**IN THE EASTERN CARIBBEAN SUPREME COURT**
**TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE**

**CLAIM NO. BVI HC (COM) 62 OF 2012**

**BETWEEN:**

**GLANVILLE PENN**

**Claimant**

**And**

**THE ATTORNEY GENERAL**

**Defendant**

**Appearances:**

Mr Gerard St. C. Farara, Q.C., instructed by Messrs Farara Kerins for the Claimant; Ms Jo-Ann Williams-Roberts, Solicitor General and Ms Kaidia Edwards-Alister for the Defendant

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2016: July 18, 19, 20; 2017: March 2, 2017

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**JUDGMENT**

[1] **Wallbank J. [Ag]**: The Claimant is the owner of a restaurant catering facility at the Terrance B. Lettsome International Airport on Beef Island in the TVI. The Claimant does business as the Turtle Dove Restaurant. He has brought a claim on 22 June 2012 for damages against the Government for an alleged continuing breach of contract and claims US$4,426,511 together with legal costs. For convenience I shall refer to the Defendant as the Government, although the Claimant's various negotiations and exchanges were with a number of Ministries, Departments, a public authority, as well as direct representatives of the Government of the day.

[2] The Government has counterclaimed for unpaid rent in an amount of US$108,500, for a period from September 2002 to April 2005 at US$3,500 per month.

[3] The Claimant had started operating a catering outlet at the airport, when it was still known as the Beef Island Airport, some 27 years earlier. This was, or developed into, a snackette and bar inside the terminal building and what he described as a full service restaurant, known as "The Airport Restaurant", just opposite the old terminal building.

[4] It is not clear precisely what legal arrangement the Claimant had with the Government. No document was produced by either side evincing this. There were some other shops or outlets at the original terminal, but the Government did not produce any document in these proceedings for those either to be able to show the probable legal basis for the Claimant's presence. The Claimant claimed to have had a lease, and to have had a document, but that this had been lost in hurricane Hugo in 1989. The Government claimed that the Claimant had a mere license. In any event, whatever strict legal regime governed the Claimant's relationship with the Government, the parties' commercial relationship worked well enough, until it went seriously awry in 2002.

[5] In around 2001 word reached the Claimant that the terminal was going to be redeveloped.

[6] In September 2001 the Government published a public invitation to tender for various privately operated facilities and outlets at the new terminal building.

[7] One of these was for "passenger catering". The Claimant tendered for this on 25 September 2001, and he was informed that his bid had been accepted in around September 2002. The Claimant started operating his catering concession in the new terminal building on 15 November 2005, some three years and two months after his bid was accepted, and some three years and 7 months after he had been given notice to quit, in March 2002.

[8] The Claimant was not officially informed that he would have to cease his business at the old terminal until he received a letter from the relevant Ministry dated 19 March 2002. The new building had been formally opened a few days earlier, on 7 March 2002.

[9] This letter gave him notice that operations at the airport would transfer to the new terminal building. That in itself was not objectionable. However, and the Claimant was justifiably vexed about this, the letter told him that the terminal was going to close two days later on 21 March 2002 and that he had to remove his equipment within one week of the cessation of operations. The letter did apologize for the short notice, but this was cold comfort.

[10] This letter put relations between the Claimant and the Government on a wrong footing, and they stayed that way throughout the exchanges that followed. What ensued was a very protracted discussion, with various demands made by the Claimant, and assurances and proposals made by the Government, which culminated in this claim. Teasing out the legal effect of this train of exchanges, during which the bases kept shifting, has been no mean task.

[11] The first element of the dispute between the parties concerned the period of notice that the Claimant was entitled to. The Claimant asserted that he had a tenancy, terminable upon reasonable notice, which he said consisted in the circumstances of this case of notice not less than twenty four months in advance. The Government disagreed, contending that the Claimant had had an oral license only, with rent being paid on a month to month basis, and thus that he was not formally entitled to more than one month's notice to quit.

[12] The Claimant argues that the Government should have relocated his business to the new airport building, and that it had in fact promised that it would do so, but that it did not. The Claimant appears to rely upon the reference to transfer of operations in the letter dated 19 March 2002 that his business was going to be moved over to the new terminal building, but that reference could also be read as referring to airport functions *strictu sensu*, which did not include ancillary private businesses such as the Claimant's catering outlets. The Claimant also points out that the Government had relocated the other concessions to enable them to continue immediately without a break in their business, giving him a legitimate expectation of being treated similarly.

[13] The Claimant claims that he suffered loss of income in an amount estimated at $1,125 per day as a result of being forced to close his business without notice and as a consequence of the Government's failure to relocate him.

[14] It is clear to me that the Government made no representation that the Claimant's business would be continued into the new building. This is borne out by the fact that the Government required those who wanted to operate businesses in the new terminal building to tender for the concessions by way of open public tender, and the Claimant's tender was accepted over five months after he was given notice to quit. The Claimant's argument would have rendered the public tender process a charade. I am not persuaded that was the case.

[15] The next differences between the Claimant and the Government arose out of the document by which the Government invited the public to tender bids for the private concessions.

[16] This was described as concerning "Phase 1 development, New Airport Concessions".

[17] The General Information Summary section listed the passenger catering concession as one of several, identified generally "such as". The total area allocated for concessions was 4000 square feet. The passenger catering concession was described as comprising 340 square feet of kitchen space and 1500 square feet of dining area.

[18] The catering premises were described in the tender document, differentiating ground floor from first floor, as "Passenger catering by way of Restaurant, Buffet and/or Snack Bar."

[19] The Claimant contends that the tender document, properly construed, offered an exclusive right to the successful bidder to sell food and beverages at the terminal, with a bar.

[20] Paragraph 1 of the pertinent part of the tender document spoke in terms of "the unit", but the distinction between plural and singular was not respected elsewhere in that paragraph and it is unclear whether the singular was intended to comprise the plural.

[21] The tender document did not state in terms that the successful tenderer would have exclusivity in relation to that concession. The issue of exclusivity would continue to rankle.

[22] Paragraph 5 provided that "*the Condition* (sic) *of Tender shall contain therein a provision to the effect that no liability whatsoever rests with the Authority should the opening of the new terminal be delayed*."

[23] Paragraph 9 provided that "*concession units on the ground floor will be glazed with ceilings unfinished and floors laid to screed to allow for tenant completion; internal partition walls will be installed by the Airport to create the required standard or custom retail area*."

[24] Paragraph 10 provided that "*Standard size first floor lounge areas will be finished with floors laid to screed to allow tenant completion, walls finished to base coat and no ceilings installed. …All internal partitioning, shelving display units or special finishes including wall, floor and ceiling finishes will be installed by the concessionaire at the cost of the concessionaire*." It was further provided that utilities would be laid to the boundary of concession site. The Government's position is that this meant the successful tenderer was to construct and fit out the facility at his own expense. The Claimant disagreed and argued that it was for the Government to construct the restaurant, and for the concessionaire to finish it. Although paragraph 10 appears on its face to deal with first floor premises, it includes reference to the catering kitchen area, which was described as being on the ground floor. I shall therefore treat paragraph 10 as expressing terms for the ground floor catering concession as well.

[25] Paragraph 14 provided that arrangements were to be made with the representative of the relevant Ministry for the successful tenderer to be provided access to the concession

space to enable him to carry out any final fitting out or furnishing work when it was considered that the work could be carried out without interfering with the main contractor completing the building.

[26] Paragraph 15 provided that the date of the commencement for the period of the concession was to be fourteen days after the relevant Authority notified the successful tenderer in writing that he could have access to the concession area for fitting out works.

[27] Paragraph 16 provided that the term of the license for the concession was to be for an initial period of 3 years following the opening of the new terminal, unless such other term was agreed in writing by the relevant Authority.

[28] Paragraph 17 (bis) provided that tenders were to be submitted to a Public Tenders Committee. This indicates that this was to be a public tender.

[29] Paragraph 19 (bis) provided that every tender would be treated as a continuing offer, and irrevocable until 30 November 2001.

[30 ] Paragraph 21 provided: "*Upon and as soon as reasonably possible after the acceptance of a tender, the Authority shall forward to the successful tenderer such number of copies as the Authority shall require to be executed of the Deed hereto annexed, being the Deed of License in respect of the concession for which the tender has been accepted, which Deed shall be deemed to be part of and included in these conditions as if fully set out herein and the successful tenderer shall execute and hand such copies of the said Deed to the Authority within fourteen (14) days of such Deed being forwarded to the successful tenderer*."

[31] In the tender form, the applicant was required to indicate which concession he/she wished to apply for. The passenger catering concession was not expressed as a single unit, whereas retail units were. Porterage was not expressed as a single porter either. The new airport terminal was designed to handle up to 430 passengers per hour. I do not

imagine that the Authority's intention was to permit only one porter to carry all the bags of all 430 passengers per hour.

[32] Paragraph 27 envisaged that more than one person might be the successful tenderer for each concession. This is a further indicator that there was no intention of guaranteeing exclusivity.

[33] The tender document contained a draft Deed of License.

[34] The Claimant tendered to take up the passenger catering concession at a monthly license fee of $42,000 per year or $3,500 per month. He was informed by a letter dated 29 October 2002 that he had been awarded the concession. The letter asked the Claimant to sign and return two copies of an enclosed concession agreement, together with a quarter of the guaranteed minimum annual concession fee. The letter further stated that the Claimant would then be permitted to access the premises to commence fitting out. The letter further stated that the commencement of the concession would be treated as being when the Claimant had completed fitting out the premises. This letter therefore contained at least two variations from the terms set out in the tender document.

[35] The Claimant, for his part, did not treat the tender document and draft Deed as carved in stone either. On 26 November 2002 he had his Attorney-at-Law write to the Ministry.

[36] In this letter, the Claimant proposed a number of amendments to the proposed terms. He requested an express right of exclusivity and a longer term than three years. He described the area provided as "*merely a vacant floor area, with absolutely no facilities for a restaurant and bar business*." The Claimant stated that he anticipated the cost of creating a restaurant and bar to be in excess of US$200,000 and proposed a term of at least fifteen years with an option to renew for further five. He asked further that upon a transfer of the concession, he be reimbursed capital sums expended in construction and creation of a restaurant and bar. The Claimant also wanted a term that the Government would not

permit food and drink vendors to operate at or from the airport property in competition with this concession.

[37] The Claimant followed this with a letter dated 29 November 2002. The purpose of this was to tender to the Government a cheque for the first month's rent in respect of the concession license, in an amount of $3,500. It informed the Government that this sum was to be applied to the annual license fee of $42,000. The Government, it appears, banked this cheque without reservation or comment. It is difficult to see what legal effect, if any, tendering and acceptance of this payment had. This is so because both sides to the discussion had already deviated from the terms of the tender document, and the Government had not yet replied to the Claimant's requests in his letter of 26 November 2002.

[38] The Government replied on 5 February 2003. Its letter records that the parties had met on 13 January 2003. Concerning exclusivity, the Government stated: "*Firstly, we are prepared to say that there will be no other restaurant opened within the envelope of the current building…. The Government, therefore, reserves the right to open catering outlets, such as coffee shops or snack bars in any extended part of the building. Secondly we will grant exclusive rights to your clients for passenger catering at the airport for a period of five years. We will use our endeavours to remove the catering vans currently situated in the car park*." The Claimant contends that this statement confirmed agreement on the part of the Government that the Claimant was being granted the exclusive right to operate a catering food and beverage concession at the new airport terminal and permit no other catering concessions within the terminal or environs, at any rate for as long as there was no substantial expansion of the terminal building. That would be going too far however, as the Government's letter expressly made it clear that the operator of a soda machine would be allowed to continue purveying beverages from his device, albeit at the other end of the terminal building, food vans could probably not be expelled immediately, and the Government wished to leave it open to those organizing functions at the airport to use other caterers.

[39] The Government accepted that an initial term of three years was inadequate. It said it was prepared to grant an initial term of nine years, with an option to extend for a further three years.

[40] The Government addressed the question of the unfinished state of the premises: "*the premises were left in an unfinished state in order not to pre-empt the wishes of the successful tender* (sic) *in the layout or design of his kitchen and restaurant*."

[41] The Government's letter addressed other aspects raised by the Claimant and concluded that it would be content to provide a total redraft of the entire agreement.

[42] The Claimant replied by a letter dated 20 March 2003.

[43] He counter proposed that the Government should extend the exclusivity period from five to nine years. He proposed a fixed date for expulsion of the food vans, and wanted the soda vendor to be limited to operating only one machine. The Claimant continued to hold out for a reimbursement of his capital outlay in creating the restaurant.

[44] The Claimant followed this with a letter dated 2 April 2003. In this, he *inter alia* asked for an initial license period of twelve years, with an option to extend for a further three, to accommodate the financing the Claimant would need to invest to create the facility. The Claimant communicated a professional costing by quantity surveyors at $176,934.23.

[45] A meeting between the parties then took place on 23 April 2003. There is no minute of this meeting before the Court, but it is clear from a subsequent letter from the Claimant's Attorney-at-Law dated 2 May 2003 that the Government expressed the thought of putting the concession back out to tender. The Claimant rejected this and referred to payment of the first month's rent which was accepted. In the same breath the Claimant stood upon his demands expressed previously and proposed further matters that would commit the Government and provide him with comfort.

[46] It is clear that up to this point there had only been a limited meeting of minds, and certainly not enough to see the existence of a mutually binding agreement. There had not been a meeting of minds on fundamental terms such as the period of the concession, reimbursement of the Claimant's capital expenditure, and the extent and degree of the exclusivity sought by him.

[47] It was also the case that at this point the Government had not yet provided premises with utilities reaching the boundary of the intended premises, and otherwise constructed to the degree the tender document had clearly represented. That aspect however becomes academic, because there was no agreement in place between the parties in relation to those other main terms anyway. The Claimant had not accepted and executed the terms of the draft Deed enclosed with the tender document. There was as yet no contract that required performance.

[48] On 31 October 2003 the Government provided the Claimant with an amended Deed of License. It asked the Claimant to confirm by 17 November 2003 if the Claimant agreed to the terms of the amended agreement. The letter noted that the Government was now proposing to construct as well as fit out the premises.

[49] By a letter of 11 November 2003 of his legal representatives, the Claimant provided a lengthy commentary upon the proposed Deed and accepted the Government's proposal for it to construct and fit out the premises, but the Claimant disagreed with the Ministry over the period of the license and some other aspects. The Claimant wanted an initial term of six years, or three with an option to extend by another three years, to take into account that he would be spending about $200,000 to fit out the facility.

[50] The Ministry made a revised offer on 12 January 2004, open for acceptance on or before 24 January 2004. This was in terms that the license period would be for three years, with a possibility of a three year extension, subject to satisfactory performance and a rent review. In this, they queried the Claimant's indication that his likely cost of fittings would be $200,000, on the basis that the Claimant had asked the government to clarify what the

Government would be doing by way of construction and fitting out, such that until the Government had conveyed that information the Claimant could have no basis for such a valuation. The Government further observed that the Claimant had indicated that his own responsibility should be limited to "*cutlery, glassware, utensils etc., [h]ardly something that would cost $200,000*." The letter explained that *"[t]he Government will construct the restaurant, kitchen and bar and will fit out the premises with principal fixtures, such as a stove with hood and extraction to the exterior, fridge, freezer, cupboards, sinks, worktops and dishwasher. Within the restaurant, the Government will provide the tables and chairs and the seating area, the hot food counter, and alcove with seat for your client to install his own cash register, and the Government will build the bar and provide the high chairs*."

[51] It was also made clear that the agreement was not to be exclusive.

[52] The letter further provided that the Government considered that now the Claimant had been released from the responsibility to fund the construction and fitting out of the restaurant, with the Government assuming this burden, the concession fee should be increased from the Claimant's proposed $22.83 per square foot to $31 per square foot, equating to $57,040 per annum or $4,753.33 per month.

[53] This letter took a more forceful line than the Government had taken previously and it was clear that it wished to bring finality to the negotiation.

[54] The Claimant did not reply by 24 January 2004, so the Government's offer lapsed. He made a counter-proposal on 10 February 2004. He continued to hold out for exclusivity, except for the soda vendor's machine, which the Claimant conceded could be placed at the other end of the terminal building. The Claimant also proposed, *inter alia*, that the rent be reduced back to $42,000 per annum. The Government did not reply immediately.

[55] On 16 April 2004 the Claimant wrote to the government, setting a deadline of 30 April 2004 to conclude the license agreement on terms acceptable to the Claimant, and to confirm in writing that construction and other works necessary to build the premises would

commence no later than 31 May 2004, to be completed no later than 31 July 2004, failing which the Claimant would commence legal proceedings.

[56] On 30 April 2004 there was a further meeting between the Claimant and the Ministry. This resulted in the Claimant confirming that he was prepared to accept that the initial license period would be 3 years with an option to renew for a further three years, with an annual license fee of $57,040.00.

[57] After that date the matter appears to have taken a different turn, with Executive Council deciding to terminate the Claimant's award of the passenger catering concession. It is recorded in a letter from the Ministry on 13 July 2004 that this decision to terminate was reversed. The Ministry returned the Claimant's payment of $3,500 and informed him that when the agreement would be finalized a new advance payment would be required based on a revised license fee.

[58] The government signed contracts with two contractors to construct and fit out the catering facility, at a total cost of around $232,000, in around March 2005, with a scheduled completion of the end of June 2005.

[59] The Government then entered into a Deed of License with the Claimant on 28 April 2005.

[60] Whilst the period of the license was left blank, the Claimant was granted an option to extend the period by a further three years, upon making a request three months in advance.

[61] The annual fee was stated to be $57,040.00. It was expressly provided that the construction and fitting out would be undertaken by the Government at its own expense, and that the principal fittings would remain the property of the Government.

[62] The contract did not include reference to a bar, nor to exclusivity. Nor did it include an entire agreement provision.

[63] A covering letter from the Ministry dated 29 April 2005 stated that the period of the license was for three years, to be renewed for a further term of three years, subject to compliance with terms and conditions.

[64] Both sides executed the Deed of License on 28 April 2005 before a notary. The notary attested by way of a formal stamp, amended in manuscript, that both sides freely and voluntarily executed this instrument and understood its contents. This is significant, as the Claimant later alleged that he had been coerced by the Government into signing the document and that it should therefore be treated as null and void. The Claimant stated in his Witness Statement that the coercion comprised a threat by the Government that it would cut off all negotiations and put the concession back out to tender if he did not sign this latest version of the Deed.

[65] The Claimant, through his legal representative, wrote to the Government on 31 May 2005, asking for a plan showing the layout of the restaurant including the position of the bar to be constructed by the Government as per the latter's letter of 12 January 2004, over a year earlier. The Claimant also asked for a list of all fixtures, equipment, appliances, tables and chair that would be provided by the Government.

[66] The Claimant, through his legal representative, wrote a further letter to the Government on 24 June 2005. He recorded that he had visited the premises and found no bar. The Claimant recounts that he was told the Government did not intend to provide a bar at the restaurant, but to allow another person to operate a bar upon the upper level. The Claimant complained that this would be contrary to all agreements with and representations made to the Claimant and he threatened in effect to embarrass the Government in the media.

[67] By letter dated 6 July 2005 the Ministry took the position that its previous letter of 12 January 2004 did mention inclusion of a bar, but stated that that letter had been an offer open for acceptance for ten days, failing which the Government did not consider itself

bound by the terms of that offer, and further that the signed agreement did not specify a bar.

[68] That letter also informed the Claimant that the outfitting of the concession had been completed, and asked that the start date for operation of the concession would be no later than 15 July 2005. The letter asked whether that would be acceptable to the Claimant.

[69] The Claimant, through his Attorney-at-Law, replied on 27 July 2005, making no mention of a start date. Instead, the Claimant demanded a bar, asserting that this had been promised by the Government.

[70] On 10 August 2005 the Ministry told the Claimant to begin operating on or before 20 September 2005.

[71] On 11 August 2005 the Ministry wrote to the Claimant informing him that the Government was considering a proposal for a "bar type facility" at the concession premises.

[72] Various meetings and discussions ensued. On 27 October 2005 the Government confirmed in a letter that it would install a bar opposite the food service area, that it was to be used only for selling drinks, and would not be fitted with stools. Patrons were to use the seating area already provided. The letter also recorded an adjusted start date of 15 November 2005. That is when the Claimant commenced operating the concession in the new terminal building.

[73] However, before he did so, on 7 November 2005 the Claimant personally wrote to the managing director of the Airports Authority to request a reduction in rent back to US$42,000, as well as to have the initial term extended from three years to ten years in order to be eligible for bank financing.

[74] On 4 August 2006 the Claimant wrote further to the Ministry, raising the issue of a reduction in rent, the absence of a bar, certain other issues, and the question of compensation.

[75] The Claimant raised these and other issues further on 16 August 2006 with the managing director of the Airports Authority. He mentioned amongst the issues that the dishwasher supplied and installed by the Government had never worked. The non-functioning dishwasher became a significant head of claim in its own right, as the Claimant alleged that this had compelled him to hire two additional employees to wash dishes for a period in excess of 200 weeks, costing over $90,000. As it was a Government installation, he contended that he would have been in breach of the license agreement if he replaced it himself.

[76] The Claimant engaged a certified public accountant, Mr Roy D. Jackson, to provide a report on estimated damages and lost profits. Mr Jackson rendered a report in March 2008.

[77] He calculated that the Claimant had incurred loss of profits of $3,542,488 for a period of 20 March 2002 to 31 March 2008, together with overpayment of rent of $45,191.88 and $53,040.00 for the cost of employees to wash dishes from November 2005 to 2008 on account of the non-functioning dishwasher.

[78] The Claimant started positioning himself to bring a claim against the Government. By a letter dated 18 April 2008 from his Attorney-at-Law, the Claimant recounted his view of the basic underlying facts and asserted that he should have been given twelve months' notice prior to the demolition of the older terminal building.

[79] The Claimant further complained that he had been coerced into signing the license in April 2005 under threat of losing the concession. He complained that as a result he had agreed to pay the elevated rent of $4,753.33 instead of the lower, $3,500 per month, fee as set out in the tender documents. The Claimant stated that he was finally able to open the

concession for business on 15 November 2005 and that he had not been provided with a bar, which represented a serious financial loss to him.

[80] The Claimant also complained that when he did commence operating the concession he did not have the exclusive right to sell food and beverage at the new terminal building and in its environs, as the Government had permitted a cyber café to open, and a number of food vans were working in the parking lot. The Claimant complained that two sets of drinks and snacks machines had been installed inside the terminal building itself, and hotels were being permitted to provide refreshments for their arriving passengers.

[81] Despite his complaints, on 10 July 2008 the Claimant asked for the term of his license to be extended by a term of at least a further three years from 16 November 2008.

[82] The Government replied on 28 July 2008, by a letter of the Attorney General, asserting that the Claimant had been on a month to month license in the old building, and in consequence he had been entitled to only one month's notice to quit.

[83] The Government took the position that the parties' contractual relations were governed by the written license agreement dated 28 April 2005 as amended by the Government's agreement to install a bar in the area opposite the food service area. The Government denied any exclusivity had been granted. The letter acknowledged that the Government did not install the bar as promised but denied that this resulted in significant or any loss to the Claimant. The Government further held the Claimant in breach of his own license obligations, in that he was in arrears of his fees, in an amount of $104,573.26.

[84] On 7 November 2008 the Claimant called upon the Government to extend the license and resolve the issues in dispute, by*, inter alia*, constructing and fitting out the bar and replacing the dishwasher. The Claimant informed the Government that he continued to suffer loss and damage at a rate of $580.74 per day from 31 March 2008 until the damages are liquidated.

[85] The original period of the license was due to expire on 15 November 2008. An intense round of negotiations took place in the days before and around then. The upshot of these, in relation to construction of the bar, was that the Government's representative agreed that the construction of the bar by the Government would be discussed by the Cabinet. No positive decision appears to have been reached on this issue however, or if it was, it was not put into action. There is no evidence that the Government re-committed itself to providing a bar for the second three year term.

[86] On 27 August 2009 the Government, by way of letter from the Premier's Office, informed the Claimant that the Cabinet had decided that the Claimant's lease would be for ten years beginning 1 December 2008, that the rent payable would be reduced to $1,500 per month with effect from 1 December 2008 and that the Claimant would be allowed to build a bar, subject to planning approval and Public Works Department oversight.

[87] On 17 February 2010 the Claimant wrote to the Premier, treating numerous aspects to have been resolved, but now asking for permission to fit out the upper level at the airport with offices for rent, and also holding out for compensation for past losses, to be determined by a committee.

[88] The Airports Authority wrote further to the Claimant's proposals on 20 September 2010, confirming that the Claimant had permission to construct a bar to the Claimant's design as approved by the Town and Country Planning Department and that he would be granted a ten year lease as from 1 December 2008 with monthly rental payments of $1,500.

[89] The Government then provided a lease document. On 27 October 2010 the Claimant replied with suggested amendments. One of these was to have the term of the lease run from the expiry of the existing license, rather than from 1 December 2008. Further, the Claimant stated that his execution of the lease would be without prejudice to his various claims.

[90] The Premier's Office confirmed on 23 March 2011 that the new lease would run from 16 November 2011 instead of from 1 December 2008, and that it would continue to run at a monthly rent of $1,500.00, with a review after five years.

[91] On 27 April 2011 the Ministry, by the Financial Secretary Mr Neil Smith, wrote to the Claimant setting out its financial position in relation to compensation, from a reconciliatory standpoint. In this the Ministry stated it was willing to make a number of concessions. These included:

- Offering the Claimant US$135,899 as compensation for lack of notice, on the basis of a maximum six months' notice period, based upon profits corresponding with the previous year's sales and expenses;
- US$53,040 as compensation in respect of the non-functioning dishwasher;
- Compensation at a figure to be discussed for the period after signature of the license contract and up to the date the space was ready for occupancy
- Compensation in an amount equivalent to additional costs incurred as a result of the rent increase from November 2005 until March 2008, if such an increase was a breach of a previous contractual agreement;
- If such terms were to be accepted, taxes, fees and professional fees.

[92] The Ministry specifically stated that they were not making a concession in relation to exclusivity.

[93] The Claimant, in response, complained that the Ministry's proposal was not in line with the process that had been discussed previously between them, for a compensation committee to determine the compensation amount.

[94] He also complained about the manner in which the committee might operate, demanding to be allowed to give testimony before the committee.

[95] The committee rendered its report on 24 May 2011. It accepted the opinions of the Claimant's accounting expert Mr Jackson and recommended that the Claimant be paid $4,117,973 by way of loss of profits, $96,600.00 for the cost of two employees due to the non-functional dishwasher, $21,038.00 for Mr Jackson's fees and $190,900 for the Claimant's legal costs. The committee had been divided, and it came to the chairman's casting vote to make this recommendation.

[96] The Claimant followed this with a letter on 25 July 2011. In this the Claimant pressed for the Government to sign the lease, to be told when Cabinet would be making a decision with regard to the compensation committee report and to stress that the Claimant needed the bar to be able to meet all of his financial obligations, including to pay social security dues.

[97] On 29 January 2012 the Ministry wrote to the Claimant enclosing a cheque for $189,000 by way of compensation, "*as full and final settlement of the claim*." This letter was not expressed to have been without prejudice to liability, entirely or save as to costs. The cheque counter-foil itself, however, was endorsed "*Ex Gratia Payment – Turtle Dove*".

[98] The Claimant rejected this payment as inadequate. The Claimant brought these proceedings, seeking the following compensation:

- $821,250 for damages/loss of profits due to breach of an implied obligation on the part of the Government to have given the Claimant twenty four months' notice to quit, at $1,125 per day;
- Further or alternatively $1,503,529 as damages for breach of a legitimate expectation that the Claimant's business in the old terminal would be relocated to the new building.
- $2,683,760 for damages and loss of profits due to breach of the terms of the operative agreement between the parties, in particular for failure to deliver up to the Claimant premises in an operational condition, failure to construct a bar, and provision of a non-functioning dishwasher, failure to give the Claimant exclusivity;

- $139,893 and continuing, as damages for wrongful increase in rent from November 2005 pursuant to the terms of the Concession Agreement signed by the parties on 28 April 2005, which the Claimant contends was invalid and unenforceable on grounds that the Government had unlawfully coerced him into signing it;
- Damages to be assessed for loss of profits from 23 June 2012 to judgment, in accordance with the opinion of Mr Jackson;
- Alternatively, $4,117,973 for damages and loss of future profits as assessed by the Compensation Committee; and
- Damages and future loss of profits to be assessed for the period following judgment until rectification of the breaches.

[99] The Claimant has continued to operate the concession, but without the benefit of a ten year lease in place. At trial oral evidence given by the Claimant's son was that although Cabinet had decided to grant the Claimant a ten year lease, another authority had refused it.

[100] In the period between receiving notice to quit the old terminal building in March 2002 and when he started operating the concession in November 2005, the Claimant did not establish a catering business elsewhere. He worked as an electrician to help make ends meet. He admits that he owes the Government money, including that he had fallen behind with rent payments, but blames the Government, in particular for not having provided him with a bar.

## Discussion

### Limitation

[101] The Government's first line of defence is to contend that the claim, and its various elements, are time-barred.

[102] Superficially that is an attractive argument. However, I am not persuaded that it is correct. The Government conducted itself in such a way as to admit in effect that the Claimant had been wronged and that compensation was due to him. Even though the counter-foil to the cheque tendered in January 2012 was annotated to record this was an ex-gratia payment, no formal reservation of liability or expression that it was without prejudice to liability accompanied it. Then there was the establishment of a compensation committee. It is clear that the Government proceeded on the basis that the Claimant had a good claim, at least in part, and that it ought to compensate him. I find that the Defendant accepted liability.

[103] The question then arises what the Government is liable for, and if so, the level of damages that flows from this.

**The notice to quit**

[104] The evidence was inconclusive whether the Claimant had a tenancy of the premises at the old terminal building or a mere license. No document was disclosed by either side. The Claimant may well have had a document that was destroyed in hurricane Hugo, but that was some twenty seven years ago. Whether it was a tenancy agreement, or some other concession agreement, cannot be verified. The Claimant's oral evidence was that it was a tenancy agreement. He may well be right, but after such a lapse of time, there is a possibility that he may have been mistaken. Be that as it may, the fact of the matter is that there is no evidence what, if any, period of notice had been agreed.

[105] The Claimant is holding out for twenty four months' notice. The Government contends for one month. The Finance Secretary, Mr Neil Smith, considered six months to be reasonable. I agree with Mr Smith's assessment. One, or even three months would be too short, if the Claimant had to give employees notice of termination of their employment contracts. On the other hand, the Government cannot reasonably be expected to timetable redevelopment of an airport complex with accuracy two years in advance.

Overruns can, and even on smaller developments, often do occur. Mr Smith's period strikes a balance which I agree is reasonable.

[106] I accept the Claimant's figure for daily losses under this head, of $1,125 per day. I will therefore award the Claimant $205,312.50 under this head, being $1,125 multiplied by 182.5 days.

**Legitimate expectation of being relocated**

[107] I accept that the Claimant had an expectation that his business would be relocated to the new terminal building. I do not accept, however, that such an expectation was legitimate, so as to give rise to an entitlement to damages if it was not met.

[108] The Claimant points to this expectation arising at least in part from seeing other concession operators being relocated and being able to resume trading immediately.

[109] Contrary to this must be considered the fact that the Government had instigated a public tender process some six months prior to the formal opening of the new terminal. This must have put the Claimant on notice that his transfer to the new building was not a foregone conclusion.

[110] Additionally, with a redeveloped terminal, it would not have been reasonable for the Claimant to assume that everything about the catering concession would remain as before. The tender document made no mention of a drinks bar. It mentioned a possible snack bar, in describing the catering concession as being "by way of Restaurant, Buffet and/or Snack Bar." Much as the Claimant has tried to stretch inclusion of the word "bar" to mean that the concession was to have a drinks bar, that is untenable. A snack bar is not necessarily a drinks bar. The Merriam-Webster Dictionary defines a snack bar as "a public place where small meals and snacks are served usually at a counter". The Cambridge Dictionary defines it as "a small, informal restaurant where small meals can be eaten or bought to take away".

[111] The tender document also clearly indicated that the Government intended to offer an initial term limited to three years. This must have put the Claimant on notice that the Government did not have in mind an elaborate restaurant requiring significant financial outlay on the part of the concession operator.

[112] It also indicated that the Government wished to establish written terms for the grant of the concession which would replace the apparently long lost agreement applying to the old terminal concession.

[113] The Claimant had sufficient information in the tender document to ask himself – and the Government if he was not sure prior to submitting a tender – why the Government described the concession in that way, what it had in mind by way of anticipated catering facilities and how the Government envisaged that this could be achieved. Once he had considered these aspects the Claimant could then have made up his mind whether he indeed wished to tender for the concession.

[114] The Claimant appears to have assumed that he could submit a tender and then negotiate for better terms. The Claimant decided to take the risk that he could achieve better terms.

[115] I therefore find that the Claimant is not entitled to compensation under this head.

**Damages and loss of profits**

**Failure to deliver up to the Claimant premises in an operational condition**

[116] It is true that when the Government informed the Claimant on 29 October 2002 that his tender had been accepted the space for the future concession had not yet been constructed to the extent described in the tender documents. Those represented that all a prospective concession operator would need to do was finish and fit out the area, hook up to utilities provided to the boundary of the concession, and start business. The tender

documents envisaged that the successful tenderer would have only fourteen days in which to fit out the premises before starting work. This was an indicator that the premises would not require significant further work, and certainly no further construction was envisaged – unless of course the concessionary wished to do so whilst paying rent.

[117] The tender document made no representation when the Government would release the space to a successful tenderer for fitting out. It had no express obligation to have provided it as soon as the Claimant had received notice to quit, nor immediately after he had been confirmed as the successful tenderer.

[118] Any question whether or not the Government had a duty to make the premises available in an operational condition became moot, in my view, by the fact that the Claimant engaged upon negotiations lasting in effect from November 2002 until he signed the Deed of License on 28 April 2005.

[119] I recognize that this Deed is most inconvenient for his case, and that the only way for him to avoid its terms is to contend that he had unlawfully been coerced into executing it. It is however part of business life that a point can be reached in negotiations where one side tells the counterpart that he will have to accept terms proposed failing which there will be no contract. The counterpart then has the option to sign, or walk away. The Claimant's financial state at that point could well have been, and probably was, such that he was faced with an invidious choice of accepting the concession on less favourable terms than he wanted and having no business at all. But that did not amount to unlawful coercion on the part of the Government. There are two (or more) sides to every matter. It is clear that the Government had been enormously patient with the Claimant's incessant demands. It is not surprising that the Government decided to take matters into its own hands in the face of the Claimant's constant dissatisfaction, to go beyond what was required of it in the tender document and fit out and equip the facility, and finally lay down terms on a "take it or leave it" basis. It should be borne in mind that the new terminal had been formally opened in March 2002, and, as at April 2005, the airport had been without a passenger catering facility inside the terminal building for over three years.

[120] Although on 6 July 2005 the Government informed the Claimant that it had completed the fitting out, and called upon the Claimant to commence operating by 15 July 2005, the Claimant continued to press for a drinks bar to be constructed. The Claimant was not ready to commence operating the concession until 15 November 2005. It appears he only did so after the Government had promised in a letter dated 27 October 2005 that it would construct a bar in the concession space, restricted to having no stools and no food sales, with patrons being required to sit in the general seating area.

[121] The result of these events is that any failure on the part of the Government to provide an operational catering facility was overtaken by the Claimant's own unreadiness to agree terms and to commence sooner than 15 November 2005.

[122] Accordingly I find that no compensation is due to the Claimant under this sub-head.

**Failure to construct a drinks bar**

[123] The Government's offer on 12 January 2004 proposed that it would construct a bar and provide stools. That offer was open for acceptance on or before 24 January 2004 and the Claimant allowed that date, and hence the offer, to elapse. The ensuing negotiation culminated in the signed Deed of 28 April 2005. That did not expressly include reference to a drinks bar (and the tender documents had not done so either), but the Government well knew the Claimant's insistence upon having one. It appears to have been the Government's promise in its letter dated 27 October 2005 that induced the Claimant finally to enter into possession and commence operating.

[124] Doing so was partially to the Claimant's detriment, in that it was not in fact provided with the promised bar.

[125] The Claimant's evidence was that it did sell alcoholic drinks as part of its catering service, but that it was not able to sell high profit margin drinks that a bar would enable it to sell.

The Claimant relied upon an expert opinion from Mr Jackson in an attempt to establish his loss as a result. Mr Jackson's report however made a number of uncritical assumptions, including that financial data supplied by the Claimant was accurate, and somewhat incredibly postulated a straight-line, ever-increasing rise in drinks sales, even where historical data showed a decrease in other sales from the concession. Moreover, his analysis showed that the overall sales from the Claimant's concessions at the old building and the new building were similar. That was with the Claimant also operating a drinks bar at the old terminal. Sales at the new terminal were generally slightly higher, even without a drinks bar. The Claimant understandably, in this context, focuses upon the difference in profit margin between food and small beverages and alcoholic beverages purveyed from a bar. A factor apparently ignored by Mr Jackson is that not all bars generate the same revenue. It is quite possible that a bar at which patrons are discouraged from sitting would not draw the same number of customers as one at which a longer pause, facilitated by high stools, is encouraged.

[126] The Government's expert, Mr Bickerton, considered the issue from a different angle. Although his analysis overall is not perfect, in that, for instance, he took account only of departing and not arriving passenger numbers or other users of the terminal, Mr Bickerton started from certain general statistical records and adjusted them by percentages to take account, *inter alia*, of the fact that the Claimant was also selling alcoholic beverages as part of his catering activity. Mr Bickerton estimates lost profits from the absence of a bar at $146,564 from 2005 to 2013, at an average of $17,960.37 per year.

[127] I prefer Mr Bickerton's method to Mr Jackson's straight-line increase hypothesis. Both are in any event an approximation.

[128] I will award the Claimant damages under this sub-head. However, I must also consider for what period the Claimant ought to be compensated. I have come to the conclusion that this should only be for the first term of the license, from 15 November 2005 to 15 November 2008. This is because there is no evidence that the Government had re-committed itself to providing the bar during the renewal discussions in 2008. The evidence

indicates that the most the Government committed itself to was to discuss the issue at Cabinet level, and of course the decision there might be taken not to provide a bar. The end result of this deliberation process was that the Government proposed in August 2009 to grant a ten year lease to the Claimant and let him construct the bar himself. At the commencement of the second license term there could be no reliance by the Claimant upon any expectation, legitimate or otherwise, that the Government would provide a bar.

[129] Therefore I will award the Claimant $70,424 as damages for loss of profits due to the absence of a bar in the original term of the license. I have reached this figure by taking Mr Bickerton's loss of profit figures for the period of operation of the concession from 15 November 2005 to the end of 2008. As the first term ended on 15 November 2008 this represents a slight over-payment of a month and a half, but I will allow that as both experts' figures were approximations.

[130] The total awarded under this sub-head is therefore $70,424.

**Non-functioning dishwasher**

[131] The Claimant contends that he was forced to hire two additional workers to wash dishes because the dishwasher which was the property of the Government and the responsibility of the Government to provide did not work. He contended that he had no right, nor any obligation to repair or replace it.

[132] The Claimant submitted that he had had to expend approximately $96,000 as a result, by employing two persons to wash dishes for over 200 weeks. He has formally claimed the cost of only one of those persons, being $53,000.

[133] The Government's expert, Mr Bickerton, opined that clearly the Claimant was entitled to some compensation. But he observed that clause 5 of the Deed of License contained a covenant on the part of the Claimant to keep all parts of the premises in good repair. A problem with that is that the machine was never in a good state of repair to start with. The

Claimant had no obligation to render something fit for its purpose that was not fit when it was provided.

[134] Mr Bickerton suggests the measure of damages would more appropriately be the cost of repair or replacement, the latter of which he puts at just short of $10,000. I have considerable sympathy with the Claimant's position. The Government were made aware of the non-functioning dishwasher but for reasons that are unclear, or no good reason, it did not remedy the problem.

[135] However, one must not lose sight of proportionality. The Claimant replaced a labour saving device, not with a similar device, but with human labour, which cost almost ten times as much. I accept that had the Claimant caused the defective dishwasher to be repaired or replaced there was a risk he might have been in breach of his contract with the Government by interfering with its property and/or installations, for which the Government might hold him liable, but there was no evidence before the Court that replacing the dishwasher was particularly complicated or that there was any appreciable risk of damaging the Government's property.

[136] I have considered the principles regarding mitigation of loss. In **Lombard North Central Plc v Automobile World (UK) Ltd**[1] the English Court of Appeal summarized the applicable principles relating to what is commonly referred to as the duty to mitigate. In claims in contract and tort an injured party cannot recover damages for any loss which could have been avoided by taking reasonable steps. Moreover, an injured party cannot recover the cost of unreasonable steps which increase loss. Rix LJ concluded in **Lombard North Central Plc** that the duty to mitigate is not a demanding one as "*it is the party in breach which has placed the other party in a difficult situation*". The duty on the Claimant is thus only to do what is reasonable in the circumstances and the burden is on the Government, as the party in breach, to demonstrate that the Claimant failed to act reasonably.

[1] [2010] EWCA Civ 20

[137] Whilst it would probably not have been unreasonable for the Claimant to have employed additional staff to wash dishes for a short time while he made efforts to have the Government attend to the repair or replacement, and then to have it repaired or replaced himself, it does not strike me as reasonable for the Claimant to have allowed this state of affairs to continue to the point that it made no economic sense. A temporary solution costing many times the cost of replacing the defective device, and allowing the situation to go unrectified for a period of about two hundred weeks, strikes me as wholly unreasonable.

[138] I will allow the Claimant to recover the reasonable cost he would have incurred had he replaced the device, in an amount of $10,000, together with four weeks' wages for one person to have washed dishes pending delivery and installation of such a replacement. I calculate such wages as being $1,060 ($53,000 divided by two hundred multiplied by four).

[139] The total awarded under this sub-head will therefore be $11,060.

**Exclusivity**

[140] I am not persuaded that there was ever a contractual term between the parties that the Claimant should have exclusivity. Nor am I persuaded that he had any legitimate expectation of exclusivity, nor that he relied to his detriment upon any assurance by the Government that he would be granted exclusivity. No damages are due to the Claimant under this sub-head in my view.

**Alleged wrongful increase in rent**

[141] I am not persuaded that the Claimant was coerced into signing the Deed of License on 28 April 2005. I find as a fact that he was not. I accept the Claimant found himself in a financially difficult position at that moment, such that signing a contract with the Government was better than no contract, but he did have a choice.

[142] That suffices to address this head of claim but I should state further that both sides had moved away from the rent publicized in the original tender document when they proceeded on the basis that the Government would also fit out and equip the facility. The Claimant cannot reasonably be heard to argue that he should only have to pay the rent stated in the tender document when the tender document was framed in terms that the licensee would fit out and equip the facility.

[143] No damages are due to the Claimant under this head in my view.

**Future loss until rectification**

[144] There are no heads of claim for which compensation has been allowed that are susceptible to an award of continuing damages.

**The proposed ten year lease.**

[145] Although the Government informed the Claimant that the Claimant's lease would be for ten years at a rent of $1,500 per month, the Government never provided the Claimant with a lease document for execution.

[146] The history of the matter shows that the Claimant took issue with every agreement document put forward by the Government. In the case of the Deed of License signed on 28 April 2005 the Claimant took issue with that document after execution and he sought to renegotiate its terms. There is absolutely no certainty that the Claimant would have agreed to the terms of any further proposed draft lease agreement and history suggests indeed the opposite.

[147] The Claimant's evidence was that although Cabinet had decided to grant such a lease, another authority has refused it.

[148] There was consequently no meeting of minds on the terms of a lease. I therefore decline to make any declaration with regard to such a lease, or to impose one.

[149] There is no evidence of loss attributable to other complaints leveled by the Claimant, such as a failure of the Government to provide an enclosed space, even if there was any agreement that it would do so.

[150] All other claims will therefore be dismissed.

**The Counterclaim**

[151] The Government's counterclaim seeks to recover loss of rental income at $3,500 per month from September 2002 to April 2005, in an amount of $108,500.

[152] This claim was predicated on the basis that the premises were ready for occupancy from September 2002, and that the Claimant had come under a contractual obligation pursuant to the tender documents to enter into the premises upon being notified that they were ready.

[153] This claim was also predicated upon an incorrect interpretation of the tender documents which placed the burden on the Claimant to construct the premises.

[154] The premises were not in fact ready for occupancy in September 2002. The tender documents, properly construed, required the Government to construct and the eventual licensee to fit out and equip the premises. In addition, the rights and obligations of the parties then evolved, until the agreement of 28 April 2005 was reached. The premises then only became ready for occupancy in around July 2005.

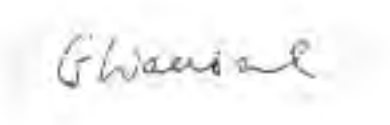
[155] No breach and thus no damages lie in favour of the Government for the period September 2002 to April 2005.

[156] The Counterclaim will therefore be dismissed.

[157] The order of the Court will therefore be that:

1. The Defendant shall pay damages to the Claimant in the sum of $286,796.50
2. The Defendant shall pay the Claimant's costs of these proceedings, to be assessed if not agreed within 60 days.

[158] Finally I thank the parties' Learned Counsel for their assistance in this matter. In particular, quite apart from the merits or otherwise of the positions advanced therein, I commend the Claimant's legal representatives Messrs Farara Kerins for the dispassionate clarity of their correspondence to the Defendant. This proved invaluable in establishing a concise contemporaneous record of the many twists of the legal events concerned.



Commercial Court Judge
2nd March 2017