

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2017/0009

BETWEEN:

GLANVILLE PENN

Appellant

and

THE ATTORNEY GENERAL

Respondent

Before:

The Hon. Mde. Gertel Thom
The Hon. Mde. Vicki-Ann Ellis
The Hon. Mr. Dexter Theodore

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

Appearances:

Mr. Sydney Bennett, QC for the Appellant
Mrs. Joanne Williams Roberts, Solicitor General for the Respondent

2022: January 14;
May 13.

Commercial appeal — Damages — Notice to quit — Whether the learned judge erred in determining that a period of 6 months' notice was reasonable notice of termination of the appellant's tenancy of premises at the old terminal building — Legitimate expectation — Whether the learned judge erred in failing to find that the appellant had a legitimate expectation that his business would be relocated to the new terminal building, giving rise to an entitlement for damages — Expert witness — Whether the learned judge erred in considering the evidence of the respondent's expert witness — Breach of contract — Economic duress - Loss of profits — Whether the learned judge erred in his determination and calculation of damages to be awarded to the appellant on his claim

Mr. Glanville Penn ("the appellant") operated a restaurant catering facility at the old Beef Island Airport terminal building ("the old terminal building") in the Territory of the Virgin Islands ("the BVI") for some 27 continuous years prior to March 2002. The nature of the legal arrangement between the appellant and the government of the BVI ("the government" or

“the respondent”) during that time is not clear. The appellant claims to have had a lease, while the respondent claims that the appellant had a mere license. Diverging allegations on the legal arrangements between the parties aside, the parties had a working commercial relationship which went awry in 2002. By a letter dated 19th March 2002 the respondent advised the appellant that operations would transfer to the new terminal building at a new airport on or about 21st March 2002 and that plans were being made to demolish the old terminal building. The appellant was further advised to cease operations and remove his equipment from the occupied space within one week of the cessation of operations in the old terminal building.

In September 2001 the respondent had invited tenders for concessions at the new airport. This included a passenger catering concession. The appellant tendered for this concession and the government advised him by letter dated 29th October 2002 that his bid had been accepted and that he had accordingly been awarded the concession to provide such services. By the said letter dated 29th October 2002 the respondent forwarded two copies of the concession agreement to the appellant for signature. At the date of this letter the area designated for use as a restaurant/passenger catering space was not prepared for the type of fit out envisaged by the concession agreement. The tender documents envisaged that the successful tenderer would have only 14 days in which to fit out the premises before starting work. The appellant did not sign the proffered Deed of Licence, but instead, through his counsel, he entered into negotiations with the government and presented proposals as to terms and conditions which would enable him to carry on the work necessary to complete construction and fit out the approved passenger catering facility. By letter dated 29th November 2002 the appellant tendered a cheque for the sum of \$3,500 representing a month’s licence fee payment to the government and the government responded accepting some of the appellant’s proposals, rejecting others and making counter proposals with regard to some. Further correspondences followed between the appellant and the government and by around May 2003 it appeared the parties were at an impasse and the government had expressed the intention of rescinding the agreement and putting the concession back out to tender.

By letter dated 31st October 2003, the appellant was advised that the government intended to seek the necessary approval to undertake the construction and fitting out of the premises at the new terminal building. The Deed of License was amended to that end and to incorporate other counter proposals including an increase to the proposed annual license fee. The appellant was granted, and on 28th April 2005 duly executed, a license to operate the concession in the terms proposed by the government. By letter dated 6th July 2005 the government advised the appellant, through his counsel, that outfitting of the concession had been completed. The appellant commenced operation of the concession on 15th November 2005.

Subsequent to commencing operations of his business at the new terminal building the appellant took issue with several aspects of operating at the new terminal building, including that the government permitted other entities to provide refreshments to passengers and that the dishwasher supplied and installed by the government was not functioning. The appellant elected to hire two additional employees to wash dishes for approximately 3 years and 11 months. The original period of licence was due to expire on 15th November 2008 and the

appellant sought an extension from the government of the term of his licence for at least a further three years and sought compensation for his grievances. There followed a further round of communications and discussions and ultimately by way of letter dated 27th August 2009 the government informed the appellant that Cabinet had decided to grant him a lease for 10 years, that rent payable would be reduced to \$1,500 per month and that the appellant would be allowed to build a bar subject to planning approval and Public Works Department oversight. No actual agreement on the proposed 10-year lease was executed between the parties. On 12th April 2011 the government advised the appellant that Cabinet had decided to appoint a Compensation Committee ("the Committee") to recommend appropriate compensation for him. The Committee rendered a report on 24th May 2011, accepting the opinions of Certified Public Accountant Mr. Roy D. Jackson and recommending that the appellant be paid \$4,117,173.00 by way of loss of profits, \$96,600.00 for the cost of two employees hired by reason of the non-functional dishwasher, \$21,038.00 for Mr. Jackson's fees and \$190,900.00 for the appellant's legal costs. On 29th January 2012 the government proffered a cheque in the sum of \$189,000.00 in full and final settlement of the claim. The appellant rejected this offer as inadequate.

The appellant commenced proceedings against the government in the court below seeking damages for an inadequate period of notice to quit, breach of a legitimate expectation, wrongful increase in rent, coercion, breach of contract, loss of profits and loss of future profits. The learned judge ordered the respondent to pay damages to the appellant in the sum of \$286,796.50 and to pay the appellant's costs of the proceedings to be assessed if not agreed within 60 days. Being dissatisfied with the amount of damages awarded by the learned judge, the appellant appealed to this Court on 18 grounds of appeal. These several grounds of appeal may be summarised into four main issues: (i) whether the learned judge erred in determining that a period of 6 months' notice was reasonable notice of termination of the appellant's tenancy of premises at the old terminal building; (ii) whether the learned judge erred in failing to find that the appellant had a legitimate expectation that his business would be relocated to the new terminal building, giving rise to an entitlement to damages; (iii) whether the learned judge erred in considering the evidence of the respondent's expert witness; and (iv) whether the learned judge erred in his determination and calculation of damages to be awarded to the appellant on his claim.

Held: allowing the appeal in part and ordering the appellant to pay costs to the respondent being 50% of the costs awarded in the court below, that:

1. In the absence of any evidence of there being a specified agreement of tenancy between the parties, the learned judge correctly took into account all the historical circumstances, including the length of time which the appellant had been operating his business at the old terminal building along with the period within which rent was paid, and balanced that with the evidential deficiencies in the appellant's case in proving any obligation on the part of the government to give notice within a specified period. Moreover, there was no error in principle on the part of the judge in determining six months as a reasonable amount of time for the appellant to arrange his affairs and give notice to his employees in anticipation of the closure of his business at the old terminal building.

2. The circumstances based on the evidence before the learned judge do not reveal any legitimate expectation which could have arisen on the part of the appellant. Accordingly, the learned judge did not err in determining this issue as he did.

Council of the Civil Service Unions v Minister of the Civil Service [1984] 3 All ER 935 followed; **Rainbow Insurance Company Limited v The Financial Services Commission and others** [2015] UKPC 15 followed.

3. When the issue of the respondent's expert witness, Mr. Andrew Bickerton, failing to attend court came up, counsel acting for the appellant in the court below did not take any issue with the non-attendance of Mr. Bickerton to be cross-examined. Therefore, on appeal, it would be unreasonable for the appellant to take issue with this fact. Furthermore, there is nothing on the evidence which suggests that Mr. Bickerton was not credible as an expert witness. In the circumstances, the learned judge was entitled to consider his evidence and there is no merit to this ground of appeal.
4. It is pellucid that the letter dated 29th October 2002 awarding the appellant the concession did not give an unqualified acceptance of the appellant's tender. At the point of acceptance of the tender it cannot be said that the terms of the concession were certain or that there was a meeting of the minds on the terms of the concession agreement. Accordingly, there could be no breach of contract by the government for failure to deliver the premises in an operational condition to the appellant or for making variations to some of the terms set out in the tender document including the government (i) deciding to completely outfit the passenger catering concession premises, (ii) increasing the annual rent to be paid by the appellant for occupation and use of the said premises, and (iii) imposing other terms on the appellant not provided for in the invitation to tender, since there had been no concluded contract until the Deed of License was signed in April 2005.

Halsbury's Laws of England 5th edition 2018, Volume 6 paragraph 218 considered; **Hyde v Wrench** (1840) 3 Beav 334 followed; **Butler Machine Tool Co Ltd v Ex-Cell-O-Corpn (England) Ltd** [1979] 1 All ER 965 followed.

5. The appellant had the alternative of simply choosing not to contract with the government for the concession and operating his business elsewhere. He was also in a position to be advised independently as to his rights in the circumstances. Moreover, with negotiations between the parties spanning a three year period the learned judge was correct to determine that the government had been enormously patient with the appellant's incessant demands. In the circumstances, there is no evidence on which the learned judge could have found that there was economic duress which induced the appellant to contract and accordingly no compensation is due to the appellant under this sub-head of his claim for damages.

Pao On and others v Lau Yiu and another [1979] 3 All ER 65 followed; **DSND Subsea Ltd v Petroleum Geo Services ASA** [2000] BLR 530 considered; **Kolmar Group AG V Traxpo Enterprises PVT Ltd** [2010] EWHC 113 considered.

6. The evidence shows that in November 2008 when the appellant requested that the government extend his license beyond the original expiration date of the first term of the licence on 15th November 2008, the government's representative agreed that the construction of the bar by the government would be discussed by Cabinet. There is however no evidence, that beyond this agreement for the construction of the bar being considered by Cabinet, that any agreement materialised where the government actually re-committed itself to providing a bar for the second three year term of the license. Therefore, the learned judge was correct in his finding that damages awarded to the appellant for the government's failure to provide the drinks bar as agreed under the first term of the license would not extend to the second three year term.
7. One month was too short a time in the circumstances as a reasonable period within which the appellant ought to have taken steps to mitigate his losses regarding the non-functioning washing machine. The appellant would have needed reasonable time to notify the respondent and thereafter reasonable time for the respondent to have arranged replacement of the dishwasher before the appellant took any steps to replace it. In that regard, three months would have been a more reasonable period of time. Accordingly, the damages awarded to the appellant under this sub-head ought to be increased to \$13,180.00, being \$10,000 to replace the dishwasher and twelve week's wages of \$3,180.00 (\$53,000.00 divided by two hundred multiplied by twelve) for one person to have washed dishes pending delivery and installation of the replacement dishwasher.
8. The evidence does not show that any agreement granting exclusivity was actually formed between the parties. Therefore, it cannot be said that the learned judge erred in his finding that no such exclusivity existed in the concession agreement which ultimately formed between the parties.
9. To say that the court below ought to have found that a lease existed granting the appellant a 10-year term based on the decision of Cabinet falls short of any evidence that there was indeed a meeting of the minds and that a lease agreement was formed. There was no concluded certainty of the terms of the proposed 10-year lease nor was there any document executed to give effect to such a lease.
10. The sum which the Compensation Committee rendered in its report dated 24th May 2011 was a recommendation and not an express promise of a sum to be paid to the appellant. Moreover, there was no agreement reached between the parties that the recommendation of the Compensation Committee would be adopted and that the government would pay the recommended sums as compensation to the appellant. The parties had not arrived at any conclusive agreement as to the amount which the government was prepared to pay the appellant as compensation. Therefore, there was no agreement formed between the parties, nor did the appellant have any legitimate expectation, that the government would pay him the sums recommended by the Compensation Committee.

Council of the Civil Service Unions v Minister of the Civil Service 1984] 3 All ER 935 followed; **Rainbow Insurance Company Limited v The Financial Services Commission and others** [2015] UKPC 15 followed.

JUDGMENT

- [1] **THOM JA:** This is an appeal against the judgment of the Commercial Court delivered by the learned judge on 2nd March 2017. The learned judge awarded damages in the sum of \$286,796.50 to the appellant, dismissed the respondent's counterclaim for arrears of rent, and ordered the respondent to pay the appellant's costs of the proceedings to be assessed if not agreed within 60 days of the judgment.

Background

- [2] Mr. Glanville Penn ("Mr. Penn" or "the appellant") operated a restaurant catering facility at the old Beef Island Airport terminal building ("the old terminal building") in the Territory of the Virgin Islands ("the BVI") for some 27 continuous years prior to March 2002. The nature of the legal arrangement between the appellant and the government of the BVI ("the government" or "the respondent") during that time is not clear. The appellant claims to have had a lease, however this had been lost in hurricane Hugo in 1989. The respondent claims that the appellant had a mere license. Diverging allegations on the legal arrangements between the parties aside, the parties had a working commercial relationship which went awry in 2002.
- [3] In September 2001 the government invited tenders for concessions at the new airport. This included a passenger catering concession. By a letter dated 19th March 2002, under the signature of the Permanent Secretary of the Ministry of Communications and Works ("the Ministry"), the appellant was advised that:

"Pursuant to your operation of a concession in the old terminal building at the Terrance B. Lettsome International Airport, please be advised that operations will transfer to the new terminal building on or about 21st March

2002. Plans are being made to demolish the old terminal building shortly thereafter.

Please note the date for cessation of operations and arrange to remove your equipment from the occupied space within one week of the cessation of operations in the old terminal building.

Kindly accept my sincere apologies for the short notice. Efforts had been made to give at least one week's notice of the cessation date but due to the uncertainty of the change over schedule and my absence from the territory during the week 10th-16th March, I regret that the anticipated notice period has been severely eroded."

- [4] The appellant tendered for this concession and the government advised him by letter dated 29th October 2002 that his bid had been accepted and that he had accordingly been awarded the concession to provide such services within a 15000 sq. ft. space at the terminal with 340 sq. ft. of kitchen space. Clauses 10 and 11 of the tender document contemplated that the floors would be laid to screed, walls finished to base coat, no ceilings installed, all to be completed by the concessionaires at their own expense. Wiring and utilities such as electricity and telephone were to be connected to appropriate service ducts in or on the boundary of the site as was chilled water for air conditioning fan coil units to be supplied by the concessionaires. In the case of the restaurant concession water and sewerage were also to be brought to the catering kitchen area.
- [5] By the said letter dated 29th October 2002, two copies of the concession agreement were forwarded to Mr. Penn for signature, and asked for a quarter of the guaranteed minimum annual concession fee. At the date of this letter the area designated for use as a restaurant/passenger catering space was not prepared for the type of fit out envisaged by the concession agreement. The space was not enclosed with walls finished to base coat, wiring and other infrastructure for utilities such as electricity telephone and air conditioning had not been accepted, and the space for the future concession had not yet been constructed to the extent described in the tender documents. The tender documents represented that all a prospective

concession operator would need to do was finish and fit out the area, connect utilities provided to the boundary of the concession and start business. The successful tenderer would have only 14 days in which to fit out the premises before starting work.

- [6] The appellant did not sign the proffered Deed of Licence, but instead, through his counsel, he entered into negotiations with the government and presented proposals as to terms and conditions which would enable him to carry on the work necessary to complete construction and outfit out the facility.
- [7] By letter dated 29th November 2002 the appellant tendered a cheque for the sum of \$3,500 representing a month's licence fee payment to the government and the government responded accepting some of the appellant's proposals, rejecting others and making counter proposals with regard to some. Further correspondence followed between the appellant and the government and around May 2003 it appeared the parties were at an impasse and the government had expressed the intention of rescinding the agreement and putting the concession back out to tender.
- [8] In June 2003 an election held in the BVI resulted in a change of government. By letter dated 31st October 2003, Mr. Penn was advised that the Ministry intended to seek the necessary approval to undertake the construction and fitting out of the premises at the new terminal building. The Deed of License was amended to that end and to incorporate other counter proposals including for the proposed annual license fee to be some \$57,040.00 per annum (\$4,753.33 per month) rather than the \$42,000.00 per annum (\$3,500.00 per month) which had been the accepted tender.
- [9] On 30th April 2004 there was a meeting between the appellant and the Minister and by letter of even date the appellant confirmed that he was prepared to accept an initial term of three years with an option to renew for a further three years and an annual license fee of \$57,040.00. The appellant was granted, and on 28th April 2005

duly executed, a license to operate the concession in accordance with the terms proposed by the government. By letter dated 6th July 2005, the government advised the appellant, through his counsel, that outfitting of the concession had been completed. The appellant commenced operation of the concession on 15th November 2005.

- [10] Subsequent to commencing operations of his business at the new terminal building, the appellant took issue with the fact that the government had also permitted a Cyber Café and two sets of drinks and snack operations to be installed inside the terminal building. He was also aggrieved that a number of food vans were working inside the parking lot and that hotels were permitted to provide refreshments to their arriving guests. Furthermore, the dishwasher supplied and installed by the government had never worked and the appellant had to hire two additional employees to wash dishes for approximately 3 years and 11 months.
- [11] The original period of licence was due to expire on 15th November 2008. The appellant sought an extension from the government of the term of his licence for at least a further three years and compensation for his grievances. There followed a further round of communications and discussions and ultimately by way of letter dated 27th August 2009 the government informed the appellant that the Cabinet had decided to grant him a lease for ten years commencing 1st December 2008, that rent payable would be reduced to \$1,500 per month with effect from 1st December 2008 and that the appellant would be allowed to build a bar subject to planning approval and Public Works Department oversight. By letter dated 23rd March 2011, the government further advised the appellant that the Cabinet had confirmed its subsequent decision that the term of the new 10-year lease would commence on 16th November 2011 rather than from 1st December 2008 and would be at the monthly rate of \$1,500.00 with a review after 5 years. No actual agreement on the new 10-year lease was executed between the parties.

[12] On 12th April 2011 the government advised the appellant that the Cabinet had decided to appoint a Compensation Committee (“the Committee”) to recommend appropriate compensation for him as operator of the Turtle Dove Restaurant. The Committee rendered a report on 24th May 2011. It accepted the opinions of Certified Public Accountant Mr. Roy D. Jackson and recommended that the appellant be paid \$4,117,173.00 by way of loss of profits, \$96,600.00 for the cost of two employees hired because of the non-functional dishwasher, \$21,038.00 for Mr. Jackson’s fees and \$190,900.00 for the appellant’s legal costs. On 29th January 2012 the Ministry proffered a cheque in the sum of \$189,000.00 in full and final settlement of the claim. The appellant rejected this offer as inadequate.

Claim below

[13] The appellant commenced proceedings against the government in the court below seeking compensation. By his claim against the government the appellant sought:

- (i) \$821,250.00 for damages representing twenty-four months’ notice to quit to which he claimed to be entitled upon termination of his business operating a concession at the old terminal building calculated at the rate of \$1,125.00 per day;
- (ii) further or alternatively \$1,503,529.00 as damages for breach of a legitimate expectation that his business at the old terminal would have been relocated to the new terminal upon closure of the old facility;
- (iii) \$2,683,780.00 for damages and loss of profits due to breach of the terms of the agreement constituted by acceptance of his tender and in particular for failure to deliver up premises in the operational condition required by the tender agreement, failure to construct a bar as agreed and failure to give his business the exclusivity which he had been assured, loss caused by a non-functioning dishwasher;

- (iv) \$135,893.00 for damages for wrongful increase in rent premised on the assertion that he had been unlawfully coerced into signing a concession agreement which provided for a licence fee in excess of the amount tendered for and initially agreed;
- (v) damages to be assessed for loss of profits from 23rd June 2012 to judgment, in accordance with the opinion of Mr. Jackson;
- (vi) alternatively, \$4,117,973.00 for damages and loss of future profits as assessed by the Compensation Committee; and
- (vii) damages and future loss of profits to be assessed for the period following judgment until rectification of the breaches.

[14] The matter came up for hearing before the learned judge in July 2016 and by his judgment the learned judge:

- (a) found that the appellant's operation of the concession at the old terminal building was terminable on reasonable notice and that a notice period of six months was reasonable in the circumstances. He awarded the sum of \$205,312.50 to the appellant calculated as 180 days at the rate of \$1,125.00 per day;
- (b) dismissed the appellant's claim for damages for breach of a legitimate expectation that his business at the old terminal would have been relocated;
- (c) dismissed the appellant's claim for damages and loss of profits due to alleged breach of the terms of the tender agreement, holding that any failure on the part of the government to provide an operational catering facility was overtaken by the appellant's own unreadiness to agree terms and to commence sooner than 15th November 2005;
- (d) accepted the evidence of the respondent's expert and rejected that of the appellant's expert and found that the appellant would have lost profits at an average of \$17,960.37 per year and awarded the sum of \$70,424.00 under this

sub head on the basis that the appellant would be entitled to such profits only for the period commencing 15th November 2005 and ending 15th November 2008;

- (e) awarded \$11,060.00 for losses suffered in consequence of the non-functioning dishwasher;
- (f) dismissed all claims brought by the appellant with regard to exclusive rights to provide food and beverage services, for damages for wrongful increase in rent, and for any alleged and continuing future losses; and
- (g) found that there had been no meeting of the minds of the parties with regard to the terms of a ten-year lease from the government to the appellant and refrained from ordering the government to execute and perform the lease as agreed.

[15] As it relates to the appellant's claim the learned judge ultimately ordered the respondent to pay damages to the appellant in the sum of \$286,796.50 and to pay the appellant's costs of the proceedings to be assessed if not agreed within 60 days.

The appeal

[16] Being dissatisfied with the decision of the learned judge, the appellant appealed to this Court on 18 grounds of appeal. These several grounds of appeal may be summarised into four main issues before this Court for consideration:

- (i) Whether the learned judge erred in determining that a period of 6 months' notice was reasonable notice of termination of the appellant's tenancy of premises at the old terminal building;
- (ii) Whether the learned judge erred in failing to find that the appellant had a legitimate expectation that his business would be relocated to the new terminal building, giving rise to an entitlement to damages;
- (iii) Whether the learned judge erred in considering the evidence of the respondent's expert witness; and

- (iv) Whether the learned judge erred in his determination and calculation of damages to be awarded to the appellant on his claim.

NOTICE TO QUIT

Appellant's submissions

- [17] Learned Queen's Counsel Mr. Sydney Bennett, submitted on behalf of the appellant that the learned judge erred in determining that a period of 6 months was reasonable notice of termination of the appellant's tenancy at the old terminal building. He asserted that notwithstanding the general principle of 6 months' notice for termination of an annual tenancy, as set out in **Sidebotham v Holland**,¹ each case ought to be decided on its particular facts. He argued that when all the relevant facts and circumstances surrounding the appellant's tenancy are taken into account, in particular, the length of his tenancy and that this was a business premises, the appellant ought reasonably to have been given at least 12 months advanced notice by the respondent to close his business and vacate the premises of the old terminal building.
- [18] He stated further that the judge erred in only considering the appellant's obligation to give termination notice to his employees and the government's ability to predict how long the redevelopment process would have taken. He asserted that the important question was the amount of time that the appellant's business would have needed to arrange for closing in an orderly manner and to mitigate its losses, and argued further that at the relevant time the government had sufficient information to give at least 12 months' notice. In those circumstances, Mr. Bennett submitted that the award of \$205,312.50 to the appellant under this head was too low and ought to have been, at minimum, the sum of \$410,625.00 which represents 12 months of losses.

¹ [1895] QB 378 at p 387.

Respondent's submissions

- [19] Mrs. Joanne Williams Roberts, Solicitor General appearing for the respondent, disagreed vehemently with the assertions made on behalf of the appellant regarding the issue of reasonable notice. She brought to this Court's attention the affidavit evidence of Mr. Neil Smith on behalf of the respondent² which exhibited a letter from the Attorney General dated 28th July 2008 which makes clear that the initial relationship between the parties was a month-to-month licence held by the appellant at the old terminal building. She stated that the licence was an oral one terminable by one month's oral notice and that in the said letter the Attorney General demonstrated that the appellant was given more than one year's oral notice of the demolition of the old terminal building and by extension the cessation of the licence in the old terminal building. In those circumstances, Mrs Williams Roberts stated that the letter written to the appellant giving less than 24 hours' notice would have been additional notice. She submitted that there was no finding by the learned judge that there was a lease and that the learned judge was merely being generous and conducting a balancing exercise based on the facts before him in finding that 6 months would have been reasonable notice to the appellant.

Discussion

- [20] The learned judge found that the evidence of whether the appellant had a tenancy of the premises at the old terminal building or a mere license was inconclusive. He found that there was no evidence of what, if any, period had been agreed. He also found that one, or even three months' notice would be too short, if the appellant had to give his employees notice of termination of their employment contracts and that on the other hand, the government could not reasonably be expected to timetable redevelopment of an airport complex with accuracy two years in advance. The learned judge agreed with the assessment of the Finance Secretary, Mr. Neil Smith, that six months' notice to quit the premises at the old terminal building would strike a reasonable balance. Having accepted the appellant's figure for daily losses of \$1,125.00 per day, the learned judge awarded \$205,312.50 under this head.

² See pages 538-564 of the Record of Appeal.

- [21] Given the evidence before the learned judge, in particular the lack of evidence that there was an express lease, concession, or license agreement between the appellant and the government in respect of the premises at the old terminal building, it was open to the learned judge to strike a balance by finding that six months would be a reasonable period of notice to quit. I do not agree with Mr. Bennett that twelve months' notice was required, especially in circumstances where there was no determined period of tenancy from which to conclude that the appellant was owed such time for notice to quit.
- [22] In the Territory of the Virgin Islands, a lease for a period of more than two years must be in writing, signed, sealed and delivered in accordance with section 46 of the **Registered Land Ordinance**.³ Even though the appellant alleged that the lease agreement had been lost, there was no satisfactory evidence of this before the learned judge. However, what was clear was that there was a long-standing relationship between the parties whereby the appellant occupied the premises at the old terminal building and paid a monthly sum. In those circumstances, at best the learned judge could have inferred a monthly periodic tenancy for which only one month's notice to quit would have been required.
- [23] I consider that in absence of any evidence of there being a specified agreement of tenancy between the parties, the learned judge correctly took into account all the historical circumstances, including the length of time which the appellant had been operating his business at the old terminal building along with the period within which rent was paid, and balanced that with the evidential deficiencies in the appellant's case in proving any obligation on the part of the government to give notice within a specified period. Moreover, it was not unreasonable for the learned judge to determine six months as a reasonable amount of time for the appellant to arrange his affairs and give notice to his employees in anticipation of the closure of his business at the old terminal building. In light of the foregoing, I do not discern any error in principle on the part of the judge in striking a balance and awarding damages

³ Cap 299, Laws of the Virgin Islands.

under this on the basis of six months' notice to quit. In fact the learned judge was quite generous in this respect given the limited evidence before him. The appeal therefore fails on this issue.

LEGITIMATE EXPECTATION OF BEING RELOCATED

Appellant's submissions

- [24] Mr. Bennett argued that given that the appellant would have had a legitimate expectation that his business would have been relocated to the new terminal building, and that relocation, if even temporarily as was the case with the other tenants, was the only practicable way to mitigate his losses.
- [25] He submitted that the learned judge erred in the face of the clear documentary evidence in the letter dated 19th March 2001, and the uncontradicted testimony of the appellant and his son, Mr. David Penn, in not finding that the appellant had a legitimate expectation that his business would relocate to the new terminal building so as to give rise to an entitlement to damages. Mr. Bennett argued that the representation set out in the letter of 19th March 2001 represented to the appellant that his business would transfer to the new terminal building, and being clear and unequivocal, it was capable of rising to the level of a legitimate expectation. He relied on the case of **Council of the Civil Service Unions v Minister of the Civil Service**⁴ in support of this submission. He submitted further that the learned judge failed to embark upon a consideration of the authorities relating to the concept of legitimate expectation and that this approach was necessary in light of the documentary evidence and the basis of the appellant's claim relating to this head of compensation.
- [26] Mr. Bennett also submitted that the learned judge's finding that the appellant had no legitimate expectation was based on his erroneous deduction that because the government had invited members of the public to tender for certain concessions at the new terminal building, and where the appellant had submitted a tender for the

⁴ [1984] 3 All ER 935.

passenger catering concession, there could be no representation or legitimate expectation that the appellant's existing business at the old terminal building would transfer to the new terminal building. He asserted that this reasoning by the judge was fallacious, as it failed to consider, among other things, that the appellant's then existing business could transfer to the new terminal building, whilst the tender process was being completed, and on the same terms of tenancy as existed with respect to the appellant's tenancy of premises at the old terminal building.

[27] Mr. Bennett also argued that the learned judge's reasoning of whether the appellant had a legitimate expectation involved considerations which were irrelevant in the circumstances. He stated that the judge's considerations included that the passenger catering concession at the new terminal building, described as being 'by way of Restaurant, Buffet and/or Snack Bar' did not include a drinks facility bar. He further stated that whether the description of the passenger catering concession included a drinks bar was not a matter of relevance to the issue of legitimate expectation.

[28] Mr. Bennett further argued that the learned judge erroneously assumed or concluded that the tender document must have put the appellant on notice that the government did not have in mind an elaborate restaurant requiring significant financial outlay on the part of the concession operator. This deduction, he says, was clearly wrong in the absence of any evidential basis, more so because one of the issues which developed between the government and the appellant was the substantial capital costs that would be necessary to prepare the designated space for the passenger catering concession, a cost which the tender document did not require the successful bidder/concessionaire to bear, especially in light of an initial three year license period.

Respondent's submissions

[29] Mrs. Williams Roberts argued that there could be no legitimate expectation on the part of the appellant, given that there was a public tender process for which the

appellant himself had bid. She submitted that, in those circumstances, the appellant could not have had a legitimate expectation that his business would continue in the new terminal. She also argued that the letter dated 19th March 2001 giving notice to the appellant to quit the premises, spoke to transference of airport operations to the new terminal building and not transference of the appellant's business. She stated that the appellant's references to the circumstances of the other concessionaires and the transference of their business is speculative and that the court would have been limited to only considering the circumstances of the appellant.

- [30] Mrs. Williams Roberts disputed the applicability of the case of **Council of the Civil Service Unions v Minister of the Civil Service** relied on by the appellant. She argued that the facts of that case placed in proper context, could not apply in the circumstances of the appellant since there was no unambiguous statement made to the appellant that the business would continue at the new terminal and the public tender process was sufficient notice that any arrangement which previously existed at the old terminal building would not continue at the new terminal building. She therefore asked this Court to uphold the learned judge's finding in this regard that the appellant could not have had any legitimate expectation giving rise to an award of damages.

Discussion

- [31] I now consider the law with respect to legitimate expectation. Legitimate expectation is a public law doctrine. In **Council of Civil Service Unions and Others v Minister for Civil Service**, Lord Fraser stated that legitimate expectation 'may arise from either an express promise given on behalf of the public authority or from the existence of a regular practice which the claimant can reasonably expect to continue'. In that same case, Lord Diplock added that legitimate expectation refers to:

"some benefit or advantage which either (i) [the appellant] has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been

communication to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.”

Lord Diplock continued to qualify the type of expectation described above as:

“a ‘legitimate expectation’ rather than a ‘reasonable expectation’, in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a ‘reasonable’ man, would not necessarily have such consequences.”

[32] In **Rainbow Insurance Company Limited v The Financial Services Commission and others**,⁵ Lord Hodge stated at paragraph 51:

“The courts have developed the principle of legitimate expectation as part of administrative law to protect persons from gross unfairness or abuse of power by a public authority. The constitutional principle of the rule of law underpins the protection of legitimate expectations as it prohibits the arbitrary use of power by public authorities. Such expectations can arise where a decision-maker has led someone to believe that he will be consulted or be given a hearing before a decision is taken which affects him to his disadvantage (a ‘procedural legitimate expectation’) or that he will retain a benefit or advantage (a ‘substantive right legitimate expectation’). The source of the expectation may be either an express promise given on behalf of the public authority or an established practice which the claimant can reasonably expect to continue: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 401, [1984] 3 All ER 935, [1985] IRLR 28 per Lord Fraser.”

[33] The learned judge found that the appellant did not have a legitimate expectation, giving rise to an entitlement for damages, that his business would be relocated to the new terminal building. He underscored the fact that the government had instigated a public tender process some six months prior to the formal opening of the new terminal building, which must have put the appellant on notice that his transfer to the new building was not affirmed or anticipated without more.

⁵ [2015] UKPC 15.

[34] The evidence shows that in September 2001 the government published a public invitation to tender for various privately operated facilities and outlets at the new terminal building and the appellant tendered for this on 25th September 2001. Therefore, I agree with the learned judge that it is pellucid that the appellant was aware that any transfer of his business operations from the old terminal building to the new terminal building was not a given. I do not agree with Mr. Bennett that the learned judge should have considered that the appellant's then existing business could transfer to the new terminal building, whilst the tender process was being completed, and on the same terms of tenancy as existed with respect to the appellant's tenancy of premises at the old terminal building. This could not be a consideration to establish legitimate expectation. The judge was constrained to determine whether there was an express promise on the part of the government that the appellant's business would automatically transfer to the new terminal building or if there had been an established practice in past dealings between the government and the appellant that could give rise to a legitimate expectation in this respect.

[35] Furthermore, I do not agree with Mr. Bennett that the letter dated 19th March 2002 would have given the appellant a legitimate expectation that his business would relocate to the new terminal building so as to give rise to an entitlement to damages. The letter informed the appellant to 'please be advised that operations will transfer to the new terminal building on or about 21st March 2002' and did not make specific reference to the appellant's business itself. To give rise to a legitimate expectation, the government would have had to make a clear and unambiguous promise that the appellant's business (specifically) would be relocated to the new terminal building. It cannot be seen as unreasonable that such a statement may be interpreted as referencing the general airport operations.

[36] In applying the relevant principles governing legitimate expectation as set out in **Council of Civil Service Unions and Others v Minister for Civil Service** and **Rainbow Insurance Company Limited**, I see no error in principle committed by the learned judge in his determination on this issue. The circumstances based on

the evidence before the learned judge do not reveal any legitimate expectation which could have arisen on the part of the appellant. Furthermore, Mr. Bennett's complaint that the judge's consideration of whether the passenger catering concession at the new terminal building included a drinks facility bar was irrelevant does not assist in the furtherance of this ground of appeal. On the facts of this case, there was no evidence before the learned judge on which he could have made a finding of legitimate expectation and he did not err in determining this issue as he did.

EXPERT WITNESSES

Appellant's submissions

- [37] Mr. Bennett submitted that the learned judge erred in considering the evidence of the respondent's expert witness Mr. Andrew Bickerton, who, contrary to directions made by the court leading to the trial, was not presented by the respondent for cross-examination by the appellant. He argued that the report of Mr. Bickerton ought not to have been considered by the judge as evidence in the case, or of any evidential value whatsoever, and ought to have been completely disregarded in the learned judge's assessment of damages. Mr. Bennett stated that the only expert evidence before the learned judge as to the assessment of loss of profits was that of the appellant's expert witness, Mr. Roy D. Jackson, whose evidence the judge was under a duty to accept unless there was some significant and cogent reason for not doing so. He submitted that an award of damages commensurate with the assessment and evidence of Mr. Jackson and his report ought to be substituted by this Court for the amount awarded by the learned judge; specifically as it relates to the judge's quantification of loss of profits due to the absence of a drinks bar and the non-functional dishwasher.

Respondent's submissions

- [38] In respect of the learned judge considering the evidence of the respondent's expert witness Mr. Bickerton, Mrs. Williams Roberts argued that it is neither fair nor reasonable for the appellant to argue that Mr. Bickerton's evidence ought to have

been discounted since there was no objection to the admissibility of his evidence in the lower court even though the appellant was aware that Mr. Bickerton would not have been available for cross-examination.

Discussion

- [39] I agree with Mrs. Williams-Roberts that, given the manner in which events transpired in the court below, it would be rather unreasonable on appeal for the appellant to take issue with the fact of Mr. Bickerton not having been cross-examined. Furthermore, there is nothing on the record which suggests that Mr. Bickerton was not a credible expert witness. In the circumstances, the learned judge was entitled to consider his evidence and I find that there is no merit to this ground of appeal which fails accordingly.

DAMAGES AND LOSS OF PROFITS

Failure to deliver up to the appellant premises in an operational condition

Appellant's submissions

- [40] On the matter of damages and the appellant's loss of profits, Mr. Bennett first argued that there are no statutory provisions in the BVI governing the legal effect of invitations to tender and the submission of tenders. He stated that accordingly, the position at law is still governed by common law principles of contract, therefore, a claimant, who is the victim of a breach of contract, is entitled to be put in the position he would have been in had the contract been performed or performed in a timely manner. He submitted further that where the claimant has suffered damage, loss and injury as a result of the breach, the claimant is entitled to be compensated with damages. He relied on **McGregor on Damages**⁶ and **Chitty on Contracts**⁷. He stated further that these principles apply to loss of business profits as demonstrated in the case of **Vasiliou v Hajigeorgiou**.⁸

⁶ 19th ed [4-007].

⁷ 31st ed Vol 1 [26-001].

⁸ [2010] EWCA Civ. 1475.

[41] Mr. Bennett submitted that the formal acceptance by the government of the appellant's tender gave rise to a binding contract, on the express terms of the tender documents, that is, to be granted a license for the period of three years at an annual rent of \$42,000.00 payable monthly in the sum of \$3,500 (Clause 15 of the tender document). He stated that this was further confirmed by the government's acceptance of the first month's rent. He relied on **Manchester Diocesan Council for Education v Commercial & General Investments Ltd**⁹ and **Felton Construction Limited v Liverpool City Council**¹⁰ in this regard. Mr. Bennett argued that it was not open to the government to unilaterally vary the terms of the tender contract by (i) deciding to completely outfit the passenger catering concession premises, (ii) increasing the annual rent to be paid by the appellant for occupation and use of the said premises, and (iii) imposing other terms on the appellant not provided for in the invitation to tender. In this regard, Mr. Bennett noted that while the parties had entered into discussions with respect to the terms of the Deed of License to be issued to the appellant, the contractual obligations which were established by the binding agreement relating to the tender documents, remained in place. He stated that the government therefore had an obligation to ready the premises for final outfitting by the appellant, and to permit him to enter into occupation for such purpose and to commence business therefrom.

[42] Mr. Bennett submitted that there were three instances in which the contract could be set aside: (i) if the successful tenderer failed to execute and return the license deed, the authority would have been entitled to rescind (clause 22), (ii) if the successful tenderer failed to comply with the terms of the contract constituted by acceptance of the tender and the authority issued a notice to rescind the concession (clause 25), and (iii) if the construction of the new terminal is not in the authority's opinion sufficiently advanced to enable the authority to give access to the area to be occupied by the concessionaire so as to enable him to carry out the internal decoration (clause 17). He further stated that when the copies of the concession

⁹ (1970) 21 P. & C.R. 38.

¹⁰ [2007] EWHC 3049.

agreement were sent to the appellant for signature in October 2002, the new terminal building was open and there was no question of access, however, the government having already accepted the appellant's tender had by this time failed to carry out the construction necessary for the appellant to conduct the outfitting required for his business. Therefore, it was not possible for the appellant to carry out the outfitting without further construction and in that regard the appellant could not sign the Deed of License and instead entered into further negotiations with the government. In this regard, Mr. Bennett argued that the learned judge erred in dismissing the appellant's claim for damages and loss of profits due to the alleged breach of the terms of the tender agreement and holding that any failure on the part of the government to provide an operational catering facility was overtaken by Mr. Penn's own unreadiness to agree terms and to commence sooner than 15th November 2005.

Respondent's submissions

- [43] Mrs. Williams Roberts argued that there was no concluded contract between the government and the appellant upon acceptance of the tender bid. She submitted that a failure to conclude the Deed of Licence would have amounted to a failure to contract. She stated further that once the government and the appellant began negotiating, they would have been negotiating a new contract.

Duress and coercion

Appellant's submissions

- [44] Mr. Bennett asserted that in these circumstances when the government advised the appellant, at the meeting held in March 2004 that, unless he accepted the new terms, the award of the concession would be revoked, the tender agreement would be rescinded and the concession put back out to public tender, none of the three circumstances that would give rise to a rescission actually existed. He argued that the appellant was effectively coerced into signing to the amended terms of the tender agreement whereby the government undertook to not only complete the work they ought to have carried out but also to conduct the fit out themselves, and further

raised the appellant's rent. He indicated to this Court that at the time, the appellant was facing financial ruin and had no other practical alternative in his state of vulnerability than to sign to the amended terms.

[45] Mr. Bennett submitted that the foregoing illustrates a paradigm of economic duress. He stated that if one party to a contract applies illegitimate pressure the practical effect of which is to compel another party to agree to a variation of the terms of the contract in a way which advantages the party applying the pressure, and disadvantages the victim by causing him to consent to some contractual alteration to which he would not have consented had he any practical alternative, the impugned variation may be set aside for economic duress upon application by the victim. He relied on the case of **North Ocean Shipping v Hyundai Construction (The Atlantic Baron)**¹¹ in support of this submission. In this regard, Mr. Bennett submitted that the learned judge ought to have awarded the appellant substantial damages for loss of profit for the period of September 2002 to 15th November 2005, or at the very least from September 2002 to 6th July 2005, given that there was a binding contract in effect during this period and the delay in execution was due to the premises at the new terminal not being readied by the government in a reasonable time.

[46] Ultimately, on this point, Mr. Bennett submitted that in the face of strong evidence of failure, and breach by non-performance on the part of the government to discharge its obligations to the appellant under the invitation to tender documents, and its binding agreement with the appellant, the learned judge adopted an erroneous approach in his analysis of the evidence and failed to find the government liable to the appellant under this head of damages.

[47] Mr. Bennett also argued that the learned judge should have awarded the appellant the claimed sum of \$135,893.00 as damages for wrongful increase in rent on the premise that he had been coerced into signing the agreement setting his license fee

¹¹ [1979] QB 705.

in an amount significantly exceeding that which was in his accepted tender. He asserted that the sum of damages claimed could have been reduced to the extent necessary to reflect the fact that the appellant had not incurred the expense of outfitting the premises.

Respondent's submissions

[48] As it relates to the appellant's allegations that he was coerced under economic duress to sign the Deed of Licence, Mrs. Williams Roberts insists that signing the Deed of Licence was not the only course of action available to the appellant in the circumstances. She submitted that the appellant was at all times supported by his son, Mr. David Penn, who is an attorney-at-law and who was in a position to advise the appellant of his rights at the material time. She argued that the government was also in a difficult position during the negotiation period before the Deed of Licence was signed, as there was no operating concession stand at the new airport terminal to offer refreshments to travellers. She urged this Court to uphold the finding of the learned judge that it did not amount to unlawful coercion on the part of the government where the appellant was faced with an invidious choice of either accepting the concession on less favourable terms than he wanted or having no business at all.

[49] Mrs. Williams Roberts also argued that the learned judge was correct to make no award of damages to the appellant for the alleged wrongful increase in rent or licence fee in respect of the passenger catering concession premises. She stated that the appellant would have been able to consider his own personal and economic circumstances prior to bidding and he chose to agree to the terms of the Deed of License nonetheless.

Discussion

Failure to deliver up to the appellant premises in an operational condition – Breach of contract for variation of terms – Wrongful increase of rent – Duress and Coercion

[50] On the issue of damages and loss of profits, the appellant appealed against a number of findings of fact by the trial judge. The starting point for resolution of those issues before this Court on appeal must be a recognition of the principles which govern appellate interference with respect to the review of findings of fact, the evaluations of those facts and the inferences drawn from them by a trial judge. These well-established principles are set out in several well-known authorities including **Watt (or Thomas) v Thomas**,¹² **Datec Electronics Holdings Ltd v United Parcels Service Ltd**,¹³ **In re B (A Child) (Care Proceedings: Threshold Criteria)**,¹⁴ **McGraddie v McGraddie**¹⁵ and **Fage UK Ltd v Chobani UK Ltd**¹⁶ and have been restated by this Court several times. More recently the Privy Council in **Ming Siu Hung and others v JF Ming Inc and another**¹⁷ reiterated the need for restraint by appellate courts when asked to review findings of fact made by the lower court. The Privy Council emphasised that an appellate court should only interfere with finding of facts, including finding of primary facts, evaluation of those facts and inferences to be drawn from them, when compelled to do so.

[51] I adopt the above pronouncements as applicable to the case at bar.

[52] I turn now to the appellant's contention that the learned judge erred in dismissing the appellant's claim for damages due to the alleged breaches of the terms of the tender document. The first question to be addressed here must be whether there was a validly formed contract between the appellant and the government prior to the execution of the Deed of Licence on 28th April 2005.

¹² [1947] A.C 484.

¹³ [2007] UKHL 23.

¹⁴ [2013] 1 WLR 1911.

¹⁵ [2013] UKSC 58.

¹⁶ [2014] EWCA Civ 5.

¹⁷ [2021] UKPC 1.

[53] The learned authors of **Halsbury's Laws of England**¹⁸ set out the following principles governing the formation of a contract upon the acceptance of a tender:

"The unconditional acceptance of a tender gives rise to a contract. An acceptance is effective when communicated to the tenderer. **Where the parties are otherwise agreed on the terms of the contract but acceptance is made subject to a condition that a formal document should be executed, it is a question of construction whether such a condition is a condition precedent which prevents a concluded contract from arising.** The use of the term 'subject to contract' is a strong indication that no enforceable obligation was intended to arise before the execution of a formal document; but a statement in the acceptance that a formal contract is being prepared may not prevent a binding contract arising.

Where the acceptance of a tender is qualified by the introduction of a new term, a counter offer has been made to the tenderer which will require acceptance if a contract is to be concluded. Such an acceptance can be made by conduct and a contractor who starts work, or an employer who permits work to be started, after the receipt of a counter offer and without objection to the terms of the counter offer will be taken to have accepted those terms by conduct. **There is no concluded contract where the parties stipulate that certain matters be left for further agreement. Where at the date the work is begun the parties have not reached full agreement on all the terms of the contract, on their arriving at full agreement the resultant contract will, unless otherwise agreed, normally have effect retrospectively to the date on which the work was begun. Acceptance of a tender must be unambiguous.**" (Emphasis added)

[54] In the abovementioned statement, the learned authors of **Halsbury's Laws of England** relied on the well-known cases of **Hyde v Wrench**¹⁹ and **Butler Machine Tool Co Ltd v Ex-Cell-O-Corpn (England) Ltd**²⁰ in setting out the principle that where an acceptance of a tender is qualified by the introduction of new terms, the contract is not considered concluded, since a counter-offer would have been made which requires acceptance before the contract is formed. I adopt the above principles and authorities as applicable in the circumstances.

¹⁸ 5th edition 2018, Volume 6, paragraph 218.

¹⁹ (1840) 3 Beav 334.

²⁰ [1979] 1 All ER 965.

[55] In setting out the background of the case the learned judge made certain observations about the government's acceptance of the appellant's tender. At paragraph 34 of his judgment, the learned judge stated:

"The [appellant] tendered to take up the passenger concession at a monthly licence fee of \$42,000 per year or \$3,500 per month. He was informed by a letter dated 29 October 2002 that he had been awarded the concession. The letter asked the [appellant] to sign and return two copies of an enclosed concession agreement, together with a quarter of the guaranteed minimum annual concession fee. The letter further stated that the [appellant] would then be permitted to access the premises to commence fitting out. The letter further stated that the commencement of the concession would be treated as being when the [appellant] had completed fitting out the premises. **This letter therefore contained at least two variations from the terms set out in the tender document.**" (Emphasis added)

[56] What ensued thereafter were a series of letters and meetings for further negotiation of the terms of the concession, which culminated in the Deed of License finally being signed on 28th April 2005, some three years after the appellant was first advised that he was awarded the concession. It is pellucid that the letter awarding the appellant the concession did not give an unqualified acceptance of the appellant's tender. At the point of acceptance of the tender it cannot be said that the terms of the concession were certain or that there was a meeting of the minds on the terms of the concession agreement. Accordingly, and in consideration of the abovementioned principles adopted, I find that there could be no breach of contract by the government for failure to deliver the premises in an operational condition to the appellant, since there had been no concluded contract until the Deed of License was signed in April 2005. The appellant's appeal therefore fails on this ground as well.

[57] At paragraph 118 of his judgment, the learned judge found that:

"Any question whether or not the Government had a duty to make the premises available in an operational condition became moot, in my view, by the fact that the [appellant] engaged upon negotiations lasting in effect from November 2002 until he signed the Deed of License on 28 April 2005."

[58] While the learned judge did not expressly conclude that no contract was yet formed between the parties until the signing of the Deed of Licence on 28th April 2005, implicit in his above finding is a recognition that where terms remained uncertain between the parties, any contractual obligation on the part of the government to make the premises available in an operational condition also remained uncertain. Again, I agree with this finding and accordingly, the appellant's appeal also fails on this ground.

[59] In light of my above finding that there was no concluded contract between the parties until the signing of the Deed of Licence on 28th April 2005, it is also evident that the appellant cannot succeed in its complaint that the government was in breach of contract for making variations to some of the terms set out in the tender document. This includes, as argued by Mr. Bennett, the government (i) deciding to completely outfit the passenger catering concession premises, (ii) increasing the annual rent to be paid by the appellant for occupation and use of the said premises, and (iii) imposing other terms on the appellant not provided for in the invitation to tender. Where the agreement was not yet completed and the terms were still being negotiated the parties were at liberty to propose and counter propose terms which may have been accepted or refused by the other until a final agreement was reached. Accordingly, I do not find that the appellant is owed any damages for breach of contract in varying the terms of the tender document.

Commercial Duress

[60] I also agree with the learned judge that while the appellant's financial situation was such that he was faced with a difficult decision in ultimately accepting the less than favourable new terms of the concession after the negotiations, it did not amount to unlawful coercion on the part of the government. I find the pronouncements of Lord Scarman in **Pao On and others v Lau Yiu and another**²¹ to be instructive on this point:

²¹ [1979] 3 All ER 65 at pp 78-79.

“Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree with the observation of Kerr J in *The Siboen and The Sibotre* [1976] 1 Lloyd’s Rep 293 at 336) that in a contractual situation commercial pressure is not enough. There must be present some factor ‘which could in law be regarded as a coercion of his will so as to vitiate his consent’. This conception is in line with what was said in this Board’s decision in *Barton v Armstrong* ([1975] 2 All ER 465 at 476–477, [1976] AC 104 at 121) by Lord Wilberforce and Lord Simon of Glaisdale, observations with which the majority judgment appears to be in agreement. In determining whether there was a coercion of will such that there was no true consent, it is material to enquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are, as was recognised in *Maskell v Horner*, relevant in determining whether he acted voluntarily or not.

In the present case there is unanimity amongst the judges below that there was no coercion of Lau’s will. In the Court of Appeal the trial judge’s finding (already quoted) that Lau considered the matter thoroughly, chose to avoid litigation, and formed the opinion that the risk in giving the guarantee was more apparent than real was upheld. In short, there was commercial pressure, but no coercion. Even if this Board was disposed, which it is not, to take a different view, it would not substitute its opinion for that of the judges below on this question of fact.

It is, therefore, unnecessary for the Board to embark on an enquiry into the question whether English law recognises a category of duress known as ‘economic duress’. But, since the question has been fully argued in this appeal, their Lordships will indicate very briefly the view which they have formed. At common law money paid under economic compulsion could be recovered in an action for money had and received: see *Astley v Reynolds*. The compulsion had to be such that the party was deprived of ‘his freedom of exercising his will (2 Stra 915 at 916). It is doubtful, however, whether at common law and duress other than duress to the person sufficed to render a contract voidable; see Blackstone’s Commentariesⁱ and *Skeate v Beale*. American law (Williston on Contracts^j) now recognises that a contract may be avoided on the ground of economic duress. The commercial pressure alleged to constitute such duress must, however, be such that the victim must have entered the contract against his will, must have had no alternative course open to him, and must have been confronted with coercive acts by the party exerting the pressure: see Williston on Contracts^k. American judges pay great attention to such evidential matters as the effectiveness of the alternative remedy available, the fact or absence of protest, the availability of independent advice, the benefit received, and the speed with which the victim has sought to avoid the contract. Recently

two English judges have recognised that commercial pressure may constitute duress the pressure of which can render a contract voidable: see Kerr J in *The Siboen and The Sibotre* and Mocatta J in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd*. Both stressed that the pressure must be such that the victim's consent to the contract was not a voluntary act on his part. In their Lordship's view, there is nothing contrary to principle in recognising economic duress as a factor which may render a contract voidable, provided always that the basis of such recognition is that it must amount to a coercion of will, which vitiates consent. It must be shown that the payment made or the contract entered into was not a voluntary act."

[61] The issue of commercial duress was also considered in **DSND Subsea Ltd v Petroleum Geo Services ASA**²² where the principles were set out as follows:

"The ingredients of actionable duress are that there must be pressure, (a) whose practical effect is that there is compulsion on, or lack of practical choice for, the victim, (b) which is illegitimate, and (c) which is a significant cause of inducing the claimant to enter into the contract... In determining whether there has been illegitimate pressure, the court takes into account a range of factors. These include whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure has acted in good or bad faith; whether the victim had any realistic practical alternative but to submit to the pressure; whether the victim protested at the time; and whether he affirmed and sought to rely on the contract... Illegitimate pressure must be distinguished from the rough and tumble of pressures of normal commercial bargaining."

These principles were applied in **Kolmar Group AG V Traxpo Enterprises PVT Ltd**²³ where the court found that the pressure applied to secure the price increase in that case was illegitimate. The defendant became aware of the claimant's urgent needs during the late stages of the negotiations and imposed an exorbitant change of price.

[62] I consider the above principles as applicable in this case. In my view, the appellant had the alternative of simply choosing not to contract with the government for the concession and operating his business elsewhere. He was also in a position to be independently advised as to his rights in the circumstances. Moreover, with

²² [2000] BLR 530.

²³ [2010] EWHC 113.

negotiations between the parties spanning a three-year period the learned judge was correct to determine that ‘the government had been enormously patient with the [appellant’s] incessant demands’. This was to the point of the airport having no passenger catering facility inside the new terminal building to refresh its travellers for over three years while the government accommodated negotiations with the appellant. I also agree with the learned judge’s conclusion that:

“it is however part of business life that a point can be reached in negotiations where one side tells the counterpart that he will have to accept terms proposed failing which there will be no contract. The counterpart then has the option to sign, or walk away.”

In the circumstances, I do not discern from the facts of this case that there was economic duress which induced the appellant to contract and I agree with the learned judge that no compensation is due to the appellant under this sub-head of his claim for damages.

Failure to construct a drinks bar

Appellant’s submissions

[63] Mr. Bennett argued that despite the learned judge having found that the appellant was entitled to damages for the government’s failure to provide the bar facility as promised, he erred in the computation of the quantum of those damages. He stated that the learned judge so erred by accepting the evidence of the respondent’s expert (Mr. Bickerton), rejecting that of the appellant’s expert (Mr. Jackson) in this matter and finding that the appellant would be entitled to the sum of \$70,424.00 being calculated as loss of profits only for the first term of the licence from 15th November 2005 to 15th November 2008. He argued that once constructed the bar would continue to be part of the facilities operated by the business and it is inconceivable that the parties could have contemplated the licence being renewed without its inclusion. He submitted, therefore, that the judge erroneously concluded that the government had not recommitted itself to providing the bar during the renewal discussion in 2008 and should have awarded the appellant damages for the loss of

profits due to the absence of a bar for the period of 15th November 2005 to 15th November 2008 and continuing to the date of the judgment and beyond.

Respondent's submissions

- [64] During oral submissions, Mrs. Williams Roberts accepted that at the inception of the contract for the period of 15th November 2005 to 15th November 2008 there was a promise for a bar to be included, however there was no agreement for the type of bar which would be facilitated. She argued further that it was not the introduction of including the bar in the terms which extended negotiations between the parties but the type of bar required by the appellant. She also argued that it was open to the judge to utilise the dictionary definitions of 'bar' on which he relied and that the appellant's challenge of the judge's findings in this regard falls into speculation.

Discussion

- [65] The evidence shows that in November 2008 when the appellant requested that the government extend his license beyond the original expiration date of the first term of the licence on 15th November 2008, the government's representative agreed that the construction of the bar by the government would be discussed by the Cabinet. There is however no evidence, that beyond this agreement for the construction of the bar being considered by the Cabinet, that any agreement materialised where the government actually re-committed itself to providing a bar for the second three-year term of the license. Therefore, the learned judge was correct in his finding that damages awarded to the appellant for the government's failure to provide the drinks bar as agreed under the first term of the license would not extend to the second three-year term. Accordingly, the damages awarded by the learned judge under this sub-head are affirmed.

Non-functioning dishwasher

Appellant's submission

- [66] As part of his submissions on damages and loss of profits, Mr. Bennett also argued that the learned judge erred when he awarded the appellant the sum of \$11,060.00

as damages for the non-functional dishwasher. He stated that the judge erroneously accepted that the appellant was under a legal obligation or duty to replace the non-functional dishwasher at the said premises, when in fact the appellant was under no legal or contractual obligation to out-fit the said premises, where that obligation had been unilaterally assumed by the government. Mr. Bennett argued that as a result of this alleged breach by the government, the appellant had to employ two persons to wash dishes at the said premises over the years commencing 15th November 2005. He submitted further that this head of compensation had been conceded by the Financial Secretary on behalf of the government, both by written correspondence and by testimony at the trial. He asserted that in those circumstances, the learned judge ought to have awarded damages in the sum of \$53,000.00 as claimed by the appellant, which represents the total cost of employing only one person over the course of a 200-week period.

Respondent's submissions

- [67] Mrs. Williams Roberts argued further that in respect of the non-functioning dishwasher, the appellant was under a general duty to mitigate and act reasonably to minimise his loss. She stated that the appellant was not entitled to allow his losses to escalate unreasonably or to put himself to unnecessary expenses to the detriment of the respondent. She stated further that the sum of \$53,000.00 as damages for the non-functioning dishwasher was conceded by Mr. Neil Smith with a compensatory mind. She, therefore, invited the Court to decline to adopt Mr. Smith's purported agreement to the sum of \$53,000.00 for the dishwasher and to instead adopt the learned judge's reasoning on the matter in awarding the sum of \$11,060.00.

Discussion

- [68] Under this sub-head of damages, the learned judge considered the principles regarding mitigation of loss. He referred to the English Court of Appeal case **Lombard North Central Plc v Automobile World (UK) Ltd**²⁴ which set out the

²⁴ [2010] EWCA Civ 20.

applicable principles relating to the duty to mitigate. The judge stated at paragraph 136 of his judgment:

“In claims in contract and tort an injured party cannot recover damages for any loss which could have been avoided by taking reasonable steps. Moreover, an injured party cannot recover the cost of unreasonable steps which increase loss. Rix LJ concluded in *Lombard North Central Plc* that the duty to mitigate is not a demanding one as ‘it is the party in breach which has placed the other party in a difficult situation’. The duty on the Claimant is thus only to do what is reasonable in the circumstances and the burden is on the Government, as the party in breach, to demonstrate that the Claimant failed to act reasonably.”

[69] The learned judge concluded that whilst it would probably not have been unreasonable for the appellant to have employed additional staff to wash dishes for a short period until he made arrangements with the government to attend to the repair or replacement of the dishwasher, and then to have it repaired or replaced himself, it was not reasonable for the appellant to have allowed this state of affairs to continue to a point where it made no economic sense. Therefore, he awarded the claimant \$11,060.00, being \$10,000.00 as reasonable costs which the appellant would have incurred had he replaced the dishwasher and four week’s wages of \$1,060.00 (\$53,000.00 divided by two hundred multiplied by four) for one person to have washed dishes pending delivery and installation of the replacement dishwasher.

[70] I agree with the learned judge that it was unreasonable for the appellant to have allowed the state of affairs with the non-functioning dishwasher to have continued as long as it did. A period of 200 weeks was far too long a time for the appellant to have gone without taking better economic steps to mitigate loss, such as replacing the dishwasher himself. However, I consider that one month’s wages was too short a time in the circumstances. I consider that the appellant would have needed reasonable time to notify the respondent and thereafter reasonable time for the respondent to have arranged replacement of the dishwasher before the appellant took any steps to replace it. In that regard, I consider that three month’s wages would have been a more reasonable period of time. Accordingly, I would increase

the damages awarded to the appellant under this head to \$13,180.00, being \$10,000 to replace the dishwasher and twelve week's wages of \$3,180.00 (\$53,000.00 divided by two hundred multiplied by twelve) for one person to have washed dishes pending delivery and installation of the replacement dishwasher.

Exclusivity

Appellant's submissions

- [71] Mr. Bennett argued that the learned judge erred in finding, contrary to the documentary evidence set out in the government's letter of 5th February 2003, that the appellant was not entitled to exclusivity in relation to his operation of the passenger catering concession at the new terminal building, or that he had a legitimate expectation of such exclusivity. He argued further that the judge failed to take into account the fact that the government undertook to remove the food vans which were operating in the parking lot outside the new terminal, thereby confirming the grant of such exclusivity. He further stated that the judge also failed to take into account the clear and uncontradicted evidence that the main breach of the grant of exclusivity related to the permission which was subsequently granted for the operator of the Cyber Café within the new terminal building. He argued that, on the evidence, the judge ought to have awarded substantial damages under this sub-head of the appellant's claim in keeping with Mr. Jackson's assessment of loss of profit.

Respondent's submissions

- [72] Mrs. Williams Roberts submitted that none of the negotiations between the appellant and the government could amount to a contract granting exclusivity and, therefore, no damages ought to be awarded under this head. She insisted that the evidence was that the government would use its best endeavours to remove the catering vans situated in the car park and that no agreement granting exclusivity was actually formed.

Discussion

[73] On the issue of exclusivity, the learned judge found that there was never a contractual term between the parties that the appellant should have exclusivity in relation to his operation of the passenger catering concession at the new terminal building. He also found that the appellant had no legitimate expectation of exclusivity, nor did he rely to his detriment upon any assurance by the government that he would be granted exclusivity. Accordingly, the learned judge awarded no damages to the appellant under this sub-head.

[74] I can discern no error of principle in the learned judge's finding in this regard. In the letter dated 5th February 2003, the government stated:

“5. Firstly, we are prepared to say that there will be no other restaurant opened within the envelope of the current building. We hope that your clients will be long term concessionaires and the Government must protect itself, in the event of large scale increases in traffic through the airport. The Government, therefore, reserves the right to open catering outlets, such as coffee shops or snack bars in any extended part of the building.

6. Secondly we will grant exclusive rights to your clients for passenger catering at the airport for a period of five years. We will use our best endeavours to remove the catering vans currently situated in the car park.”

[75] Thereafter, the parties continued further negotiations on the terms of the Deed of License. The letter dated 12th January 2004 sent by the government to the appellant, made clear in its revised terms and conditions offered that ‘No. This is a non-exclusive Agreement’. This was the government's response to a letter dated 11th November 2003 from counsel for the appellant in the court below, wherein he referenced a proposed revision to clause 9 of the Deed of License requesting: ‘To this should be added a provision to the effect that the Authority shall not licence anyone else to sell the same or similar goods at the Terminal Building for the duration of the License’. Clause 9 of the Deed of Licence dated 28th April 2005 as signed by both parties reads: ‘The Licensee shall sell at retail from the premises only those good listed in the Schedule hereto and shall not sell any other good or provide any other services from the premises without the written consent of the Grantor.’

[76] It is pellucid that the evidence does not show that any agreement granting exclusivity was actually formed between the parties. Therefore, it cannot be said that the learned judge erred in his finding that no such exclusivity existed in the agreement which ultimately formed between the parties. Accordingly, the appellant's appeal also fails in this regard.

Proposed 10-year lease

Appellant's submissions

[77] Mr. Bennett also submitted that the learned judge erred in finding that there was no meeting of the minds on the terms of the 10-year lease to be granted to the appellant. He argued that this finding by the judge runs completely contrary to the documentary evidence before the court in circumstances where it was communicated in writing to the appellant and his lawyers that the government, by decision of the Cabinet, had agreed to grant the appellant a 10-year lease of the passenger catering concession premises at a monthly rent of \$1,500.00, such terms to commence on 1st December 2008. This, he says, was confirmed by letter from the Permanent Secretary in the Premier's Office on 27th August 2009 and by the BVI Airports Authority by letter dated 20th September 2010. He stated that by letter dated 23rd March 2011 from the Permanent Secretary in the Premier's Office, the government confirmed to the appellant its subsequent decision that the term of the new 10-year lease would run from 16th November 2011, instead of from 1st December 2008, and at a monthly rent of \$1,500.00, with a review after 5 years. He argued that, accordingly, the judge erred in finding that there was no meeting of the minds on the terms of the lease and ought to have ordered, in exercise of the powers of the court pursuant to section 20 of the **West Indies Associated States Supreme Court (Virgin Islands) Act**,²⁵ that the government complete the granting of the agreed 10-year lease to the appellant.

²⁵ Cap 80, Laws of the Virgin Islands.

Respondent's submissions

- [78] Mrs. Williams Roberts argued that the purported 10-year lease had not been concluded but only negotiated. She stated that the parties were coming close to a meeting of the minds, however there is no evidence of there being an agreement. She drew this Court's attention to the fact that even the appellant acknowledged in the court below that the 10-year lease was not concluded.²⁶ Mrs. Williams Roberts insisted that the Court must consider that the Airports Authority is a statutory body which is not controlled directly by Cabinet, and must further consider whether the court below could have directed the Airports Authority to do or carry out an action which Cabinet considered. In this regard, Mrs. Williams Roberts submitted that no legal fault or factual error could be found in the reasoning of the learned judge.

Discussion

- [79] This is a short point. In my view, the appellant's appeal in relation to the proposed 10-year lease also fails. To say that the court ought to have found that a lease existed granting the appellant a 10-year term based on the decision of Cabinet falls short of any evidence that there was indeed a meeting of the minds and that a lease agreement was formed. There was no concluded certainty of the terms of the proposed 10-year lease nor was there any document executed to give effect to such a lease. Accordingly, I agree with the finding of the learned judge in this regard and the appeal on this issue fails.

Legal effect of government's admission of liability and initiation of settlement process

Appellant's submissions

- [80] Mr. Bennett argued that the learned judge erred in not considering the legal effect of the settlement process instituted by the government and agreed to by the appellant whereby a Compensation Committee was appointed by Cabinet on 12th April 2011 to assess and to recommend the amount of compensation to be paid by the respondent to the appellant. He stated that the Compensation Committee by its

²⁶ See pages 779 and 793 of the Record of Appeal.

report dated 23rd May 2011 recommended the payment of compensation to the appellant in the sum of \$4,117,973.00 plus reimbursement of the sum of \$96,600.00 for the cost of two employees for the non-functional dishwasher, and accounting and legal fees. Mr. Bennett argued that in light of this the learned judge ought to have found that the respondent was obligated to accept the recommendation of the Compensation Committee as to the quantum of compensation to be paid to the appellant and ought to have awarded damages accordingly. For this submission he relied on the cases of **Boyd v Gates (UK) Ltd**²⁷ and **Pearson v Archibald Russell Limited**.²⁸

Discussion

- [81] For completeness I will also address Mr. Bennett's argument that the establishment of the Compensation Committee by which the government effectively agreed that the appellant was owed compensation thereby giving him a legitimate expectation not only that compensation would be paid but that Cabinet and the government would accept the recommendations of the Compensation Committee. While I agree, as the learned judge correctly found, that the government's action of establishing a Compensation Committee indicates that it proceeded on the basis that the appellant had a good claim, at least in part, and that it ought to compensate him, I do not agree that this also means that the appellant is owed damages equal to that recommended by the Compensation Committee.
- [82] The sum which the Compensation Committee rendered in its report dated 24th May 2011 was a recommendation and not an express promise of a sum to be paid to the appellant. Moreover, there was no agreement reached between the parties that the recommendation of the Compensation Committee would be binding and that the government would pay the recommended sums for compensation to the appellant. In fact, on 29th January 2012 the Ministry wrote to the appellant enclosing a cheque for \$189,000.00 by way of compensation 'as full and final settlement of the claim',

²⁷ (2015) S.L.T 483.

²⁸ [1916] S.C. 536.

which the appellant rejected as inadequate. It is clear that the parties had not arrived at any conclusive agreement as to the amount which the government was prepared to pay the appellant as compensation.

- [83] In light of the above, I do not agree with Mr. Bennett that there was any agreement between the parties, nor that the appellant had any legitimate expectation, that the government would pay him the sums recommended by the Compensation Committee. A recommendation is not tantamount to an agreement and the requirements giving rise to a legitimate expectation as set out in **Council of Civil Service Unions and Others v Minister for Civil Service** and **Rainbow Insurance Company Limited** are not fulfilled here. Therefore, the appellant's appeal on this issue also fails.

Conclusion

- [84] Given all that I have foreshadowed, I would allow the appeal in part, only to the extent that the damages awarded by the learned judge for the non-functioning dishwasher is varied and the appellant is to be paid the sum of to \$13,180.00 under that sub-head. Accordingly, the appellant's total damages awarded would increase from \$286,796.50 to \$289,976.50. The learned judge's orders in all other respects are affirmed. As for costs on the appeal, I consider that the appellant has gained limited success in his appeal and the respondent is the victor in large part. Therefore, I would order the appellant to pay costs on appeal to the respondent reduced to 50% of the costs awarded in the court below.

Order

[85] The appeal is allowed in part and the appellant shall pay costs to the respondent being 50% of the costs awarded in the court below.

I concur
Vicki-Ann Ellis
Justice of Appeal [Ag.]

I concur
Dexter Theodore
Justice of Appeal [Ag.]

By the Court

Chief Registrar