[2020] JMCA Civ 8

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 62/2010

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**GOODISON MINING COMPANY LIMITED**	**APPELLANT**
AND	**NORANDA BAUXITE LIMITED**	**1ST RESPONDENT**
AND	**NORANDA JAMAICA BAUXITE PARTNERS**	**2ND RESPONDENT**

Christopher Dunkley and Miss Jahyudah Barrett instructed by Phillipson Partners for the appellant

Mr Walter Scott QC and Ms Anna Gracie instructed by Rattray Patterson Rattray for the respondents

5, 6 April 2017 and 31 March 2020

MCDONALD-BISHOP JA

[1] I have read, in draft, the judgment of Edwards JA (Ag). I agree with her reasoning, conclusion and her proposed disposition of the appeal and there is nothing that I could usefully add. I would, however, take the opportunity to apologise for the delay in the delivery of this judgment which is not at all attributable to Edwards JA (Ag).

F WILLIAMS JA

[2] I too have read in draft the judgment of Edwards JA (Ag) and agree with her reasoning and conclusion. There is nothing that I wish to add.

EDWARDS JA (AG)

[3] This is an appeal brought by Goodison Mining Company Limited ("the appellant") against a judgment of B Morrison J (Ag), as he then was, ("the judge"), given on 29 November 2007, after an assessment of damages hearing.

[4] At the conclusion of the hearing, the judge found that the appellant had only proved that it was entitled to the sum of $70,000.00 together with interest at 17% which amounted to $426,400.00. This amount was significantly less than the over $29,000,000.00 it had claimed for special damages and interest for breach of contract.

[5] The appellant was aggrieved by that decision and filed this appeal to have it set aside and for this court to enter judgment in the amount of $182,332,914.79 or such other amount as this court may determine.

[6] The decision of the judge, from which this appeal emanates is in a written judgment reported as **Goodison Mining Co Ltd v Jamaica Bauxite Company, Kaiser Bauxite Company and Kaiser Jamaica Bauxite Company** (unreported), Supreme Court, Jamaica, Claim No 1998/G -185, judgment delivered 29 November 2007.

Background

[7] The appellant is a duly incorporated company and its managing director is Mr Patrick Goodison (“Mr Goodison”). Mr Goodison is also the principal of Goodison Power Techneers Ltd ("GPTL"), of which, more will be said later.

[8] The appellant filed a writ of summons in the Supreme Court against Jamaica Bauxite Company, Kaiser Bauxite Company and Kaiser Jamaica Bauxite Company, the 1st, 2nd and 3rd defendants, respectively ("the original defendants"). That writ was subsequently amended on 10 November 1998. Although the record of appeal provides no explanation, it is apparent, that sometime subsequent to the filing of the notice of appeal, Noranda Bauxite Limited and Noranda Jamaica Bauxite Partners, the 1st and 2nd respondents, respectively ("the respondents") became the successors in title of the original defendants and were substituted as parties to these proceedings.

[9] The parties had entered into several fixed price contracts, whereby, the appellant would conduct mining works at the respondents’ facilities at Discovery Bay, in the parish of Saint Ann. The mining works involved the excavation, loading and hauling of bauxite for the respondents at a fixed rate per tonnage. The contracts were for “progress payments”, where the services were performed and payments made depending on how much bauxite was mined and delivered to the respondents’ stockpile. Payments to the appellant were, therefore, determined by the amount of bauxite it mined in any one month under its existing contract with the respondents.

[10] The agreement between the parties was largely contained in standard contracts which were amended from time to time. The general conditions in the standard contracts were contained in a document headed, "Kaiser Jamaica Bauxite Company General Conditions for Standard Contracts" ("the general conditions for standard contracts"). These general conditions dealt with the scope and quality of the work to be done, the items to be provided by the contractor (the appellant), the right of the owner (the respondents) to conduct inspection, the duties of the owner, suspension of work to be done, termination of the contract as well as wages and working conditions. These general conditions were, therefore, expressly incorporated into every standard contract entered into by the parties.

[11] The evidence reveals that there were five standard contracts between the parties during the years 1991 to 1993 ("the relevant period"). These were standard contract No: 101-1560 dated 2 May 1991; standard contract No: 101-1575 dated 3 July 1992; standard contract No: 101-1590 dated 20 January 1993; standard contract No: 101-1605 dated 16 August 1993; and standard contract No: 101-1610 dated 11 November 1993.

[12] These standard contracts were amended from time to time. Of relevance to these proceedings are the following amendments:

a) Standard contract No: 101-1560 was amended on 29 August 1991, again on 17 October 1991 and thereafter, on 3 February 1992.

b) Standard Contract No: 101-1575 dated 3 July 1992 was amended on 28 August 1992.

c) Standard Contract No: 101-1590 dated 20 January 1993 was amended on 5 August 1993.

d) Standard contract No: 101-1605 dated 16 August 1993 was amended on 11 November 1993.

[13] These amendments, provided for, among other things, increases in the amount of bauxite to be mined and hauled, the maximum sum to be paid out, the rate per tonnage or the haulage rate. Importantly, all of these amendments incorporated or made it clear that all the terms and conditions in the general conditions for standard contracts remained unchanged, except to the extent that they were amended in the document.

[14] Of relevance to these proceedings is clause 14 of the general conditions for standard contracts which dealt with wages and working conditions, which provided as follows:

> "WAGES AND WORKING CONDITIONS: The employment, wages, benefits and working conditions for Jamaica[n] employees shall be strictly in accordance with the current Collective Labour Agreement between Kaiser Jamaica Bauxite Company and the National Workers' Union of Jamaica and shall be strictly observed by any Contractor and/or any subcontractor engaged by him."

[15] On 22 December 1992, the respondents entered into a new Collective Labour Agreement ("CLA") with the University & Allied Workers Union ("UAWU"), which was the union representing their workers at that time. The CLA provided, among other things, for an increase in wages and benefits to their workers, which resulted in increases on some

line items of upwards of 100%. The increases on several of the line items in the CLA were retroactive to June 1992. The appellant asserted that by virtue of clause 14 of the general conditions for standard contracts, the increases agreed to, by the respondents, with its workers, would be automatically applicable to its employees. As a result, it too was obliged to make these increased payments to its employees which led to an unforeseen escalation in its wage bill.

[16] It was the unforeseen increases, and the consequences that it averred had flowed from them, which formed the bases of the claim by the appellant against the respondents in the court below.

The proceedings in the court below and the judge's reasons for decision

[17] On 10 November 1998, the appellant filed a writ of summons against the respondents which was subsequently amended on 18 December 1998, for the recovery of $1,435,006.40 together with interest at the commercial bank rate, as money due and owing for services rendered to the respondents pursuant to standard contract No: 101-1560 and addenda thereto. The appellant also made claims for other special and general damages for breach of contract, interest and costs.

[18] A statement of claim was subsequently filed by the appellant on 21 November 2000. The appellant particularised the bases for the claim at paragraphs 11 – 14 thus:

> "11. In or about the late part of December of 1992 the [respondents] through its servants and/or agents orally through Keith Rowe, Industrial Relations Officer in the presence of Lloyd Johnson, the [appellant's] Chief Administration officer and George Traile the [appellant's]

Chief Accounting Officer and/or by conduct, and/or by inference from the [respondents'] letter to the [appellant], dated May 3, 1993 agreed to vary the Agreement with the [appellant] by increasing the rate of payment thereunder so as to offset the unforeseen escalation in the [appellant's] costs, including but not limited to the cost of labour, without which said amendment the said Agreement between the parties would have been rendered incapable of completion and thereby frustrated.

12. In reliance on the said agreed variation the [appellant] continued to perform the Agreement and pay his employees in terms of the new Collective Labour Agreement and pay for other inputs at the inordinately escalated rate in the process of such performance.

13. In breach of the said varied Agreement the [respondents] refused or neglected to pay to the [appellant] the agreed increased rate, whereby the [appellant] suffered loss and damage.

14. The [respondents] had notice of the [appellant's] financing arrangements with National Commercial Bank and Manufacturers Merchant Bank by virtue of letters of assignment dated May 29, 1991 and February 15, 1991 and respectively delivered by the [appellant] to the [respondents]."

[19] In its statement of claim, the appellant's claim for special damages was varied from its previously filed amended writ of summons and particularised as follows:

"(a) Adjusted rate of income, emoluments and wages between June 1992 – December 1993; $1,700,000.00

(b) loss of profits as a result of failure to pay over for the increased labour rates and escalation for 92 and 93; $10,000,000.00

(c) loss of equipment and interest charges by Mutual Security Bank; $15,500,000.00

(d) interest on loan to NCB @72%; and $ 758,381.98

(e) Penalties and Interest on Taxes

(PAYE 1991, 1992). $ 1,858,171.40

$29,816,553.38

AND THE [APPELLANT] CLAIMS against the [respondents] jointly and severally;

1. The recovery of the sum of $29,816,553.38 for Special Damages.

2. Interest at commercial bank rates.

3. Costs.

4. Such further and other relief as may be deem [sic] just."

[20] The claim for damages for loss of equipment and interest charges related to losses suffered by GPTL, which was not a party to any contract between the appellant and the respondents.

[21] The appellant's statement of claim was supported by, among other things, the witness statement of Mr Goodison dated 5 May 2006, in which the details of the claim and the nature and extent of the losses suffered by the appellant were set out. Mr Goodison asserted that the contract between the appellant and the respondents was partly oral, partly in writing and partly by conduct.

[22] Mr Goodison explained that there was an agreement with the respondents made orally in December 1992 and further by letter dated 6 May 1993, whereby, the respondents agreed to increase the rate of payment under standard contract No: 101-1560, to offset the costs to the appellant of the unforeseen escalation in its wage bill resulting from the CLA.

[23] In August 1993, Mr Goodison wrote to the respondents requesting that they reimburse, as agreed, the increased sums the appellant had to pay its employees, resulting from the right to parity payments in clause 14 of the general conditions for standard contracts and the increase in wages agreed to by the respondents under the CLA with the UAWU. Mr Goodison also wrote to the respondents, outlining a litany of complaints relating to the increase in the appellant's operating cost, with a view to obtaining an increase in the rate being paid to it. The increased operating cost, he said, included increases in the material and parts used, the devaluation in the Jamaican dollar, as well as the increase in wages agreed to by the respondents, which would have taken effect by the time of the first of a series of letters, written by Mr Goodison, to the respondents.

[24] On 13 August 1993, Mr Goodison again wrote to the respondents complaining about, among other things, the losses suffered as a result of the wage increases. A rate increase of 14% was granted to the appellant by way of amendment to standard contract No:101-1590 dated 5 August 1993. Sometime in September 1993, Mr Goodison wrote to the respondents indicating that the rate increase of 14% was insufficient. Between then

and November 1994, Mr Goodison, on behalf of the appellant, continued to request that the respondents reimburse the outstanding sums for retroactive wages, lump sum payments and productivity bonus.

[25] Shortly thereafter, the respondents wrote to Mr Goodison pointing out the appellant's failure to meet its target under the standard contract. The respondents terminated the contract with the appellant in February 1994. Thereafter, the appellant ceased operations. Mr Goodison complained that up to the time of the termination of the contractual arrangement between the appellant and the respondents, the promised increase was never granted.

[26] Mr Goodison also explained that the CLA had a negative effect on the appellant's operating cost and disrupted the relationship with its employees. This, he said, resulted in work stoppages and protests, which, he asserted, hindered the appellant in the performance of its obligations under the agreement with the respondents.

[27] Mr Goodison also deponed that the failure of the respondents to pay the increased wages was the catalyst to several other consequential losses sustained by the appellant. These losses included a loan for which he was personally liable to the National Commercial Bank in the amount of $758,381.98 in respect of a personal guarantee he had signed on behalf of the appellant. Also of relevance, he said, was a lease agreement that GPTL entered into with the Mutual Security Bank ("MSB") in August 1990 for the use of equipment for a 60-month period at a rate of $117,733.30 per month. That equipment was used to carry out works under the contract with the respondent. The termination of

the contract with the respondents, Mr Goodison asserted, resulted in the loss of the equipment, as a result of the failure of GPTL to honour its lease agreement with MSB.

[28] The respondents filed a defence on 28 December 2000 in which they denied the claim. On 29 July 2004, the parties gave their consent for the claim to be referred to dispute resolution before a judge.

[29] On 9 November 2005, the matter came before Campbell J, who made a number of orders and adjourned the mediation sine die. The orders Campbell J made were as follows:

> "1. Mediation adjourned sine die;
>
> 2. Judgment for the [appellant] on the claim for breach of Contract with damages to be assessed;
>
> 3. Dates for Assessment fixed for May 24 and 25, 2006;
>
> 4. Exchange of documents on or before April 3, 2006;
>
> 5. Exchange Witness Statements on or before April 28, 2006;
>
> 6. Agreed Statement of Facts and Issues on or before May 12, 2006. If not agreed, each party to file their own by May 16, 2006;
>
> 7. Each party limited to one expert and expert reports to be exchanged same day as Witness Statements;
>
> 8. Parties agree to use Bank of Jamaica's statistical digest for commercial bank lending rates over the relevant period for determination of interest;
>
> 9. Skeleton arguments on the law seven (7) days before hearing;

10. …"

[30] The assessment of damages hearing, as ordered by Campbell J, was held on 23 and 24 April 2007. At the hearing the judge assessed the several heads of damages claimed by the appellant and gave the judgment and orders which are the subject of this appeal.

[31] In his written reasons for judgment, four issues were outlined by the judge for his consideration as follows:

> "1. What is the full purport and meaning of the current Judgment of 9th November 2005.
>
> 2. Whether the [appellant] is entitled to the adjusted rate of income, emoluments and wages for the period June 2002 to December 2003.
>
> 3. Whether the [appellant] is entitled to loss of profits as a result of the avowed failure by the [respondents] to pay over to them the increased labour rates and escalation for 1992 and 1993.
>
> 4. Whether the [appellant] is entitled to claim for the loss of equipment and/or, the income from it."

[32] The judge found that the appellant had failed to prove that it was entitled to retroactive payments as claimed or that it had made any such payments to its employees. He also found that the appellant had failed to prove that it was entitled to any loss of profits or loss of income from equipment or equipment loss. Additionally, the judge found it significant that the appellant had no independently audited financial statements.

[33] At the outset of his discussion of the claim based on retroactive wages, the judge discussed the relevant law and made the following observation:

> "In the instant case the losses claimed by the [appellant] which must be specifically proved are the claims for retroactivity, wages and profits. Though each was pleaded none was proven."

[34] The judge found that it was the "varied agreement" which had to be determined in order to address the issue of retroactivity. He found that the CLA between the respondents and the UAWU, having been effected in December 1992, with the increases being required to be paid on or around 3 January 1993, and the new standard contract between the appellant and the respondents having been entered into 20 January 1993, the respondents were only liable to the appellant for increase in wages for the period 3 January to 31 January 1993. He also found that the judgment of Campbell J did not specify any duration for retroactivity payments and that the appellant had a duty to prove, on a balance of probabilities, that it was entitled to the sums claimed for retroactive payments. The judge found that it was incumbent on the appellant, in negotiating the new contract with the respondents, to have incorporated all the cost it would have had to bear by way of the increased payments to its workers and ensure the viability and sustainability of its operations.

The appeal

[35] The appellant filed a notice and grounds of appeal challenging a number of findings of fact and law made by the judge. The grounds of appeal were as follows:

> "1. The learned Assessment Judge erred in conducting a trial of the issues without any or any sufficient regard to the fact that the matter before him was an Assessment of Damages.
>
> 2. The Appellant's principal witness gave evidence of losses which were unrefuted.

3. The evidence of the Appellant's expert witness was a review of the documentary evidence of the Appellant's loss and a forecast of the present-day value, neither of which could have been rebutted by the Respondents, who only brought formal witnesses to recite the Respondents' documents.

4. The learned Assessment Judge was not entitled to interpret the parties' contract in the way that he had so as to limit the Appellant's losses contractually on an admission of a breach of contract and for which Judgment was entered by the Honourable Mr. Justice Campbell on the 9th November 2005 with the issue of quantum reserved for assessment."

Issues

[36] This appeal raises, in my view, only two issues for consideration by this court. These are as follows:

i) Whether the judge was wrong to find that there were triable issues raised on the assessment of damages following a consent judgment on liability (grounds one and four); and

ii) Whether the judge was wrong in the approach he took in assessing the damages to be awarded to the appellant, thereby resulting in an erroneous award of damages (grounds two and three).

[37] In analysing these issues which focus substantially on the judge's findings of fact and his determination of whether the respective losses had been sufficiently proven by the appellant, I have taken into account the guidance of the relevant authorities concerning the approach this court should take in reviewing the findings of fact of a trial judge. An appellate court should only intervene in circumstances where it is satisfied that

the trial judge was plainly wrong, formed a wrong opinion or failed to analyse properly the entirety of the evidence before him.

[38] Of relevance too, is the caution given by their Lordships in **Beacon Insurance Company Limited v Maharaj Bookstore Ltd** [2014] UKPC 21 that:

> "...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…"

[39] See also the relatively recent case of **Bahamasair Holdings Ltd (Appellant) v Messier Dowty Inc (Respondent) (Bahamas)** [2018] UKPC 25, as well as the oft-cited decision of **Watt (Or Thomas) v Thomas** [1947] AC 484.

Issue 1- Whether the judge was wrong to find that there were triable issues raised on the assessment of damages following a consent judgment on liability (grounds one and four)

Appellant's submissions

[40] Counsel for the appellant, Mr Christopher Dunkley, submitted that in the light of the fact that there was a consent judgment on liability and, therefore, no defence to the claim, the assessment judge's only duty was to assess the direct and consequential damages incurred by the appellant, as a result of the respondents' breach of contract. Counsel also contended that the judge, despite the consent judgment, proceeded to make findings of fact, which trespassed on the consent judgment, as such facts were settled issues as a matter of law.

[41] One of the findings complained of by counsel was the judge's finding that the appellant had failed to prove that it was entitled to retroactive payments, loss of profits, loss of equipment and/or income from the equipment. The crux of counsel's complaint, is that, as a corollary to this finding, the judge proceeded to list, as an issue to be considered by him, the effect and import of the consent judgment. Counsel argued that this was an unnecessary exercise, as the interpretation of the consent judgment was not in issue nor was it a part of the case for either party at the assessment.

[42] Counsel further contended that the judge failed to consider the fact that the respondents had not paid the agreed increase to the appellant, which resulted in it suffering loss and damage, and that this was the basis of the judgment on liability entered by the court. Counsel argued that the judge erred in treating with issues raised in the defence as triable, when his duty was to assess the damages for which the appellant already had the benefit of a judgment. It was submitted that the judge failed to confine himself to the assessment of damages and went into the issue of liability which had already been settled by the consent judgment.

[43] Counsel argued that the judge's finding, at pages 17 to 18 of his judgment, "flies in the face of the effect in law of a judgment on liability", he having formed an erroneous view of the effect of the consent judgment on the respondents, and, as a result, rejected the heads of damages claimed by the appellant. Counsel submitted that the judge had no jurisdiction to interpret the contract between the parties and that, in so doing, he "negated" the appellant's judgment against the respondents.

[44] Counsel further argued that the judge truncated the window of liability to a shorter period than that contemplated in the consent judgment. The judge, counsel noted, ought to have determined whether damages were proved for each period claimed.

[45] Counsel contended that the judge was not entitled to interpret the contract in order to limit the damages. Counsel submitted that, in relation to the claim before the assessment court, the appellant's evidence was unchallenged and the court was obliged to accept it. That was the claim, counsel said, which was accepted on liability. It was also pointed out that there was evidence of the direct losses suffered as a result of the respondents' breach and that the expert witness for the appellant had established losses amounting to $28,780,572.39, before interest was computed.

[46] Counsel drew this court's attention to the evidence of all the witnesses that were before the court below and submitted that the judge ought to have accepted their evidence, relevant to proof of damages. In particular, counsel submitted that Mr Goodison's unchallenged evidence demonstrated, among other things, that the unreimbursed additional cost of labour between 1992 and 1993, resulting from the new CLA, constituted the admitted breach of the agreement and that this was the basis of the consent order.

Respondents' submissions

[47] Queen's Counsel Mr Walter Scott, on behalf of the respondents, argued that Campbell J had found that there was some variation of the agreement between the parties, and this finding led to judgment being entered for the appellant, with the issue

of quantum reserved for assessment. He argued further that there was no finding by Campbell J regarding the duration of any payments to be made by the respondents as that issue was reserved for the assessment judge.

[48] Queen's Counsel submitted that, based on the time when the defence was filed and its content, no judgment in default had been entered, neither was there any admission of liability. In addition, Campbell J's order did not indicate that judgment was entered for the appellant, following an admission by the respondents.

[49] Mr Scott submitted that the Civil Procedure Rules, 2002 ("the CPR") sets out the procedure to be adopted where there is the entry of a default judgment, an admission of liability or a direction for trial on quantum. Queen's Counsel further argued that the defence filed contained a firm denial of the sums claimed by the appellant; and that what actually occurred was that Campbell J, at a case management conference, made a direction for a trial on the issue of quantum, pursuant to rule16.4(2)(a) of the CPR. Queen's Counsel pointed out that in this case, where there was a direction for trial on quantum, rules 16.2 and 16.3 of the CPR would not be relevant. Queen's Counsel went on further to submit that the learned draftsmen of the CPR clearly intended that the procedures under rules 16.3 and 16.4 of the CPR would differ significantly. This, he said, was apparent from the wording of those particular rules, as well as rule 16.4(3).

[50] Queen's Counsel argued that it was clear from the order made by Campbell J, that he intended for there to be a trial on the issue of quantum and not a default type proceeding in which the evidence given would not be tested by cross-examination. He

further submitted that since the appellant failed to appeal the order made by Campbell J, which prescribed the procedure to be adopted by the assessment judge, it should not be allowed to challenge the procedure adopted at the assessment hearing.

[51] Queen's Counsel also pointed out that although the issue of liability had been determined, not every breach of contract would result in a loss. As such, he said, the appellant was under a duty, at the assessment hearing, to prove, on a balance of probabilities, that it sustained the losses claimed. He relied on the decisions of **Lovell Green v Special Corporal Owen Porter and another** [2015] JMSC Civ 218 and **Marilyn Hamilton v United General Insurance Company Ltd** [2013] JMCC Comm 18 to support his contention that, "he who asserts must prove" and, as such, the appellant had a duty to prove that it suffered damages. Therefore, Queen's Counsel posited, it was open to the assessment judge to make a finding, on the facts, as to whether the damages claimed ought to be awarded.

[52] In the light of this, Queen's Counsel argued that the appellant was required at the trial on quantum to prove the:

i) "unforeseen" escalation in costs it claimed it incurred;

ii) continued performance of the agreement and the payment of its employees in accordance with the new CLA;

iii) payment of other inputs at the "inordinately" escalated rate;

iv) loss and damage suffered as a result of the respondents' breach;

v) notice to the Respondents of the appellant's financing arrangements with National Commercial Bank and Manufacturers Merchant Bank; and

vi) entitlement of the appellant to recover J$29,816,553.38 as special damages.

[53] Queen's Counsel also argued that, as a result, the assessment judge was obliged to look at issues such as causation, foreseeability of damage, mitigation of damage and remoteness, in assessing the question of quantum.

[54] Mr Scott also argued that the assessment judge could not be faulted for "perusing" rule 42 of the CPR, in circumstances where the appellant was alleging that the order made by Campbell J was done by consent. The court was, therefore, entitled to look at who prepared the document, which does not state on its face that it was by consent. Queen's Counsel argued further that based on the decision in **Michael Causwell and another v Dwight Clacken and another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 129/2002, judgment delivered 18 February 2004, in which this court distinguished between the types of judgments and the procedure to be adopted in each such case, the assessment judge needed to satisfy himself as to whether the process was "judge driven" or "party driven". This was necessary, he said, given the fact that the parties had opposing positions as to the nature of the judgment by Campbell J.

[55] Queen's Counsel submitted that it was trite law that, in construing a commercial contract, the court should consider the matrix of facts existing at the time the contract

was made, in order to ascertain the likely intention of the parties. In undertaking that exercise, the court must have regard to "commercial business sense". He cited the decisions in **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 WLR 896, **Reardon Smith Line Ltd v Yngvar Hansen-Tangen** [1976] 1 WLR 989 and **Aedan Earle v National Water Commission** [2014] JMSC Civ 69, to support his arguments.

Analysis

[56] In order to understand the approach taken by the judge, it is necessary to consider how this claim began its life. The claim was filed in 1998, by writ, in the Supreme Court, before the advent of the CPR which came into being in 2002. The matter transitioned under the CPR but, at that time, there were no mediation rules incorporated into the CPR. In 2004, the parties consented to having the matter referred to a judge for a dispute resolution conference.

[57] The matter came up for conference on 9 November 2005, where Campbell J made several orders. Nowhere in those orders does it say it is by or with the consent of the parties. The attorneys-at-law for the parties were present, however, and it is generally agreed that the orders were made with their assent or without objection. This interpretation of what took place, to my mind, seems to follow from the fact that the mediation was adjourned sine die.

[58] The import of Mr Dunkley's submissions on behalf of the appellant is that, having obtained judgment, the assessment was a mere formality, and the appellant was entitled to all it asked for in its claim.

[59] At the assessment hearing, Mr Dunkley argued that the orders of Campbell J were by consent, whereas, counsel for the respondents argued that they had been made by the judge without objection. In the light of the differing posture taken by the respective counsel, one of the issues identified by the judge, for his determination, was the full import of Campbell J's orders.

[60] The judge was concerned that neither party had referred to Part 42 of the CPR, which deals with consent judgments and orders. He noted that rule 42.7(5), which prescribed the format a consent order should take, had not been complied with. Despite this non-compliance, or, perhaps, directly resulting from it, the judge proceeded to examine, "the effect of [the] consent judgment". In explaining what "consent" meant in law, the judge stated that:

> "... Lord Denning, M.R. in **Siebe Gorman Ltd v Pneupac Ltd** [1982] 1 All E.R. at p.377, 380 if I am permitted to paraphrase, had this to say: Consent carries two meanings. Firstly, that the parties are contractually bound by the use of the word "consent". Secondly, that though the parties have agreed with the order of the court they have not done so contractually."

[61] The judge then highlighted each party's approach to the import of Campbell J's judgment, as follows:

> "From Mr. Scott's opening salvo it is clear that he is of the latter view. To quote Mr. Scott: "on the 9th November 2005, the Honourable Mr. Justice Campbell found that there was some variation of the agreement between the parties, and this finding led to judgment being entered for the Claimant and the issue of quantum reserved for assessment, ... there was no finding by the learned judge as to the duration of such payments to be made by the Defendant.
>
> To the above submission Mr. Dunkley offered only token resistance by saying that the Claimant is entitled to judgment without even attempting to garrotte (sic) the legal implications of **Siebe Gorman**, supra. It is on this basis that I therefore proceeded to determine the issue in favour of Mr. Scott's submission."

[62] Referencing the appellant's statement of case and the bases for the claim, the judge observed that it was the appellant's contention that the claim was based on an agreement between agents or servants of the parties, "to vary the agreement by increasing the rate of payment so as to offset the unforeseen escalation in the [appellant's] costs without which the said agreement between the parties would have been rendered inutile. The [appellant] says it attached great reliance on the anticipated variation and as such paid to its employees the new rates pursuant to the 'CLA'". Having made this observation, the judge stated that:

> "... The judgment of the 9th November 2005 lacked specificity as to the duration of the retroactivity, as submitted by the Defendant. However, since it was the contention of 'GMC' that this was so then 'GMC' had a duty, on a balance of probabilities, to establish its claim."

[63] In my view, the issue of whether the order made by Campbell J was one which had been made by the court without objection by the parties, but to which they were not bound contractually, or whether it was a consent order which bound them contractually,

was not an issue joined between the parties at the assessment hearing which required determination by the assessment judge. There was no application to set aside the judgment. The factual situation facing the judge was that there was a judgment on liability and the question of quantum was left for assessment.

[64] It was generally agreed that liability was based on a variation of a standard contract between the parties. There seemed to have been no further agreement and all else was in dispute.

[65] Mr Dunkley's argument that the appellant was entitled to anything it asked for in the claim was, indeed, unsustainable. Otherwise, there would have been no need for an assessment hearing, as Campbell J would simply have awarded the amount claimed. What is clear, is that even if there had been a finding on liability for breach of an agreement to vary a standard contract, the issues of the amount and duration of loss, causation, remoteness of damage and mitigation of damages, were all extant matters for the assessment judge to determine. The maxim, "he who alleges must prove", is also relevant to an assessment of damages.

[66] The argument by counsel for the appellant that the judge truncated the window of liability and found liability for a shorter period than that found by Campbell J, is unsustainable. Campbell J made no findings as to the period for which the respondents were liable on the breach. There was a judgment on liability, which was generally agreed to have resulted from a variation in the standard contract. However, as to the amount of

loss and the period covered by that loss, only the assessment judge could make that determination.

[67] It is also not accurate to say that the judge was not entitled to interpret the contract so as to determine the level of damages. Campbell J gave no written reasons for the entry of judgment on liability, neither did he set out in his order what were the limits of the liability. It was, therefore, necessary for the assessment judge to determine the question of the level of loss sustained by the appellant, including the head of loss and the period of that loss. In doing so, he was not determining the fact of liability, as complained of by counsel for the appellant but rather the extent of the liability, which is relevant in determining the amount of damages to which a claimant is entitled.

[68] Therefore, outside of the unnecessary foray into Part 42 and questions regarding when a consent is not a consent, the judge was entirely correct to embark on whatever assessment of the facts was necessary to decide whether the appellant had proved its losses.

[69] Grounds one and four, therefore, are without merit.

Issue 2- Whether the judge was wrong in the approach he took in assessing the damages to be awarded to the appellant thereby resulting in an erroneous award of damages (grounds two and three).

[70] Having found that the judge was correct to engage in an assessment of the relevant facts in order to determine the amount of damages the appellant would have been entitled to, it is now necessary for me to review whether the approach adopted by him, in doing so, was also correct. I will, therefore, examine the judge's treatment of the

respective heads of losses claimed by the appellant to determine if there is any merit in the complaints set out in these grounds of appeal.

(a) Wages and retroactive payments

Appellant's submissions

[71] Mr Dunkley argued that due to the effect of the parity clause in clause 14 of the general conditions for standard contracts (see paragraph [14] above), the appellant's contract with the respondents was such that it was contractually obliged to meet the retroactive wages of its own workers, on a parity basis with the respondents' workers. Counsel contended that by wrongfully withholding the adjustments in rates which they promised to pay, the respondents not only caused direct damage to the appellant, but also reasonably foreseeable consequential losses.

[72] Counsel pointed out that the unchallenged evidence was that by January 1993, there had been two increases affecting the period. This, he argued, increased the appellant's labour costs by 271%. In the circumstances, the appellant was entitled to an additional payment of $1,435,006.00 and a further sum of $988,296.39 in 1994 in respect of this head of loss. For this, he relied on what he said was the appellant's expert Mr Chambers' unchallenged report.

[73] Counsel concluded that, by departing from the settled position of a judgment in hand, the judge failed to take a proper account of the evidence before the court, which remained substantially unchallenged by the respondents, who offered no independent evidence of their own.

Respondents' submissions

[74] Mr Scott argued that the appellant claimed damages under several heads and that the assessment judge was, therefore, called upon to determine whether any losses suffered were, in fact, caused by the respondents or whether they were as a result of the appellant's bad business practices.

[75] Queen's Counsel also argued that it was noteworthy that although the appellant relied on a letter dated 3 May 1993, to ground its claim of an agreement to vary the contract, this letter was not produced. Instead, a letter dated 6 May 1993 was produced, which spoke to an advance payment to it by the respondents, to be used for lump sum and productivity bonus payments to 14 of its employees. Queen's Counsel pointed out that, under that agreement, the appellant was obligated to repay this sum to the respondents.

[76] In relation to the claim for damages in respect of losses resulting from the increase in wages, Queen's Counsel submitted that the appellant was only required to pay the new wage rates, under its existing contract with the respondents, for the period between 1 January and 31 January 1993. This, he further submitted, was because the new wage agreement with the UAWU was entered into in December 1992. He also pointed out that the new contract between the appellant and the respondents was executed on or around 20 January 1993. Therefore, Queen's Counsel argued, the wage rates in existence between July and December 1992 were the old rates and those rates were the "current rates" required to be paid by the appellant under the standard contract. The new rates were to guide the payments going forward. Queen's Counsel submitted that the increased

wages could not have been paid by the appellant during the period July to December 1992, as they were not yet negotiated and, therefore, could not have affected the appellant's "profit and loss situation" for the year 1992.

[77] Queen's Counsel further submitted that it could be argued that the appellant was making a "secret profit" at the expense of its workers by not paying them the wage rate stipulated. The wage sheet produced by the appellant, it was contended, showed that it was underpaying its workers. It was argued that the appellant would have had to produce documents that, on a balance of probabilities, showed that the increased wages were paid and that this increase was due to it beyond the period stated. It would also be critical, Queen's Counsel argued, to determine when these monies were paid by the appellant, since based on Mr Goodison's evidence they were not paid in 1992. Queen's Counsel pointed out further that there were no accounts for 1993, although the claim covered that period and no evidence that increased wages were paid in 1993.

[78] With respect to retroactivity, Queen's Counsel submitted that based on the standard contract, the appellant was required to pay wages "in accordance with the current CLA". He pointed out further that "the current rates" were the old rates and that the new rates did not come into effect until 3 January 1993.

[79] The retroactive payments, it was argued, at no time represented a term of the agreement between the parties and no evidence was led by the appellant of any history of it being required to make retroactive payments once new "current rates" were agreed. Furthermore, it was contended, the CLA was a contract between the UAWU and the

respondents and there was no proof of the appellant making any payments in relation to retroactive wages. Counsel contended that the presentation of the bill in 1994 "was no more than a means of extortion coupled with an attempt to save the appellant, which was currently indebted to its bank". Queen's Counsel also noted, that of the three former employees who gave evidence, only one reported being paid retroactive payments and he alleged he was paid in the year 1993 and not in the year 1992, as was being claimed by the appellant.

[80] Queen's Counsel contended that the sum being claimed for the wage rates was arrived at by simply using the unaudited profit and loss accounts taken from the payroll sheets, as Mr Chambers, in his evidence-in-chief, did not disclose any reliance on receipts or payroll advice. The lack of credible information from primary source documents available to the expert, the respondents maintained, was a weakness in the report.

[81] It was also submitted that it was not credible to assert that the sum of $1,435,006.40, being retroactive wages, was expended in 1992 when the CLA was not agreed until 22 December 1992 and payments for the new rates were not set to commence until January 1993.

[82] The respondents maintained that the expert's evidence was jaundiced at best and ought to be disregarded by this court, as it was by the judge, since it failed to provide a proper basis for any award to the appellant and was based on a lack of documentary evidence and unaudited financial statements.

[83] It was further submitted that rule 28.14 of the CPR prescribes the consequence for a failure to disclose relevant information to the other side. The consequence prescribed is that the party is unable to rely on the evidence. If this court peruses the notes of evidence of Mr Chambers, it will note that a number of documents were utilised but were either not referred to, in breach of rule 32 of the CPR, or worse, were still not disclosed, in breach of rule 28. In the circumstances, it was argued, it was fitting that the judge paid little weight to or disallowed aspects of the evidence of this expert.

[84] Queen's Counsel also drew this court's attention to the entire agreement clause in the contract which stated that, "[t]his Contract, ...constitute[s] the entire agreement between the parties and supersedes all prior negotiations and proposals, whether written or oral", as well as the principle stated in **Ravennavi Spa v New Century Shipbuilding Company Limited** [2006] EWHC 733 (Comm), to rebut the appellant's reliance on Mr Goodison's evidence in examination-in-chief that oral discussions, prior to the contract being signed, formed a part of the entire agreement with the parties.

[85] Queen's Counsel submitted further that, given the principles in **Robinson v Harman** [1843 – 1860] All ER Rep 383 at 385 and **Hadley and another v Baxendale and others** [1843 – 1860] All ER Rep 461, the judge was correct to decline to make any award on account of the alleged retroactive wages and to solely make a payment in respect of 14 workers for four weeks in January 1993, as during that period the costs to the appellant would have been unforeseen and inordinately escalated.

Analysis

[86] The judge identified as an issue for his determination the question of whether the appellant was entitled to the adjusted rate of income, emoluments and wages for the period 1992 to December 1993. To make that determination, the judge made a number of findings in relation to the agreement between the parties and the addenda signed to amend the standard contract.

[87] The judge found that the information in Mr Goodison's witness statement in relation to the oral agreement to vary the standard contract was insufficient because he was not present at the time this agreement was supposed to have been made and none of the persons who were said to be present gave evidence. He also found that the respondents made an advance to the appellant in the amount of $209,000.00 in respect of lump sum and productivity bonus payments for 14 employees, with the understanding that this sum would be deducted from monies to be paid to the appellant. He went on to find that, from the "extant record", the appellant had 14 employees.

[88] In relation to the appellant's request made in August 1993, the judge found that:

> "Mr. Patrick Goodison on behalf of [the appellant] by letter dated 2nd August 1993 requested of [the respondents] an increase of the mining rates pursuant to the increased rates to be paid to his employees of which he claimed to have been, "lately apprised". This I think is the clincher. This is the Rosetta Stone in resolving the issues as to retroactivity.
>
> Accordingly, [the respondents] increased the mining rates by virtue of contract dated 5th August 1993. The negotiated rates increased by 14%, - which [the appellant] rebuffed by saying that the increase was not enough."

[89] The judge went on to note that the appellant wrote to the respondents, on two occasions, demanding repayment of the sum of $1,700,000.00 which it claimed represented the increases paid to its workers. There was no response from the respondents to these demands and the appellant later presented an invoice by way of letter dated 9 November 1994, demanding the sum of $1,435,006.40 for retroactive wages, lump sum payments and productivity bonus. This demand also was not met.

[90] The judge then referred to the claim filed by the appellant and noted that it had been amended to include wage costs associated with the increase in wages granted and that the amount claimed was now $2,423,302.39.

[91] This is how the judge dealt with the claim for reimbursement for retroactive wages paid:

> "It was submitted by the [respondents] that as there is no evidence before the Court that [the appellant] had entered directly into any 'CLA' with the union apart from the obligation to pay the increased wages based on the contract between the parties there was no other obligation on the [appellant]. Further, as the payment of the retroactive rates did not form a part of the contractual obligations of the [appellant] it cannot recover those sums from [the respondents]. For the stated reasons above I am in agreement with the [respondents'] submission."

[92] The judge discussed the appellant's and the respondents' position and stated thus:

> "In the resolution of this matter, having regard to the claim as filed and the defence thereto I took recourse to the judgment as entered by Campbell, J for its purport and effect. The order made in general terms is as hereunder:

> '[J]udgment for the [appellant] on the claim for breach of contract with damages to be assessed'."

[93] With respect to the evidence presented by the appellant in respect of this head of loss, the learned judge concluded that:

> "... [I]t is this 'varied agreement' that must be determined in order to address this matter of retroactivity. Having regard to the date of the 'CLA' being 22nd December, 1992 wherein it was stipulated that the increased rates were to commence on or around 3rd January 1993 and when looked at in the light of a further mining agreement between the parties on 20th January 1993 it is clear to me that the payment due from the [respondents] is confined to the interval between 3rd January 1993 and the 31st January 1993 in respect of the latter date on which [the appellant] received its first payment for [the respondents]."

[94] He also went on to say this:

> "To reiterate, this Court finds that the [respondents] are liable for damages in respect of the four-week period, that is, from January 1, 1993 to January 31, 1993. However, I accepted that the best evidence is the extant record of the number of employees in the [appellants'] employ as opposed to the viva voce evidence of the [appellants'] witnesses ..."

[95] He then examined both clause one, which was the entire agreement clause, and clause 14, which was the parity clause, in the General Conditions for Standard Contracts and concluded that:

> "...[I]t was incumbent on [the appellant] when negotiating its new contractual terms with [the respondents] to incorporate therein costs it would have to bear by way of retroactive payments to its workers in order to ensure viability and feasibility of its operations. In relation to the above I accepted the submission of the [respondents] that the [respondents] would be responsible for the payment of the increase in the

> wages relative to the period under reference. Thereafter, it would become the [appellant's] responsibility."

[96] In support of his conclusion, the judge referred to the fact that there was no evidence that the appellant was a party to the CLA with the UAWU; so, apart from the obligation to pay the increased wages undertaken by the respondents and the appellant's obligation pursuant to the standard contract, there was no obligation for the respondents to pay the retroactive wages.

[97] The learned judge then said:

> "...To buttress this, I need only refer to an amendment to the Standard Contract between the parties. In the body of this I find these lucid words: 'By this amendment contractor and owner I [sic] agree that the increases or decreases in the contract price set forth above cover all claims they may have for all work done or expense of every nature required to be performed, incurred or omitted under this amendment': See Contract of January 20, 1993 between the parties. I find that the above facts confess themselves to the unsustainability of the [appellant's] bland submissions that the question of, 'no contractual obligation to pay retroactive wages is not the issue' is, in fact, the issue. Thus, I hold that it was a signal failure on the part of the [appellant's] Managing Director not to have negotiated 'claims they may have for all work done or expense of every nature required to be performed, incurred or omitted under this agreement.'"

[98] In relation to the claim for the increased wages paid to the appellant's workers as a result of the new CLA, the judge assessed the evidence presented and observed:

> "In attempting to prove its case [the appellant] were [sic] obliged to produce the best evidence of which it was capable in order to demonstrate that the increased wages were in fact paid and when. Not only that. What of the accounting records for 1993, asks the [respondents], seeing that, if the new rates were paid this was not done in 1992 but presumably in 1993?"

[99] The judge went on to hold:

> "The retroactive payment at no time became a term of the agreement between the [appellant] and the [respondents]. That is so obvious as [the appellant] was obliged to pay its workers, wages in accordance with the 'current' CLA between [the respondents] and 'UAWU' for the contract period of the successor agreement of January 1993. 'Current', in this context, inevitably means the old rate in contrast to the new rate as renegotiated and agreed by the parties in January 1993. The new CLA was a contact between [the respondents] and the 'UAWU' to which [the appellant] was not a party. Thus, any payments, if made by [the appellant] to its workers were not recoverable from [the respondents] all the more so as there is no proof that this was done, says the [respondents] and, further, as no averment is made by [the appellant] as to when and how it was paid. This submission I also accept as incontrovertible."

[100] The judge then referred to, and quoted in full, a letter dated 6 May 1993, which referred to an advance to the appellant to facilitate its payment of, among other things, lump sum and productivity bonus to 14 employees, signed by the appellant's managing director, and commented that:

> "...On this evidence alone the [appellant's] case is irredeemable and is further proof that the [appellant] is untrustworthy.
>
> In summary I accept [the respondents'] counsel methodology in arriving at the final figure."

[101] On page 31 of his judgment, the learned judge concluded that based on his calculations the appellant was entitled to judgment in the sum of $70,000.00 with interest which brought the amount awarded to the grand sum of $496,400.00.

[102] It seems to me that, on the evidence, there was a general agreement made in or about December 1992 that the current standard contract would be varied to take account of the increases resulting from the CLA between the UAWU and the respondents entered into in December 1992. That could have been the only variation which Campbell J found, thus resulting in his entry of judgment on liability.

[103] Standard contract 101-1560 was last amended in February 1992. Standard contract 1575 was effected on 2 July 1992 and amended on 28 August 1992. It seems to me that, despite Mr Goodison's claim that the contract which was varied was 101-1560, it was more likely that it was standard contract 101-1575. Nothing really turns on this however, as it is clear that the variation was to the contract in existence in 1992 before the CLA was executed in December 1992. A new standard contract 101-1590 was executed by the parties on 20 January 1993, after the CLA was already signed. Therefore, by that time, the CLA was no longer "unforeseen". There was evidence that Mr Goodison was aware of the CLA. What the judge seemed to have found insufficient in Mr Goodison's evidence, was the actual terms of the variation in the contract with regards to the actual payment; that is, how much and for how long.

[104] It seems to me that there was sufficient evidence, from both sides, that the agreement was for a payment of sums to cover the increased cost in wages and benefits, attendant on the CLA, which payment by the appellant was rendered necessary by virtue of the parity clause. The effective period of the CLA was January 1993 with some items retroactive to June 1992. The standard contract being varied between the parties was

the existing contract, that is, that which was amended in August 1992, before the CLA was executed (based on the contemporaneous documents that appears to be 101-1575 executed on 2 July 1992 and amended on 28 August 1992). That contract expired in January 1993. It means, therefore, that the agreement to vary the payments to the appellant to cover the unforeseen increases in the cost of wages and benefits attendant on the CLA must include all wage and benefit payments that the respondents were obliged to pay their employees under the CLA. This is because, if the respondents were obliged to pay, then under the parity clause, the appellant was also obliged to pay its employees the same.

[105] I find, therefore, that on the question of damages for breach of the agreement to vary an existing contract in order to compensate for increased labour costs, it was necessary for the assessment judge to determine the amount and duration of the appellant's losses.

[106] In order to determine the question whether the loss included the payment of retroactive wages and benefits, it was necessary to determine firstly, whether the appellant was liable to pay retroactive wages and benefits, and secondly, whether they were indeed paid by the appellant.

[107] As a result of the CLA, the respondents were not only obliged to pay their workers the new wages and benefits which came into effect from January 1993 but also those that took effect from June and November 1992. Those increases which took effect from June and November 1992 were of retroactive effect because those periods were in the

past, but it did not mean that there was any less liability to pay them because, pursuant to the CLA, those were the wages which the workers were entitled to receive.

[108] The respondents deny that contractors were required to pay retroactive rates. In the witness statement of Nelson Barton filed on 8 November 2006 in response to the claim, he avers that all contractors were required to pay existing rates, "until new rates came into effect". It is my view that the respondents' argument that the appellant was not obliged to pay retroactive sums is unsustainable, in light of the fact that, apart from the parity clause, the appellant's workers were also members of the same union as the respondents' employees.

[109] If the new rates the contractor was obliged to pay took effect retroactively, would the contractor not be required to pay those rates as per the terms of the CLA and the parity clause? It seems logical, to my mind, that in order to achieve parity, if the respondents' workers were entitled to those retroactive payments, representing increases on their old salary and benefits, then so too were the appellant's employees. The appellant was, therefore, obliged to pay its workers the same under the parity clause. It is clear to me, therefore, that any agreement between the respondents and the appellant to offset the costs of labour would include the unforeseen increases in the costs of wages from July 1992 to the end of the period of the existing standard contract. The standard contract which was varied ended January 1993.

[110] The respondents claim that there was an oral contract to pay an additional sum to the appellant to compensate for wage payments when the new rate (basic rate of wages)

came into effect up to when the contract ended, that is, solely for January 1993. Mr Goodison, in his witness statement, states that the agreement to pay the increases in the rate to offset the unforeseen expenses was made orally in late December 1992, and in writing in May 1993, although no evidence of this May written agreement was put forward. This is the oral variation to its standard contract the appellant claimed was breached.

[111] In such a case, based on the respondents' arguments, which were accepted by the judge, the variation would only cover the period 3 January to 20 January 1993. That period covered the effective start of the new wage period and the ending of the appellant's existing standard contract with the respondents. The judge extended the period to 30 January 1993, because that was when the appellant received the first payment under its new standard contract with the respondents.

[112] The judge clearly accepted the respondents' position that the period of the loss should be limited to January 1993 on the basis that the appellant was only obliged to pay, at parity rates, the current new wages for that period, but not the retroactive figures going back to July 1992. In doing so, to my mind, he fell into error.

[113] Lump sum payments under the CLA were retroactive to June 1992, employer's contributions to the savings plan were retroactive to June 1992 and productivity bonus payments were retroactive to November 1992. The appellant was obliged to make these payments under its parity clause. The appellant claims to have made these payments to its staff. There was an agreement to compensate it for the unforeseen escalation in these

costs. They were unforeseen for the exact reason that when it was negotiating the rates under the old contract, it could not have foreseen that its wage bill for that period would have been increased due to the retroactive payments for increases in wages extending to periods under the old contract. There was, therefore, no basis upon which to limit the agreement to vary the existing contract to compensate for the unforeseen increases in wage rates to a period from 1 January to 30 January 1993 and not to include the period for which the relevant retroactive payments were to be made. There is nothing in the general conditions or in the terms of the standard contract which limits the parity clause in the manner suggested by the respondents and adopted by the judge. The judge, therefore, erred in this regard.

[114] However, where the oral variation was made to the existing contract, then it could only have been valid for the period of that contract. The appellant would have been required to negotiate the costs of labour in its new contract. The new contract commenced on 20 January 1993. By this time, the CLA was already in place. The appellant would have been expected to negotiate, thereafter, a rate sufficient to cover the costs of labour from thenceforth, in that new contract. It is unlikely that the parties would have agreed to vary an old contract to also cover a period for which a new contract was to be agreed and there is no evidence that they did so.

[115] I agree with the respondents that the judge was correct to find that they are not liable for any period after January 1993, for the simple reason that if the existing contract which was varied came to an end in January 1993, then so did the variation to that

contract, as the variation did not extend the contract beyond the relevant contract period. It was also not an independent collateral contract, which could have extended beyond the contractual period and it was never treated as such by the parties. I should also state for good measure that it was also clear from the posture and submissions by the parties that the existence of a collateral contract was not the basis of the judgment on liability.

[116] I also agree with the submission of the respondents that the appellant had the power to negotiate its contract going forward from the new CLA. It did so on 20 January 1993, a month after the CLA was entered into. There is evidence that the appellant was given rate increases of up to 17% in 1993. There were, at least, two other standard contracts and addenda thereto in 1993. It is expected that the appellant would have negotiated and agreed a rate increase sufficient to honour its obligations, including wage increases, and to make a profit under these contracts. The letter dated 6 May 1993, granting an advance to the appellant, shows that the appellant was responsible for the wage bill under the new contract and Mr Goodison accepted (by his signed endorsement of the terms on the letter) that this was so. He cannot now claim otherwise.

[117] That being said, the only remaining question is how much the appellant is entitled to under this head of damages. Troubling to me, in this regard, is the fact that the wage claim made by the appellant does not match the evidence presented by Mr Goodison at the assessment hearing. The appellant's claim is for increased wages and productivity and lump sum payments for 32 employees. The appellant's records show it calculated lump sum payments and productivity bonuses for 34 employees. However, its weekly

wage payment calculations for the period under review reflect calculations for a fluctuating number of employees, the maximum of which was 23.

[118] The appellant relied heavily on the expert report of Mr Douglas Chambers, a chartered accountant. Mr Chambers was a fellow member of The Chartered Association of Certified Accountants of the United Kingdom, a fellow member of The Institute of Chartered Accountants of Jamaica, a member of the Public Accountancy Board of Jamaica and an associate member of The Association of Certified Fraud Examiners of the United States. At the time of the report, he had 17 years' experience as a chartered accountant and was the senior partner at Chambers Henry & Partners (Chartered Accountants). However, the report of Mr Chambers was heavily criticised by the respondents, who cited several deficiencies in it.

[119] In his written report to the court, Mr Chambers indicated that his instruction was to provide:

> "An estimate on the loss incurred by [the appellant] due to the non receipt of wage increases from [the respondents], the liability for which was admitted to by the appellant by virtue of the consent judgment against [the respondents]."

[120] Mr Chambers explained that, based on actual amounts paid to the appellant's employees during 1992, an additional amount of $1,435,006.40 should have been reimbursed by the respondents. He also indicated that in 1993 an additional amount of $988,296.39 was paid to staff because of additional increases and should have been reimbursed. Although the expert mentioned looking at payroll sheets, his evidence is that

he saw no payslips, receipts or cheques and he failed to indicate what documents he examined to conclude that the sums indicated were paid to employees.

[121] I have examined the evidence, as culled from the documents presented by the appellant at the assessment hearing. In respect of the number of employees on the payroll, as I have summarised it, that evidence shows the following:

> *"Schedule of retroactive, lump sum and productivity bonus"*
>
> July to December 1992 productivity bonus chart - 34 workers
>
> Lump sum chart - 34 workers
>
> Retroactive wages for 32 employees July – December 1992 (chart showing 34 workers)
>
> *"Payroll sheets 1992"*

Week ending	12/7/92	-	20 workers
Week ending	28/7/92	-	19 workers
Week ending	9/8/92	-	17 workers
Week ending	23/8/92	-	21 workers
Week ending	8/9/92	-	22 workers
Week ending	20/9/92	-	23 workers

Week ending	4/10/92	-	23 workers
Week ending	18/10/92	-	22 workers
Week ending	1/11/92	-	22 workers
Week ending	15/11/92	-	23 workers
Week ending	18/12/92	-	22 workers
Week ending	27/12/92	-	22 workers
Week ending	3/1/93	-	20 workers

"*Payroll Sheets 1993*":

Week ending	17/1/93	-	22 workers
Week ending	31/1/93	-	22 workers
Week ending	14/2/93	-	15 workers
Week ending	28/2/93	-	16 workers
Week ending	14/3/93	-	15 workers
Week ending	28/3/93	-	14 workers
Week ending	11/4/93	-	15 workers

Week ending	25/4/93	-	14 workers
Week ending	23/5/93	-	7 workers
Week ending	6/6/93	-	8 workers
Week ending	20/6/93	-	7 workers
Week ending	4/7/93	-	8 workers
Week ending	18/7/93	-	9 workers
Week ending	1/8/93	-	8 workers
Week ending	15/8/93	-	7 workers
Week ending	29/8/93	-	9 workers
Week ending	12/9/93	-	8 workers
Week ending	26/9/93	-	8 workers
Week ending	10/10/93	-	8 workers
Week ending	24/10/93	-	9 workers
Week ending	7/11/93	-	10 workers
Week ending	21/11/93	-	10 workers
Week ending	5/12/93	-	10 workers

Week ending	19/12/93	-	10 workers
Week ending	20/12/ - 31/12/93	-	10 workers

[122] Having painstakingly trolled through the numerous payroll sheets for the end of each week, as shown in the summary listing I have made above, it is clear that there is no evidence that the appellant, at any time during the relevant period, had on its payroll 34 workers. If it did not have 34 workers on the payroll, it could not have paid 34 workers. Neither did it have 32 workers on the payroll at any time during the period.

[123] The appellant presented payroll sheets calculations showing payments due to its employees at the start of the contract period. Although the calculations for lump sum payments, and productivity payments showed calculations for 34 workers and the claim was for 32 workers, at no time, according to the appellant's own records, which it tendered into evidence at the assessment hearing, did it have 34 or 32 employees on its payroll, during the relevant period. In my view, therefore, the appellant is not entitled to be paid the amount it claimed for retroactive sums for 32 workers, as there is no proof it had 32 workers during the period claimed.

[124] One thing is clear, and that is that no increased wage payments were made in 1992, the CLA having been effected in December 1992. If payments were made at all, it would necessarily have been made in 1993 for the retroactive sums due from June 1992 as per the terms of the CLA. Mr Goodison's evidence in this regard is unreliable. On the one hand, he claims there was work disruption because he was unable to pay and workers

were being disruptive, on the other hand, the evidence from the UAWU and workers is that there was no disruption caused by non-payment. The only clear evidence from which an inference can be drawn that payments were made is from the letter of 6 May 1993, where the advance to meet the payments to 14 employees was made, and from the four employees who gave evidence that they were paid. The request for sums to pay productivity bonuses to 14 employees is not surprising, since the appellant's own records show that by the week ending 25 April 1993, it only had 14 employees on the payroll. The witness statements from the employees who gave evidence, simply stated they were paid back wages in full. Only one said he was paid in 1993.

[125] The judge, therefore, could not be faulted for finding that, because an advance payment was made to the appellant by the respondents in May 1993 for 14 employees, the appellant had only 14 employees. It is clear too that the appellant at that time felt itself obligated to pay only 14 employees. The evidence, however, shows that the number of employees on the payroll fluctuated over the relevant period in 1992 from a minimum of 17 to a maximum of 23. In my view, based on the parity clause and the fact that the appellant's workers were members of the same union as the respondents' workers, they would all be entitled to some retroactive payment.

[126] I think it bears repeating here that the claim was for direct losses on adjusted rate of income, emoluments and wages between July 1992 and December 1993. This period of the claim is unsustainable as the contract which was breached was a variation of an existing contract which ended in December 1992. A new contract period began 20

January 1993 with the first payment out on that contract having been made 30 January 1993. The wage bill, which would be applicable to the variation of the contract, is for the period July 1992 to the date of the new contract January 1993.

[127] The evidence of Mr Goodison was unreliable regarding the number of workers and the contracts with the respondents. He claimed to have paid increased wages to 32 workers between 1992-1993, but his own evidence showed that at no time during the relevant period did he ever have 32 workers to whom wages were paid. In January 1993, the appellant had only 22 workers on the payroll and, in any event, by December 1993 it only had 10 workers on the payroll. The appellant's claim for reimbursement for increases paid to 32 workers, therefore, seems to have been contrived.

[128] The question of whether the appellant had paid the retroactive payments was raised by the fact that, in the claim, it was indicated that workers were restive, having not received payments. If this is true, it means that the workers were not paid retroactive payments due in 1992, nor, perhaps, the increases due in 1993. The letter of 6 May 1993 indicates that the respondents advanced $209,000.00 to the appellant to make lump sum and productivity bonus payments to 14 employees. This would have been in regard to the appellant’s obligations under its new contract with the respondents. The advance terms were accepted by Mr Goodison.

[129] The respondents were obligated under the varied agreement to reimburse the appellant for the costs of the increases from July 1992 to January 1993 only. On a balance of probabilities, based on the evidence of the union and the former employees who gave

evidence, retroactive payments were likely made in 1993. The average number of workers to whom retroactive payments were due for the period July 1992 to January 1993 (based on the payroll sheets for the period), I would safely say, doing the best I can in the circumstances, would have been 22. The respondent is, therefore, liable to reimburse the appellant for 22 workers for retroactive payments.

[130] Both Mr Goodison's and Mr Chambers' evidence is that the appellant is entitled to $1,435,006.00 as reimbursement for retroactive payments for 32 employees. Although the respondents have challenged the fact that his report is based on undisclosed documentation and have been critical of the unaudited financials upon which it is based, there is no challenge to Mr Chambers' mathematical computations, so I will accept that his computations are correct. All that the respondent has complained of with regard to the unaudited financials is true, but it does not deflect from the fact that the appellant is entitled to some compensation. Four former employees of the appellant gave evidence that they were paid and that there were no disruptions as a result of non-payment. I have no reason to believe they would have given evidence against their own self-interest.

[131] The actual payroll sheets were before the judge and were examined and used by Mr Chambers in his computations and I have no reason to reject them. However, having rejected that the appellant ever had 32 employees on its payroll during the relevant period of retroactivity, I must, of necessity, make the adjustment to the figure given by Mr Chambers to more accurately reflect the true picture. Therefore, I will divide the $1,435,006.00 Mr Chambers put forward in his report, by 32, which results in $44,843.94

per employee. When that figure is multiplied by 22 the resulting figure rounds off to $986,600. 00. That is the sum for which the respondents are liable to pay the appellant, plus interest, for reimbursement for retroactive payments made.

[132] The claim for increases paid on wages after the new standard contract in January 1993, seems to be predicated on the notion that there was some general agreement to compensate the appellant (other than the variation in the existing standard contract as amended in 1992 which was the subject of the breach and Campbell J's judgment on liability). The claim for such a payment would not be based on the variation of an existing standard contract, as amended in 1992, but seems to be based on a separate independent contract. There is no evidence that such a separate independent contract existed. Certainly, the judgment on liability was not made on that basis. Therefore, the appellant cannot rely on the variation of an existing standard contract, the subject of the breach, in respect of which Campbell J entered judgment on liability, to claim damages under the operation of a new contract going forward into 1993 and 1994. In any event, there was no evidence put forward by the appellant of this contract to reimburse for increased wages for the period 1993 to 1994.

[133] To determine the amount to be awarded for January 1993, doing the best I can, I will use the figure of $988,296.39, which Mr Chambers reported was paid for increases in wages for 1993 and divide that by 12 to get the monthly figure. This amounted to $82,358.03. I will then divide that number by 32, to get the sum payable to a single employee, since the claim is that the payment was made to 32 workers and Mr Chambers'

computation was based on 32 workers. That figure came out at $2,573.68 per employee, which when multiplied by 22 employees equates to $56,621.00 for increased wages for January 1993 alone.

(b) Loss of profits

Appellant's submissions

[134] Mr Dunkley argued that Mr Goodison's evidence was that it was expected that the appellant would make a net profit of at least 20%. Counsel also referred to the documentary evidence presented by the appellant through Mr Chambers, noting that it was the best evidence in support of the claim for loss of profits and, as it was also unchallenged, should have been accepted, on a balance of probabilities. Counsel also pointed out that Mr Goodison was unshaken by cross-examination on this aspect of the claim.

Respondents' submissions

[135] Queen's Counsel Mr Scott, argued that in a claim for breach of contract, in order to recover for loss of profits, the appellant would have had to provide the judge with a rational basis to calculate loss of profits and this must be shown with reasonable certainty and with a reasonable degree of precision. In addition, Queen's Counsel submitted that a contracting party is not guaranteed a profit. The appellant, he said, carried the burden of proving the amount of its damages with reasonable certainty.

[136] Queen's Counsel pointed out that the judge had conducted a review of the documentation provided to determine whether the respondents' failure to pay the

increased wages contributed to the appellant's economic loss-making position, or whether it's business was erected on such a tenuous foundation that circumstances beyond its control, and over which the respondents had no legal obligation, conspired to make the business unprofitable. Queen's Counsel submitted that speculative profits of a new business enterprise are not recoverable, especially in circumstances where there is no data before the court regarding the history of the company.

[137] Queen's Counsel also submitted that the appellant entered into fixed price contracts with the respondents and as a result it was exposed to a number of economic factors, including inflation. Further, during the lifetime of the contract, the appellant's expenditure was varying, in circumstances where its revenue was fixed. A trial judge nor a lawsuit, he argued, should not compensate a businessman for a bad deal into which he voluntarily entered.

[138] Queen's Counsel submitted further that the judge was also entitled to take judicial notice of the extraordinary inflation and the devaluation of the Jamaican dollar, when assessing Mr Goodison's oral evidence, along with the unaudited financials, which were provided. Also, that a fixed-price contract, in the then Jamaican scenario, amounted to commercial suicide and was sufficient to account for the losses, if any, sustained by the appellant.

[139] It was also submitted that, since Mr Goodison's evidence was that the increased wages were not paid in 1992, this factor could not have affected the profit and loss account of the appellant for that period. Additionally, it was pointed out that the appellant

had failed to provide any audited financial statements or any financial statements at all for the year 1993, thus, the learned judge, and this court, would not be able to make an accurate assessment as to whether the increased wages paid 1 January to 31 January 1993, had any adverse impact on the appellant's business in 1993.

[140] Queen's Counsel argued further that due to the unaudited nature of the accounts provided; the fact that no accounts were presented for the year ending 1993, which was the applicable year for the purposes of this matter; and the prevailing economic factors, the learned judge was correct to decline to make any award under this head of damage. This is so, he maintained, notwithstanding the evidence of Mr Goodison, which if accepted, would be wholly self-serving. Queen's Counsel asked this court to note that the contract in 1992 was only from May to December 1992 yet the appellant had tendered accounts for the entire 12 months of 1992.

[141] Counsel also argued that there would be double counting if the appellant were to receive the wage rates as well as the claim for profit. Further, that Mr Chambers under cross-examination stated that where retroactive pay is equal to profit, to get interest on these sums would be double counting. The respondent also submitted that the calculation of the "profits" under the contract is fatally flawed as it failed to consider the revenue made during the period 1992 to 1994 to determine whether or not a profit would have been made.

[142] Queen's Counsel also pointed out that the unaudited profit and loss account presented by the appellant for the year 1992, was unsafe and there was no satisfactory

explanation, accompanying the accounts, for the increases in respect of equipment rental, repairs, maintenance, bank charges and equipment expenses. Queen's Counsel pointed out that the appellant's primary witness, Mr Goodison, had provided no documentary proof of any equipment rental paid to GPTL or any equipment rental income accruing to GPTL. Queen's Counsel submitted that having regard to the contradictory nature of Mr Goodison's own evidence, the judge was correct to decline to make an award for loss of profit.

Analysis

[143] The claim under this head of damages, was for a minimum loss of profits of $1,707,226.00 (kept at that constant rate for the years 1992 and 1993 by the appellant's expert Mr Chambers) with interest.

[144] In relation to the claim for loss of profits, the judge noted that the appellant had claimed loss of profit as a result of the respondents' failure to pay over the increase labour rates and escalation for 1992 and 1993, totalling $3,414,452.00, and a claim for loss of equipment and/or income therefrom amounting to $22,942,818.00. The learned judge examined the submissions made by the parties and made the following observation:

> "I find as already adverted to, that this argument by the [appellant] is unsustainable, as it has not been demonstrated that the [respondents] actually or inferentially knew of GPTS arrangements with MSB."

[145] The judge concluded that, not only had the appellant failed to prove that it was entitled to the retroactive payments as claimed or that that such payments were made to all its employees, but also that it had failed to prove:

> "… that it is entitled to its loss of profits claim or, indeed, to its claim for loss of equipment and/or income from the equipment. Finally, and stunningly exiguous at that, the [appellant] had no audited accounts for the year ending 1992."

[146] The judge, in applying the principle in **Cullinane v British "Rema" Manufacturing Co Ltd** [1954] 1 QB 292 and **Anglia Television Ltd v Reed** [1971] 3 All ER 690, held that:

> "In the instant case at bar the [appellant] has attempted to claim for profit loss and the increased cost of labour which is contrary to the principle annunciated [sic] above. This is not allowed as there is not sufficient evidence to make an award on the profit basis there being no independently audited financial statements submitted to this tribunal so as to aid the process of assessment of any probable profits. It must be borne in mind that the [appellant's] profit was contingent on the [respondents] renewing the contractual arrangement. As is demonstrated in the case of **The Commonwealth of Australia v Amann Aviation Pty Ltd**. (1992) 174 CLR 65. A court is reluctant to award profit in such circumstances ..."

[147] The judge found that the appellant's contention that the wage increase, imposed by the CLA, was the cause of the decline in its profits and that the court should take this into consideration when determining the compensation to be awarded to the appellant, was "unsupportable from the evidence adduced".

[148] He went on to state that:

> "... Indeed, if the payments were made they would have been made in 1993 not 1992, and would not have impacted the profit and loss accounts of the Claimant for 1992. The unhappy affairs of the Claimant unaudited profit and loss accounts for the year 1992 adds it [sic] measure of doubt when one considers that this claim ought to be strictly proven."

[149] To succeed under this head of damages, the appellant would have to show that the failure by the respondents to pay the compensation on its wage claim led to a loss of profits. Mr Scott is correct, in his submissions on behalf of the respondents, in saying that a breach of contract does not automatically lead to a finding that there was a loss resulting from that breach. Any loss claimed must be strictly proved.

[150] The standard contracts entered into by the appellant with the respondents were all fixed price contracts. Once entered into, unless there was an agreed variation, the appellant was locked into that contract and was obliged to fully perform the contract at the agreed price. There were no guaranteed profits.

[151] The respondents say that the appellant made no retroactive payments in 1992, so if the appellant made a loss in that year, there would be no basis to claim against the respondents for that loss. Also, and in any event, the obligation to make retroactive payments extended to only half the year. The respondents also submitted that there was a new contract in 1993, so there is no basis to place any loss of profit, resulting from a new wage bill in that year, at the feet of the respondents.

[152] Firstly, it is important to note that the appellant is claiming compensation for the failure of the respondents to pay the agreed compensation for the unforeseen increases in the wage bill as well as loss of profits resulting from the failure to pay the said sums. The judge found that, based on principles cited in **Robinson v Harmon** [1843 – 1860] All ER 383 and **C Williams v British Rema Manufacturing Co Ltd** [1954] 1 QB 292, the appellant could not claim both wasted expenditure and profit and loss. In his view

such a claim was contrary to principle. I agree with the judge that the appellant is not entitled to both claims.

[153] In any event, the appellant failed to indicate how the failure to pay labour costs led to loss of profits on a fixed price contract. What profit would it have made outside of the fixed cost contract? Certainly, any loss of profit would simply be the deduction of the increased wage bill it had to pay from the fixed price of the contract, so that its expected income from the contract would have been reduced by exactly that amount. In that situation, there would be no further loss of profit to be claimed in addition to the claim for compensation, as, in such a case, there would be double counting.

[154] As was stated earlier, the appellant had a fixed price contract with the respondents and its profits would depend solely on the level of its expenditure and the continued renewal of the standard contracts. As the judge found, a court is reluctant to make an award on a claim for profits in such a case (see **Commonwealth of Australia v Amann Aviation Pty Ltd** (1992) 174 CLR 65). In this case, the appellant is claiming that it had an unexpected expenditure in the form of the new wage rates, which, based on the parity clause in its contract, it was also obliged to pay to its workers. This new CLA came almost at the end of its contract period and would, therefore, not have been in its contemplation when it agreed to the contract price. The agreement to vary the addendum to the standard contract to increase the price to cover this unexpected expenditure, if it had been carried through, would have put the appellant back in the position it was in before the CLA was executed. The only loss to the appellant, therefore,

was the value of the increase in expenditure resulting from its obligation to pay over to its workers this unexpected increase in emoluments.

[155] The new CLA was in December 1992, which means that there was no impact to the appellant's financial position in that year. To say the appellant suffered a loss in 1992 as a result of the respondents' failure to pay the increases on the wage claim, as agreed, could not possibly be correct. This is because the appellant made no payments in 1992, referable to the new CLA and could not have done so. Therefore, if no increased wage payments were made by it in 1992, there could have been no loss of profits at year ending December 1992, occasioned by the increase in the wage bill. It could not, therefore, have encountered any loss in profits in 1992, as a result of the breach.

[156] The claim for loss of profits in 1993 would also suffer from a similar defect, as it too, is premised on the basis that the appellant paid increases in the wage rates in 1993, based on a variation in its fixed price standard contract of 1992. However, the evidence is that it entered into a new standard contract with the respondents in January 1993. Since at the time of entering that contract it knew of the terms of the new CLA and given that the variation was on the old contract, it is difficult to see how any loss of profits in 1993 could be attributable to the respondents' breach.

[157] Even if one were to assume (and this is not the appellant's case), that the retroactive payments were paid in 1993 and so affected profits for 1993 (and there is no evidence of this one way or the other), that sum for loss of profits would still be a duplication of the claim for compensation under the wage claim.

[158] The judge was not duty bound to accept the expert's report without question. For one, the expert was not conducting an assessment of damages. He was simply conducting an accounting function based on figures given to him by the appellant. The judge also could not be faulted for his finding that there was insufficient evidence to make an award for loss of profits, as there were no independently audited financial statements to aid the process of assessment. For those reasons, therefore, he was correct to refuse an award under this head of damages.

(c) Loss of equipment and loss of income

Appellant's submissions

[159] It was also argued that the appellant was entitled to consequential losses in the form of equipment loss, loss of opportunity, loss of new contracts and bank charges. Mr Dunkley argued that in reliance on the agreement with the respondents, the appellant, with the respondents' knowledge, assistance and encouragement, through a hireage agreement, procured specialized mining equipment through its associate company GPTL.

[160] Further, the respondents dealt with Mr Goodison personally or through whatever corporate vehicle he was using from time to time. Counsel contended that the respondents, at all times, had direct knowledge of, and assisted at all stages of the procurement, shipping and financing of the equipment by GPTL, applying for a tax exemption for the equipment by representing to the Tax Administration of Jamaica that the purpose of the importation was to facilitate the pending agreement with the appellant.

[161] Counsel also argued that the equipment losses arose from the appellant's hireage agreement with GPTL, which had no independent cause of action against the respondents for their admitted breach of the agreement with the appellant. In addition, counsel pointed out that it was unchallenged in the court below that it was the appellant's business which was the source of the funds servicing a loan facility with MSB. Counsel also pointed out that GPTL was not operational and was purely a facilitator through which the appellant accessed the necessary bank financing for the equipment needed to perform the contract.

[162] Counsel submitted that the judge erred in overlooking the fact that it was foreseeable that the respondents' breach would have resulted in the loss of the equipment through foreclosure action by MSB. This, he argued, was the appellant's loss, and, accordingly, it was entitled to an award for the loss of opportunity to earn income from the equipment for three years, being the unutilised portion of the lease term. Relying on the expert evidence of Mr Chambers, the appellant submitted that it was entitled to the sum of $22,942,818.00 under this head of damages.

Respondents' submissions

[163] Queen's Counsel asked this court to note that GPTL, which was incorporated in 1984, was a separate legal entity from the appellant, which was incorporated in 1989, and that GPTL was never a shareholder of the appellant. Moreover, it was GPTL that had entered into the lease agreement with MSB for the leasing of the equipment in 1990. Queen's Counsel also referred to clause five of the lease agreement, which restricted GPTL's use of the equipment, noting in particular that it was not allowed to, among other

things, sell, pledge, sublet or part with possession of the equipment. Queen's Counsel further pointed out that GPTL almost immediately went into arrears on the loan from 1990.

[164] Queen's Counsel referred to the pleadings, cited the well-known dicta regarding the purpose of pleadings in **McPhilemy v Times Newspapers Limited and others** [1999] 3 All ER 775. He argued that at the time of the filing of the claim it would have been clear who the aggrieved parties were and the possible claims open to them. Further, the respondents had only contracted with the appellant, and so, any claim by associated parties to it would need to be founded on some other cause of action. Queen's Counsel relied on the decisions in **Hadley v Baxendale**, **Victoria Laundry (Windsor) Ltd v Newman Industries Ltd (Coulson & Co Ltd (Third Party))** [1949] 1 All ER 997 and **The Heron II Koufos v C Czarnikow Ltd** [1967] 3 All ER 686, in submitting that the appellant's claim for compensation in respect of the equipment and the interest on the loan must fail. Queen's Counsel argued further that there was not a scintilla of evidence of any actual knowledge by the respondents that the equipment utilised under the contract was leased from GPTL or that either Mr Goodison personally or GPTL had entered into any loan arrangement.

Analysis

[165] In relation to this head of damages, the submission by the appellant is that, based on the decision in **DHN Food Distributors Ltd v Tower Hamlets London Borough Council**; **Bronze Investments Ltd v Same; DHN Food Transport Ltd v Same**

[1976] 1 WLR 852, both the appellant and GPTL are to be treated as a single economic entity with respect to the latter's loss of equipment and the income therefrom.

[166] The judge discussed the general principle relating to the recovery of damages for breach of contract, as enunciated in **Hadley v Baxendale,** and went on to state:

> "Thus, the critical consideration is whether on the available information known to the [respondents] at the time of the formation of the contract he/she should as a reasonable person possessed of that knowledge would have realized that such a loss flowed naturally from the breach or that the loss of that kind should have been within his/her contemplation ..."

[167] The judge stated that in the **DHN Food Distributors Ltd** case:

> "... [T]he Court of Appeal determined that where the question in issue was the entitlement of the owner of a business to be compensated for its extinguishment and on the facts the trading company was in a position to control the subsidiary companies in every respect, the court could pierce the corporate veil which regarded limited companies as separate legal entities and treat the group as a single economic entity for the purpose of awarding compensation for disturbance." (Emphasis as in original)

[168] He later continued:

> "In summary the Court of Appeal allowed the claim on the basis that DHN was in a position to control its subsidiaries in every respect."

[169] The judge also referred to the House of Lords decision in **Woolfson and others v Strathclyde Regional Council** (1978) 2 EGLR 19, where the decision in **DHN Food Distributors Ltd** was distinguished, and noted that the House of Lords had doubted whether the decision in **DHN Food Distributors Ltd** was a correct application of the

general principle regarding the piercing of the corporate veil. The judge then noted that **DHN Food Distributors Ltd** and **Woolfson and others v Strathclyde Regional Council**, "arose as the [c]ourt was asked to determine whether a subsidiary could be regarded as a single entity with its parent company in order to enable the group to claim compensation for disturbance on a compulsory purchase".

[170] The judge then cited the case of **Salomon v Salomon** [1897] AC 22, and held that:

> "In applying the extracted principles to the case at bar, in light of the failure by the [appellant] to show that the [respondents], 'must have had in its contemplation', consequential damages for breach of the contract, 'as may be considered as either naturally arising according to the usual course of things', or 'such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it,' I have to say that the proposition of the [appellant] is outside the pale of the recognized principles in the law of damages ... There is not one iota of evidence that the [respondents] knew or ought to have known of [GPTL's] existence."

[171] The judge later concluded:

> "It is my view, which is in adopted from the [respondents'] submissions, that the claim for compensation in respect of the equipment and the interest on the loan cannot succeed."

[172] The judge also found that, based on the decision in **British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd** [1911-13] All ER Rep 63, the appellant had a duty to mitigate its loss. The judge went on to state that:

> "In applying this principle to the fact that the [appellant] and [the respondents] pursuant to the "CLA" with the "UAWU" had entered into a number of mining contracts it was incumbent on the [appellant] to have sought to mitigate its loss having regard to the fact that the [appellant] was not forestalled in advancing appropriate rate claims."

[173] The equipment which forms the subject of this claim was leased by GPTL from MSB and used by the appellant in its mining contract with the respondents. The application for the loan to lease the equipment was made one full year before the first contract with the respondents. When the appellant lost the contract with the respondents, the equipment was seized by MSB because the loan was no longer being serviced.

[174] The respondents say that GPTL is not a party to any contract with it and is a separate entity from the appellant. It is also not a party to the claim and no mention is made of them in the pleadings. There is no evidence that the respondents knew of any bank loan to GPTL with regard to the lease of trucks directly relating to their contract with the appellant. None of the correspondence between the appellant and its bankers was copied to the respondents. There is some evidence, however, that the respondents would have known of Mr Goodison's association with the appellant and GPTL, he having sent correspondence to them as a representative of that company.

[175] The appellant would have had to show that the failure to pay the promised wage claim directly resulted in the loss of equipment. This was an uphill task for the appellant from the outset.

[176] Mr Chambers, in his expert report to the court, indulged in some speculation on this point. He explained that in his view, "it is **most probable** that [the respondents]

would have issued some assurance to MSB (whether written or verbally) that (1) [the respondents] would be entering into a contract with [the appellant] to provide mining services once the specialized equipment is on site in Jamaica and (2) that the tenor of the contract would be at least for the period of the loan with MSB" (emphasis as in the original). In the absence of any evidence of this, or even any evidence from which some inescapable inference of this could be drawn, this was mere baseless speculation by Mr Chambers.

[177] The appellant's contract was not terminated as a result of the equipment, but because it was unable to carry out its contract in a productive way. It was not made incapable of carrying out its contract with the respondents by reason of anything done by the respondents. The claim is not based on termination of the mining contract. The claim of loss of rental for the lease period of three years is to ask the respondents to guarantee a three-year contract to the appellant and to guarantee that it will make profits on those contracts over the three years.

[178] There was a letter from the respondents to the appellant to remove its equipment from the site. The bank had repossessed the trucks leased to GPTL and there is evidence the bank arranged to have them removed. The expert's opinion, that the fact that the equipment was left on the site was evidence that it was leased solely for work on the respondents' mines, was baseless. There is also evidence that GPTL was in trouble with its bankers from as early as February 1990, when the bank wrote to Mr Goodison, pointing out its disappointment with the manner in which the account was being conducted. From

as early as then the account was in arrears and was in a "delinquent and non-productive state". At that time, the appellant had not yet started its first contract with the respondents, which only began in May 1991.

[179] The appellant failed to show that the respondents were so possessed of knowledge of how it structured its affairs that they ought to have reasonably foreseen that the loss, in 1994, of equipment leased and used by it in its mining contract, and income therefrom, was a likely result from their breach of the variation in the standard contract in 1992. As a result, the appellant failed to show that the respondents are liable to reimburse it for that loss. (See the dicta of Asquith LJ in the case of **Victoria Laundry (Windsor) Ltd v Newman Industries Ltd (Coulson & Co Ltd (Third Party))** and Lord Reid in **The Heron II Koufos v C Czarnikow Ltd**.) The judge was, therefore, correct to refuse to make an award under this head of damages.

(d) Interest on loan, penalties and taxes

Appellant's submissions

[180] Mr Dunkley cited, among others, the case of **British Caribbean Insurance Company Limited v Delbert Perrier** (1996) 33 JLR 119 to show the court's approach in awarding interest. Counsel argued that this court in **British Caribbean Insurance Company Limited v Delbert Perrier** confirmed the applicability of a "broad brush" approach used by trial judges in awarding interest of 25%. The learned judge, it was submitted, failed to find that the appellant's unchallenged expert report was that it was entitled to interest at the domestic interest rate, yearly average lending rate and that this amounted to $153,542,342.40.

Respondents' submissions

[181] Queen's Counsel Mr Scott submitted that this court was being asked to award interest as at 1992. He argued, however, that if this court was to proceed on that premise, it would mean that all payments would have been made on time by the appellant and there would have been no penalties. Queen's Counsel also pointed out that the appellant, in its claim for the increase in wages, failed to specify whether the sums being claimed were net or gross sums. Therefore, the court ought to proceed on the basis that it would be gross sums and would already contain a component of the figure claimed by the appellant. Queen's Counsel contended that, in any event, the claim for penalties and PAYE must fail as it was subsumed under the appellant's claim for wages and interests. Queen's Counsel submitted that it was correct for the judge to decline to make any award under these heads of damages.

Analysis

[182] The claims for reimbursement of penalties and interest on taxes and interest on bank loans have no demonstrable foundation in law or fact, and the judge was correct not to make any award for such claims.

(e) Loss of opportunity, loss of new contracts and loss of credit reputation

Appellant's submissions

[183] Counsel for the appellant argued that where a breach of contract deprives the innocent party of the chance to receive a particular benefit or avoid a particular risk, damages may be awarded for the loss of that chance. Counsel submitted that the decision in **Commonwealth of Australia v Amann Aviation Pty Ltd** (1991) 174 CLR 64 is

authority for the proposition that if a profitable contract is rescinded for breach, the profits, loss and the costs, actually and reasonably incurred in its performance, is a proper subject for compensation.

[184] Further, counsel argued that, in a situation where it is impossible for a claimant to prove that the net value of his net contractual benefits exceeded the losses incurred by reliance on a defendant's promise, it is just to shift the onus of proof to the defendant. In addition, it was argued that the judge failed to consider that a consequential loss occasioned by the respondents' breach amounted to a loss of opportunity.

[185] Counsel submitted further that, based on the appellant's evidence before the judge, it was proved that, as a result of the respondents' admitted breach of the contract, the appellant was significantly hindered in its ability to perform the contract, which led to it being terminated. Counsel also argued that, as a result of those circumstances, it was unable to procure any further contracts from the respondents or any other bauxite company, which led to the loss of opportunity to fully exploit the equipment it had procured. Counsel contended that as a result of the judge's error in going behind the judgment as to liability, his judgment was silent on this head of loss.

[186] Counsel also argued that the appellant was entitled to recover substantial damages for the loss of credit reputation, as the respondents' breach of contract caused the appellant and its principal, Mr Goodison, to default on several lines of credit from the National Commercial Bank, Jamaica Citizens Bank and MSB. Counsel submitted that the doctrine of remoteness of damages was inapplicable to this claim. In support of this

submission, he relied on the principle as stated in **Hadley v Baxendale** as well as an extract from Halsbury's Laws of England Volume 12(1).

Respondent's submissions

[187] Queen's Counsel maintained that the general principle adumbrated in **Hadley v Baxendale** is that, in the absence of some special statutory or contractual provision, the damages to which an innocent party is normally entitled in respect of a breach of contract, are such as may fairly and reasonably be considered, either as arising naturally from the breach, or as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach.

[188] Queen's Counsel submitted that bearing in mind the various breaches of the Civil Procedure Rules, the lack of probative corroborating documentary evidence, the conflicting nature of the evidence led by the appellant and the case law, the appeal should be dismissed.

Analysis

[189] The appellant having failed to show any basis upon which it could be found that it is entitled to damages for loss of credit reputation, loss of opportunity to enter into new contracts and for any other head of general damages, as a result of the respondents' failure to honour their agreement to vary the existing contract in 1992, I can find no basis for this court to say that the judge erred in not making any such award.

[190] The appellant continued to operate under several renewed contracts with the respondents after the varied agreement in 1992. The ultimate termination of the

relationship with the respondents was due to its failure to demonstrate any ability to carry out any future contracts. The termination had little or nothing to do with any increases in wage rates in 1992, nor was it due to any fault on the part of the respondents. There was no demonstrable correlation between the breach of the varied agreement and the appellant's default on its credit lines with its bankers. Neither is there any evidence of any correlation between the breach of the varied agreement and any loss of opportunity and loss of new contracts by the appellant.

[191] These grounds of appeal are, therefore, without merit.

(f) Commercial interest

[192] It is generally agreed by the parties that the commercial interest applied by the judge was correct. The judge concluded as follows:

> "As agreed by the parties the commercial bank lending rate as is contained in the Bank of Jamaica Statistical Digest for the relevant period as at the date of judgment given by Campbell, J is hereby applied [f]rom the Bank of Jamaica Statistical Digest the average rate up to 2008 is approximately 17%."

[153] The appellant is therefore entitled to 17% interest, the figure accepted by the judge as the applicable rate, on the sums found due to it by this court.

Disposition

[193] I would, therefore, allow the appeal in part in so far as it relates to the judge's failure to make any award for damages for retroactive wages and the sum awarded for damages for the increase in the wage bill for January 1993. I would set aside the award

of damages in the sum of $426,400.00 made by B Morrison J on 29 November 2007. I would also substitute therefor the award of damages to the appellant in the sum of $1,043,200.00 calculated as follows:

a) $986,600.00 for the claim for retroactive payments for the period July to December 1992;

b) $56,621.00 for the claim for compensation for increase in wages consequent on the implementation of the CLA, for January 1993;

c) Interest is to be paid on the said sum of $1,043,200 at 17% from 31 January 1993 to 29 November 2007. Thereafter, interest is to be applied at a rate of 6% until payment is made.

[194] I would affirm all other aspects of the decision of B Morrison J dated 29 November 2007. Since the appellant was only partially successful in this appeal, I would also award 50% of cost of the appeal to the appellant.

MCDONALD-BISHOP JA

ORDER

(1) The appeal is allowed in part.

(2) The award of damages in the sum of $426, 400.00 made by B Morrison J on 29 November 2007 is set aside and substituted therefor is the following order:

(i) Damages in the sum of $1, 043, 200.00 to the appellant being:

a. $986,600.00 for retroactive payments for the period July 1992 to December 1992;

b. $56,621.00 for increased wages for January 1993;

c. Interest to be paid on the said sum of $1,043,200.00 at 17% per annum from 31 January 1993 to 29 November 2007 and thereafter at 6% per annum until payment.

(3) All other aspects of the decision of B Morrison J dated 9 November 2007 are affirmed.

(4) 50% of the costs of the appeal to the appellant to be agreed or taxed.