EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2012/0045

BETWEEN:

SAFFRON LIMITED

Appellant

and

ANGEL ESTATES LIMITED

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Chief Justice [Ag.]
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Dr. David Dorsett for the Appellant
Mr. John Fuller for the Respondent

2018: June 11;
2019: February 1.

Civil appeal — Assessment of damages — Mitigation of damage — Whether learned judge erred in finding that the appellant failed to mitigate its losses — Requirements of rule 10.7 of the Civil Procedure Rules 2000 — Whether Court should interfere with findings of fact of the trial judge — Loss of profit — Appellate interference with an award of damages

The appellant, Saffron Limited ("Saffron"), operated a restaurant on part of a premises leased by the respondent, Angel Estates Limited ("Angel"). The 21-year lease agreement dated 2nd October 2006 was due to expire in October 2027. The lease provided that Saffron would pay for the electricity consumed, which was supplied by the Antigua Public Utility Authority ("APUA"). Saffron complied with this term of the lease. However, on or about 21st October 2008, APUA discontinued the supply of electricity to Angel's premises because of Angel's non-payment.

Saffron claimed against Angel for breach of its contractual obligation under the lease

agreement to provide electricity to the premises. Saffron claimed damages for breach of contract and special damages representing loss of profits until the end of the term of the lease in 2027, severance pay and the costs of return flights to India for two chefs. Saffron obtained default judgment. By a consent order, the default judgment was subsequently set aside and judgment was entered for Saffron with damages to be assessed.

At the assessment of damages, the issue of mitigation arose. Angel argued, inter alia, that Saffron failed or refused to mitigate its loss by connecting to the Caribbean Development (Antigua) Limited ("CDAL") power supply. The learned judge found that Saffron did not do all that it reasonably could to stay in business and took no steps to mitigate its loss, as Saffron made no attempt to find alternative premises or to obtain an alternative power source by way of purchase or lease of a generator to keep its restaurant open. Damages were assessed and Saffron was awarded $54,000.00 in general damages and special damages of $188,762.83.

Saffron, being dissatisfied with the learned judge's assessment, appealed. Saffron's grounds of appeal raise the following issues: (i) whether the learned judge erred in holding that Saffron failed to mitigate its loss by failing to seek an alternative venue, as no such allegation or factual argument had been set out in Angel's defence; (ii) whether the learned judge erred in holding that the renting or purchasing of a generator to provide electricity was an alternative available to Saffron by failing to have regard or proper regard to section 5 of the Public Utilities Act and the interest of the APUA; (iii) whether the judge erred in holding that the question of whether spending $200,000.00 to connect Saffron to an alternative power source would have exposed it to financial risk did not arise, when the issue of whether Saffron was under a duty to undertake financial risk in order to connect to CDAL was a live one; (iv) whether the judge erred in disallowing Saffron's claim for special damages for loss of profit; (v) whether the judge erred in disallowing Saffron's claim of special damages for severance pay to the workers together with the costs of repatriating Saffron's two chefs to India; and (vi) whether the sum of US$20,000.00 awarded as general damages for breach of contract is adequate.

Held: allowing the appeal in part; awarding 5% of the prescribed costs in the court below and two-thirds of that sum on appeal to Saffron, that:

1. Rule 10.7 of the Civil Procedure Rules 2000 ("CPR 2000") provides that a defendant who wishes to raise the allegation or factual argument on the issue of mitigation must plead it in his defence. A failure to so plead is not necessarily fatal to his ability to advance the issue. The allegation or factual argument with respect to mitigation can be raised otherwise than in the defence with the permission of the court or agreement of the parties. In this case, a consent order was entered between the parties which provided the requisite agreement pursuant to which Angel could have adduced and did adduce affidavit evidence with respect to the issue of mitigation.

   Rule 10.7 of the Civil Procedure Rules 2000 applied; Calix v The Attorney General of Trinidad and Tobago [2013] UKPC 15 considered; Geest plc v

Lansiquot [2002] UKPC 48 considered; Townsend v Persistent Holdings [2008] UKPC 15 considered.

2. The duty to mitigate is a duty not to expose a contract breaker or tortfeasor to additional expense by reason of the claimants not doing what they ought reasonably to have done. That principle is qualified for it does not impose an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. There is no evidence before the Court that Saffron even attempted to obtain alternative premises; that the premises occupied by Saffron had a distinctive feature which no other premises could provide, or that the ambience could not be duplicated elsewhere.

3. There is no evidence of any request being made to APUA for Saffron to use a generator to supply its own electricity. Further, Saffron could have exhausted the available options of leasing alternative premises or connecting to CDAL before resorting to the drastic measure of closing its business. Section 5(2) of the Public Utilities Act allows APUA to give written permission to any person to generate or supply electricity at any place in Antigua and Barbuda. In the circumstances, requesting such permission was certainly an option available to Saffron under section 5(2) of the Act and Saffron failed to mitigate its losses by so doing.

   Section 5(2) of the Public Utilities Act Cap. 359, Revised Laws of Antigua and Barbuda 1992 considered.

4. The learned judge's finding on the question of financial risk was clearly predicated upon the absence of evidence. The judge considered Saffron's response to Angel's breach of contract and found that there was no evidence that Saffron would have to expend $200,000.00 to connect to the CDAL. Having so found, the learned judge was entitled to conclude that the issue of whether or not expending that sum would expose Saffron to financial risk, simply did not arise.

5. Saffron's claim for special damages for loss of profit is unsustainable due to its failure to take reasonable steps to mitigate its loss.

6. Section C40 of the Antigua and Barbuda Labour Code (the "Labour Code") provides for the entitlement to severance pay. Although it is necessary to plead and prove special damage with proper particularity, the amount of the severance pay has been prima facie established. Further, there does not appear to be any challenge to the entitlement to the severance payment. Additionally, severance pay is liable to be paid as a matter of law having regard to the provisions of section C40 of the Labour Code. The learned judge should therefore have allowed Saffron's claim for special damages for severance pay. The claim for special damages in respect of the cost of the repatriation of the chefs to India is unsustainable, on the basis that no evidence was adduced in support of that item.

Section C40 of the Antigua and Barbuda Labour Code Cap.27, Revised Laws of Antigua and Barbuda 1992; Perestrello E Companhia Limitada v United Paint Co. Ltd. [1969] 1 WLR 570 considered; Grant v Motilal Moonan Ltd and Another (1988) 43 WIR 372 applied.

7. There is no all-embracing principle governing the assessment of general damages other than that an award must be of such amount as will fairly compensate the claimant for his loss. Given the principles governing appellate interference with an award of damages, it has not been demonstrated that this is an appropriate case warranting such intervention. Taking issue with the judge's assessment of the evidence is hardly a promising start or basis for disturbing the award of general damages. In this case, there is no proper basis for disturbing the award of general damages.

West Midlands Travel Ltd v Aviva Insurance UK Ltd [2013] EWCA Civ 887 applied; Flint v Lovell [1935] 1 KB 354 applied; Nance v British Columbia Electric Railway Co. Ltd [1951] AC 601 applied.

JUDGMENT

[1] BAPTISTE JA: Saffron Limited ("Saffron") appeals the order of Remy J [Ag.] upon an assessment of damages for breach of contract. The background facts are that Saffron operated a restaurant on a part of premises leased by Angel Estates limited ("Angel") under a 21-year lease agreement dated 2nd October 2006. The lease was due to expire in October 2027. It was a term of the lease that Saffron would pay for electricity consumed. The electricity was supplied by the Antigua Public Utility Authority ("APUA"). Saffron complied with this term of the lease. However, on or about 21st October 2008, APUA discontinued the supply of electricity to Angel's premises, part of which was leased to Saffron, on account of Angel's non-payment.

[2] In April 2009, Saffron instituted a claim against Angel for breach of its contractual obligation under the lease agreement to provide electricity to the premises. Saffron claimed damages for breach of contract and special damages, amounting to EC$15,190,031.95. This included $14,658,300.00 for loss of profits until the end of the term of the lease in 2027 and EC$178,524.85 as severance pay and costs of return flights to India for two chefs, EC$30,592.86 representing the total

amount of severance pay. Saffron obtained default judgment on 15th August 2009. By a consent order dated 8th October 2009 and entered 17th January 2011, the default judgment was set aside and judgment was entered for Saffron with damages to be assessed.

[3] The issue of mitigation loomed heavily at the assessment. The judge noted that there were various options available to Saffron to mitigate its loss, like connecting to or renting a generator or relocating to an alternative location. Saffron chose the option of closing the restaurant. Having done so, it did not relocate the restaurant to alternative premises. At the time of closing the restaurant, Saffron had 19 years on the lease remaining. It chose to sue for the unexpired portion of the lease.

[4] The judge found that the facts did not support Saffron's contention that it did all that it reasonably could to stay in business. The judge stated that the facts disclosed that Saffron made no attempt to find alternative premises or to obtain an alternative power source by way of purchase or lease of a generator so as to keep its restaurant open. Saffron took no steps to mitigate its loss. Damages were assessed and Saffron awarded EC$54,000.00 in general damages and special damages of EC$188,762.83. Saffron is dissatisfied with the assessment and has filed several grounds of appeal against the judge's order.

Mitigation - **Parties'** Submissions

[5] The learned judge held that notwithstanding Angel's breach, Saffron was compelled to take the steps of re-locating (or seeking the possibility of re-locating) its restaurant to a new location, consistent with its duty to mitigate its damage. The first ground of appeal alleges that the learned judge erred in holding that Saffron failed to mitigate its loss by failing to seek an alternative venue. This ground is predicated on the complaint that no such allegation or factual argument had been set out in Angel's defence. Dr. Dorsett, learned counsel on behalf of Saffron, accordingly submits that Angel is estopped by rule 10.7 of Civil

Procedure Rules 2000 ("CPR 2000") and as a matter of substantive law from relying on an allegation or factual argument not set out in its defence.

[6] Dr. Dorsett points to paragraph 5 of Angel's defence as containing its pleaded case on mitigation. Angel pleaded that Saffron failed or refused to mitigate its loss by connecting to the Caribbean Development (Antigua) Limited ("CDAL")[1] power supply. Dr. Dorsett posits that, that being the pleaded case on mitigation, if it were to be contended that Saffron's entitlement to damages was to be affected by the possibility that it could have relocated its business, that matter should have been pleaded or otherwise appropriately raised so that that contention could be examined through admissible evidence. Dr. Dorsett states this is the only way in which mitigation can properly be dealt with. In that regard, Dr. Dorsett relies on the Board's judgment in Calix v The Attorney General of Trinidad and Tobago[2] and Geest plc v Lansiquot.[3]

[7] In Calix v The Attorney General, at paragraph 20, the Board stated that if the plaintiff's entitlement to damages was to be affected by the possibility that he would have been released on bail, this was a matter which was required to be pleaded and examined through admissible evidence. It was not something which regard could be had on a speculative and ad hoc basis. Mitigation can only be dealt with in this way.

[8] In Geest Plc v Lansiquot, the defendant raised a point on mitigation of loss during the course of an assessment of damages hearing. The assessment proceeded without any pleading and without any evidence beyond the plaintiff's affidavit and oral evidence. Had there been pleadings, it would have been the clear duty of the company to plead in its defence that the plaintiff had failed to mitigate her damage and to give appropriate particulars sufficient to alert the

[1] CDAL was the management company for the Jolly Harbour area and provided electricity from its own power plant there for the entire area.
[2] [2013] UKPC 15; [2013] 1 WLR 3283 at para.16.
[3] [2002] 1 WLR 3111; [2002] UKPC 48.

plaintiff to the nature of the company's case to enable the plaintiff to direct her evidence to the real issues of dispute and avoid surprise. No complaint was made by the plaintiff's counsel when the company's counsel advanced the argument on mitigation and no point was taken in the Court of Appeal or before the Board on the procedure adopted. The Board stated at paragraph 16:

> "It should however be clearly understood that if a defendant intends to contend that a plaintiff has failed to act reasonably to mitigate his or her damage, notice of such contention should be clearly given to the plaintiff long enough before the hearing to enable the plaintiff to prepare to meet it. If there are no pleadings, notice should be given by letter."

[9] Dr. Dorsett argues that apart from not being raised in the pleadings, the issue of relocation was not raised by the judge during the trial so that the appellant's counsel could have a fair opportunity to address the matter. In the circumstances, the appellant was denied natural justice. Dr. Dorsett relies on Townsend v Persistent Holdings.[4] There, the Board stated that it is simply a denial of justice to dismiss an appeal on the basis of a point which has not been argued or put to counsel for the appellant, so that he can deal with it before it is decided. Particularly so, when the law relating to the point is not straightforward.

[10] Mr. Fuller, learned counsel on behalf of Angel, relying on Saffron's own authorities, contends that all that is truly required to avoid the consequences of rule 10.7 of the CPR 2000 is for the opposing party to give sufficient notice of the allegation or factual argument before trial so that he could properly prepare to meet the allegation or factual argument. In that regard, Mr. Fuller points out that paragraph 19 of the affidavit of Anthony Velardi filed on Angel's behalf on 1st February 2011, raised the allegation or factual argument a year before the 11th June 2012 assessment hearing. Mr. Velardi deposed that: "several alternative locations were available to the Claimant if they so desired and were available with no notice and at a cheaper rental than was being paid to the Defendant".

[4] [2008] UKPC 15 at para. 23

[11] Mr. Fuller submits that the factual argument with respect to relocation having been raised in the affidavit, would have given Saffron sufficient notice to be prepared to meet it. Mr. Fuller also argues that during the entirety of the proceedings, Saffron never took issue with the point on relocation being raised, even after the affidavit was filed and cannot now find fault with proceedings it acquiesced to.

Analysis

[12] In assessing Dr. Dorsett's complaint, a contextual analysis is necessary. What is the context? An amended claim form was filed on 14th April 2009. A default judgment was entered against Angel on 15th August 2009. By a consent order dated 8th October 2009 and entered 17th January 2011, the default judgment was set aside and judgment was entered for Saffron with damages to be assessed. It is instructive to note that the consent order records Dr. Dorsett as appearing for Saffron and Mr. Fuller for Angel. Of much moment to this matter is paragraph 2 of the consent order; it provides that: "[i]n lieu of filing a Defence, the Defendant [Angel] shall be entitled, upon the hearing of the application for assessment of damages to adduce evidence in support of mitigating the Claimant's [Saffron's] damages". The fons et origo of Angel's affidavit evidence in lieu of filing a defence was that consent order.

[13] On 19th November 2009, Keith Martel, Saffron's managing director filed an affidavit in support of the application for assessment of damages. On 1st February 2011, Anthony Velardi, Angel's managing director filed an affidavit in reply. Paragraph 19 of the affidavit in reply states:

> "In any event, several alternative locations were available to the Claimant, if they so desired and were available with no notice and at cheaper rental than was being paid to the Defendant."

Other affidavits were filed including that of Dr. Richards, a chartered accountant, on 19th July 2011. In the circumstances outlined, one would have thought that judgment having been entered and affidavits filed by the parties in respect of assessment of damages, the matter would have proceeded to assessment.

Rather surprisingly, if I may say, on 24th January 2012, Angel filed a defence to the claim.

[14] It is instructive to note that no evidence was filed subsequent to the filing of the defence. The assessment appears to have proceeded on the affidavit evidence filed prior to the defence being filed and of course, what was obtained in cross-examination. The defence recites that it is filed pursuant to a consent order made by a judge on 18th January 2012. Paragraph 5 of the defence avers, inter alia, that Saffron failed or refused to mitigate its loss by connecting to the CDAL power. I observe that there is no reference to failing to mitigate by seeking an alternative venue. Dr. Dorsett has pounced on this in advancing his case that the learned judge erred in her finding with respect to the failure of the appellant to mitigate by not finding an alternative location.

[15] A holistic appreciation of the matter will demonstrate without peradventure that the absence of an alternative location averment in the defence cannot have the consequences Dr. Dorsett contends for. As indicated earlier, Angel's affidavit in reply to Saffron's affidavit in support of assessment clearly states that several alternative locations were available to Saffron. Angel's evidence was filed in lieu of filing a defence, pursuant to a consent order to adduce evidence in respect of mitigation at the hearing of the assessment of damages. Given the circumstances, it could not be realistically advanced by Dr. Dorsett, that the issue of mitigation by way of an alternative location was not raised. It was raised since February 2011. Mr. Fuller could not be anything else but right, and surely, cannot be wrong, in contending that Saffron had sufficient notice to enable it to be prepared to meet the relocation point. The argument that Saffron suffered a breach of natural justice, only has to be stated, to be dismissed as fanciful and devoid of merit.

[16] Given paragraph 2 of the consent order, Dr. Dorsett could not take issue during the assessment hearing, with the point of relocation being raised. Likewise, this

position pertains to the appeal. Angel, in its affidavit evidence, having addressed the issue of relocation as a mitigating option available to Saffron, pursuant to the consent order, it is not open to Saffron to advance the point raised in the first ground of appeal. Saffron's conduct in pursuing this ground in the given circumstances will certainly attract adverse costs consequences regardless of the outcome of the appeal.

[17] Dr. Dorsett's contention that Angel did not satisfy rule 10.7 of the CPR 2000 is not well founded. In my judgment, rule 10.7 of the CPR 2000 was complied with. Rule 10.7 states: "The defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission or the parties agree". It cannot be too often stated that the overriding objective of the CPR 2000 is to deal with cases justly and the court must seek to give effect to the overriding objective when it exercises any discretion given to it by the CPR 2000 or interprets any rule. Given the circumstances and the factual matrix, an acceptance of Dr. Dorsett's arguments would be inharmonious with the overriding objective of dealing with cases justly.

[18] By virtue of rule 10.7 of the CPR, a defendant who wishes to raise the allegation or factual argument on the issue of mitigation must plead it in his defence. A failure to so plead is not necessarily fatal to his ability to advance the issue. The allegation or factual argument with respect to mitigation can be raised otherwise than in the defence with the permission of the court or agreement of the parties. So where, as here, by consent of the parties, recorded in a consent order, in lieu of filing a defence, Angel was entitled to adduce evidence in support of mitigation at the assessment hearing, it would have satisfied rule 10.7 of the CPR 2000. To put it otherwise, the consent order dated 8th October 2009 and entered 17th January 2011 provided the requisite agreement pursuant to which Angel could have adduced and did adduce affidavit evidence with respect to the issue of

mitigation. Angel's affidavit evidence engaged the issue of mitigation by seeking an alternative venue.

[19] For all the reasons given, ground 1 of the appeal fails. The learned judge did not err in holding that notwithstanding Angel's breach, Saffron was under a duty to take the step of relocating or seeking the possibility of relocating its restaurant to a new location, consistent with its duty to mitigate its damages.

The Law on Mitigation

[20] The issue of mitigation forms a crucial part of this appeal and impacts on several of the grounds. It would be apt at this stage to set out the relevant law on mitigation. The legal burden in establishing a failure to mitigate lies on the party asserting such a failure. The burden is on the defendant to show that the claimant did not take reasonable steps to mitigate his losses. The defendant has to establish that the claimant failed to act reasonably. The principle of mitigation imposes a duty on the plaintiff to take all reasonable steps to mitigate the loss consequent on the breach and debars him from recovering damages which he could thus avoid but has failed, through unreasonable action or inaction, to avoid. Put shortly, the claimant cannot recover for avoidable loss.[5]

[21] Mitigation issues are heavily fact sensitive, multifactorial questions, upon which an appellate court will indeed be slow to interfere unless the judge has gone clearly wrong. Nonetheless, the question at the end of the day is whether there has been an unreasonable failure to mitigate, and the application of a reasonable test does, in the final analysis, require an objective analysis which requires something more than just fact-finding.[6]

[22] The duty to mitigate is a duty not to expose a contract breaker or tortfeasor to additional expense by reason of the claimants not doing what they ought

[5]See: McGregor on Damages 19th Edn., Sweet & Maxwell: London (2014).
[6]See: Lord Justice Briggs in Lsref III Wight Limited v Gateley LLP [2016] EWCA Civ 359 at para. 39.

reasonably to have done. That principle is qualified for it does not impose an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business.[7]

[23] The law is satisfied that if a party placed in a difficult situation by reason of the breach of duty owed to him has acted reasonably in the adoption of remedial measures, he will not be held to be disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.[8]

[24] The learned judge stated that notwithstanding Angel's breach, Saffron was compelled in the circumstances, to take steps to mitigate its loss. The learned judge asked: what would a reasonable businessman, in the shoes of Saffron do? One option was to relocate to alternative premises. The judge noted that Saffron had a 21-year lease, of which only 18 months had elapsed. Saffron closed the restaurant ostensibly for vacation for three weeks and did not re-open. Saffron contends that it was forced to cease the operation of its restaurant on account of Angel's non-provision of electricity. The judge noted Saffron's contention that connecting to CDAL's power was not an option, but correctly held that this did not absolve Saffron from taking other steps to mitigate its loss.

[25] At paragraph 32 of her judgment, the learned judge held that Mr. Martel and/or the other directors or managers of Saffron, as reasonable men, ought to have 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 Saffron had a distinctive feature which no other premises could provide, or that the ambience could not be duplicated elsewhere. To my mind, that finding is unimpeachable; any attempt to assail it is unmeritorious.

---

[7] See: British Westinghouse Electric and Manufacturing Company Limited v Underground Electrical Railway Company [1912] AC 673 per Viscount Haldane at p. 689.

[8] See: Lord Macmillan in Banco de Portugal v Waterlow & Sons Ltd [1932] AC 452 at p. 506.

Grounds 2 and 3

[26] Grounds 2 and 3 engage the issue of mitigation. Ground 2 alleges that the learned judge erred in holding that the renting or purchasing of a generator to provide electricity was an alternative available to the appellant by failing to have regard or proper regard to section 5 of the Public Utilities Act[9] and the interest of the APUA.

Submissions and Discussion

[27] The learned judge stated that renting or purchasing a generator to provide electricity was a step available to Saffron. The judge stated that the evidence shows that when Angel stopped supplying electricity to Saffron from their generators in late May 2008, Saffron rented a generator at a cost of US$100.00 a day. Mr. Martel's evidence was that the generator powered the restaurant and "other areas that they needed to function". Mr. Martel stated that the 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 in cross-examination what was the cost, he responded, "I did not investigate that".

[28] Dr. Dorsett contends that renting or purchasing a generator was not a reasonable option; it would be an inappropriate temporary measure for what was clearly an ongoing, chronic and long term problem. The problem being Angel's apparent permanent inability to pay APUA so that its premises, including the portion leased to Saffron could be served with electricity in accordance with the terms of the lease.

[29] While recognizing that renting a generator may not have been a viable long term solution for the remainder of the lease, Mr. Fuller contends that it could have been an effective temporary measure given the fact that Angel had offered to reimburse any expense Saffron would have to undergo for the restoration of electricity to its premises. Mr. Fuller posits that the correspondence between APUA and Saffron

[9] Cap. 359, Revised Laws of Antigua and Barbuda 1992.

only reflect inquiries or requests being made relating to supply of electricity by APUA. There is no evidence of any request being made to APUA for Saffron to use a generator to supply its own electricity. Further, Saffron could have exhausted the available options of leasing alternative premises or connecting to CDAL before resorting to the drastic measure of closing its business.

[30] Dr. Dorsett's reference to section 5 of the Public Utilities Act provides no utility to ground 2. Section 5(1) simply declares APUA's exclusive right to generate, distribute, supply and sell electricity in Antigua and Barbuda. Section 5(2) allows APUA to give written permission to any person to generate or supply electricity at any place in Antigua and Barbuda.

[31] Reference to section 5 tends to highlight or emphasise Saffron's inaction. Mr. Fuller points to the absence of evidence of any request by Saffron to APUA to use a generator to supply its own electricity. I am of the view that requesting such permission was certainly an option available to Saffron under section 5(2) of the Act. Dr. Dorsett also referenced affidavit evidence of Saffron's interaction with APUA, where in paragraph 7, Mr. Martel, deposed that he offered APUA a deposit of $20,000.00 to encourage them to supply electricity to Saffron. The offer was not acceptable to Saffron, "given the millions owed by the Defendant Company [Angel] to APUA". The judge noted that: (i) Mr. Martel did not offer a shred of evidence of this; and (ii) there was no evidence of any correspondence between Mr. Martel and APUA either by letter, fax, email or otherwise.

[32] Ground 3 avers that the judge erred in holding that the question of whether spending $200,000.00 would have exposed Saffron to financial risk did not arise, when the issue of whether Saffron was under a duty to undertake financial risk in order to connect to CDAL was a live one.

[33] The issue in ground 3 revolves around the cost of connecting to an alternative available power source - CDAL. Dr. Dorsett states that would be a costly exercise,

as, on the evidence of the engineers, the combined costs of the devices required would be in the region of $200,000.00. Dr. Dorsett submits that such an outlay entailed significant financial risks and would have placed Saffron's otherwise sound financial position in a precarious position. In the circumstances, Dr. Dorsett submits that the failure to spend $200,000.00 was not unreasonable.

Discussion

[34] Ground 3 does not have much traction as it boils down to inviting this Court to overturn a factual finding of the trial judge, absent a basis for so doing. The learned judge considered the matter of the $200,000.00 when she dealt with the averment that Saffron failed or refused to mitigate its loss by connecting to CDAL. The judge considered Dr. Dorsett's submission that Mr. Martel's evidence was that he had been informed that the 45 KVA supply from CDAL was insufficient to operate Saffron's restaurant. The judge referred to Mr. Martel's affidavit evidence of 1st March 2011 that in or about June 2008, he approached Mr. Watson, CDAL's Chief Engineer, and inquired of him the possibility of Saffron obtaining electric power supply from CDAL. Mr. Watson advised him that connecting to CDAL "was not a feasible option at that time". Further, Mr. Watson advised him that Saffron required at least 125 KVA and the excess capacity of CDAL was 45 KVA.

[35] Critically, the learned judge stated "I do not accept Mr. Martel's evidence". The judge pointed out that Mr. Watson was adamant 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. The judge pointed out that 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".

[36] The judge referred to Dr. Dorsett's submissions that the engineers suggested that costly measures would have had to be undertaken to, at best, salvage the situation. The judge also dealt with Dr. Dorsett's submission that Saffron's failure

to spend $200,000.00 was not unreasonable and Dr. Dorsett's statement that "Mr. Watson and Mr. Owens suggested that the Claimant [Saffron] might have been able to keep the lights on if it was able to fork out $200,000.00 on imported electrical devices".

[37] Having considered Dr. Dorsett's submissions, the learned judge noted that Mr. Martel did not make inquiries of Mr. Watson or Mr. Owen as to what amount of power would be required to run Saffron's restaurant. The judge also made the important finding: "There is no evidence that, prior to the [Saffron's] closure of the Saffron Restaurant, that either Mr. Watson nor (sic) Mr. Owen told Mr. Martel that the sum of $200,000.00 was needed on imported electrical devices". The learned judge then concluded that: "The question whether or not the expending of the sum of $200,000.00 would have exposed [Saffron] to financial risk as contended by Dr. Dorsett simply does not arise, and is therefore not a basis for concluding that [Saffron] 'was not unreasonable in refusing to undertake such a risk,'" as submitted by Dr. Dorsett.

[38] The judge's conclusion has to be looked at in context. It was clearly predicated upon the absence of evidence. The judge was considering Saffron's response to Angel's breach of contract and found that there was no evidence that Saffron would have to expend $200,000.00. Having so found, the learned judge was entitled to conclude that the issue of whether or not expending that sum would expose Saffron to financial risk, simply did not arise. In the circumstances, there was no basis for concluding that Saffron was not unreasonable in refusing to take such a risk.

[39] Dr. Dorsett takes issue with the judge's finding that Mr. Martel did not make inquiries of Mr. Watson or Mr. Owen as to what amount of power would be required to run the Saffron. Dr. Dorsett contends that this finding is contradicted by Mr. Watson's evidence at pages 346 to 347 of the record of appeal that he

discussed with the Martels, a long time ago - a few years ago - but could not remember the date, supplying the restaurant with 45 KVA.

[40] Mr. Fuller points to page 347 of the record of appeal where Mr. Watson specifically stated that he was unaware of Saffron's drawing needs but told Mr. Owen that 45 KVA was the maximum availability that could be provided. Mr. Fuller points out that the information was never in relation to the minimum KVA required to operate Saffron's business. Mr. Fuller submits that since no evidence was advanced as to the minimum KVA required for the property, Saffron has, in effect, failed to establish its case that it would have had to expend $200,000.00.

[41] Mr. Fuller further submits that Mr. Watson's evidence relating to the switch gear - the custom-made device, which would have to be made in the United Kingdom and ordered, costing 35.00 pounds was only necessary if Saffron required a greater power supply than the 45 KVA. This was not proved. In the circumstances, Mr. Fuller submits that the only expenditure Saffron would have had to make would be in relation to Mr. Owen's evidence on the cost of the transformer, US$20,000.00.

[42] The learned judge disagreed with Saffron that it did all that it reasonably could do to stay in business, stating that the facts do not support Saffron's contention. There was no attempt to obtain an alternative power source by way of purchase or lease of a generator to keep 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 Saffron to unreasonable financial risk.

[43] Like the learned judge, I conclude that Saffron's response to Angel's breach was unreasonable. Saffron was required to take all reasonable steps to lessen the damage resulting from Angel'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 reasonable steps to mitigate its loss. Several options were available. Saffron did not even attempt to secure an alternative location. It chose instead to claim, inter alia, loss of profits for the unexpired term of the lease, 19 years. Accordingly, Saffron also fails on grounds 2 and 3 of the appeal. The finding as to mitigation also has adverse consequences for grounds 5 and 6 of the appeal.

Loss of profit

[44] Ground 5 reflects Saffron's dissatisfaction with the judge's disallowance of its claim for special damages for loss of profit. Dr. Vincent Richards is an economist and chartered accountant. Saffron commissioned him to perform an analysis of its financial performance and an estimate of the income that it would have generated had it continued as a going concern for the entirety of the 21 year lease. Dr. Richards concluded that as a result of the closure of Saffron's Restaurant, the present day value sum of US$5.429 million (EC$14,658,300.00) which might have been gained as operating income had been lost.

[45] The learned judge stated that Dr. Richards' report was not loss of net profit but an estimate of what Saffron's accumulated gross profit was likely to be by the year 2027, based on a number of assumptions. The most fundamental assumption being that Saffron would continue as a going concern - a successful and viable business - for the remainder of the lease period of 19 years. The learned judge viewed this as speculative and concluded that Saffron had failed to prove its loss. Based on the authorities and the totality of the evidence, Saffron failed to prove on a balance of probabilities that it is entitled to special damages in the sum of EC$14,658,300.

[46] Dr. Dorsett contends the judge mistakenly adopted the view that "the first report of Dr. Richards is not loss of net profit" when the report was properly relating to net profit. Dr. Dorsett submits that the report did not show accumulated gross profit but showed accumulative net income over the projected period. The accumulative

net income in the "present day value sum of US$5.429 million (or EC$14,658,300.00) took into account taxes that would have been paid on the net income earned".

[47] Dr. Dorsett referred to the learning in The Law of Contract Damages,[10] that where profits that would have been made are not capable of precise calculation, the burden of proof is not on a balance of probabilities to the specific pleaded figure of the loss and the judge is entitled to make a reasonable assessment. Further, the fact that the loss of profits may depend upon many speculative factors is not a sufficient reason for denying an assessment. The court will do the best it can and examine the evidence in a realistic manner. Dr. Dorsett submits that there was no proper basis for not awarding Saffron damages for loss of profits based upon a reasonable assessment. The learned judge simply failed to do an assessment.

[48] Mr. Fuller agrees with the learned judge's conclusion on Dr. Richards' report. Critically, Mr. Fuller submits that the loss could have been avoided by simply having regard to the available options. I agree.

[49] In my judgment, Saffron's claim for special damages for loss of profit is unsustainable due to its failure to take reasonable steps to mitigate its loss. This provides a complete answer to ground 5.

[50] Ground 6 avers that the learned judge erred in disallowing Saffron's claim for loss of profits when the loss of profits over a number of years was not too remote and would have been in the contemplation of the parties. Dr. Dorsett recognises that there are restrictions upon recovery of substantial damages for breach of contract. Among the restrictions he referred to are remoteness – the loss must not be too remote – and mitigation. The innocent party must not have failed to mitigate his loss. Mr. Fuller quite properly points out that the issue at assessment has always

[10] Kramer, Adam (2014), The Law of Contract Damages, Hart Publishing Ltd: Oxford at p. 470.

been that the extent of the loss suffered by Saffron could have been mitigated; it has never been that loss of profit is too remote. I agree with Mr. Fuller.

[51] In my judgment, like ground 5, the finding that Saffron failed to act reasonably to mitigate its loss certainly has adverse consequences for the successful pursuit of ground 6. Saffron had a duty to take all reasonable steps to mitigate the loss consequent on Angel's breach. Saffron is debarred from claiming any part of the damage which is due to the failure to take such steps. Angel is not to be exposed to additional cost by reason of Saffron not doing what it ought to have reasonably done. Not having mitigated its loss, Saffron is not entitled to recover as damages sums it would have earned had it mitigated its loss.

Treatment of E-mail

[52] Ground 7 relates to the judge's treatment of an email dated 7th December 2008 from "Dorothy Martel owner Saffron" to one Dayanna Regis. The email reads in part: "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…". In referring to this email, the judge stated: "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 also went on to draw an inference as to what was disclosed by the email in relation to the negative effect on Saffron's business if it had remained open after the casino's closure.

[53] Dr. Dorsett launched a bicipital attack in ground 7. The gravamina of his complaint are that: (i) liability having been established against Angel, the judge erred in holding that the real reason for Saffron's closure was not due to Angel's fault; and (ii) the judge drew improper inferences from the email.

[54] With respect to the first limb, Dr. Dorsett states that the judge engaged in warranted and improper speculation as to the real reason for Saffron's closure.

Further, "the real reason for the closure of Saffron" was not a live matter on the pleadings and was never an issue between the parties. The learned judge erred in finding that the "real reason" for the closure of Saffron's Restaurant and the resulting loss to Saffron was something other than Saffron's breach of contract.

[55] Mr. Fuller argues that notwithstanding that liability was settled, the judge was free to comment upon any piece of evidence. Mr. Fuller posits that the reasoning behind the closure of Saffron's restaurant has always been a live issue between the parties. It was alluded to in the defence and was especially important in mitigation since it may have essentially disclosed why Saffron failed to take certain steps in the circumstances.

Discussion

[56] In my judgment, the facts show clearly that the real reason for Saffron's closure was Angel's dire financial straits which precluded it from paying APUA for electricity, leading APUA to suppress the electricity supply to the building which housed Saffron's restaurant and the casino. The closing of the casino was synced with the same issue of Angel's financial difficulty. In the premises, I agree with Dr. Dorsett that the learned judge wrongly engaged in speculation as to the real reason for Saffron's closure. I do not, however, regard the judge's statement as a holding that the real reason for the closure was not due to Angel's default resulting in a breach of contract. The learned judge did not so hold.

[57] The first limb of Dr. Dorsett's complaint having failed, the second limb falls to be considered. To put the complaint in context, it is useful to have regard to what the learned judge said. The judge said:

> "…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" [emphasis added].

Dr. Dorsett takes exception to the inference drawn by the learned judge regarding the fact disclosed by the email, contending that no such fact was disclosed by the email. Further, even if it is accepted that the casino's closure negatively impacted Saffron's restaurant, there was no factual evidence demonstrating that the closure of the casino was "resulting in a loss to the claimant".

[58] Mr. Fuller posits that the trial judge had the accounts for two fiscal years from which it could reasonably determine whether traffic to the restaurant would have been significantly reduced as a result of the casino's closure. An estimated loss is not a far-fetched conclusion to make in the circumstances. Mr. Fuller submits that the judge did not make an unreasonable inference and wrongly discounted cogent evidence from Dr. Richards. The learned judge simply took Saffron's words at face value and made her own determination on the evidence as presented.

[59] It is an elementary proposition that findings of fact must be based on evidence, (including inferences that can properly be drawn from the evidence) and not on suspicion or speculation: Re A (A Child) (No 2).[11] It is settled law that a trial judge is entitled to draw inferences from the facts found. It is also an error of law to make a finding of fact for which there is no supporting evidence. However, so long as there is some evidence capable of supporting the conclusion, the issue is not subject to review as a question of law. The Court of Appeal will only interfere with the inference drawn if it is compelled to do so.

[60] The learned judge was not making a finding of primary fact. The judge was drawing an inference of fact. This being an inference drawn by the judge, Dr. Dorsett has to show that the judge was plainly wrong in drawing the inference. Was there evidence to support the inference the judge drew? Was it a permissible inference? The learned judge had the email before her, and from its content, drew the inference of fact that had Saffron remained open after the casino's closure, its business would have been negatively affected, resulting in a loss. It is not, in my

[11] [2011] EWCA Civ 12 at para. 26.

view, an unreasonable inference or one which has no basis. It cannot be said that there was no evidence to support that inference. In that situation, an appellate court would not interfere with the inference drawn.

[61] The learned judge's statement that the email "discloses the fact that" and what follows after, forms the basal point of Dr. Dorsett's criticisms. The statement that the email "discloses the fact" may attract the criticism of being inapt or infelicitous, due to the fact that what the judge referred to as facts disclosed by the email, were not primary facts but rather were inferences of fact being drawn by the learned judge. However, inaptness or infelicity of language does not detract from the fact that the learned judge was drawing an inference of fact, the reasonableness of which has not been derailed by the criticisms levelled. I bear in mind the words of Lady Gloster in Ellison v Glencore Services (UK)[12] at paragraph 24:

> "it is all too easy for an appellate court to criticise individual sentences or infelicities of language or reasoning of a trial judge, notwithstanding that at the end of the day his judgment on the entirety of the evidence may well have been correct. A judgment should be looked at in the round … It should not be picked over or construed as if it were a piece of legislation or a complex commercial contract".

Looking at the matter in the round, for the reasons given, this limb of the bicipital attack also fails.

Matters that can be taken on assessment

[62] Before moving to the next ground, it may be useful to set out the parameters relating to what may be argued at an assessment hearing for damages, when liability has been determined. This assumes some moment in light of Dr. Dorsett's submission that liability having been established against Angel, the learned judge erred in holding that the real reason for Saffron's closure was not due to Angel's fault. The relevant backdrop would be the guidance the Board gave in Strachan v The Gleaner Company Limited[13] at paragraph 16: When judgment has been given for damages to be assessed, a defendant cannot dispute liability at the

[12] [2016] EWCA Civ 407.
[13] [2005] 1 WLR 3204; [2005] UKPC 33.

assessment hearing. At the assessment hearing, the claimant must prove his loss or damage by evidence. The claimant obtains his right to damages from the judgment on liability; thereafter, it is only the amount of such damages which remains to be determined.

[63] The relevant law governing what matters can be taken on an assessment of damages is set out in Lunnun v Singh.[14] The law is that a default judgment is conclusive on the issue of liability of the defendant as pleaded in the statement of claim. On an assessment of damages, the defendant might not take any point inconsistent with the liability alleged in the statement of claim. It is open to a defendant, however, to take points relevant to the assessment. Matters relevant to the assessment of damages include: contributory negligence, failure to take reasonable steps to mitigate, and causation, to the extent that the defendant's acts were not causative of any particular item of alleged loss.

[64] In Lunnun, Peter Gibson LJ expressed the principle thus: "the true principle is that on an assessment of damages any point which goes to quantification of the damage can be raised by the defendant, provided that it is not inconsistent with any issue settled by the judgment". Mr. Justice Jonathan Parker stated:

> "the underlying principle is that on an assessment of damages all issues are open to a defendant save to the extent that they are inconsistent with the earlier determination of the issue of liability, whether such determination takes the form of a judgment following a full hearing on the facts or a default judgment".

[65] Saffron's judgment was conclusive on the issue of Angel's liability as pleaded in the amended statement of claim. An assessment of damages was subsequently undertaken to determine what loss or damage was caused by Angel's breach. On the assessment of damages, although Angel could not take any point which was inconsistent with the liability alleged in the statement of claim, it might take points relevant to the assessment, including failure to take reasonable steps to mitigate.

[14] [1999] EWCA Civ 1736.

The issue before the judge was not one of the real reason for Saffron's closure; it was really one of whether Saffron took reasonable steps to mitigate its loss. There is no indication that the judge was not seised of that fundamental issue. Angel's reference in paragraph 4 of the defence to the casino closing is contextually synced to mitigation.

Severance Pay

[66] Ground 4 concerns the judge's disallowance of Saffron's claim of special damages amounting to $178,524.85 as severance pay to the workers together with the costs of repatriating some of them, in particular two Indian chefs. Saffron complains that the judge erred in disallowing such personnel costs. The learned judge denied severance pay on the basis that: "There are no receipts, or any other form of documentary evidence that the said payments were in fact made to the employees".

[67] Dr. Dorsett posits that Saffron would be entitled to the damages claimed not upon proof that the severance was paid, but upon a finding that the severance was liable to be paid. Dr. Dorsett founds his submission on section C40 of the Antigua and Barbuda Labour Code[15] (the "Labour Code") which states:

> "Every employee whose terms of employment with an employer and his predecessors has in aggregate exceeded one year is entitled to severance pay upon termination of said employment by employer for reasons of redundancy."

[68] Mr. Fuller seeks to uphold the rectitude of the learned judge's finding and points to the absence of documentary evidence that the sum claimed was paid to the employees. Mr. Fuller submits that in the absence of proof that the sum represents losses actually suffered by Saffron, the amount claimed cannot be recovered as special damages. Mr. Fuller contends that section C40 of the Labour Code does nothing to rebut the judge's finding. The section only speaks to an employee's entitlement to severance pay from an employer after termination. It

[15] Cap. 27, Revised Laws of Antigua and Barbuda 1992.

can be used to show that the employees should have rightfully been paid in that respect; it cannot be used to counter the explicit requirements in claiming for special damages.

[69] As a matter of law, it has always been necessary to plead and prove special damage with proper particularity.[16] To get special damages you have to plead and prove them. The witness statement must prove the special damages claim. The special damages claimed here are founded on severance pay and repatriation of the chefs. Section C40 of the Labour Code is a statutory provision speaking to an entitlement to severance pay. While there is no evidence that Saffron paid the severance sum, there does not appear to be any challenge to the entitlement to the severance payment. The case of Grant v Motilal Moonan Ltd and Another[17] is instructive on this point. In that case the court, in awarding the claim for special damages in full, found that although special damage must be pleaded, particularised and proved strictly, the appellant had prima facie established the cost of certain articles and the respondents had not attempted to challenge the values placed on them. I tend to agree with Dr. Dorsett's submission on that issue. Here, the amount of the severance payment has been prima facie established by Saffron and there is no challenge to the entitlement to the severance payment by Angel. In fact, severance pay is liable to be paid, as a matter of law, having regard to the provisions of section C40 of the Labour Code. In the premises, Saffron is awarded the special damages claimed in respect of severance pay. The claim for special damages in respect of the cost of the repatriation of the chefs to India is dismissed, on the basis that no evidence was adduced in support of that item.

Challenge to adequacy of general damages

[70] Ground 8 challenges the adequacy of the sum of US$20,000.00 (EC$54,000.00) the judge awarded as general damages for breach of contract. Saffron seeks an upping of general damages to EC$200,000.00. There is no all-embracing principle

[16] See: Dictum of Lord Donovan in Perestrello E Companhia Limitada v United Paint Co. Ltd. [1969] 1 WLR 570 at p. 579.
[17] (1988) 43 WIR 372.

governing the assessment of general damages other than that an award must be of such amount as will fairly compensate the claimant for his loss. Circumstances may differ and each case has to be approached on its own facts, but it is necessary to bear in mind that the fundamental purpose of an award is compensatory.[18]

[71] As the Court is being invited to increase the quantum of general damages, it is prudent to pay regard to the principles governing appellate interference with an award of damages by a lower court. The circumstances justifying appellate interference are fairly circumscribed and accordingly lie within narrow parameters. Before an appellate court interferes with an award of damages, it has to be satisfied that in assessing damages, the trial judge applied a wrong principle of law or made an award so inordinately low or so unwarrantably high that it represents an entirely erroneous estimate of the damage to which the claimant is entitled and as such could be said to be plainly wrong. In such circumstances, it cannot be permitted to stand. Numerous authorities support that proposition.

[72] In Flint v Lovell,[19] Greer LJ said:

> 'In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

To the same effect are the words of Viscount Simon in Nance v British Columbia Electric Railway Co. Ltd:[20]

> "... before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

---

[18] See: West Midlands Travel Ltd v Aviva Insurance UK Ltd [2013] EWCA Civ 887 at para. 23.
[19] [1935] 1 KB 354 at p. 360.
[20] [1951] AC 601 at 603 at p. 613.

[73] These guiding principles inform my approach. The parties shared the common position that the cost of acquiring electricity from CDAL was a proper basis for the assessment of general damages. In that regard, the learned judge awarded general damages of US$20,000.00 (EC$54,000.00). The judge came to that conclusion after assessing the evidence.

[74] Dr. Dorsett submits that a proper assessment of the entirety of the evidence, in particular, the evidence of the two engineers indicate that the cost of acquiring electricity from CDAL would be in the region of EC$200,000.00. Dr. Dorsett referred to Mr. Watson's testimony of the need for a custom-made device estimated to cost 35.00 pounds and Mr. Owen's testimony that a transformer costing US$20,000.00 would have to be part of a possible solution. Dr. Dorsett posits that the combined costs of these devices would be in the region of EC$200,000.00.

[75] Mr. Fuller submits that based on the evidence of Mr. Watson and Mr. Owen, the learned judge determined that no assessment had been made as to the minimum amount of KVA the restaurant would need and no such evidence was presented that Saffron did actually require more than the 45 KVA available. Mr. Watson's evidence relating to the custom-made device was only necessary if Saffron required a greater power supply than the 45 KVA. This was not proved. Thus, the judge's conclusion was based entirely on Mr. Owen's evidence as it related to the cost of the transformer.

[76] Given the principles governing appellate interference with an award of damages, Dr. Dorsett has not demonstrated that this is an appropriate case warranting such intervention. Taking issue with the judge's assessment of the evidence is hardly a promising start or basis for disturbing the award of general damages. I am not of the view that there is a proper basis for disturbing the award of general damages.

[77] I would allow the appeal to the extent that Saffron Limited is awarded special damages of EC$30,592.86 in respect of severance pay only. The other grounds of appeal are dismissed.

Costs

[78] This takes me to the issue of costs. The Court's discretion as to costs is a wide one. The aim is always to make an order that reflects the overall justice of the case. The general rule is that costs should follow the event, i.e. that the unsuccessful party will be ordered to pay the costs of the successful party. The court may depart from the general rule. The question who is the successful party for the purpose of the general rule must be determined by reference to the litigation as a whole. The question of who is the successful party "is a matter for the exercise of common sense". The court may make an order that a party must pay a proportion of another party's costs.

[79] There is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues. In any litigation, especially complex litigation, any winning party is likely to fail on one or more issues in the case. "The court can properly have regard to the fact that in almost every case even the winner is likely to fail on some issues": Budgen v Andrew Gardener Partnership.[21]

[80] In deciding what order to make, the court will have regard to all the circumstances, including the conduct of the parties; whether a party has succeeded on part of its case, even if that party has not been wholly successful. The conduct of the parties includes whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue. The reasonableness or unreasonableness of the successful party's conduct in relation to the issues on which it lost may be taken into account when deciding whether to deprive it of a portion of its costs.

[21] [2002] EWCA Civ 1125 at para. 35.

[81] Saffron was successful on only one ground of appeal. Saffron was unsuccessful on all the major issues. Further, Saffron's conduct in raising, pursuing and contesting the issue of mitigation by way of relocation has been minutely examined by this Court. For the reasons indicated earlier when the Court addressed ground 1 of the appeal, and which it is not necessary to repeat, Saffron's conduct in so doing was manifestly unreasonable. As stated earlier, it would have adverse costs consequences. Taking into account all the circumstances and in exercise of the Court's discretion, the appropriate costs order would be that Saffron Limited is awarded 5% of prescribed costs in the court below and two-thirds of that sum on the appeal. I would so order.

Conclusion

[82] For the above reasons, I would make the following orders:

(1) The appeal is allowed to the extent that Saffron Limited is awarded special damages of EC$30,592.86 in respect of severance pay only. The other grounds of appeal are dismissed.

(2) Saffron Limited is awarded 5% of prescribed costs in the court below and two-thirds of that sum on the appeal.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar