JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 20/2006

BEFORE: **THE HON. MR. JUSTICE HARRISON, P.**
THE HON. MRS. JUSTICE McCALLA, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)

BETWEEN	**SANS SOUCI LIMITED**	**APPELLANT**
AND	**VRL SERVICES LIMITED**	**RESPONDENT**

Lord Gifford, Q.C. & Stephen Shelton instructed by Myers, Fletcher & Gordon for the appellant

Richard Mahfood, Q.C. & Dr. Lloyd Barnett instructed by Hart Muirhead Fatta for the respondent

30th April; 1st, 2nd, 3rd, 4th, May 2007
& 12th December 2008

HARRISON, P.

1. This is an appeal from the decision of Mrs. Hazel Harris, J., (as she then was) on 10th February 2006, refusing to set aside the award of Arbitrators on 16th July 2004. The award answered the questions in its terms of reference in favour of the respondent. The order appealed against is,

> "a. **That the application made by the Appellant in the Fixed Date Claim Form dated the 3rd day of September 2004,** that the Arbitral Award made by Roald Nigel Adrian Henriques and John Cecil Wilman, Arbitrators delivered on the 16th day of July 2004 in an Arbitration between the Respondent

> and the Appellant whereby it was awarded that the appellant do pay to the Respondent:
>
> i. Damages in the sum of $370,705,264.40 (US$6,034,793 at US$1:00 to JA$61.4280);
>
> ii. Interest on the sum of $370,705,264.40 calculated from the date of the Award at a rate equivalent to the average of the commercial banks' prime lending rates prevailing on that date;
>
> iii. The Respondent's costs in the Arbitration; and
>
> iv. The Arbitrator's and the Umpire's costs in the amount of $5,962,275.00 and US$2,465.00
>
> be set aside pursuant to Section 12 (2) of the Arbitration Act or pursuant to the inherent jurisdiction of the Court on the ground that the said Arbitrators firstly erred in Law and secondly fell into error in the calculation of the Award of damages which constituted an error on the face of the award is dismissed."

2. The facts relevant to this matter follows.

3. The appellant Sans Souci Ltd ("SSL") and the respondent VRL Services Ltd ("Manager"), each being a company incorporated in Jamaica, both entered into a management agreement ("the Agreement") dated 12th October 1993. Manager would manage SSL's hotel as stated in clause 2:

> "... effective on or before the First Day of November, 1993, and shall thereafter continue for an initial term to March 31, 2004, and shall continue for a further term of ten (10) years commencing from the end of

> the initial term on the same terms and conditions as set out herein ...".

Provision was made in the Agreement for its termination in certain expressed circumstances. Supplemental agreements were signed by the parties on 1st May 1997, 16th October 1997 and 31st March 1999, amending the initial Agreement.

4. The Agreement provided for the resolution of disputes between the parties to be referred to arbitration. Clause 13 reads:

> "13. This agreement is governed by the Laws of Jamaica and shall be construed and take effect in accordance with the Laws of Jamaica;
> If any difference shall arise between the parties hereto as to the interpretation of this Agreement or to the rights duties or liabilities of any party hereto or generally as to any act matter or thing arising out of or under this Agreement the same shall be submitted to two arbitrators one to be appointed by each party who shall by instrument in writing appoint an umpire immediately after they are themselves appointed. Such submission shall be a submission to arbitration under the provisions of the Arbitration Act or any statutory reenactment modification or extension thereof for the time being in force."

SSL, by letter dated 10th of June 2002 to Manager sought to terminate the Agreement pursuant to clause 16, on the ground that Manager had "... failed to achieve the performance criteria set out ..." in that said clause. Manager had resisted that attempt by letter dated 13th June 2002 in response. It reads:

> "Re: Grand Lido Sans Souci
>
> We acknowledge receipt of the Notice of Intention to Terminate the Management Agreement of the above hotel pursuant to Clause 16 of the Management Agreement.

> Whilst we acknowledge that we did not achieve the performance criteria set out in that Clause, which same Clause provides that you may not exercise your right of termination whenever we, as Managers of the hotel have been prevented from achieving the Performance Criteria by force majeure.
>
> Clause 2(a) of the Management Agreement defines what constitutes force majeure. We submit that both the events of early July 2001 as well as the terrorist attacks on the United States of America of 11th September 2001 constituted force majeure events as defined in the Management Agreement, and thus you are precluded from terminating the Management Agreement.
>
> You are well aware that the above events resulted in the cancellation of bookings for a number of months after the events. Additionally, Jamaica became even more of a "hard sell" destination and rates had to be reduced in order to attract visitors.
>
> Accordingly, having been prevented from achieving the Performance Criteria by force majeure, we do not consider your notice to be valid or effective."

SSL, by letter dated 29th July 2002 to Manager, withdrew its Notice of Intention to Terminate. It reads:

> **"RE: GRAND LIDO SANS SOUCI HOTEL**
>
> We are in receipt of your letter dated July 23, 2002.
>
> We have considered your proposal in some detail and have concluded that there are some fundamental issues on which we are unlikely to reach agreement. Our position on whether force majeure operated in the financial year to March 31, 2002 has already been stated and you have stated as well your position on what constitutes force majeure.
>
> Over the past weeks, we have continued our discussions on an informal basis reviewing the

> alternative arrangements presented by you for operating the Hotel going forward. We recognize that it is not in the best interest of arriving at any new arrangement with respect to the Hotel with disputed Notice of Intention to Terminate the Management Agreement. We have, therefore, taken the decision to withdraw this Notice with immediate effect and you are to treat this letter as the formal withdrawal thereof..."

5. SSL, by letter dated 4th March 2003, again gave notice to Manager terminating the Agreement, purporting to act under the provisions of clause 14(iv) of the Agreement, on the ground that force majeure had materially affected the operation of the hotel. Clause 14 (iv) inter alia, reads:

> "14. Without prejudice to any other remedies that either party hereto may have against the other, either party shall have the right at any time by giving notice in writing to the other party to forthwith terminate this Agreement in any of the following events:
>
> ...
> (iv) if Force Majeure shall materially affect the operation of the hotel;"

6. Manager rejected SSL's right to terminate the Agreement pursuant to clause 14 (iv) and by letter dated 6th March 2003 to SSL indicated its intention "... to renew the Agreement for a further term of ten (10) years ...", pursuant to clause 2 of the Agreement. That clause required Manager to -

> "... give at least one (1) year's written notice of its intention to renew this Agreement..."

The tenure and existence of the Agreement was dependent on the condition in clause 2, inter alia, that the Manager shall:

> "a) have performed all its several obligations under this Agreement save where prevented by any default on the part of SSL in the performance of an obligation to be performed by SSL hereunder or by reason of force majeure."

"Force Majeure" is defined in clause 2:

> "For purposes of this Management Agreement force majeure shall mean, inter alia, act of God, war, insurrection, riots, strikes, lockouts, civil commotion, shortages of labour or materials specified or reasonably necessary in connection with the construction, refurbishment and operation of the hotel, fire, unavoidable casualties, failure of any applicable Governmental authority to issue any required Governmental permits and any other occurrence, event or condition beyond the control of SSL or Manager, ..."

7. Disputes having arisen, arbitrators were appointed. Manager appointed Mr. Roald N.A. Henriques, Q.C., and SSL appointed Mr. Cecil Wilman. Both Arbitrators appointed Hon. Mr. Justice Boyd Carey (retired) as umpire:

8. At a meeting of the parties and their counsel on 26th August, 2003 with the Arbitrators, the latter ruled that the terms of reference were:

> "(i) whether Sans Souci Limited lawfully terminated the said Management Agreement under clause 14(iv) thereof by a notice dated the 4th day of March 2003; and
>
> (ii) if not, what damages would VRL Services Limited be entitled to recover as a consequence of the wrongful termination of the agreement."

The parties filed their points of claim and defence, respectively.

9. The respondent contended that clause 14(iv) only gave the appellant the right to terminate the contract on the grounds of force majeure if the force majeure "materially affects the operation of the hotel." Neither the operation nor the administration of the hotel had been "materially" affected by force majeure and consequently the appellant acted in breach of the contract in terminating the Agreement.

10. The appellant in its points of defence contended that the operation of the hotel was materially affected by force majeure by reason of the fact that the number of visitors had declined due to fear of overseas air travel. As a consequence Manager was compelled to reduce the rates substantially to fill the rooms and to limit the losses. However, the gross operating profit of the hotel declined and its performance criteria was not achieved for the periods 2001-2 and 2002-3. In addition, the hotel suffered losses for the said periods compared with a net operating profit in 2000-1. For those reasons, because of force majeure the hotel had ceased to be a financially viable operation.

11. Having conducted a hearing of written and oral evidence and heard submissions, the Arbitrators, on the 16th July 2004, made the following findings, inter alia:

> "5.4 THAT having considered the Agreement as a whole the apparent scope of clause 14(iv) must be limited by the fact that the parties included in the Agreement a special termination clause (clause 16) granting the Respondent a special right to terminate in the

event of the non-achievement by the Manager of the specified Performance Criteria and providing that the special right could not be exercised by the Respondent if the Manager had been prevented by force majeure from achieving the performance criteria.

5.5 THAT having provided in clause 16 for termination by the Respondent on the basis of non-achievement of the Performance Criteria (subject to the above-mentioned proviso) it must logically follow that the Agreement could not be terminated under clause 14(iv) in reliance upon the same force majeure events which excused non-performance under clause 16 unless the operation of the hotel was materially affected in some other manner unrelated to the non-achievement of the Performance Criteria.

5.6 THAT on the basis of our interpretation and having considered the evidence presented the force majeure events described in paragraph 1.15 above did not materially affect the carrying on of the business of the hotel."

and made the following award -

"1. The questions posed in the Terms of Reference can be answered as follows:

(i) Sans Souci Limited un-lawfully in breach of contract terminated the Management Agreement under clause 14(iv) thereof by a Notice dated the 4th day of March, 2003.

(ii) the Claimant is entitled to the total sum of SIX MILLION THIRTY FOUR THOUSAND SEVEN HUNDRED AND NINETY THREE DOLLARS (UNITED STATES CURRENCY) (US$6, 034,793) comprising US$5,475,000 damages as claimed and US$559,793 (cost of

amending advertising and promotional material) which amount shall be payable in Jamaican currency computed at the prevailing 10 day moving average rate of exchange for sales published in the Jamaican press on the date of this Award and shall be accepted in full and final settlement of the Claimant's claim arising out of the matters in dispute in this reference.

(iii) the Claimant is entitled to interest on the said sum of US$6,034,793 calculated from the date of this Award at a rate equivalent to the average of the commercial bank's prime lending rates prevailing on that date.

2. We further award and direct that the Respondent bear and pay its own and the costs of the Respondent in and of this Arbitration.

3. We declare that the costs of the Arbitrators and the Umpire as set out in the Appendix to this Award is the amount of J$5,962,275 and US$2,465 and direct that these amounts shall be paid by the Respondent.

4. We further direct that to the extent that the Claimant shall have paid all or any of the costs of this Award, it shall forthwith be reimbursed by the Respondent the full amount so paid.

5. We declare that there are no matters in difference under the Reference to this Arbitration between the parties other than the matter or matters awarded by us thereon PROVIDED NEVERTHELESS THAT the parties have referred to us and the Umpire appointed by us another dispute arising out of the management of the Hotel and this reference is still pending at the date hereof."

and attached the reasons for their findings and award.

12. Mrs. Harris, J., (as she then was), held that the Arbitrators were correct to find that the Agreement was wrongly terminated by the appellant, that the sum awarded for damages was reasonable and that compensation for the loss suffered by the respondent was adequate and consequently she refused to set aside the award. This appeal resulted.

13. The grounds of appeal are:

> "a. The Learned Judge erred in holding that the force majeure clause in Clause 14 (iv) of the Agreement did not grant relief to the Appellant from its obligations provided it did not make impossible or impracticable the performance of the contractual obligation, when the wording of the clause clearly connoted otherwise.
>
> b. The Learned Judge erred in wrongly construing the words 'if force majeure shall materially affect the operation of the hotel' in Clause 14 (iv) of the Agreement as meaning if force majeure shall substantially have an effect on the performance or working or running of the hotel, carrying on the business of the hotel and providing services for guests and cannot encompass the financial performance, or relate to economic performance or profitability of the hotel; whereas the parties by using the words in the context of a right of either party at any time by giving notice in writing to terminate the Agreement, intended exactly what the words meant in their ordinary and natural sense, namely all aspects of the operation of the hotel which were materially affected, from the point of view of either parties' interests, including financial and economic performance.

c. The learned Judge erred in finding that Clause 16 of the Agreement was the only Clause that permitted termination of the Agreement for economic and financial performance and failure to meet performance criteria while Clause 14 (iv) provided for immediate termination in the event that force majeure prohibits the functioning of hotel or renders the running of the hotel impossible or impracticable; whereas when the words of Clause 14 (iv) do not say that and could not in applying the cardinal rule of construction be deemed to have meant that.

d. The Learned Judge erred in finding that the Court was not empowered to disturb the Arbitrators finding in relation to what they held was a reasonable construction of Clauses in the Agreement in circumstances where that issue of construction was not specifically referred to the Arbitrators.

e. The Learned Judge erred in finding that when the Arbitrators found that the Appellant's claim that the Respondent in performing its contractual obligations in future years would incur certain unrecoverable expenses which should be deducted from any calculation of future loss amounted to a 'set off' of overpayments in past years against the damages to be awarded, it only amounted to an inaccurate use of the words and to no error on the face of the Award; when the Arbitrators as a consequence of their finding failed to consider the Appellant's claim in relation to this issue at all and consequently did not deduct these unrecoverable expenses from their Award.

f. The Learned Judge erred in finding that the principle that in assessing damages against a party who breaks a contract, that the contract breaker is entitled to perform the contract in a manner which is most beneficial to himself, was not applicable to damages for wrongful

termination of a management contract for a fixed period of years, when the authorities support the application of this principle to the instant case.

g. The Learned Judge erred in finding that although the Arbitrators failed to give details of the specific amounts which were computed as the base and incentive fees that this could not be considered a violation of the Award as the Arbitrators were guided by the opinion of experts and the Award was therefore made without any error of law appearing on the face of the record; when by not giving these details the Arbitrators failed to properly illustrate whether their starting point was the full base and incentive fees less the cost of earning those fees and then discounting for contingencies in particular the possibility of the early sale of the hotel."

14. This Court is obliged to consider whether Mrs. Harris, J., was correct to refuse to set aside the Arbitrators' award.

15. The issues to be determined as the Arbitrators recognized are:

(1) On a proper construction of clause 14 (iv) of the Agreement, did the appellant have the power to terminate the contract in the circumstances, and

(2) if not, what are the damages due to the respondent in respect of its losses, due to the breach of contract committed by the appellant.

16. An arbitration award is final and binding on the parties thereto, by virtue of section 4(h) of the Arbitration Act ("the Act"). However, in view of section 12

(2) of the Act, a court may set aside the award in particular circumstances, namely, where he has misconducted himself. The section reads:

> "12 (1) ...
>
> (2) Where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured the Court may set the award aside."

"Misconduct" is used in its widest sense and is not confined to wrongdoing. It may include a mistake of law or fact. However, the court, in addition, has an inherent power to set aside an award where there is an error on the face of the record.

17. The authors in ***Russell on Arbitration,*** 20th edition at page 394, with reference to the power of the court under the Arbitration Act 1950 (later repealed by the 1979 Act), said:

> "Section 23 (2) gives the court power to set aside an award where 'an arbitrator or umpire has misconducted himself or the proceedings, or an arbitrator or award has been improperly procured."

And, at page 409 said:

> "'Misconduct' is often used in a technical sense as denoting irregularity, and not any moral turpitude. But the term also covers cases where there is a breach of natural justice. Much confusion is caused by the fact that the expression is used to describe both these quite separate grounds for setting aside an award; and it is not wholly clear in some of the decided cases on which of these two grounds a particular award has been set aside."

Section 12 (2) of the Arbitration Act (Jamaica) is in pari materia with the said section 23 (2) of the English Act.

18. The terms of reference submitted to the arbitrators for resolution will usually determine the ambit of their powers and jurisdiction.

19. Where the issues to be determined are referred to the arbitrators generally, in broad terms, and the consequent award reveals an error of law on the face of the record, the court will set it aside if the error is clearly apparent. This is more-so if the point of law was not specifically so referred but the arbitrators regarded it necessary to determine it in coming to their conclusion. In the case of ***In the Matter of an Arbitrator between King and Duveen et al*** [1913] 2 KB 32, Channell, J., clarified the court's powers in arbitration matters. At page 34 he said:

> "It is no doubt a well-established principle of law that if a mistake of law appears on the face of the award of an arbitrator, that makes the award bad, and it can be set aside. ... but it is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside. Otherwise it would be futile ever to submit a question of law to an arbitrator."

Bray, J., in the said case, supporting that view at page 36 said:

> "... it is not often the case that parties refer a specific question of law to a lay arbitrator. Here they have done so, and therefore the rule as to setting aside an award which is bad on its face does not apply. The

> parties agree to be bound by the decision of the arbitrator and they are bound by it, although it may be erroneous in law."

Where specific questions are therefore referred to arbitrators who decide it and make their award, that award will rarely be set aside even if it is erroneous, unless such arbitrators commit some extreme fundamental error on the face of the award.

20. The issue of the construction of the terms of a contract has been treated as a question of law. This issue of such specific reference was considered by the House of Lords in ***Government of Kelantan v Duff Development Co., Ltd*** [1923] AC 395. Viscount Cave, L.C., approving the dicta of the Judicial Committee of the Privy Council in ***In re King v Duveen,*** and ***Attorney-General for Manitoba v Kelly*** [1922] 1 A.C. 268 at page 408 said

> "... unless it appears on the face of the award that the arbitrator has proceeded on principles which were wrong in law, his conclusions as to the construction of the deed must be accepted. No doubt an award may be set aside for an error of law appearing on the face of it; and no doubt a question of construction is (generally speaking) a question of law. But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the Court only because the Court would itself have come to a different conclusion. If it appears by the award that the arbitrator has proceeded illegally – for instance, that he has decided on evidence which in law was not admissible or on principles of construction which the law does not countenance, then there is error in law which may be ground for setting aside the award; but the mere dissent of the Court from the arbitrator's

> conclusion on construction is not enough for that purpose."

A court will not disturb an arbitrator's award, once it is satisfied that the arbitrator has proceeded through the process of ascertaining the facts, correctly ascertaining and identifying the relevant law and having done so, applies the law to the facts and arrives at a conclusion that he could have (***Finevelt AG v Vinava Shipping Co Ltd The Chrysalis*** [1983] 2 All ER 658).

21. In the instant case the terms of reference submitted to the Arbitrators were,

> "(i) whether Sans Souci Limited lawfully terminated the said Management Agreement under Clause 14 (iv) thereof by a notice dated the 4th day of March, 2003; and
> (ii) if not, what damages would VRL Services Limited be entitled to recover as a consequence of the wrongful termination of the agreement."

The resolution of this appeal warrants an examination of the decision of Mrs. Harris, J approving the Arbitrators' interpretation of the interaction of the several clauses of the Agreement, and in particular, clauses 14 (iv) and 16, as they relate to the termination of the contractual Agreements.

Clause 16 reads:

> "16. In addition to and without prejudice to any other right which SSL may have to terminate this Agreement under any other section of this Agreement, SSL shall have the special right to terminate this Agreement in the event that any of the Performance Criteria set forth below are not achieved for the applicable period provided that SSL may not exercise this special right to terminate whenever

> Manager shall have been prevented from achieving the Performance Criteria by force majeure. The Performance Criteria shall be the minimum level of Annual Gross Operation Profit allowable at the respective percentage level of paid occupancy for the applicable period as shown below and on the attached Appendix A:
>
> | Applicable Period | Minimum Annual Gross Operating Profit (Performance Criteria) | Paid Occupancy Percentage |
> |---|---|---|
> | April 1, 1994 to March 31, 1995 | US$ 945,000 | 61% |
> | April 1, 1995 to March 31, 1996 | US$ 1,457,000 | 68% |
> | April 1, 1996 to March 31, 1997 | US$ 1,744,000 | 72% |
> | April 1, 1997 to March 31, 1998 | US$ 1,962,000 | 75% |
> | April 1, 1998 to March 31, 1999, and for annual applicable periods thereafter | US$1,962,000 | 75% |
>
> SSL shall exercise its right to terminate under this provision of this clause after giving a notice period of ninety (90) days to Manager of its intention so to do."

22. The appellant argued that it is entitled to terminate the Agreement under the provisions of clause 14 (iv) in circumstances where certain events occurring in 2001 amounted to force majeure which materially affected the operations of the hotel by way of the financial losses incurred.

23. The term "force majeure" derived from the French language meaning "greater force" was introduced in the English law of contract from the Napoleonic Code. The clause excused a party from liability if some unforeseen event beyond the control of that party prevented it from performing its obligations under the contract. Bailhache, J., in ***Matsoukis v Priestman & Co*** [1915] 1 KB 681, in finding that the universal coal strike of 1912 which prevented the defendants from building and delivering the plaintiff's ship on the contract date,

came within the meaning of the words "force majeure" thereby absolving the defendant from their obligation, at page 685, said:

> "The words 'force majeure' are not words which we generally find in an English contract. They are taken from the Code Napoleon, and they were inserted by this Roumanian gentleman or by his advisers, who were no doubt familiar with their use on the Continent. ... I cannot accept the argument that the words are interchangeable with 'vis major' or 'act of God'. I am not going to attempt to give any definition of the words 'force majeure,' but I am quite satisfied that I ought to give them a more extensive meaning than 'act of God' or 'vis major'."

The contract contained the exemption clause obliging the defendant to deliver the ship by an agreed date and in default,

> "... the builders hereby agree to pay to the purchaser for liquidated damages ... ten pounds sterling ... for each day of delay ... being excepted only the cause of force majeure and/or strikes of workmen where the vessel is being built, or the workshops where the machinery is being made or at the works where steel is being manufactured for the steamer or any works of any sub-contractor."

The context in which the phrase "force majeure" was used in the above contract amply covered the events of the coal strike which delayed the manufacture of steel plates, which in turn extended the time for the building of another ship prior to that of the plaintiff's, creating a complete dislocation of the defendant's business. It was all beyond the defendant's control. The defendant was therefore absolved of liability for the delay by virtue of the force majeure clause.

24. The words used by parties to a contract must be construed in the context in which they are used, taking into consideration the intention of the parties concerning their respective obligations, in viewing the contract as a whole. In ***Tennants (Lancashire) Ltd v C.S. Wilson and Company Limited*** [1917] A.C. 495, their Lordships in the House of Lords held that a condition in the terms of the contract absolved the defendants from liability in suspending the delivery of products to the plaintiffs, due to the outbreak of war, a factor beyond the control of the defendants. The defendants had contracted to sell magnesium chloride to the plaintiffs and other customers. The bulk of the defendants' goods came from a source in Germany. The outbreak of the Second World War ended that source. The defendants in order to satisfy its customers would have been able to obtain the product from other sources, albeit at a higher cost to the defendants, this would have been a financial failure of its business. The defendant, acting under the terms of its contract with the plaintiffs; suspended the supply of the product.

25. The plaintiffs sued for damages for breach of contract. The condition on which the defendants relied reads:

> "Deliveries may be suspended pending any contingencies beyond the control of the sellers or buyers (such as fire, accidents, war, strikes, lock-outs, or the like) causing a short supply of labour, fuel, raw material, or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article." (Emphasis added)

Although the actual words were not used, it was in substance a "force majeure" clause. Their Lordships held that, in all the circumstances, although the defendants were not "prevented" from satisfying their obligations, they were "hindered" in their operations, and consequently properly entitled to suspend their deliveries. Significantly, their Lordships emphasized that neither increased financial difficulties, nor onerous additional expenses to the defendants in obtaining the products could be a factor to prevent the defendants from honouring its obligations and justify a suspension of deliveries to the plaintiffs. Lord Finlay, L..C (although otherwise dissenting in his judgment) at page 509 said:

> "I think that Pickford L.J. was right when he pointed out that a rise in price, even if very great, would not amount to a prevention of delivery on the true reading of the condition, that 'prevention' in such a clause must refer to physical or legal prevention and not an economical unprofitableness, and that 'hindering' must refer to an interference with the manufacture or delivery from the same cause as 'preventing', but interference of a less degree." (Emphasis added)

Earl Loreburn at page 510 said:

> "By 'hindering' delivery is meant interposing obstacles which it would be really difficult to overcome. I do not consider that even a great rise of price hinders delivery. If that had been intended different language would have been used, and I cannot regard shortage of cash or inability to buy at a remunerative price as a contingency beyond the sellers' control. The argument that a man can be excused from performance of his contract when it becomes 'commercially' impossible, which is forcibly criticized by Pickford L.J., seems to me a dangerous

> contention, which ought not to be admitted unless the parties have plainly contracted to that effect." (Emphasis added)

Lord Dunedio, at page 516 said:

> "If the appellants had alleged nothing but advanced price they would have failed. But they have shown much more. They have shown a total failure of what after all was the main source of supply to their business, namely the German article;..."

26. Circumstances or events which occur subsequent to the making of a contract between parties, which make the contract no longer viable or financially healthy, cannot be relied on by a party so affected to opt out of his obligations on the basis of a force majeure clause, unless the contract expressly provides for such eventualities – ***Tennants Ltd v Wilson & Co*** (supra.) See also ***Peter Dixon & Sons Ltd v Henderson, Craig & Co Ltd*** [1919] 2 KB 778, in which the Court of Appeal, following ***Tennants Ltd v Wilson & Co;*** (supra,) held that the arbitrators were correct to say that the "force majeure" clause in the contract for the supply of wood pulp, entitled the sellers to suspend delivery, due to the outbreak of war, which "hindered" delivery but did not "prevent" delivery. The Court also held that it was the dislocation of the sellers business rather than the increase in price of the product, which availed the sellers.

27. In more recent times in the United States of America, this principle embraced by the English Courts, was expressed by the United States District Court in ***OWBR LLC v Clear Channel Communications, Inc*** (2003) 266 F.

Supp. 2nd 1214. A resort hotel in Hawaii sued its parent company and its subsidiary, claiming damages for economic losses suffered in respect of an entertainment scheduled for February 13-17, 2002, as a result of the terrorist attacks of September 11, 2001. The company relied on the "force majeure" clause to excuse it from liability under the room reservation agreement for the event, "Power Jam 2002." The District Court held that the subsidiary was not absolved because of the economic losses due to the said terrorist attacks within the meaning of the "force majeure" clause. District Judge Kay, at page 1223 said:

> "...courts interpreting force majeure provisions have held that nonperformance dictated by economic hardship is not enough to fall within a force majeure provision. *See e.g. Stand Energy* 760 N.E.2d at 458 (finding that unseasonably hot temperatures resulting in record demand for power and unprecedented high hourly prices for electric power did not excuse, under the force majeure clause, defendant's inability to deliver the power required under the contract). '[M]ere increase in expense does not excuse performance [under a force majeure provision] ...
>
> From an economic standpoint, it was certainly unwise, or *economically* inadvisable, for Defendants to continue with the Power Jam 2002 event. Nonetheless, a force majeure clause does not excuse performance for economic inadvisability, even when the economic conditions are the product of a force majeure event." (Emphasis added)

28. In the instant case, the appellant relies on the terms of clause 14(iv), to justify the right to terminate the contract with the respondent, on the ground

that the force majeure events had materially affected the operations of the hotel, that is inclusive of its financial operations.

29. All parties are agreed that the relevant force majeure events were the riots in Jamaica in 2001 and the terrorist attacks on the United States of America on the 11th of September 2001.

30. In the instant case clause 14 of the Agreement permits either party to terminate the contract on the occurrence of certain specified events. All the events, inclusive of clause 14 (iv):

> "(iv) if force majeure shall materially affect the operation of the hotel; ..."

seem to be of a particular nature, envisaging a fundamental change or variation in the course of dealing between the parties that is a dissipation or destruction or non-existence of the subject matter. The clause contemplates, any breach of the Agreement that cannot be made good, for example, entry into liquidation, substantial destruction of the hotel and not rebuilt, unauthorized assignment of right, cessation of benefit of skill and expertise of particular directors or sale of the hotel. None of these events can be described as, nor contemplates financial difficulties or commercial unprofitability in the operation of the hotel. Clause 14 (iv) does not expressly do so, nor could it be so construed on the strict interpretation of the ejusdem generis principle. Clause 14 (iv) was therefore, intended to be construed, as far as the "force majeure shall materially affect the

operation of the hotel", as referring to the disruption of services in a physical sense rather than the "operation" being referable to economic unprofitability.

31. Clause 16 is the only clause in the Agreement which expressly permits the appellant only, "the special right" to terminate the Agreement due to financial considerations. It reads:

> "16. In addition to and without prejudice to any other right which SSL may have to terminate this Agreement under any other section of this Agreement, SSL shall have the special right to terminate this Agreement in the event that any of the Performance Criteria set forth below are not achieved for the applicable period provided that SSL may not exercise this special right to terminate whenever Manager shall have been prevented from achieving the Performance Criteria by force majeure. The Performance Criteria shall be the minimum level of Annual Gross Operation Profit allowable at the respective percentage level of paid occupancy for the applicable period ..." (Emphasis added)

Note that the clause expressly excludes the resort to this clause to terminate, in circumstances where the unprofitability is caused by force majeure. Clause 14 recognized the existence of the provisions of clause 16 by the use of the words, "without prejudice to any other remedies that either party hereto may have against the other ...". Similarly, clause 16, contemplated the prior recital and existence of clause 14, by the use of the words:

> "In addition to and without prejudice to any other right which SSL may have to terminate this agreement ..."

It would be quite wrong, as Lord Gifford, Q.C. for the appellant suggests, to read into clause 14 (iv) provisions for termination, which the parties had deliberately expressly excluded. To do so would render clause 16, which was expressly employed to provide for the unprofitability of the hotel's operation, superfluous and useless.

32. The arbitrators, in the reasons for their award at page 25, inter alia, said:

> "... Clause 16 confers on the Respondent a special right to terminate the Agreement in addition to any other right to terminate in the Agreement, particularly at Clause 14. Clause 16 therefore must be dealing with a right to terminate which is not within the ambit of Clause 14 but is in addition thereto.
>
> It follows therefore by parity or reasoning that Clause 14 (iv) and Clause 16 cannot relate to the same right to terminate. There clearly has to be a distinction between the special right to terminate in Clause 16 and the right to terminate in Clause 14 (iv). If it were not so, then Clause 16 would be meaningless as it would not confer any additional right on the Respondent.
>
> The special right to terminate that is given by Clause 16 relates specifically to non-performance of the Performance Criteria which is the additional right to Clause 14 (iv).
>
> It is therefore clear that Clause 14 (iv) cannot be construed as to confer a right on the Respondent to terminate for economic reasons, as this is not within the ambit of Clause 14 (iv). Moreover, if Clause 14 (iv) confers on either party the right to terminate, it is difficult to see how the Claimant would have a right to terminate for non-performance of the economic criteria under Clause 14 (iv).

> It is therefore manifestly clear that Clause 16 properly construed confers an additional special right to terminate by the Respondent for non-performance of the economic criteria. To hold otherwise, viz that same is also within the ambit of Clause 14 (iv) would render Clause 16 meaningless, as it would not be an additional special right."

Correspondingly, Mrs. Harris, J., in her judgment at page 17 said:

> "Clause 14 and 16 are separate and distinct clauses. Under clause 14 (iv) the Agreement is terminable on the occurrence of force majeure which renders the running of the hotel impossible or impracticable. Clause 16 does not permit the claimant to terminate the Agreement if the defendant failed to achieve performance criteria by reason of force majeure. It restricts the claimant's exercising the option of termination should the defendant fail to achieve economic criteria due to force majeure. Under clause 14 (iv) either party may terminate the contract immediately if conditions attributed to force majeure are present. Clause 16 requires that a 90 day notice of termination be given while Clause 14 (iv) provides for immediate termination in the event force majeure prohibits the functioning of the hotel.
>
> Clause 16 grants to the claimant a special right of termination, clause 14 does not. Clause 16 expressly deals with termination by reason of economic criteria performance. Clause 14 makes absolutely no provision for financial loss relating to performance criteria."

33. I agree with the conclusion of both the Arbitrators and the learned judge, as to the non-applicability of clause 14 (iv) to justify the right of the appellant to terminate the contract, in the circumstances of this case.

34. Clause 14 (iv) of the Agreement is employed by the parties to permit termination, "... if force majeure shall materially affect the operation of the

hotel...". Words and phrases in a contract must be given their plain and ordinary meaning and interpreted viewing the contract as a whole, in order to ascertain the intention of the parties. Consequently, the phrase "... the operation of the hotel..." must be construed according to the context in which it is used in the said Agreement. The Arbitrators found that "... materially affect the operation of the hotel" meant "... the physical structure with consequential effect on the provision of hotel services."

35. An examination of the Agreement itself, discloses the ambit of "the operation of the hotel." For example, initially, in the recital, "Hotel" is defined as containing "... rooms used as guest rooms ... restaurants ... shops ... recreational and health facilities ...", detailing such facilities. Clause 1 provides for "services to be rendered by Manager ..." and that the appellant will maintain the hotel "with guest amenities and facilities." Clause 3 recites Manager's agreement ... to manage the hotel ... to provide such services ... necessary to ensure continuous and efficient management," detailing administrative duties, including maintenance, employment, pricing of rooms, advertising and guest service at the hotel ...", among numerous other duties of Manager. The provision of monthly and quarterly statements of account, operating budget, capital expenditure projections by Manager to the appellant is also required under that clause. Clauses 4,5,6,7,8, 9, 10 & 11 concern Manager's role as agent of the hotel with "full control ... of ... the hotel", the remuneration to Manager, reimbursement of trading and other costs, the opening and operation of bank accounts and the

provision of stock for the hotel, rights of inspection, structural repairs, non-interference by appellant and adequacy of insurance. Clause 18 is an indemnity clause.

36. The Agreement, read as a whole, details the requirements for the running of the hotel in the provision of services for its guests, including catering, recreation and health services and the maintenance of the physical plant. The Arbitrators were not in error to find that "the operation of the hotel" meant the provision of essential services to guests. The learned trial judge was equally correct to accept that view.

37. Such operation of the hotel was not "materially" affected or at all. The appellant had the burden to show, in order to justify the right under Clause 14 (iv), to terminate the Agreement, that the force majeure had made the provision of such services to guests impossible. This, the appellant had failed to do. On the contrary, the evidence before the Arbitrators from Messrs Issa and Battaglia was that during the relevant period in 2001 onwards, the hotel remained open, providing services to guests, except for the closing of one of the restaurants and some reduction of staff during the period of low occupancy.

38. In my view force majeure affecting "the operation of the hotel", does not include financial unprofitablity, as argued by Lord Gifford, Q.C., for the appellant. Even if the hotel was suffering a loss, it would no less be "operating", by providing services to guests. The force majeure clause could not be relied on in

such circumstances to excuse a party from honouring one's obligations. (See ***Boulos Gad Tourism & Hotels Ltd v Uniground Shipping Co*** **Ltd** (unreported, dated 16th November 2001). The appellant could not therefore rely on clause 14(iv). The appellant candidly agreed that the agreement had become unprofitable and consequently, it was seeking to terminate it. Having initially sought to rely on clause 16, with its financial performance criteria component, and failed to terminate the agreement, the appellant's attempt to utilize clause 14 (iv), was ineffective and wrongful under the terms of the contract.

39. The award of the Arbitrators in that regard, revealed no error on the face of the record. Mrs. Harris, J., was accordingly correct to refuse to set it aside.

40. The respondent claimed damages for the wrongful termination of the Management Agreement.

41. As to damages, the Arbitrators in their reasons for award at page 55 said:

> "Having reviewed the principles applicable to damages in this matter and the evidence that has been adduced by the respective parties, the method of computation of damages for the Claimant is clearly more reasonable and constitutes fair compensation for the loss sustained.
>
> The methodology of Mr. Kay is logical, and takes into consideration the principle of contingencies resulting in a sum that constitutes reasonable compensation. This methodology is supported by expert opinion of Kathleen Moss.
>
> On the other hand, the Respondent's computation of the damages is flawed in a material respect as there

> is double discounting which drastically affects the computation of the Respondent. Moreover, the Respondent goes to the extreme in that the period for computing the damages is drastically reduced from ten (10) to three (3) years, this is further compounded by a higher rate of discount of 15% for both base and incentive fee. This is manifestly unreasonable in the circumstances if it is intended to result in fair and reasonable compensation.
>
> On the totality of the evidence presented and principles applicable, it is our opinion that the evidence of Mr. Kay and Mrs. Moss should be accepted and that the sum arrive (sic) at of U.S. $5,547,000.00 is adequate and reasonable compensation for the loss of the base and inventive (sic) fee.
>
> Insofar as the figure for removal of advertising material is concerned, there was no challenge on this, so the amount claimed of U.S.$559,793.00 is awarded. Whereas the figures have been computed in United States dollars because that is the currency of the account of the hotel, nevertheless pursuant to Clause 5(A) the currency of payment has to be in Jamaican dollars."

42. The appellant had argued before the Arbitrators that the respondent was not entitled to recover the loss of the Management fee claimed. However, if there was any loss, it was the loss of profit that the respondent would have earned for each of the future years, that is, the Management fee, less expenses which the respondent would have incurred, which were not re-imbursable by the appellant, under the Agreement. The appellant, in paragraph 18 of its points of defence,said:

> "18. In relation to the Damages claimed in Appendix 1 the Respondent denies that Claimant is

> entitled to any of the sums claimed or any sums at all and will deal with each item in Appendix 1 separately notwithstanding:
>
> A. LOSS OF MANAGEMENT FEES
>
> (I) The Respondent denies that the claimant is entitled to recover the loss of the Management fees claimed, as this does not represent the loss if any which the Claimant suffered. The Claimant was required to expend substantial sums in managing the hotel, all of which sums were not properly recoverable from the Respondent under and pursuant to the Management Agreement. In the circumstances if the Claimant will suffer any loss which is denied, then the same would only be for the profit it would have made, which would be Management Fees less the unrecoverable expenses it would have incurred in managing the hotel, particulars of which for the period January 2002 to March 2003 are set out hereunder and prorated for the twelve (12) month period."

The appellant thereafter enumerated the "unrecoverable expenses," to be borne by the respondent, in its view. Emphasizing the point, the appellant, in paragraph 18A (iii) stated:

> "(iii) The Respondent [appellant] will contend that even if the Management fees alleged were in fact the management fees which would be lost for the respective years, which is denied, there should be deducted from each years alleged management fees the comparable total of the unrecoverable expenses in each year."

43. Each party relied on the evidence of its expert witness in calculating the loss incurred by the respondent for the years 2004 to 2014 as a consequence of the termination of the agreement. The respondent relied on the calculations of

David Kay, vice president, corporate finance of the Super Clubs group of companies, a Fellow of the Institute of Chartered Accountants, and agreed to by Kathleen Moss. The appellant relied on the evidence of one Mrs. Marlene Sutherland.

44. The appellant also argued before this Court and before Harris, J that the Arbitrators misconstrued the appellant's point of defence in paragraph 18, by regarding it as a claim to set off management fees overpaid in previous years from any damages found to be due and owing during the years 2004 to 2014.

45. The Arbitrators, in respect of the appellant's points of defence at page 144 of the record, did say:

> "The Respondent in its Point of Defence, initially denied that the Claimant was entitled to any of the sums claimed or at all, and contended that the Claimant suffered no loss. Further, that there were sums to be set-off.
>
> Alternatively, if there were management fees due, then it is entitled to set-off sums which should have been deducted over the years, but were claimed as management fees."

46. The trial judge examined the Arbitrators' treatment of the appellant's points of defence, and, at page 354 of the record said, of the use of the term "set off":

> "In the process of their deliberations the arbitrators alluded to the word 'set off' with reference to the method of calculation proposed by the claimant in its revised calculations in arriving at adjusted management fees. The claimant had proposed using

> a three (3) year period as the basis for the fees, adding the base and incentive fees and thereafter including discount factors.
>
> It cannot be denied that the arbitrators' use of word 'set-off' in the foregoing context could amount to an inaccurate use of the word. This however is not a ground for setting aside of the award. Mere inaccuracy of expression does not vitiate an award and would therefore not amount to an error on the face of the award."

47. In arriving at their assessment of the management fees due to the respondent, the Arbitrators, at page 154 of the record said:

> "In assessing damages for the purposes of producing a figure which would represent a fair and reasonable compensation for breach of a contract for a period of years, allowances have to be made for contingencies."

The Arbitrators awarded to the respondent a sum of U.S. $6,034,793.00 plus interest on the amount "from the date of the award at the average of the commercial banks' prime lending rate prevailing at that date."

48. Mrs. Harris, J., in upholding the award of the Arbitrators accepted their approach to the assessment and their findings and found that there was "no error of law appearing on the record."

49. The award of damages for breach of contract is governed by the well accepted principles enunciated by Alderson, B., in ***Hadley and Anor. v. Baxendale and Ors*** [1843-60] All ER Rep. 461. He said at page 465:

> "Where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, 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."

The general rule is that the party not in breach would be entitled to net damages. In the event of wrongful termination of a contract of employment the damages would be the net earnings or the net profits, as the circumstances may determine, after deduction of tax. This would satisfy the purpose of compensation for breach of contract, that is, that the plaintiff is entitled to be placed, so far as money can do it in the same position he would have been in, had the contract been performed (see ***British Westinghouse Co. v Underground Electrio Railway*** [1912] A.C. 673, 689, per Viscount Haldone L.C. and ***Koufos* v *Czarnikow Ltd*** [1969] 1 AC 350 at page 414 per Lord Pearce. Consequently, both in contract and in tort, the principle of the recovery of net losses after tax, for example, in personal injury cases and wrongful dismissal from employment, respectively, were accepted (See ***British Transport Commission v Gourley*** [1956] A.C. 185)

50. In addition, damages may be reduced in circumstances where there is an immediate payment of a lump sum, for example, for loss of future earnings, or

taking into account the contingencies of life, with all its uncertainties and variables.

51. In the instant case, the appellant argued before this Court, as it did before Mrs. Harris, J., that because the Arbitrators misunderstood its points of defence in paragraph 18, treating it as an attempt by the appellant to set off past unrecoverable expenses overcharged by the respondent as Management fees, against any damages found to be due to the respondent for the years during which the contract would have continued, but for the wrongful termination, the Arbitrators award of damages, in those circumstances, was manifestly excessive.

52. The respondent contended that the Arbitrators' reference to "set off" was a correct interpretation of the appellant's closing submissions that the calculation of any future loss should allow for a deduction of an amount being the sums overcharged in previous years, that is,

> "... the measure of the deduction that should be made in calculating future loss."

The respondent maintained that the Arbitrators having accepted the evidence of David Kay, including his methodology and computation, it cannot be said that they failed to consider or rule on the appellant's contention as to the excessive damages. There was, therefore, no error on the face of the record in that respect, they contended and the trial judge was therefore correct.

53. The respondent also argued that the stance of the appellant is inconsistent, in that the grounds filed, initially complained that the Arbitrators failed to demonstrate in their award that they had made the deductions which the appellant claimed were "unrecoverable expenses." Subsequently, it argued that the affidavit of David Kay in Appendix 1, shows that his calculations of the management fees due, failed to include a deduction of the appellant's description of non-reimbursable expenses, thereby disclosing an error on the face of the record. It seems to me that, in each instance, the appellant was contending that no allowance had been made for the deduction of the expenses which had been incurred by the respondent and which were not properly re-imbursable by the appellant. The respondent submitted that there was no description of "unrecoverable expenses" in the agreement. The respondent did submit however, that it was for the Arbitrators to decide "as a matter of fact", whether these expenses,

> "... were reasonably required to meet the contractual objective ... were being incurred to the advantage of the appellant ... and [if] the appellant would continue to agree them."

If not, the Arbitrators would decide if they should be excluded.

53. The management fees payable to the respondent for its services in managing the hotel is contained in paragraph 5(A) of the management agreement. It reads:

> "5(A) The fees payable to Manager by SSL pursuant to the terms of this Agreement shall be the aggregate

> of two amounts to be calculated and paid in Jamaican currency as follows subject to annual adjustment on the basis of audited accounts;
>
> (i) an amount equivalent to four per cent (4%) of the hotel's gross revenues and payable quarterly in arrears
>
> (ii) an amount equivalent to ten per cent (10%) of the hotel's annual gross operating profit payable quarterly in arrears;..."

The date of payment and accounting period then follow:

> "(iii) payments under (i) and (ii) above will be made within thirty (30) days after the expiration of the relevant period subject to adjustments after finalization of the audited accounts which adjustment shall be promptly made.
>
> (iv) For the purpose of this clause, the financial year is April 1st to March 31st."

Paragraph 2(b) granted to the respondent the option to extend the agreement for a further ten (10) years from 1st April 2004 by giving "... at least one (1) year's notice to SSL." This the respondent did, extending the contract to 2014.

54. In order to determine the loss of earnings suffered by the respondent for the years 2004 to 2014 due to the breach by the appellants, the Arbitrators relied on and accepted the evidence of David Kay, supported by that of Kathleen Moss. The Arbitrators in their reasons for the award, at page 148 of the record, said:

> "The methodology used to convert the future stream of loss of fees to a present value is that proposed by David Kay. The method is as follows:

To calculate the future stream of earnings that have been lost through the termination of the contract, it is then converted to the present value or an amount a reasonable person will be willing to pay now, in the exchange for the future earning stream. The accepted methodology for doing this is to apply a discount rate for future earnings. The discount rate reflects the required return from the investment.

To determine the discount rate, what components are used. Firstly, there is a base rate which is arrived from a risk free rate of return and cost of capital and, secondly a risk premium reflecting the incremental return required to compensate for the risk associated with future earnings from the particular investment.

The risk free rate was that of a return of U.S. Government's securities using ten year Treasury Bill with a rate of 4.45%. A Bond rate was also used which varies with the rate which would be a Baa and according to Federal Reserve yield is 7.01% as the base rate.

A risk analysis is then considered. Thereafter, a discount rate is determined and then applied. The discount rate was based on the Baa and Bond rate of 7.01% as the base rate and further risk adjustments which produces a discount rate of 9.00% for the base management fee and 13% for incentive management fee.

The abovementioned methodology produced present value of loss base management fee of U.S. $3,985,000 and present value of loss incentive management fees of US$1,490,000 a total value of loss management fees for $5,475.00. This is the quantum of damages for which the Claimant contends it is entitled for loss of management fees.

In addition there is the sum of $559,763.00 being claimed for the amendment of advertising and promotional material pursuant to Clause 18(a)."

55. The Arbitrators noted that the approach of the appellant differed substantially from that of the respondent. The Arbitrators at page 153 of the record said:

> "The Respondent in revised calculations used three years as the basis for which the fees in Jamaican dollars would represent adequate compensation to the Claimant. The method used was to take three years from 2004 to 2006, and add base fee, the incentive fee, and deduct any recoverable expenses to then arrive at the adjusted management fee and then take in discount factors. The rate used for the discount factor is 15%. This then produced a figure of J$34,461,200.00 which is the level of damages which should be awarded in the event that (sic) the Claimant."

56. The Arbitrators properly recognized that in assessing such losses in the future, allowances must be made for contingencies and that that is effected by way of a discount. They rejected the computation of the appellant's witness Marlene Sutherland, noted that the appellant's approach amounted to double discounting and consequently was flawed. They concluded that the method used by the respondent was "... clearly more reasonable and constitutes fair compensation for the loss sustained."

57. Employment cases simpliciter, concerned with proved wrongful dismissal by an employer, are usually resolved by awarding damages for the period of time the employee would have received earnings, if the proper notice of dismissal had been given, less any earnings in mitigation which the employee did earn or

shouldl have earned in alternative employment. The duration of the contract in such cases, being in the hands of the employer.

58. The Arbitrators were correct to differentiate such cases from contracts for fixed terms, as was the Agreement in the instant case. Harris, J., rightly upheld that finding. This fixed term of contract of ten years, in the instant case, seems to me to attract its peculiar considerations.

59. Both the respondent and the appellant agreed that in accordance with clause 5A, in assessing the loss of Management fees, the starting point was the aggregate of the gross base and gross incentive fees as described in the Agreement and applying it to the average annual earnings using as an example, the period January 2002 to March 2003.

60. The respondent however, suggested the use of a four years period, making allowances for earnings affected by force majeure, and applying that average earning projected over a ten year period, discounting the base fee by 9% and the incentive fee by 13%.

61. On the appellant's part, it was contended that an average annual Management fee should be ascertained by using a three year period from 2004 – 2006 (applying the base and incentive fees) and reducing for each year "... the unrecoverable expenses the Respondent would incur in managing the hotel which were not recoverable under the Management Agreement." The amount

would be discounted by being assessed over a period of three years, instead of ten years, and the total arrived at would be further discounted by 15%.

62. The appellant was contending that in order to arrive at the management fees payable, there ought to be deducted from the annual management fees to be used to calculate the total management fees due for the period 2004 to 2014, any expenses the respondent would have incurred in running the hotel and which were not re-imbursable by the appellant.

63. In my view, the items and figures listed in paragraph 18(A)(i) of its points of defence, were put forward to advise the Arbitrators of the type of expenses the appellant labeled as "unreasonable expenses" to be deducted in a given annual period in calculating loss of management fees, in future years. The appellant was not contending, in paragraph 18 that it was entitled to a "set-off", as the Arbitrators found, for being overcharged and having overpaid in past years. The argument concerned the computation of the future total loss of management fees by first deciding what was the appropriate net annual management fee. By not deducting these unrecoverable expenses from the gross management fees, the final fees payable would be "greatly overstated", and therefore if awarded would be manifestly excessive.

64. The appellant said in paragraph 18 (A)(iii):

> "(iii) The Respondent will contend that even if the Management fees alleged were in fact the management fees which would be lost for the respective years, which is denied, there should be

> deducted from each years alleged management fees the comparable total of the unrecoverable expenses in each year."

In my view the appellant was not claiming a "set off". The appellant was looking to the future not at the past.

65. The Arbitrators stated at page 144 of the record:

> "The Respondent in its Point of Defence, initially denied that the Claimant was entitled to any of the sums claimed or at all, and contended that the Claimant suffered no loss. Further, that there were sums to be set-off.
>
> Alternatively, if there were management fee due, then it is entitled to set-off sums which should have been deducted over the years, but were claimed as management fees."

Insofar as the Arbitrators classified that defence in paragraph 18(A)(iii) "as set-off" they erred. Mrs. Harris, J., in that regard was also in error.

66. Although clause 5A of the Agreement mandates the use of "the hotel's gross revenue" and "... the hotel's annual gross operating profit" for the calculation of the management fees payable, from any such total the expenses not reimbursable by the appellant would be properly deductable.

67. It is correct, as argued by the respondent, that nowhere in the agreement is there any categorization of "irrecoverable expenses." However, implicit in the fact that expenses incurred by the respondent would require the

approval of the appellant prior to being reimbursable, it means that some expenses may be objected to and consequently become "non recoverable".

Clause 6 of the Agreement, inter alia, reads:

> "6. SSL shall promptly reimburse, in the currency of expenditure, to Manager such of the following costs as may be incurred or disbursed by Manager with the approval of SSL; ..." (Emphasis added)

68. Mr. Shelton for the appellant argued that the expenses set out in the points of defence were not recoverable because they did not fall under clause 6 of the Agreement. Clause 6(vi) makes reimbursable -

> "(vi) such other costs as may be agreed between the parties from time to time." (Emphasis added)

The evidence of Dane Thomas however, confirmed that although the items in the points of defence did not fall under any of the specified heads in clause 6 of the Agreement, he regarded them as reasonable charges because they had been agreed in the past, under clause 6(vi), but nothing obliged the appellant "... to agree for all time with the particular item."

69. Whether or not expenses incurred by the respondent, were in fact "unrecoverable", as claimed by the appellant, in its points of defence or re-imbursable as contended by the respondents should have been determined by the Arbitrators. The Arbitrators were required to demonstrate in their award, that they accepted that the expenses were "unrecoverable" or alternatively, payable by the appellant. At its lowest, the Arbitrators should have

demonstrated that they considered the issue of the "unrecoverable expenses" as contended for by the appellant. The respondent seemed to have recognized this omission by the Arbitrators in a virtual concession in their "Supplemental Skeleton Argument". The respondent at paragraph 6, submitted:

> "6. There is no categorization of 'unrecoverable expenses' in the Management Agreement. It was therefore for the Arbitrators to decide as a matter of fact whether –
>
> (1) these expenses were reasonably required to meet the contractual objective;
> (2) these expenses were being incurred to the advantage of the Appellant; and
> (3) the probability is that the Appellant would in the circumstances continue to agree them;
>
> and if not that they should be excluded."

70. The point of the "unrecoverable expenses" having been raised by the appellant, assuming that such expenses were so found not to be re-imbursable, they should have been excluded from the sum used to determine the annual management fees earned. Thereafter, using that reduced annual management fee, the assessment of the damages for the years 2004 to 2014 would be effected with the appropriate discounting.

71. A discount factor was used by both parties. The respondent used discounts of 9% and 13% with reference to the base and incentive fees, respectively. The appellant used a discount rate of 15% for each fee.

72. Acknowledging the use of the discount factor, the Arbitrators at page 154 of the record, said:

> "In assessing damages for the purposes of producing a figure which would represent a fair and reasonable compensation for breach of a contract for a period of years, allowances have to be made for contingencies. This is usually done by way of a discount. ...
> The [respondent] has thereby discounted by way of a percentage."

73. By analogy, in an assessment of damages by the court, for prospective loss of future earnings in breach of contract or in personal injuries, a discounting is effected in consideration of:

(a) an immediate payment of a lump sum and

(b) for contingencies, usually, the risk to life or health.

This is a recognition that such future loss of earnings spread over many years ahead, for example, ten years has to be turned into a lump sum, that is, a capital sum payable at the time of the award. The claimant would then be receiving such a lump sum which he would never have received all at once had there been no breach of contract; that would amount to a windfall. In practice, therefore, a sum lesser in amount than the accumulated aggregate of ten (10) years loss of earnings is arrived at. This represents a capital sum which, when invested, will earn interest and be sufficient to provide an annual income that would have been earned until the sum is virtually exhausted at the end of year 10, in the future. This is in reality an actuarial exercise. Courts over the years have

achieved this result by the use of the multiplicand/multiplier method with the appropriate discounting. (See ***Cookson v Knowles*** [1979] AC 556, [1978] 2 All ER 604]. An arbitration tribunal, however, is not strictly bound by the principles that govern the court of law.

74. In the instant case, the immediate payment of the lump sum is applicable. However, a possible contingency, namely, the sale of the hotel within the relevant period did not arise.

75. The Arbitrators recognized that the discounting by each party was to allow for "contingencies", presumably, the risk of the employment activity, including the possible influence of force majeure. Each sought to arrive at a reasonable sum representing the loss over the period of years, but payable at the time of the award. The appellant seems to have resorted to the multiplicand/multiplier method, but discounted the ten (10) years by the rather low use of three (3) years purchase and the "double discounting". The respondent claimed a sum amounting to the aggregate of ten (10) years management fees, discounted by the risk factor and a discount of the base and incentive fee, to arrive at a present value payable for the future loss.

76. In all this the Arbitrators failed to allude to or consider the issue of the "unrecoverable expenses" defence. In ***Middlemiss & Gould v Hartlepool Corp.*** [1972] 1 W.L.R. 1643, the issue in the arbitration was the determination of the contract of employment under a Clause 25(4) of the contract. In allowing

the appeal against the order preventing the claimants from enforcing the award, it was held that if a point is raised for decision and by implication it is decided, it is final, although the arbitrators did not say anything expressly about it.

77. The ***Middlemiss*** case (supra) is distinguishable from the instant case. In the former, the issue was, whether the money was payable, in view of the clause 25(4). The arbitrators held that the money was payable implicitly considering the said clause.

78. In the instant case, the Arbitrators treated the appellant's paragraph 18 of its points of defence as a set-off, claiming a repayment of management fees overpaid in the past and therefore not subject for consideration in the reference before them. Instead, they should have considered it as a list of expenses incurred by the respondent, which the appellant was contending was "not reimbursable," and therefore should not be included in the average annual management fees ascertainable from the period January 2002 to March 2003, and to be used to assess the damages for loss of future earnings for the period 2004 to 2014, being considered by them. No implication therefore arose in the instant case, as it did in ***Middlemiss v Hartlepool*** (supra). The Arbitrators, in the instant case by not considering the proper implication of clause 18 of the appellant's points of defence, were in error.

79. Where an arbitrator has omitted to decide something which he ought to have decided, the award may be remitted to him for such a decision to be made.

(See ***King et al v. McKenna Ltd et al*** [1991] 1 Q.B. 480). The power of remittal is contained in section 11 of the Act. It reads:

> "11. – (1) In all cases of reference to arbitration the Court or a Judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire."

In section 2 of the Act, "Court" means the Supreme Court and "Judge" means a Judge of that Court.

80. The powers of the Court of Appeal are contained in section 18 of the Act. It reads:

> "18. The Court of Appeal shall have all the powers conferred by this Act on the Court or a Judge thereof under the provisions relating to references under order of the Court."

81. In the circumstances, this matter ought to be remitted to the Arbitrators for a reconsideration of the issue as to damages, with particular reference to the "unrecoverable expenses" claimed.

82. For the above reasons, it is my view that the appeal against the order of Mrs. Harris, J., refusing to set aside the award ought to be dismissed, in part. The appeal against the award of damages ought to be allowed and remitted to the Arbitrators to determine the issue of damages only.

83. Half the costs of this appeal and of the costs below should be paid by the respondent and to be agreed or taxed.

McCALLA, J.A.

I agree.

DUKHARAN, J.A.

I agree.

HARRISON, P.

ORDER

1. The appeal against the order of Mrs. Harris, J., refusing to set aside the award is dismissed, in part.

2. The appeal against the award of damages is allowed and the matter is remitted to the Arbitrators to determine the issue of damages only.

3. Half the costs of this appeal and of the costs below are to be paid by the respondent, such costs to be agreed or taxed.