he personally inspected the water boots, not every one but a basic sample was taken. His team and research manager also looked at the boots. Mr. Samuels said that in his post as General Manager and Managing Director it would be normal for him to inspect the quality of items to determine whether they were appropriate for the market. The company had a quality control department to test the quality of seeds and pesticides which was a daily operation.

38. If a customer had a complaint, there was a special department for receiving complaints. Whether the complaint came to Mr. Samuels or any of the other managers he would be made aware of it.

39. The Claimant closed its case after calling Mr. Samuels.

M.P.L.'s Case

40. A number of witnesses were called on behalf of the Defendant M.P.L., the first of whom was Mr. Winston Williams. Mr. Williams' Witness Statement filed November 27 2006 was ordered to stand as his examination-in-chief. Mr. Williams stated that he is the Managing Director of Pioneer Meat Products

Limited and his company processes meat for sale to wholesalers and retailers. In 1999 his company entered into a contract with M.P.L. for the purchase of water boots for their employees in the meat processing, packaging, storage and distribution sections. Mr. Williams says that Mr. Logan informed him that the water boots were manufactured by and came from Petroquimica.

41. Mr. Williams says that the water boots were defective and not durable, as they would break in the shank and split after a short period of usage. Some were porous and could not serve the purpose for which they were made.

42. According to Mr. Williams, the frequency with which his company was replacing the water boots was too costly for the company, hence the decision was taken by him as Managing Director to discontinue use of the said water boots. Mr. Williams states that in a letter dated 12th July 2001, he wrote to Mr. Logan advising him of his company's decision to stop purchasing the water boots with immediate effect.

43. In cross-examination Mr. Williams stated that meat processing involves bringing in meat parts, whether in parts or whole carcasses. He agreed that he has pork products in his business, mainly sausage. Pork, fatty meat would require frequent cleaning of the floor, every single day. In 1999 Mr. Williams dealt with at least 50,000 to 60,000 pounds of meat. To get rid of the grease, they have to use several cleaning agents such as all-purpose soap, disinfectant, and chemicals conducive to the meat industry. Mr. Williams company bought water boots more than two times from M.P.L., maximum of three purchases between 1999 and 2001.

44. Mr. Williams states that he got receipts from M.P.L. but had not shown them to the Court. In re-examination Mr. Williams indicated that the reason why he continued to buy the water boots from Mr. Logan was because the price was a bit better than what was available, so they purchased on more than one occasion, with the hope that the problems that were discovered would not have been a continuous problem because in manufacturing there are hiccups here and there.

45. The next witness for the Claimant was Mr. Osbourne Stern. Mr. Stern gave evidence that he operates a hardware store and offers goods for sale on a wholesale and retail basis. Mr. Stern says that in 1999 he entered into a contract with M.P.L. in relation to Petroquimica's water boots. According to Mr. Stern, sometime after he started to sell the water boots he began receiving complaints from customers about the poor quality of the water boots. Many of them returned the boots and claimed refund of the monies paid. Mr. Stern states that he wrote to M.P.L. in January 2001 informing of his decision to discontinue sale of the water boots. In cross-examination Mr. Stern said that he ordered boots in 1999 twice, about two to three months apart. Boots were returned from the first transaction within a few weeks. Mr. Stern refunded those who bought bad boots. The first order consisted of tall boots and short boots. However, Mr. Stern got complaints about the tall ones so he ordered after that only short boots. However, complaints came in again within a few weeks.

46. Mr. Stern claims that he waited thirteen months to write a letter to Mr. Logan because he did not sell water boots every day. He says he had no phone contact so he had to write a letter. Mr. Stern said he had a system of keeping invoices and copies of correspondence that went out. However, no documents in proof of purchase orders or of the letter of complaint were put before the court.

47. The next witness called for M.P.L. was Mr. Medford Lewis. He indicated in his Witness Statement that he is one of the proprietors of Allman Hill Town Farm at the top of Saint Andrew, bordering with Saint Catherine. In or about the year 2000 Mr. Lewis claims to have purchased a quantity of water boots from Fire Equipment Sales & Services Ltd, two cases. He says that another company also operates at 6 Park Avenue.

48. In cross-examination Mr. Lewis indicated that he grows flowers for export. He grows 12 acres of flowers and has 30 acres of land. Mr. Lewis claimed to have written the letter of complaint personally, he keeps copies of correspondence but he does not recall whether he attached that letter to his

Witness Statement. There was in fact no letter attached to the Witness Statement. Mr. Lewis stated that because of the defects he would not touch the (Petroquima's) boots again.

49. The Defendant next called as a witness Mr. Alton Alphonso Davis. His Witness Statement dated June 15 2007 was ordered to stand as his examination-in-chief. Mr. Davis stated that he was Acting Manager of Metrology and Testing, the Engineering Division of the Bureau of Standards in Jamaica. He was trained in the field of Pure and Applied Chemistry and he has secondary level training in Mechanical Engineering, involving physics, chemistry and metallurgy, the study of metals. In 2001 and in 2004 he was the Senior Scientific Officer employed to the Bureau.

50. Mr. Davis stated that in 2001 as a result of a report received at the bureau from M.P.L. he and other members of staff of the Non-Metallic Department of the Bureau did the following (paragraph 3 of his witness statement):

3...(a) An examination of a sample of the water boots submitted by M.P.L. was carried out on the right foot of the sample, a line approximately 9cm long was observed on the upper through which the lining was exposed.

(b) We visited a warehouse at 6 Park Avenue Kingston 5 where a quantity of PVC water boots were stored. There a representative sample of each size was inspected.

(c) A leakage test was carried out on two samples of the boot, both of which had the lining exposed.

(d) Visual examination of several samples revealed defects which would affect the performance of the boots in service. One of the boots gave an unsatisfactory result for the leakage test. Of the twenty one pairs of boots examined for all the sizes, thirteen were defective giving a 62% defective in sample size.

This indicated that more than 50% of the batch is of unsatisfactory quality. Mr. Davis exhibited a copy of his Calibration Certificate Test Report.

51. Mr. Davis in his Witness Statement goes on to indicate that in or about March 2004, pursuant to a request from Myers Fletcher & Gordon, he visited Fire Equipment Sales & Services Limited at 6 Park Avenue Kingston 5 where water boots were in storage. A representative sample of each size and style of water boots was visually inspected for defects and two samples were taken. Twenty nine percent of the sample overall had defects with the lining being exposed through PVC upper.

52. Certain tests of the said sample of P.V.C. water boots were carried out in 2004 and this Calibration Report was also attached to Mr. Davis' Witness Statement.

53. In the 2001 Report, Mr. Davis indicates that he performed leakage tests. When tested for leakage using a pressure of 10 kPa, one of the samples showed leakage of the air in the vicinity of the exposed lining. The other sample gave a satisfactory result. In his general comments Mr. Davis stated as follows:

The exposure of the lining through the surface detracts from the appearance of the boots and could affect their performance in service as constant flexing of the boot when walking would extend the opening. As a result, it would no longer offer the protection it was designed for. The result of the leakage test indicates that boots with the lining exposed are likely to fail in wear.

54. In the 2004 report, on the other hand, a representative sample was taken of each size and style and twenty-nine percent of the sample overall was found to have defects with the lining being exposed through the PVC upper. The report goes on to indicate that two samples, one with defects and one without, were taken back to the lab where a leakage test was performed on the boots. Both samples showed no sign of leakage.

55. Mr. Davis amplified on his Examination-in-Chief by explaining the leakage test. The mouth of the boot is blocked with a piece of wood and sealed with wax. This makes a tube protrude from the middle of the wood, seals the boot and makes it airtight and then air is pumped into the boot through the pipe until it appears inflated. The boot is then fully immersed in a tank of water, taking care that the tube opening does not become submerged. If there is leakage one would see air bubbles coming up through the water, if there are no air bubbles there is no leakage. In the 2001 report at paragraph 3(d) referred to above Mr. Davis states that he saw leakage.

56. Mr. Davis was thoroughly cross-examined. He indicated that his area of specialty is metrology and that metrology is the science of measurement of masses, forces and pressure.

57. Mr. Davis indicated that it is correct that the 2001 report had no input from Petroquimica. Mr. Davis indicated that the Bureau of Standards deals with the complainant and are under no duty to deal with the manufacturer of the product complained about. During the 2004 inspection, it was likely that Mr. Logan was present but Mr. Davis really could not recall now.

58. Mr. Davis indicated that it was correct to say that the difference between the two reports is that the 2001 report speaks of 62% defects and the 2004 report speaks of 29%. Another difference between the two reports is that the 2001 report showed leakage whereas the 2004 report did not.

59. In answer to a question from the Court, Mr. Davis said that the samples examined were completely different ones on each occasion of the inspection. He indicated that the finding of 29% sample defect in 2004 and 62% in 2001 were not necessarily strange because efforts were made by M.P.L. to clean up some of the stock in order to sell it.

60. Further in cross-examination Mr. Davis said that the nature of the goods under storage is not such that they would deteriorate because the defect is at manufacture and would remain throughout. He said that it is a statistical situation where you have a sample, you should get almost the same thing

because there is no way that the thread would now come on the outside and be in storage, this would have to take place from the time of manufacture.

61. Mr. Davis said he trained as a Chemist at the University. A chemist amongst other matters does certain tests to determine the contents of products and does titration to determine the strength of solutions. In 2001 and 2004 his inspection of the boots did not call for any experience in Chemistry.

62. The next witness called on behalf of the Defendant was Mr. Edward Logan, the Managing Director of M.P.L. Both Mr. Logan's Witness Statement dated 19th January 2006 and his Supplemental Witness Statement dated 4th May 2007 were ordered to stand together as his Examination-in-Chief.

63. Mr. Logan indicated that M.P.L. had a contract with Petroquimica whereby M.P.L. would be the sole distributor of Petroquimica's water boots in Jamaica. From the outset Mr. Logan says that there were discrepancies to do with the stock of boots ordered and those received. There were size mismatch, lining and other defect problems. These shortfalls were continuously communicated to Petroquimica. M.P.L. also received numerous complaints from its customers about the water boots. Some of the complaints were:

- (a) that the water boots burst easily
- (b) that the water boots were too thin
- (c) that the water boots were not lined
- (d) that the water boots were porous.

64. According to Mr. Logan, in paragraph 7 of his Witness Statement, a number of the Defendant's customers wrote letters of complaint "supported by affidavit of truths" indicating their dissatisfaction with the quality of the water boots.

65. Petroquimica subsequently visited M.P.L.'s warehouse to assess defects in the water boots. According to Mr. Logan, Petroquimica engaged the services of untrained labourers to assist with the checking of the water boots. The water boots were not removed from their plastic bags which inhibited close and proper examination, even by an expert. Petroquimica identified 191 defective pairs of water boots. Having conceded the defects, Petroquimica suggested a

reimbursement plan to compensate M.P.L. for the water boots identified as being defective. Subsequently, M.P.L. received a shipment from Petroquimica, which contained mainly seconds (inferior water boots), which had more than the usual number of defective water boots.

66. M.P.L. wrote to Petroquimica informing of their decision to reject order #004/2000, plus the current inventory of stock in hand. According to Mr. Logan the intervention of the Jamaica Bureau of Standards resulted in the issue of a Calibration Certificate Test Report which confirmed that the water boots were in fact defective.

67. According to Mr. Logan M.P.L. which has been operating in Jamaica since 1980 suffered loss of goodwill and reputation as a result of being associated with the supply and distribution of a defective product supplied by Petroquimica.

68. In his Supplemental Witness Statement Mr. Logan makes a claim for over US \$ 600,000.00 for damages under a variety of heads, including for loss of goodwill and reputation, costs incurred in clearing the defective water boots, costs of storage and insurance of the water boots.

69. Mr. Logan was cross-examined. He stated that the business of M.P.L. is to import and market water boots. He is one of the directors of the company M.P.L. and also a shareholder. He is also Managing Director of Fire Equipment and Sales. Mr. Logan states that Mr. Melford Lewis is also a Director of M.P.L. Mr. Lewis was one of the witnesses who was called by M.P.L. to give evidence as a customer.

70. Mr. Logan stated that he was introduced to Petroquimica by Caricom Channels Limited. He does not know of Caricom Channels being an agent for Petroquimica in Jamaica. He denied that Petroquimica had other distributors of its water boots in Jamaica other than M.P.L., including Caricom Channels Limited. Mr. Logan indicated that it was not only in August 2000 that he bought boots from Petroquimica. He bought from them on two occasions before that. Boots were bought in 1999, came in September 1999, another shipment was bought by Mr. Logan in March 2000. The boots that Mr. Logan had bought

in September 1999 had not been sold entirely when Mr. Logan ordered more boots in March 2000. The boots that M.P.L. had bought in March 2000, the majority had not been sold before Mr. Logan made the further order in August 2000, however by the time the boots came here more than fifty percent had been sold.

71. Mr. Logan denied a suggestion put to him by Mr. Kellman that all of the boots were lined. He said that about thirty percent of the shipment had boots that were not lined. Mr. Logan agrees that he had gone to the Bureau of Standards to complain about the quality of the water boots. Mr. Logan was forced to agree however, that in neither the 2001 Report nor the 2004 Report did the Bureau of Standards say that there were boots which were not lined. Mr. Logan said that he did not show Mr. Davis, the Bureau of Standards' Representative the boots which were not lined. He says that he had such samples but he did not show them to Mr. Lewis. Mr. Logan said that he would not be surprised if none of the witnesses that he called to give evidence made any mention of the boots not being lined. He said that the paragraph in his witness statement about the boots not being lined related to the 1999 shipment.

72. Mr. Logan denied that the reason that he purchased boots from Petroquimica multiple times was because of the good quality of the boots. He agreed that if a water boot is porous then it would have failed in the most fundamental way. He said that he did not find that problem right away, he is a wholesaler, distributor of the water boots to the retailers. Retailers were the ones who told Mr. Logan that they kept getting complaints. The first time the boots were not found to be porous. It was from the second and third shipment that the boots were found to be porous. Mr. Logan's evidence brought to an end the line of witnesses who gave evidence on behalf of M.P.L.

73. In this case it is not denied by M.P.L. that the water boots have been sold and delivered by Petroquimica to M.P.L. and indeed on November 28th 2000 M.P.L. paid the sum of US \$10,000.00 on account of the purchase price. I therefore agree with Mr. Kellman that the only way that M.P.L. can

demonstrate that it is not liable for the agreed price is if it is established that the water boots are not of merchantable quality as claimed.

74. The commercial invoice in this case, exhibit D2 to the Affidavit of Denis Acra, indicates that the water boots were described as "PVC Boots with Liner". The brand name Goliat is also referred to in the invoice. Sub-Section 15 (b) of the **Sale of Goods Act** implies certain conditions or warranties where goods are sold by description:

15. Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows-

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

75. There is no statutory definition for the term "merchantable quality" in the Jamaican **Sale of Goods Act**. However, the term has been examined in case law.

76. In **Cammell Laird & Co. Ltd. v. Manganese Bronze and Brass Ltd.** [1943] A.C.402, at 430, and **B S Brown and Son Ltd.** [1970] 1 All E.R. 823, the following definition was used in respect of the term as it appears in the English Act of 1813 :

What sub-section (2) now means by "merchantable quality" is that the goods in the form in which they were tendered were of no use for any purpose for which goods which complied with the description under which these goods were sold would normally be used, and hence were not saleable under that description.

77. In **Grant v. Australian Knitting Mills Ltd. and others** [1936] A.C. 85, the Privy Council considered the provisions of section 14 of the South Australia Sale of Goods Act, 1895, which was identical with section 14 of the English Sale of Goods Act, 1813, and with section 15(b) of our own Act. Lord Wright at pages 99-100 stated:

Whatever else merchantable may mean, it does not mean that the article sold, if only meant for one particular use in ordinary course, is fit for that use; merchantable does not mean that the thing is saleable in the market simply because it looks alright; it is not merchantable in that event if it has defects unfitting it for its only proper use but not apparent on ordinary examination: that is clear from the proviso, which shows that the implied condition only applies to defects not reasonably discoverable to the buyer on such examination as he made or could make. ...

It may also be pointed out that there is a sale by description even though the buyer is buying something displayed before him on the counter : a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description, e.g., woolen under-garments, a hot-water bottle, a second-hand reaping machine, to select a few obvious illustrations.

78. Under the **Sale of Goods Act** there are a number of remedies available in different circumstances to the buyer when the seller is in breach of contract by supplying goods which are not of merchantable quality. Some of these remedies are as follows:

- (a) Rejection of the Goods;
- (b) Setting up a breach of warranty in diminution or extinction of price;
- (c) Maintaining an action against the seller for damages for breach of warranty.

79. Section 52 (1) of the **Sale of Goods Act** provides as follows:

52(1). Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods but he may-

- (a) set up against the seller the breach of warranty in diminution or extinction of the price; or*
- (b) maintain an action against the seller for damages for the breach of warranty.*

80. One of the first issues in this case which I will need to resolve is whether the water boots sold and delivered by Petroquimica to M.P.L. were of merchantable quality. I am of the view that such an implied condition arises because there is no evidence that M.P.L. had examined all of the goods or that having examined them, the defect as regards the boots not being water proof (as opposed to appearance of the water boots or the lining being exposed over the upper) ought to have been revealed. In any event, Attorneys for both sides appear to be agreed that in this case there would be an implied condition that the goods are of merchantable quality.

81. There is no doubt that the goods were sold by the description in the Invoice exhibited and that Petroquimica deals with goods of that description. I agree with Mr. McBean's submission that when one applies the definition of merchantable quality as discussed in the cases, this suggests that in order for the water boots to be of merchantable quality the water boots must have been fit for the purpose for which water boots are normally bought or used. In this case the water boots must have been waterproof for them to be used and to pass the test of being of merchantable quality.

82. Petroquimica says that there were minor aesthetic defects in about 191 pairs which would not affect the function of the water boots and would not prevent them from being water proof. M.P.L. says that there were serious defects. The main complaint of M.P.L. is that the boots were not waterproof, they were porous.

83. What is the evidence that the goods were not of merchantable quality? Mr. Edward Logan purports to give evidence that the boots do not fit their description in that he states that 30% of the boots were not lined. I found Mr. Logan's evidence on this point quite incredible. Mr. Logan's complaint that the boots lacked lining is a serious defect, yet Mr. Logan, when confronted with the fact that none of his witnesses, including Mr. Alton Davis of the Bureau of Standards, and his two reports, made any mention whatsoever of any of the boots having no lining, gave the perplexing answer that although he complained to the Bureau of Standards about the quality of the boots, and had samples of the boots that had no lining, he did not show them to Mr. Davis. That is a very odd piece of evidence and I agree with Mr. Kellman that if Mr. Logan had such evidence he would reasonably have been expected to draw Mr. Davis' attention to them. His answer that the complaint about no lining was in relation to the 1999 order just does not seem credible after his previous responses, his letter dated January 10 2001 to Petroquimica (part of "D4"), and the fact that several of his witnesses gave evidence about purchases in 1999 and failed to mention that any of the boots had no lining.

84. What is the evidence in relation to the fitness of the boots as water boots? Essentially Petroquimica's witnesses have said that, though Mr. Logan had made complaints to Petroquimica prior to December 2000, none of those had been to do with the quality of the boots. Having received the boots in August 2000, and paid US\$10,000.00 on account of the purchase price, M.P.M. raised complaints about certain alleged defects in the water boots in December 2000. In January 2001 in response Petroquimica sent representatives who inspected the shipment and noted only small irregularities affecting 191 pairs of boots. According to the witnesses from Petroquimica these aesthetic effects did not affect the performance of the boots, they were waterproof. This is because even if the cotton lining is exposed, meaning there is no P.V.C. over it, the water cannot go through because the PVC and the cotton are melded together. These small portions of exposed liner are actually covered over or fused with the PVC. Nevertheless, credit was given for these

191 pairs in the sum of US \$750.93 reducing the total amount due from M.P.L. to US \$ 18,555.26. The Defendant M.P.L. was also given a further credit for US \$63.84 in respect of a previous transaction so that the balance due and owing from M.P.L. to Petroquimica is US\$18,554.03. Petroquimica also gave evidence that this was not the first transaction, it was the fourth transaction in which M.P.L. was ordering Goliat water boots from Petroquimica. There was also evidence of the reputation of the water boots made by Petroquimica, and the witness Cordell Samuels spoke very highly of the quality of the water boots, noting in particular that the boots were of good durability and that cracks were absent.

85. M.P.L.'s witness Mr. Williams testified that he found the water boots were not durable and were porous. However, Mr. Barnichta Petroquimica's Production Manager testified that the water boots were not suitable for industries such as that of Mr. Williams. He stated that the water boots cannot, (there had earlier been some problems because of Mr. Barnichta's accent and the fact that Spanish, and not English, is his main language as to whether he said "can" or "can't", but I have accepted that he said and meant, consistently with his Witness Statement, "cannot"), be used in the poultry or meat industry, or in an environment with acid, bleach or oil industry. He said that PVC stands for poly-vinyl and chloride, which is a chemical compound. The main characteristic of this compound is flexibility, durability and hardness. Because it has these characteristics, P.V.C. is used in modern form of plastics and is used to make many appliances. Mr. Barnichta said that the Goliat boots use a specific P.V.C. for the water boots. Each PVC has its own characteristic so if you want to have a water boot that is, for example oil resistant, one has to use a PVC with that characteristic.

86. I note that as it is in relation to all of the witnesses, called by the Defence, there was no attempt to furnish documentary proof of the Invoices or orders made by these persons. In addition, although these witnesses claimed to have made written complaint, no copies or original documents were furnished to the Court. To be contrasted is the detailed, document-supported evidence of

Mr. Cordel Samuels, former Marketing and Development Manager of Hardware and Lumber Ltd in relation to purchases of water boots from Petroquimica.

87. Mr. Stern spoke of purchase and of making complaint some thirteen months after purchase. He did not purport to have first hand knowledge of the alleged poor quality of the water boots.

88. Perhaps however, one of the most telling aspects of the Defendant's case in terms of credibility, is the evidence of Mr. Medford Lewis. Again, nowhere in his evidence was evidence of proof of purchase produced and again, he mentioned a letter of complaint which was produced neither by him nor by Mr. Logan. However, I am not disposed to believe a witness who failed to mention that he is and was at the time of the alleged purchase, a director of the Defendant Company M.P.L. I agree with Mr. Kellman that this would have been a most germane fact to reveal in his evidence, since he must clearly fall into the category of witnesses who are connected and therefore not independent. I cannot help but think that this was a deliberate omission, since in his Witness Statement he mentions that he purchased the boots, from Fire Equipment Sales and Services Limited, at 6 Park Avenue, Kingston 5. In amplifying his evidence in examination-in-chief, Mr. Lewis said there is another company that operates from 6 Park Avenue, Kingston 5. That other company is M.P.L. so Mr. Lewis' mind was clearly directed to the identity of the Defendant M.P.L. as an entity and yet he failed to mention his relationship as a Director. It is only in cross-examination that Mr. Logan confirmed that Mr. Lewis was in fact a Director of M.P.L. I reluctantly infer that both Mr. Logan and Mr. Lewis would have had me conclude that Mr. Lewis was merely an independent customer of the Defendant company, instead of being a highly connected person.

89. I now turn to look at the evidence of, Mr. Davis of the Bureau of Standards. Mr. Davis prepared two reports, one in 2001 and one in 2004. The findings of both reports are markedly different. In the 2001 report prepared at the request of M.P.L. it was concluded that 62 % of the sample size were defective, while in the 2004 report requested by Petroquimica it was concluded that only 29% of the sample were defective for exposed lining. In the 2001

report there was found to be leaking in one sample. The 2004 report said there were no signs of leakage.

90. Mr. Davis in response to questions aimed at ascertaining whether it was strange that both reports had different percentage sample defects, said that it was not necessarily strange because he learnt that M.P.L. had tried to clean up some of the stock to sell it. However, he says that the nature of the goods is such that under storage, the goods would not deteriorate, also the defect is at manufacture and would remain throughout. Mr. Davis explained that in a situation to do with statistics, one takes a sample, one does not normally test the whole stock. One takes a representative sample and should get almost the same result because there is no way that the thread could now come and be on the boot when in storage, it would have to take place from manufacture.

91. Having considered Mr. Davis evidence and the two reports carefully, I agree with Mr. Kellman that the explanation for the discrepancies about the alleged cleaning up by M.P.L. does not really provide a plausible explanation, especially in relation to leaks since I do not accept that a clean up exercise would solve a leak. I have to say that I do not find Mr. Davis' evidence particularly helpful, because even if one accepts that since the samples examined were completely different ones each time, upon each of the two inspections, they are supposed to be a representative sample and on Mr. Davis' own evidence, there really should not be such large variations in the findings. To my mind, the findings and explanations to a considerable measure defy logic and/ or there is no proper and reasoned conclusion that one can come to in relation to the whole batch of 7440 pairs of water boots shipped, or in relation to the 5454 pairs of boots which were available for inspection. In addition, since the sample size taken was capable of having such varied results, it seems to me that even if the results of Mr. Davis' testing are correct, it is possible to conclude that any adverse results obtained, such as leaking, applied only to 191 pairs of boots for which M.P.L. has already been given credit by Petroquimica. It is also true as Mr. Kellman pointed out that Mr. Davis does not have any expertise in production or properties of water boots.

Further, or alternatively, given that Petroquimica had no input into the 2001 report, whereas both parties had input into the 2004 report, and given Mr. Logan's evidence that he had certain samples which he did not show to Mr. Davis which he says had no lining, the 2004 report is to be preferred to the 2001 report. Though that report speaks of lining being exposed through the PVC upper, it indicates that there was no leakage.

92. On the other hand, whilst I appreciate that both Mr. Barnichta and Mr. Cabral are employed to Petroquimica, and therefore cannot be said to be independent witnesses, they both impressed me as being highly qualified professionals and as having expertise in relation to this matter of the production and manufacture of water boots. Their explanations as to why they considered the lining problem merely an aesthetic one, commends itself to me.

93. As regards Mr. Logan's evidence, I have already pointed to some areas where I was not impressed with his credibility. However, I must say that I find the Counterclaim as amended somewhat strange. In this Counterclaim, the Defendant M.P.L. is asking the Court to award over US \$600,000.00 under heads such as Loss of profits on sale of the water boots for over US \$328,000.00, and cost of storage, security and insurance of these water boots which are said not to be of merchantable quality. In addition there is a claim for over US \$35,000.00 for the value of the water boots in stock. As regards the claim for security and insurance, would M.P.L. be asking the Court to accept that it spent/ threw away good money after bad? I feel justified and bound to say that it is clear that this Defendant has been prepared to go to considerable lengths to set up a claim in extinction of the purchase price agreed with Petroquimica.

94. Having had the opportunity of seeing and hearing the witnesses in this case, I found the witnesses for Petroquimica more credible than those called for the Defendant and the evidence of Petroquimica's witnesses is far more cogent, probative and reliable on the issue of whether the Goliat water boots were fit for use as PVC water boots with liner.

95. I find as a fact that the water boots did have liner. I find that there were 191 pairs of boots which had minor lines and lining showing over the upper. Though the letter of January 10 2001 referred to 25 to 50 dozen boots, the letter said such numbers, may have had the problem and this was before the inspection in 2001. The inspection which Mr. Barnichta conducted was adequate for the purpose by examining the boots through the plastic, since the plastic was transparent. Whilst the leakage test is a test that has as its object to ascertain whether the boots are water proof, or whether there is leakage, it is not the only test and I accept that the visual test performed by Petroquimica was adequate in the circumstances. I find that these imperfections were negligible and were aesthetic blemishes which would not affect the overall performance of the water boots. I accept that the water boots would still be water proof and would not leak water because the cotton lining and the PVC are merged or molded together. The fact that the outer plastic covering left some parts of the inner lining visible from the outside would not affect the boots water proof nature because the PVC would still be carrying out its waterproofing functions. I accept the evidence of Petroquimica's witnesses as to its manufacturing process, quality control measures, and the use of top of the line equipment from Italy. I also accept Mr. Barnichta's evidence that these water boots were to be water proof only and that their normal use and purpose was not for use in the meat industry or in environments involving oil and chemical industry. I reject Mr. Davis' conclusion as to the effect that exposure of the lining would cause. In any event, even if Mr. Davis were correct, based on the variation in his 2001 and 2004 findings I could not accept that any conclusions drawn by him apply to the whole stock of water boots, statistically or otherwise.

96. I therefore find that the water boots were of merchantable quality and that the Defendant M.P.L. is liable to the Claimant Petroquimica.

97. The claim here is in respect of a money debt where the money of account and payment between the parties is foreign currency that is, United States dollars. The Claimant is therefore entitled to judgment in the foreign currency.

In **Jamaica Carpet Mills Limited v. First Valley Bank**, reported at 23 J.L.R. 338, our Jamaican Court of Appeal, following the House of Lords case of **Milliangos v. George Frank (Textiles) Limited** [1975] 3 All E.R. 801, held that where a Claimant is entitled to judgment in a foreign currency, the judgment should be for the foreign currency or the Jamaican equivalent at the date of payment. In **Milliangos v. George Frank (Textiles) Limited (No. 2)** [1977] 1. Q. B. 489, it was held that interest in that commercial case could be recovered according to the proper law of the contract and was awarded at a rate at which the Claimant could reasonably have borrowed in the foreign currency in the foreign country. Here, there is no such evidence before me nor is there evidence as to the rate at which one could borrow US dollars in Jamaica. Interest is being claimed at the rate of 12% per annum, the interest rate applied at the relevant time to judgment debts. This is a commercial case, but it involves foreign debt. I am prepared in the circumstances to exercise my discretion and to award interest at the rate of 6% per annum.

98. There will therefore be judgment for the Claimant Petroquimica against the Defendant M.P.L. on the Claim in the sum of US\$18,554.03 or the Jamaican equivalent thereof at the date of payment. Interest is awarded on the said sum at the rate of 6% per annum from the 1st September 2000 to the 25th April 2008. There will also be judgment for the Claimant on the Counterclaim. Costs are awarded to the Claimant to be taxed if not agreed or otherwise ascertained.