[2019] JMCA Civ 12

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 35/2015

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**JAMAICAN REDEVELOPMENT FOUNDATION, INC**	**APPELLANT**
AND	**CLIVE BANTON**	**1st RESPONDENT**
AND	**SADIE BANTON**	**2nd RESPONDENT**

Mrs Sandra Minott-Phillips QC and Mrs Alexis Robinson instructed by Myers, Fletcher & Gordon for the appellant

Emile Leiba and Jonathan Morgan instructed by DunnCox for the respondents

24, 25, 26 October 2016 and 10 May 2019

MCDONALD-BISHOP JA

[1] I have had the privilege of reading, in draft, the judgment of my learned sister, Sinclair-Haynes JA. I am in agreement with her decision concerning the disposal of the appeal and the counter-appeal. However, given the marked differences in our approach to the analysis of several issues raised for consideration, I consider it necessary to express my reasons for the decision arrived at. Being mindful of the already detailed

draft judgment of my learned sister, I have made strenuous efforts to be as brief as I possibly can.

[2] I must also apologise to the parties for the delay in the delivery of this judgment. No excuse will be advanced, except to say that most of the constraints, which militated against a more expeditious disposition of the matter, are well known.

Introduction

[3] The appeal treats with two broad questions: the first is whether a judge of the Supreme Court erred in law when he found that a mortgagee, acting as the vendor ("mortgagee vendor") in a contract for sale of land in the exercise of its power of sale, was liable in damages to the third party purchasers for the cancellation of the agreement for sale. The second question is whether the learned judge erred in awarding damages to the purchasers in the sum he did, thereby rendering the award of damages inordinately high and an erroneous estimate of the loss suffered by the purchasers.

[4] As a minor issue, the award of interest on the damages awarded, which was ordered to run from a date prior to judgment, is also the subject of challenge on the appeal.

[5] The purchasers have also filed a counter-notice of appeal. The broad issue for determination on the counter-appeal is whether the learned judge erred in the assessment of damages, thereby resulting in the award of damages being inordinately low and an erroneous estimate of the loss suffered by the purchasers.

[6] Also considered as a preliminary and collateral question relative to the appeal is whether the mortgagee vendor should have been allowed at the commencement of the hearing of the appeal to amend its grounds of appeal to add a new ground, alleging bias against the learned judge.

[7] The mortgagee vendor was the Jamaican Redevelopment Foundation, Inc ("JRF"), the appellant, and the third party purchasers were the respondents, Clive and Sadie Banton ("the Bantons") who, at all material times, were husband and wife, respectively.

[8] The appeal and counter-appeal emanated from the judgment of Batts J made in the Commercial Division of the Supreme Court on 20 March 2015. The learned judge granted judgment in favour of the Bantons, on a claim brought by them on 13 September 2011, against JRF for wrongful cancellation or purported cancellation of the agreement for sale of land, situated at Woodleigh in the parish of Clarendon and registered at Volume 1240 Folio 116 of the Register Book of Titles ("the land").

[9] The claim was bifurcated for trial, with the issue of liability being resolved in a separate hearing from that of damages.

[10] The reasons for judgment on the issue of liability from which the appeal has arisen are to be found in a written judgment reported as **Clive Banton and Sadie Banton v Jamaica Redevelopment Foundation Incorporated** [2014] JMSC Civ 106.

[11] The reasons for the judgment on damages from which the appeal and the counter-appeal have emanated are contained in the written judgment reported as **Clive Banton and Sadie Banton v Jamaica Redevelopment Foundation Inc** [2015] JMSC Civ 61.

[12] The order of the learned judge, which has given rise to these proceedings, is in these terms:

> "1. Judgment for [the Bantons] against [JRF] in the sum of US$940,908.80 with interest at the rate of one percent (1%) per annum from the 5th of May 2011 to the 20th of March, 2015 pursuant to the Law Reform (Miscellaneous Provisions) Act.
>
> 2. Costs to [the Bantons] to be taxed if not agreed.
>
> 3. Stay of execution of the judgment granted for six (6) weeks."

[13] JRF has challenged in this appeal both the findings on liability and damages in 10 wide ranging grounds of appeal, while the Bantons, by way of their counter-notice of appeal, have also challenged the damages awarded by the learned judge on 10 grounds. These grounds have been set out fully in paragraph [195] by my sister, Sinclair-Haynes JA, and in the interest of brevity will not be reproduced.

[14] Before undertaking the examination of the grounds of appeal and the counter-appeal, the preliminary issue relating to the application made by JRF at the commencement of the hearing of the appeal to amend its grounds of appeal will first be disposed of.

Application to amend the grounds of appeal

[15] JRF made an oral application to add an 11th ground of appeal in the terms that, "the judge below was not impartial due to his bias".

[16] No prior notice of the application was given to the Bantons or the court. This, of course, is not in keeping with the rules of procedure and the established practice in the court. Permission to amend, prior to the hearing of an appeal, is generally to be sought in writing and with notice, in keeping with Part 11 of the Civil Procedure Rules 2002 ("the CPR"), which applies to this court by virtue of rule 1.1(10)(h) of the Court of Appeal Rules 2002 ("the CAR"). Needless to say, the court and counsel for the Bantons were completely taken by surprise. The court, nevertheless, agreed to hear the application, given the indication of Mrs Sandra Minott-Phillips QC, for JRF, that it related to an allegation of non-disclosure and bias on the part of the learned judge. This was viewed as a serious allegation that could have affected the outcome of the appeal.

[17] The application, not surprisingly, was strenuously opposed by the Bantons, through their counsel Mr Emile Leiba, who urged the court to refuse it for several reasons.

[18] Having considered the application, the applicable law and the submissions of counsel for the parties, we refused the application and promised to give our reasons for doing so at the time of the judgment on the substantive appeal. These are my reasons for concurring in the decision of the court that the application be refused.

Reasons for refusing the application

[19] Mrs Minott-Phillips contended that the basis for the application to add the proposed ground of appeal was that the learned judge had failed to specifically disclose that a year and a half before the trial of the instant case, he had appeared for Scotiabank Jamaica Trust and Merchant Bank Limited ("Scotiabank"), which was the defendant in a claim brought by National Commercial Bank Jamaica Limited ("NCB") as first claimant, and JRF as the second claimant. The case to which learned Queen's Counsel referred, a copy of which was brought to the attention of the court, is reported at **National Commercial Bank Jamaica Limited and Jamaica Redevelopment Foundation Inc v Scotiabank Jamaica Trust and Merchant Bank Ltd** [2012] JMSC Civil 1.

[20] According to learned Queen's Counsel, JRF had secured a significant victory over Scotiabank (in the sum of over US$14,800,000.00). The learned judge's involvement in that case as counsel had disqualified him from adjudicating in the instant case, she contended. She pointed out that the learned judge failed to make specific disclosure to allow the parties to give an informed consent for him to preside at the trial. Learned Queen's Counsel argued that there was apparent and actual bias on the part of the learned judge against JRF, in the conduct of the case at trial.

[21] Rule 1.12 of the CAR grants an appellant in a civil case (except on a procedural appeal), the right to amend his grounds of appeal once without permission at any time

within 21 days from receiving notice under rule 2.5(1)(b) or (c). At any other time, permission to amend the grounds of appeal must be sought from the court.

[22] The CAR has not expressly set out the principles that should be applied by the court in considering applications for permission to amend. In the text, Civil Appeals: Principle and Procedure, First Edition, at pages 337-338, the learned authors, James Leabeater et al, in speaking to the practice in the English Court of Appeal, helpfully noted that in the absence of principles governing the power of that court in granting permission to amend, "the court will apply the general principles on amendments as would apply under CPR Pt 17" (our CPR Part 20).

[23] The CAR do not state specifically that Part 20 of the CPR applies to appeals in this court but, according to rule 2.15(a) of the CAR, the court, in relation to a civil appeal, in addition to the powers in rule 1.7, has all the powers and duties of the Supreme Court. It means that the same powers that inhere in the Supreme Court in relation to amendments to a statement of case would likewise inhere in this court.

[24] Rule 1.7(2)(n) of the CAR also provides that the court has the power to make any order or give any direction, which is necessary to determine the real question in issue between the parties to the appeal. This would include making such amendments that may be necessary, subject to the overriding objective.

[25] In my view, the administration of justice in our jurisdiction could benefit from the approach of the English courts in treating with the issue of permission to amend a statement of case on appeal, given the similarities in the relevant rules and the absence

of a regime in the CAR. So, the principles developed by the English courts, in applying their equivalent rules contained in Part 17, have proved quite instructive in my deliberation on the issue.

[26] Invaluable guidance was obtained from the text, Zuckerman on Civil Procedure Principles of Practice, Third Edition, 2013, in which the learned author, at pages 307 to 312, by reference to decided cases, highlighted some material principles relative to the approach the court should take, in treating with applications for permission to amend a statement of case. Some of those general principles have been distilled and outlined for present purposes. They are as follows:

i. The foremost consideration is whether the proposed amendment is needed in order to determine the real issues in dispute between the parties in the light of all the relevant circumstances.

ii. The court must have regard to the need to avoid prejudice to the other party as well as to the need for the efficient administration of justice: **Cobbold v London Borough of Greenwich**, 9 August 1999, unreported, CA; [1999] Lexis Citation 1496, per Peter Gibson LJ. The court must have regard to the need to ensure that court and party resources are not unreasonably wasted: **Bowerbank v Amos (formerly Staff)** [2003] EWCA Civ 1161.

iii. The court's approach to late amendments cannot be radically different from the approach to enforcing compliance with any other process

requirements and to case management generally. Tolerance to late amendments may undermine the court's ability to manage the litigation process effectively.

iv. The jurisdiction is now governed by the overriding objective. The older authorities that amendments should be allowed as of right, if a party could be compensated in costs without injustice, had made way for a view, which pays greater regard to all the circumstances. This is now summed up by the overriding objective (**Savings and Investment Bank Ltd v Fincken** [2003] EWCA Civ 1630 per Rix LJ).

v. A heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court (**Swain-Mason and others v Mills & Reeve (a firm)** [2011] EWCA Civ 14 per Lloyd LJ).

vi. Applications for permission to amend must necessarily turn on the particular facts and no hard and fast rules are possible. The outcome of an application to amend will, therefore, depend on a fact-based assessment of the various relevant considerations. Decided cases can only illustrate the way in which discretion is exercised.

vii. The interests of justice would not be advanced by amendments that are bound to fail on the merits and so, the court will allow an amendment only if it has a reasonable prospect of success.

[27] The learned author also noted the case of **SX Holdings Ltd v Synchronet Ltd** [2001] CP Rep 43, a decision of the English Court of Appeal, as further illustrating the range of considerations that should be taken into account on an application to amend.

[28] Having been guided by the foregoing principles and commentary on the applicable law, which should govern applications to amend a party's statement of case, I rejected the application, mainly, for these reasons: (i) the lateness of the application; (ii) the absence of a good reason for the delay in the making of the application; (iii) prejudice to the Bantons; (iv) absence of prejudice to JRF; (v) the lack of a real prospect of success of the proposed ground; (vi) the effect on, or the implication for, the efficient operation of the court and the administration of justice; and (vii) the overriding objective.

(i) The lateness of the application

[29] JRF was at liberty to amend its grounds of appeal once without permission in the circumstances set out by the CAR. It did not do so. One of the considerations the court should take into account in assessing whether an amendment should be allowed is the opportunity the applicant had to formulate his statement of case adequately at an earlier stage (**SX Holdings Ltd v Synchronet Ltd**). JRF had many opportunities to adequately formulate its grounds to allege bias at an earlier stage of the proceedings.

For JRF to have waited until the commencement of the hearing to raise the application in the manner it was done, was nothing short of an ambush of the Bantons. This was also taken as showing scant regard for the rules and processes of the court. The lateness of the application and the fact that JRF had more than enough time to seek to amend its grounds of appeal were factors that strongly militated against a favourable consideration of the application.

(ii) The reason for the delay

[30] Mrs Minott-Phillips' explanation for the late application was that there was (what I would describe to be) a measure of discomfort on her part to raise the point alleging bias against the learned judge. It is difficult, however, to comprehend this reported unease on the part of learned Queen's Counsel to raise what she considered to be a crucial point that goes to the heart of jurisdiction and, indeed, the justice of the case. If JRF was confident in the allegation that the judge was bias, there should have been no difficulty in bringing the issue to the attention of the Bantons and to this court at an earlier stage of the proceedings for the necessary enquiry to be fairly and fully conducted.

[31] Furthermore, there was nothing from JRF, itself, setting out any reason for the lateness of the application. There was this omission on the part of JRF although its representative in these proceedings (Ms Naudia Sinclair) was involved in the case in which the learned judge appeared as counsel and was also representative in this case at trial. Ms Sinclair also represented JRF at the case management conference in this

court but no indication was made that an amendment would be sought to raise the ground of bias. Having considered all these matters, I found there was no good or acceptable reason for the delay. This is, indeed, tantamount to there being no reason for the late application.

(iii) Prejudice to the Bantons

[32] Prejudice to the opposing party is always an important consideration. In Civil Procedure, Volume 1 (2003), paragraph 17.3.7, it is stated:

> "An important factor for the court to consider when permission to amend is sought close to the trial date is whether the amendment will put the parties on an unequal footing or will place or add an excessive burden to the respondent's task of preparing for trial so as to jeopardise the trial date or so as to inevitably cause a postponement of the trial."

[33] In Zuckerman on Civil Procedure Principles of Practice, Third Edition, 2013, the learned author, in making the point that prejudice is still an important consideration, also opined at page 311 that:

> "If permission to amend is sought close to the trial date, the court would refuse permission if it would add an excessive burden on the opponent or risk losing the trial date and delaying the final resolution."

[34] It was observed in this case that despite the obvious knowledge on the part of JRF that an allegation of bias would have been raised, it made no effort to notify the Bantons of the complaint and of its intention to raise it as a ground of appeal. It was also observed that counsel for JRF were well prepared to make the application, armed as they were at the start of the hearing with the authorities on which they were relying

and copies of the case in which the learned judge appeared as counsel. This is strongly indicative of a prior settled intention to make the application to the court, without notice.

[35] Mr Leiba, in objecting to the application, indicated to the court that the Bantons were prejudiced by the oral application done without notice and would have needed time to adequately respond, not only to the application but to the substantive appeal, if the amendment were allowed. The necessity of obtaining a statement from the learned judge explaining his failure to disclose was also raised by Mr Leiba.

[36] It was clear that for the Bantons to respond properly so as not to be prejudiced in the application and in the substantive appeal, they would have had to be granted an adjournment. This would have resulted in the loss of the hearing date in this court. This also would have meant that the Bantons would have been put to added costs and expense to meet the new challenge resulting from the late application to amend. This would have placed an additional burden on them in responding to the appeal.

[37] Although the learned judge's explanation for his failure to make a disclosure of his involvement as counsel in the previous case would not have been binding on this court, it may have been of some assistance to the Bantons in preparing their response to the application and/or the substantive appeal. There was the strong likelihood that the learned judge would have been required by the court to provide a statement for his failure to disclose his involvement in the prior case, in keeping with established

authorities. In order for the court to secure that statement from the learned judge, an adjournment would also have been required.

[38] The learned author in Zuckerman on Civil Procedure Principles of Practice, Third Edition, 2013, further stated at page 310, that:

> "In determining whether to allow an amendment that may necessitate putting off the trial date the court will have regard to whether the party seeking to amend could and should have raised the point earlier and the effect that the proposed amendment would have on the other parties and on court resources. An application for an amendment close to the end of the trial would be unlikely to succeed where no explanation is provided for the delay in raising the point."

[39] Similarly, the learned authors of Civil Appeal: Principle and Procedure, First Edition, 2010, page 338 paragraph 16-020(6) further pointed out that as a matter of practice, if the application to add a new ground of appeal is delayed until the appeal then it is unlikely to be permitted if it would cause any prejudice to the other parties to the appeal or an adjournment is required.

[40] The prejudice to the Bantons of the late application, which was made without notice and without good reason, on the date scheduled for the hearing of the appeal, was palpable.

(iv) Prejudice to JRF

[41] Having found clear prejudice to the Bantons, it was incumbent on the court to ascertain whether there would be any overriding prejudice to JRF, if the application were not granted. This compelled an examination of the merit of the proposed ground.

Having conducted that enquiry, I concluded that greater prejudice would have been caused to the Banton's than to JRF, if the application were allowed. Indeed, I concluded that there was no prejudice to JRF, in the light of my conclusion on the prospect of success of the proposed ground, which will now be outlined.

(v) Prospect of success of the proposed ground of appeal

[42] The allegation of bias on the part of a judge is a very serious matter and so, whenever the issue is raised, the court must scrutinise the circumstances with care. I found, however, when the circumstances of this case were closely examined, that JRF's argument that the learned judge ought to have disclosed his involvement as counsel in **National Commercial Bank Jamaica Limited and Jamaica Redevelopment Foundation Inc v Scotiabank Jamaica Trust and Merchant Bank Ltd** could not take it very far in impugning his decision, given its own involvement as a party in the case and its prior knowledge of the learned judge's involvement in it.

[43] Upon enquiry made by this court, Mrs Minott-Phillips confirmed that Miss Sinclair, who appeared as JRF's representative in these proceedings, was also its representative in the case in which the learned judge appeared when he was counsel. Miss Sinclair was also the representative and witness for JRF in the trial of this claim in the Supreme Court. The learned judge and JRF were, therefore, together in the same case and so the involvement of the learned judge must be taken to have equally been within the knowledge of JRF. In my view, there cannot be a strict requirement for there to be disclosure to a party of a fact that is known to be within that party's knowledge. It was

the Bantons who would have required such a disclosure and they are not the ones complaining of the non-disclosure.

[44] If JRF genuinely had concerns about the learned judge presiding in the case, it could have raised the objection and applied for his recusal, given what it knew. The learned judge had disclosed his association with JRF's expert witness, Mr Mervyn Down, during the trial and no objection was raised in relation to that matter. The point at which the learned judge made the disclosure to the parties concerning Mr Down would have been an opportune time for the issue of his involvement in the earlier case to be raised. There is nothing from JRF on this application to state its reason for failing to raise the issue with the learned judge at the time of the trial, which it had more than ample opportunity to do.

[45] It is plainly unacceptable for JRF to have waited until a decision adverse to it had been handed down, before raising the point of non-disclosure of a fact within its own knowledge and alleging bias on the part of the learned judge. The authorities have held that where a party who is aware of an issue that may support a claim of bias, does nothing or elects to remain silent, that gives rise to waiver, as the failure to act may be construed as a deliberate decision not to pursue the issue. See the Australian case, **Smith v Roach** [2006] HCA 36). Similarly, in **Locabail (UK) Ltd v Bayfield Properties Ltd and another** [2000] QB 451, it was held that it was not open to the appellant to wait and see how her case turned out before pursuing her complaint of bias. Her failure to act amounted to her treating the disclosure as being not important.

She had therefore waived her right to object. This could well apply to JRF's conduct. It could, perhaps, be argued with a reasonable prospect of success, if the point were allowed to proceed, that JRF had waived its right to complain of the non-disclosure.

[46] Even more importantly, and quite apart from the question of possible waiver by JRF of its right to complain of non-disclosure, the proposed ground of appeal, otherwise, had no prospect of success.

[47] Sinclair-Haynes JA has also examined the merit of the proposed ground and concluded that it had no prospect of success. I am in agreement with her reasoning and conclusion that JRF could not succeed on the allegation of actual bias. I will add a few words of my own, particularly as it relates to apparent bias.

[48] The test to be applied in determining the issue of apparent bias on the part of a judge is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased when he delivered his judgment in the case. See **Porter and v Magill** [2001] UKHL 67, at paragraph 103.

[49] In **RBTT Trust Limited v Flowers** (2012) 80 WIR 139, the Court of Appeal of Belize stated that "the application of the test must necessarily begin with an identification of the facts which the putative fair minded and informed observer must consider". Also, in **Locabail (UK) Ltd v Bayfield Properties Ltd and another**, the court said:

> "It would be dangerous and futile to attempt to define or list the factors, which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided."

[50] I have examined the case in which the learned judge appeared when he was counsel and in which JRF was named as the second claimant. It was observed that although judgment was entered for JRF as one of the claimants in the matter, the primary parties in real dispute were Scotiabank and NCB. The issues for resolution by the judge in that case emanated from a central question of whether a contract existed between those two parties arising from certain correspondence between them. The trial judge found that there was a contract between them and that Scotiabank had breached the contract, which resulted in loss to NCB. Having made that finding of fact, he stated his conclusion thus:

> "I believe that it is open to the Court and I so find that there was indeed, a duty owed by [Scotiabank] and that [Scotiabank] breached that duty. I also find that it was the breach of that duty which led to the loss suffered by [NCB] and accordingly I find for [NCB].
>
> In the circumstances I make the following awards:
>
> A. Judgment for the Claimants on the Claim in the sum of US$14,861,992.98.
>
> B. Interest on the judgment debt at the rate of 4% from July 10, 1997 to the date of payment;
>
> C. Costs to the Claimants, to be taxed if not agreed."

[51] JRF was obviously a beneficiary of the judgment, even if not a major disputant in the claim. However, the mere assertion that it had secured a large monetary victory against Scotiabank would not be a sufficient or reasonable basis on which to hinge a

finding of bias, in the light of the known facts. The basis on which the learned judge would have been biased against JRF in all the circumstances, so as to deviate from the course of deciding the case before him on the merit, is not at all discernible or readily apparent and it has not been sufficiently articulated by JRF.

[52] The Court of Appeal of Belize in **RBTT Trust Limited v Flowers** cited the dicta of Gleeson CJ, McHugh, Gummow and Haynes JJ in **Ebner v Official Trustee in Bankruptcy** [2001] 2 LRC 369, at paragraph 8, that:

> "There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision-making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed."

[53] Furthermore, **Locabail (UK) Ltd v Bayfield Properties Ltd and another** also makes it clear that, ordinarily, an objection cannot be "soundly based" on a judge's employment background or "previous receipt of instructions to act for or against any party, solicitor or advocate in a case before him".

[54] I found that JRF would have had an insurmountable hurdle to establish that there was a deviation from impartial decision making on the part of the learned judge and unfairness and bias in his conduct of the proceedings because of his involvement as counsel in the case in which it was a party.

[55] JRF had no reasonable prospect of success in arguing either apparent or actual bias on the part of the learned judge as a basis to disturb his decision. Granting an amendment to add a ground, which was bound to fail, would have been an act of futility.

(vi) The effect on the efficient operation of the court and the administration of justice

[56] The court must have regard to the need for the proper administration of justice. This, in effect, means that it must ensure that the parties' as well as the court's resources are not unnecessarily or unreasonably wasted. A late amendment to the grounds of appeal at the commencement of the hearing of the appeal would have been inevitably disruptive of the court's schedule. The likely prejudice to other litigants who had the need to access the limited time and resources of the court was also clear.

(vii) The overriding objective

[57] The jurisdiction to grant an amendment is governed, ultimately, by the overriding objective. In my view, the grant of the amendment, in the circumstances of this case, would not have been in keeping with the overriding objective to deal with the case justly. The amendment sought was not at all necessary in order to determine the real issues in dispute between the parties on the appeal, having regard to all the relevant considerations. Therefore, it was more in keeping with the overriding objective to refuse the application than to grant it.

[58] I concluded that there was no proper basis in law to grant the application to amend JRF's statement of case.

The substantive appeal

JRF's appeal from the judgment on liability ([2014] JMSC Civ 106)

[59] The substantive appeal brought by JRF against the judgment on liability will now be examined. It is, however, necessary to begin with a broad overview of the factual background and relevant aspects of the chronology of events leading to this aspect of the appeal.

The factual background and chronology of events

[60] By a written agreement dated 2 March 2011, JRF agreed to sell to the Bantons the land which was, at the material time, owned by H B Construction Limited, who was the mortgagor pursuant to a mortgage agreement with JRF. The land is said to lie on the flood plains of the Rio Minho River. The agreed purchase price was US$225,000.00 payable as follows: a deposit of US$22,500.00; a further payment of US$52,500.00; and the balance of US$150,000.00 upon completion, which was agreed to be 60 days from the execution of the sale agreement. JRF also agreed to grant a vendor's mortgage to the Bantons by a separate agreement of the same date.

[61] By an accompanying letter dated 4 January 2011, JRF, through its attorney-at-law, Miss Sinclair, sent documents to the Bantons' attorney-at-law, Miss Sheron Henry, for execution. The Bantons were asked to execute the documents and to return them with a cheque in the sum of US$75,000.00 (deposit and further payment) and another cheque in the sum of JA$60,000.00, to cover the attorney's cost for the preparation of the agreement for sale. By letter dated 16 February 2011, the Bantons' attorney-at-law

returned the executed documents to JRF's attorney-at-law, with the cheques as requested.

[62] Following later correspondence between the parties' attorneys-at-law, JRF's attorney-at-law, by a letter dated 15 March 2011, wrote to the Bantons' attorney-at-law and enclosed for the Bantons' attention, a statement of account to close and Transfer of Land under Power of Sale in duplicate. The Bantons were asked to sign the instrument of transfer and return it with a cheque in the sum indicated in the attached statement of account to close. The statement of account showed the sum of $508,765.01 as the outstanding sum due and payable for closing.

[63] The Bantons' attorney-at-law, by letter dated 8 April 2011, wrote to JRF's attorney-at-law and enclosed the duly executed instrument of transfer. No cheque was sent as requested. She advised that the cheque for the balance that was required to close, would be forwarded "shortly".

[64] On 29 April 2011, the Bantons' attorney-at-law received a cheque from the Victoria Mutual Building Society, made payable to JRF in the requisite sum. This, however, was on a Friday. The date for completion having been set at 60 days would have been on 1 May 2011, a Sunday. The Bantons' attorney-at-law, however, did not send the cheque by the Monday, 2 May 2011, which would have been the first working day following the date fixed for completion.

[65] On Tuesday, 3 May 2011, JRF's attorney-at-law wrote to the Bantons' attorney-at-law, indicating that JRF had no option but to cancel the agreement for sale because

H B Construction Limited, the mortgagor, had paid the outstanding mortgage in exercise of its right to redeem ("the cancellation letter”). The cancelled agreement was enclosed in the letter. A promise was also made to forward cheques representing the sums that were paid for the deposit and further payment.

[66] The Bantons refused to accept the cancellation and on 4 May 2011, through their attorney-at-law, advised JRF of their intention to commence legal action. On 5 May 2011, JRF sent to the Bantons a cheque representing a refund of the deposit and further payment. The Bantons initially returned the cheque, which was sent to them. The cheque was, however, eventually accepted by them, "without prejudice".

[67] The Bantons initiated proceedings in the Supreme Court seeking, among other things, damages for breach of contract; specific performance; injunction; special damages; and interest. The core of their case was that JRF had wrongfully cancelled or purported to cancel the agreement for sale and consequently, they had incurred expenses and suffered loss and damage.

[68] JRF countered in its defence that the cancellation and return of the monies to the Bantons did not constitute a breach of contract. It maintained that time was of the essence, as stipulated in special condition 5 of the agreement for sale, and that the Bantons had failed to make payments within the stipulated time. Therefore, JRF was entitled to cancel the agreement for sale by virtue of special condition 5. JRF’s contention was that the letter of 15 March 2011, that was sent to the Bantons’ attorney-at-law, indicating the outstanding balance on account, and the letter of 8 April

2011, from the Bantons' attorney-at-law, acknowledging that the payments were outstanding, were enough to satisfy the requirements for notice before cancellation as stipulated by special condition 5.

[69] JRF also contended that it had a separate legal basis for cancellation upon which it was entitled to act, and which was additional and unrelated to the reason conveyed to the Bantons in the cancellation letter, that is, to allow the mortgagor to redeem. It denied that the Bantons had suffered the losses particularized in their particulars of claim and that they were entitled to the reliefs sought because the initial payments were refunded.

[70] After hearing evidence from Mr Clive Banton, Miss Henry (the attorney-at-law who acted for the Bantons in the transaction), and Miss Sinclair (the attorney-at-law who acted for JRF), the learned judge found that JRF had wrongfully cancelled the agreement for sale and was liable in damages to the Bantons for breach of contract, with those damages to be assessed. The agreement could no longer be specifically performed, he reasoned, and so the issue that remained was the quantum of damages to which the Bantons were entitled. That issue was adjourned for trial, which took place on 16 and 17 February 2015.

Issue: whether the learned judge erred in finding that JRF was liable for breach of contract for failure to give proper notice in accordance with special condition 5 (grounds one to five)

[71] JRF has challenged aspects of the learned judge's reasoning and conclusion relative to the issue of the cancellation of the agreement for sale, pursuant to special

condition 5. JRF's core complaint on this issue is that the learned judge erred in his construction of special condition 5 and in his evaluation of the evidence, thereby falling into error in finding that it had failed to give the proper notice and as such, wrongfully cancelled the agreement for sale.

[72] Having examined the grounds of appeal against the background of the facts, the relevant law and the learned judge's reasons for his decision in respect of liability, I agree with the conclusion of Sinclair-Haynes JA that the learned judge did not err in law in finding JRF liable for cancellation of the agreement for sale. For the reasons that I will now outline, some of which coincide with those of my learned sister, I find that there is no basis in law for this court to interfere with the learned judge's decision on liability.

The standard of review

[73] In assessing the grounds of appeal, which focus substantially on the learned judge's findings of fact and his construction of the disputed clauses of the agreement for sale, I adhered to the guidance of the relevant authorities concerning the approach this court should employ in reviewing the findings of fact of a trial judge.

[74] In the relatively recent case of **Bahamasair Holdings Ltd v Messier Dowty Inc** [2018] UKPC 25, the Privy Council, at paragraphs 32-34, after a review of some older authorities, reiterated the settled principles governing the approach that an appellate court should take in reviewing the findings of a trial judge. Their Lordships instructed as follows:

i. The appellate court should intervene only if it is satisfied that the trial judge was plainly wrong. See **Watt (Or Thomas) v Thomas** [1947] AC 484 and **Clarke v Edinburgh & District Tramways Co Ltd** (1919) SC (HL) 35.

ii. It can only be on the rarest of occasions and in circumstances where the appellate court is convinced by the plainest considerations that it would be justified in finding that the trial judge had formed a wrong opinion. See **Thomson v Kvaerner Govan Ltd** [2003] UKHL 45.

iii. The appellate court must defer to the trial judge's opinion because the trial judge is in a privileged position to assess the credibility of the witnesses' evidence but it is not limited to that. There are other relevant considerations such as the fact that the trial judge's major role is the determination of fact and with experience in fulfilling that role comes expertise. See **Anderson v City of Bessemer** (1985) 470 US 564.

iv. An appellate court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the trial judge's findings and position, in particular the extent to which, he or she had, as the trial judge, an advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere. See

Central Bank of Ecuador v Conticorp SA [2015] UKPC 11; [2016] 1 BCLC 26, paragraph 5.

v. Duplication of the trial judge's efforts in the appellate court is likely to contribute only negligibly to the accuracy of fact determination. See **Anderson v City of Bessemer**.

vi. The principles of restraint do not mean that the appellate court is "never justified, [or], indeed required, to intervene". The principles rest on the assumption that "the judge has taken proper advantage of having heard and seen the witnesses, and has in that connection tested their evidence by reference to a correct understanding of the issues against the background of the material available and the inherent probabilities." Where one or more of these features is not present, then the argument in favour of restraint is reduced. See paragraph 8 of **Central Bank of Ecuador v Conticorp SA**.

[75] In the earlier case of **Beacon Insurance Company Limited v Maharaj Bookstore Ltd** [2014] UKPC 21, their Lordships, similarly, stated:

> "It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts…Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the

> knowledge that it has only the printed record of the evidence. **The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence**…" (Emphasis added)

[76] It is partly against this background that the grounds of appeal have been examined.

Discussion and finding

[77] Special condition 5 was pivotal to the learned judge's resolution of the issue of liability. It reads:

> "Time is of the essence of this Agreement for Sale in respect of all stipulations herein for payment of any sum(s) due by the Purchaser or for the performance of the Purchaser of any act or thing to be done by him. In the event of the failure of the Purchaser on the due date of any payment to punctually remit such payment or punctually to do any act or thing required by this Agreement to be done by him, the Vendor shall be entitled to cancel this Agreement upon seven (7) days notice to the Purchaser and the Purchaser having failed to make good the default and to forfeit the deposit and without notice to the Purchaser and without tendering any transfer of the lands to him, re-sell the property and apply the proceeds thereof to its own use provided however that the Vendor shall be entitled at its option to allow the Purchaser time to satisfy his obligations hereunder subject to the provisions of special condition 7 hereof."

[78] Before the cancellation letter was sent to the Bantons on 3 May 2011, the only letter, which indicated that outstanding sums were due for completion, was the letter of 15 March 2011. This letter was a follow up to the 4 March 2011 letter, in which JRF indicated that it would forward the statements of account to close. It is this letter

dated 15 March 2011 that JRF is contending is the notice required for cancellation by special condition 5. It is important to appreciate the terms of this letter in its entirety. It reads:

> "March 15, 2011
>
> Ms. Sheron A. Henry
> Attorney-at-Law
> 11A - 15 Oxford Road
> Kingston 5
>
> Dear Ms. Henry:
>
> **Re: Proposed Sale of Land part of Woodleigh, Clarendon registered at Volume 1240 Folio <u>116 to Clive Banton and Sadie Banton</u>**
>
> We refer to previous correspondence herein and enclose herewith the following documents:
>
> 1. Statements of Account to Close.
>
> 2. Transfer of Land under Power of Sale, in duplicate
>
> Kindly have your clients sign the Transfer of Land in duplicate, and return them to us along with manager's cheques payable to Jamaican Redevelopment Foundation, Inc. and Naudia N. Sinclair, Attorney-at-Law in settlement of the outstanding sums indicated in the attached statements of account.
>
> Please note that the Agreement for Sale is presently at the Office of the Stamp Commissioner for assessment, however, the original and copy Mortgage and Promissory Note have been stamped.
>
> We advise that we have requested up to date Certificate of Payment of Taxes and water rates bill and receipt and hereby give you our professional undertaking to forward them to you as soon as we have them in hand.
>
> Yours faithfully,

JAMAICAN REDEVELOPMENT FOUNDATION, INC.

Per:..................................

NAUDIA N. SINCLAIR (MS.)
ATTORNEY-AT-LAW"

[79] There was no indication in this letter to the Bantons of any default on their part. There was nothing in it which directly stated that it was a notice to them to remedy a default under the agreement for sale, failing which, the agreement would have been cancelled. It did indicate what was the outstanding sum due from the Bantons to close, which is the usual statement of account to close in conveyancing contracts. The letter did not set a specific time for the payment of the requisite sum to close. But, it would have been expected, in keeping with the terms of special condition 5, that the Bantons, upon being notified as to what payments and acts were required on their part to complete, were obliged to act punctually, or at any rate, by the date fixed for completion.

[80] I have noted the arguments of counsel for the Bantons that there was no breach by the Bantons, which would have triggered special condition 5. One of the bases for this contention is that the date of the contract was not 2 March 2011, as indicated on the face of the agreement, but instead a later date because the agreement for sale was not received for signing until 10 March 2011. It follows then, according to them, that the date for completion would not have been 1 May 2011, which was 60 days from 2 March 2011. On that computation, the Bantons would not have failed to carry out their obligations by the date fixed for completion.

[81] This argument is, however, rejected for two reasons. Firstly, it runs counter to the pleadings and evidence of the Bantons in the court below in which they have maintained from the very outset, beginning with their particulars of claim, that the date of the agreement was 2 March 2011. They are, therefore, bound by their statement of case in the court below.

[82] Secondly, the argument that the Bantons were not in breach could not properly be advanced on the appeal without there being a counter-notice of appeal in which the Bantons seek the courts affirmation of the judgment on a ground other than one relied on by the learned judge in coming to his decision. The learned judge did not state in his conclusion that JRF breached the agreement by terminating without there having been any breach by the Bantons. JRF breached, he said, because it failed to carry out the terms of the agreement for cancellation by issuing the proper notice. A finding that JRF had breached the agreement because the Bantons were not in breach, would have been a finding not made by the learned judge and one on which his decision was not based.

[83] On the terms of the agreement for sale, time was of the essence for the making of every payment and the doing of every act, including the payment of the closing cost. It can be safely accepted that the cheque with the sum required by the letter of 15 March 2011 was not sent to JRF on the date due for completion. This means that the Bantons would have failed to act punctually in making the requisite payment or, at any rate, to fulfil that obligation by the date fixed for completion. Special condition 5, which

made time of the essence, would have been triggered when the payment was not made by the date fixed for completion.

[84] I would therefore hold, contrary to the views of counsel for the Bantons, that it was open to the learned judge to have properly found on the evidence before him that there was a failure on the part of the Bantons to carry out their obligations by the date fixed for completion, in accordance with the terms of the agreement. Unless, the Bantons were able to prove that JRF had waived time being of the essence, then the right of JRF to cancel, pursuant to special condition 5, would have arisen.

[85] It must be noted that the Bantons in their reply to JRF's defence, had pleaded waiver on the part of JRF. The learned judge, however, in the light of the Bantons reply, did not resolve the issue raised on the pleadings as to whether the Bantons were in breach thereby entitling JRF to cancel or whether there was waiver by JRF.

[86] At paragraph [9] of his judgment with respect to liability ([2014] JMSC Civ 106), the learned judge identified the issue for consideration in this way:

> "In the case I have to decide the issue is whether the right to terminate had accrued. This depends on a true construction of the agreement, that is, what is the nature of the notice required prior to termination pursuant to special condition 5."

[87] He then proceeded to examine issues pertinent to the question of the notice that was required by special condition 5. Having conducted his analysis, and after highlighting several issues, which were argued before him by the parties, including that the Bantons were not in breach, he then said at paragraph [14]:

> "I do not find it necessary and hence will not venture a position on any of those issues because on my construction of the agreement and on the facts of the case, the [JRF]breached its agreement for sale by terminating without first sending a notice as required in special condition 5 of the agreement."

[88] The learned judge did not see it necessary to express his position on the question of whether the Bantons were in breach. This is somewhat curious given the issue in controversy between the parties and the wording of special condition 5, which made a breach by the Bantons, a precondition for cancellation of the agreement for sale by JRF under special condition 5. If there was no breach, then the question of JRF giving notice under special condition 5, would not properly have arisen. In other words, JRF's right to cancel was contingent on the failure on the part of the Bantons to act in accordance with the terms of the agreement.

[89] It is this omission of a specific finding that the Bantons had breached the contract that led to JRF's complaint in ground five that the learned judge erred in his decision on liability. In my view, the learned judge's failure to expressly find whether the Bantons had breached the agreement cannot be of any assistance to JRF on the appeal against the decision on liability. This is so, because a breach by the Bantons would have been the most favourable position for JRF to be in. No breach by the Bantons would have meant no right on the part of JRF to cancel. The breach by the Bantons would have justified JRF's reliance on special condition 5 to cancel the agreement. So, even in its best position, JRF was obliged to comply with special condition 5, with regard to the issuance of the requisite notice.

[90] The learned judge's examination of the question as to whether proper notice was given by JRF was not an error going to his decision. With a specific finding of breach by the Bantons, he would have had to embark on that enquiry, in any event. JRF is no worse off by him so doing without a specific finding that the Bantons had breached the contract. For this reason, I see no need, unlike my sister, to venture into determining, in any detail, the issue of whether or not the Bantons were in breach.

[91] The learned judge, having distilled the propriety of the cancellation of the agreement as the central issue to be decided, and having considered the various authorities cited by the parties, found that there was no notice given in accordance with special condition 5, or any at all. The kernel of his treatment of the provisions of special condition 5 and the letter of 15 March 2011 that lead him to that conclusion is to be found in paragraphs [9]-[11] of his judgment on liability ([2014] JMSC Civ 106). Having conducted his analysis on the issue of the notice, the learned judge concluded at paragraph [12]:

> "On this construction of the agreement it is clear [JRF] has not given notice of the breach or their intention to terminate. The letter dated 15th March 2011 did neither. I hold it was not notice pursuant to special condition 5 or any notice whatsoever. Nor it appears was it intended by [JRF] to be such a notice. This is evidenced by the fact that the letter of termination dated 3rd May 2011 did not advert to the letter of the 15th March or purport to terminate for non-payment. That letter terminated for a reason which had nothing to do with any or any alleged breach by the [Bantons]. It is true that the reason for a breach of contract may be preyed [sic] in aid so long as it existed, even if it was not relied on at the time. However I am not here taking issue with that, I am using the fact that no reference is

> made to a breach when terminating as evidence that, when issuing the letter of the 15th March 2011, [JRF] was not issuing a notice and had in fact no intention to issue a notice pursuant to special condition 5."

[92] On this critical issue, relating to the requisite contractual notice for cancellation, and JRF's action in cancelling the agreement, it cannot be said that the learned judge made an error in his application of the law and/or was plainly wrong in his findings of fact. There is, therefore, no challenge posed by JRF to the learned judge's construction of special condition 5, and his treatment of the letter of 15 March 2011, in grounds of appeal one, two, three and four, that is sufficiently meritorious to justify this court disturbing the learned judge's decision on liability.

[93] Also, the learned judge's failure to expressly find that the Bantons were in breach is not of sufficient weight to undermine his ultimate finding that the proper contractual notice for cancellation of the agreement was not given by JRF. Ground five, regrettably, cannot avail JRF.

[94] All five grounds challenging the learned judge's findings that JRF is liable, therefore, fail. The decision on liability stands unimpeachable.

Appeal and counter-appeal from the judgment on damages ([2015] JMSC Civ 61)

[95] Both JRF and the Bantons allege that the learned judge erred in his conduct of the trial on damages in relation to the treatment of the expert evidence as well as in his application of the law and analysis of the relevant facts. Accordingly, they contend, in the grounds filed in relation to damages, that the award is an erroneous estimate of the

damages to which the Bantons are entitled. JRF says the award is too high while the Bantons say it is too low. In my view, both positions are untenable.

[96] Before discussing the reasons for my conclusion, it would prove useful to appreciate the factual context from which the disgruntlement of the parties has arisen in relation to this aspect of the case, and to indicate the standard of assessment that has been employed in determining whether the learned judge erred in his decision on damages as alleged by both sides.

The relevant background to the appeal and counter-appeal on damages

[97] Both parties at the hearing of the assessment of damages sought to rely on expert evidence, following court orders approving their expert witnesses. DC Tavares & Finson Realty, Real Estate Agents, Appraisers, Auctioneers, Consultants ("DC Tavares & Finson") was appointed expert witness for JRF and the firm Allison Pitter & Co, Chartered (Valuation) Surveyors ("Allison Pitter"), was appointed as the expert witness for the Bantons. Mr Kenneth Allison was the expert representing Allison Pitter and Mr Down represented DC Tavares & Finson.

[98] At the commencement of the hearing, it was disclosed to the learned judge by then counsel for the Bantons, Mr Garth McBean QC, that there was a conflict of opinion between the experts. He made an application for permission for the experts to be called to give oral evidence, in the light of their conflicting opinions. JRF's counsel, Mrs Minott-Phillips, objected on the ground that there was no prior order for the experts to give oral evidence and so, cross-examination was not permitted. The learned judge ruled

that the experts should be called to give oral evidence and be cross-examined. He allowed the Bantons' expert, Mr Allison, to give evidence first.

[99] Mr Allison had prepared an initial expert report dated 28 January 2015 ("the original Allison Pitter report"), in keeping with the order of the court. Upon Mr McBean applying for the report to be admitted in evidence, an objection was taken by Mrs Minott-Phillips on the basis that it contained hearsay evidence in the form of a report from another company, Blastec Company Limited ("Blastec"). Blastec was commissioned by Allison Pitter to provide a qualitative and quantitative estimate of the aggregate deposits on the land. This report was prepared by a Mr Laurence Neufville, the Managing Director of Blastec ("the Blastec report"). Based on Mrs Minott-Phillips' objection to Mr McBean's application, the learned judge did not allow the original Allison Pitter report to be admitted in evidence but ruled that the Blastec report should be excised. He allowed Mr Allison to redact the original Allison Pitter report and to re-date it. This modified report was dated 16 February 2015, the date of the hearing ("the redacted Allison Pitter report").

[100] Mrs Minott-Phillips then indicated to the learned judge that she had not had a chance to see the redacted Allison Pitter report. The learned judge, however, permitted it to be admitted on the word of Mr Allison that he had not relied on the Blastec report, in any way, in stating his observations and opinion in the redacted report. Mr Allison testified that he had removed the areas where he had relied on the experience of Mr Neufville. This redacted Allison Pitter report was admitted into evidence as exhibit 5.

[101] Upon the learned judge's ruling, Mr McBean made an application for Mr Neufville to be called to give evidence. The learned judge refused that application, following the objection of Mrs Minott-Phillips.

[102] Mr Allison had excised the Blastec report from the original Allison Pitter report, although in the latter report, it was stated under the heading, "Disclosure and Limitations", that, "this Appraisal is to be used only in its entirety and no part is to be used without the whole report."

[103] During the course of Mr Allison's cross-examination, Mrs Minott-Phillips asked that the original Allison Pitter report be admitted in evidence. The learned judge acceded to that request and the report was admitted as exhibit 6. However, after hearing the case in its entirety, the learned judge subsequently found, as set out in his written reasons for the judgment on damages, that the report was "singularly unhelpful and irrelevant". He therefore refused to rely on it in his assessment of the damages.

[104] In coming to his finding on the award of damages, the learned judge accepted the evidence of value of the property contained in the redacted Allison Pitter report. It stated that the market value of the property, as at 5 May 2011, would have been between US$1,165,908.80 and US$1,224,204.26. The learned judge accepted the market value to be US$1,165,908.80, being the lower value of the range. The learned judge then deducted the purchase price of US$225,000.00 and awarded damages in the sum of US$940,908.80 with interest and costs.

[105] The learned judge refused to accept, as contended by the Bantons, that the assessment should take into account an income stream from mining on the land itself. He opined that there is no evidence that any of the parties was aware that the land, as distinct from the riverbed, contained sand and aggregate in sufficient quantities below the surface such as to make mining a "viable proposition". He concluded that there was no evidence to satisfy him that mining on the land (as distinct from in the riverbed) was within the contemplation of the parties at the time the agreement for sale was entered into. Furthermore, he said, no such claim was pleaded by the Bantons. The learned judge, therefore, stated that he would disregard the averment of loss of income from mining on the land as being pertinent to the value or as a separate and additional head of damage.

The standard of review

[106] It is to be noted from the outset that the same principles relative to the approach that this court should take in treating with the decision on liability, set out above at paragraphs [73] – [75], have been engaged in the consideration of JRF's appeal as well as the Bantons' counter-appeal on damages.

[107] In addition, the principles treating specifically with the approach an appellate court should take in treating with an appeal from a trial judge's award of damages as well as the exercise of his discretion have also been engaged, given that the complaints of the parties in relation to the award of damages have given rise to such considerations.

[108] In the Bahamian case of **Cadet's Car Rentals and another v Pinder** [2019] UKPC 4, the Privy Council gave the most recent guidance to an appellate court in treating with an appeal from an assessment of damages. Their Lordships restated the applicable law in these terms:

> "7. An appellate court will not, in general, interfere with an award of damages unless the award is shown to be the result of an error of law or so inordinately disproportionate as to be plainly wrong. In *Flint v Lovell* [1935] 1 KB 354 Greer LJ referred (at p 360) to the power of an appellate court to reverse a decision on quantum of damages in the following terms:
>
>> '[T]his Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. 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.'
>
> Similarly, in *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601 the Board observed (at pp 613-614):
>
>> '… 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 (*Flint v Lovell* [1935] 1 KB 354, approved by the House of Lords in *Davies v Powell Duffryn Associated Collieries* Ltd [1942] AC 601).'"

[109] In so far as the exercise of the learned judge's discretion is concerned, the well-established principles enunciated in **Hadmor Productions Ltd v Hamilton** [1983] 1 AC 191 have been borne in mind.

Discussion and findings

JRF's appeal on damages

[110] JRF has challenged the learned judge's decision in four grounds of appeal, they are, grounds six, seven, eight and nine. Ground six may be regarded as a 'sweep up' ground, which reflects JRF's discontentment, generally, with the damages awarded and the basis on which the learned judge awarded those damages. In that ground, JRF complains that the award of damages was arrived at by the learned judge, (i) applying wrong principles of law; (ii) failing to apply the relevant principles of law; (iii) having regard to irrelevant expert evidence; and (iv) failing to have regard to relevant expert evidence.

[111] Grounds seven, eight and nine are subsets of ground six. They touch and concern the learned judge's treatment of the expert evidence, both written and oral, adduced by the parties and some principles that he applied in the assessment of damages. Therefore, the analysis and outcome of grounds seven, eight and nine, inevitably, have informed the resolution of the issues raised in ground six. For that reason, ground six is considered after a determination of the other three grounds.

[112] The core issues identified for consideration on the four grounds of appeal are:

i. whether the learned judge erred in allowing the expert witnesses to be cross-examined (ground seven);

ii. whether the learned judge erred in admitting the redacted Allison Pitter report in evidence (ground eight);

iii. whether the learned judge erred in rejecting the expert evidence of DC Tavares & Finson (ground nine); and

iv. whether the award of damages was extremely high due to error on the part of the learned judge in treating with the evidence of the expert witnesses and in his application of the relevant principles of law to that evidence (ground six).

Issue (i): whether the learned judge erred in allowing the expert witnesses to be cross-examined (ground seven)

[113] JRF contends that the learned judge erred in permitting the expert witnesses to be called for cross-examination in circumstances where, (i) the court had not ordered that their evidence be given, otherwise than in a written report; and (ii) the court had ordered that written questions, if any, were to be put to the experts within a stipulated time. Mrs Minott-Phillips argued that the proper time at which there ought to have been an assessment of whether the expert should have been called to give oral evidence was at the time he was being certified, and so, the learned judge, in allowing the expert witnesses to be called after certification was done, acted wrongly. With all due respect, I cannot accept this argument.

[114] The learned judge had appointed the experts as a matter of law, based on their qualifications, expertise and the relevance of their area of expertise to the issue of damages. There is no issue taken with the appointment of the experts. The issue had to do with how their evidence was to be given. The power to control the evidence at the hearing resided in the learned judge and so, it was for him to determine how the evidence should be given, which was a matter for the exercise of his discretion. In considering the issue of whether to allow the experts to give evidence, he stated:

> "I ruled that the experts would be allowed to give evidence orally. This is because where experts differ, it is only by seeing and hearing them give evidence that a court can usually decide which opinion to prefer."

[115] There is highly persuasive authority, which states that the calling of expert witness to give oral evidence should be a matter of last resort, given the expense involved in having experts attend court. See **Daniels v Walker** [2000] 1 WLR 1382. In that case, Lord Woolf MR, albeit treating with the issue within the context of a joint expert report, directed that before experts who have conflicting views are called to testify, steps should be taken to direct questions to them or to have them meet for discussions. This approach, suggested by Lord Woolf MR, was examined by the learned author, Stuart Sime, in his text, A Practical Approach to Civil Procedure, 15th edition, at page 376, paragraph 31.34, and he stated that, "[i]f there are unresolved issues after this process, the court may give permission for both experts to give oral evidence at the trial."

[116] The learned judge did not follow the approach recommended by Lord Woolf MR. This failure, however, cannot be viewed as an error of law that would render his decision on the critical issue of damages flawed. The dicta of Lord Woolf MR, albeit of tremendous persuasive value, was not binding on the learned judge. The learned judge's case management powers continued until the end of the trial, and so, by virtue of rule 26.1(2)(v) of the CPR, he was entitled to, "take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective". It was for him to determine what steps would have been necessary to enable the proceedings to be conducted fairly.

[117] In the absence of any law that would have precluded the learned judge from making an order permitting the expert witnesses to be called to give oral evidence and be cross-examined, after they were already certified, it cannot be said that he made an error of law that goes to the root of his ultimate findings on the quantum of damages. Indeed, his decision cannot be said to have caused any injustice to JRF or was, otherwise, inconsistent with the interests of justice.

[118] I conclude that there is nothing wrong in principle or in law with the learned judge's decision allowing the experts to give oral evidence and to be cross-examined. Ground seven, therefore, fails.

Issue (ii): whether the learned judge erred in admitting the redacted Allison Pitter report in evidence (ground eight)

[119] JRF has attacked the admission into evidence of the redacted Allison Pitter report (exhibit 5) on several bases. Its contention is that the report was inadmissible because

it was, (i) irrelevant; (ii) expressed to be unseverable from the whole; and (iii) inherently inconsistent and unreliable. JRF also complains that the report was materially altered when the Blastec report was excised and it was not served on its counsel before it was admitted. For all these reasons, JRF contends that the report was wrongly admitted in evidence by the learned judge.

[120] It is trite law that the question of admissibility of evidence is determined by the question of relevance, and so, all evidence that is sufficiently relevant to prove or disprove a fact in issue is admissible, unless its admission is precluded by an exclusionary rule of law or by a judge in the exercise of his discretion. In relation to the admissibility of expert evidence, however, additional considerations do apply.

[121] The guidance provided by Stuart Sime in his text, A Practical Approach to Civil Procedure, 15th edition, at paragraph 31.03 is useful. The learned author, usefully set out what he termed, "[the] four preconditions for the admission of expert evidence". According to him, for expert evidence to be admitted: (i) the matter must call for expertise; (ii) the area must be an established field of expertise; (iii) the witness must be suitably qualified; and (iv) permission to adduce the expert evidence must be obtained from the court.

[122] In **Barings plc and another v Coopers & Lybrand and others; Barings Futures (Singapore) Pte Ltd (in liquidation) v Mattar and others** [2003] EWHC 2371 (Ch), Evans-Lombe J explained the circumstances under which expert evidence is admissible in any case (albeit within the context of the English Civil

Evidence Act 1972, section 3). The circumstances are: (i) where the court accepts that there exists a recognized expertise governed by recognized standards and rules of conduct capable of influencing the court's decision on any of the issues it has to decide; and (ii) the witness who is to be called satisfied the court that he had sufficient familiarity with and knowledge of the expertise in question, to render his opinion potentially of value in resolving any of those issues, that is, it is helpful to the court .

[123] The evidence, according to Evans-Lombe J, would not be helpful if the issue to be decided is one of law or is one in respect of which the court is able to come to a fully informed decision, without hearing such evidence.

[124] The above statement by Evans-Lombe J was adopted by this court in **National Commercial Bank Jamaica Ltd (Successors of Mutual Security Bank Limited) v K & B Enterprises Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 70/2005, judgment delivered 5 September 2005.

[125] In the light of the foregoing principles of law, there can be no question that the evidence of Allison Pitter would have satisfied the preconditions for admissibility, as a matter of law. The learned judge needed the assistance of valuators to assist him in his assessment of the damages to be awarded for loss of bargain. Allison Pitter was appointed by the court as an expert valuator to give evidence on behalf of the Bantons in that regard. No issue was taken by JRF with that appointment. It cannot be said that the report was of no relevance to the issue of the market value of the land, which would have been relevant to the question of the damages to be awarded.

[126] That, notwithstanding, JRF is not content to accept that the basis for the admissibility of the report existed. I consider it to be sufficient, in indicating my conclusion on the broad issue raised in ground eight, regarding the admissibility of the report, to summarize my analysis under four sub-headings in keeping with the sub-issues raised by JRF.

(i) Whether the redacted Allison Pitter report (exhibit 5) was inadmissible due to irrelevance

[127] JRF maintains that the redacted Allison Pitter report was not relevant and ought not to have been admitted on two bases. The first is that Allison Pitter did not value the land as at the approximate date of judgment, minus improvements of the current owner, (if any), in the period between the contract and judgment dates.

[128] The learned judge treated as the material date for the assessment of damages, the value of the land as it stood at the breach date, rather than the date of judgment. JRF's contention that the judge erred in so holding is not accepted, despite its reliance on the decision of this court in **Rajah Tewari v The Attorney General** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 67/1998, judgment delivered 31 July 2000. In that case, Harrison JA opined that the breach date rule does not apply where damages are to be awarded for loss of bargain in circumstances where a vendor failed or refused to give title. The court relied on **Malhotra v Choudhury** [1979] 1 All ER 186, as authority in support of that principle and awarded damages as at the date of judgment.

[129] It is recognised, however, that there is compelling authority, which support the learned judge's view that the proper date for the purposes of assessing damages in the circumstances of this case, would have been the date of the breach and not the date of judgment. See, in this regard, **Engell v Fitch** (1869) LR 4 QB 659; **Johnson v Agnew** [1980] AC 367; **Ridley v De Geerts** [1945] 2 All ER 654 and Halsbury's Laws of England, Volume 29 (2014) paragraph 604.

[130] The learned judge's reason for accepting the breach date as the operative date, as stated in paragraph [25] of his judgment, is not entirely accurate in law. That is to say, he is not correct in stating that the breach date rule applies where the vendor "is unable to give title not where he fails or refuses so to do ". When the vendor, acting in good faith and without fraud, is unable to give title due to no fault of his own, no question arises as to damages for loss of bargain because the rule in **Bain v Fothergill** (1874) LR 7 HL 158 would apply. In such a case, the question of whether the breach date rule or the date of judgment rule should apply does not arise.

[131] In this case, JRF was able to provide good title at the date of cancellation of the agreement for sale. The evidence shows that up to the date when the cancellation letter was written indicating that JRF had allowed the mortgagor to redeem the property, the mortgage had not yet been discharged. Based on Miss Sinclair's evidence in cross-examination, JRF was merely promised by NCB payment of the outstanding sum needed to discharge the mortgage and it acted on that promise. The payment of the outstanding sum was made months after the cancellation of the agreement for sale

by JRF. So, this was a case in which no question arises as to defect in title or JRF being unable to give title due to no fault of its own at the time the agreement was cancelled. In such circumstances, the question of damages for loss of bargain would have had to be resolved by the court, which the learned judge, in fact, did. So, despite the error in the learned judge's reasoning, he did, in the end, treat the case as one for assessment of damages for loss of bargain and as one to which the breach date rule was applicable. He cannot be faulted for so doing.

[132] In the light of the authorities, the learned judge cannot be held to have been plainly wrong when he refused to apply the broad, definitive and unqualified statement in **Rajah Tewari v The Attorney General**, that where the vendor refuses or fails to give title, the breach date rule does not apply. I would refuse to hold that the learned judge was wrong not to have considered himself bound by that decision as contended by Mrs Minott-Phillips.

[133] It follows, therefore, that any assessment of the market value which was done by Allison Pitter, at a time more proximate to the date of breach, rather than the date of judgment, did not render the report irrelevant and, therefore, inadmissible, as contended by JRF.

[134] In any event, the learned judge's use of the breach date rule, even if incorrect, does not render the award of damages extremely high to the detriment of JRF. If anything, it would have rendered the award more advantageous to JRF, since the value at the time of breach, would likely to have been less than the value at the date of

judgment. The application of the breach date rule is, therefore, not a basis for holding that the award of damages was too high and, therefore, an erroneous estimate of the damages to which the Bantons are entitled.

[135] The second basis on which JRF is contending that the redacted Allison Pitter report was irrelevant and inadmissible is that the land was valued by Allison Pitter on the assumption of it being used for income generating activities of agriculture, sand mining and aggregate extraction in the absence of any pleading or evidence that, (i) the land was wanted by the Bantons for any purpose over and above its mere acquisition; and (ii) the Bantons had made those purposes known to JRF at the time the agreement for sale was made.

[136] The contention of JRF that the redacted Allison Pitter report was inadmissible on the ground of irrelevance for the reasons detailed by Mrs Minott-Phillips in her submissions under this head is not accepted. The report would have had to be first admitted in evidence in order for the learned judge to have regard to the matters raised by JRF in determining whether the evidence should be accepted as true and reliable for the purposes for which it was admitted.

[137] As was explained by the learned authors in the text, Cross on Evidence, Sixth Edition at page 440:

> "In **Beckwith v Sydebotham** [(1807) 1 Camp 116], Lord Ellenborough allowed shipwrights to testify concerning seaworthiness of a ship. **He said that, where there was a matter of skill or science to be decided, the jury might be assisted by the opinion of those peculiarly**

> **acquainted with it in their professions or pursuits. As the truth of the facts stated in them was not certainly known, their opinion might not go for much, but still it was admissible evidence**. **In cross-examination, they might be asked what they would think of the state of facts contended for by the other side.** His Lordship was referring to a difficulty that is encountered in the reception of all kinds of expert evidence. In the vast majority of cases, the witnesses will not have perceived the occurrences with which the case is concerned." (Emphasis added)

Following the lead of Lord Ellenborough, it may safely be said that the report was admissible evidence.

[138] Mr Allison in his examination-in-chief explained, prior to the tendering of the report into evidence, that the value (which was accepted by the learned judge), "...took into account what we knew of the land at that time. This was independent of any other report". He made it clear that this valuation did not take into account the Blastec report. The learned judge accepted that as true.

[139] In the end, the evidence of market value, which the learned judge accepted, was one of three different "scenarios" initially proposed by Allison Pitter in the report. The learned judge accepted the lower value of the range of values from the first "scenario" which took into consideration "existing use only". The "existing use[s]" indicated in the report, and which Mr Allison explained was in 2011, were, "agriculture and sand mining from the river". According to the unchallenged evidence of Mr Allison, this value was based on actual observation of activities which took place or were taking place on the land, including in the riverbed, at the time of valuation and would not have reflected

any value for the potential use for sand mining and/or aggregate extraction on the land itself, spoken to in the Blastec report.

[140] The use and/or potential use of the land for not only agriculture but also sand mining in the riverbed (identified by Allison Pitter as existing uses) was also supported by the evidence of DC Tavares & Finson. In terms of agriculture, the DC Tavares & Finson's report indicated that the predominant soil type for the area is Agualta Sandy Loam, which is fertile and capable of intensive use. It spoke to the ease of irrigation of the soil and that "[s]ugar cane, citrus, bananas, and tobacco are the recommended uses". The report went further to indicate that the land was "suitable for agricultural development, most likely sugar". The use or potential use of the land for agricultural purposes must reasonably have been in the contemplation of JRF at the time of the contract.

[141] In addition, Mr Down testified in cross-examination that he saw evidence of mining of aggregate and sand in the riverbed, and that H B Construction Limited had a mining licence, which was specific to the riverbed. That evidence clearly indicated that an open and obvious use of the land was the mining of sand and aggregate in the riverbed. The use of the land for both agriculture and sand mining, the two activities taken into account by Allison Pitter, in arriving at its value, ought, at least, to have reasonably been within the contemplation of JRF at the time of entering into the agreement, as the learned judge opined.

[142] Mr Allison used, what he observed to be the potential and actual use of the land as relevant considerations in arriving at an appropriate market value, having regard also to comparable values of other properties in the area. It is neither fair nor accurate to say then that the redacted Allison Pitter report was inadmissible because it was based on assumptions of it being used for income generating activities that were either not pleaded or in relation to which there was no evidence that the Bantons had purchased it beyond its mere acquisition and had advised JRF at the time of the agreement of an intended special use.

[143] In concluding on this aspect of ground eight, it may be said that in the light of the test to be applied in determining the admissibility of expert evidence, none of the matters pointed out by JRF, in alleging that the redacted Allison Pitter report was irrelevant, would have rendered it inadmissible. The acceptance or rejection of its contents was one for the learned judge in the exercise of his jury mind in assessing the weight of the evidence, in the light of all the other evidence in the case.

(ii) Whether the redacted Allison Pitter report was inadmissible because it was "a portion of a document expressed as being un-severable from the whole"

[144] The original Allison Pitter report, had a clause which indicated that, "the Appraisal is to be used only in its entirety and no part is to be used without the whole report". On the basis of that clause, counsel for JRF argued that the redacted Allison Pitter report should not have been admitted in evidence when the court ordered that the Blastec report be excised from the original Allison Pitter report. In my view, the clause did not necessarily mean that the report was not severable. It was not in, and of

itself, determinative of the question of admissibility of the redacted Allison Pitter report. Mr Allison had testified, prior to the report being admitted, that he had taken out the portion of the report on which reliance was placed on the opinion of Blastec and that he did not rely on the Blastec report in coming to his decision. Having heard that evidence, the learned judge was satisfied that the Blastec report could have been severed and was, in fact, severed. The learned judge then admitted the redacted report in evidence. He was not barred from any exclusionary principle of law from doing so.

[145] Furthermore, and even more importantly, it is quite evident that the clause on which JRF is relying to say that the report was not admissible is one that was placed there by Allison Pitter & Co, and no one else. The fact that the two reports had that clause is enough to lead one to reasonably conclude that it was a standard clause used by Allison Pitter to guide third parties in the use of its reports. It does not mean, and, indeed, cannot be taken to mean, that Allison Pitter, itself, was estopped from treating with the report as it saw fit, which would have included excising the Blastec report from it. The clause was a limitation as to user, which was directed at third parties, and not a limitation on preparation or presentation by the maker. Mr Allison, who prepared the report, was, therefore, the best person to treat with it, as he considered necessary. There is no merit in JRF's complaint that the report was inadmissible because of the existence of the clause that it should be used in its entirety.

[146] Any issue JRF has with the learned judge's treatment of the redacted Allison Pitter report, he, having admitted it as severed from the Blastec report, cannot properly

be in relation to the question of admissibility but rather the learned judge's treatment of the contents in coming to his findings as the tribunal of fact.

(iii) Whether the redacted Allison Pitter report was inadmissible because it was inherently inconsistent and unreliable

[147] The same reasoning in relation to the issue of whether the report was relevant also applies to JRF's complaint that it was inadmissible because it was inherently inconsistent and unreliable. It is difficult to say that the subject matter of the opinion expressed in the report did not form part of a body of knowledge or experience, with which the expert was acquainted and which would have rendered its opinion of assistance to the court. See **R v Bonython** (1984) 38 SASR 45. Against this background, it cannot be said that the report was not sufficiently reliable to be admitted into evidence to assist the court on the question of damages.

[148] Even more significantly, the distinction between admissibility and weight must be appreciated in treating with this complaint of JRF. It is quite evident that the matters raised by JRF (including inconsistencies) as going to the issue of reliability are more connected to the question of the weight to be given to the contents of the report rather than to the question of its admissibility. The matters would have touched on the twin issues of credibility and reliability and so would have been relevant to the learned judge's evaluation of the evidence, in the exercise of his jury mind, in determining the appropriate award of damages.

[149] Those matters which would have affected the reliability of the report and/or Mr Allison's evidence were correctly noted by the learned judge in his reasoning at

paragraph [14] of his judgment on damages ([2015] JMSC Civ 61). Those related primarily, to statements in the report that JRF was the registered owner of the land (when the owner was, in fact, HB Construction Limited) and that the land was mined out (as distinct from "substantially mined out" or "not mined out" as stated in oral evidence). I have observed from the reasoning of the learned judge that he failed to expressly demonstrate how he resolved those aspects of the evidence raised in cross-examination. I find, however, that those inconsistencies were not of such materiality to affect the expert's opinion about the market value of the property, the learned judge's ruling on the admissibility of the report and his ultimate reliance on it. The learned judge, having admitted the report in evidence, was entitled to determine what weight to attach to its contents.

[150] Within this context, I am compelled to state that while Mrs Minott-Phillips has flagged several aspects of the report that she argued have rendered it internally inconsistent and unreliable, she failed to challenge Mr Allison on some critical matters in cross-examination. For instance, she did not question Mr Allison in any detail, or at all, on the valuation exercise he conducted to demonstrate that the values which had been given by him should not be accepted. It is noted that she asked Mr Allison whether, apart from the change of the date of the report, he had made other changes to it, to which Mr Allison answered in the affirmative. In examination-in chief, the witness had indicated, upon being asked by Mr McBean what changes were made, that he had removed from the report the areas where he had relied on the experience of Mr Neufville of Blastec. He also said, before that, "I will not consider Neufville's report as

part of my report". Mrs Minott-Phillips, having heard the witness' evidence, did not explore with him the question as to the changes made to the report and she did not suggest to him what changes, if any, JRF was contending he had made or not made to the report.

[151] Even more importantly, at no time was it raised with the witness on cross-examination that what he said was not the truth. This notwithstanding, Mrs Minott-Phillips, before us undertook an exercise to show that Mr Allison's evidence that he had not relied on the Blastec report should not be viewed as credible. This approach is unacceptable, given the failure of learned Queen's Counsel to raise these matters with the witness during the course of his cross-examination to give him an opportunity to explain his position. Fairness would have demanded that approach.

[152] In Halsbury's Laws of England, Fourth Edition Reissue, Volume 17(1), paragraph 1024, the purpose of cross-examination was explained to be as follows:

> "Cross-examination is directed to (1) the credibility of the witness; (2) the facts to which he has deposed in chief, including the cross-examiner's version of them; and (3) the facts to which the witness has not deposed but to which the cross-examiner thinks he is able to depose. Where the court is to be asked to disbelieve a witness, the witness should be cross-examined; and failure to cross-examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of the evidence…"

[153] As this court indicated in **D & L H Services and others v The Attorney General and another** [2015] JMCA Civ 65, this is, in fact, a re-statement of the law as

extracted from the relevant authorities, most notable of which is the oft-cited, **Browne v Dunn** (1894) 6 R 67. The guiding principle from that case is that if in the course of a case, it is intended to suggest that a witness is not speaking the truth upon a particular point, the witness' attention must be directed to that fact by some questions put to him in cross-examination (that is to say, while he is in the witness box) showing that that imputation is intended to be made, so that he may be afforded the opportunity to give an explanation which is open to him. Therefore, the credibility of a witness ought not to be impeached upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion, in the course of the case, that his account of events is not accepted. This is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.

[154] The general rule that a witness should be cross-examined when it is intended to ask the tribunal of fact to disbelieve him on a point, however, is not absolute and inflexible. In **Browne v Dunn**, it was also recognised that a witness need not be cross-examined on an issue if it is otherwise perfectly clear that he has had full notice beforehand, in which it has been "distinctly and unmistakably given", that there is an intention to impeach the credibility of his story or if the story is of an "incredible and of a romancing character". It is also not always necessary to put to a witness explicitly that he is lying, provided that the overall tenor of the cross-examination is designed to show that his account is incapable of belief. See Adrian Keane, The Modern Law of Evidence, 7th edition, pages 195-196.

[155] In this case, the circumstances that would have ousted the application of the general rule at the trial did not arise. Therefore, it should have been put to Mr Allison, during cross-examination, the reasons for JRF's contention that Allison Pitter's valuation was not reliable and should not be accepted. Moreover, the suggestion should have been made to Mr Allison that although he had said in examination-in-chief that he had not relied on the Blastec report in giving the values in the redacted Allison Pitter report, he, in fact, had done so. This would have been necessary to give him an opportunity to respond to those suggestions on those matters before the court was asked to reject the evidence on the basis that it was not credible or reliable. In these circumstances, it cannot be accepted that the report was inadmissible due to internal inconsistencies and unreliability.

(iv) Whether the redacted Allison Pitter report was inadmissible due to non-service on JRF

[156] It is also observed that Mrs Minott-Phillips, in raising the objection to the admissibility of the report, apart from saying that she had not seen it, only stated that "it was part of a previous report that he had previously declared to be unseverable from the report". She gave no other basis at that stage for her objection to the admissibility of the report.

[157] Upon the admission of the report in evidence, Mrs Minott-Phillips then proceeded to cross-examine Mr Allison on matters contained in it. She made no application for an adjournment to be allowed the opportunity to further review its contents. In fact, she brought her cross-examination to an end just before the adjournment of court for that

day, without reserving the right to return the following day to continue the cross-examination.

[158] It seems that learned Queen's Counsel was quite content with the extent of her cross-examination, despite the prior complaint of non-service of the redacted report. There is nothing to suggest that JRF was prejudiced or embarrassed in the preparation and advancement of its defence. The contention of JRF that it was not properly served with the redacted report cannot justify a finding that it was inadmissible.

[159] The learned judge made no error of law in relation to the question of admissibility of the redacted Allison Pitter report that would be fatal to his assessment of damages. In all the circumstances, this court cannot hold that the learned judge erred in law, when he formed the view that the report was relevant and admissible.

[160] Ground eight cannot succeed.

Issue (iii): whether the learned judge erred in rejecting the expert evidence of DC Tavares & Finson (ground nine)

[161] JRF's complaint in ground nine is that the learned judge erred in not having any, or any sufficient, regard to the expert report of DC Tavares & Finson. According to JRF, the learned judge's rejection of that evidence, and the reliance on that of Allison Pitter, was unreasonable in the light of the entirety of the evidence. This included the fact that JRF was exercising its power of sale in accordance with its legal obligation attendant on the exercise of that power, namely, not to sell at an undervalue.

[162] Mrs Minott-Phillips, in her submissions on behalf of JRF, pointed to several aspects of the DC Tavares & Finson report, which she maintained would have rendered it more reliable and credible than the redacted Allison Pitter report and so ought to have been accepted by the learned judge.

[163] After an examination of the expert evidence and the reasoning and conclusion of the learned judge, I am unable to accept JRF's contention that he erred in preferring the redacted Allison Pitter report. I say so for these reasons.

[164] The treatment of expert witnesses is the same as the treatment of non-expert witnesses. It was, therefore, open to the learned judge, as the tribunal of fact, to prefer the evidence of one expert over the other, as in the case of every other witness. That was a matter entirely within his province as judge of the fact.

[165] As already alluded to, those matters which would have affected the reliability of Mr Allison's evidence were not of such materiality to affect the expert's opinion about the market value of the property and the learned judge's preference for that evidence.

[166] The reasoning of the learned judge does demonstrate, however, that he paid due regard to the evidence of Mr Down, expert witness from DC Tavares & Finson, as well as the reports tendered through him, contrary to the contention of JRF. Between paragraphs [19]-[23], the learned judge focused attention entirely on the relevant aspects of the evidence of Mr Down, especially as it concerned the use of the land.

[167] The learned judge, after a detailed review of Mr Allison's evidence at paragraph [11] of his judgment, later indicated in plain terms his reasons for preferring the evidence of Allison Pitter/Mr Allison to that of DC Tavares & Finson/Mr Down in paragraphs [25]-[30] of his judgment. The main aspects of the learned judge's reasoning have been extracted and summarised as follows:

i. DC Tavares & Finson gave a valuation by reference to a date closer to judgment rather than the date of breach, while Allison Pitter gave their valuation by reference to a date closer to the breach date. The latter date is the operative date for the purposes of assessing damages for loss of bargain (paragraph [25]).

ii. Sand mining in the riverbed was an open and obvious activity, which ought reasonably to have been in the contemplation of the parties at the time of contracting. DC Tavares & Finson had paid no regard to the potential for mining in the riverbed, although Mr Down acknowledged that there was evidence of sand mining in the riverbed. Mr Allison's opinion that this potential use was relevant, and positively impacted the market value of the land, was accepted (paragraph [26]).

iii. Mr Down had said that had he taken into account sand mining in the riverbed, all other things being equal, he would have given the land

a higher value. Mr Down was not asked to, nor did he critique the opinion of Mr Allison (paragraph [29]).

iv. Mr Allison, in a "full detailed and very impressive analysis", had outlined the basis on which his opinion was rendered. He also supported his conclusions by reference to sales comparisons of other properties in the area (paragraph [30]).

[168] The learned judge's acceptance of the redacted Allison Pitter report and the evidence of Mr Allison over the DC Tavares & Finson report and the evidence of Mr Down, fell squarely within his purview, as the trier of fact. This is a matter that this court cannot lightly interfere with, having regard to the standard of assessment that must be applied. There is no error in the evaluation of the relevant evidence within the framework of the applicable law that is of such gravity to undermine the learned judge's conclusion that the market value of the land proposed by Allison Pitter, was more reliable than that proposed by DC Tavares & Finson.

[169] I am satisfied that this court would have no basis in law to interfere with the learned judge's decision to accept the evidence of one expert over another in assessing the damages to be awarded.

[170] Ground nine fails.

Issue (iv): whether the award of damages was extremely high due to error on the part of the learned judge in treating with the evidence of the expert witnesses and in his application of the relevant principles of law to that evidence (ground six)

[171] Having regard to the analysis and findings in respect of grounds seven, eight and nine, I find that this court would not be justified in disturbing the award of damages on the grounds advanced by JRF in ground six. That is to say that it cannot properly be said that the learned judge arrived at an award of damages by the application of wrong principles of law; by having regard to irrelevant expert evidence and by disregarding relevant expert evidence. This finding is arrived at after due consideration of all the arguments that have been strongly urged on the court by Mrs Minott-Phillips on JRF's behalf, including the value of the land accepted by the Stamp Commissioner for the purposes of the assessment of stamp duties and that the Bantons would be securing what is regarded by JRF as a windfall, given the contracted purchase price.

[172] There is no proper basis on which the award of damages could be reduced to US$30,884.00 as urged on this court by JRF. In the result, the appeal in relation to the award of damages cannot succeed.

The Banton's counter-appeal on damages

[173] The Bantons have challenged the learned judge's award of damages in their counter-appeal on 10 grounds. In the interest of brevity, the grounds have been compressed and examined under two broad issues. These issues are:

i. whether the learned judge erred in his treatment of the original Allison Pitter report (grounds one, two, three, four, five, six and seven); and

ii. whether the learned judge erred when he refused to consider, as part of his assessment of damages, evidence of an income stream from sand mining on the land (grounds eight, nine and 10).

Issue (i): whether the learned judge erred in his treatment of the original Allison Pitter report (grounds one, two, three, four, five, six and seven)

[174] The learned judge had originally ruled that the original Allison Pitter report was inadmissible because it contained hearsay evidence, which was the Blastec report. He also refused to grant an adjournment to have the maker of the report, Mr Neufville, attend the hearing to testify.

[175] It is clear that Allison Pitter, the court appointed expert, was not the maker of the Blastec report, but had incorporated it into its report. The Blastec report on which Allison Pitter sought to rely, was indeed, hearsay evidence. Rule 32.7(2) of the CPR specifically states that expert evidence is to be contained in a written report subject to, "any enactment restricting the use of 'hearsay evidence'".

[176] It is an established principle of law that an expert may rely on hearsay information in arriving at his conclusions in respect of matters on which his opinion is required by the court. This is subject to limitations, however, one of which is that the information relied on by the expert must fall within his area of expertise, or form part of

a general corpus of knowledge in a particular field. See **Seyfang v GD Searle and Company and another** [1973] QB 148. It is clear from the evidence that what was contained in the Blastec report did not fall within the knowledge and expertise of Allison Pitter. The learned judge noted in paragraph [8] of his judgment the basis for ruling the document to be inadmissible:

> "It was clear that the document did not only contain the opinion of [Allison Pitter] as it sought to incorporate the opinions of [Blastec] with respect to matters outside the experience and expertise of [Allison Pitter]. It was clearly hearsay and inadmissible to prove the truth of its contents..."

[177] There was nothing to place the Blastec report, which contained opinion evidence relating to matters outside the ambit of the expertise of Allison Pitter, within any exception to the hearsay rule. The learned judge cannot be faulted in ruling as he did that the original Allison Pitter report was inadmissible on the basis that it was hearsay.

[178] Furthermore, one of the preconditions for the admissibility of an expert report, as already indicated, is that permission must first be obtained from the court. Rule 32.6 of the CPR is clear that no party may call an expert witness or put in an expert witness' report, without the court's permission, which it states should, as a general rule, be given at a case management conference. No such permission was obtained by the Bantons in respect of Blastec and/or Mr Neufville.

[179] The only approved expert for the Bantons, for the purposes of the trial, was Allison Pitter. Rule 32.6((3)(b) of the CPR states that any permission granted shall be in relation to that witness only. So, permission appointing Allison Pitter was permission for

Allison Pitter only. The Bantons had failed to ensure compliance with the rules for reliance to be placed on expert evidence other than that of Allison Pitter. JRF would not have been afforded a fair opportunity to raise objection, if any, to the proposed appointment of an expert other than Allison Pitter. It was within the learned judge's power and discretion to disallow the original Allison Pitter report. The learned judge would have been correct in his original ruling that the report was inadmissible.

[180] For the same reasons detailed above, the learned judge cannot be faulted also, for refusing to allow Mr Neufville to be called to testify as an expert witness. Apart from the rules, which would have restricted the evidence to be adduced, given that the experts were already appointed, the calling of Mr Neufville was entirely a matter for the discretion of the learned judge. This court sees no basis in law on which it could disturb the exercise of that discretion.

[181] In any event, the learned judge reversed his decision upon the application of JRF and admitted the original Allison Pitter report in evidence. In effect, this subsequent admission of the report would have rendered the grounds of appeal in relation to its admissibility, and the refusal to have Mr Neufville called as a witness, redundant.

[182] In the end, the learned judge had both the original and redacted Allison Pitter reports for his consideration and he found that the original report was "singularly unhelpful" and irrelevant and more prejudicial than probative because it contained hearsay. The learned judge's conclusion was based on the fact that the Blastec report related to the availability of aggregate deposits on the land itself (as distinct from the

riverbed) and the earnings to be derived from mining on the land. In his view, the mining of sand on the land itself was not within the contemplation of the parties at the time they entered into the agreement for sale. His finding, therefore, was that the potential for sand mining on the land was not open and obvious and known to all or would have reasonably been within the contemplation of the parties as in the case of sand mining in the riverbed. Therefore, to the extent that the original Allison Pitter report treated with the potential for mining on the land and the potential income to be derived therefrom, that evidence would have been irrelevant and not probative.

[183] In the light of this finding by the learned judge (and my conclusion below in relation to grounds eight, nine and 10 of the counter-notice of appeal), the contention of Mrs Minott-Phillips that neither the Blastec report nor the testimony of Mr Neufville was reasonably required to resolve the proceedings justly, is accepted.

[184] Having considered the authorities relied on by counsel for the Bantons, I see no proper basis for this court to hold that the conclusion of the learned judge with respect to the original Allison Pitter report constitutes an error of law and/or was so plainly wrong to justify interference by this court with the damages he awarded. For these reasons, I agree that grounds one, two, three, four, five, six and seven of the counter-notice of appeal are without merit.

Issue (ii): whether the learned judge erred in his assessment of damages in failing to consider the evidence of an income stream from sand mining on the land (grounds eight, nine and 10)

[185] Given the conclusion I have arrived at above, I cannot say that the learned judge made an error of law or was plainly wrong when he refused to take into account, in his assessment of damages, the presence of aggregate on the land and the income that could be earned from mining the land as distinct from the riverbed. Not only did he find that the use of the land for mining was not within the contemplation of the parties at the time of contracting but he disregarded the opinion of Blastec, on which the Bantons would have had to rely to prove the extent of their loss of bargain, taking into account such potential use of the land. Once the opinion of Blastec was not accepted (and I have already established that the learned judge was correct in doing so), then there would have been no proper evidential basis for an award of damages, taking into account mining on the land itself. Grounds eight, nine and 10 are also without merit.

[186] The counter-appeal, therefore, fails.

JRF's appeal on interest

Issue: whether the learned judge erred in awarding interest prior to judgment (ground of appeal 10)

[187] I agree with the reasons given by Sinclair-Haynes JA in concluding that this ground of appeal cannot succeed. The order made for the payment of interest from a date prior to judgment was on the basis of the learned judge's application of the breach date rule in the assessment of damages. The award of interest was purely within the discretion of the learned judge in accordance with the powers conferred on him by

section 3 of the Law Reform (Miscellaneous Provisions) Act. There is no basis in law that would justify this court interfering with the exercise of that discretion.

Disposition of the appeal and counter-appeal

[188] Having evaluated the appeal and counter-appeal from the learned judge's decision, within the framework of the applicable law, including the standard of assessment that must be applied, I found that no proper basis exists in law that would justify this court interfering with the decision of the learned judge on both liability and damages, either in favour of JRF or the Bantons.

[189] For the reasons detailed above, I conclude, in agreement with my learned sister, Sinclair-Haynes JA, that both the appeal and the counter-appeal should be dismissed.

[190] In the light of this outcome, I would also agree with the proposal that there should be no order as to costs on the appeal or counter-notice of appeal. I would invite the parties, however, to make submissions in writing within 21 days of this judgment, if they are of the view that a different order as to costs should be made.

SINCLAIR-HAYNES JA

[191] On or about 2 March 2011, Jamaica Redevelopment Foundation Inc (the appellant) entered an agreement to sell Mr Clive Banton and his wife Sadie Banton (the respondents) property situated at Woodleigh in the parish of Clarendon. The cancellation of that agreement to sell, which Batts J held to have been a breach of contract, and his award of damages in the sum of US$940,908.80 with interest of 1%

from 5 May 2011 to 20 March 2015, are the reasons for this appeal and the respondents' counter notice of appeal.

[192] The land, the subject of the agreement, was mortgaged by the appellant to HB Construction Limited (the mortgagor), which defaulted on its payments. The appellant consequently agreed to sell the property to the respondents for the sum of US$225,000.00. Pursuant to the agreement, the respondents paid the required deposit of US$22,500.00 and a further sum of US$52,500.00.

[193] The respondents were also responsible for half the cost of the stamp duty, half the cost of the registration fee in respect of the transfer and half the attorney's cost. The stamp duty was to have been assessed and the respondents advised as to the cost. The registration fee was payable upon lodging the instrument of transfer at the Office of the Registrar of Titles. The appellant, however, paid the respondents' half costs of the stamp duty and registration fee. On 3 May 2011, the respondents cancelled the agreement. The reason advanced in that letter for the cancellation was that the mortgagee had been paid all monies, which were owed under the mortgage agreement. In that letter, a promise was made to return the sums of US$22,500.00 and US$52,500.00 to the respondents.

[194] The respondents, being displeased by the cancellation of the sale, instituted proceedings against the appellant and sought the following:

> "(1) Damages for breach of contract.

(2) Specific performance of an agreement made between the Claimants and the Defendant on or about the 2nd day of March 2011 for the sale by the Defendant to the Claimants of land at Woodleigh in the parish of Clarendon being the land comprised in Certificate of Title registered at Volume 1240 Folio 116 of the Register Book of Titles.

(3) An injunction restraining the Defendant its servants or agents from registering, issuing or causing to be registered discharges of the said mortgages.

(4) The sum of US$75,000 for special damages and continuing.

(5) Interest pursuant to the Law Reform (Miscellaneous Provisions) Act.

(6) Costs.

(7) Such further or other relief as this Honourable Court deems just."

[195] The learned trial judge made the following orders:

"1. There is judgment on liability for the Claimants against the Defendant.

2. Judgment for the Claimants against the Defendant in the sum of US$940,908.80 with interest at the rate of 1% per annum from the 5th May 2011 to the 20th of March, 2015.

3. Cost to the Claimants to be taxed if not agreed."

Both the appellant and the respondents were aggrieved by the learned judge's decision.

The appellant consequently filed an appeal containing the following grounds of appeal:

Ground 1

"The learned trial judge fell into error because he failed to appreciate sufficiently that the agreement for sale made time of the essence for certain obligations of the purchasers and that the 'time' that special condition 5 of the agreement

for sale made "of the essence" was stipulated as 7 days following notice to the purchasers of their default, if not remedied by then."

Ground 2

"The learned trial judge erred in finding that construing the notice as referencing the purchasers' default, rather than referencing the vendor's entitlement to cancel would give rise to a redundancy when, in fact, the opposite is true."

Ground 3

"The learned trial judge fell into error in failing to regard notice from the vendor to the purchasers that their due payments are 'outstanding' as notice of their default in making their payments on time pursuant to special condition 5."

Ground 4

"The learned trial judge erred in failing to find that the vendor's right to terminate the agreement accrued 7 days after it informed the purchasers that their payment was outstanding, their default having not been remedied prior to the expiry of the 7-day period."

Ground 5

"The learned trial judge erred in failing to expressly find that the purchasers were in breach of their agreed obligations to make all their payments at the times stipulated in the agreement for sale, especially in the light of the evidence, inclusive of their written acknowledgement as at April 8, 2011 (referencing the vendor's March 15, 2011 notice) that the balance due from them was outstanding."

Ground 6

"The amount of damages awarded by the learned trial Judge was extremely high, an entirely erroneous estimate, and arrived at by:

(1) applying wrong principles of law;
(2) failing to apply the relevant legal principles;
(3) having regard to irrelevant expert evidence; and
(4) failing to have regard to the relevant expert evidence."

Ground 7

"The learned trial judge erred in granting the Respondents' application for cross-examination of the expert witnesses in circumstances where the court had not, beforehand, ordered that their evidence be given otherwise than in a written report, and where the court had, at case management, ordered that written questions be put to the experts within a stipulated time in the event a party required clarification of aspect of the reports."

Ground 8

"The learned trial judge erred in admitting the expert report of Allison Pitter & Company, that is exhibit 5 into evidence because it was irrelevant, a portion of a document expressed to be un-severable from the whole, inherently inconsistent and unreliable."

Ground 9

"The learned trial judge erred in rejecting the expert report of DC Tavares & Finson Realty Limited. His rejection of that evidence and reliance on that of Allison Pitter & Company is unreasonable in the light of the entirety of the evidence, including the fact that the Appellant was exercising its power of sale in accordance with the legal obligation attendant on its exercise of that power (namely, not to sell at an undervalue)."

Ground 10

"An award of damages as at the date of judgment would not allow an award of pre-judgment interest, and the learned trial judge erred in awarding pre-judgment interest."

[196] The respondents filed a counter notice of appeal expressing their displeasure at the learned judge's award of US$940,908.80, as compensation for their loss of bargain. They have sought a variation of the order to substitute an award of US$2,689,772.00. The following are the grounds contained in the counter notice of appeal:

> "1) The learned Judge erred in law by originally upholding the objection of Counsel for the Defendant, that the Expert Report prepared by Allison Pitter & Company on January 28, 2015, was hearsay and inadmissible to prove the truth of its contents, in circumstances where the document in question was a single report produced by Allison Pitter & Company, which relied on a Blastec Assessor's report as supporting material, and a principal of Allison Pitter & Company, who was also the maker of the document, was available to give first-hand evidence;
>
> 2) The learned Judge erred in both fact and law by finding that the evidence of Blastec (Mr. Neufville) was irrelevant in circumstances where the measure of damages for breach of the Agreement for Sale of Land is determined by the 'loss of bargain', and the report of Mr. Neufville was reasonably required to show the existence of 'aggregate deposits on the property' and the 'earnings to be made from mining sand' which would, as a matter of fact, impact the market value of the land;
>
> 3) The learned Judge erred in both fact and law by finding that the prejudicial effect of the Expert Report prepared by Allison Pitter & Company on January 28, 2015, outweighed its probative value in circumstances where the report of Blastec Company Ltd. contained substantive unpublished information forming part of the corpus of knowledge in the field of sand mining, and was relied on by Allison Pitter & Company as a supporting document with bearing on the factual question of identifying the market value of the

property. Furthermore, Exhibit 6 had little prejudicial effect to the Defendant, if any;

4) In the alternative, the learned Judge erred in the exercise of his discretion by refusing the Claimants' Application for permission to call Mr. Neufville as an expert witness, in circumstances where it would be necessary and reasonable to grant an adjournment, in the interest of justice; having earlier ruled that the evidence of the [sic] Mr. Neufville could not be admitted or otherwise considered in his absence.

5) The learned Judge erred in fact by finding that the Claimants had had ample time to put their house in order as:

   i. the Order granting permission for Allison Pitter & Co. to provide an Expert Report on the issue of damages, was made on November 12, 2014;

   ii. time for filing and exchanging Expert Reports was extended to January 30, 2015, to facilitate the extensive investigations required;

   iii. time for experts to answer questions put to them was set for February 13, 2015; and

   iv. the Assessment of Damages hearing commenced on February 16, 2015;

6) Further and in the alternative, the learned Judge erred in law, and wrongly exercised his discretion, by failing to appreciate that permission could and should have been granted to have the report of Blastec Consultants Ltd. stand as an independent Expert Report without any need to call Mr. Neufville to give oral evidence;

7) In any event, having subsequently admitted the entire Expert Report prepared by Allison Pitter & Co., dated January 28, 2015 into evidence as Exhibit 6, the learned Judge further misdirected himself in law, by

labelling the document as 'unhelpful', determining that it was not evidence, and disregarding it, all on the basis that it was irrelevant and hearsay;

8) The learned Judge erred in fact by finding that there was no evidence as to the likelihood of a licence to mine on the land being granted, where Exhibit 6 states that, a licence to extract aggregate would be forthcoming from the Mines and Geology Division, and that the time between application and grant of licence should not exceed four (4) months;

9) The learned Judge misdirected himself by refusing to consider as part of his assessment, evidence of an income stream from mining on the land itself, in circumstances where the legal test was not "whether the Claimants or the Defendant was aware that the property contained aggregates or sand in sufficient quantities below the surface such as to make mining a viable proposition, but whether this purpose 'ought reasonably to have been' in the minds of the parties as it was not 'some hidden or rather peculiar use' of the land;

10) The learned Judge also misdirected himself by refusing to consider evidence of income from mining on the land itself on the basis that this purpose was not pleaded, in circumstances where it was not necessary to plead the purposes for which the land was to be used for the Court to assess damages in the circumstances of this case."

The application to amend the grounds of appeal to add an eleventh ground

[197] At the hearing, the appellant applied for permission to amend its grounds of appeal to include an eleventh ground which complained that "the learned judge was not impartial due to bias".

[198] Mr Emile Leiba, on behalf of the respondents, submitted that the starting point for an application to amend is the Court of Appeal Rules 2002 (the 'CAR'). Rule 1.12(1)

provides the basis on which an appellant, except on a procedural appeal, can amend the grounds of appeal. This rule, he pointed out, provides for an amendment to the grounds of appeal without permission. Such amendments must, however, be done within 21 days of receiving notice under rule 2.5(1)(b). It was counsel's submission that 21 days having expired, permission to amend was required.

[199] Although permission to amend, to add and argue an eleventh ground was sought at the hearing of this appeal, which was well outside of the stipulated 21 days, we nevertheless heard learned Queen's Counsel, Mrs Sandra Minott-Phillips, on the matter. We however refused the application. The reasons for that refusal are set out below.

The appellant's submissions

[200] The basis for the appellant's complaint, said Mrs Minott-Phillips, was that the learned judge failed to specifically disclose that a year and a half before he embarked on this trial, he had appeared for the Bank of Nova Scotia Jamaica Limited in a matter against the appellant and that judgment was awarded in favour of the appellant. Judgment in that case was delivered on 13 January 2012. It was her submission that the learned judge was therefore biased towards the appellant.

[201] Learned Queen's Counsel postulated that bias goes to the indispensable element of due process which is every litigant's entitlement. Citing **Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2):** HL 15 Jan 1999 **(Pinochet 2)** as authority, Queen's Counsel posited that the absence of the elements of due process is jurisdictional and therefore can be raised and argued at any

point in time, even at the highest level where the court is *functus*. She submitted that in this case, there was actual bias because the learned judge did not specifically disclose his involvement as an attorney in promoting victory for the Bank of Nova Scotia against the appellant.

[202] According to Queen's Counsel, that fact would not have been peculiarly within the appellant's knowledge but rather, was peculiarly within the learned judge's. She argued that the judge's failure to make sufficient disclosure of his interest is sufficient to disqualify him. Even if the appellant knew, it cannot be taken that it waived its right to recusal as it was the judge's duty to disclose that he had an interest in one of the parties.

The respondents' submissions

[203] Counsel submitted that there is no substance in this ground hence the amendment should not be permitted.

[204] He contended that there is no principle in law that automatically or otherwise disqualifies a judge who appeared on behalf of one party against another, prior to elevation, from adjudicating over a case against the latter party. Batts J, he submitted, was not required to make disclosure to any party.

[205] Counsel argued that the case of **Pinochet No 2** was distinguishable because at the time the matter was heard, Lord Hoffmann, who adjudicated in the matter, was an unpaid director of a charity controlled by Amnesty International (AI), and his wife had functioned in an administrative capacity for over 20 years. Amnesty International had

campaigned against the appellant and had intervened in his appeal. **Pinochet No 2**, he submitted, extended the principle of judicial bias beyond pecuniary interest to a common cause and is distinguishable from the point being raised by learned Queen's Counsel. At the time the matter was heard by Batts J, he was not seeking to promote a cause of a matter in which he was involved together with one of the parties.

[206] This case, counsel contended, is plainly not a case which falls in the category of a judge acting in his own cause, who should be disqualified. Batts J would have had to have common cause with one of the parties at the time he was making a determination in the court below, for bias to be a concern.

[207] Counsel further expressed his inability to respond to Queen's Counsel's submissions without the opportunity to conduct research. He submitted that the respondents would be severely prejudiced by the granting of an application for amendment.

<u>Reasons for the refusal of the application to amend the grounds of appeal</u>

[208] Rule 1.12(1) of the CAR governs applications for amendments in this court. Rule 1.12(1) plainly states that:

> "The appellant may, except on a procedural appeal, amend the grounds of appeal once without permission at any time within 21 days from receiving notice under - (i) rule 2.5(1)(b) or (c) in the case of a civil appeal;"

Not only was this ground not filed in compliance with the rules, prior to the hearing of the appeal, the respondents were not alerted that the appellant intended to raise that

issue. Indeed, the appellant's written submissions made no mention of such a complaint or of its intention to include such a ground. As counsel Mr Leiba submitted, the granting of Queen's Counsel's application at that juncture, the respondent not having had the opportunity to properly respond, could possibly end the matter in favour of the appellant. In the circumstances, I agreed with Mr Leiba's submission that Queen's Counsel's oral application to add the proposed ground of appeal at the commencement of the hearing would be prejudicial to the respondents and the judge.

[209] Moreover, in my view, there is no merit to this proposed ground. The circumstances of the learned judge's involvement as counsel in a matter a year and a half prior, against the appellant, are wholly distinguishable from those of **Pinochet No 2** and indeed other authorities cited in the matter.

[210] In **Pinochet No 2**, as Mr Leiba pointed out, Lord Hoffmann, against whom the application was made, and his wife, were members of a charity affiliated with AI, a human rights organization. His wife was employed in an administrative capacity and he was a director. Prior to the hearing, AI had campaigned against Mr Pinochet and had intervened in the appeal. In allowing Mr Pinochet's application to disqualify Lord Hoffmann, the rationale on which Lord Browne-Wilkinson relied was that Lord Hoffmann had been involved in the promotion of a cause against Mr Pinochet. His decision in the case would, therefore, have lead to the promotion of a cause in which he and his wife were involved.

[211] At page 20 of the case, Lord Browne Wilkinson expressed his view for allowing the appeal thus:

> "The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties. Thus in my opinion, if Lord Hoffmann had been a member of A.I. he would have been automatically disqualified because of his non-pecuniary interest in establishing that Senator Pinochet was not entitled to immunity."

Lord Browne Wilkinson cited the dictum of Lord Hewart CJ in **Rex v Sussex Justices, Ex parte Mc Carty** [1924] 1 KB 256, 259 that it is:

> "[of] fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

[212] Distilled from the decision of the court in **Pinochet No 2** is the governing principle of *nemo judex in sua causa* or "a man shall not be a judge in his own cause". This principle is extended to apply to any cause in which the judge has an interest. There is no allegation that Batts J had any personal interest whether financial or otherwise in the outcome of the matter. Neither is there any allegation that in discharging his duty as Queen's Counsel in the matter against the appellant, his conduct of that matter fell short of the standard required of counsel which could lead to a conclusion that his conduct of the instant matter lacked the required impartiality.

Indeed there is no allegation that there was evidence of bias in the learned judge's handling of the matter. Nor was there a scintilla of evidence that the learned judge had any personal interest or displayed any bias or partiality on the agreed transcript. It was for those reasons that I refuse the application.

The appeal

Grounds one, two, three, four and five of the appeal

[213] Grounds one, two, three, four and five can conveniently be dealt with together as the issues which arise for determination therein are whether the appellant gave the respondents notice of its breach and of the appellant's intention to cancel the agreement.

The appellant's submissions

[214] It was contended on behalf of the appellant, by Mrs Minott-Phillips, that because time was made of the essence for the respondents to perform their obligations under the agreement, the appellant was not liable for breach of contract. The failure of the respondents to perform their obligation within the specified time, entitled the appellant to cancel the agreement for sale and allowed the mortgagor, who had satisfactorily settled its debt to the appellant, to redeem its property.

[215] Queen's Counsel contended that the appellant's cancellation of the agreement negated the respondents' contention that it had waived its right to insist on strict compliance with the terms of the contract, even if the reason for its cancellation was misstated. The appellant, argued Queen's Counsel, was entitled to cancel the

agreement for sale and legitimately did so because of the respondents' failure to comply with the terms of the agreement in a timely manner. The cancellation of the agreement for sale was therefore consistent with its right to do so.

[216] The learned judge, Queen's Counsel posited, erred in failing to appreciate sufficiently that the agreement for sale made time of the essence for certain obligations of the purchaser. She postulated that the "time" made "of the essence" referred to in special condition 5 of the agreement for sale, was stipulated as seven days following notice to the purchaser of their default, if the default was not remedied within that period.

[217] The learned judge, she further posited, erred in construing the notice as referencing "the purchaser's default" rather than referencing the vendor's entitlement to cancel. The purchasers were already notified by the appellant of their obligations to make their payment at the time stipulated for doing so in the agreement. The appellant was therefore entitled to cancel. The respondents would have been properly notified except that it was not stated that they were actually in default of their obligation to pay at the stipulated time. A notice, in the circumstances, referencing the respondents' default would have been redundant.

[218] Queen's Counsel further argued that the learned judge erred by his failure to regard the notice from the appellant to the respondents that their due payments were outstanding, as notice of their default in making their payments on time, pursuant to special condition 5. The learned judge also erred, she submitted, in not finding that the

vendor's right to terminate the agreement accrued seven days after it informed the purchasers that their payment was outstanding, their default not having been remedied before the expiration of the seven-day period.

The respondents' submissions

[219] Counsel, Mr Emile Leiba, on behalf of the respondents, acknowledged that parties to contracts which expressly stipulate that time is of the essence, are obliged to comply. He submitted that in addition to expressly stating that time is of the essence, a contract may also contain a clause which requires that a notice be served before the cancellation of the agreement.

[220] Counsel argued that the appellant's challenge to the learned judge's interpretation of special condition 5 of the agreement is misconceived because the learned judge acknowledged that time was made the essence of the respondents' obligations, but that the respondents were entitled to seven days within which to address any breach. He contended that the time of the essence provision in the agreement is subject to the stipulated notice requirement.

[221] The effective date on which the agreement could have been terminated for non-payment was seven days after notice of the default was given. He submitted that the learned judge accepted that the agreement could have been terminated seven days after the receipt of a proper notice and not a mere notice of default. Had the respondent given proper notice and the alleged breach not remedied, the appellant would have been entitled to cancel the agreement.

The learned judge's finding

[222] The learned judge expressed the view at paragraphs [9] to [12] of his judgment on liability, [2014] JMSC Civ 106, that:

> "[9] In the case I have to decide the issue is whether the right to terminate had accrued. This depends on a true construction of the agreement, that is, what is the nature of the notice required prior to termination pursuant to special condition 5. Notice is defined in the Oxford English dictionary as:
>
> '1. Attention or observation,
>
> 2. Warning or notification,
>
> 3. A formal statement of the termination of a job or an agreement,
>
> 4. A sheet displaying information'
>
> [10] The meanings at 2 and 3 are the germane ones. It seems to me that the intention of the parties, as expressed by the words of this agreement, is that although time is of the essence a party should prior to termination, have 7 days in which to correct or address any breach that would give rise to such termination.
>
> In point of fact therefore the 7 days' notice should follow the offensive breach. Whether it does or does not however the notice is to be a notice which:
>
> a. Informs the other party of the obligation
>
> b. Informs the other party of the intent to cancel the agreement for breach of that obligation.
>
> Termination will then follow if 7 days after the notice is given [sic] the breach has not been remedied. In effect

therefore the agreement automatically waives time of the essence by 7 days.

[11] I am fortified in my construction of the agreement by the following:

(a) Special condition 5 uses the phrase (with my emphasis), 'the vendor shall be entitled to cancel this agreement upon seven 7 days' notice to the purchaser and the purchaser having failed to make good the default…'

Clearly 'Notice' is referrable to the entitlement to cancel. Further 'default' ought to have already occurred which he having had 7 days' notice of the intent to cancel, has failed to make good.

(b) The parties in **Legione** (cited above) expressly placed in the contract their expectations of a notice. In this case this was not done but that is not to say that the word notice does not connote or rather denote something specific. That is communication of the other party's intention and dissatisfaction and a last chance to make right a breach.

(c) The fact that any other construction will mean that a mere reminder that money is due on a certain date might be sufficient notwithstanding that the other party may be of the view, having regard to the course of dealings, that termination was not being contemplated.

(d) On any other construction, the requirement of 7 days' notice prior to termination would be redundant. Time is of the essence of the agreement and hence on a breach the party will have a right to terminate. If the interposition of a 7 days' notice period is to mean anything it must be, to alert the defaulter that termination will follow if the breach which has occurred is not remedied.

> [12] On this construction of the agreement it is clear the Defendant has not given notice of the breach or their intention to terminate. The letter dated 15th March 2011 did neither. I hold it was not notice pursuant to special condition 5 or any notice whatsoever. Nor it appears was it intended by the Defendant to be such a notice. This is evidenced by the fact that the letter of termination dated 3rd May 2011 did not advert to the letter of the 15th March or purport to terminate for non-payment. That letter terminated for a reason which had nothing to do with any or any alleged breach by the Claimant. It is true that the reason for a breach of contract may be preyed [sic] in aid so long as it existed, even if it was not relied on at the time. However I am not here taking issue with that, I am using the fact that no reference is made to a breach when terminating as evidence that, when issuing the letter of the 15th March 2011, the Defendant was not issuing a notice and had, in fact, no intention to issue a notice pursuant to special condition 5."

Law and discussion

[223] Failure to comply with the terms and conditions of a contract entitles an innocent party to rescind the contract. In the English case, **Union Eagle Ltd v Golden Achievement Ltd** [1997] AC 514, Lord Hoffmann expressed the law thus:

> "An innocent party's right to terminate or rescind a contract for breach of a condition is an accrued right. There is no basis in principle for recognizing a power in the defaulting party to deprive the innocent party of that right by tendering late performance. Once the time for completion had passed performance of the contract by the purchaser was not possible. The vendor was thus entitled to rescind the contract."

Pursuant to special condition 5, time was made of the essence of this agreement for sale in respect of all stipulations for payment of any sum(s) due by the purchaser, or

for the performance of the purchaser of any act or thing to be done. Special condition 5 provides:

> "Time is of the essence of this Agreement for Sale in respect of all stipulations herein for payment of any sum(s) due by the Purchaser, or for the performance of the Purchaser of any act or thing to be done by him**. In the event of the failure of the Purchaser on the due date of any payment to punctually remit such payment or punctually to do any act or thing required by this Agreement to be done by him, the Vendor shall be entitled to cancel this Agreement upon seven (7) days notice to the Purchaser and the Purchaser having failed to make good the default and to forfeit the deposit and without notice to the Purchaser** and without tendering any transfer of the lands to him, re-sell the property and apply the proceeds thereof to its own use provided however that the Vendor shall be entitled at its option to allow the Purchaser time to satisfy his obligations hereunder subject to the provisions of special condition 7 hereof." (Emphasis added)

Were the respondents in breach?

[224] Scrutiny of the agreement for sale is necessary in determining whether the respondents failed to perform any of their obligations within the time specified which would have entitled the appellant to rescind the agreement.

[225] By virtue of special condition 2, the stamp duty and transfer tax could have been paid from the respondents' deposit and in the event the agreement was cancelled and the vendor had opted to pay the stamp duty and transfer tax from the respondent's deposit, those amounts were to be returned to the respondents. The sums which were utilized by the appellant from the deposit to make those payments would have been

considered refunded to the respondents upon the appellant providing the respondents with the original receipts. It is necessary to state special condition 2 which reads:

> "It is understood and agreed that the Vendor's Attorney-at-Law **shall be entitled to stamp this Agreement for Sale with Transfer Tax and Stamp Duty from the initial payment** and that if for any reason whatsoever the same has to be refunded to the Purchaser, the Purchaser shall to the extent of such duty and/or Tax so impressed, be deemed to have been refunded same by delivery up to him of the original Transfer Tax receipt and stamped Agreement for Sale duly noted by the vendor as cancelled." (Emphasis added)

[226] The appellant's attorney wrote to the respondents' attorney on 15 March 2011, to which letter, the statement of account and the documents relating to the transfer of land under the power of sale, in duplicate, were attached. The respondents' attorney was instructed to sign the documents relating to the transfer of land under power of sale in duplicate and return them with manager's cheque for the outstanding amount which she indicated, was stated in the said letter.

[227] She further informed the respondents' attorney that the agreement for sale was at the Office of the Stamp Commissioner for assessment but that the original, copy mortgage and the promissory note had been stamped. She gave her professional undertaking to forward an up-to-date certificate of payment of taxes and water rate bills and receipt which she stated had been requested.

[228] It is helpful to state *verbatim* the contents of the letter of 15 March 2011. It reads:

"Ms. Sheron A. Henry
Attorney-at-Law
11A - 15 Oxford Road
Kingston 5

Dear Ms. Henry:

Re: Proposed Sale of Land part of Woodleigh Clarendon registered at Volume 1240 Folio 116 to Clive Banton and Sadie Banton

---

We refer to previous correspondence herein and enclose herewith the following documents:

1. Statements of Account to Close.
2. Transfer of Land under Power of Sale, in duplicate

Kindly have your clients sign the Transfer of Land in duplicate, and return them to us along with manager's cheques payable to Jamaican Redevelopment Foundation, Inc. and Naudia N. Sinclair, Attorney-at-Law in settlement of the outstanding sums indicated in the attached statements of account.

Please note that the Agreement for Sale is presently at the Office of the Stamp Commissioner for assessment, however, the original and copy Mortgage and Promissory Note have been stamped.

We advise that we have requested up to date Certificate of Payment of Taxes and water rates bill and receipt and hereby give you our professional undertaking to forward them to you as soon as we have them in hand.

Yours faithfully

JAMAICAN REDEVELOPMENT FOUNDATION, INC

Per:
NAUDIA N. SINCLAIR (MS.)
ATTORNEY-AT-LAW:

STATEMENT OF ACCOUNT

….

STAMP DUTY & REGISTRATION FEE

		J$
TO:	Stamp Duty on Inst. of Mortgage	121,008.75
	with Power of Attorney	500.00
	Stamp Duty on copy Inst. of Mortgage	10.00
	Stamp duty on Promissory Note	10.00
	*½ Stamp Duty on Agreement for Sale (J$19,361,250.00 x 3% = 580,860.00)	290,430.00
	½ Registration fee on Agreement for Sale (J$19,361,250.00 x .5% = 96,806.25)	48,403.00
	½ Registration fee on Instrument of Mortgage (J$19,361,250.00x.5%=96,806.25)	48,403.13
	Amount due & payable	**508,765.01**

ATTORNEY'S HALF COST

		J$	J$
TO:	Preparation of Instrument of Mortgage & Promissory Note	30,000.00	
	Preparation of Agreement for Sale	60,000.00	60,000.00
	Preparing Letter of Possession, Letters to Utilities	10,000.00	
	Amount Outstanding	______	40,000.00
		100,000.00	100,000.00

THIS AMOUNT TO BE PAID TO NAUDIA SINCLAIR".

[229] On 8 April 2011, the respondents' attorney, by letter, sent the duly executed Instrument of Transfer in triplicate to the appellant's attorney and informed her that the cheque for the outstanding balance would be forwarded to her "shortly".

[230] On Ms Sinclair's evidence, those payments might not have been insisted on because the stamp duty and registration fee were subject to assessment. At pages 23 and 24 of the transcript the following is recorded:

> "Q. Having regard to fact that Agreement was sent from 4th January with a condition that half cost payable on execution and it was sent back to you on 16th February, **why didn't you ask for half cost stamp duty and registration fee?**
>
> A. **It was stipulated in agreement and because agreement subject to assessment of stamp commissioner then sometimes you do not insist.**
>
> Q. **Is that the reason why you did not insist in this case?**
>
> **A I cannot say**
>
> Q. **I cannot recall but it could have been**
>
> Q. **You requested everything, they sent it back but the day you send it down for stamping but no request in writing?**
>
> A. **No."** (Emphasis added)

In re-examination she however stated unequivocally that the appellant did not rely on special condition 2. It instead advanced the sums. It is helpful to quote:

> " **Re-examination**
>
> Q. In relation to special condition 2, page 9 Exhibit 1, you agree it gives JRF an option of stamping the agreement for sale?
>
> A. Yes.

Q. With transfer tax and stamp duty?

A. No. We did not use the funds of US$75,000 we advanced it, US$75,000 kept in escrow." (Emphasis added)

[231] The agreement of sale specifically stated that completion ought to have been:

> "Within sixty (60) days of the date of the Agreement upon full payment of the purchase price and cost and such amounts payable by the Purchaser herein subject to the terms and conditions of the Vendor's mortgage executed contemporaneously herewith."

[232] The sixty-day period would have ended on Sunday, 1 May 2011. On Friday 29 April 2011, the respondent's attorney received a cheque from the Victoria Mutual Building Society in the sum of $508,765.01 payable to the appellant. The weekend intervened. The next working day was therefore Monday, 2 May 2011. On Tuesday, 3 May 2011, the respondent's attorney received a letter from the appellant's attorney cancelling the agreement for sale. The respondents were in breach of the agreement for sale. But was proper notice given?

Was proper notice given?

The reason for the cancellation of the agreement

[233] The letter of 3 May 2011 stated:

> "**Cancellation of Sale of Land part of Woodleigh Clarendon registered at Volume 1240 Folio 116 to Clive Banton and Sadie Banton**
>
> The premises at caption are being sold to your clients under the Powers of Sale contained in the mortgage endorsed on the Title.

> It is settled law that the mortgagor is entitled to redeem his property if he has paid the principal, interests and costs due under the Mortgage even in the case of a sale being conducted under powers of sale contained in the mortgage.
>
> In light of the above provisions of the law and in light of the fact that JRF has now been paid the principal, interests and costs due to it under the mortgages by the registered proprietor, JRF has no option but to cancel the sale of the aforesaid premises to your clients, as the mortgagor, the registered proprietor has exercised his right of redemption.
>
> I hereby enclose a copy of the Cancelled Agreement and will forward to you the cheques representing the refund of amounts paid to us as deposit and further payment herein.
>
> Kindly advise of any costs incurred by your client in relation to the land so that we can reimburse same."

[234] The appellant's purported cancellation was swiftly rejected by the respondents. On 4 May 2011, the respondents' attorney wrote to the appellant and informed them accordingly. That letter notwithstanding, under cover of letter dated 5 May 2011, the appellant's attorney returned to the respondents' attorney, a cheque which represented a refund of the sum which the respondents had paid. The letter with the said cheque was promptly returned to the appellant the said day by the respondents' attorney.

[235] Ms Sinclair accepted under cross-examination that the only reason for the cancellation which was stated in the letter of 3 May 2011 was that there was a promise from the National Commercial Bank (NCB) to pay the appellant the sum outstanding, and the appellant had acted on that promise. She also accepted that the reason proffered in the appellant's defence was different. Ms Sinclair concurred with counsel's suggestion that the letter of 15 March 2011 was the letter upon which the appellant

relied as notice pursuant to special condition 5. She agreed that by that letter the respondents were neither given a deadline nor was any consequence of non-compliance stated.

[236] The agreement entitled the appellant to cancel the agreement on the purchaser's failure to make any payments within the prescribed time and upon the giving of seven days' notice of any default to the respondents. Failure on the respondents' part to correct any such default within the seven-day period, would entitle the appellant to forfeit the deposit without further notification. The amount due was paid a day later than was stipulated. The respondents were therefore in breach of special condition 5 which made time of the essence. The pertinent issue therefore is whether the proper notice was given.

[237] The Australian cases of **Legione v Hateley** [1983] HCA 11, **Robinson v Becata Pty Ltd** [2004] NSWSC 310 (7 May 2004) and **Catley and Another v Watson and Another** (1981) V ConvR 54-003, to which Mr Leiba referred, bolster the view that a notice must be clear and unambiguous. Mr Leiba placed reliance on paragraph [31] of **Robinson v Becata Pty Ltd** where Campbell J examined what constituted a valid notice:

> "[A] notice is not valid unless it is in relation to its essential features as required by that condition, clear and unambiguous. By this I mean, not that its import must be clear beyond the slightest peradventure, but that its terms must be such that a reasonable person, having given it fair and proper consideration, would be left in no doubt as to its meaning….It must be possible to say that, after the

> appropriate consideration, any doubts that may have arisen would be quieted and the purchaser would not be left in any uncertainty as to the meaning of the notice."

[238] The letter of 15 March 2011 could not constitute proper notice. It was merely a letter stating the fees that had become due and payable and a request for payment.

[239] By the letter of 3 May, the reason advanced for the appellant's cancellation of the contract was the mortgagor's redemption of the property and not the respondents' failure to pay the outstanding sum within the period stipulated. Indeed there was not the slightest indication in the letter that the respondent was in breach of any aspect of the agreement. It notified the respondents that the agreement had been frustrated by the mortgagor's redemption of the property. Had the appellant pointed out the breach and given the respondents the requisite notice period to comply, the requirements of special condition 5 would have been satisfied.

[240] There is, therefore, no basis to disturb the learned judge's findings. Grounds one, two, three, four and five therefore fail.

The assessment of damages hearing

[241] It is convenient at this juncture to deal with ground seven.

Ground seven

Whether the trial judge erred in having the experts testify

Background

[242] Both the appellant's and respondents' attorneys attended the case management conference held on 9 July 2014. Batts J allowed each to appoint an expert. The firm NAI Jamaica Langford and Brown, Commercial Real Estate Services was appointed as an expert witness for the respondents and DC Tavares Finson Realty Limited, Real Estate Agent Appraisers, Auctioneers, and Consultants ("DC Tavares & Finson Realty Limited" hereinafter) was appointed as an expert for the appellant. Reports from both experts were to be filed and served by 12 December 2014. Each expert was required to answer questions, if any were posed, seeking clarification.

[243] That order was varied on 12 November 2014 to allow the respondents to appoint the firm of Allison Pitter & Co as its expert instead of NAI Jamaica Langford & Brown. Both parties were present and there was no issue taken.

[244] On 21 January 2015, the learned judge extended the time for filing of the reports and the time within which the experts were to answer the questions. Both attorneys were also present. The respondents posed their questions to DC Tavares & Finson Realty Limited on 5 February 2015.

[245] The assessment of damages hearing commenced on 16 February 2015 and the parties communicated their differences in opinion as to whether the expert witnesses should testify. The respondents' attorney was of the view that the testimony of the

experts was necessary. The appellant's attorney was however of a contrarian view because there was no prior court order that the experts should appear to be cross-examined. The learned trial judge, however, ruled that their attendance to give oral evidence, would assist in determining which report was to be preferred and he allowed both experts to testify. After further exchanges with both Queen's Counsel, the learned judge ruled that:

> "[T]he experts should give oral evidence and be cross-examined. The Claimant's expert [would] give evidence first"

The submissions before this court

<u>The appellant's submissions</u>

[246] Mrs Minott-Phillips argued that the learned judge erred in granting the respondents' application for cross-examination of the expert witnesses in circumstances where the court had ordered at the case management conference that written reports and written questions were to be put to the experts within a stipulated time, in the event a party required clarification of aspects of the reports. According to learned Queen's Counsel, in the absence of a court order, rule 32.7 of the CPR applies.

[247] She posited that it was at the certification of the experts that the learned judge was required to assess the expert's qualification and the necessity to call him. That time, Queen's Counsel contended, was 9 July 2014 at the time the case management order was made.

The respondents' submissions

[248] Mr Leiba submitted that in controlling the evidence to be given at the trial of a claim, the trial judge has wide discretion, specifically as it relates to the way in which the evidence is to be placed before the court. For that submission, he relied on rule 32.7 of the CPR. Rule 32.7 of the CPR, counsel submitted, does not limit or restrict the court's discretion to require expert witnesses to attend for cross-examination. He also directed the court's attention to the case, **Daniels v Walker** [2000] 1 WLR 1382 in support of his contention that the court has the discretion to allow the oral evidence of experts "when all other avenues have been exhausted".

[249] It was counsel's submission that, subject to the grounds set out in the respondents' counter-notice of appeal filed on 9 February 2016 and submissions set out in its skeleton arguments filed on 30 June 2016, the learned trial judge properly exercised his discretion by requiring the attendance and cross-examination of the expert witnesses. He submitted that at the assessment of damages hearing, each party sought to rely on separate reports which were starkly different in respect of the market value they ascribed to the property. The oral evidence substantially assisted the court to determine which opinion ought to be preferred.

[250] Counsel posited that the evidence elicited from the appellant's expert indicated that his valuation paid no regard to the natural and obvious uses of the property, and that had regard been paid to the natural and obvious usage, the market value in his report would have been higher. Without oral evidence and the test of cross-

examination, counsel posited, the court would not have received such in-depth assistance notwithstanding the responses provided to written questions posed, prior to the trial.

Analysis and law

Should the order allowing the experts to testify have been made at the point in time the experts were certified?

[251] Learned Queen's Counsel has not pointed to the rule which dictates that the learned judge ought to have made the order allowing the experts to testify at the point in time they were certified and this court has not been able to find any such rule. Rule 32.7(1) of the CPR states:

> "Expert evidence is to be given in a written report unless the court directs otherwise."

[252] By that rule, the learned judge was conferred with the discretion to allow the experts to testify. Rule 32.18 of the CPR further provides that:

> "An expert or an assessor appointed by the court who gives oral evidence may be cross-examined by any party."

[253] **Daniels v Walker** is authority for the proposition that generally the court ought only to require the attendance of experts to give oral testimony, when all other avenues have been exhausted. At paragraph [H], at page 1387 **Lord** Woolf MR enunciated:

> "In a case where there is a substantial sum involved one starts, as I have indicated, from the position that, wherever possible, a joint report is obtained. If there is disagreement on that report, then there would be an issue as to whether

> to ask questions or whether to get your own expert's report. If questions do not resolve the matter and a party, or both parties obtain their own expert's report, then that will result in a decision having to be reached as to what evidence should be called. That decision should not be taken until there has been a meeting between the experts involved. It may be that agreement could then be reached; it may be that agreement is reached as a result of asking the appropriate questions. It is only as a last resort that you accept that it is necessary for oral evidence to be given by the experts before the court. The cross-examination of expert witnesses at the hearing, even in a substantial case, can be very expensive."

[254] Batts J, having ascertained from counsel on both sides that each expert would have been saying "different things", considered it desirable that both experts be cross-examined in order to determine which expert to prefer.

[255] The exercise of Batts J's discretion cannot be impugned in the circumstances of this case where both valuations were incommensurable. Ground seven also fails.

Ground eight of the appeal and grounds one, two and three of the counter appeal

[256] It is convenient to examine ground eight of the appeal and grounds one, two and three of the counter appeal as these grounds deal essentially with whether the judge was correct in his reliance on the expert report of Allison Pitter & Co (the Allison Pitter Report) without the attached report from Blastec Company Limited (the Blastec Report) on the ground that it was 'unhelpful', 'irrelevant' and 'hearsay'. The respondents/cross-appellants sought to rely on the Blastec Report to provide a quantitative and qualitative survey and estimate of the sand and aggregate deposits on the property and the earnings to be made from sand mining.

[257] At the assessment of damages hearing, Mrs Minott-Phillips objected to the Allison Pitter Report being tendered into evidence because attached to that report, was the Blastec Report. Learned Queen's Counsel submitted that they were separate entities, the reports were signed by different persons and the court did not appoint the expert who produced the Blastec Report. The Blastec Report could not, therefore, be incorporated in the Allison Pitter Report. Furthermore, Queen's Counsel argued, the Blastec Report constituted hearsay and there was no application made for permission to tender hearsay evidence.

[258] In response, Mr McBean, however, referred the learned judge to rules 32.13(1)(a), (b), (c), (d) and 32.13(4) of the CPR. He proffered the following analogy in support of his contention that the Blastec Report was not hearsay:

> "...let's say there was a simple valuator and he used a survey report. He can use that survey according to the Rules."

[259] The learned judge, however, rejected Mr McBean's submissions in relation to counsel's reference to the aforesaid rules and his arguments. The learned judge opined that the matters must be within the expert's expertise. "[I]t must be within the realm of what he is giving evidence about", he said.

[260] In rejecting Mr McBean's assertion that the 'rules contemplate some hearsay', the learned judge said:

> "I do not believe that is what Mrs Minott-Phillips is saying. But, what you are trying to do is to get in a substratum of

fact through the back door where that evidence is not within the area of expertise of the expert."

[261] The learned judge was of the opinion that the author of the Blastec Report would have to testify. At that juncture Mr McBean applied for permission to call Blastec's managing director, Mr Neufville, the author of the report. He, however, would not have been available to testify on that day. The judge was prepared to accede to his request to have Mr Neufville testify but Mrs Minott-Phillips objected for the following reasons:

> "1) The appellant would be deprived 'of the opportunity to review the expert's background etc and make submissions in opposition'.
>
> 2) The report had been due on the 30th of January but she had only received it on the 2nd of February.
>
> 3) In transactions 'for sale of land where the agreement of sale has been canceled, no account should be taken of economic use in a circumstance where it was not communicated to the vendor'."

[262] Queen's Counsel referred the court to the decision of **Tewari v Attorney General** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 67/1998, judgment delivered 31 July 2000 in support of her argument. The judge consequently refused the application for an adjournment to allow the witness to attend. He also refused to admit the Allison Pitter report with the Blastec report and ordered that the Blastec Report be excised from it. Mr Allison then prepared the redacted report.

Submissions before this court

The appellant's submissions

[263] Mrs Minott-Phillips submitted that the learned judge erred in admitting the irrelevant expert report of Allison Pitter & Co into evidence. The report was irrelevant, she posited, because:

(i) It did not value the land as at the approximate date of the judgment, less any improvements (if any) by the current owner in the period between the contract and judgment dates;

(ii) The land was valued on the assumption of it being used for income generating activities, that is, agriculture, sand mining and aggregate extraction in the absence of any pleading or evidence that:

a. The land was acquired for any purpose above its mere acquisition; and

b. The purchaser had not disclosed his intention as to the use of the property to the appellant at the time of the sale.

[264] According to Queen's Counsel, the report was also inherently inconsistent and unreliable. She directed the court's attention to the following points in support of this submission:

> "a. The Rio Minho has been mined out and sand and aggregate deposits, in large, depleted and the report valued the land taking into account agriculture and sand mining from the river;
>
> b. The presence of sand and aggregate deposits below a layer of the alluvial was based on hearsay as reliance was placed on the Blastec Report which it commissioned.
>
> c. The Blastec Report was first incorporated as a part of the Allison Pitter Report and subsequently completely excised from it, although it was expressly stated that neither version could be used except as a whole document.
>
> a. Blastec's Report considered the potential for sand and aggregate mining.
>
> b. Having presented a report that no longer relied on the Blastec Report, Allison Pitter & Co substantially altered section 5 of its report which dealt with 'Valuation' and then valued the land '*on the basis of its agricultural potential enhanced by the fact that the river provides seasonal construction grade aggregate'* and further gave a market value which took into account '*the potential value of construction aggregate and sand from the river on the property'*, previously attributed to the hearsay evidence of Blastec."

[265] Learned Queen's Counsel also complained that the Allison Pitter Report was materially altered on 16 February 2015, at the assessment of damages hearing, during the luncheon break, in that the Blastec Report was excised from it and the date changed to 16 February 2015. Having excised the Blastec Report, the Allison Pitter

Report was therefore altered and ought not to have been admitted into evidence without prior service of the altered and re-dated document following the overruling of the appellant's objection, she contended.

[266] Queen's Counsel sought to impugn the expert evidence of Mr Allison by pointing to his evidence in which he erroneously described the mortgagee as the owner of the land. Queen's Counsel also argued that he paid no regard to the fact that sand mining does not occur on the land and that he proceeded on an incorrect assumption that the owner of the land has a right to mine sand from the river running through the land.

<u>The respondents' submissions</u>

[267] Counsel submitted that the appellant's argument that the expert report submitted by the respondent's expert was inadmissible on the basis that it was irrelevant or an excision form of a report that was expressly stated by its maker to be usable only as a whole document is misconceived.

[268] The expert report relied on by the court comprised solely of the views of Allison Pitter & Co. All elements and opinions of third parties were removed and the court accepted the evidence that the report did not rely in any way on information provided by Blastec Company Limited.

[269] The independent opinion provided by Allison Pitter & Co also correctly took into account existing uses of the land that were open, obvious and known to all parties, he submitted. The learned judge preferred the opinion of Mr Allison to that of Mr Down

because the Allison Pitter report provided "a full, detailed and very impressive analysis" of the ingredients for determining property value.

[270] The learned judge was also satisfied with the basis on which he formed his opinion. On the other hand, the report of DC Tavares & Finson Realty Ltd had failed to take account of obvious uses of the land and showed far less detail and analysis of the relevant information in coming to an undervalue.

Law and analysis

Was the Allison Pitter report unseverable and was it inherently inconsistent and unreliable?

[271] The crux of this ground is whether the Allison Pitter Report was capable of severance from the Blastec Report and whether it was severed. In my view, the Allison Pitter Report was severable and was indeed severed. It was Mr Allison's evidence under cross-examination that the excised Blastec Report sought to "provide a 'quantitative and qualitative' survey and estimate of the sand and aggregate deposits on the subject property".

[272] On Mrs Minott-Phillips own assessment of the reports, it is clear that she regarded the Allison Pitter Report as separate and severable from the Blastec Report. In attempting to persuade the judge that Blastec Limited is a separate entity and that the reports are from different entities, Mrs Minott-Phillips advanced the following reasons for her objection to the court admitting the Allison Pitter Report into evidence:

"Objection

Sandra Minott-Phillips QC: Allison Pitter & Co and Blastec Company Limited are two separate entities, operating from separate premises. There is no evidence otherwise. So, for instance, My Lord, if you pick up the expert report, you will see a yellow divider. Look behind the yellow divider. It has an expert report of Blastec in it.

Batts, J: So this is an expert report within an expert report?

Sandra Minott-Phillips QC: Yes, and look at the signature page. I am assuming it is a signature of Mr. L. Neufville.

Now, look at page 2. This is Allison Pitter saying who Laurence Neufville is. He is the MD of Blastec Company Limited.

Now the address of Allison Pitter just behind the yellow divider is 1 Tremaine Road, whereas Blastec has a Dumbarton address.

At page 22 bottom which starts 'two scenarios emerge here ...' then at 2 it says 'supported by a report from Blastec Company Limited (copy attached)'. So what he has done is incorporated Blastec's report as his expert's report. I wish now to take you to two significant disclosures of Allison Pitter. See #6. 'Appraisal is to be used only in its entirety ...' Also, at 7: 'We, cannot, however, guarantee their accuracy or assume responsibility thereof ...'

So, what we have here is that Allison Pitter, on the one hand, incorporates Blastec's report and say we cannot excise any part of it, but on the other hand, says, that they cannot vouch for it. See Rule 37(2) [sic]."

[273] The learned judge ordered the excision of the Blastec Report from the Allison Pitter Report and therefore it formed no part of the Allison Pitter Report or Mr Allison's evidence. There is no evidence that the learned judge relied on any part of the Blastec Report. In fact, the learned judge categorically stated that he did not. At paragraph [13] of his decision on assessment of damages ([2015] JMSC Civ 61), the learned judge said:

> "Upon the hearing being resumed Mr Allison explained the adjustments made to the document and over Mrs Minott-Phillips' objection, I admitted the revised report as Exhibit '5' being a report dated 16th February 2015. My basis for doing so was the evidence of Mr Allison that his opinion did not rely in any way on the report of Blastec or Mr Neufville."

Learned Queen's Counsel's complaint that the Blastec Report was unseverable is therefore without merit.

[274] Learned Queen's Counsel also complained that the Allison Pitter Report, from which the Blastec Report was severed, was not served on her. Although it would have been best if the said report had been served, in light of the manner in which the matter proceeded, there would have been no opportunity to serve the amended report as Mrs Minott-Phillips objected to an adjournment of the matter, which objection was upheld by the learned judge. Apart from Mr Allison's evidence that the Blastec Report was excised from the Allison Pitter Report, the only change to the report, noted in the evidence, was the change of the date from 28 January 2015 to 16 February 2015, which amendment Mrs Minott-Phillips had submitted, was necessary.

[275] It is apparent that Queen's Counsel was seised of the contents of both the Allison Pitter and Blastec Reports. Although the report should have been served on Friday 30 January 2015, Queen's Counsel would have been in possession of the Allison Pitter Report containing the Blastec Report two weeks prior to the hearing, having been served with this report on Monday 2 February 2015, two days later than she should have been served. While this court frowns upon dilatory conduct in complying with orders of the court, it is noteworthy that those two days were Saturday and Sunday.

[276] Mrs Minott–Phillips had objected to the report being tendered on the ground that Allison Pitter and Company had previously stated that the report was to be used only in its entirety. The learned judge ultimately stated that Mr Allison did not rely on the report of Mr Neufville. Moreover, on the evidence, Queen's Counsel had thorough knowledge of both reports. In the circumstances, it is unlikely that the appellant would have suffered any prejudice for the lack of service on its counsel of the revised Allison Pitter report. In light of the above, ground eight of the appeal and grounds one, two and three of the counter appeal also fail.

Ground nine

[277] The issue for consideration in this ground is whether the learned trial judge erred in his rejection of the expert report of DC Tavares & Finson Realty Limited and his acceptance of that of Allison Pitter & Company, in light of the entirety of the evidence, including the fact that the appellant was exercising its power of sale in accordance with

the legal obligation attendant on its exercise of that power (namely, not to sell at an undervalue).

[278] The disparity between the valuation placed on the property by Allison Pitter Company Limited and DC Tavares & Finson Realty Limited was significant. Whereas Allison Pitter and Company placed the value of the property as at 5 May 2011 at US$1,165,908.80–US$1,224,204.26, DC Tavares & Finson Realty Limited valued the property at US$222,841.00-US$245,125.00 as at 2 March 2011 and US$239,827.00 – US$271,861.00, as at 16 February 2015.

The appellant's submissions

[279] The learned trial judge, Mrs Minott-Phillips submitted, erred in not having any, or any sufficient, regard to the expert report of DC Tavares & Finson Realty (the DC Tavares & Finson Report) which was:

> "i. prepared on the basis of the intrinsic value of the land without an assumption of any peculiar user;
>
> ii. consistent with its prior estimation of the value/pricing opinions of the same property since 2004;
>
> iii. supported by more comparable sales data than that set out in the expert report of Allison Pitter & Co;

iv. accepted (as reflected in the March 2011 contract price) by the Stamp Commissioner as genuinely reflecting the value of the land with his impress of stamp duty and transfer tax on the sale price of US$225,000.00; and

v. that the land remained listed and unsold on the Appellant's website for a number of years prior to the Respondents agreeing to buy it for US$225,000.00 in March 2011 pursuant to the Appellant's exercise of its power of sale."

Should the judge have preferred the Allison Pitter Report?

[280] In preferring the Allison Pitter Report, the learned judge said Mr Allison's opinion and his report provided "the preferable" valuation for the purpose of this assessment of damages and explained his reasons for the choice as follows at paragraphs [29] and [30] of his reasons:

> "[29] I find as a fact also that the opinion of Mr. Allison and his report as detailed in Exhibit 5 is the preferable valuation for the purpose of this assessment of damages. Mr. Meryn [sic] Down admitted that his reports of 2014, 2004 and 2010 took no account of possible sand mining in the river bed. Further, that had he done so, all other things being equal, he would have given the land a higher value. Mr. Down was not asked to, nor did he, critique the opinion of Mr. Allison.
>
> [30] Mr. Allison, in a full detailed and very impressive analysis, has outlined the basis on which his opinion was rendered. He has also supported his conclusions by

> reference to sales comparisons of other properties in the area. I accept the lower of the range of values he gives."

[281] The learned judge cited several portions of Mr Allison's evidence. At paragraph [11] of his judgment he stated:

> "…He deponed that he had known that property for many years, and was very familiar with it even prior to being asked to do this report. He had done assessments in 2009 and 2010 in relation to highway construction. For the purpose of this case, he had visited the property in October and November of 2014 and again on the 17th January 2015. He said prior to 2010 the property was used as a tobacco farm. Floods in 1986 damaged that farm. In 2010 it was used for cash crop farming. There was also sand mining. The owners of the said land, he said, had equipment on adjoining property and mined sand. There was he said a mining license #QC1221 which expires 3rd March 2015. He affirmed that his expert valuation was done based on an existing use of the land. By "existing" the witness explained he meant in 2011. It was as at that year that he did his valuation. In doing his valuation he said he relied on other sales in the area. He said Blastec's opinion did not impact his opinion on the market value of the land. He only relied on Blastec for what he called the 2nd scenario of his report. He said the report has 3 valuations. The first valuation is independent of the other 2."

[282] Under cross-examination, Mr Allison agreed that the licence to mine to which he referred was granted to the mortgagor and not to the respondents. It was his evidence that his report stated that the land, at that point in time had been substantially mined out and that the area of the river over which there was the licence had been mined out but the supply was not completely exhausted.

[283] In reliance on rule 32.16 of the CPR, Mrs Minott-Phillips requested that the Blastec Report of 2 February 2015, to which she had objected, be tendered into

evidence. Mr McBean objected. He submitted that this rule assumes that the report is admissible, but the court had already ruled that it was inadmissible. The learned judge overruled his objection and admitted the report into evidence.

[284] Mr Mervyn Down was the expert called on behalf of the appellant. It is helpful to set out some of the questions and answers which may have led the judge to his conclusion that the Allison Pitter Report was more reliable:

> "Question 1: Having regard to your reference at page 3 of your expert report dated September 30, 2014, to the registered proprietors use of the property to conduct mining operations, is the property in question amenable to mining operations?
>
> Answer 1: As stated on page 3 of our Expert Report dated September 30, 2014, the land was, we understand, purchased in order to gain access to the river bed where the sand and stone was mined and not on the land itself. We are unaware of any mining being carried out on the said land, it took place in the river bed, and are unable to state if any portion of the land is amenable to mining.
>
> Question 2: If the answer to question (1) is yes, to what extent (if any) would such mining operations affect the assessed market value of the property in your said report?
>
> Answer 2: If the answer to question 1 was yes, then it would have an effect on the assessed market value of the property but this would be entirely dependent on whether or not a licence would be granted by the Mines and Geology Division of the Ministry of Science Technology, Energy and Mining for such mining and also in relation to the type of

material, the quantity, the rate of extraction and over what period of time etc.

Question 3: Is there scope for or does there exist sand and/or aggregate mining activities on properties with access to the Rio Minho River within the said community?

Answer 3: Yes, but with extraction from the bed of the Rio Minho River.

Question 4: ... Did you take the likely construction of the trend of 'residential subdivision and housing schemes' into account in assessing the market value of the land in question?

Answer 4: No. The subject parcel of land is agricultural in nature and before being allowed to fall idle/fallow was agricultural in use ...."

[285] His report, as well as the answers to the questions submitted to him, were tendered into evidence. In his evidence, both orally and in the report, Mr Down stated the following:

a. The predominant soil type for the area is Aguata Sandy Loam which is fertile and capable of intensive use.

b. Sections of the property is/was used by trucks and other heavy-duty vehicles as an access to the riverbed from where river stone is/was mined and carried to a crushing plant on an adjoining property.

c. There is also sand mining which takes place in the river bed.

d. "From our investigations, all the properties set out herein were agricultural in use ...The subject property consists

> of a large parcel of land suitable for agricultural development, most likely sugar, but which is for the most part unused ..."

It was also his evidence that:

> "We understand that the owners had purchased the property in order to gain access to the river bed for their mining operations and the land is/was not developed/used for any other purpose. We also understand that at one time an attempt was made to develop a portion of the property for agricultural purposes with the planting of citrus trees and cash crops but literally everything was stolen ..."

[286] It was also Mr Down's evidence that there was sand on the land (sandy loam) but he did not test its depth. Mr Down confirmed that the Rio Minho ran across the property and estimated its width "from 50m to 200m in some areas". Where there was depletion of sand, he admitted, heavy rainfall could replenish the sand. He also testified that he saw evidence of mining on the property and the mining of the aggregates which he saw was in the river which runs across the property.

[287] Mr Down was shown a picture of a riverbed in the Allison Pitter Report which showed "ponding" and he agreed that there was also evidence of sand. Although he had been to the riverbed, he could not identify the particular section in the photograph. He also agreed that the value which the Allison Pitter Report placed on the property was higher than his and he accepted that if his report had taken sand mining into account, "all things being equal", the value would have been higher.

[288] Mr Down admitted that he was unable to say whether any of the six properties that he had compared the subject property to had rivers running across them. He

admitted that properties with a river running across them would have increased value. His reason for disregarding the possibility of sand mining was that the owners had indicated that they were "not really making much money from the sand mining and they had tried other things which had failed". He, however, pointed out that it did not mean "that sand mining could not be done". It was his evidence that the mortgagor was in possession of a current mining licence but he was unable to state, without research, whether the existence of the licence would have impacted his valuation.

[289] Although Mr Down's answers to counsel in relation to sand mining were confirming what was stated in his expert report, Mrs Minott-Phillips objected to the questions posed on the ground that there was no pleading that at the time of the agreement for sale, the respondents had made known to the appellant that the land was being acquired for any specific purpose but for its mere acquisition.

[290] Mr McBean, in reliance on **Hadley and another v Baxendale and others** [1843-60] All ER Rep 461 and **Victoria Laundry Windsor LTD v Newman Industries Ltd** [1949] 1 All ER 997, submitted that where certain activities on the land are obvious and apparent, as stated in both expert reports, there was no need to fix the appellant with special knowledge, especially as the land had continued to be utilized for that purpose. He contended that there was no need for it to be specifically pleaded. That evidence, he said, went to the market value. Mr Down also agreed that the value of properties from which sand and aggregate could be mined would be higher than those without that ability.

[291] The learned judge's exercise of his discretion in preference of the Allison Pitter Report cannot be faulted in light of Mr Down's admission that, although sand was mined on the property in the past and the mortgagor was in possession of a licence to mine sand, he neither took its presence nor the possibility of sand mining into account. This was pivotal in the judge's acceptance of Mr Allison's evidence and the rejection of Mr Down's. It is important to note that, in concluding as he did, the learned judge expressly placed no reliance on the Blastec Report which was admitted at the request of Mrs Minott-Phillips.

[292] The reasons for the learned judge's rejection of counsel for the appellant's submission are stated at paragraphs [26] and [28] of his reasons:

> "[26] On the evidence I find as a fact that the potential for sand mining in the river bed which passed through the property was open and obvious and known to all. It was therefore within the contemplation of the parties, or ought reasonably to have been, that the potential use for such activity would positively impact the value of the land. I therefore take into account that potential use and agree with the Claimant's expert that it is relevant to and does positively impact the market value of the property.
>
> …
>
> [28] I find also Exhibit 6 in so far as it references or relies upon the opinion of Blastec is singularly unhelpful. This is not only due to irrelevance but also because one expert, giving evidence cannot by mere reference to the opinion of another expert, convert that other expert opinion into evidence. Blastec has not given evidence before me. I therefore for that reason also, disregard the opinion of Blastec."

[293] In light of the foregoing, there is no basis for the complaint.

Ground 10

Whether the trial judge erred in his award of pre-judgment interest

[294] Regarding the trial judge's award of pre-judgment interest, Queen's Counsel submitted that an award of damages as at the date of judgment would not allow an award of pre-judgment interest. The learned judge, she posited, erred in awarding pre-judgment interest. It was Mr Leiba's submission that the learned judge was correct in awarding pre-judgment interest, in light of the provisions of section 3 of the Law Reform (Miscellaneous Provisions) Act (the Act). The Act conferred upon him the discretion to award pre-judgment interest in this case where the effective date of loss was the date of breach and not the date of judgment as set out above.

[295] Counsel further submitted that the learned judge's finding that the measure of damages was to be determined by utilizing the market value of the property at the time of breach, was entirely consistent with his finding that pre-judgment interest was to be awarded to the respondents.

<u>Analysis</u>

[296] Section 3 of the Act provides that:

> "The Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damage **for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.**" [Emphasis mine]

[297] It was entirely within the judge's discretion to award pre-judgment interest. No proper reason has been advanced which would warrant interfering with the exercise of the judge's discretion. Ground 10 fails.

The counter appeal

Grounds four, five, six and seven of the counter appeal

[298] Grounds four, five, six and seven of the counter appeal can conveniently be dealt with at this juncture as the issues which arise for consideration are:

(1) Whether Allison Pitter could have relied on the Blastec Report.

(2) Whether the learned judge erred in not granting an adjournment to allow Mr Neufville to testify.

(3) Whether the Blastec Report could have stood as an independent report.

<u>Could Allison Pitter have relied on the Blastec Report?</u>

[299] A reading of rule 32.13(1) of the CPR makes it plain that an expert may rely on the work of another. It sets out the requirements of an expert who is seeking to rely on other material. The rule provides that the expert's report must:

> "(b) give details of any literature or other material which the expert witness has used in making the report;
>
> (c) say who carried out any test or experiment which the expert witness has used for the report;
>
> (d) give details of the qualifications of the person who carried out any such test or experiment;"

Allison Pitter was appointed an expert by the learned judge, and therefore, pursuant to rule 32.13(1) of the CPR, would have been able to rely on the opinion of other experts, within the area of his expertise. The matters about which Mr Neufville opined, was however not within Mr Allison's area of expertise. Although the following authorities to which Mr Leiba referred, support his contention that it is permissible for an expert to rely on the work of another, the respondent has not satisfied the requirement.

[300] The learned authors of The Modern Law of Evidence 9th Edition in referring to the view held by Megarry J in **English Exporters (London) Limited v Eldonwall Ltd** [1973] Ch 415 expressed the view that:

> "…although a professional valuer called as an expert witness to give his opinion as to the value of the property, could not give evidence on comparable rents of which he had no personal knowledge in order to establish this rent as matter of fact, because that would amount to inadmissible hearsay, he was entitled to express opinion that he had formed as to values even though substantial contributions to the formation of those opinions had been made by matters of which he had no firsthand knowledge but had learnt about from sources such as journals, reports of auctions and other dealings, and information, relating to both particular and more general transactions obtained from professional colleagues and others......
>
> Under the same doctrine the expert may fortify his opinion by referring not only to any relevant research, tests, or experiments which he has personally carried out, whether or not expressly for the purposes of the case, but also to works of authority, learned articles, research papers, letters and other similar material written by others **and comprising part of the general body of knowledge falling within the field of expertise of the expert in question.**" (Emphasis added)

[301] Stuart Sime in his work, Practical Approach to Civil Procedure, 5th edition refers to the English rule under the section 'Supporting documents", which rule is similar to rule 32.13(4) of the CPR. On page 322, the learned author stated:

> "28.5.4 Supporting documents
>
> **Published and unpublished information forming part of the general corpus of knowledge in a particular field may be relied on by an expert in reaching an opinion** ... Experts also back up their opinions by referring to photographs, plans, survey reports and other factual materials." (Emphasis added)

[302] The learned authors of O'Here and Browne's Civil Litigation, 12th edition (2005) agreed and expanded the list:

> "Photographs, plans, analyses, measurements, survey reports and other similar documents relied on by an expert form part of his report and therefore copies should accompany it on exchange."

[303] In the case of **Seyfang v G.D. Searle & Co and another** [1973] 1 All ER, Cooke J stated:

> "**I apprehend that in England a medical expert witness with the proper qualifications would be allowed to refer to the articles [prepared by other doctors] as part of that corpus of expertise, even though he was not the author of the articles himself.** It does appear to me with the greatest respect that a system which does not permit experts to refer in their expert evidence to the publications of other experts in the same field is a system which puts peculiar difficulties in the way of proof of matters which depend on expert opinion." (Emphasis added)

[304] The respondents sought to rely on the Blastec Report to determine the quantity of sand on the property and the earnings that could be derived from sand mining. It is

palpable from the authorities that although an expert may rely, not only on the published work but also the unpublished work of another expert, the work being relied upon must, however, be within the witness' scope of expertise. There is no evidence that Mr Neufville's findings fall within Mr Allison's field of expertise. Indeed, the evidence is to the contrary.

[305] In light of the foregoing, these grounds fail.

Should the learned judge have granted an adjournment to allow Mr Neufville to testify?

[306] The learned judge found that the Allison Pitter Report, insofar as it referenced or relied on the opinion of Blastec, was unhelpful (see paragraph [105] above). Mr Leiba submitted that the learned judge not only erred in disallowing the Blastec Report to be tendered into evidence, but he further erred by his failure to grant an adjournment to allow Mr Neufville, its maker, to attend. In an effort to demonstrate that the learned judge fell into error, Mr Leiba outlined the chronology which lead to the hearing as follows:

i. The order appointing the experts was made on 9 July 2014.

ii. The experts were required to answer the questions which the attorneys sought clarification within 28 days of service of such questions.

iii. On 12 November 2014, the Honourable Mr. Justice Fraser varied the order appointing the firm NAI Jamaica Langford & Brown, Commercial Real Estate Services as the appellant/respondent’s attorney, and substituted the firm of Allison Pitter & Co, Chartered Valuator as the Claimants' expert witness.

iv. On 21 January 2015, the learned judge extended the time for the filing and exchange of expert reports to 30 January 2015.

v. Time was also extended to 6 February 2015 for questions to experts to be served.

vi. On 5 February 2015, the respondents filed and served its questions for the Defendant's expert witness.

vii. The appellant's expert filed its answers on 12 February 2015.

viii. They were served on the respondents' attorneys on 15 February 2015, which was the day before the Assessment Hearing.

ix. Four answers from the appellant’s expert were of concern to the respondents.

Discussion

[307] The principle outlined in **Hadmor v Hamilton** [1982] 1 All ER 1042 at page 1046 guides an appellate court in whether to interfere with the decision of a court below. Interference by this court will only be justified in the limited category of cases set out by Lord Diplock in that judgment, at page 1046:

> "It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own."

[308] Lord Fraser of Tullybelton in **G v G** [1985] 2 All ER 225, 229, in pronouncing on the issue on behalf of the House of Lords, expressed the view that "the appellate court should only interfere when it considers that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible".

[309] Rule 32.6 of the CPR is instructive. The rule states:

> "1) No party may call an expert witness or put in an expert witness's report without the court's permission.
>
> 2) The general rule is that the court's permission is to be given at a case management conference.
>
> 3) When a party applies for permission under this rule -
>
> (a) that party must name the expert witness and identify the nature of the expert witness's expertise; and
>
> (b) any permission granted shall be in relation to that expert witness only.
>
> 4) No oral or written expert witness's evidence may be called or put in unless the party wishing to call or put in that evidence has served a report of the evidence which the expert witness intends to give."

[310] The case management conference would have been the proper forum to have requested Mr Neufville's attendance and to have had him deemed an expert. That fact notwithstanding, the judge had the discretion to allow an adjournment in furtherance of the overriding objective.

[311] As pointed out by Mr Leiba in his chronology of events in respect of the orders made in relation to the filing of expert reports, and the filing of questions and answers, the time allotted was indeed very short. But was the learned judge blatantly wrong in not allowing an adjournment? There is no indication that the reason the adjournment was requested was to apply to have Mr Neufville deemed an expert. The complaint is that the adjournment was sought to have him testify. He would therefore not have been able to proffer any opinion. In any event, his report related to aggregates on the

land which the learned judge correctly found was not open and obvious. The learned judge's refusal to adjourn to allow Mr Neufville to testify cannot be regarded as unreasonable in the circumstances.

Could the Blastec Report have stood as an independent report?

The respondents' submissions

[312] It was Mr Leiba's submission on behalf of the respondents that the learned judge erred by failing to appreciate that permission should have been granted to have the Blastec Report admitted without the attendance of Mr Neufville. He said that while the court has the discretion to control evidence at a trial pursuant to rule 29.1 of the CPR, particularly in circumstances where it was necessary to determine which expert's evidence was to be preferred, the alternative option of admitting the Blastec Report without calling the maker remained, in the circumstances, open to the court.

[313] Mr Leiba submitted that upon the refusal of the learned judge to admit the report signed by Mr Neufville, the respondent had enquired as to whether the court would direct a meeting of the experts. The learned judge instead required the attendance of Mr Neufville but refused an application for an adjournment to facilitate his attendance. Mr Leiba submitted that the learned judge should have considered the option of admitting the Blastec Report and directing a meeting of the experts, to avoid substantial prejudice and to serve the interests of justice.

The appellant's submissions

[314] It was Mrs Minott-Phillips' submission that there was no order applied for by the respondents pursuant to rule 32.6 of the CPR that would have warranted the learned judge's permission of the Blastec Report to stand as an independent report, even if it had been relevant to any pleaded issue. The Blastec Report was premised on an assumption of the land being used for specific commercial purposes and it could not have been reasonably required to resolve the proceedings justly. The court, she submitted, is required to restrict the expert evidence to that which is reasonably required to resolve the proceedings justly. In this case, she submitted, the only expert report meeting that criterion was that of DC Tavares & Finson Realty Limited.

Discussion and analysis

[315] The Blastec Report could not stand independently as Mr Neufville, as already noted, was not appointed by the court as an expert pursuant to rule 32 of the CPR. Mr Allison was. Grounds four, five, six and seven of the counter appeal therefore fail.

Whether the prejudicial effect of the Blastec Report outweighed its probative value

[316] Mr Neufville's evidence related to the presence of sand and aggregates and the probable earnings from the mining of sand. Although Mrs Minott-Phillips had recanted from her objection to it being tendered into evidence, the learned judge however rightly disregarded it. Mr Neufville was not deemed an expert.

Ground six of the appeal

Whether the award of damages was too high and were the proper principles applied and the correct report utilized?

The judge's reasons for the award

[317] The learned judge explained his reason for arriving at the figure of US$940,908.80 thus, at paragraphs [31] and [32] of the judgment:

> "[31] In the circumstances and for the reasons stated above I find as a fact that as at the 5th May 2011, the property in question had a true market value of US $1,165,908.80. The Claimants loss of bargain therefore, when the agreement for sale was wrongfully terminated was: US $1,165,908.80 less US $225,000.00 =US $ 940,908.80.
>
> [32] In the result there is judgment for the Claimants against the Defendant for US $940,908.80. The judgment is in the currency of the United States and having heard submissions I award interest at 1% from the 5th May 2011 until today's date. Thereafter interest will run on the judgment in the manner prescribed by law until payment."

[318] The question is whether the learned judge was correct in finding as he did. Was the award of damages too high and were the proper principles applied and the correct report utilized?

The appellant's submissions

[319] It was Mrs Minott-Phillips' submission that there was common ground between the parties that Batts J's assessment of the damages warranted review by this court. Queen's Counsel contended that in the instant case it is clear that the

respondents/cross-appellants have claimed damages on the basis of "expectation loss" or, as stated in the court below, "loss of bargain".

[320] It was Queen's Counsel's further submission that the amount of damages awarded by the learned trial judge was extremely high. It was an erroneous estimate arrived at by the learned judge because of his:

(1) application of wrong principles of law;

(2) failure to apply the relevant legal principles;

(3) regard to irrelevant expert evidence; and

(4) failure to consider the relevant expert evidence.

[321] She directed the court's attention to paragraph [61] of Brooks JA's decision in **Carib Cement Company Limited v Freight Management Limited** [2016] JMCA Civ 2 in which he cited with approval the view expressed by Greer LJ in **Flint v Lovell** [I935] 1 KB 354 which had been earlier adopted by this court in **Robinson and Co v Lawrence** (1969) 11 JLR 450, concerning an appellate court's reluctance to interfere with an award of damages after an assessment hearing by a lower court. Greer LJ, at page 360 had enunciated on the issue thus:

> "I think it right to say that this Court will be disinclined to reverse the finding of a trial judge as to the number of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. 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."

[322] Queen's Counsel pointed out that the respondents in the instant case are also relying on the fact that the learned judge misdirected himself for the reasons set out in their counter-notice of appeal and acted on a wrong principle of law in assessing damages.

[323] She further referred the court to the dictum of Brooks JA in **Carib Cement Company Limited v Freight Management Limited** in which he considered the three options open to an appellate court which holds that a lower court had erred in its award of damages. That is, whether to: 1) refuse any award of damages in the absence of proof of loss; 2) remit the case to the Supreme Court for assessment of damages to be heard de *nova;* or, 3) conduct its own assessment of damages.

The respondents' submission

[324] On behalf of the respondents, Mr Leiba submitted that the proper measure of damages in the circumstances of this case is the respondents' loss of bargain. For this proposition, he relied on Halsbury's Laws of England 5th ed. Volume 29. The respondents' precise loss of bargain, he submitted, is calculated by subtracting the contract price from the market value of the property at the time of the breach.

[325] Counsel submitted that the appellant voluntarily allowed the mortgagor to redeem the property after it had exercised its power of sale through the signing of the sale agreement with the respondents. In consequence, the appellant made itself

incapable of completing the sale. Specific performance could not have been ordered at the date of the purported redemption. The court was therefore correct to find that the date of breach was the applicable date on which damages should be assessed. Counsel also posited that the complaint that the learned judge failed to properly consider the evidence was without merit as the learned trial judge properly considered the relevant expert evidence before him, and he applied the proper principles of law as to the values used to calculate the respondents' loss of bargain.

[326] Counsel postulated that the court was not required to assess whether the ingredients for an award of "consequential loss" or an award of "loss of opportunity to make a profit" were satisfied in this case. Instead, the court assessed the factors that determined the market value of the property, for the purpose of calculating loss of bargain. In so doing, he submitted, the agricultural nature of the land, and the potential of the property for sand mining, particularly in the river bed, were correctly utilized for determining the market value of the property.

[327] He called attention to the evidence of the expert witness who was retained by the appellant, which confirmed that there was potential for mining. The witness' evidence was that if that factor had been considered, it would have led to an increase in his valuation of the property's market value. He argued that for the sole purpose of determining the market value of the property, the knowledge of the appellant at the time of entering into the contract was immaterial. He postulated that outside of the

scope of assessing market value, the court should also award damages for losses that the reasonable man would have realized were likely to result from the breach.

[328] According to Mr Leiba, the court properly found, in its capacity as the tribunal of fact, that the use of the property for sand mining in the riverbed was "open and obvious and known to all". Having regard to the information available to the appellant at the time, counsel submitted, the appellant ought to have realized that loss of that opportunity, was likely to result. Further, there was no requirement for the respondents to have expressly advised the appellant of that intended use, at the time of contracting.

Law and analysis

[329] It is settled law that in determining an appropriate award, the aim is to put the wronged party in the position, as far as it is monetarily possible, he would have been if he had not been wronged. Brooks JA in **Carib Cement Company Limited v Freight Management Limited** stated the two types of loss which could entitle a wronged party to damages. At paragraphs [48] to [49] he states:

> "[48] …The first is called 'expectation loss', that is, the failure to secure the profit that he would have made if, as in a case of contract, the contract had been performed. The second type of loss is called 'reliance loss', that is, the expenditure that the wronged party incurred in preparing, in the case of contract, to perform his end of the bargain. The wronged party is entitled to choose either approach in his claim for damages.
>
> [49] In **Anglia Television Ltd v Reed** [1971] 3 All ER 690, the English Court of Appeal held that a plaintiff was entitled to elect to claim for his wasted expenditure by reason of breach of contract, instead

> of through his loss of profits. The court made it clear that that plaintiff could not claim both types of loss and must elect between them."

Having allowed the mortgagor to redeem the property, the appellant rendered completion of the sale to the respondents impossible. Paragraph 604 of Halsbury's Laws of England 5th edition volume 29, relied on by the respondents, is accepted as a true statement of the applicable principles for the process of assessment of damages upon the vendor's default:

> "Where the vendor of land wrongfully refuses to complete, the measure of damages is the loss incurred by the purchaser as the natural and direct result of the breach, which may be claimed as well as the return of any deposit paid with interest. These damages most commonly include the expenses of investigating title; but may also encompass the expenses within the contemplation of the parties, and consequential losses generally. Loss of the opportunity to make a profit from redevelopment may be compensated in principle but in most case will be too remote in the absence of clear knowledge in the vendor of the purchaser's plans.
>
> In addition, there may be damages for loss of bargain based on the difference between the value and the price of the land (though the award of both wasted expenses and loss of bargain will often be barred on the basis that it would amount to double recovery). Where loss of bargain damages are awarded, the relevant time is the date completion was due; but this is not invariable, and if there is good reason a different date may be taken."

In light of the above the learned judge, in my view, correctly found that the sale agreement was wrongfully terminated by the appellant and correctly assessed the respondents' loss as a loss of bargain.

[330] In the circumstances, he correctly applied the principles of law in his assessment of the damages in seeking to place the respondents in the position they would have been, had the agreement not been terminated in the manner it was. The learned judge found as a fact that the potential for sand mining in the riverbed which passed through the property was open, obvious and known to all. He therefore correctly considered the effect of the value of the income-earning potential of the property as a source of construction aggregates and sand on the market value of the property.

[331] He arrived at the amount of US$940,908.80 by computing the difference between the contract price and the market value of the property as at the date of the breach. His computation is supported by dicta in **Engell v Fitch and Anor** (1869) LR 4 QB 659. In that case the purchaser commenced a claim against the vendors of mortgaged property for their failure to complete a sale agreed between them. The agreement stated that possession would be given on completion of the purchase. The mortgagor refused to give up possession of the property upon the purchaser's requiring possession before completing the purchase, and, though the vendors were in a position to eject the mortgagor, they refused to complete the sale. The ratio expressed in the headnote states:

> "That as the breach of contract arose not from inability of the defendants to make a good title, but from their not having taken the necessary steps to secure possession…the plaintiff was entitled to recover not only his deposit and expenses of investigating the title, but also damages for the loss of his bargain; and that the measure of damages was the difference between the contract price and the value at the time of the breach of contract; and that the profit which

> it was shown the plaintiff could have made on a resale, uncontradicted by other evidence, was evidence of this enhanced value."

There is no reason therefore to disturb the learned judge's award to the respondents. This ground therefore fails.

Grounds eight, nine and 10 of the counter appeal

[332] The issues which emanate from grounds eight and nine of the counter appeal are interrelated as the point in question is whether on a preponderance of probabilities, the land contained sand and aggregates in sufficient quantity to allow for sand mining and whether it was probable that a licence would have been granted for sand mining. These grounds will, therefore be considered together.

[333] Indeed, the view expressed by the learned judge supports conflating these grounds. At paragraph [27] of his decision he said:

> "I do not, however, accept that as part of that assessment evidence of **an income stream from mining on the land itself is permissible. This is because there is no evidence that a license to mine on the land is in existence nor is there any evidence as to the likelihood of such a license being granted. There is moreover no evidence that the Claimants or the Defendant was aware that the property contained aggregates or sand in sufficient quantities below the surface such as to make mining a viable proposition**. In short, there is no evidence before me from which it can be concluded that mining on the land (as distinct from in the river bed) was within the contemplation of the parties at the time the agreement for sale was entered into. I, therefore, pay no regard to a loss of income from mining on the land as pertinent to the value or as a separate and additional

> head of damage. Furthermore, no such claim was pleaded."
> (Emphasis added)

Was the land capable of being mined for sand?

The evidence

[334] Mr Allison's evidence was that there was mining in the riverbed. For the avoidance of doubt, it is necessary to quote:

> "Q: You would also agree with me that the land at Woodleigh has been mined out?
>
> A: Substantially, yes.
>
> Q: Did I use the word substantially? Would you agree with me that your report says that the land has been mined out?
>
> A: The river."

That answer lends itself to the interpretation that Mr Allison was distinquishing between the river which was substantially mined out and the land which was not. Both Mr Allison's and Mr Down's evidence was that a depletion of sand can be replenished by heavy rainfall.

[335] Under cross-examination, Mr Down admitted that in his report he stated the soil type of the property was Agualta Sandy Loam which he testified had sand. It was his evidence that he did not test the depth. He explained that by his statement that "the predominant soil type in 'the general area in the river bed' is Agualta Sandy loam..." he meant there was a mixture of sand and loam. He admitted that he has seen evidence of mining on the property. It was his evidence that the mining of aggregates which he

saw, occurred in "the river which ran across the property". He agreed that the value of the property would increase if sand and aggregates could be mined. He also agreed that his valuation did not include sand mining because it did not appear, he testified, that sand mining was a significant factor. He also considered that the property had been on the market for over 10 years "and there were no takers".

[336] Mr Down accepted that the mortgagor was in possession of a licence to mine in 2004 and 2010. The licence, he said was specific to the riverbed. He was unable to tell whether the existence of the licence would have impacted his valuation. To determine whether it would require research and enquires of licence holders as to any income earned as the value of the land depended on any profit earned. His evidence was that the grant of a licence "may or may not" have impacted his valuation of the property.

The judge's ruling

[337] The following dictum of Greer LJ in **Flint v Lovell** at page 360, cautioning appellate courts concerning their interference with an assessment of damages award by a lower court has been endorsed by this court in **Robinson and Co v Lawrence** (1969) 11 JLR 450 and more recently, by Brooks JA in **Caribbean Cement Company Limited v Freight Management Limited**. At page 360 in **Flint v Lovell**, Greer LJ enunciated:

> "I think it right to say that this Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. 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."

In arriving at his conclusion that it was unlikely that the respondents would have been granted a licence and his rejection of the proposition that mining on the land ought to have been in the minds of the parties as a viable income stream, the learned judge opined as follows at paragraph [27] of his reasons:

> "[27] I do not, however, accept that as part of that assessment evidence of an income stream from mining on the land itself is permissible. This is because there is no evidence that a license to mine on the land is in existence nor is there any evidence as to the likelihood of such a license being granted. There is moreover no evidence that the Claimants or the Defendant was aware that the property contained aggregates or sand in sufficient quantities below the surface such as to make mining a viable proposition. In short, there is no evidence before me from which it can be concluded that mining on the land (as distinct from in the river bed) was within the contemplation of the parties at the time the agreement for sale was entered into. I, therefore, pay no regard to a loss of income from mining on the land as pertinent to the value or as a separate and additional head of damage. Furthermore, no such claim was pleaded."

[338] Mr Allison admitted that his reference to a licence to mine was a reference to a licence to the mortgagor. He admitted that the land had been substantially mined out. He said the area of the river over which there is a licence had been substantially mined

but explained that he was referring to the area of the river over which there was a licence. The following exchange occurred:

> "Question: And by 'mined out' you meant that the supply is exhausted?
>
> Answer: Not completely
>
> Question: It is either mined out or not.
>
> Answer: I did not say that the land was mined out, I said it is at this point in time mined out.
>
> Question: According to your report, your initial visit, and by initial I mean first visit, was on October 31, 2014?
>
> Answer: Yes"

[339] When crossed examined, Mr Down admitted that although he described the land as sandy loam, he had not tested to what depth. He admitted that the Rio Minho runs across the property. He had not measured the width of the river but estimated it at 50 to 200 meters in some areas. He admitted that where sand is depleted it can be replenished by heavy rainfall. The following exchange occurred:

> "Question: You saw evidence of mining on the property?
>
> Objection: Please read the whole sentence. (Read)
>
> Answer: Yes in the river bed the mining license is specific to the Rio Minho river.
>
> Question: You indicated that the river runs across the property?
>
> Answer: Yes.
>
> Question: The mining of aggregate was it in the river bed that ran across the property?

Answer: Yes"

[340] The learned judge explained the reason for his conclusion that there was no evidence as to the likelihood of a grant of licence to mine on the land. In addressing the conflict, the learned judge expressed the view at paragraphs [26], [27] and [29] of his judgment:

> "[26] On the evidence I find as a fact that the potential for sand mining in the river bed which passed through the property was open and obvious and known to all. It was therefore within the contemplation of the parties, or ought reasonably to have been, that the potential use for such activity would positively impact the value of the land. I, therefore, take into account that potential use and agree with the Claimant's expert that it is relevant to and does positively impact the market value of the property.
>
> [27] I do not, however, accept that as part of that assessment evidence of an income stream from mining on the land itself is permissible. This is because there is no evidence that a license to mine on the land is in existence nor is there any evidence as to the likelihood of such a license being granted. There is moreover no evidence that the Claimants or the Defendant was aware that the property contained aggregates or sand in sufficient quantities below the surface such as to make mining a viable proposition. In short, there is no evidence before me from which it can be concluded that mining on the land (as distinct from in the river bed) was within the contemplation of the parties at the time the agreement for sale was entered into. I, therefore, pay no regard to a loss of income from mining on the land as pertinent to the value or as a separate and additional head of damage. Furthermore, no such claim was pleaded.
>
> [29] I find as a fact also that the opinion of Mr. Allison and his report as detailed in Exhibit 5 is the preferable valuation for the purpose of this assessment of damages. Mr. Mervyn Down admitted that his reports of 2014, 2004 and 2010 took no account of possible sand mining in the river bed. Further, that had he done so, all other things being equal, he would

> have given the land a higher value. Mr. Down was not asked to, nor did he, critique the opinion of Mr. Allison."

[341] On both Mr Allison's and Mr Down's evidence, sand mining was observed in the river which flowed over the property. Both observed mining occurring in the river. There was also a consensus between the parties that heavy rainfall replenishes the depleted sand. In fact, there was unchallenged evidence that in 2006**,** heavy rainfall wreaked havoc on the property.

[342] Although the learned judge eventually admitted the Blastec Report into evidence, he deemed it unreliable and placed no reliance on it. His assessment of damages would therefore have been arrived at without regard to the evidence of Mr Neufville who, as aforesaid, was not appointed as an expert. The decisive issue is whether mining on the land was obvious and open.

[343] The presence of sand on the land and its quantity, as indicated by the learned judge was not pleaded and, unlike the mining of sand from the river, there was no evidence before the learned judge that mining from the land was openly and obviously taking place on the land.

[344] The market value of US$1,165,908.80 was arrived at by Mr Allison by having regard to existing use only, that is, agriculture and sand mining from the river. No consideration was given to mining on the land. There is therefore no basis for interfering with the learned judge's finding. These grounds also fail.

[345] In light of the foregoing, I am of the view that the appeal should be dismissed. The learned judge's award of US$940,908.80 with interest of 1% per annum from 5 May 2011 to 20 March 2015 should stand. The respondents' counter appeal should be dismissed. There should be no order as to costs. However, I would agree with the proposal of McDonald-Bishop JA that the parties be allowed to make submissions in writing on the question of costs before the order is made final.

P WILLIAMS JA

[346] I have had the privilege of reading, in draft, the judgments of both my learned sisters. I concur with the conclusion at which they have arrived that both the appeal and the counter-appeal should be dismissed. However, since they have arrived at this conclusion using somewhat different approaches, I am compelled to add a few words as to which most commends itself to me.

[347] I will firstly deal with the preliminary issue relating to the application made by the appellant, Jamaica Redevelopment Foundation Inc ("JRF") at the commencement of the hearing of the appeal to amend its grounds of appeal by adding another ground. McDonald-Bishop JA conducted, what I consider to be, an extremely useful and necessary exercise of seeking to set out the principles that should be applied by the court in considering such an application. Her analysis thereafter of the reasons for rejecting the application is therefore one which accords with the reasons I concurred with the decision to refuse the application.

[348] Further, I was satisfied that the proposed ground had no prospect of success as it could not succeed on allegations of either actual bias, as discussed by Sinclair-Haynes JA, or apparent bias, as discussed by McDonald-Bishop JA.

[349] In relation to the appeal against liability, I am in concurrence that the findings of Batts J that JRF is liable is unimpeachable. To my mind, the more crucial issue to be determined was whether proper notice had been given by JRF, before it purported to cancel the agreement for sale pursuant to special condition 5. Although it may well have been useful for the learned judge to resolve whether there was a breach on the part of the respondents, his failure to do so is not fatal. His explanation for focusing on and dealing with the issue of the proper notice cannot be faulted in the circumstances.

[350] The consideration of the grounds of appeal relative to this issue, against the settled principles governing the approach that an appellate court should take in reviewing the findings of a trial judge, as identified by McDonald-Bishop JA, is to my mind most appropriate. The issue was resolved on the learned judge's findings of fact and on his determination of the disputed clauses of the agreement for sale. I am therefore in agreement with the reasoning of McDonald-Bishop JA.

[351] In relation to the appeal against damages, it is clear that most of the grounds of the appeal as well as the counter appeal were taking issue with the judge's exercise of his discretion as it regarded the conduct of the assessment exercise and the admission of evidence from the expert witnesses. I am in concurrence with the approach by McDonald-Bishop JA. Her analysis and discussion demonstrate more clearly that the

learned judge has not been shown to have erred in law or in fact in the exercise of his discretion. Neither was it demonstrated that his findings of fact in this area was such that ought to be disturbed.

[352] On the issue as to whether the learned judge erred in the awarding of interest I, like McDonald-Bishop JA, agree with the reasons given by Sinclair-Haynes JA in concluding that this ground cannot succeed. There is no basis for interfering with the judge's exercise of his discretion in making the award he did.

[353] Finally, on the matter of costs, I concur with the view that there should be no order as to costs in the appeal or counter notice of appeal, in these circumstances. However, I agree with my sister McDonald-Bishop JA that the parties be given the opportunity, if they wish to make submissions on the matter.

MCDONALD-BISHOP JA

ORDER

i. The appeal is dismissed.

ii. The counter-appeal is dismissed.

iii. There shall be no order as to costs unless the parties, within 21 days of the date hereof, make submissions in writing that a different order be made by the court as to costs.