[2014] JMCA Civ 43

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 18/2009

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**AKBAR LIMITED**	**APPELLANT**
AND	**CITIBANK NA**	**RESPONDENT**

Ransford Braham QC, Christopher Dunkley and Miss Tameka Dunbar instructed by Phillipson Partners for the appellant

John Graham, Miss Janice Behari and Miss Annaliesa Lindsay instructed by John G Graham & Co for the respondent

18, 23, 24 July 2013 and 14 November 2014

HARRIS JA

[1] I have read in draft the judgment of Phillips JA. I agree with her reasoning and conclusion and have nothing to add.

PHILLIPS JA

[2] This is an appeal against the decision of Jones J made on 12 January 2009 in which he found in favour of the appellant, Akbar Limited ('Akbar'), in its claim against

the respondent, Citibank NA ('Citibank'), for inducement of breach of a contract but made no order as to damages.

Background

[3] Akbar was at the material time a company incorporated in Jamaica engaged in carrying on the business of a restaurant. Sometime in May of 1997, Akbar and Herman Chen entered into negotiations for the lease by Mr Chen to Akbar of premises located at 53 Gloucester Avenue in the parish of St James. A lease agreement was subsequently signed by Rajiv Bakshi, a director of Akbar. The agreement did not bear a date of signing but it stated that the date of commencement of the lease was 1 July 1997 for a period of 10 years with monthly rent of $100,000.00 to be paid in advance on the first day of each month. The lessee covenanted to pay, on the commencement of the lease, two months' rent representing a security deposit of $200,000.00. Clause 4(a) of the agreement stated:

> "That the Lessee shall be at liberty at its own expense to construct an external kitchen for its use together with the leased premises, provided that the building plans and location of said kitchen on premises belonging to the Lessor, are first approved in writing by the Lessor and the Saint James Parish Council."

[4] By letter dated 19 June 1997, Ms Audrey Wilson of Audrey Wilson and Company, attorneys-at-law for Mr Chen, wrote to Mrs Jeanne Robinson-Foster of Messrs Watt, King and Robinson, attorneys-at-law for Akbar, indicating that Mr Chen had executed the lease and that she was instructed to send the executed lease to Mrs Robinson-

Foster upon receipt of rent, security deposit and costs payable by Akbar. Mrs Robinson-Foster then relayed this information to Akbar by means of a letter dated 25 June 1997. In this letter, she requested that Akbar "immediately let us have a cheque" for the total amount payable, being $362,855.00. Ms Wilson again wrote to Mrs Robinson-Foster, by letter dated 23 July 1997, requesting an explanation for the "silence from your clients after executing the … lease" and requesting the payment of the sum due. It appears from further correspondence between the parties that Akbar made a payment of $200,000.00 into the account of Mr Chen sometime in August 1997, and Mrs Robinson-Foster thereafter requested a copy of the duly executed lease. There followed a letter from Ms Wilson on 2 September 1997 indicating that she was unsure of the basis on which the sum of $200,000.00 had been paid in light of the fact that Akbar ought to have paid security deposit of $200,000.00 in addition to the first month's rental to "commence the lease" plus attorney's costs billed to Akbar by her (which costs were, according to the agreement, "half of the costs and disbursements of and incidental to the preparation and stamping of the lease and counterpart").

[5] By letter dated 6 October 1997, Mrs Robinson-Foster wrote to Ms Wilson referring to an earlier conversation between both of them on 3 October, in which they had confirmed that the sum owing was rental for September and October 1997, security deposit of $200,000.00 and half of the costs of the agreement. She enclosed cheques for outstanding rent of $200,000.00, for security deposit of $200,000.00 and the costs of $47,855.00. She indicated that the sums were being sent solely in exchange for the executed lease and the keys for the premises. The cheques were returned by Ms Wilson

by letter dated 8 October in which she asserted that what had been agreed was that the sum which ought to have been paid up to 2 October was $600,000.00 plus attorney's costs, of which Akbar had deposited $200,000.00. She indicated that they were in a "quandry as to how [Akbar] had come by Mr Chen's account number". She also indicated that Mr Chen had given firm instructions that he would not be executing the lease and did not wish to do business with Akbar since it "had displayed an inability to perform". The cheques were resent to Ms Wilson by Mrs Robinson-Foster by letter dated 9 October, Mrs Robinson-Foster stating that Akbar intended to abide by Ms Wilson's directions in her previous letter that the lease had been duly executed. She indicated that Akbar had given $50,000.00 to Mr Chen for the construction of the kitchen at the side of the building, pursuant to authorisation given by Ms Wilson and that in accordance with the authorisation Akbar had obtained approval of the building plans for construction of the kitchen and Mr Chen had in fact pursued the construction. She further stated that furnishings belonging to Akbar were on the premises and that Mr Chen had previously offered to give Akbar the keys to the premises at the time when the furnishings were placed there, but Akbar had refused because Mr Chen had had some items on the premises, which were to be removed by him.

[6] Ms Wilson again returned the cheques to Mrs Robinson-Foster stating, by letter, that this would be her response, as many times as the cheques were sent, as she had no instructions to accept payment. She also indicated that though Mr Chen had affixed his signature to the lease document in June, the signature had not been attested, and she had no instructions to complete the attestation. She denied authorising the

construction of the kitchen, but indicated that she had "merely outlined the terms subject to which [Mr Chen] was prepared to authorise construction and in the absence of an approved building plan, "we" must deny your allegations that same was approved". The record reveals no further communication between the attorneys until Mrs Robinson-Foster, by letter dated 27 October, wrote to Ms Wilson indicating that Mr Chen had "dumped" Akbar's equipment and furnishings on the property of someone totally unconnected to Akbar. Akbar subsequently commenced proceedings against Mr Chen in Suit No CL-A 233/1997 claiming specific performance of the lease agreement, and in November of that year, Akbar filed an application for an interlocutory injunction restraining Citibank or its agents from entering into a lease or rental agreement in respect of the property and from obtaining occupation or possession of the premises; and restraining Mr Chen from granting a lease to Citibank or to any other person or from transferring ownership of the property to any person without such transfer being made subject to the 10 year lease in favour of Akbar until the suit for specific performance was determined. This application was served on Citibank in December 1997. It is not clear from the record what the conclusion of that suit was, or if it was determined at all. The application for the injunction, however, was heard and determined in January of 1998 when it was refused.

[7] It does not appear from the record on what date Citibank entered the picture in relation to the property at 53 Glouchester Avenue. However, there appears in the record a series of correspondence between 6 October 1997 and February 1998 involving: Citibank and its attorney; Citibank's attorney and Ms Wilson; Mr Chen and his

wife and Citibank; and Ms Wilson and Citibank. The correspondence reveal that there were negotiations concerning the terms of a written lease to be executed between Citibank and Mr Chen. They included a letter dated 6 October 1997 from Mr Trevor Patterson, attorney-at-law, to a Mr Robert Abrahams, one of Citibank's officers, in which Mr Patterson made some observations and comments after reviewing a photocopy of what he indicated that he understood to be the form of the lease proposed by the landlord. By letter dated 28 October, Mr Patterson wrote to Ms Wilson, enclosing a draft of the proposed lease, incorporating his suggestions on behalf of Citibank and indicating that Citibank was anxious to complete. By letter dated 7 November, Citibank's vice-president, Mrs Dorothy Parkins, wrote to Mr Chen stating that Citibank had amended the lease to include a special provision to deal with "the Rajiv Bakshi situation" and detailing aspects of that provision. Then, by letter dated 12 February 1998, Mrs Parkins wrote to Mr and Mrs Chen indicating that Citibank was delighted at concluding the lease and enclosing the executed lease agreement and cheques representing payment of one month's rent and one month's security deposit. She also requested a return of Citibank's "Refundable Good Faith Binder of $25,000.00 which was sent to you in our letter of October 2, 1997".

[8] Akbar filed another action against Mr Chen by commencing Suit No CL-A 115/2000, although the exact date of the action is unclear. It thereafter filed an amended writ of summons in which Citibank was added as a second defendant. The reliefs sought were: damages for breach and/or repudiation by Mr Chen and inducement of the breach and/or repudiation by Citibank of the lease agreement;

recovery of the sum of $6,838,350.00 for special damages; interest at a commercial bank rate; costs; and further or other relief. In its statement of claim filed in 2000, Akbar alleged in paragraph 5 that the lease agreement had been varied by the parties "partly orally, partly in writing and partly by conduct with respect to the commencement date thereof". It appears that this statement of claim was amended in 2005, although the previous suit number CL-A 233/1997 seems to have been inserted on the document by mistake. In this amended statement of claim, paragraph 5 was amended to state that the variation was partly oral and partly written "with respect to the commencement of rent payments thereunder as being September 1st, 1997". Paragraphs 6, 7 and 8 detailed that the agreement was orally varied at meetings between Mr Chen and Mr Chen's servants or agents and Akbar's servants or agents in or about the months of July and August 1997 and during teleconferences between the attorneys for both parties. The variation in writing was, it was alleged, contained in and/or to be inferred from the various correspondence between the attorneys-at-law for the parties. In so far as variation by conduct was concerned, it had been varied by: Mr Chen's conduct in continuing the construction of the kitchen at the premises on behalf of Akbar beyond 6 June 1997, for which work he was paid $50,000.00 by Akbar; Mr Chen accepting delivery to the premises of Akbar's newly purchased restaurant equipment and permitting them to be stored on the premises; acceptance by Mr Chen of the $200,000.00 as deposit and/or rent in or about August 1997; and Mr Chen allowing access to the premises to Akbar's servants or agents until late September.

[9] The amended statement of claim also included particulars of inducement at paragraph 10, which were as follows:

> "(a) In or about the early part of September 1997, the Second Defendant through its servant(s) or agent(s) approached the Claimant and made an offer of J$1,000,000 for the Claimant to either assign the lease for the premises to the Second Defendant or abandon same, which offer was rejected by the Claimant;
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> (b) The Claimant was orally advised by the First Defendant that in or about [sic] latter part of September 1997 he was approached by the Second Defendant who made a better rental offer for the Premises than that to be paid by the Claimant;
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> (c) In or about December 1997 the Second Defendant was served with the Writ of Summons, Summons for Interlocutory Injunction and Amended Affidavit in Support of Summons for Injunction, all in Suit No CLA 233/1997 and dated November 28th, 1997, which documents set out in detail the Claimant's claim against the First Defendant with respect to the Premises.
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> (d) In or about February of 1998 following the discharge of the injunction over the Premises in Suit No. CLA 233/1997, the Second Defendant, knowing full well that the said suit was still pending before the Court, proceeded to enter into a lease agreement for the Premises with the First Defendant."

[10] It appears that Mr Chen died some time in 2000 and no order was obtained from the court with respect to representation on behalf of his estate for the purpose of continuing these proceedings. Citibank, however, filed a defence on 13 Dec 2000 in which it did not admit, among other things, the allegations contained at paragraphs 6, 7 and 8 of the statement of claim. It admitted that it had approached Mr Chen with a view to entering into a contract to lease the ground floor of the building but denied that

it had induced Mr Chen "to breach the alleged lease agreement". It also asserted that it did not know of a subsisting contractual relationship between Akbar and Mr Chen when it entered into the lease agreement with Mr Chen.

[11] In his witness statement, dated 24 February 2006, Mr Bakshi stated that his attorneys had informed Mr Chen's attorneys that the "commencement date (of the lease) would be subject to the construction of the kitchen. He said that a "suitable kitchen was essential to the operation of a restaurant". He confirmed that although Mr Chen's attorneys had indicated that Mr Chen would take no responsibility for the kitchen, he (Mr Chen) had been allowed to construct the same. The plans for the construction of the kitchen had been approved by the Parish Council, and had been handed over to Mr Chen, who had acted in accordance with his (Mr Bakshi's) position. He said that he had acquired furniture and equipment through Workers Bank by way of negotiations commenced in August, and although completed in September he had access to the same in August, and they were taken to the leased premises in August, with the knowledge and consent of Mr Chen. In September, the construction of the kitchen was nearing completion. He stated that that was why funds had been sent by his attorneys to Mr Chen's attorneys in October 1997, and payment of the sum of $200,000.00 was in payment of the full rental up to October 1997. The security deposit was also paid then. The funds, he said, were paid consequent on a discussion he had had with Mr Chen that workmen would be going to the premises on 9 October to attend to the interior of the premises in accordance with the lease agreement.

[12] Mr Bakshi said that in constructing the kitchen, Mr Chen had built a two-storey building which was not in keeping with the approval which had been obtained, and on which he (Mr Chen) had expended additional funds. He stated further that he had been anxious to commence business before the Christmas season so that he could start benefitting from the investments made, including the purchase of the furniture and equipment, the construction of the kitchen, and the employment of Indian workmen, for whom he had obtained work permits, in order that they could be deployed in Jamaica. Then, he said, he had become aware that Mr Chen was in discussions with Citibank for lease of the premises. His enquiries of Mr Chen had only produced statements that the premises was more suited for a bank than a restaurant. Mr Chen, he said, was encouraged to pursue those negotiations. He asserted that he had spoken to Mr Peter Moses, the country officer of the Jamaican operation of Citibank at the time, about the location of the new restaurant in Montego Bay, and that Mr Howard Mitchell, who was general legal counsel for Citibank at the time, had offered him $1,000,000.00, "to step away from the lease with Mr Chen". That, he said, had not occurred, and he was later informed that Mr Chen had entered into the lease with Citibank.

[13] Mrs Dorothy Parkins' witness statement dated 28 February 2006 stated that Citibank had decided to open a branch in Montego Bay and as a vice president, in relationship management of the institution, she had been requested by Mr Moses to secure a lease over suitable property and to make the necessary arrangements for the bank to conduct its operations. With the assistance of a real estate agent, she said, she had viewed several properties including 53 Gloucester Avenue. She said that she was

told by Mrs Chen that there was another tenant upstairs but she also said, initially that she had not been told about Akbar. She indicated that she had noticed a little out-house that was being built on the side of the building, and that there was some kitchen equipment in the space that Citibank would be renting. She said that she was told that the building was a part of a kitchen. In answer to her enquiry of Mrs Chen in respect of the reason for the kitchen equipment being in the premises, Mr Chen, who had arrived on the property, answered stating that "he had entered into an agreement with Akbar Limited, which had failed to pay the agreed amount of money and as a result, the contract was forfeited. He was, therefore, free to deal with whomever he wished". After several meetings with Mr and Mrs Chen, she said the lease was finalised. She stated that she had never had any interaction with Mr Bakshi.

[14] Mr Moses, in his witness statement, dated 29 May 2006, stated that he had been employed with the company for over 32 years. He said that Howard Mitchell had only been employed to Citibank in a legal capacity during the period 3 October 1977 - 22 September 1978. Mr Mitchell, he said, had not been employed to Citibank during the period that the bank had been in negotiation with Mr Chen in respect of the lease of 53 Gloucester Avenue, and he had not been instructed to conduct any negotiations on behalf of Citibank. He said that he (Mr Moses) was part of the team that had made the decision to open the branch of the bank in Montego Bay, but he had not made any offer to anyone with regard thereto, nor had he instructed anyone to do so.

[15] Mr Mitchell's witness statement, dated 11 May 2006, confirmed the period that he had acted as general counsel for the bank. He denied that he had ever had any

negotiations with Mr Bakshi, or that he had ever acted on behalf of the bank in relation to the lease at 53 Gloucester Avenue or made any offer to Mr Bakshi for the amount of $1,000.000.00 on behalf of Citibank or at all. He stated that the firm in which he had been a partner, during 1986 - 1996, namely Clinton Hart and Company, had also not done any work for the bank, during that time, in relation to the lease at 53 Gloucester Avenue.

[16] The matter was heard by Jones J who found that there was a valid and enforceable contract between Akbar and Mr Chen. He found further that on 6 October 1997 when Akbar's attorneys had sent the three cheques to Mr Chen's attorneys, there was still a subsisting lease agreement and that when Mr Chen returned the cheques "he was not to have discharged the lease agreement and he was therefore in breach". In relation to Citibank's contention that it thought that the contract between Akbar and Mr Chen had been forfeited, the learned judge relied on **Emerald Construction Co Ltd v Lowthian and Others** [1966] 1 WLR 699 as authority for the principle that for the tort of inducement to be proven, it is sufficient if the defendant who has procured the inducement was recklessly indifferent, and he found that the "smoking gun" was the good faith cheque of $25,000.00 sent by Citibank to Mr Chen on 2 October 1997. He also found that Citibank had accepted the word from Mr Chen that the contract was at an end and had not gone further to find out more when it could easily have done so. As previously stated at paragraph [2], the judge made no award of damages to Akbar as he was of the view that he was unable to assess any damages. He, however, awarded costs to Akbar.

[17] Akbar filed two grounds of appeal as set out hereunder:

> " a) The Learned Trial Judge having found for the Appellant on liability erred in failing to find that the Appellant was entitled to an award of General Damages against the 2nd Defendant, notwithstanding the numerous authorities in law to that effect.
>
> b) The Learned Trial Judge erred in failing to find that there was sufficient evidence before the Court upon which to infer the special damage loss claimed by the Appellant."

Citibank also challenged the judgment of Jones J by filing a counter-notice of appeal setting out the following grounds:

> " (a) There was insufficient evidence on which the learned trial judge could properly base a finding that a lease agreement existed or was proved and if it was that the respondent had knowledge of the lease agreement/contract between the appellant and Herman Chen;
>
> (b) There was insufficient evidence on which the learned trial judge could properly base a finding that when the respondent paid the good faith binder it intended to induce a breach of contract or that the tender of the good faith binder by the respondent did in fact amount to inducement in law so as to induce Herman Chen to breach the contract with the appellant;
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> (c) That the learned judge erred in entering judgment in favour of the appellant even though the appellant had not proved that it has suffered any loss;
>
> (d) That the learned judge erred in awarding costs to the respondent [sic] even though no damages were awarded to the respondent [sic] as there was no evidence on which the judge could base any such award;
>
> (e) Even if costs were to be awarded to the appellant for a part of the trial costs should be awarded to the respondent

> for the 2nd December 2008 and the 12th January 2009 when the matter continued for the appellant to make further submissions and to provide further authorities to support its contention that there was evidence on which an award of damages could be made."

Submissions

For Akbar

[18] Before the court, Mr Braham QC, first made submissions in relation to the counter-notice of appeal, which concerns in part the judge's findings on liability. He submitted that there was direct evidence of the lease and if there was not, Citibank was put on notice as to the existence of the lease between Akbar and Mr Chen. He referred to the witness statement of Mr Bakshi and submitted that there was evidence contained therein supporting the existence of the lease between Mr Chen and Akbar.

[19] Queen's Counsel submitted that there is no requirement in law that a lease must be witnessed, although this is done to prevent fraud. He further argued that even though the cheques that were paid for rental for September and October together with the costs had been returned, the payment supported Akbar's contention that the lease commenced in September or October when the kitchen was to be completed. Counsel argued that even if payments were in fact to be made in July 1997, the mere fact of not doing so would not automatically terminate the lease as there was a provision in the lease for forfeiture and there was no evidence that Mr Chen had exercised the option to forfeit the lease. In any event, it was argued, even if Mr Chen did forfeit the lease, Akbar was entitled to apply for relief from forfeiture. However, he contended, even

before the question of a possible breach came up for consideration, the learned judge had to consider whether the term commenced in July 1997 or some later date. Counsel argued that at the end of the day, the question for the judge was: did the parties, notwithstanding the signed document, agree to extend the date of commencement to coincide with a date when the kitchen was completed or in a state of readiness? If this was so, and there was evidence to support this, it was submitted, there was no breach by Akbar.

[20] Relying on Clerk & Lindsell on Torts 19th edn, it was submitted also that to induce a third party to break its contract with another without reasonable justification or excuse is a tort, and in order to establish this tort, the claimant must establish that the alleged tortfeasor had knowledge of the contract and had the requisite intention to breach or cause the breach of contract. Similarly, it was argued, recklessness may import intention under the modern authorities. For this latter submission, counsel relied on **Emerald Construction Co Ltd v Lowthian and Others**. It was further submitted that the element of intent would be sufficiently established if the third party intended for the contract-breaker to bring the contract to an end by breach of it if there was no way of bringing it to an end lawfully.

[21] Counsel submitted that there was evidence before the learned judge on which he could have properly concluded that Citibank had knowledge of the contract or lease between Akbar and Mr Chen. Counsel referred to the evidence of Mrs Parkins, as contained in her witness statement as to her observations on her visit to 53 Gloucester Avenue. Counsel submitted that Citibank would have been put on notice that Mr Chen

had in fact entered into an arrangement or lease for the premises to be used as a restaurant. There would be no basis for putting the kitchen equipment on the premises unless Mr Chen had given permission for the said premises to be used as a restaurant, he argued. Further, it was significant that Mrs Parkins said that Mr Chen had told her that he had entered into a lease but that the lease had been breached and had therefore been forfeited. It was argued that having received this information, Citibank ought to have enquired further of Akbar or Mr Chen as to the nature of the lease and ought to have investigated as to whether the lease was terminated or not. However, Citibank made no attempt to satisfy itself that the lease had been terminated. Counsel submitted that the judge would have been entitled to infer from that evidence that Citibank was reckless as to whether there was a lease. In support of these submissions, counsel referred to Clerk & Lindsell on Torts (op cite). However, it was submitted, Citibank's recklessness was likely to have been occasioned by clause 4(g) of the lease between Citibank and Mr Chen in that the clause did not affirm that there was a lease which had been terminated or forfeited. The clause stated that discussions between Mr Chen and Akbar had been terminated and that Mr Chen had not granted or agreed to grant any lease to Akbar. It was submitted that this clause was in direct contradiction to the evidence of Mrs Parkins.

[22] Mr Braham also submitted that even if at the time when negotiations commenced between Citibank and Mr Chen, Citibank was unaware of the lease, certainly by the date of the conclusion of the lease, in February 1998, Citibank was well

aware of its existence. Further, as at February 1998, Citibank had had sight of the claim filed in the 1997 suit.

[23] It was submitted that Citibank's conduct in this matter occurred with full knowledge that there was a lease between Mr Chen and Akbar and that Citibank ought to have been aware that a lease for the same property or for property which included premises leased by Akbar would, of necessity, compel Mr Chen to breach the lease between himself and Akbar. It was submitted that Citibank in entering an agreement or lease inconsistent with that of Akbar is to be taken to have induced a breach of contract. Counsel relied on **DC Thompson & Co Ltd v Deakin & Others** [1952] 2 All ER 361 to support this submission.

[24] In relation to damages, while conceding that special damages as pleaded in the claim could not be pursued in light of the lack of supporting evidence, Mr Braham nonetheless submitted that Akbar was entitled to special damages as Mr Bakshi had paid $50,000.00 to Mr Chen towards the construction of the kitchen and had paid $200,000.00 into Mr Chen's bank account, which had not been returned.

[25] On the issue of general damages, Mr Braham submitted that there was no requirement to give evidence of specific damage because damages in relation to an inducement of breach of contract are at large. The court is entitled to infer loss based on the evidence. For this submission counsel relied on **Exchange Telegraph Co Ltd v Gregory and Co** [1896] 1 QB 147, **Goldsoll v Goldman** [1914] 2 Ch 603, **British Motor Trade Association v Salvadori and Others** [1949] 1 Ch 556, McGregor on

Damages 17 edn, pages 1455-1456, paras 40-002 to 40-0005 and **Rookes v Barnard** [1964] AC 1129. Mr Braham indicated to this court, however, that although Akbar was relying on **Rookes v Barnard**, it would not be seeking exemplary damages. In this case, counsel argued, the lease of the premises that Akbar was entering into was a thing of value and Akbar had been deprived of this. Further, this thing of value was priced by Akbar and Mr Chen at $100,000.00 per month to be increased annually for a period of 10 years with an option to renew. The judge ought to have used this deprivation as the basis for assessing Akbar's general damages, counsel submitted. Akbar ought to be compensated for the denial of the use and occupation of the premises, based on the rental. It was submitted that it is reasonable to infer from the rental that the loss initially would be at least $100,000.00 per month. In addition, in determining a reasonable award, the court is entitled to take into account the inconvenience and hurt that was occasioned by the breach of the lease. When all the circumstances are considered, the equivalent of the lease for a period of seven years would be reasonable, which would amount to $8,400,000.00. It was his submission that to this sum should be added the costs of $250,000.00, that is the total of the sums proven as being spent by Akbar, and interest should be added to these sums from February 1998 when Citibank entered into the lease with Mr Chen up to the present. The judge, he argued, was therefore in error when he found that he did not have a basis for assessing damages.

[26] Learned Queen's Counsel submitted that as an alternative to the award mentioned above, the court is at liberty to award damages based on the gains or

benefits which accrued to Citibank arising from its unlawful action. This would be a claim for restitution and on this principle Akbar would not be required to prove its losses. Counsel referred to and relied on **Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners and Another** [2007] 4 All ER 657. Learned Queen's Counsel submitted that the benefit or gain that Citibank obtained for its unlawful action was the lease of the premises to it. In that lease the rent is $95,000.00 per month, payable by Citibank for a period of five years. Based on the clear benefit to Citibank, the sum of $5,700,000.00 may be ordered in favour of Akbar and to this should be added the sum of $250,000.00 with interest. Counsel also submitted that there ought not to be any pleading issues barring this course since Akbar had claimed damages generally, and in any event, the court is entitled to proceed in this manner pursuant to rule 8.7(1)(a) and (b) of the Civil Procedure Rules (CPR).

[27] On the question of costs, it was submitted that once this court upholds the lower court's determination as to liability and allows the appeal as to damages, there can be no question that costs should follow in favour of Akbar. It was further submitted that even if the court was minded to dismiss the appeal as to damages, the learned trial judge was not in error to impose costs in favour of Akbar since Akbar succeeded on liability.

For Citibank

[28] Mr Graham for Citibank submitted that if it is being contended that there was a lease, there are matters that must be certain, such as, the commencement, duration,

and ending of the term of the lease. The lease which Akbar contends existed between itself and Mr Chen falls woefully short of the first requirement of certainty, he argued. Further, based on the correspondence it was not open to the learned trial judge below to find that the commencement date was capable of being ascertained. To support this submission, counsel relied on **Lace v Chantler** [1944] KB 368 where it was held that the commencement of a lease described as "at the end of the war" was uncertain. Counsel referred to the amended statement of case in which the lease was pleaded as beginning on 1 September 1997. Counsel argued that the correspondence revealed that building approval of the plans was a pre-condition of the lease. However, according to the evidence given on behalf of Akbar, the kitchen had not been completed. The construction of the kitchen and the approval for the building plans were matters of uncertainty, counsel argued. What existed therefore was the lease agreement that was not signed and returned to the attorney for the lessee (Akbar), no kitchen being built and no building approval obtained. Akbar could not put forward any document to show the date on which the lease should have commenced. On the evidence of Akbar, no lease came into being.

[29] He further submitted that Akbar did not get a signed lease from the attorneys for Mr Chen and in so far as offer and acceptance are concerned, the signed lease would have to be delivered to the other party for the offer to be communicated. Mr Chen signed the lease but it was subject to other financial obligations being carried out. Counsel submitted that there being no certainty of commencement, every other element would be uncertain and the notice to the world that this document would

provide was hopelessly flawed. Counsel referred to the term in the lease agreement between Akbar and Mr Chen which provided that the amendment of the lease would be binding only where it was reduced to writing and signed by both parties. Counsel submitted that it was not sufficient for the judge to say that at the time the cheques were returned there was a lease agreement in place. Counsel also submitted that the evidence of Mrs Parkins as to what Mr Chen had told her about there being a lease between him and Akbar must be taken in the context that it was coming from a layman.

[30] With respect to whether it had been proven that Citibank had procured the inducement of the breach of contract by Mr Chen, Mr Graham submitted that the question was whether Citibank had sufficient knowledge that it was inducing a breach. Counsel referred to and relied on **OBG Ltd and Others v Allan and Others** [2007] 4 All ER 545 and submitted that this case emphasises that there has to be knowledge and intention and if the person who is accused of inducing the breach had an honest belief that he was not, then that negatived one of the primary ingredients. Citibank, it was submitted, could not have intended to induce the breach of a contract in respect of which one party to the contract had cogent bases for believing that he was no longer bound by the contract.

[31] Counsel submitted that the uncontroverted evidence was that Citibank would not have entered into the lease with Mr Chen if it had known that there was a lease subsisting between Mr Chen and Akbar; it was only on being assured that the contract was at an end that Citibank proceeded to enter into the agreement. Counsel further submitted that if the court was of the view that Mrs Parkins had "turned a blind eye"

and could have made further enquiries, then the question that would emerge would be to whom should she have made those enquiries? Counsel argued that the only other persons to whom she could have made enquiries were the attorneys-at-law for Mr Chen or Mr Bakshi. Had she made further enquiries, she would have discovered that a lease agreement had been prepared between Mr Chen and Akbar; the lease ought to have had effect when signed by Mr Chen and delivered to Akbar or its attorneys; and the correspondence between the parties showed that the lease would commence on 1 July 1997. Counsel submitted that it could not be said that Citibank deliberately turned a blind eye as Mrs Parkins asked questions of the only person whom she reasonably could have and received answers which made her comfortable. Finally, it was submitted that three of the requirements necessary for a finding of inducing breach of contract as set out by Morgan J in **Aerostar Maintenance International Ltd and Another v Wilson and Others** [2010] EWHC 2032 (Ch) had not been satisfied, that is, there was no evidence that: the conduct of Citibank was such as to procure or induce the breach of contract by Mr Chen; Citibank knew of the existence of the relevant term in the contract which Mr Chen had breached or had turned a blind eye to the existence of such a term; and Citibank actually realised that the conduct that was being induced or procured would result in a breach of the term.

[32] In relation to damages, Mr Graham submitted that a claim for special damages must be pleaded with full particulars so that it is known at the outset not only what is the amount of the loss or damage that Akbar alleged that it had suffered, but also how such amount is calculated. The burden of proof is on Akbar to do so. Counsel relied on

Sempra Metals Ltd v Inland Revenue Commissioners. It was submitted that at first instance Akbar had conceded that it did not meet the standard required for an award of special damages. Counsel submitted that Akbar claimed the sum of $6,838,350.00 as special damages but adduced no evidence to form the basis on which the learned judge could make an award. Referring to clause 4(a) of the lease, Mr Graham submitted that the kitchen had nothing to do with the workings of the lease. Further, it was submitted, there was no evidence of any construction being undertaken by Akbar. The sum of $395,000.00 claimed for construction expenses, counsel contended, was a contrivance, a mistake or an attempt by Akbar to claim the monies which it had never paid. Counsel submitted further that there was nothing advanced to show loss of income for two and one half years; no cash projections were made available, no information was provided as to any market surveys done; and no airline ticket or receipt from a travel agency was provided to suggest that travel expenses had been incurred.

[33] Mr Graham submitted that there was no pleading or evidence on which to ground an award of general damages. Referring to **Exchange Telegraph**, he submitted that Citibank would have had no notice of the formula in relation to the rent proposed by Akbar. He contended that there should be pleadings and evidence should be adduced to show that it is appropriate for the court to infer that Akbar suffered loss and there should have been cash projections and market surveys, among other things. Mr Graham submitted that the evidence was not too far away as Akbar had commenced operating a restaurant two years later and there was not enough material to show what

the restaurant climate would have been. Referring to **Lonhro v Fayed (No 5)** [1994] 1 All ER 188, it was submitted that the fundamental principle that a litigant must know the case he has to meet would be turned on its head if, in the Court of Appeal, a claimant who had never made submissions similar to those being made by Akbar and had left it for the judge to trawl through the lease based on rent that Akbar had not paid, was granted damages in circumstances where there was nothing to show that the business would have succeeded when Akbar had information as it had business operations in Montego Bay and Kingston. In relation to the submission that an award could be made as damages for restitution, Mr Graham submitted that where one is making a claim for restitution, it ought to be pleaded and evidence of the extent to which the party who has done wrong has been enriched ought to be adduced. For this latter submission, counsel relied on Bullen and Leake and Jacob's Precedents of Pleadings.

Analysis

[34] Although the grounds of appeal are concerned solely with damages, in the light of the facts found by the learned trial judge, and the matters raised in the counter-notice of appeal dealing with liability, I think it prudent to deal with the issue relating to liability first. I have therefore identified the issues arising on the appeal and the counter-notice of appeal, but intend to deal with them in the order in which I have set them out below.

Issues on appeal and counter-notice of appeal

i. Was there a lease agreement subsisting between Mr Chen and Akbar at the material time? (October 1997) (ground (a) of counter-notice)

ii. If the answer to (i) is in the affirmative, did Citibank know of the subsisting lease agreement? (ground (a) of counter-notice)

iii. Did Citibank induce a breach of the agreement by Mr Chen? (ground (b) of counter-notice)

iv. Ought the learned judge to have entered judgment in favour of Akbar on liability in circumstances where he was of the view that he was unable to assess damages? (ground (c) of counter-notice)

v. Ought the court to have made an award in relation to (a) inferred special damages and (b) general damages in the circumstances? (grounds of appeal (a) and (b); ground (c) of counter-notice)

vi. What is the appropriate order to be made in respect of costs in light of the fact that there was no award of damages made? (grounds (d) and (e) of counter-notice)

Issue i - Was there a lease agreement subsisting between Mr Chen and Akbar at the material time?

[35] The learned trial judge made a specific finding that there was a valid and enforceable contract between Akbar and Mr Chen. Was he correct in making that finding? In my opinion, he was. The lease agreement was before the court. It was

signed by both parties. Mr Chen's signature had not been witnessed but there was no dispute that he had signed it, even his attorneys had written indicating that he had in fact done so. His signature not having been witnessed would not have affected the validity of the lease, and counsel for Citibank did not pursue that argument with any vigour. The document was signed and sealed on behalf of Akbar. There are certain essential terms for an agreement for a lease. These are the identification of the lessor and lessee; the premises to be leased; the commencement and duration of the term; and the rent or other consideration to be paid. Once those matters have been ascertained, offered and accepted, that is sufficient for a concluded agreement. Also, any other additional term must be and would have been unconditionally accepted by the parties, by way of their respective signatures on the document.

[36] In this matter the only controversy relates to the date of commencement of the lease. The agreement specifically stated that the lease was to commence on 1 July 1997. Clause 4(a) of the lease is set out in paragraph [3] herein and permitted Akbar to construct an external kitchen provided the building plans and location met with the approval in writing of Mr Chen and the Saint James Parish Council. Clause 4(j) stated that all the covenants, promises, terms and agreements were set out in the agreement and any changes to the agreement would not be binding on the parties unless reduced to writing and signed by them. There was no such document indicating any changes in the agreement in this case, but there were changes which were acted on by the parties and, in my view, operated as a variation of the same by conduct and agreement. I draw

support for this conclusion from the dictum of Moore-Bick LJ in **Westbrook Resources Ltd v Globe Metallurgical Inc** [2009] EWCA Civ 310, at paragraph 12:

> "It is well established that if a party to a contract who is entitled to receive performance of an obligation by a stipulated date represents to the other that he is willing to accept performance out of time and the other relies on that representation, he cannot insist on performance by the date originally stipulated. If the representation is made before the time for performance has come, the waiver will operate by way of equitable estoppel. If it is made after the time for performance is past it may also take effect as an election to affirm the contract."

The learned judge found that the contract in that case, even though it contained a clause requiring any variation to be in writing, was varied by application of these principles and he remarked further that there was no reason that that amendment clause itself could not be varied orally.

[37] The evidence of Mr Bakshi is that the commencement date of the lease was changed to September 1997. He said this was done by way of verbal agreement between himself and Mr Chen, without it being reduced into writing, as their agreement required, because he thought "Herman Chen was an honourable man and a handshake would be good enough". As a consequence, in his view, his lease was not in jeopardy. There are several indicia to support the contention that the commencement date had changed, and that the date was September 1997: the kitchen was being constructed by Mr Chen instead of Akbar, although at Akbar's expense; on Mr Bakshi's evidence, the kitchen was never fully completed, but was ready for occupation in

September; the negotiation with Workers Bank for the funds to pay for the equipment for the kitchen was in August (although completed in September), but Akbar obtained early possession of the equipment which was placed in the premises at about that time, with the knowledge of Mr Chen; Akbar got possession of the premises in August 1997; the first payment for rental was lodged to Mr Chen's account in August; and Akbar obtained the work permits for the workers from India in September 1997.

[38] The evidence indicates that the adjustment to the commencement date was conditional on the completion of the construction of the kitchen, which was reasonably foreseeable and was also an essential requirement for the operation of a restaurant. In my view, Mr Chen having undertaken the construction of the same, and also adding to the construction to the building, by one floor, ought not to be heard to say that the commencement date remained at 1 July 1997, when the premises were not ready for occupation as a restaurant then. These facts are dissimilar to those in **Lace v Chantler** referred to by counsel for Citibank where, as previously indicated, a dwelling house was let to "the defendant for the duration of the war". That period was found quite correctly to be uncertain. I agree with Lord Greene, MR that:

> " .. A term created by a leasehold tenancy agreement must be expressed either with certainty and specifically or by reference to something which can, at the time when the lease takes effect, be looked to as a certain ascertainment of what the term is meant to be."

Lord Green later, in endorsing as correct, the law as stated in Foa's Landlord and Tenant, 6th edn, page 115, made the point that:

> "… The habendum in a lease must point out the period during which the enjoyment of the premises is to be had; so that the duration, as well as the commencement of the term, must be stated."

[39] In this case the lease was for 10 years, at a monthly rental of $100,000.00, with the date for commencement being adjusted based on a collateral matter, which had some certainty as the kitchen was completed within two months of the original commencement date.

[40] The correspondence from Akbar's attorneys sending the two cheques of $200,000.00 each, to Mr Chen's attorneys on 6 October 1997, indicated that the sums represented rental for the months of September and October and the security deposit respectively. There was no mention in that letter of the sum sent in August, perhaps because the funds were sent directly from Akbar to Mr Chen's account, to the concern of his (Mr Chen's) attorneys. Suffice it to say that as at 6 October 1997, once September was accepted as the commencement date of the lease, the rent for the months of September and October in respect of the premises would have been paid, as well as the security deposit required under the lease. Even if the commencement date had been 1 July 1997, the monies due at October 1997 would have been paid (including monies in respect of the security deposit) although late, but certainly before any acts had been taken to determine the lease in accordance with the terms of the lease. In my view, there definitely would have been a concluded and subsisting contract at the material time, on 8 October 1997, and ground (a) of the counter-notice must therefore fail.

[41] With that finding, it would be important for what is to follow, that it be noted that Mr Chen breached the contract, when on 8 October 1997 Ms Wilson returned Akbar's cheques and stated her instructions that Mr Chen did not wish to do business with Akbar.

Issue ii – Did Citibank know of the subsisting lease agreement?

[42] There is no doubt that Mrs Parkins, Citibank's representative, went to 53 Gloucester Avenue, and she saw "the out-house" being built on the side of the building, which she was told was a part of a kitchen. She saw kitchen equipment in the area Citibank proposed to lease, and she was told that Akbar had entered into an agreement to lease the premises, but there were problems and the lease had been forfeited.

[43] The learned judge found that Citibank accepted the word of Mr Chen that the contract was at an end and had not gone further to find out more when it could easily have done so. I agree. As indicated, although Mrs Parkins gave evidence that Mr Chen had told her who owned the kitchen equipment, and with whom he had entered into a contract for the lease of the premises, no direct contact was made with Akbar to ascertain the true status of the relationship between Akbar and Mr Chen. It appeared as if the intent of Citibank was that the less that was known of the situation, the better it would be able to protect its interests. No specific dates were given in Mrs Parkins witness statement, and in cross-examination she stated that she did not remember what time in the year she had visited the site, but in my view, the good faith cheque which was sent by Citibank to Mr Chen on 2 October 1997 was no doubt sent shortly

after Mrs Parkins' visit to the premises, when she had been told of the contract with Akbar, although the lease was supposed to have been forfeited. Mrs Parkins stated further that she had not contacted Mr Bakshi although nothing had prevented her from so doing, save and except she said that she had no reason to do so.

[44] **In Emerald Construction Co Ltd v Lowthian and Others**, the defendants who were officers of a trade union of bricklayers knew of the existence of a labour only subcontract between the plaintiffs and the main building contractors but initially not what the specific terms of the subcontract were. The defendants made demands and continued to bring pressure to bear on the main contractors to get the labour contract terminated, even after they knew that the contract could be terminated lawfully if the plaintiffs did not maintain lawful progress. In these circumstances an injunction was granted to prevent interference with the subcontract and Lord Denning MR in his inimitable style, opined as follows:

> "Such being the facts, how stands the law? This 'labour only' sub-contract was disliked intensely by this trade union and its officers. But nevertheless it was a perfectly lawful contract. The parties to it had a right to have their contractual relations preserved inviolate without unlawful interference by others; see **Quinn v Leathem** by Lord Macnaghten. If the officers of the trade union, knowing of the contract deliberately sought to procure a breach of it, they would do wrong. see **Lumely v Gye**. **Even if they did not know of the actual terms of the contract, but had the means of knowledge – which they deliberately disregarded – that would be enough. Like the man who turns a blind eye.** So here, if the officers deliberately sought to get this contract terminated, heedless of its terms, regardless whether it was terminated by breach or not, they would do wrong." (emphasis supplied)

[45] In the instant case, in my view, Citibank turned a blind eye or was recklessly indifferent as to whether Akbar's contract which it knew had existed was still subsisting at the time it wished to enter into a contract with Mr Chen for the lease of the property for the operations of Citibank. Citibank made no enquiries as to the terms of the contract and whether it had been or could have been terminated lawfully.

[46] The learned judge found that the letter of 2 October was the "smoking gun", in the factual situation, which letter, in my view perhaps gives an indication as to the reason the cheques were returned by Mr Chen's attorneys on 8 October 1997, to Akbar's attorneys, which the learned judge found was in breach of the contract with Akbar, and which did not discharge the lease agreement. In fact, there was correspondence from Mrs Parkins on 7 November 1997, indicating her amendment of the lease document being prepared between Citibank and Mr Chen, which included a "special provision dealing with the Bakshi situation". This clause, she stated, contemplated that if "Rajiv creates a problem we can terminate the Lease, remove tenants' fixtures and seek compensation in relation to other improvements which are irremovable by virtue of being incorporated in the real estate". Although this letter was sent after the date of the breach by Mr Chen, it is certainly confirmatory that Citibank was aware that as at 8 October, the date of Mr Chen's breach, there was the possibility of a lease still existing between Akbar and Mr Chen. There was also evidence that in September Mr Moses had been told by Mr Bakshi about Akbar's plans to locate a restaurant at 53 Gloucester Avenue, although this was denied by Mr Moses, and there is

too the controversial discussion which allegedly took place between Mr Bakshi and Mr Mitchell sometime between November and December of 1997. However, the learned judge made no findings with regard to these bits of evidence so I will make no comment on any potential impact that that evidence could have had on the case.

[47] In my opinion, the fact that the good faith cheque was sent shortly after the visit to the site, was indicative of knowledge by Citibank of the contract between Akbar and Mr Chen, or was evidence of Citibank being recklessly indifferent as to whether it subsisted or not. It also demonstrated the need by Citibank to act with some dispatch in an effort to successfully conclude the agreement between Mr Chen and Citibank. That Citibank wished to act with dispatch was confirmed by the letter of Mr Patterson dated 6 October in which he indicated that as at that date, which was four days after the good faith cheque was sent, he had a copy of the proposed lease between Citibank and Mr Chen, which was apparently prepared by Mr Chen's attorney. The letter of 27 October is also of significance as it shows that Akbar's equipment would have been removed from the premises while Citibank's legal representatives were reviewing the lease and it certainly points to a conclusion that Citibank continued to pursue negotiations even though Akbar's equipment was still visible on the premises. Although this removal is said to have occurred after the date of the breach by Mr Chen, it is indicative of Citibank's reckless disregard as to the subsistence of a lease between Akbar and Mr Chen.

[48] In my view, the finding that Citibank had knowledge of the contract between Akbar and Mr Chen was correct. Based on the evidence and the circumstances of this

case, the learned judge cannot be faulted for so finding. Ground (a) of the counter notice must therefore fail.

Issue (iii) - Did Citibank induce a breach of the agreement by Mr Chen?

[49] A clear statement of the law on the inducement of a breach of a contract can be found in the speech of Lord McNaghten in **Quinn v Leathem** [1901] AC 495 at page 501, which statement has been endorsed in many authorities for over a century:

> " … I have no hesitation in saying that I think the decision—that is the decision [in ***Lumley v Gye***] was right, not on the ground of malicious intention that was not, I think, the gist of the action--- but on the ground that a violation of [sic] legal right committed knowingly is a cause of action, and that it is a violation of [sic] legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference."

[50] **Transport and General Workers' Union v Middlebrook Mushrooms Ltd** [1993] IRLR 232, relied on by Akbar's counsel, is a case dealing with the plaintiff mushroom producers (employers) and the union, which failed to agree on the plaintiffs' proposal for overtime arrangements which were being imposed to reduce costs. The dispute led to industrial action, and 89 employees taking part in the industrial action were dismissed. The union gave notice of their intention to have the members picket supermarkets supplied by the plaintiffs and to distribute leaflets informing customers of the situation, and through the leaflet ask customers to support the dismissed strikers by refusing to buy mushrooms when shopping at the store in question. The judge at first instance granted the injunction preventing the picketing, but this was

overturned on appeal. The Court of Appeal held that this was not a case of direct interference but a case of indirect inducement and there had never been any suggestion of any unlawful means. Hoffmann LJ explained the difference in the law in this way:

> "The classic judgment of Jenkins LJ in **DC Thomson v Deak** in [1952] Ch 646 distinguishes between various forms of the tort. The primary form, exemplified by the leading case of **Lumley v Gye** [1853] 2 E&B 216 was 'direct persuasion or inducement applied by the third party to the contract-breaker, with knowledge of the contract and the intention of bringing about its breach".

This, he said, should be contrasted with cases where the acts complained of do not amount to a direct invasion of the plaintiffs' contractual rights. He stated:

> "The example given is the persuasion or inducement of a contracting party's employees, with the intention of causing that party to break or making it impossible for him to perform his contract, to refuse to perform services for him. In such a case Jenkins LJ says that the defendant can be liable only if he has used unlawful means, for example by inducing the employees to break their contracts of employment. This class of case is commonly called indirect inducement, by contrast with the direct inducement employed in ***Lumley v Gye*** which is unlawful per se."

The instant case is clearly one of direct inducement governed by the principles enunciated in **Lumley v Gye**.

[51] Lord Hoffmann set out the elements of inducing a breach of contract in **OBG Ltd and Others v Allan and Others** at para 39, in this way:

> "To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so."

Lord Hoffmann dealt with what he described as what counts for knowledge for the purposes of liability for inducing a breach of contract and referred to and endorsed the dictum of Denning MR in **Emerald Construction Co Ltd v Lowthian and Others** (set out previously) indicating that that statement of the law had been followed in many cases without giving rise to any difficulty. Lord Nicholls also set out with clarity what the mental ingredient in the **Lumley v Gye** tort entailed. He stated on page 598 c-f:

> "[191]… The mental ingredient is an intention by the defendant to procure or persuade ('induce') the third party to break his contract with the claimant. The defendant is made responsible for the third party's breach because of his intentional causative participation in that breach. Causative participation is not enough. A stranger to a contract may know nothing of the contract. Quite unknowingly and unintentionally he may procure a breach of the contract by offering an inconsistent deal to a contracting party which persuades the latter to default on his contractual obligations. The stranger is not liable in such a case. Nor is he liable if he acts carelessly. He owes no duty of care to the victim of the breach of contract. Negligent interference is not actionable.
>
> [192] The additional, necessary factor is the defendant's intent. He is liable if he intended to persuade the contracting party to breach the contract. Intentional interference presupposes knowledge of the contract. With that knowledge the defendant proceeded to induce the other contracting

> party to act in a way the defendant knew was a breach of that party's obligations under the contract. If the defendant deliberately turned a blind eye and proceeded regardless he may be treated as having intended the consequence he brought about. A desire to injure the claimant is not an essential ingredient of this tort."

Lord Nicholls made it clear, however, that a defence of justification may be available in inducement tort cases, especially if the defendant's interference with another's contract was to protect an equal or superior right of his own. He also clarified that an honest belief by the defendant that the outcome sought by him will not involve a breach of contract, was inconsistent with him intending to induce a breach of contract, and in those circumstances, he would not be held liable for the third party's breach of contract.

[52] In the instant case, Mrs Parkins said in cross-examination that Citibank, at the material time, did not have a branch of its offices in Montego Bay. It only had one branch at Knutsford Boulevard in Kingston. It was her evidence that the opening of another branch would have increased Citibank's "returns by 100%", and that the opening of a branch in the "second city" was therefore very important to Citibank. Also, she said that utilising a site which had been used as a branch of a bank previously, made it "easier", and that there had been no other locations which she had visited which had that advantage. So, it is clear, that it was crucial to Citibank to pursue leasing the premises at 53 Gloucester Avenue.

[53] I have already indicated that the learned judge was correct when he found that Citibank had direct knowledge of the contract between Akbar and Mr Chen or had

deliberately turned a blind eye to the existence of the contract and its terms. It would be correct to find that Citibank would in those circumstances have intended the consequences which it have brought about. There certainly was no evidence that Citibank had any desire to injure Akbar, but there is evidence that in the face of the knowledge of the contract leasing the premises to Akbar, Citibank pursued arrangements to lease the same premises. The conclusion of those arrangements, between Citibank and Mr Chen, in respect of the lease of 53 Gloucester Avenue would clearly have been inconsistent with Mr Chen leasing the same premises to Akbar.

[54] The evidence is that having known about the building of the kitchen and the kitchen equipment, and the lease to Akbar (although it was allegedly forfeited), Citibank paid its "good faith" cheque to Mr Chen and shortly thereafter the funds sent to Mr Chen's attorneys on behalf of Akbar in keeping with its contractual obligations were returned. Importantly, as previously indicated, after the "good faith" cheque was sent by Citibank on 2 October, on 6 October attorneys on behalf of Citibank were reviewing a proposed copy of the lease between Mr Chen and Citibank.

[55] Citibank cannot claim to be a stranger acting in ignorance of any contractual relations between Akbar and Mr Chen. It did not, in my view, act carelessly or negligently, but deliberately pursued the contract with Mr Chen to lease the premises, and must therefore bear the consequences. The clauses inserted in the lease between Citibank and Mr Chen are confirmatory of that position. Clause 4(h) was not indicative of a lack of knowledge of Akbar's contract, but an intention to enter into a lease agreement with Mr Chen regardless of the "Bakshi situation" and which could only have

occurred if Mr Chen breached his contract with Akbar. There was no basis on which Citibank could claim justification for so doing, and certainly its interest in pursuing the lease could not be in protection of a superior right to Akbar's, Akbar having entered into the lease agreement several months previously.

[56] The learned judge found that the return of the cheques on 8 October by Mr Chen's attorneys was a breach of the lease agreement and that Citibank had induced the breach. I agree. Ground (b) of the counter-notice must therefore fail.

[57] However that is not an end of the matter. The issue which of necessity arises is: has there been any loss suffered as a result of this inducement to breach the contract? Has Akbar proved any loss or the entitlement to any relief, by way of special and/or general damages?

Issue iv - Ought the learned judge to have entered judgment in favour of Akbar on liability in circumstances where he was of the view that he was unable to assess damages?

[58] It is a fundamental principle of the law of torts that there will be no liability where there is no injury or loss occasioning the damage caused by the wrongful act complained of; this is expressed in the maxim, '*damnum sine injuria'.* However, where the tort is inducement to breach a contract, it has consistently been held that specific damage need not be proven. In **Exchange Telegraph**, valuable information as to the prices of stocks and shares during the day was collected on the London Stock Exchange and supplied to the plaintiff for a consideration. The plaintiff upon receiving this information, in accordance with its agreement with its subscribers, would supply it to

each subscriber. By this agreement, each subscriber would pay an annual fee to the plaintiff for the information and would not sell or communicate the information to non-subscribers for a pecuniary consideration or otherwise. The information was also printed in a newspaper produced by the plaintiff and sold to any person who wished to have a copy. The defendant, which was a former subscriber, obtained the information from one of the plaintiff's subscribers and posted it on notice boards and at other places in its office. An injunction was granted against the defendant restraining it from, inter alia, continuing to induce a subscriber to supply the information to it in breach of the subscriber's contract. On appeal, it was argued that the plaintiff had not been injured. Lord Esher MR in holding that the injunction had been rightly granted, stated:

> "To say that the damage must be such as can be measured – that you must shew how much the wrongful act complained of would injure the person against whom it was done – is no answer. A man who does such a wrongful act as the defendant has done lays himself open to be told by the tribunal before whom he appears, 'You have damaged the plaintiff….' It is not necessary to give proof of specific damage. The damages are damages at large."

[59] Lord Justice Kay, for his part, stated that though the gist of the action is damage, if a judge or jury could properly infer from acts complained of that those acts must result in damage to the plaintiff that would be sufficient for the purposes of grounding liability. He continued by saying that it was obvious that what the defendant did could be done by others, with the consequence that very few persons would become subscribers if the information could have been obtained by inducing a subscriber to communicate the information to others. He concluded that "the inference

[was] irresistible that damage must accrue". Similarly in **Goldsoll v Goldman**, Mr Goldsoll and Mr Goldman were rival dealers in imitation jewellery. Both entered into an agreement for the purpose of putting an end to the competition, whereby Mr Goldman agreed to discontinue his business and, that among other things, by himself or with others, directly or indirectly, he would not be engaged, concerned or interested in or render services to the business of a dealer in real or imitation jewellery. Neville J held that Mr Sessel of S. Sessel and Company had induced Mr Goldman to break his contract with Mr Goldsoll by obtaining from Mr Goldman the names of his customers, the name cards and the register, among other things. On the question of damage, he stated that damages are essential to the right of action and concluded that the evidence of damage in that case was sufficient. Referring to **Exchange Telegraph** he stated that if the breach which the defendant had procured had been such as must in the ordinary course of business have inflicted damage on the plaintiff, then "the plaintiff may succeed without proof of any particular damage which has been occasioned".

[60] Based on the above-mentioned authorities, it is clear that in order to succeed in its claim against Citibank, it was not necessary for Akbar to point to any particular damage or loss that it had suffered. If the breach by Mr Chen was of such that in the ordinary course of business, it would result in damage to Akbar, the learned judge would have been entitled to infer that some damage had resulted from Mr Chen's breach. In my view, it cannot be disputed that the breach of the lease of a property upon which the business of a restaurant is to be carried on and for which sums had been spent in procuring restaurant equipment and erecting a kitchen, must, in the

ordinary course of business, result in pecuniary loss to the plaintiff, particularly, where loss of profits is concerned. The learned judge was therefore entitled to infer that some damage had resulted to Akbar for the purposes of establishing liability. Ground (c) of the counter-notice would therefore fail.

Issue v - Ought the court to have made an award in relation to (a) inferred special damages and (b) general damages in the circumstances?

[61] In its amended statement of claim, Akbar had set out the following as its particulars of "special damages and/or damages for breach of contract":

"(a) Loss of income from business for 2 years and 6 months	$3,750,000.00
(b) Legal fees	50,000.00
(c) Director's loan to the following expenses:-	
(i) Travel expenses	378,350.00
(ii) Labour Expenses	995,000.00
(iii) Miscellaneous Expenses for Business start-up	995,000.00
(iv) Construction expenses	395,000.00
(v) Interest and other charges on $900,000.00 for financing equipment	345,000.00"

Although written submissions were filed on behalf of Akbar as to its entitlement to special damages, as indicated previously, Mr Braham did not vigorously pursue those arguments before this court. In my view, this was the prudent course to adopt as it is trite law that special damages must be pleaded as well as proved (**Ratcliffe v Evans** (1892) 2 QB 524 per Bowen LJ), and Akbar did not attempt to resist the observation of this court that despite having pleaded all of the above items of expenditure, there was no supporting evidence to substantiate the sums claimed as being expended in relation to most of these items. Of course, the requirement that special damages must be

specifically pleaded and strictly proven is not inflexible and depending on the circumstances of the case, an award may be made where strict documentary proof has not been forthcoming – see for example **Desmond Walters v Carlene Mitchell** (1992) 29 JLR 173 and **Attorney General of Jamaica v Tanya Clarke** SCCA No 109/2002, delivered 20 December 2004.

[62] In my view, there are several items for which there would not have been much difficulty in substantiating the sums claimed: for example, Mr Bakshi would have received invoices or receipts for the sums expended on airline tickets for the Indian chefs and should not have encountered much difficulty in obtaining copies of these. The same could be said for the loan and interest charges. Furthermore, he had been operating a restaurant at another location in Montego Bay at the time of the trial and so had the means to obtain figures to substantiate his claim for loss of income. He could also have obtained a receipt in respect of legal expenses. Although Mr Bakshi could perhaps have obtained invoices for the amounts spent on construction, he gave evidence of paying to Mr Chen $50,000.00 as "start up" costs towards the construction of the kitchen. He had also stated that he considered Mr Chen to be a gentleman and so it is not unreasonable that he may not have asked for a receipt or if he had obtained one, to not have kept the receipt for future purposes. Furthermore, even if he had obtained a receipt and subsequently lost it, it would not have been feasible for him to obtain a copy of the receipt from Mr Chen and there was clear evidence that construction had taken place in respect of the kitchen. I would therefore accept that sum as having been pleaded and proved.

[63] Akbar did not however plead any specific amount as special damages being due having been paid in respect of rental. But there was explicit evidence with regard to the payment of $200,000.00 in August for rent. Indeed in paragraph 13 of Mr Bakshi's witness statement, he said:

> "When the kitchen was nearing completion in August 1997, I paid Two Hundred Thousand Dollars ($200,000.00) to Mr Chen's account at C.I.B.C (First Caribbean International Bank) then forwarded the deposit slip to my said Attorneys-at-law in Montego Bay for onward presentation to Mr Chen's Attorneys-at-law."

[64] As stated by the authors of McGregor on Damages (16th edition 1997) at paragraph 2025, special damages "consist in all items of loss which must be specified by the plaintiff before they may be prove and recovery granted". The important point is that the defendant must not be taken by surprise. The defendant is entitled to know the type of claim being made by the claimant and the amount that is being claimed. However, as stated by Harris JA in **Grace Kennedy Remittance Services Ltd v Paymaster (Jamaica) Limited and Paul Lowe**, SCCA No 5/2009, judgment delivered 2 July 2009, endorsing Lord Woolf's judgment/dicta in **McPhilemy v Times Newspaper** [1999] 3 All ER 775, once the general nature of a claim has been pleaded, if the witness statements are exchanged those statements may supply particulars of a claim. There is thus no longer the need for extensive pleadings. They are not superfluous, they are still required to mark out the parameters of the case of each party and to identify the issues in dispute, but the witness statements and other documents will detail and make obvious the nature of the case that the other party has to meet. In

Eastern Caribbean Flour Mills v Ormiston St Vincent and the Grenadines Civil Appeal No 12/2006 delivered 16 July 2007, Barrow JA at paras [43] and [44] also endorsed the principles declared by Lord Woolf and stated:

> "[43] … therefore, to prevent surprise at the trial, the pleading must contain the particulars necessary to serve that purpose. But there is no longer a need for extensive pleadings, which I understand pleadings to mean with an extensive amount of particulars, because witness statements are intended to serve the requirement of providing details or particulars of the pleader's case.
>
> [44] It is settled law that witness statements may now be used to supply details or particulars that, under the former practice, were required to be contained in pleadings… "

[65] Additionally in **MV Ltd v Tom L Vidrine**, Court of Appeal of Belize A.D. 2010, Civil Appeal No 1 of 2010, Morrison JA having reviewed the Civil Procedure Rules (part 8) in Belize, which are somewhat similar to the Civil Procedure Rules in Jamaica, concluded (with the agreement of the other members of the court), that save in respect of personal injury claims there really is no explicit requirement in the rules that obliges a claimant to particularise the specifics of special damages claimed. He thereafter endorsed the principles enunciated in **McPhilemy** and **Eastern Caribbean Flour Mills**. I would therefore accept that the amount paid in respect of rent was recoverable, as special damages.

[66] It is my view, that Akbar having claimed construction expenses and having given evidence of having paid $50,000.00 in respect of the construction of the kitchen, and having stated clearly in its witness statement that $200,000.00 had been paid in

respect of rental, which had been acknowledged as having been received, and thus proved, and as Citibank could not claim any surprise in relation to the latter claim, Akbar is entitled to recover the sum of $250,000.00 as special damages.

[67] It was argued that where general damages are concerned, there ought to be an award because Akbar has been deprived of the use of the premises, which is a thing of value. It is well-accepted that unlike special damages, general damages are not capable of strict proof. In **Mediana (Owners) v Comet (Owners)** [1900-03] All ER Rep 126, the House of Lords had to decide whether the Mersey Docks and Harbour Board in that case should be entitled to recover damages for the loss of use of one of its reserve ships, which was caused by a collision due to the negligence of persons in charge of the Mediana, despite the board having failed to prove its loss. In concluding that the board was entitled to damages, Lord Halsbury said this in relation to special and general damages:

> "Where special damage is alleged you must show precisely the nature and extent of the injury sustained, and the person liable must have the opportunity of inquiring into the details before the case comes to court. In the case, however, of general damage no such principle applies, and the jury have only to give a proper equivalent for the unlawful withdrawal of the particular subject-matter. That broad principle comprehends this and many other cases, and the jury may assess damages which are not nominal damages though the amount may be trifling."

Although the instant case does not concern the deprivation of Akbar's property, it is my view that the "broad principle" in relation to general damages is nonetheless applicable

and therefore the judge ought to have made an award. The question which arises is: what is an appropriate sum to be awarded? While I agree that the use of the premises was a thing of value, I do not think that the amount to be awarded should be with reference to the income that would have been obtained under the lease as that would have been the value of the use of the premises to Mr Chen and not to Akbar. However, in the light of Lord Halsbury's dictum, it is my view that nominal damages would not be appropriate in these circumstances nor should it be a "trifling sum". There is clear evidence of pecuniary loss that has been suffered by Akbar.

[68] Further, in arriving at an appropriate sum to award, the court is entitled to take into account the expenses incurred, as was the case in **British Motor Trade Association v Salvadori** [1949] 1 Ch 556 where the defendants' actions had caused a breach of a contract between the plaintiff association, which was a trade union consisting of car manufacturers and dealers, and purchasers of cars from the plaintiff association. The plaintiff had incurred expense in maintaining an extensive inquiry service and large investigation department in order to unearth the defendants' unlawful manoeuverings. The trial judge held that the expenses so incurred which could not be recovered as part of the costs of the action could be regarded as being directly attributable to the tort and it was immaterial that they could not be precisely quantified. In the instant case, there is evidence of labour costs being incurred and other costs associated with commencing operations although Mr Bakshi was unable to give a precise figure. There is an invoice for $10,625.00 towards the costs of preparing building plans and a receipt from the parish council for $1,345.00. These, however,

related to another property, that is, 166 Gloucester Avenue and therefore cannot be taken into account. However, undoubtedly much expense had been incurred by Akbar.

[69] In addition, damages are at large in the circumstances of this case (see paragraph [58] above). In **Rookes v Barnard**, in dealing with the issue of what the court is entitled to consider when damages are at large, Lord Devlin in the House of Lords said:

> "It must be remembered that in many cases of tort, damages are at large, that is to say, the award is not limited to the pecuniary loss that can be specifically proved. In the present case, for example, and leaving aside any question of exemplary or aggravated damages, the appellant's damages would not necessarily be confined to those which he would obtain in an action for wrongful dismissal. He can invite the jury to look at all the circumstances, the inconvenience caused to him by the change of job and the unhappiness maybe by a change of livelihood. In such a case …, it is quite proper without any departure from the compensatory principle to award a round sum based on the pecuniary loss proved."

And in **Pratt v British Medical Association**, [1919] 1 KB 224 McCardie J said:

> "The plaintiffs are not limited to actual pecuniary damages suffered by them. The court or jury, once financial loss be proved, may award a sum appropriate to the whole circumstances of the tortious wrong inflicted."

[70] In that case, the judge, took into account the "deliberate and relentless vigour" of the defendants in carrying out the tortious act and the long period for which the plaintiffs had suffered humiliation and menace, in making his award of damages. There

is no doubt that Akbar through its director, Mr Bakshi, suffered loss beyond the monies expended and that there was non-pecuniary loss. According to Mr Bakshi's evidence, there was anxiety suffered as he had hoped to open the restaurant for December 1997 and by doing so, he would be seeking to recoup some of the monies that he had spent on his investment. Further, it is not unreasonable to assume that some inconvenience would be occasioned by Akbar being unable to operate its business for which it had already obtained a loan to purchase kitchen equipment and did purchase the equipment and had also spent sums in construction of the kitchen and hired workers from India. I am of the view that in the circumstances, in light of the inconvenience and hardship which would have been suffered by Akbar and the expenses which it would have incurred, the sum of $250,000.00 should be awarded for general damages. Grounds (a) and (b) of the appeal would therefore succeed and ground (c) of the counter-notice would be dismissed.

Issue vi - What is the appropriate order to be made in respect of costs in light of the fact that there was no award of damages made?

[71] Part 64.6 of the Civil Procedure Rules governs the award of costs in the court below, and by rule 1.18(1) of the Court of Appeal Rules, those principles are applicable to an appeal subject to certain modifications and amendments which are not relevant for present purposes. The general rule is that the unsuccessful party must pay the costs of the successful party, although the court may order a successful party to pay all or part of the costs of the unsuccessful party (rule 64.6(1) and (2)). In this case, Akbar is undoubtedly the successful party, it having succeeded on liability and although not

being awarded all that it sought in damages, it may be regarded as succeeding on damages also. In these circumstances, it seems to me that the general rule should apply.

[72] Mr Graham has, however, argued that if costs are to be awarded to Akbar, Citibank ought to be awarded costs in respect of the dates when the matter continued for Akbar to make further submissions and provide further authorities to support its contention that it should be awarded damages. It is true that notwithstanding the general rule set out in rule 64.6(1), the court has the discretion to make a wide variety of orders in respect of costs. Rule 64.6 sets out the orders that the court may make, which includes orders that a party pay: a proportion of another party's costs; a stated amount in respect of another party's costs; and costs from or until a certain date only. However, a judge is entitled to seek the assistance of parties in an effort to deal with cases fairly and justly and I do not regard the circumstances of this case where the court sought assistance on damages, which assistance could have enured to the benefit of either party, to warrant a departure from the general rule as to costs. In any event, as explained above, I am of the view that Jones J ought to have awarded damages to Akbar. Grounds (d) and (e) of the counter-notice would therefore fail.

[73] I would therefore allow the appeal and dismiss the counter-notice of appeal. I would order that Citibank pay to Akbar $250,000.00 by way of special damages plus interest at the prime lending rate from 31 August 1997 until payment and $250,000.00 by way of general damages plus interest at the rate of 3% from 31 October 1997 until payment. I would award costs to Akbar.

BROOKS JA

[74] I too have read the draft judgment of Phillips JA. I agree with her reasoning and conclusion and have nothing to add.

HARRIS JA

ORDER

Appeal allowed. Counter-notice of appeal dismissed. Citibank NA ordered to pay Akbar Limited:

(1) $250,000.00 by way of special damages plus interest at the prime lending rate from 31 August 1997 until payment and

(2) $250,000.00 by way of general damages plus interest at the rate of 3% from 30 October 1997 until payment

Costs to Akbar Limited to be agreed or taxed.