THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV2008/0641

BETWEEN

SAFFRON LIMITED

Claimant

AND

ANGEL ESTATES LIMITED

Defendant

Appearances:

Dr. David Dorsett for the Claimant
Mr. John Fuller and Ms. N. Spencer for the Defendant

2012: November 13

JUDGMENT

[1] **REMY J.**: The dispute in this case arises in respect of a written lease agreement (the Lease Agreement) between the Claimant and the Defendant. The Claimant company was at all material times a tenant of the Defendant. The Defendant was at all material times the owner of property situate at Jolly Harbour, Antigua. The property comprised a portion of land together with a building erected thereon, out of which building the Claimant operated a restaurant business, namely Saffron Restaurant (Saffron).

BACKGROUND FACTS

[2] By a contract dated 2nd October 2006, the Defendant granted a 21 year lease to the Claimant whereby the Claimant leased a portion of the Defendant's building; that

building also housed the Defendant's casino and sports bar and restaurant, which were on the ground floor of the building.

[3] Included in the terms of the lease was the provision of utility services to the Claimant to include electricity and water, which services were to be paid for by the Claimant to the Defendant for onward payment to the relevant statutory bodies. It was therefore understood that the leased premises would be supplied with electricity and that it would be the duty of the Defendant as the landlord so to do, and not that of the tenant, whose duty was to pay for the electricity supplied.

[4] In late 2007, the Defendant's company was in dire financial straits and unable to pay for its electricity; as a result, APUA suppressed electricity to the Defendant's premises. As a result of the suppression, the Defendant ran its generators for approximately one (1) year into 2008. Throughout that period, the Claimant continued its operations, using electricity provided by the Defendant.

[5] According to the evidence of Mr. Velardi, the Managing Director of the Defendant Company, in the beginning of May 2008, the Defendant was unable to purchase diesel to run its generators due to its finances. He informed Mr. Martel, the Managing Director of the Claimant company, that the Defendant company would be obliged to discontinue providing electricity from its generators. The Claimant company rented a generator and continued the running of the Saffron restaurant until the 2nd October 2008. During that period of time and until the end of August 2008, the Claimant paid rent to the Defendant.

[6] Mr. Velardi further states that, at the end of August 2008, Mr. Martel informed him that he would be sending their chefs on vacation, in anticipation of the upcoming season. Mr. Martel did not tell him that he would be closing down the restaurant; he was of the opinion that Mr. Martel was preparing to re-open as normal during the peak season.

[7] As a result of the Defendant becoming bankrupt, it ceased its operations of the casino, sports bar and restaurant, on the ground floor of the building.

[8] Mr. Martel closed the restaurant sometime in mid-September 2008 for holidays for three weeks. According to the Claimant's Reply to Defence, the Claimant did in fact re-open its restaurant after the 2008 annual vacation, but on opening night, "the lights went out". The Defendant however alleges that, after the holiday closure, the Claimant never re-opened the restaurant. It is Mr. Martell's contention that the closure of his company's restaurant was due to the Defendant's failure to provide electricity for which they have been found liable. He states that the Defendant acted in breach of its obligation with respect to the supply of electricity and because of this, the Claimant's restaurant was forced to close.

THE CLAIM

[9] By an Amended Claim Form filed on 14th April 2009, the Claimant brought a claim against the Defendant for breach of contract arising out of the Lease Agreement for failure to provide electricity to the premises leased by the Claimant as agreed.

[10] In its Amended Statement of Claim, the Claimant claimed damages as follows:-

a) Special damages of $15,190,031.95.
b) Damages for breach of contract.

The Claimant also claims interest and costs.

[11] On 8th October 2009, a Consent Order was entered into by the parties whereby judgment was entered against the Defendant with damages to be assessed.

[12] The sole issue before the court is the quantum of damages.

THE LAW

[13] The law is settled that damages for breach of contract are intended to put the injured party (the claimant) in the position, as far as money can do it, as he would have been if

there had been no breach. The claimant must, however, take all reasonable steps to mitigate the loss consequent on the breach.

[14] As stated by the learned writers of McGregor on Damages[1]:-

> "The first and most important rule is that the claimant must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid. Put shortly, the claimant cannot recover for avoidable loss." The learned writers go on to state that "it is the loss that has to be avoided and not the wrong itself." (see the first supplement to the 18th edition.)

SUBMISSIONS OF COUNSEL

[15] Counsel for the Defendant submit as follows:-

(a) The law does not generally allow an injured party to simply take no steps whatsoever to minimize its loss and then claim a balloon sum after having so failed to act. The law imposes on an injured party a duty to take reasonable steps to minimize its loss: British Westinghouse v Underground Railways [1912] AC 673. Failure to do so will result in the injured party being able to recover only a reduced amount on any claim.

(b) The duty to mitigate commences from the time when the Claimant becomes aware of the breach: - The Superhulls Cover Case (No.2) [1990] 2 Lloyds Rep. 431 at 461. From the evidence, the Court is asked to note that the Claimant was kept informed by the Defendant and that the Claimant had at least four months notice of the impending situation of the Defendant's inability to continue to provide the Claimant with electricity.

[1] 18th edition, page 236, paragraph 7-004

(c) The Defendant's case – as put to the Claimant's witness Mr. Keith Martel - is that the Claimant simply failed to take any or any sufficient steps to mitigate its loss. The Defendant contends that the Claimant simply saw the Defendant's inability to perform that portion of the contract as an "out" for the Claimant and that the Claimant in effect rested on its laurels and took no steps to avoid or minimize any loss which it may have suffered.

(d) Where the Claimant fails to actively mitigate, he is not entitled to recover further loss for instance in respect of deprivation of opportunity to make a profit: Hussey v Eels [1990] 2 Q.B. 227.

[16] It is the further submission of Counsel for the Defendant that:-

(i) There is absolutely no evidence of the Claimant having even attempted to seek alternate premises from which the restaurant could operate; this would have been one of the first steps taken by any reasonable businessman. Businesses relocate regularly and it is entirely reasonable to expect that the Claimant could and ought to have looked into this possibility and taken steps to this end.

(ii) The Claimant never applied to Caribbean Developments (Antigua) Limited (CDAL), the management company for the Jolly Harbour area and which provided electricity from its own power plant there for the entire area.

(iii) The Claimant did not look into sourcing any generator which could have been used as an alternative source of power. In fact, the Claimant so failed to look into this option that he could not when asked under cross-examination, indicate the cost of this. The Claimant simply did nothing in this regard.

(iv) The Claimant refused the Defendant's offer of reimbursement to the total sum of $50,000.00 towards the expenses involved in acquiring an alternate source of electricity. Part of the Claimant's duty to mitigate may involve a requirement for the Claimant to reasonably accept from the party in breach a different

arrangement than that originally agreed between the parties. The Claimant's refusal to accept the Defendant's offer was unreasonable in all the circumstances.

(v) The utter lack of any evidence from the Claimant that upon deciding to go the drastic route of closing down the business entirely, of any effort on its part to sell its stock or assets or otherwise actively seek to minimize losses.

[17] Learned Counsel for the Defendant further submit that from at the latest May/June 2008, the Claimant was aware of the significant challenges being faced by the Defendant in continuing to provide electricity to the premises and that the Defendant was likely to be unable to continue to provide electricity. Mr. Martel admitted under cross-examination that since around May/June 2008 another tenant in the same building owned by the Defendant had connected to the power from CDAL and that he, Mr. Martel was aware since this same time of the switch made by the other tenant, - Mr. Steve Barker. Despite knowing this, apart from an attempt to connect to APUA directly, the Claimant made no effort to source power otherwise to facilitate the continued operation of the restaurant at the premises.

[18] Learned Counsel further contend that the court will take judicial notice that some of the monies claimed as losses are monies which were not expended or lost directly as a result of the breach, but are instead monies which would have had to have been expended even if the contract had survived. With respect to the claims being made in respect of monies and salaries lost by Mr. and Mrs. Martel, Counsel note that under cross-examination, Mr. Martel accepted that neither he nor his wife were claimants in the matter. It is further submitted by Learned Counsel that these sums in respect of lost directors' salaries, do not fall under losses of the Claimant company and ought to be rejected by the court in any event.

[19] The rival submissions of Learned Counsel for the Claimant, Dr. Dorsett are as follows:-

a) The "pith and substance" of the Defendant's case was that the Claimant failed or refused to mitigate its loss by connecting to a CDAL power supply.

b) It is settled law that the onus is on the defendant who must show that the claimant ought, as a reasonable person, to have taken certain steps to mitigate his loss, and that the claimant could thereby have avoided some part of his loss. The conventional approach that the onus falls on the defendant is an approach that is "soundly based" – Geest plc v Lansiquot [2002] 1 WLR 3111 at [14], per Lord Bingham of Cornhill.

c) The burden is on the Defendant to prove that in not connecting to CDAL the Claimant acted unreasonably. The burden is on the Defendant to prove that (1) connecting to CDAL was reasonable in that it was plainly and unambiguously known (and not a matter of speculation) to the principals of the Claimant that there was an adequacy of supply from CDAL and (2) this supply was available without subjecting the Claimant to financial risk.

THE DUTY TO MITIGATE

[20] I will now address the issue of what Dr. Dorsett states "is the pith and substance" of the Defendant's case. In paragraph 9 of its Defence filed on the 24th January 2012, the Defendant pleads as follows:-

> "The Claimant failed or refused to mitigate its loss by connecting to the CDAL power but did in fact operate on generator power until about the 20th of October, 2008 notwithstanding Mr. Velardi's repeating often that the Claimant could connect to CDAL power. ....."

[21] Dr. Dorsett in his submissions contends that the evidence of Mr. Martel was that he had been informed that the 45KVA supply from CDAL was not sufficient to operate Saffron Restaurant. In his Affidavit filed on the 1st March 2011, in response to that of Mr. Anthony Velardi filed on the 1st February 2011, Mr. Martel deposed that in or about June 2008, he approached Mr. David Watson, Chief Engineer for CDAL and made inquiries of him as to whether it was possible for Saffron to obtain electricity power supply from CDAL. Mr. Watson advised him that connecting to CDAL "was not a

feasible option at that time." Further, that Mr. Watson advised him that Saffron required at least 125 KVA and that the excess capacity of CDAL was 45KVA.

[22] I do not accept Mr. Martel's evidence. Mr. Watson was adamant in his evidence under cross examination that he only advised Mr. Martel of the maximum available power of 45 KVA and that he did not know if that would have been enough for his needs. Under re-examination by Mr. Fuller, Mr. Watson testified that he never told Mr. Martel that he needed "X or Y KVA", because "he is not familiar with the restaurant."

[23] According to Dr. Dorsett, the engineers, namely Mr. Watson and Mr. Owen, suggested that costly measures would have had to be undertaken to at best salvage the situation.

[24] Dr. Dorsett further submits that the Claimant's failure to expend $200,000.00 was not unreasonable. That an outlay of that magnitude would have placed the otherwise sound financial position of the company in a precarious position and that the size of the outlay itself was a significant outlay without the guarantee of secured returns. He adds that "Mr. Watson and Mr. Owens suggested that the Claimant might have been able to keep the lights on if it was able to fork out $200,000.00 on imported electrical devices."

[25] With respect to the above submission of Learned Counsel, the Court notes the following:-

a) Mr. Martel did not make inquiries of Mr. Watson or of Mr. Owen as to what amount of power would be required to run the Saffron.

b) Neither Mr. Watson nor Mr. Owen was called by the Claimant to give evidence to state what is being alleged by Dr. Dorsett. The engineers were subpoenaed by the Defendant.

c) There is no evidence that, prior to the Claimant's closure of the Saffron Restaurant, that either Mr. Watson nor Mr. Owen told Mr. Martel that the sum of $200,000.00 was needed on imported electrical devices.

[26] The question of whether or not the expending of the sum of $200,000.00 would have exposed the Claimant to financial risk as contended by Dr. Dorsett simply does not arise, and is therefore not a basis for concluding that the Claimant "was not unreasonable in refusing to undertake such a risk," as submitted by Dr. Dorsett.

[27] The case of **Payzu, Limited v Saunders**[2] tells us that "the question what steps a plaintiff in an action for breach of contract should take towards mitigating the damage is a question of fact and not of law."

[28] In assessing reasonableness, while it has been said that the claimant is "not bound to nurse the interests" of the defendant, it has also, and for long, been said that the claimant must act with the defendant's as well as his own interest in mind.- per Channell J in **Smailes v Hans Dessen**[3]. The claimant is not under any obligation to do anything other than in the ordinary course of business. He need not risk his money too far; he need not do anything to damage his commercial reputation. He is however obliged to take some action; inaction is not an option.

[29] Turning to the instant case.

[30] What would a reasonable businessman, in the shoes of the Claimant do? The Claimant had a 21 year lease. Only 18 months of this lease had elapsed. The Claimant closed the restaurant ostensibly for vacation for three weeks, and did not re-open. It is the Claimant's contention that it was forced to cease the operation of its restaurant on account of the Defendant's non-provision of electricity.

[31] If, as stated by the Claimant, connecting to CDAL power was not an option, was the Claimant absolved from taking any other steps towards mitigating its loss? Based on the authorities, the answer cannot be in the affirmative. It is the view of the Court that,

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[2] [1919] 2 KB 581
[3] [1906] 94 L.T. 492 at 493

notwithstanding the Defendant's breach, the Claimant was compelled, in the circumstances, to take one or other of the following steps:-

a) Renting or purchasing a generator to provide electricity. The evidence before the Court is that when the Defendant stopped supplying electricity from their generators to the Claimant in late May 2008, the Claimant rented a generator at a cost of $100 U.S. per day. Mr. Martel's evidence is that this generator powered the restaurant and "other areas that they needed to function." He stated that this generator was a 125 KVA which was "the minimum that was needed." He stated that he attempted to find the cost of a generator like the one he rented, but when asked under cross-examination what was the cost, he responded, "I did not investigate that."

b) Re-locating to alternative premises.

[32] Would a reasonable businessman in the shoes of Mr. Martel seek alternative premises to re-locate the restaurant as submitted by the Defendant? The Court is of the view that the answer to this question has to be in the affirmative. Mr. Martel and/or the other Directors or Managers of the Claimant company ought to have, as reasonable businessmen, sought an alternative venue to operate their restaurant. There is no evidence before the Court that they even attempted to obtain alternative premises. There is no evidence that the premises occupied by the Claimant had a distinctive feature which no other premises could provide, or that the ambience could not be duplicated elsewhere.

[33] Mr. Martel also gave evidence that he made enquiries of APUA and offered a deposit of $20,000.00 as a gesture to encourage them to supply electricity to his company's restaurant. He adds that this offer was not acceptable "given the millions owed by the Defendant Company to APUA." The Court notes that Mr. Martel offers not a shred of evidence of this. There is no evidence of any correspondence between Mr. Martel and APUA either by letter, fax, email or otherwise.

[34] The Claimant chose the option of closing the restaurant at the Defendant's premises. Having done so, it did not re-locate the restaurant to alternative premises. At the time of the closure of the restaurant, the Claimant had another 19 years on the lease remaining; it chose to sue for the unexpired portion of the lease – i.e. – the remaining 19 years.

[35] It is the Claimant's contention that it did all that it reasonably could do to stay in business. I disagree. The facts do not support the Claimant's contention. What the facts do disclose is that the Claimant sat back and did nothing; there was no attempt to find alternative premises; there was also no attempt made to obtain an alternative power source by way of purchase or lease of a generator so as to keep the Saffron Restaurant open. Mr. Martel did not even attempt to find out what a generator would cost. He cannot therefore even suggest that the purchase of a generator would have exposed the Claimant Company to unreasonable financial risk.

[36] The rule of law in relation to mitigation of damages was stated by Cockburn C.J. in **Frost v Knight**[4] as follows:-

> "In assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been, or would have been, diminished."

[37] In similar vein, Saunders J.A. in **International Motors Limited and Ronnie Thomas**[5] stated:-

> "The law is that a person bringing a claim for damages should act reasonably in seeking to mitigate the damages. Even though you have a good, solid claim against a defendant, the law expects you to behave in a reasonable and responsible manner to ensure that the damages suffered or incurred are not greater than they reasonably ought to be. The law will not allow you to recover loss that could and should have been avoided".

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[4] 20 WR 471
[5] Civil Appeal No. 7 of 2002

[38] The Court is of the view that the response of the Claimant to the Defendant's breach was not reasonable in the circumstance. The Claimant was required to take all reasonable steps to lessen the damage resulting from the Defendant's breach. It was not entitled to sit back and suffer loss which was avoidable by taking steps which a reasonable and prudent businessman would take. It took no steps to mitigate its loss.

QUANTUM OF DAMAGES

[39] As stated above, the law is settled that damages for breach of contract are intended to put the claimant in the position he would have been in if the contract had been performed so far as possible through money.

[40] A claimant is allowed to recover loss of net profit not loss of gross profit. It is the duty of the claimant to prove his loss of profit. – per Barrow J.A. in **Josephine Gabriel and Company Ltd. vs Dominica Brewery & Beverages Ltd**[6].

[41] Learned Counsel for the Defendant submit that the sum of in excess of 15 million dollars claimed by the Claimant is "significantly flawed" on a number of grounds. Counsel contend that these errors are as follows:-

a. The Claimant filed in support of its claim an affidavit of Dr. Vincent Richards who prepared an estimate of the income that "would have been generated by the company had it continued as a going concern as a restaurant for the entirety of the 21 year lease as tenant of Angel Estate Limited."

b. From the statement, it is clear that there is an underlying presumption made by the deponent that the restaurant would have continued as a going concern. There is no guarantee that this would have happened or even that it was likely to happen.

[6] Dominica Civ. App. 10 of 2004

c. Dr. Richards under cross examination accepted that he did not conduct an audit of the figures and documents provided to him by the Claimant but that he accepted same "based on [his] judgment."

d. Although his affidavit was sworn in July, 2011, under cross examination, Dr. Richards indicated that he did not factor in the global recession. Under cross-examination, Dr. Richards conceded that this would have been a relevant and useful consideration and that his numbers would have to properly be "revisited" in light of the economic conditions.

ANALYSIS

[42] In the Particulars of Special Damage at paragraph 9 of its Amended Statement of Claim, the Claimant has listed 8 items which make in the aggregate a total of $15,190,031.95. These consist of:-

PARTICULARS OF SPECIAL DAMAGE

Item	Description	Cost
1	Personnel costs including severance pay and costs of return flights for chefs	$ 178,524.85
2	Cancelled event bookings	$ 114,000.00
3	Lost food and beverage stocks	$ 31,904.65
4	Generator costs inclusive of rental and diesel	$ 48,762.83
5	Promotional costs	$ 15,666.30
6	Compensation for summer closure	$ 7,873.32
7	Present value of loss profits to end of lease term in 2027	$14,658,300.00
8	Security deposit	$ 135,000.00
Total		$15,190,031.95

[43] It is trite law that special damages are to be specifically pleaded and strictly proved. In the instant case, therefore, the onus lies on the Claimant to show, on a balance of probabilities, that it is entitled to be re-imbursed for each item claimed. The Claimant must also establish that its loss was caused by the Defendant's breach of contract. Further, the Claimant is debarred from claiming any part of the damage which is due to its neglect to take such steps as are necessary to mitigate the loss consequent on the Defendant's breach.

[44] It is the submission of Learned Counsel for the Defendant that the Claimant's claim for special damages of $15,190,031.95 is "astronomical, exorbitant and unreasonable." Counsel contend that the Claimant is not lawfully entitled to the claimed sum. Counsel submit that "any damages awarded to the Claimant should not exceed the cost of US $20,000.00, being the cost of acquiring electricity from CDAL which option was available to the Claimant and of which option the Defendant voluntarily offered to bear the cost."

[45] Learned Counsel for the Claimant submits that that the Defendant "has not seriously challenged the evidence with respect to the damages suffered by the Claimant." Counsel agrees that the greater part of the claim ($14,658, 300.00) of damages of $15,190,031.95 is the "present value of loss profits to the end of the lease term in 2027."

[46] I will now address each item of Special Damages in turn:-

Item #1 - Personnel costs including severance pay and costs of return flights for chefs.

The Claimant claims for the above item the sum of $178,524.85. With respect to (a) - the severance pay, Mr. Keith Martel in paragraph 7 of his Affidavit filed on 19th November 2009, deposed as follows:-

> "All of the Claimant's employees had to be severed and paid their severance together with the statutory deductions. As it was the case that the electricity was cut off suddenly and without warning the dismissed workers had to be given their periodic wages in lieu of notice. These payments totaled $16,102.86. See Exhibit KM4."

[47] The Court notes that Exhibit KM4 referred to above merely shows: - "Pay in Lieu of Notice" with respect to 8 persons and Severance with respect to the same 8 persons. There is no evidence of payments made to the persons stated in KM4. There are no receipts, or any other form of documentary evidence that the said payments were in fact made to the employees. The Court notes further that no documentary evidence has been provided with respect to the amount of $14,490.00 as stated in paragraph 9 of the Affidavit of 19th November 2009. In any event, the said amount refers to "severance to be given" to the executive chef, three waitresses and the restaurant supervisor.

[48] With respect to (b) - the return flights, Mr. Martel states that 3 chefs were recruited from India. The chefs had to be repatriated to their homeland and required special visas which were to be obtained from the British High Commission in Barbados and that a total of $3,679.59 was expended with respect to the travel cost to Barbados. Mr. Martel further deposed that; travel arrangements had to be made to have the chefs transported to New Delhi, India, via a flight from St. Maarten. The cost of the visas was $1,755.06. The cost of the flights was $20,144.14. The documents which the Claimant has exhibited with his Affidavit to substantiate his claim for this item show that:-

(a) Sales receipt dated 7th August 2008 – invoice number 1468 and 1481 with respect to Kushal Singh. The description – Air France Credit Card - for a total of $7,280.80 plus $913.54 – for travel on 13th August – to 22nd September. If, as Mr. Martel alleges, the restaurant closed annually for the summer, this above amount cannot possibly have been the cost of re-patriating Mr. Kishal Singh to India as a result of the closure of the restaurant.

(b) Ticket # 2 - with respect to Mr. Ravinder Rawat - sales receipt dated 4th September 2008 - Sale no. SC 16847 – total $ 7,509.10. Again, this cannot possibly have been the cost of re-patriating Mr. Rawat to India, if the restaurant was due to be re-opened after the summer closure.

(c) Ticket # 3 – with respect to Mr. Pramod Unijal – dated 14th November 2008 – sale No. SC 17524 – cost of airline ticket – ONE WAY – to Delhi. Cost of ticket $4,410.70.

The Court is of the view that the one way ticket for Mr. Unijal might possibly be the only valid ticket for repatriation to India.

[49] In any event, the Court is of the view that, had the Claimant re-located to alternate premises, the costs of the return flights for the chefs would have been avoided. The Court notes also that the obligation to repatriate was an extant obligation in any event. The breach by the Defendant merely brought forward the time of repatriation.

Based on all of the above, Item #1 will be disallowed.

[50] Item 2 – Cancelled event bookings - $114,000.00

In paragraph 13 of his Affidavit, Mr. Martel deposed that: - "as a result of the forced closure, confirmed bookings for the restaurant were lost and the attendant revenue."
He adds that:-

(a) A booking from the International Women's Club of Antigua & Barbuda was lost - $15.000.00.
(b) A booking from First Caribbean Bank Ltd. was lost – this would have brought in $22,500.00.
(c) A booking from Jolly Harbour Yacht Club - $15,000.00.
(d) LIAT Unity Club had booked an event - $10,000.00.
(e) A small party of five by Dyana Regis was booked – the amount lost was $500.00.

The total of the "confirmed bookings" as indicated above is $63,000.00.

[51] The Court notes, however, that the Claimant has claimed the sum of $114,000.00 as special damages for the "cancelled event bookings." Paragraph 14 of Mr. Martel's Affidavit seems to address the discrepancy between the sum of $63,000.00 and the amount of $114,000.00 claimed under the above item 2. In paragraph 14, Mr. Martel deposes as follows:-

> "In December 2007 the restaurant generated revenue of $165,076.13. By the most conservative of estimates, the restaurant lost $51,000.00 in revenue in addition to the confirmed bookings. No less than $114,000.00 in earnings was lost as a result of the forced closure. See Exhibit KM8."

[52] It would appear, therefore, that the Claimant is now seeking to add the alleged "lost revenue" of $51,000.00 to the sum of $63,000.00 previously indicated as "confirmed bookings". The Court therefore finds that the sum of $51,000.00 forms no part of the "cancelled event bookings" and will be disallowed. Additionally, the Court also disallows the sum of $63,000.00 representing the total of the "confirmed bookings', as there is no evidence to support the amounts claimed. There is no evidence that any monies had been deposited to secure these bookings. The Court further notes that, as is evident from the attached email, the request for the "confirmed booking" referred to in (e) above was made in December 2008, two (2) months after the closure of the Saffron Restaurant. In any event, the Court is of the view that, since the Claimant took no steps to mitigate its loss by relocating to alternative premises, the above sums are disallowed. The Court further notes that the figures quoted are gross revenue figures, not net loss figures. The Court is in no position to calculate net loss from gross loss.

[53] Item - #3 - Lost food and beverage stocks - $31,904.65

In paragraph 15 of his Affidavit, Mr. Martel deposes as follows:-

> "The forced closure due to the electricity suppression resulted in a tremendous loss of food and beverage stock. Virtually all was loss (sic) save some beverage items that the company was able to return to various vendors. The food and beverage records show the stocks available at the end of September 2008, subsequent purchases made, and

> the stock on hand at the time of the forced closure. Records were also taken of any items returned. The loss incurred for lost Food & Beverage stocks totaled $31,904.65. See Exhibit KM9."

[54] Exhibit KM9 consists of some 8 pages of items. The Court notes that, although Mr. Martel deposes that "records were also taken of any items returned", that there is no record of the sum or sums re-imbursed for the returned items. In particular, there is no record of the beverage items returned to the vendors, and the sums re-imbursed for those items. The Claimant has provided no evidence of the actual amount lost. Notwithstanding that fact, the Court is cognizant of the fact that food items used in a restaurant are perishable and/or have an expiry date, and will therefore allow a nominal sum of $5,000.00 under this item of special damages.

[55] Item # 4 - Generator costs inclusive of rental and diesel - $ 48, 762.83

The Claimant has provided receipts for this item. This item is allowed; it is a loss flowing naturally from the Defendant's breach. The rental of a generator was a reasonable step which the Claimant took in order to mitigate its loss when the Defendant could no longer provide it with electricity from its generator.

[56] Item # 5 - Promotional costs - $15, 666.30

In paragraph 18 of his Affidavit, Mr. Martel deposed that:-

> "The Claimant had incurred promotional and advertising costs whilst in business. Much of this was prepaid and the benefit of the promotions was yet to be realized. The closure of the restaurant means that the Claimant will have forever lost the benefit of these promotional expenditures which amounted to $17,609.72. See Exhibit KM12."

[57] The Court is of the view that the Claimant cannot succeed in his claim for promotional and advertising costs whilst in business. The law is settled that a claimant will be unable

to recover damages in respect of the loss he has suffered if he cannot establish a causal link between his loss and the defendant's breach of contract. In the instant case, the Claimant would have had to incur promotional and advertising costs in any event, even if there had been no breach by the Defendant. This is part of doing business. Promotion and advertising were necessary in order for the Claimant to generate business and make profits. In the view of the Court, the Claimant therefore has failed to establish that the promotional costs which it claims, are a loss which was caused by the Defendant's breach. The Court therefore disallows item # 5 above as an item of special damages.

[58] Item # 6 - Compensation for summer closure - $ 7, 873. 32.

In paragraph 19 of his Affidavit, Mr. Martel deposed that:-

> "The sum of $7,873.32 is also claimed with respect to compensation for closure during the summer when there was intermittent supply of electricity. This is based on an offer of $50,000.00 from Mr. Anthony Velardi, principal for the Defendant, less amounts that were paid for security, insurance, water, and generator use."

[59] Mr. Martel does not state exactly what period of time he claims that there had to be closure "when there was intermittent supply of electricity." He has however stated in paragraph 5 of his Affidavit filed on the 1st March 2011, that a vacation was scheduled during the period September to October 2008.

[60] If, as Mr. Martel contends, the restaurant would have been closed for vacation during the off-season for some time between September to October, then it follows that that vacation was scheduled. The Court is of the view that, since the closure was a scheduled closure, the Claimant cannot claim compensation for summer closure. The above item #6 – is therefore disallowed.

[61] Item # 7 - Present value of loss profits to end of lease term in 2027.

By far the most controversial item of Special Damages claimed by the Claimant is Item #7 - Present value of loss profits to end of lease term in 2027. - $14,658,300.00.

[62] In his Affidavit filed on the 19th November 2009, Mr. Martel deposed inter alia that:-

> "The Claimant's business was a going concern and a thriving business. The Claimant had a 21 year lease. As a result of the closure arising from the Defendant's breach, "the future stream of income that would have been realized is now all gone....An analysis conducted by Dr. Vincent Richards indicates that the present value of the future stream of income using a discount rate of 5% would be US $5.249 million or the equivalent of EC $ 14,658,300.00"

[63] The Claimant relies on the evidence and report of Dr. Vincent Richards to establish its claim to item #7 above. The Court notes from the outset that Dr. Richards was not an expert witness as his "report" in no way complies with the requirements of Part 32.14 of CPR. The Court notes, however, that no objection was taken to the said report by the Defendant.

[64] In his Affidavit filed on the 19th July 2011, Dr. Richards, deposes, inter alia, as follows:-

> Parag. 3 - "In 2009 I was asked by Saffron Limited to perform an analysis of its financial performance and based on this analysis to provide **an estimate of the income that would have been generated by the company had it continued as a going concern as a restaurant for the entirety of its 21- year lease as a tenant of Angel Estate Limited**." (my emphasis)
>
> Parag. 4 - "In performing my analysis I examined the financial and accounting records for Saffron Limited for the fiscal year 2007 (December 2006- November 2007) and the first half of the fiscal year 2008 (December 2007 – May 2008.)....."

Parag. 8 - "The income statement for the 1st half of fiscal year 2008 indicated that Saffron Ltd. produced revenue (or sales) of US $ 279,057 with its cost of sales being US $86,529 resulting in gross profit of US $192,528. The company's operating expenses were US $167,055 resulting in an operating profit of US $25,473. ....."

Parag. 9 - "As the company would have been the beneficiary of a carry-over for loss incurred in fiscal year 2007, it would have incurred minimal corporate tax liability for fiscal year 2008."

[65] Under cross-examination, Dr. Richards testified that what he prepared for the Claimant was called an Income Projection. This was based upon income statements for a year and a half; they also had the balance sheet information as well. He prepared the balance sheet; the balance sheet was prepared from information provided to him by Mr. Martel; he did not do an audit. He stated that while an audit was not done in preparing the income statements and balance sheet, he took the opportunity to look at "a substantial amount of the documentary evidence related to the transactions of the business." The documentary evidence consisted of invoices, records relating to sales, as well as the lease agreement.

[66] Dr. Richards testified that the first six (6) months of 2008 resulted in a net operating profit of $25,423.00 U.S. When asked by Counsel for the Defendant whether he used that information to forecast an income over 21 years of $10,595 million U.S., Dr. Richards replied that he used that information as well as other analyses and assumptions. He stated that "for example, you look at the competition, the market niche that the business is engaged in, the environs, the national economy and the prospect of growth in the national economy; you look at the international environment and in particular those countries that Antigua and Barbuda has important relationships with." Dr. Richards testified that he prepared this report in 2009. He agreed that since then, there has been a global downturn in the economy. He agreed that "it would be useful" to re-visit his numbers in light of that factor. Dr. Richards also agreed that he based his report on "an

underlying assumption" that Saffron had security of tenure to the premises. He agreed that "one would have to re-visit that assumption" if Saffron did not have security of tenure.

[67] It is quite evident that Dr. Richards' report is purely an estimate. His evidence states that this is so. As stated in his Affidavit, Dr. Richards has prepared "income projections" which "indicate that the cumulative operating income for Saffron Limited up to the end of its lease would have been US $10,595 million." Dr. Richards deposes that he has arrived at that figure by making the following **assumptions** (my emphasis) namely:-

> Paragraph 10 - "In determining what the projected operating income would have been for the company up to the completion of its lease I made the following assumptions:
>
> i. I assumed that the company would experience growth in revenue but that the growth would decrease over time, with revenue growth in fiscal 2008 being 35% and revenue growth in the last year of the lease been 10%. The growth would have been fuelled in part by the restaurant expanding its hours of operation, including luncheon service.
> ii. I assumed that the cost of sales as a percentage of revenue would decrease over time on account of efficiencies realized from gaining more experience in conducting the operations and from economies of scale. Cost of sales in fiscal year 2008 would be 30% and reduce to 25% at the end of the lease term.
> iii. I assumed that expenses as a percentage of revenue would also reduce in time as a result of economies of scale. Expenses as a percentage of income would be estimated at 60% for fiscal year 2008 and reduce to 55% at the end of the lease term.
> iv. Corporate income tax would remain constant at 30%, though the applicable rate is now 25%."

[68] Learned Counsel for the Defendant contend that there is no guarantee that the restaurant would have continued as a "going concern" as a tenant of the Defendant for the period of the lease (i.e. 21 years).

[69] Dr. Dorsett, on the other hand, submits that the Defendant "has not seriously challenged the evidence with respect to the damages suffered by the Claimant." He states that "the

Claimant claims damages of $15,190,031.95 of which the greater part ($14,658,300.00) is the present value of loss profits to the end of the lease term in 2027."

[70] It is the submission of Dr. Dorsett that:-

> "Evidence relating to the computation of the loss profits was given by Dr. Vincent Richards, a chartered accountant and economist. In his affidavit and in his oral evidence Dr. Richards explained how he arrived at his quantification of the loss. Dr. Richards made reference to his examination of various financial records and documents including ABST Tax Remittance sheets (e.g., ABST Tax Remittance Form at page 63 of the Trial Bundle.) An examination of the ABST Tax Remittance Form discloses that the form requires the reporting of four types of "supplies" and the calculation of "TOTAL SUPPLIES." A reading of section 6 of the Antigua and Barbuda Sales Tax Act 2006 discloses that "supplies" is the statutory language for what in every language is called sales. Dr. Richard's stated that taking into account the profitability of the Claimant's business and based his projections he calculated that the Claimant's business would, up to the end of its lease, have accumulated profit of US $10.595 million. When a discount rate of 5% is applied the present day value of such profit would be US $ 5.429 million or EC $14,658,300.00."

[71] The law is settled that in an action for damages for breach of contract, a claimant is allowed to recover loss of net profit not loss of gross profit. As stated by Barrow J.A. in the **Josephine Gabriel and Company Ltd. case**, supra "it is the duty of the claimant to prove his loss of profit." The facts of that case are as follows:-

> In October 1995 the parties entered into a distributorship agreement for the appellant to distribute the products of the respondent. That agreement ran for its scheduled duration of three years at the end of which the respondent gave notice of termination to take effect in October 1999. The parties thereafter entered into a new agreement to continue "for the next six or twelve months

under the general terms and conditions" of the expired first agreement. In a departure for the provision of the first agreement, the respondent reserved the right to sell its products directly to traders.

By letter dated 28th December 2001 the respondent terminated the new agreement by giving a month's notice. .....The trial judge determined that the notice period given by the respondent did not accord with what was required by the provisions of the new agreement and, therefore, that the respondent had terminated in breach of contract. The claimant/appellant claimed damages as follows:

> Loss of profit for 12 months $839,300.00
> Loss of goodwill $156,672.00
> Loss from discarding stationery advertising the respondent's product, $32,100.00."

[72] The trial judge awarded damages for breach of the notice requirement of $30,673.00 and for the loss of the discarded stationery of $5,000.00. Interest at the rate of 5% on the above sums from the date of the claim until payment was also awarded. The claimant appealed. One of the grounds of appeal was that the judge wrongly disregarded the calculation of loss put forward by the claimant's expert because it was based on an estimate. Barrow J., in delivering the judgment of the Court of Appeal, stated, in paragraph 18 of the judgment that ".....the main reason for rejecting the claim was the manifest truth that what was being claimed under the head of "loss of Profit" was clearly not loss of net profit but rather the loss of the cash flow to the business from selling the respondent's product. As the judge stated in paragraph [28] of his judgment, the appellant's witness "did not calculate net margin and as such could [not] establish the extent of its loss." In dismissing this ground of appeal, the learned judge stated: "I therefore find no merit in the complaint that the judge disregarded the calculation of loss put forward by the appellant because it was based on an estimate. To repeat, the judge rejected it because it was (sic) claim for gross margin or gross profit."

[73] The learned writers of Butterworth's Law of Contract[7] state, "... In pursuit of its compensatory aim damages for breach of contract are awarded on a "net loss" basis. Or put another way, an award of damages should not put the claimant in a better position than he would have been in if the contract had been performed and so secure "a massive and wholly unwarranted windfall."

[74] According to the learned writers of Butterworth's Law of Contract[8]:-

> "Damages for breach of contract generally seeks to compensate the victim for his loss rather than to punish the wrongdoer for his conduct. The general compensation aim means that in the absence of provable loss only nominal damages will be awarded."

[75] The Court is of the view that what has been presented to the Court by way of the report of Dr. Richards is not loss of net profit but an estimate of what the Claimant's accumulated gross profit was likely to be by the year 2027, based on a number of assumptions made by Dr. Richards. The chief and most fundamental of these assumptions is that the Saffron Restaurant would have continued as a going concern for the next nineteen (19) years, meaning that it would have been a successful and viable business for the remainder of the lease period. This is based on speculation and has no basis in practical economic reality. Dr. Richards stated that he assumed that the company would experience growth in revenue but that the growth would decrease over time, with revenue growth in fiscal 2008 being 35% and revenue growth in the last year of the lease being 10%. He also assumes that the growth would have been fuelled in part by the restaurant expanding its hours of operation, including luncheon service. This is all speculative. There is no evidence that the Claimant company had lucrative contracts for providing services to either individuals or companies for the next 19 years. There is no evidence that the restaurant would actually have expanded its hours of operation, or that it would have increased its profits or its clientele even if it had.

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[7] 4th edition, at page 1709, paragraph 8.8
[8] 4th edition, at page 1695, paragraph 8.1

[76] The Claimant could have suffered the same fate as several other businesses, not excluding the restaurant business. In times of economic hardship, people tighten their belts and watch their pennies. Their priorities are purchasing their basic necessities of life. Food, rent and paying off their loans are at the top of the list of priorities. Eating out at a restaurant is confined, if at all, to special occasions, like birthdays, anniversaries and weddings. The proprietors of restaurants, like the Saffron, would be largely dependent on the tourist industry. The Court takes judicial notice of the fact that, during the off season, business is so slow, that several business places, including restaurants and hotels, lay off staff.

[77] Given the above, it is not outside the realm of probability that the Claimant would have experienced a loss over the remainder of the lease period. In fact, the evidence before the Court is that the Claimant experienced a loss in fiscal year 2007. Further, in the view of the Court, the email dated 7th December 2008, exhibited as KM8 is very significant and very telling. This is an email from "Dorothy Martel/owner Saffron" to Dayana Regis; the subject states "RE: Reservation". The email reads in part as follows:-

> "Hi there,
>
> Many thanks for your reservation. Sadly we are unable to accept it as Saffron closed on 21st October 08 DUE TO GRAND PRINCESS CASINO CLOSING. AS WE ARE LOCATED ON THE 2ND FLOOR OBVIOUSLY IT AFFECTED US....."

[78] The Court is of the view that the above email perhaps discloses the real reason for the Claimant's closure of the Saffron Restaurant. The Court is of the further view that it is not unreasonable to infer that the above email discloses the fact that, had the Saffron remained open after the closure of the casino, the Claimant's business would have been negatively affected, resulting in a loss to the Claimant, and not the profit which was assumed by Dr. Richards .

[79] The law is settled that a claimant can recover no damages for a defendant's breach of a contract that, if it had been performed, would have resulted in a net loss to the claimant – see **C.C.C. Films (London) Ltd v Impact Quadrant Films Ltd**[9].

[80] As stated above, the Claimant is required to prove his loss of profit. In the view of the Court, it has failed to do so. Specifically, the Court is of the view that, based on the authorities as well as the totality of the evidence, the Claimant has failed to prove, on a balance of probabilities that it is entitled to Special Damages in the sum of $14,658,300.00 with respect to item # 7. Accordingly, item # 7 is disallowed.

[81] Item # 8 - Security deposit - $135,000.00

The Court notes that the above sum claimed in the Particulars of Special Damage is at variance with the amount stated in the Affidavit of Mr. Martel. In paragraph 22 of the said Affidavit, Mr. Martel deposed that the security deposit paid to the Defendant in the sum of $135,845.20 has not been returned to the Claimant. The Court further notes that the Lease Agreement addresses the issue of the security deposit in those terms:-

> "A security deposit of US $50,000.00 must be paid on or before the 30th September, 2006, in order to secure the commitment to lease the premesis (sic). This deposit is only refundable should the tenants remain the occupants of the leased premesis (sic) beyond a twenty four (24) month period."

[82] The Claimants remained the occupants of the leased premises for a period of eighteen (18) months, that is, six months less than the period stipulated in the Lease Agreement. The Court is of the view that the Claimant not remaining in occupation beyond the specified twenty-four month period is as a result of the breach by the Defendant. The above item # 8 is therefore allowed.

[83] My finding with respect to the claim for special damages is as follows:-

1. Item # 3 – The sum of $5,000.00 for lost food and beverage stocks is allowed

[9] [1985] QB 16

2. Item # 4 - generator costs inclusive of rental and diesel in the sum of $48, 762.83 is allowed.
3. Item #8 - security deposit - $135,000.00 is allowed.

Making a total of $188,762.83

DAMAGES FOR BREACH OF CONTRACT

[84] In its Amended Statement of Claim, the Claimant claims damages for breach of contract. In **British Westinghouse Electric and Manufacturing Company Limited vs Underground Electric Railways Company of London Ltd.**[10], the learned Judge stated that:-

> "It is the duty of a person suffering from a breach of contract to minimize the loss, and if that can be effected by the expenditure of a smaller sum of money that expenditure is the measure of damages."

[85] The Court's finding is that the Claimant did not take steps to mitigate its loss; in particular that the Claimant could have re-located the restaurant to alternative premises. As stated by Lindley LJ in **Grosvenor Hotel Co v Hamilton**[11], a case cited by Counsel for the Claimant, the expense of setting up in a new place would be recoverable as damages, as this would be a "natural consequence" of the Defendant's breach.

[86] Learned Counsel for the Defendant have submitted that "any damages awarded to the Claimant should not exceed the cost of US $20,000.00, being the cost of acquiring electricity from CDAL which option was available to the Claimant and of which option the Defendant voluntarily offered to bear the cost." Learned Counsel for the Defendant based this amount firstly on the report of Mr. Owen, which report is dated the 19th December 2008. As stated by Counsel in their submissions, both Mr. Martel and Mr. David Watson indicated in their evidence that they do not disagree with the contents of

[10] [1912] AC 673
[11] [1894] 2 QB 836

Mr. Owen's report. Based on the said report, the cost of materials and labour was $14,262.00 US. At the trial, Mr. Owen gave evidence that this estimated cost did not include freight and duty and that with those two additional costs included, the total would amount to approximately US $20,000.00.

[87] The Claimant has not provided the Court with any cogent evidence on which to make a finding as to the amount of general damages that should be awarded to the Claimant. The Court is however, left with the evidence of Mr. David Owen and Mr. Watson, the witnesses who were subpoenaed by Learned Counsel for the Defendant. Based on the evidence of Mr. Watson and Mr. Owen, as stated in paragraph 86 above, the Court is of the view that the amount of general damages to be awarded is U.S. $20,000.00 or its E.C. equivalent $54,000.00. Accordingly, the Court awards the sum of $54,000.00 as general damages for the breach of the Lease Agreement. I might remark that I am not unmindful of the email dated the 7th December 2008, referred to in paragraph 77 above.

ORDER

The Order of the Court is as follows:-

Damages are awarded to the Claimant as follows:-

1. Special damages in the sum of E.C. $188,762.83.
2. $ 54,000.00 E.C. for the breach of contract.
3. The Defendant will pay the Claimant prescribed costs in accordance with Part 65 of the Civil Procedure Rules (CPR) 2000.

JENNIFER A. REMY
Resident High Court Judge
Antigua & Barbuda