

**THE EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF APPEAL**

**GRENADA**

**GDAHCVAP2024/0006**

**BETWEEN:**

**HERON'S FLIGHT INC.  
(Trading as "Spice Isle Coffee")**

Appellant

and

**THE AIRPORTS AUTHORITY**

Respondent

**Before:**

The Hon. Mde. Vicki Ann Ellis  
The Hon. Mr. Trevor M. Ward  
The Hon. Mr. Gerard St. C Farara

Justice of Appeal  
Justice of Appeal  
Justice of Appeal [Ag.]

**Appearances:**

Ms. Melissa Modeste-Singh with her Mr. Dylan Charles for the appellant  
Ms. Margaret Wilkinson with her Mr. Zuriel Francique for the respondent

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2025: January 31  
March 13

**Re-Issue: April 01.**

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*Civil Appeal – Appeal against decision of the learned trial judge to dismiss claim for damages for misrepresentation and breach of warranty – Rule 10.5 (3) and (4) of the Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023 - Defendant's duty to set out case - Whether the appellant's pleading of the representation was denied by the defence or is deemed to have been admitted - Misrepresentation – Whether the expressions "food" and "beverage" included or was meant to include all "soft snacks and soft beverages" – Whether the learned trial judge erred in not applying the ordinary dictionary meaning of the words "food" and "beverage" - Evidence Act of Grenada– Admissibility of certain evidence formerly admissible at common law - Whether the learned judge made any finding*

*on the adduced evidence or statements in violation of the rule against hearsay – Memorandum of understanding – Pre-contract representation - Whether the learned trial judge erred in law in deciding that the memorandum of understanding solely formed the basis for the contract without taking account of the alleged misrepresentation*

This is an appeal against the judgment of a learned judge of the High Court in the State of Grenada dated 27<sup>th</sup> February 2024 dismissing the appellant's (the claimant in the court below) claim for damages for breach of warranty and misrepresentation. The appellant's claim is grounded on an oral representation allegedly made by a representative of the respondent prior to and in order to induce the appellant to enter into and sign a memorandum of understanding on 4<sup>th</sup> May 2016 ("1<sup>st</sup> MOU") for the operation of a food and beverage concession ('Spice Isle Coffee') located on the second floor of the Maurice Bishop International Airport, St. Georges, Grenada ("the MBI Airport"). The alleged representation as pleaded by the appellant at paragraph 4 of its statement of claim is in the following terms:

'Before the MOU was signed, and in order to induce [the appellant] to sign the MOU, [the respondent] warranted and represented the following to [the appellant]:

- a. That food and beverages would only be sold on the second floor of the airport; and
- b. That the main food and beverage vendor currently on the ground floor would be relocated to the second floor and thereafter no food and beverages would be sold on the ground floor;

and which amounted to a continuing representation and/or warranty.'

The appellant's pleaded case was also that in reliance on the representation by the respondent, it prepared and presented its business plan to the respondent for approval and then signed the 1<sup>st</sup> MOU. It was pleaded specifically, that its 'forecasted earnings [at the business] were entirely premised on the representation that no food and beverages would be sold on the ground floor but only on the second floor.' It was also pleaded by the appellant that in accordance with the representation made to it by the respondent, the main food and beverage vendor, Goddard Catering Grenada, was relocated from the ground floor to the second floor of the MBI Airport. On 2<sup>nd</sup> August 2017, the appellant and the respondent entered into a second memorandum of understanding ("2<sup>nd</sup> MOU") by which, inter alia, the area of the proposed rental unit was reduced resulting in a consequential reduction in the stipulated rent, service charge and security deposit, and the intended term of the proposed lease of the rental unit increased from 3 to 5 years. All other terms stipulated in the 1<sup>st</sup> MOU remained unchanged.

Upon the appellant's entry into occupation of the rental unit on 23<sup>rd</sup> October 2017, the appellant through its director and representative Ms. Zofia Malisiewicz, noticed that the gift and duty-free shops situated on the ground floor were continuing to sell snacks and soft beverages. This the appellant relied on as constituting a breach by the respondent of warranty by way of the terms of the pleaded representation. The appellant also pleaded that the respondent had placed a cold drink vending machine on the ground floor, which they considered to be in breach of the representation and therefore in breach of the warranty. It was also pleaded that the placing by the respondent of its vending machine on the ground floor had 'resulted in a reduction of foot traffic to the second floor' which had a negative effect on the appellant's Coffee Shop business.

During a meeting between the parties on 12<sup>th</sup> March 2019, the respondent admitted to representing that no food and beverages would be sold on the ground floor of the terminal building at the MBI airport, however, it asserted that 'its definition of "food" and "beverages" differs from that of [the appellant] in that [the respondent] maintains that it does not include snacks and soft drinks.'

The appellant also pleaded that the representation made by the respondent to induce it to enter into the 1<sup>st</sup> and 2<sup>nd</sup> MOUs was false and made fraudulently or recklessly, the respondent not caring whether it was true or false, and as a result the appellant had suffered loss and damage 'in that the customer footfall on the second floor was severely reduced due to the availability of food and beverages on the ground floor and the [appellant's] projected income severely reduced.'

The respondent denied that the placement of the vending machine on the ground floor of the terminal building was in breach of warranty or representation. It pleaded that the said vending machine had been placed on the ground floor by the respondent in the interest of "customer service" since all food and beverage outlets close by 9:00pm and at times there are scheduled airline departures delayed and an outcry from customers for the availability of snacks and drinks. Further, it was the respondent's defence that the MBI Airport is an international airport which has to operate by international standards, and edible items must be available at various locations at all times throughout the airport. This notwithstanding, the respondent had the vending machine moved to the second floor "to placate the [appellant]."

Regard what transpired at the 12<sup>th</sup> March 2019 meeting between representatives of both parties and their respective lawyers, the respondent pleaded that it is only at the said meeting, coming some 3 years since the 1<sup>st</sup> MOU was signed by the parties, that the appellant raised the issue of the interpretation of the expression "Food and Beverage". They asserted that it was the appellant who was coming into an already established environment at the terminal building 'who had a duty to clearly identify its requirements to the [respondent]', and put the appellant to strict proof that the respondent ever represented to the claimant that food and beverage, included snacks and soft beverages, would not be sold on the ground floor and that the respondent had undertaken to vary its relationship with the existing tenants on the ground floor (except Goddard Catering Grenada) to facilitate the appellant.

In the court below, the learned judge considered the following issues: (i) whether the respondent had misrepresented to the appellant that food and beverage was only being sold on the second floor; (ii) whether there was a breach of warranty by the respondent by placing a vending machine on the ground floor; (iii) whether the appellant is entitled to the relief sought given that it never executed a lease agreement with the respondent and (iv) whether the respondent had wrongfully charged the appellant for the provision of air conditioning maintenance. By a judgment dated 27<sup>th</sup> February 2024, the learned judge dismissed the appellant's claim for damages for breach of warranty and representation, found the claim for damages in relation to the charges for the air conditioning proved, and awarded the appellant prescribed costs on the total sum to be reimbursed for the charges for air conditioning maintenance.

Dissatisfied with the decision of the learned judge in the court below the appellant appealed to the judgment by notice of appeal filed on 5<sup>th</sup> April 2024. The appellant relies on 7 grounds of appeal. It is also asserted (both in the notice of appeal and appellant's skeleton) that the learned judge made certain erroneous findings at paragraphs 38, 41, 44, 53, and 54 of the judgment in coming to her decision in dismissing the claim for damages for breach of warranty and misrepresentation.

**Held:** dismissing the appeal, affirming the judgment and decision of the learned trial judge dismissing the appellant's claim for damages for misrepresentation and breach of warranty, with costs to the respondent to be assessed by a judge of the High Court or Master, if not agreed by the parties within 21 days of the date of delivery of this judgment, that:

1. Rule 10.5(3) and (4) of the Civil Procedures Rules 2000 ("CPR") does not mandate the use by a defendant of the word "denial" in the defence when denying a matter pleaded in a claimant's statement of claim, nor is it stipulated that if not used the defendant would be deemed to have admitted an allegation of fact pleaded in the statement of claim. Moreover, CPR 10.5 does not provide any consequence for a failure or shortcoming in how an allegation in the statement of claim is responded to or denied in the defence. The gravamen and meaning of these provisions is that in the defence, if an allegation is not admitted, it must, by the language used, be clearly denied or the claimant put to strict proof of it. As to the requirement at r.10.5(4) that if there is a denial the defendant must state the reasons for doing so, the respondent did state its reasons at paragraphs 3, 4, 5 and 6 of the defence as to why the representation pleaded by the appellant was not made.

Rules 10.5 (3) and (4) of the **Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023** (CPR) applied.

2. The respondent in its defence, at paragraph 3 in particular, did sufficient to deny making the representation pleaded by the appellant at paragraph 4 of the statement of claim. Furthermore, it is well-established that where a defendant does not admit an allegation in the statement of claim, the effect of this is not an admission of the allegation, but to put the claimant to its proof by adducing evidence at the trial. In this case, there was no actual or implied admission of the representation such that it would operate to absolve the appellant of the burden of proving that the representation as pleaded was in fact made by the respondent and that the said representation had induced the appellant to enter into the MOU. The pleading at paragraph 10 of the defence makes clear that the respondent takes issue with the appellant's case that there was an oral representation that any food and beverage, including snacks and soft beverages, would not be sold on the ground floor or would only be sold on the second floor, and that it undertook to vary its relationship with its existing tenants on the ground floor (save and except for Goddard's Catering Grenada) to facilitate the appellant and its business to be operated from the second floor. It was therefore for the trial judge having heard the evidence and seen the witnesses give their evidence and be cross-examined, to decide as a fact whether

the pleaded representation was made by the respondent to the appellant, and whether it was made with the intention of inducing the appellant into signing the MOU. Moreover, (as admitted by counsel for the appellant) this pleading point raised by the appellant on appeal was not raised during the trial below and no objection was taken by the appellant to the evidence led from the witnesses for the respondent to the effect that no such representation would have been made to the appellant for the reasons which they gave. The said evidence having been given at the trial without objection, it was for the learned judge to assess its evidential value and to determine whether she could accept it or any aspect of it. Accordingly, this issue was joined between the parties at the trial.

3. The meaning attributed by the respondent to the words “food” and “beverage” as found by the learned judge, is neither far-fetched nor so far removed from the sense in which these words are used and understood by a reasonable person or by persons in the position of the appellant and the respondent. Firstly, the prevailing situation at the MBI Airport at the relevant time of the representation included the existence of tenants and concessions selling snacks, soft beverages and alcoholic beverages on the ground floor. Second, the main concessionaire Goddard’s Catering Grenada, the appellant’s admitted competitor was the only concession which the respondent represented will be removed from the ground floor to the second floor. Accordingly, a reasonable person would have understood that the other concessions on the ground floor would not be moved to the second floor or be compelled to stop selling snacks and soft beverages from their outlets on the ground floor. Further, when the word “food” was used by the respondent it did not and could not in all the prevailing circumstances have meant anything that people eat, including soft snacks; and likewise, when the word “beverage was used it did not mean any type of drink except water.
4. Words may have a particular meaning in a particular locality and among a particular class of persons. In West Indian or Caribbean parlance, as the learned judge alluded to, the words “food and beverage” does not include or is not understood to include a reference to selling snacks and soft drinks, unless so stipulated. When these words are used together, they are usually understood to be a reference to cooked food and to alcoholic drinks. Additionally, this common usage or common meaning of these words in the Caribbean context is given much credence by the fact that historically the other small outlets on the ground floor at the time selling snacks and soft beverages had operated there for some time, without the sale of these items being considered to be in violation of the exclusivity which the main concessionaire, Goddard’s Catering Grenada, then enjoyed. Furthermore, as the respondent’s evidence discloses, no one other than the appellant, had raised any issue with the said small outlets continuing to operate from the ground floor selling snacks and soft beverages.

**Shore v Wilson (1842) 9 Cl & Fin 355** applied; **Smith v Wilson (1832) 110 ER 266** applied; **Myers v Sarl (1860) 3 El. & El. 306** applied; **Maddison v Alderson (1883) 8 App Cas 467** applied.

5. The learned judge did not make any finding as to the truth of Mr. Lenworth Gordon's evidence in his witness statement in violation of the rule against hearsay. The trial judge did not approach this evidence in that way when making key findings on this issue at paragraphs [41] and [44] of the judgment. Instead, what the judge did was to use the evidence of the prevailing circumstances at the MBI Airport, especially with regard to the tenants on the ground floor selling snacks and soft beverages, and to consider that this took place apparently without demur or objection in the face of the exclusivity then enjoyed by Goddard's Catering Grenada. The judge also considered what was stated in the MOU and the appellant's business plan setting out the products it wished to provide at its Coffee Shop, and the total absence of any statement in said business plan of the representations made to it being that all food and beverages, including snacks and soft beverages will not be sold on the ground floor going forward, in accepting that the words "food" and beverage" were not understood, and were never intended by the respondent to convey to the appellant that all snacks, food and beverages, including soft beverages would only be sold on the second floor. In reasoning to this conclusion, the learned judge also considered in the appellant's business plan that the only 'competition' mentioned was Goddard's Catering Grenada, and no mention was made that it had been represented or that any representation made to it by the representatives of the respondent was understood to mean that the other tenants on the ground floor would no longer be permitted to sell snacks and soft beverages or that they would be moved to the second floor if that practice was to continue. In making these findings, all of which were open to the judge on the evidence without breaching the rule against hearsay, the learned judge made no finding as to the truth of what was stated at paragraph 4(a) to (f) of Mr. Gordon's witness statement.

**Section 36B of the Evidence Act of Grenada Chapter 92 of the Laws of Grenada**, Section 36B applied; **Franciscus Petrus Vingehoedt v Stanford International Bank Limited (In Liquidation)** ANUHCVP2014/0030 (delivered 26<sup>th</sup> January 2015, unreported) applied

6. The question of whether a pre-contract representation was made by the respondent to the appellant as the latter asserts, what were the terms of the representation, did it induce the appellant to enter into the MOU, was it the kind of representation that was capable of inducing the appellant to enter into the MOU, whether that representation when made was false or incorrect, was it made innocently, fraudulently, negligently or recklessly as to its correctness, are all questions of fact for the court to decide. In the instant matter, the learned judge seems to have accepted that a representation was made by the respondent to the appellant that no "food and beverages" will be sold on the ground floor. However, the judge decided that the meaning put on those words or that phrase as contended for by the appellant, was not proven on a balance of probabilities, having considered and analysed the evidence. This evidence included the evidence of Ms. Malisiewicz for the appellant and that of Mr. Gordon for the respondent, the correspondence passing between the parties prior to the filing of the appellant's claim, and the documentary evidence including the two MOUs and the appellant's business plan, none of which speak to any representation or to the appellant's understanding that

the phrase “food and beverage” included any kind of snacks or soft beverages. The upshot of all this is that the learned judge did not accept that any representation made to the appellant that “food and beverage” would not be sold on the ground floor encompassed and was meant or intended to include snacks and soft beverages. This finding, which this Court ought not to interfere with, meant that there was no breach of the representation pleaded by the appellant.

## JUDGMENT

- [1] **FARARA JA [AG.]:** This is an appeal against the judgment of a learned judge of the High Court in the State of Grenada on 27<sup>th</sup> February 2024 dismissing the appellant’s (the claimant in the court below) claim for damages for breach of warranty and misrepresentation.

### The Claim

- [2] By claim form and statement of claim filed 30<sup>th</sup> October 2019, the appellant brought a claim in the High Court against the respondent seeking damages for misrepresentation and breach of warranty. After the trial the appellant’s claim for damages for misrepresentation and breach of warranty were dismissed by the learned judge. However, the judge found the appellant’s claim for special damages proven and made an award. There is no appeal against the award of special damages.
- [3] On the matter of costs, the parties had agreed costs below in the claim in the sum of \$5,000.00. However, the learned judge awarded the appellant, for its partial success, prescribed costs on the total sum of special damages awarded to be reimbursed by the respondent pursuant to the **Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023** (CPR) Rule 65.5 Appendix C. No costs were awarded to the respondent for its success on the main issue in the claim.

### Appellant’s Pleadings Case

- [4] The appellant’s claim is grounded on an oral representation allegedly made by a representative of the respondent prior to and in order to induce the appellant to enter

into and sign a memorandum of understanding on 4<sup>th</sup> May 2016 (“1<sup>st</sup> MOU”) for the operation of a food and beverage concession (“Spice Isle Coffee”) located on the second floor of the Maurice Bishop International Airport, St. Georges, Grenada (“the MBI Airport”). As to the alleged representation, the appellant pleaded the following at para. 4:

4. Before the MOU was signed, and in order to induce [the appellant] to sign the MOU, [the respondent] warranted and represented the following to [the appellant]:

a. That food and beverages would only be sold on the second floor of the airport; and

b. That the main food and beverage vendor currently on the ground floor would be relocated to the second floor and thereafter no food and beverages would be sold on the ground floor.

and which amounted to a continuing representation and/or warranty.

[5] The appellant’s pleaded case was also that in reliance on these representations by the respondent, it prepared and presented its business plan to the respondent for approval and then signed the 1<sup>st</sup> MOU and specifically, that its ‘forecasted earnings [at the business] were entirely premised on the representations that no food and beverages would be sold on the ground floor but only on the second floor.’

[6] The appellant pleaded further that on 2<sup>nd</sup> August 2017, the appellant and the respondent made certain amendments to the 1<sup>st</sup> MOU and executed a 2<sup>nd</sup> MOU. This was prompted when it was discovered that the proposed rental unit on the second floor of the MBI Airport to be occupied by the appellant was smaller than what was originally or first intended. This 2<sup>nd</sup> MOU also increased the term of the proposed lease to be entered into from 3 to 5 years, and decreased the rental fee, service charge and security deposit (based upon the smaller size of the rental unit). Both the 1<sup>st</sup> and 2<sup>nd</sup> MOU entered into by the appellant and the respondent provided for the parties to enter into a formal lease agreement that would govern the relationship going forward.

- [7] The appellant entered into occupation of the unit on 23<sup>rd</sup> October 2017 before any lease was finalized or executed, and no written lease was ever executed by the parties. Upon entering into occupation the appellant, through its director and representative Ms. Zofia Malisiewicz (or “Ms. Malisiewicz”), noticed that the gift and duty-free shops situated on the ground floor were selling food, namely snacks, and beverages. This the appellant relied on as constituting a breach of warranty by way of the terms of the pleaded representation. The appellant also pleaded that the respondent had placed a cold drink vending machine on the ground floor, which they also considered to be in derogation of the representation and therefore in breach of the warranty. It was also pleaded that the placing by the respondent of its vending machine on the ground ‘resulted in a reduction of foot traffic to the second floor.’
- [8] During a meeting on 12<sup>th</sup> March 2019, these issues and alleged breaches of warranty were raised by the appellant’s representative with the representative of the respondent and the parties’ respective lawyers. It is pleaded that during the said meeting the respondent admitted to representing that no food and beverages would be sold on the ground floor of the terminal building at the MBI Airport, but asserted that ‘its definition of “food” and “beverages” differs from that of [the appellant] in that [the respondent] maintains that it does not include snacks and soft drinks.’<sup>1</sup>
- [9] The appellant went on to plead that the representation made by the respondent to induce it to enter into the 1<sup>st</sup> and 2<sup>nd</sup> MOUs was false and made fraudulently or recklessly, the respondent not caring whether it was true or false<sup>2</sup> and as a result the appellant suffered loss and damage “in that the customer footfall on the second floor was severely reduced due to the availability of food and beverages on the ground floor and the [appellant’s] projected income severely reduced.”<sup>3</sup> It was also pleaded that the respondent has threatened to evict the appellant from the coffee

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<sup>1</sup> Statement of Claim, paragraph 10

<sup>2</sup> Statement of Claim, paragraph 11

<sup>3</sup> Statement of Claim, paragraph 12

shop unit if it did not sign the lease by 31<sup>st</sup> October 2019, but the terms of the lease has never been finalized by the parties, as counsel for the respective parties were in the midst of settling same when [the respondent's] threats of ejection commenced.<sup>4</sup>

### **Respondent's Pleaded Case**

[10] At paragraphs 3, 4 and 5 of the defence filed on 5<sup>th</sup> December 2019, the respondent responded to the pleading of the representation at paragraph 4 of the statement of claim. These three paragraphs will be set out in full later in the judgment when considering ground 1 of the appeal. Suffice it to be said that by which ground the appellant contends these paragraphs and what is said at paragraph 10 of the defence about putting the appellant to strict proof, do not comply with the pleading requirements for a defence at CPR 10.5, were not a denial that the representation was made by the respondent to the appellant, the consequence being that the said representation is admitted. Accordingly, the learned judge erred when she allowed the respondent to adduce evidence from its witnesses so as to controvert the making of the representation.

[11] In response to the pleading at paragraph 5 of the appellant's statement of claim regarding the preparation and presentation of its business plan to the respondent, the latter avers: these projections were made on the appellant's erroneous interpretation. The [appellant] is put to strict proof that the [respondent] ever represented to the Claimant that Food and Beverage included snacks and soft beverages.' Further, having admitted paragraph 6 (the changes and signing the 2<sup>nd</sup> MOU) and paragraph 7 (no formal lease having been entered into), the respondent also admitted at paragraph 8 of its defence the correctness of the appellant's stated observations at paragraph 8 when it commenced operations of the Spice Isle Coffee unit and business. The respondent went on at paragraph 8 to plea, in part, -

"In fact, having already made a great concession to strip its long standing tenant Goddard's Catering Grenada of exclusivity for the sale of Food and Beverage which based on its operating requirements, the Defendant

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<sup>4</sup> Statement of Claim, paragraph 13

defines as *“fresh and prepared foods as well as alcoholic and nonalcoholic beverages consumed in a seated environment or designated common use area”* it would be too onerous to vary its relationship with all its other Tenants in order to facilitate the Claimant, especially when this request was never specifically made and did not form part of the negotiations of Memorandums of Understanding.” (emphasis added)

- [12] Regarding the pleading concerning the placement of the vending machine by the respondent on the ground floor of the terminal building, the respondent denied that this was in breach of warranty; that it was placed in the interest of “customer service” since all food and beverage outlets close by 9:00pm and at times there are scheduled airline departures delayed and an outcry from customers for the availability of snacks and drinks. Further this is an international airport which has international standards, and edible items must be available at various locations at all times throughout the airport. This notwithstanding, the respondent had the vending machine moved to the second floor “to placate the appellant.”
- [13] Regarding the appellant’s pleading of the 12<sup>th</sup> March 2019 meeting between representatives of both parties and their respective lawyers, the respondent pleaded that it is only at said meeting coming some 3 years since the 1<sup>st</sup> MOU was signed by the parties that the appellant raised the issue of the interpretation of “Food and Beverage”. They asserted that it was the appellant who was coming into an already established environment at the terminal building “who had a duty to clearly identify its requirements to the respondent”, and put the appellant **“to strict proof that the Defendant ever represented to the Claimant that Food and Beverage included snacks and soft beverages and that the Defendant undertook to vary its relationship with its existing tenants (save and except Goddard’s Catering Grenada) to facilitate the Claimant.”** (emphasis added)
- [14] In response to the appellant’s pleading at paragraph 12 of the statement of claim of having suffered loss and damage because of the breach of warranty as the foot traffic on the second floor was severely reduced as a consequence of the breaches, the respondent characterized this assertion as **“speculative”**, the alleged loss and

damage not itemized or quantified, asserted that the forecasted earnings were “mere predictions”, and that the failure to meet them “could be as a result of overestimation of the quality of the product offered, amongst other things.” And while the appellant is not the only vendor on the second floor, none of the other second floor vendors “have raised an issue of the sale of snacks and soft beverages on the ground floor or on any floor affecting their bottom-line.”<sup>5</sup>

[15] Regarding the pleading concerning the lease not having been finalized by the respective lawyers, the respondent points to the negotiating process being unduly lengthy; that the appellant had not responded to the fulsome comments on the lease agreement made by the respondent’s lawyers and sent to its lawyer on 2<sup>nd</sup> April 2019; that it is unreasonable for the appellant to have brought the negotiations to a standstill by failing to respond to the issues raised by the respondent, “and yet expects negotiations to continue ad infinitum.”<sup>6</sup> The respondent also denied threatening the appellant with eviction, but in its correspondence “merely sought to put in place timelines for the execution of the Lease Agreement”, and that it reserved its rights to terminate the relationship with the appellant should a lease agreement not be executed within the 2-month period specified in the correspondence.<sup>7</sup>

[16] The respondent, therefore, denied that the appellant was entitled to the relief claimed. The respondent annexed to its filed defence as “AA1” three pieces of correspondence passing between the parties. These are, in chronological order: -

- (i) letter dated 8<sup>th</sup> October 2019 from Ms. Malisiewicz of the appellant company to Mr. Lenworth Gordon (or “Mr. Gordon”) of the respondent Authority referring to the ‘representation’ made by the respondent’s representatives to her as the appellant’s representative on 4<sup>th</sup> February 2018, that the appellant had prepared its business plan based upon said representation, which representation had been

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<sup>5</sup> Defence, paragraph 11

<sup>6</sup> Defence, paragraph 12

<sup>7</sup> Defence, paragraph 13

contravene by the respondent by the installation of a vending machine with snacks and beverages on the first floor of the terminal, and by most of the gift shops and duty free outlets on the first floor being allowed to sell snacks, beverages and even ice creams “competing albeit unfairly with the [appellant].” By this letter the appellant also requested a slew of changes to the then draft lease in the form of responses to specified clauses/provisions;

(ii) email sent 13<sup>th</sup> February 2019 from the respondent’s lawyers Wilkinson, Wilkinson & Wilkinson (for short “Wilkinson Chambers”) to Mr. Lenworth Gordon and Ms. Wendy Francette-Williams of the respondent attaching comments to a draft lease;

(iii) email response sent 12<sup>th</sup> March 2019 from the respondent’s lawyers Wilkinson Chambers to Ria Marshall of the appellant’s lawyers Henry, Henry & Bristol (“H,H&B Chambers”) referring to a meeting at the respondent’s offices earlier that morning and attaching the respondent’s comments in response to the comments of the appellant on a draft lease;

[17] No reply to defence was filed by the appellant. The appellant filed the witness statement of Ms. Malisiewicz on 10<sup>th</sup> January 2022.

[18] The respondent filed on the same date the witness statements of Ms. Joan Gilbert (an employee for one year and then General Manager of the respondent Authority), and Mr. Lenworth Gordon (an employee for the past 5 years and the then Marketing and Properties Manager of the said Authority). As such neither of the respondent’s witnesses at trial had been employed by the respondent at the time when the oral representation had been made to Ms. Malisiewicz of the appellant on 4<sup>th</sup> February 2016 by Ms. Wendy Francette-Williams, the then General Manager, as alleged by Ms. Malisiewicz at paragraph 5 of her witness statement and a member of the “Concessionaire Committee” of the respondent. No witness statement by the former

General Manager of the MBI Airport, Ms. Wendy Francette, was filed nor was she called as a witness at the trial by either the respondent or the appellant.

### **Appeal**

- [19] In its notice of appeal the appellant relies on 7 grounds of appeal (set out therein as (a) to (g), and as 1 to 7 at paragraph 13 of the appellant's skeleton argument). I shall deal with each of the 7 grounds of appeal seriatim. It is also asserted (both in the notice of appeal and appellant's skeleton) that the learned judge made certain erroneous findings at paragraphs 38, 41, 44, 53, and 54 of the judgment in coming to her decision. Likewise, the appellant challenges 4 findings of law, each of which will also be addressed when considering the various pertinent ground or grounds of appeal. Before embarking upon a consideration of the grounds of appeal, I will consider the terms and contractual force, if any, of the MOU.

### **The MOU – is it binding, and if not, is the claim sustainable?**

- [20] The appellant and respondent entered into two memoranda of understanding. The first dated 4<sup>th</sup> May 2016 and the second dated 2<sup>nd</sup> August 2017, it being an amendment to certain of the terms in the first MOU and which expressly provides that "all other terms and conditions as outlined in MOU dated 4<sup>th</sup> May, 2016 will apply". Accordingly, the 1<sup>st</sup> and 2<sup>nd</sup> MOUs are to be read and construed as one Memorandum of Understanding ("the MOU").
- [21] The MOU sets out the terms and conditions under which the parties agreed that the appellant would occupy and formally lease from the appellant the designed unit space on the second floor of the departure lounge at the MBI Airport "for the operation of a Food and Beverage Concession". The legal status and enforceability of the MOU was considered by the learned judge from paragraphs [29] to [33] of the judgment. The learned judge correctly noted that the appellant's claim is predicated on a memorandum of understanding and that a memorandum of understanding is, usually, not a binding contract but an agreement between parties to enter into a formal contract, classically described as a "contract to enter into a contract."

- [22] As to the law applicable to memoranda of understanding and whether they have or do not have contractual force, the learned judge cited extensively from paragraphs [53] and [54] of the judgment of Albertini J of the Commercial Court in Saint Lucia in **Gearing Up Limited v FDL Consult Inc**<sup>8</sup> where the learned judge neatly summarized some of the applicable principles of law. I need not, for present purposes, repeat or set out in full the said paragraphs.
- [23] Suffice it to be said that a memorandum of understanding is a species of ‘agreement’ which may or may not have contractual force or create binding contractual obligations between the signing parties. Typically, this species of “agreements” are referred to as or includes what is referred to as a “preliminary agreement” or a “letter of intent” or “pre-contract protocol” or “term sheet”. These species of documents usually are used to set out the accepted terms and expectations of the parties to it and their intention to enter into a formal agreement or contract or, as in the instant case, a lease agreement binding on the parties thereto.
- [24] Moreover, it is well established that the law does not recognize a contract to enter into a contract or an agreement to agree. Such species of ‘agreements’ are non-binding and therefore unenforceable, unless some provision thereof expressly provides for it to have binding or contractual force, or the parties thereto agree to be immediately bound by certain of the provisions stated therein until a formal contract is executed by them. This species of agreement be they of the totally non-binding/non-contractual kind or be they of the kind where only certain provisions set out therein are agreed to be binding and of contractual force, is not unusual in commercial and other dealings. They are useful as preliminary agreements while the parties negotiate and seek to reach agreement on some of the other important, but yet unagreed, terms and conditions which are subsequently to be encapsulated in a formal contract.

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<sup>8</sup> SLUHCM2020/0056 (delivered 26<sup>th</sup> July 2022, unreported)

- [25] At paragraph [33], the learned judge considered whether the MOU in the instant matter was enforceable. She posited that one main factor to be considered in deciding this question is 'the intention of the parties to be interpreted from the terms and the conduct of the parties post the execution of the MOU'. She also held that the onus rested on the appellant (as claimant) to prove that it entered into the MOU as a result of the alleged representation. The latter statement about the representation, while correct as a matter of principle, "he who alleges must prove", is a separate but important consideration from the question of whether the MOU itself has contractual force or is otherwise enforceable in law. However, the former statement as to the importance of ascertaining the intention of the parties from the terms of the MOU, is relevant to the question as to the binding nature of the MOU. This question is to be decided first and foremost by construing the intention of the parties from the terms of the MOU itself. If it is clear that the terms properly construed show that the parties did not intend the MOU or any of its terms and conditions to give rise to binding and enforceable obligations, then that answers the question as to its enforceability as a contract.
- [26] However, the matter does not end there. The court must, in such circumstances, go on to consider whether a person to whom a representation is made in breach of a duty of care to ensure its correctness and who is induced by the misrepresentation (whether innocent or fraudulent or negligent) to enter into an MOU or some similar species of non-binding document, the said "agreement" is "equivalent to a contract" and can give rise to a claim in damages for breach of the duty of care.<sup>9</sup> In such circumstances, the party alleging misrepresentation or breach of duty as to the correctness of the representation/inducement to enter into a contract to contract, would be able to still rely on the inducement and to claim damages.

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<sup>9</sup> **Hedley Byrne & Co. Ltd v Heller Partners Ltd** [1964] A.C. 465 per Lord Devlin at pages 528-529.

[27] The learned judge went on to consider the law on what constitutes an “inducement” as set out in **Esso Petroleum Co. Ltd v Mardon**<sup>10</sup>. There the judge opined as to the duty of care arising in circumstances where a person makes a representation with the intention of inducing another to enter into a contract with him, that duty being to use “reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable.”

[28] However, the learned judge did not actually decide the predicate question which she posed at paragraph [33] as to whether the MOU was enforceable. The closest she came to doing so is this statement at paragraph [31]:-

“Accordingly, **the MOUs govern the terms of the arrangement between the parties**, subject to the parties entering into a mutually acceptable lease agreement setting forth the terms and conditions in the MOU.” (emphasis added)

[29] In making this pronouncement, the learned judge did not embark upon an examination of the terms of the MOU to ascertain its binding and enforceable contractual force, if any. To determine whether the MOU is binding on the parties thereto so as to have contractual force, the starting point is to examine the terms of the said MOUs themselves to discern whether the parties intended that certain or all of its provisions would be binding on and between them, until such time as an agreement for a lease is concluded and entered into.

[30] What then are the important terms of the MOU? Generally, the MOU sets out certain important terms of the arrangement for the rental by the appellant of the designed unit space on the 2<sup>nd</sup> floor of the departure lounge at the MBI Airport. These key terms include the term of the intended lease (initially 3 but amended to 5 years) with an option to renew exercisable by the appellant (tenant) upon satisfactory performance of the terms and conditions. The exact location of the unit space is described and specified, also its square footage (initially 360 sq. ft. and changed to 355 sq. ft.); the rental fee calculated at \$10.00 per sq. ft. (changed from

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<sup>10</sup> [1976] QB 801 at page 820.

XCD\$3,600.00 per month to XCD\$3,550.00 per month); service charge initially of \$360.00 (10% of rental fee) changed to \$355.00; utilities; \$240.00 A/c maintenance (if unit is provided by the respondent); metered electricity; security deposit of \$21,600.00 (6 month rental); premises rented 'As Is'; and facility improvements by tenant to be as per approved architecture design/plans, and works in accordance with the contractor guideline regulations in force by the MBI Airport.

[31] Importantly, the MOU addresses the tenant's "Use of Premises" in these terms: -

"Spice Isle Coffee shall use the leased premises and facilities exclusively for the development and operation of a coffee shop facility at [the MBI Airport].

The following services will be provided:

- Espresso Coffee drinks/Brewed Coffee
- Fresh Roasted Coffee beans
- Teas
- Pastries
- Sandwiches
- Yogurts
- Non-alcoholic Beverages
- Salads
- Small snacks

Spice Isle Coffee shall not engage in any business or activity at the airport other than that authorized in writing by the [respondent]."

[32] In relation to "Services" the MOU stipulates: -

"The Tenant must ensure that the services remain open to the public **through the entire operational hours of the airport**, including weekends and public holidays."

[33] Other provisions in the MOU concern staff parking, airport development, the tenant abiding by the airport rules and regulations for the proper management of the airport facilities, and the tenant maintaining public liability insurance with respect to the premises. Item 16 dealing with "Lease Agreement" provides: "This correspondence is subject to the parties entering into a mutually acceptable lease agreement settling forth the terms and conditions contained herein." Significantly, the MOU goes on to stipulate further:

**“The said lease to be signed by responsible officers of both parties and until such time the Tenant may occupy and conduct business in the specified area, in accordance with the above terms.”** (emphasis added)

- [34] Learned counsel for the appellant submitted that this provision of the MOU clearly demonstrates that the MOU is a binding and enforceable agreement, albeit intended to be preliminary to the parties entering into a lease agreement with respect to the designed premises, and the appellant’s operation of a coffee shop concession therefrom.
- [35] It is common ground that the appellant, prior to any lease agreement being finalized, and it has not been finalized by the parties to date, entered into occupation of the said concession premises and commenced business as a coffee shop therefrom on 23<sup>rd</sup> October 2017, paying rent and otherwise operating the said business pursuant to the terms of the MOU. It is the appellant’s submission that in such circumstances, the MOU clearly was intended by the parties to (and did) create legal relations. This is clearly what they argue from the express terms of the provision at paragraph [33] above. However, in response to this point, learned counsel for the respondent submitted that the MOU was not a binding agreement, but merely an agreement to enter into a formal lease agreement, and therefore its terms are not binding.
- [36] This submission was also made to buttress the respondent’s case that there was no representation made by the respondent as alleged, and if it was made, no claim can be made for its breach in circumstances where it did not induce the party relying on it to enter into a binding contract, as the MOU is not a binding agreement, but merely an agreement to enter into a lease, and is thus unenforceable as a matter of law. However, in answer to this latter point, learned counsel for the appellant counters that the duty of care is not limited to contractual relationships or relationships of a fiduciary nature, but include also relations which are “equivalent to contract”, that is “where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract.” **Hedley Byrne & Co Ltd v Heller Partners Ltd** per Lord Devlin citing approvingly Lord Shaw

in *Nocton v Lord Ashburn*) I have already reached a conclusion on the law and applicable principles relative to this issue at paragraph [25] above.

### **Conclusion on legal status of the MOU**

[37] It is my considered view that the terms of the MOU (as amended) was intended by the parties to govern their business relationship in the interim until a formal lease or lease agreement was entered into incorporating the agreed upon terms and conditions. That it was intended to create legal relations between the parties was made clear by the provision (cited above) in the MOU which expressly permitted the appellant to enter into occupancy and to conduct the agreed upon business concession from the designed unit on the 2<sup>nd</sup> floor of the departure lounge at the MBI Airport, in accordance with the terms and conditions stipulated in the MOU. This is a clear case where the MOU is not merely an agreement to agree or a contract to contract, which species of agreement are generally not binding and, therefore, unenforceable. Here, the MOU expressly provides for its binding effect as between the parties in stipulating that its terms were to govern the relationship between the appellant and the respondent in the event that the appellant took up occupancy and commenced business from the designed unit. The clear intention of the parties as gleamed from the MOU was to create legal relations between them as landlord and tenant in the eventuality that the tenant exercised its right of occupancy and to commence business from the designed unit prior to a lease agreement being executed by the parties, and to do so upon the legal basis of the binding terms and obligations set out and agreed upon by them in the MOU.

[38] Furthermore, the appellant in reliance on the said provision in the MOU, was let into occupation by the respondent and permitted to commence and to carry on therefrom its Coffee Shop business subject to its compliance with the terms and conditions of the MOU. It is also pellucid that the respondent conducted itself in relation to the appellant on the footing that the terms and conditions of the MOU were applicable and binding. The respondent sought to apply and to enforce in relation to the appellant the provisions in relation to the occupancy by the appellant and its conduct

of business from the said designed unit. Importantly, the appellant paid the rent set out in the MOU to the respondent, which rent was accepted by the respondent, and the appellant conducted business from the said premises over a period of several years.

[39] This gives rise to the inescapable conclusion that from the terms of the MOU itself and for the conduct of the parties after the MOU was signed, it was the intention of the parties that the terms and conditions of the MOU would be binding and have contractual force and enforceability until it was replaced by a formal lease agreement. The parties by their conduct after the signing of the MOU treated its terms as binding and enforceable between them as parties to the MOU.

[40] Turning to the follow up question identified at paragraph 25 above. In any event, based on the principle in **Hedley Byrne v Heller** and **Esso Petroleum Co. Ltd. v Mardon**, a party making a representation owes a duty of care to ensure that it is correct and not to make such representation fraudulently, recklessly or negligent as to it being correct. In such circumstances, even where the claimant did not enter into a binding contract as a result of the representation, he/she can nevertheless maintain a claim based upon misrepresentation and inducement where the resulting 'agreement' is "equivalent to a contract". In the instant matter the appellant does not have to rely on these principles, as the MOU has contractual force and its terms and conditions were intended by the parties to be binding and are binding on each other, until superseded by a formal agreement for a lease.

#### **Ground 1 – Pleading of the representation not controverted in defence**

[41] This ground of appeal presents, first, a technical pleading issue and, secondly, a substantive one which goes to the question of whether the appellant's pleading of the representation was denied by the defence or is deemed to have been admitted. The appellant's first point in support of this ground of appeal is that in responding to the pleading of the representation at paragraph 4 of the statement of claim, the respondent (as defendant) did not deny that the representation was in fact made by

the appellant to it. The appellant's case as set out in the witness statement of its director Ms. Zofia Malisiewicz is that the representation was made during a meeting on 4<sup>th</sup> February 2016 between herself and the Airport's Concessionaire Committee. More specifically, it was made by Mrs. Wendy Francette-Williams who told her that "after the completion of the second-floor departure lounge, all sales of food and beverages would thereafter be located exclusively on the second floor"<sup>11</sup>; and that the Concessionaire Committee had assured her that no food and beverages would be sold on the ground floor "so as to drive passenger traffic to the second floor."<sup>12</sup>

[42] The response pleading in the defence merely put the appellant "to strict proof that [the respondent] ever represented to [the appellant] that Food and Beverage included snacks or soft beverages."<sup>13</sup> This pleading did not individually or collectively satisfy the requirements of CPR 10.5(3) and (4). Therefore, the fact of the representation being made was admitted by the respondent.

[43] In reply to this first point, the respondent argues that what is pleaded at paragraphs 3, 4 and 5 of the defence when read together is or amounts to a clear denial that such a representation was in fact made and, therefore, the pleading requirements of CPR 10.5 were met. It is also submitted that the fact that the word "denied" is not actually used in the said paragraphs of the defence, does not derogate from the meaning and effect of the words used therein being a denial that the representation was in fact made by the respondent to the appellant prior to the parties entering into the MOU.

[44] CPR r.10.5(3) and (4) states:-

"(3) In the defence the defendant must say which (if any) allegations in the claim form or statement of claim –

(a) are admitted;

(b) are denied;

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<sup>11</sup> Witness Statement of Zofia Malisiewicz, paragraph 5

<sup>12</sup> Witness Statement of Zofia Malisiewicz, paragraph 6

<sup>13</sup> Defence, paragraph 10

- (c) are neither admitted nor denied, because the defendant does not know whether they are true; and
  - (d) the defendant wishes the claimant to prove.
- (4) If the defendant denies any of the allegations in the claim form or statement of claim –
- (a) the defendant must state the reasons for doing so; and
  - (b) if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence".

[45] The appellant's second point in support of ground 1 is that the consequence of this failure to deny the representation is that the respondent has admitted fact of it having been made.

### **Analysis and Conclusion -ground 1**

[46] Paragraphs 3,4 and 5 and the last sentence of paragraph 10 of the defence state: -

"3. In response to paragraph 4, the Defendant states that Claimant was never induced to sign anything, and all interactions between the parties were fairly negotiated. In fact, in an effort to facilitate the Claimant's business plans, the Defendant removed the exclusivity on the sale of Food and Beverage which was held by their long-standing tenant, Goddard's Catering Grenada. This required that the lease agreement between Goddard's and the Defendant be varied. At( a) times in its relationship with Goddard's Catering Grenada and its other tenants, (sic) [the Defendant] has always represented Food and Beverage to exclude snacks and soft beverages including drinks such as water. Snacks and soft beverages have always been sold by the tenants on the ground floor notwithstanding Goddard's Catering Grenada's exclusivity arrangement relative to the sale of food and beverages.

4. Moreover, in its Memorandum of Understanding dated 4<sup>th</sup> May 2016, at clause 10, the Claimant identified the types of food it wished to sell. By further Memorandum of Understanding dated 2<sup>nd</sup> August 2017, there was no stated revision on the terms the Claimant wished to sell, however the Claimant has proceeded to sell said terms without seeking the leave of the Defendant.

5. The Defendant states that to date, no other Tenant has raised a concern with the sale of snacks and soft beverages on the ground floor. The Defendant never undertook to vary its tenancy agreements with its other tenants to prevent the sale of soft beverages and snacks. Moreover, at the time in which both Memoranda of Understanding were signed with the claimant, there were tenants selling snacks and soft beverages on the ground floor and the Claimant never requested that (sic) the defendant vary

its leases with said tenants and the defendant never represented that it would so do.

**[Paras 6 -9 not pertinent to this issue]**

10. ....The Claimant is put to strict proof that the Defendant ever represented to the Claimant that food and beverage included snacks and soft beverages and that the defendant undertook to vary its relationship with its existing tenants (save and except Goddard's Catering Grenada) to facilitate the claimant."

[47] For purposes of this point, I make the following observations of what is stated at paragraphs 3,4,5 and 6 of the defence: -

- (i) in the first line of paragraph 3, the respondent states that the appellant was never induced to sign anything. This is a denial of what is asserted at paragraph 4 of the statement of claim that 'in order to induce [the appellant] to sign the MOU' the respondent warranted and represented certain things. Here the respondent is clearly denying that it offered any inducement to the appellant to enter into the MOU. While this is not a flat-out denial of the exact matters pleaded as the representation, it is in my view sufficient of a denial of the representation by the respondent. The question would be whether the respondent is saying I may have said those words but not with the intention of inducing the appellant to enter into the MOU or no such representation was made at all.
- (ii) By the rest of what's pleaded at paragraph 3, the respondent seems to be addressing the circumstances which existed with the existing tenants and why it could not, and presumably did not make the representation to the appellant as pleaded.
- (iii) At paragraphs 4 and 5, the respondent is raising the issue of what they see as the appellant's misunderstanding of what is meant or covered by the expression "food and beverage" as not including snacks and soft beverages and in the last sentence of paragraph 10, putting the appellant to strict proof that it was ever represented to the appellant

that “Food and Beverages” included snacks and soft beverages. This raises the specter (not relied on in the court below) as to the parties not being in this respect *ad idem*).

[48] Although somewhat curious, I am satisfied that the respondent in its defence, at paragraph 3 in particular, did sufficient to deny making the representation pleaded by the appellant at paragraph 4 of the statement of claim, and this issue was joined with the parties at the trial. Moreover, it is well-established that where a defendant does not admit an allegation in the statement of claim, the effect of this is not an admission of the allegation but to put the claimant to its proof by adducing evidence at the trial. In this case there was no actual or implied admission of the representation which operates in any event to absolve the claimant of the burden of proving that the representations as pleaded were in fact made by the respondent and induced the appellant into entering into the MOU. The pleading at paragraph 10 of the defence makes clear that the respondent takes issue with the appellant’s case that there was an oral representation that any food and beverage, including snacks and soft beverages, would not be sold on the ground floor or would only be sold on the second floor, and that it undertook to vary its relationship with its existing tenants (save and except for Goddard’s Catering Grenada) to facilitate the appellant and its business to be operated from the second floor.

[49] CPR 10.5(3) and (4) does not mandate the use by a defendant of the word “*denial*” otherwise, he/she would be deemed to have admitted an allegation. In fact, CPR 10.5 does not provide a consequence for any failure or shortcoming in how an allegation in the statement of claim is responded to in the defence. The gravamen and meaning of these provisions is that in the defence, if an allegation is not admitted, it must, by the language used, be clearly denied or admitted or the claimant put to strict proof of it. As to the requirement at r.10.5(4) that if there is a denial, the defendant must state the reasons for doing so, the respondent states its reasons at paragraphs 3, 4, 5 and 6. It is for the trial judge having heard the evidence and seen the witnesses give their evidence and be cross-examined, to decide the

issues of fact as to whether the pleaded representation was made and whether it was made with the intention of inducing the appellant into signing the MOU.

- [50] Moreover, as admitted by counsel for the appellant, this pleading point was never raised during the trial below and no objection was taken by the appellant to the evidence led from the witnesses for the respondent effectively saying or contending that no such representation would have been made to the appellant for the reasons which they gave. Moreover, the said evidence having been given at the trial without objection, it was for the learned judge to assess its evidential value and to determine whether she could accept it or any aspect of it. At paragraph [35], the learned judge stated that the respondent had “denied the purported representations and contends that the [appellant’s] forecasted earnings were all made of its own free will.” Further, at paragraph [39] she recounts that the respondent states that:

“what was represented to the [appellant] was the removal of the exclusivity arrangement it had with its previous tenant, Goddard’s Catering for the sale of food and beverages as the sole concessionaire at the airport. The [respondent] states further that it always understood “food” and “beverage” to exclude snacks and soft beverages.”

- [51] For these reasons ground 1 fails.

**Ground 2 – Did the judge err in not applying the ordinary dictionary meaning of the words “food” and “beverage”?**

- [52] The appellant submits that the learned judge erred when at paragraph [53] of the judgment she accepted the respondent’s evidence that:

“it would be unreasonable to restrict sales of food, snacks and beverages only to the top floor as [the appellant] suggest... The court accepts [the respondent’s] evidence that a restriction not to sell food and beverages on the ground floor would not be in keeping with international airport standards. The MOUs, which forms the basis of the contract are silent on the purported exclusivity which the [appellant] asserts.”

- [53] The appellant submits that it was reasonably entitled to believe the key words used by the respondent in the representation, that is, “food” and “beverage” to carry their dictionary ordinary meaning or definition: “**food**” –“things that people or animals

eat”; and “**beverages**” – “any type of drink except water”, and not to exclude snacks and soft drinks. Relying on the statement of principle in **Headley Byrne v Heller** and **Esso Petroleum**, it is submitted where a representative of an airport authority was having discussions with a potential tenant, that representative and hence the airport authority, “is under a duty to use reasonable care to ensure that any representations made relating to the tenancy is correct.”<sup>14</sup> With that submission I entirely agree.

[54] The appellant submitted that the learned judge misguided herself at paragraphs [43] in that no other witnesses or documents were necessary to support the ordinary dictionary meaning of these words “food and beverage”, and that the onus rested in law on the respondent to show that the definition it attributed to those words was one that would be understood by a reasonable person.<sup>15</sup> The appellant also submits that the judge’s reliance at paragraph [53] on the evidence of the respondent as to the unreasonableness of restricting the sale of all snacks, food and beverages only to the second floor and that such a restriction would not be in keeping with international airport standards was also misguided, incorrect and ought not to stand. This is not least for the fact that the respondent did not at trial lead any evidence as to what if any were the ‘international airport standards’ to which such a restriction would be inimical or contrary.

[55] In response to ground 2, the respondent points out that it is the appellant who in closing submissions at the trial contended that it was a matter of interpretation what was included in the expression “food and beverage”. In other words, the emphasis during the appellant’s case at trial was not on the judge simply accepting the dictionary meaning of the words. The respondent also submits that it was quite reasonable for the appellant to have understood that the respondent would not have included an onerous term in the contract (the MOU) which precluded the sale of snacks and soft beverages on the ground floor, without specifically identifying how

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<sup>14</sup> Appellant’s skeleton arguments, paragraph 24.2

<sup>15</sup> Appellant’s skeleton arguments, paragraph 24.6

that was to be achieved. This would involve the respondent having to break the concession contracts with all these small outfits, a matter which would prove too onerous to achieve.<sup>16</sup>

[56] Furthermore, in response to this ground, the respondent argues that the learned judge having reviewed the appellant's business plan and other document at paragraphs [33] to [44] was correct to conclude that there was no evidence to support the appellant's position and interpretation of the said words.<sup>17</sup> Also, the judge gave reasons as to why she ought to move away from the dictionary meaning of the said two words relied on by the appellant. The respondent submitted that the meaning of "food and beverage" posited by it is a reasonable one, especially in the Caribbean context, which factor the judge clearly took into account. In support of this submission, the respondent cites this statement of principle in Halsbury Laws of England Vol 31 –

“.. a representor will not, however, be fraudulent if he believed the statement to be true in the sense in which he understood it, provided that was a meaning which reasonably be attached to it.”

[57] Applying the principles upon which an appellate court may overturn findings of fact made by a trial judge as set out by this Court in **East Pine Management Ltd v Tawney Assets Ltd & Ors**<sup>18</sup>, the respondent submits that this is not such a case for interference, and this ground of appeal ought to be dismissed.

### **Analysis and Conclusion – ground 2**

[58] At paragraphs [37] to [44] of the judgment, the learned judge set out and considered the case for the appellant and the respondent on this issue. In doing so, she considered the provisions in the 1<sup>st</sup> and 2<sup>nd</sup> MOUs as to the 'use' of premises by the appellant; the description in its business plan of its start-up inventory, equipment and product description. She also considered the respondent's evidence that it was always understood that "food" and "beverage" excluded or did not include snacks

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<sup>16</sup> Respondent's skeleton arguments, paragraph, 15

<sup>17</sup> Respondent's skeleton arguments, paragraph 17

<sup>18</sup> BVIHC VAP2012/0035 (delivered 24<sup>th</sup> March 2014, unreported)

and soft beverages; that the appellant never requested a variation of the arrangements with the existing tenants on the ground floor selling snacks and soft beverages (other than the transfer of the business of Goddard's Catering Grenada to the second floor; and the respondent's contention that the items identified in the appellant's business plan were not items that were in competition with the snacks and soft beverages sold by the tenants on the ground floor.

[59] Importantly, at paragraph [41], the learned judge accepted the respondent's evidence that "food" and "beverage" did not include snacks and soft drinks being sold by the tenants on the ground floor, noting that "the only reference in the appellant's business plan to possible competition business was in relation to Goddard's. In its business plan under the rubric "Competition" the appellant recognized the Snack Bar operated by Goddard's as a "potential competition", at the same time extolling the virtues its planned business model as a smaller bar offering "different atmosphere and excellent coffee together with a friendly and professional [sic] service."

[60] The learned judge also identified the appellant's argument that it was entitled to believe and to understand the words "food" and "beverage" as carrying their ordinary dictionary meaning and not excluding snacks and soft beverages which were then being sold by tenants on the ground floor. At paragraph [43], the learned judge mused that the appellant had not provided any witnesses or documents in support of this position. She noted in particular that there was no reference in the appellant's business plan to any such representation under the headings "Keys to Success" and "Competition", that "there will be no snacks and soft beverages of any kind being sold on the ground floor."

[61] Having reviewed the evidence (oral and documentary) and the competing arguments advanced by both parties, the learned judge made this crucial finding at paragraph [44] –

"[44] In the circumstances therefore, the claimant has not provided any evidence to prove that as a matter of fact the said alleged representation

was made. The defendant's conduct in removing the exclusivity clause held by Goddard's accords with the defendant's posture that no further undertaking was given in relation to the other shops on the first floor. The absence of such expressed consensus for exclusivity cannot be inferred except with the conduct in relation to Goddard's Catering which was recognized in the claimant's business plan."

[62] The learned judge also made this finding at paragraph [53] –

"[53] The court notes that the claimant is unilaterally seeking to enforce terms not expressed in the MOUs. The court also accepts the defendant's evidence that it would be unreasonable to restrict sales of food, snacks and beverages only to the top floor as the claimant suggests. It is the claimant's own evidence of the difficulty to reach the second floor when the lift is dysfunctional or where persons have heavy luggage. The court accepts the defendant's evidence that a restriction not to sell food and beverages on the ground floor would not be in keeping with international standards. The MOUs, which form the basis of the contract are silent on the purported exclusivity which the claimant asserts."

[63] Accordingly, the learned judge, having reviewed the evidence and opposing arguments, found at paragraph [54] that the appellant had failed on a balance of probabilities to establish a breach of representation or warranty. This is a finding of fact. Matters such as credibility and the weight to attach to parts of the evidence, as matters for the trial judge and this Court will be slow to overturn such a finding unless it has been shown that the judge was plainly wrong.

[64] The appellant in its written submissions prayed in aid the dicta in **Baron Uno Carl Samuel Akerhielm and another v Rolf De Mare and others**<sup>19</sup>:-

"... the meaning placed by the respondent on the representation made may be so far removed from the sense in which it would be understood by any reasonable person as to make it impossible to hold that the respondent honestly understood the representation to bear the meaning claimed by him and honestly believed it in that sense to be true."

[65] The applicability of this principle to the facts in the instant matter is doubtful. This is not a situation where the meaning attributed by the respondent to the words "food" and "beverage" or that found by the learned judge is either far-fetched or so far

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<sup>19</sup> [1959] A.C. 789 at pg. 805.

removed from the sense in which it would have been understood by a reasonable person or by persons in the position of the representatives of the appellant and the respondent. It is certainly not so far removed as to make it impossible for the court to hold that it had the meaning in which the respondent understood it and as found by the learned judge at paragraphs [37] to [44] and [53] of the judgment. I say this for two principal reasons.

[66] The first is that when one looks at the prevailing situation at the MBI Airport at the relevant time of the representation, with tenants and concessions selling food, snacks, beverages and alcoholic beverages on the ground floor and the main concessionaire being Goddard's Catering Grenada; that Goddard's was the appellant's admitted competitor and the only concession represented by the respondent that will be removed from the first to the second floor; the respondent cancelling Goddard's exclusivity to facilitate the appellant's new Spice Isle Coffee Shop business, it is neither farfetched nor far removed for a reasonable person to have understood that the other concessions on the first floor would not be moved to the second floor or be compelled to stop selling snacks and soft beverages from their outlets there. It is also not farfetched or far removed that when the word "food" was used by the respondent it did not and could not in all the prevailing circumstances mean anything that people eat, including soft snacks; and likewise, that when the word "beverage" was used it meant any type of drink except water.

[67] The second reason for reaching this conclusion is that words may have a particular meaning in a particular locality and among a particular class of persons.<sup>20</sup> In West Indian or Caribbean parlance, as the learned judge alluded to, the words "food and beverage" do not include or are not understood to include a reference to selling snacks and soft drinks. When the words are used together this is usually understood to be a reference to cooked food and to alcoholic drinks. Perhaps more importantly, this common use or common meaning of these words in the Caribbean context is

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<sup>20</sup> **Shore v Wilson** (1842) 9 Cl & Fin 355; **Smith v Wilson** (1832) 110 ER 266 and **Myers v Sarl** (1860) 3 El. & El. 306, per Cockburn C.J.

given much credence by the fact that historically the other small outlets on the first floor at the time selling snacks and soft beverages operated, apparently for some time, without the sale of these items being considered to be in violation of the exclusivity which the main concessionaire, Goddard's Catering Grenada, then enjoyed. As the respondent's evidence discloses, no one else raised the issue which the appellant did with the said small concessionaires continuing to operate from the first floor selling snacks and soft beverages.

[68] However, there is an additional and important point which impacts, to some extent, upon whether the respondent represented to the appellant, by the use of the words "food and beverage", that it also included a representation that no snacks or soft beverages will be sold by the outlets on the first floor. This point concerns the difference between the appellant's pleading of the representation made to it, and Ms. Malisiewicz' evidence as to what was the actual representation made to her on 4<sup>th</sup> February 2016 by the Airport Concessionaire Committee. Ms. Malisiewicz evidence at paragraphs 5 and 6 of her witness statement is not on all fours with the formulation and specific pleading of 'the representation' at paragraph 4 of the appellant's statement of claim. The main point of similarity is that food and beverages would only be sold on the second floor. However, the main point of departure between these two versions of 'the representation' is that Ms. Malisiewicz in her witness statement does not include as part of the representation what is stated at sub-paragraph (b) of paragraph 4 of the statement of claim, viz, "that the main food and beverage vendor currently on the ground floor would be relocated to the second floor and thereafter no food and beverages would be sold on the ground floor."

[69] This point of difference between the appellant's pleaded case of 'the representation', upon which its entire case is hinged, and what is Ms. Malisiewicz's evidence in chief, is significant. It is significant because as matters turned out, a principal issue before the learned judge in the court below and indeed before this Court in the appeal, was whether the expressions "food" and "beverage" included or was meant to include all

“soft snacks and soft beverages”. The appellant contends that it did and this accords with the dictionary meaning of both words. Whereas the respondent says it did not and could not have been intended to include soft snacks and soft beverages sold by the other concessionaires on the ground floor. Accordingly, there was no representation that these other concessionaries would have been relocated to the second floor by the respondent.

[70] This having not occurred, which assertion is a main plank of the appellant’s contention that the representation was breached to its detriment and loss, did not in fact constitute a breach of any representation made to the appellant. Moreover, the only assurance given to the appellant was that the main concessionaire then on the ground floor, Goddard’s Catering Grenada, would be moved to the second floor departure lounge once completed, which indisputably did occur. Accordingly, this critical issue is of significance in deciding between the two contrary versions, the decision on which hinges on the court accepting, as it did, the representation that “the main food and beverage vendor” Goddard’s Catering Grenada, was the only concessionaire on the ground floor agreed to be relocated by the respondent to the second floor. The inference being that there was no representation that the other small outfits selling soft snacks and soft beverages would be moved to the second floor, as the appellant contends.

[71] There is a further point which goes to the viability of the claim based on representation. It is that for a representation to be actionable it must relate to some existing fact or some past event. It implies a *factum* not a *faciendum*. The former contains no element of futurity and is not a statement of intention. Thus, a promise or undertaking to do something in the future gives rise not to a claim for misrepresentation, but to a different claim and different remedy.<sup>21</sup>

[72] For these reasons ground 2 also fails.

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<sup>21</sup> **Maddison v Alderson** (1883) 8 App Cas 467.

**Ground 3- judge erred in not discarding hearsay evidence from respondent  
Ground 4 - references at paragraph 4(f) of Lenworth Gordon's witness  
statement res inter alios acta**

[73] These two grounds of appeal may conveniently be dealt with together. They are also related to ground 2 which challenged the judge's acceptance of the respondent's evidence and case that the words "food" and "beverage" excluded snacks and soft beverages and therefore there was no breach of any representation made by the respondent to the appellant prior to the latter entering into the MOU.

[74] Ground 3 specifically challenges the learned judge's reliance on and failure to discard at paragraph [41] the evidence contained at paragraphs 4(a) to (f) of the witness statement of Lenworth Gordon. I do not intend to set out verbatim paragraphs 4(a) to (f) of Mr. Gordon's witness statement, but instead the judge's summary of this evidence at paragraphs [39] and [40]: -

"[39] The defendant states that what was represented to the claimant was the removal of the exclusivity arrangement it had with its previous tenant, Goddard's Catering, for the sale of food and beverage as the sole concessionaire at the airport. The defendant states further that it always understood "food" and "beverage" to exclude snacks and soft beverages.  
[40] The defendant contends that the claimant never requested a variation of its arrangements with the tenants on the ground floor to reflect the alleged misrepresentation, and also the items identified in the claimant's business plan were not items that were in competition with the snacks and soft beverages sold by the other tenants on the ground floor."

[75] The judge's acceptance of this evidence and her reason for doing so at paragraph [41] has been addressed above in relation to ground 2. It is the appellant's submission in support of ground 3 that the respondent's witness Mr. Gordon was not employed at the respondent Authority and therefore was not present at the meeting on 4<sup>th</sup> February 2016 when the 1<sup>st</sup> MOU was signed, nor was he present when the prior discussions took place between Ms. Malisiewicz of the appellant and the Airport Concession Committee members when the representations were made, upon which its case for damages for breaches is grounded.<sup>22</sup> The upshot of this,

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<sup>22</sup> Appellant's skeleton arguments, paragraph 25.1.

argues the appellant, is that Mr. Gordon's evidence at paragraphs 4(a) to (f) of his witness statement was hearsay evidence and ought to have been discarded or not relied upon by the learned judge in rejecting the appellant's case that the representation made with regard to "food and beverages" not being sold on the first floor included the sale of snacks and soft beverages by the tenants on the first floor, with the main tenant Goddard's being moved to the second floor.

[76] In relation to ground 4, the appellant repeats paragraphs 25 to 25.1 of its written submissions. They argue further that the statement at paragraph 4(f) of Mr. Gordon's witness statement that the respondent always represented the expression "food and beverage" to exclude snacks and soft beverages was inadmissible and ought not to have been relied upon by the learned judge at paragraph [39] of the judgment.

[77] In response to this submission, the respondent points immediately to the undeniable fact (as admitted by counsel for the appellant) that the appellant never raised at the trial any issue of the admissibility of the evidence of Mr. Gordon at paragraphs 4(a) to (f) of his witness statement. To buttress this, the respondent cited the decision of this Court in **Joseph W. Horsford v Geoffrey Croft**.<sup>23</sup> At paragraph 38 of the judgment of the Court, Blenman JA refers approvingly to this statement of principle in **Stroude v Beazer Homes Ltd**<sup>24</sup> where it was held by the English Court of Appeal-

"In general, disputes about the admissibility of evidence in civil proceedings are best left to be resolved by the judge at the substantive hearing of the application or at the trial of the action..."

[78] It is the respondent's submission that the statements at paragraphs 4(a) to (f) of Mr. Gordon's witness statement are admissible, "to the extent that the respondent relied on it for the fact that it was made to the witness and not necessarily for its truth."<sup>25</sup> In support of this submission the respondent cites sections 36B and 36E of the

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<sup>23</sup> ANUHCVP2024/0006 (delivered 22<sup>nd</sup> October 2014, unreported).

<sup>24</sup> [2005] EWCA Civ 265.

<sup>25</sup> Respondent's skeleton arguments, paragraph 23

**Evidence Act** of Grenada<sup>26</sup>; and paragraphs 5 and 17 of the judgment of this Court in **Franciscus Petrus Vingehoedt v Stanford International Bank Limited (In Liquidation)**<sup>27</sup>.

[79] The respondent referred also to the judge's summary of Mr. Gordon's evidence at paragraphs [24] to [28] of the judgment and made the point that in doing so, the learned judge refrained from stating that this evidence was being accepted as the truth. The judge also reviewed the documentary evidence when coming to any conclusion or finding on the facts, as is borne out at paragraphs [37] to [44] of the judgment. Accordingly, it is the respondent's response to ground 3 and ground 4 that they ought not to succeed.

#### **Analysis and Conclusion on grounds 3 and 4**

[80] It is common ground that the appellant did not object to the admissibility of the evidence of Mr. Gordon at paragraphs 4(a) to (f) of his witness statement. The appropriate time for such an objection to be raised on the ground of hearsay is at the trial or during the case management hearing or pre-trial review prior thereto. The appellant did not avail itself of any of these opportunities once the witness statement of Mr. Gordon was filed and served in January 2022. The trial took place on 27<sup>th</sup> June 2023, almost a year and a half later. Moreover, no objection was taken to this evidence by the appellant in its closing submissions to the court below at the concluding of the trial, nor was the judge assisted by the appellant as to how properly to treat with this evidence in reasoning to her conclusion on the principal issue of the representation. Thus, the trial judge was left to decide not only how to treat with this evidence juxtaposed against the evidence of Ms. Malisiewicz regarding the representation made and specifically what was represented as being encompassed or not by the words "food" and "beverage".

[81] Section 36B of the **Evidence Act** of Grenada states: -

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<sup>26</sup> Chapter 92 of the Laws of Grenada.

<sup>27</sup> ANUHCVP2014/0030 (delivered 26<sup>th</sup> January 2015, unreported)

**“36B. Admissibility of certain evidence formerly admissible at common law**

In any proceeding, a statement which, before the commencement of this Act, would by virtue of any rule of law, have been admissible in evidence of any fact stated therein, shall continue to be admissible as evidence of that fact by virtue of this section”.

[82] Sections 36B of the **Evidence Act** of Grenada simply preserves, post commencement of the **Evidence Act**, the common law rules on admissibility of evidence such and to the extent that evidence previous thereto was admissible or inadmissible at common law, will continue to be admissible/inadmissible under the **Evidence Act**. This position is buttressed by the pronouncement made by this Court at paragraph [5] of its decision in **Vingehoedt v Stanford International Bank** as to the common law rule against the admissibility of hearsay evidence, subject to known exceptions, continuing to represent the law of Antigua and Barbuda. This position is to be contrasted with the position in the United Kingdom where the common law rule against the admissibility of hearsay evidence was modified by the Civil Evidence Act 1995 to permit the admission of hearsay evidence in civil proceedings once certain procedures have been followed. Thus, the common law rules prohibiting the admissibility of hearsay evidence have been preserved and are still applicable in Grenada.

[83] Section 36.E of the **Evidence Act** deals specifically with the ‘admissibility of first-hand hearsay statements in civil proceedings’, as the heading states. It is not necessary for me to set out in full its provisions. Suffice it to be said that this section provides that in civil proceedings a statement made, whether orally or in a document or otherwise, by a person, whether called as a witness or not in those proceedings, is “admissible of any facts stated therein of which direct evidence by him or her would be admissible”. It also stipulates that a party intending to tender such a statement in evidence must “at least 21 days before the hearing at which the statement is to be tendered, notify every other party to the proceedings as to the statement to be tendered, and as to the person who made the statement.”

[84] In **Vingehoedt v Sanford International Bank** at paragraph [17], this Court observed that the judge in the court below in that case had made clear that the US Transcript was admitted into evidence “not as evidence of the truth of any statements contained in the record but merely as evidence and proof of the words spoken and by whom.” The US Transcript “had not been admitted as hearsay evidence under section 29 of the Act, but rather as direct evidence for the purpose stated. As such there was no trampling of the rule against hearsay as explained in Subramaniam by his decision. At paragraph [18], the Court concluded that since the US Transcript had not been admitted at that stage of the proceedings as evidence in proof of the fact of what was stated and by whom, “there has been no offending of the hearsay rule.”

[85] I state immediately that in relation to Mr. Gordon’s witness statement, it was admitted into evidence wholesale in the trial and without objection from the appellant. There is nothing I have discerned from the record of the trial or otherwise in the proceedings below to indicate that Mr. Gordon’s witness statement, and the statements therein were admitted for one purpose but not for another, as was the case in **Vingehoeht v Sanford International Bank**. This included the statements at paragraph 4 of his witness statement. The respondent submitted that it relied on the statements in Mr. Gordon’s witness statement not for the truth of them, but that they were made. This is in step with what the learned judge had decided when admitting the US Transcript into evidence in **Vingehoeht v Sanford International Bank**, as found at paragraph 17.

[86] Mr. Gordon’s evidence at paragraph 4(a) to (f) of his witness statement were summarized by the judge at paragraphs [24] to [28] of the judgment. These statements were made in reliance on what was stated in the various historical correspondence and documents within the custody of the respondent Authority. Also, from what Mr. Gordon had been told by the previous General Manager Ms. Wendy Francette -Williams, the representative of the respondent that met with and spoke to Ms. Malisiewicz on 4<sup>th</sup> February 2016 in relation to the appellant’s interest

in opening a Coffee Shop business at the MBI Airport and as to any representations made at the time on behalf of the respondent.

- [87] Specifically, regarding whether the words “food” and “beverage” excluded snacks and soft beverages or included all types of snacks, food and beverages, Mr. Gordon at sub-paragraph (f) is in part recounting what he had been told by the previous General Manager Ms. Francette- Williams, and also making statements based on what has been the practice or the prevailing view of the respondent when dealing with its existing tenants on the ground floor with regard to them continuing to sell snacks and soft beverages notwithstanding the exclusivity granted to Goddard’s Catering Grenada. At (f) he states:

“At all times in its relationship with Goddard’s Catering Grenada and its other tenants, [the respondent] always represented Food and Beverage to exclude snacks and soft beverages such as water. Snacks and soft beverages have always been sold by the tenants on the ground floor notwithstanding Goddard’s Catering Grenada’s exclusivity arrangement relative to the sale of food and other beverages including alcoholic drinks.”

- [88] In relation to Mr. Gordon’s evidence in his witness statement and more specifically at paragraph 4(a) to (f), the learned judge did not make any finding as to the truth of this evidence or statements, in violation of the rule against hearsay. No such finding was made nor did the judge approach this evidence in that way when making key findings on this issue at paragraphs [41] and [44] of the judgment. Instead, what the judge did was to use the evidence of the prevailing circumstances at the MBI Airport, especially with regard to the tenants on the ground floor selling snacks and soft beverages, and to consider that this took place apparently without demur or objection in the face of the exclusivity then enjoyed by Goddard’s Catering, and to also consider what was stated in the MOU and the appellant’s business plan as the products they wished to provide at their Coffee Shop and the total absence of any statement in said business plan of the representations made to them being that all food and beverages, including snacks and soft beverage will not be sold on the ground floor going forward, in accepting that the words “food” and beverage” were not understood, and were never intended by the respondent to convey to the

appellant that all snacks, food and beverages, including soft beverage would only be sold on the second floor.

[89] In reasoning to this conclusion, the learned judge also considered in the appellant's business plan that the only 'competition' mentioned was Goddard's Catering Grenada, and no mention was made that it had been represented or that any representation made to it by the representatives of the respondent was understood to mean that the other tenants on the ground floor would either no longer be permitted to sell snacks and soft beverages or that they would be moved to the second floor if that practice was to continue. In making these findings, all of which were open to the judge on the evidence without breaching the rule against hearsay, the learned judge made no finding as to the truth of what was stated at paragraph 4(a) to (f) of Mr. Gordon's witness statement.

[90] For these reasons grounds 3 and 4 also fail.

**Ground 5- did the trial judge err in law in deciding that the MOU solely formed the basis for the contract without taking account of the alleged misrepresentation**

[91] This is a short point. By this ground of appeal, the appellant challenges paragraphs [33] and [35] of the judgment. At paragraph [33] the learned judge is not determining what formed the basis of the contract between the appellant and the respondent. She is addressing purely the question as to the enforceability of the MOU as an agreement as a binding contract in law or not, and the proper approach and matters to be considered by a court in deciding this question, it being the case that MOUs are usually agreements to enter into a formal contract and thus not generally binding so as to create legal relations between the parties. As stated above, the judge's declaration that the onus lies on the appellant, as claimant, to prove that it entered into the MOU as a result of the alleged misrepresentation, is a correct statement in law.

[92] Paragraph [35] is of no moment. There the learned judge is merely cataloging the respondent's denial that it made the alleged representations and its statement that the appellant entered into the MOU of its own free will, implicitly denying that it was induced by any representations from the respondent to do so.

[93] In relation to this ground of appeal, the appellant refers to the extract at paragraph [35] from **Halsbury's Laws of England 5th edition**<sup>28</sup>, defining what is a "misrepresentation", and submits that this definition "elucidates precisely the situation of the appellant and respondent", in the instant matter. This is a reference, in particular, to this sentence:

"Where one person (the representor) makes a misrepresentation to another ('the representee') which has the object and result of inducing the representee to enter into a contract or other binding transaction with him, the representee may generally elect to regard the contract as rescinded."

[94] The respondent's answer to these submissions is that it is a complete misstatement and mis-characterization of the judgment, for the appellant to assert that the judge failed to take account of the alleged representation when deciding that the MOU formed the basis of the contract between the appellant and the respondent. On the contrary, the learned judge addressed the alleged representation over a significant portion of the judgment, as demonstrated in its written submissions. In doing so, the judge adopted the correct approach. She first addressed her mind to the documentation in evidence before the court, before going on to consider whether the appellant had supported its pleaded case of misrepresentation and inducement.<sup>29</sup> She also properly understood the judicial exercise of applying the law to the facts as she found them to be.

### **Analysis and Conclusion on ground 5**

[95] The question of whether a pre-contract representation was made by the respondent to the appellant as the latter asserts, what exactly was the representation, did it

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<sup>28</sup> 2021 Vol 76, para. 701.

<sup>29</sup> Respondent's skeleton arguments, paragraph 28

induce the appellant to enter into the MOU, was it the kind of representation that was capable of inducing the appellant to enter into the MOU, was that representation when made false or incorrect, was it made innocently, fraudulently, negligently or recklessly as to its correctness, are all questions of fact for the court to decide. In the instant matter, the learned judge seems to have accepted that a representation was made by the respondent to the appellant that no “food and beverages” will be sold on the ground floor. However, the judge decided that the meaning put on those words or that phrase as contended for by the appellant, was not proven on a balance of probabilities, having considered and analysed the evidence. This evidence included the evidence of Ms. Malisiewicz for the appellant and that of Mr. Gordon for the respondent (already dealt with above at grounds 3 and 4), the correspondence passing between the parties prior to the filing of the appellant’s claim, and the documentary evidence including the two MOUs and the appellant’s business plan, none of which speak to any representation or to the appellant’s understanding that the phrase “food and beverage” including any kind of snacks and soft beverages.

- [96] The upshot of all this is that the learned judge did not accept that any representation made to the appellant that “food and beverage” would not be sold on the ground floor, encompassed and was meant or intended to include snacks and soft beverages. This finding, which this Court ought not to interfere with, meant that there was no breach of the representation pleaded by the appellant by the existing tenants on the ground floor continuing, as they have historically done, to sell snacks and soft beverages. For these reasons, the extract from **Halsbury’s Laws of England**, while a useful general definition of the legal concept of “misrepresentation”, does not assist the appellant, and this ground of appeal also fails.

**Grounds 6 and 7 – the judge erred in not believing the evidence of the witness for the appellant and should have disbelieved the evidence of the respondent’s witnesses as to the existence of the representations**

- [97] These two grounds of appeal will be dealt with together. They are an attack on the judge’s approach to the evidence and the reasons she gave for believing the

evidence of the respondent's witness Mr. Gordon and disbelieving the evidence for the appellant, Ms. Malisiewicz with regard to whether any representation made including a prohibition on the continued sale by the tenants on the ground floor of snacks and beverages. The appellant submits that the reasons given by the learned judge for accepting the respondent's evidence are patently unjustifiable, unsatisfactory and untenable.

[98] Having referred to the principles governing appellate interference with finding of fact made by a trial judge pronounced by Lord Thanketon in **Watt (or Thomas) v Thomas**<sup>30</sup> and by Lord Wilberforce in **Lucky v Tewari and another**<sup>31</sup>, which principles are set out above, the appellant relied on 5 points in support of ground 6. They contend:

- (i) the pleading of the representations was never denied by the respondent. This point has already been considered and rejected above when dealing with ground 1;
- (ii) this failure to deny the pleaded representations was further compounded by the witness Mr. Gordon at the trial whose evidence the judge erroneously accepted. Again, this issue has already been addressed under grounds 2 and 3 above;
- (iii) the judge appeared to place too much weight at paragraph [40] on the point that the appellant did not request a variation of the leases applicable to the tenants on the ground floor, in reaching her finding to accept the respondent's version of what is or is not encompassed by the phrase "food and beverage". In my view, this is a minor matter, the more important point relied on by the judge being that the meaning of the words "food" and "beverage" advocated for by the appellant, when viewed against the totality of the evidence, including the prevailing

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<sup>30</sup> [1947] 1 All ER 582.

<sup>31</sup> (1965) 8 WIR 363.

historical position of these tenant and Goddard's exclusivity, the respondent's version ought to be preferred.

- (iv) the judge erroneously accepted at paragraph [40] that the items identified in the appellant's business plan to be sold by it were not in competition with the snacks and soft beverages sold by other tenants on the ground floor. Again, what the learned judge accepted was that no representation was made that the sale of the snacks and soft beverages would not be continued by those tenants on the ground floor;
- (v) the judge preferred the speculative evidence of Mr. Gordon in disregarding that the only issue in dispute was the discrepancy of interpretation of "food and beverage". This point disregards the fact that the learned judge did decide that the said phrase did not include snacks and soft beverages, based largely on the undisputed evidence of the historical situation with the tenants on the ground, and the exclusivity which then was enjoyed by Goddard's Catering Grenada.

[99] Learned counsel for the appellant indicated to the Court that she would be relying mainly on the representation and not so much on a case of breach of warranty having been made out. When pressed further, she explained that the breach of warranty claim was hinged to the representation claim. In fact, the learned judge did not address the breach of warranty as a separate and distinct claim. This is not surprising since an oral representation does not automatically morph into being a warranty, unless it is expressly provided in the contract that the oral representation is to be treated as a warranty. However, based on the way in which the matter was argued by the appellant, nothing turns on this distinction, except to say that the outcome of the appeal rests on the alleged representation having been made and whether it proved to be incorrect or false.

[100] In relation to ground 7, the appellant submitted that the evidence, when critically examined as a whole, was overwhelmingly in favour of the appellant's case that the representations were made and did include a representation that no kind of food, snacks or beverages whatsoever (excluding water) would henceforth be sold on the ground floor but only on the second floor.<sup>32</sup> In my considered view, this submission is a major overstatement and misclassification of the evidence before the judge. The learned judge considered the relevant evidence and reasoned to her conclusion as to whether the representation meant that the respondent's tenants on the ground floor would have to be stopped by the respondent from selling snacks and soft beverages, which historically they had been permitted to do under the terms of their existing leases, even while Goddard's Catering Grenada enjoyed a contractual exclusivity regarding the sale of food and beverages at the MBI Airport.

[101] In this respect it is useful to say something about the appellant's business plan.<sup>33</sup> This document consists of 12 pages. It outlines that Spice Isle Coffee bar will offer customers the best prepared coffee in the Caribbean "that will be complimented with pastries, teas and other beverages." It will feature "organic coffees and teas and eco-friendly compostable cups." Its stated objectives for the first year of operation were three-fold: (i) provide extraordinary fresh and a quality cup of coffee to guests of MBIA and be recognized as one of the best products of Pure Grenada Hospitality; (ii) turn in profits from the first month of operations; and (iii) showcase a new and better way of serving organics, eco-friendly, healthier.

[102] In summary, the appellant's business was planned as a coffee bar complimented with pastries, teas, and other (unspecified) beverages, showcasing a better service and experience for customers. This was exemplified by its mission statement: "Spice Isle Coffee will make its best efforts to create a unique place where travelers can relax during their journeys while enjoying the best brewed coffee or espresso in Caribbean." To say that the appellant's intended business on the second floor was

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<sup>32</sup> Appellant's skeleton arguments, paragraph 29.1

<sup>33</sup> Record of appeal vol. 3 p. 17.

a coffee shop with an emphasis almost entire on quality coffee and espresso, would be an understatement. This is further illustrated and underscored when one looks at the 'start up inventory' and the "equipment" – almost exclusively geared towards the brewing and sale of coffee, and importantly as well by the section headed "Products". The latter does mention that in addition to coffee, they will "offer it clients pastries, small salads, yogurts and sandwiches."

[103] Under the heading "Competition" it is stated (in material part): "Spice Isle Coffee recognizes Snack Bar (next door) [Goddard's Catering Grenada] as a potential competition because of its strong financial position and established operational practices..." There is absolutely no mention or reference to the alleged representation in the business plan nor does it even make mention of the tenants on the ground floor selling, historically, snacks and soft beverages, that the respondent had agreed or represented that this practice would be discontinued or that these tenants will be moved to the second floor.

[104] In this vein, it should also be noted that the alleged representation is not mentioned in any way in the 1<sup>st</sup> or 2<sup>nd</sup> MOU, and the alleged representation as pleaded apart from being materially not the same as described in Ms. Malisiewicz's witness statement (addressed under ground 1), does not state in either versions any time frame within which the respondent was to ensure that the representation was fully and absolutely fulfilled.

[105] The appellant also submits that the judge erroneously stated at paragraph [38] of the judgment that the focus of the appellant's business plan was on providing premium coffee drinks. In my view, the fact that this was the "focus" of the appellant's business plan and that the judge was correct to so state, is more than demonstrated by the business plan itself. However, what this business plan does not demonstrate at all is that the projections of revenue and profits were based on absolutely no snacks and soft beverages being sold on the ground floor.

[106] As regard the placing of the vending machine by the respondent on the ground floor and its subsequent removal to the second floor by the respondent after the protestations of the appellant's director, this does not in my view advance the appellant's contention as to the scope of the representation and the meaning of the words "food and beverage". The respondent's evidence about this was that, like the position with the other tenants on the ground floor, it was not caught by the phrase "food and beverage" such that it was a breach of any representation. Furthermore, removing it from the ground floor was done in the interest of good relations with the appellant, and was not an acceptance of the appellant's version of what was the meaning of the words "food and beverage".

[107] The respondent addressed grounds 6 and 7 of the appeal at paragraphs 31 to 40 of its written submissions. As to principles on appellate restraint and the bases upon which an appellate court can interfere with findings of fact by a trial judge, the respondent cited paragraphs [20] – [22] of the decision of the Board in **Ming Siu Hung and Ors v J.F. Ming Inc and Anor**<sup>34</sup>; and paragraph [12] of the decision of this Court in **Gearing Up Limited v FDL Consult Inc.**<sup>35</sup>. These principles are uncontroversial.

[108] It is submitted by the respondent that the judge did not go so far as to accept the evidence of Mr. Gordon as to whether the representation was actually made, but instead she referred to and assessed the documentary evidence in reaching her conclusion on the critical question regarding the alleged representation.<sup>36</sup> It is also submitted that much of the points raised by the appellant in relation to grounds 6 and 7 have already been canvassed under the other ground of appeal, and these and the appeal itself ought to be dismissed.

#### **Conclusion on grounds 6 and 7**

[109] I have already analyzed and given my conclusions on the appellant's various points and submissions in relation to these two grounds of appeal (6 & 7). For the reasons

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<sup>34</sup> [2021] UKPC 1.

<sup>35</sup> SLUHCMAP2022/0006 (delivered 19<sup>th</sup> September 2023, unreported)

<sup>36</sup> See para. [41]

given above, I do not accept or agree with them and these grounds are, in my considered view, not substantiated by the appellant. Accordingly, they too also fail.

### **Disposition**

[110] The appellant has failed on all grounds of appeal. Accordingly, I would dismiss the appeal, affirm the judgment and decision of the trial judge dismissing the appellant's claim for damages for misrepresentation and breach of warranty. The respondent is entitled to its costs of the appeal as there are no exceptional circumstances which would warrant deviating from the fundamental rule that a successful party is entitled to their costs. I would therefore make the following orders: -

- (1) the appeal is dismissed and the order of the learned judge of the court below dismissing the appellant's claim for damages for misrepresentation and breach of warranty is affirmed;
- (2) costs of the appeal to the respondent, such costs to be assessed by a judge of the High Court or Master, if not agreed by the parties within 21 days of the date of delivery of this judgment.

[111] We thank learned counsel for the parties for their assistance to the Court.

I concur.  
**Vicki Ann Ellis**  
Justice of Appeal

I concur.  
**Trevor M. Ward**  
Justice of Appeal

**By the Court**

**Chief Registrar**