

**THE EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE  
ANTIGUA AND BARBUDA**

**CLAIM NO: ANUHCv 2008/0180**

**BETWEEN:**

**LUCA POZZONI**

Claimant

and

**BROWNS' BAY RESORT LIMITED**

Defendant

**Appearances:**

Mr. Lenworth Johnson for the Claimant  
Dr. David Dorsett for the Defendant

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2009: December 2  
2010: June 7  
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**JUDGMENT**

- [1] **MICHEL, J.:** By Claim Form and Statement and Claim filed on 17<sup>th</sup> March 2008 the Claimant, Luca Pozzoni, claimed against the Defendant, Brown's Bay Resort Limited, loss of revenue and cost of an aborted service agreement resulting from the Defendant's breach of the terms of a lease duly executed between the parties on 1<sup>st</sup> November 2006 and, further or alternatively, damages for premature termination of the lease.

- [2] By Defence filed on 16<sup>th</sup> April 2008, the Defendant disputed the Claimant's claim and counterclaimed for rent, possession of premises, mesne profits and damages.
- [3] By Reply and Defence to Counterclaim filed on 19<sup>th</sup> May 2008, the Claimant joined issue with the Defendant on its Defence and disputed the Counterclaim.
- [4] By Reply filed on 24<sup>th</sup> June 2008, the Defendant joined issue with the Claimant on his Defence to the Counterclaim.
- [5] The matter was referred to mediation by Order dated 26<sup>th</sup> June 2008 and the parties settled some issues as a result of the mediation session.
- [6] Case management directions were given in the matter on 13<sup>th</sup> January 2009 and pre-trial review took place on 15<sup>th</sup> May and 19<sup>th</sup> June 2009.
- [7] The trial of the matter took place on 2<sup>nd</sup> December 2009.
- [8] At the trial, the Claimant gave evidence on his own behalf and called no witnesses, while Dr. Vincent Richards, a former corporate officer of the Defendant, was the sole witness for the Defendant.
- [9] The evidence of the Claimant, as per his witness statement, was that he was previously the tenant of the Defendant, having leased from the Defendant a property known as Tamarind Bar & Restaurant. That the lease was for the period from 1<sup>st</sup> November 2006 to [31<sup>st</sup>] August 2008. That he ran and operated a bar and restaurant and a day charter/fishing tours business from the premises. That the first season (from 1<sup>st</sup> November 2006 to 31<sup>st</sup> August 2007) was very good for him. That he earned more than enough from the restaurant and bar to meet all his expenses and all his other obligations without difficulty, including a salary for himself and the rental for his villa. That he does not have his receipts evidencing the payments made by him because all the books and receipts were kept in the office at the demised premises and in or about December 2007 a

representative of the Defendant (Mr. Sergio Poli) changed the locks to the premises and he does not know what became of his books and receipts as a result.

[10] The Claimant stated that he had every intention of continuing with the operation of the restaurant and bar for the second season (1<sup>st</sup> November 2007 to 31<sup>st</sup> August 2008). That as soon as the restaurant was closed on August [31<sup>st</sup>] 2007 he started to pack away items for use in the next season. That he scrubbed the kitchen and the restaurant and he paid the gardener to help him put up garden lights along the walkway from the restaurant to the beach. That he paid to have Tamarind Bar & Restaurant advertised in two advertising magazines for the second season. That during the maintenance period (September and October 2007) the Defendant's representative (Mr. Poli) told him that he was going to sell the property and the new owners had other plans for the restaurant and bar and that they did not want to continue with the lease. That he told Mr. Poli that he had to honour the agreement and that the lease should continue whether or not he decided to sell, but Mr. Poli told him "agreement or no agreement, Tamarind will be closed next season." That he took that to mean that the Defendant was going to terminate his lease no matter what. That this was confirmed when he noticed that the gardener stopped cutting the grass and the maid was transferred to another property without his consent. That the Defendant had provided the maid and gardener for the premises, with half of their wages paid by the Claimant, which he had paid up to 1<sup>st</sup> November 2007. That the Defendant also allowed other people to go into the restaurant and bar, without his knowledge and consent, to take an inventory of the things that were there. That as a result of all of this, he knew that the restaurant and bar would not be opened for the next season.

[11] The Claimant stated that he had an agreement to bring a new chef and his family from Italy who were to work in the restaurant and bar as chef and hostess/manager for the second season. That as result of the situation, he had to stop the agreement and pay compensation of approximately US\$14,184 to the chef and the hostess/manager. That he also lost financially because he had invested in the property with the expectation of being in possession of the premises for at least two years. That the fishing/charter boat was purchased with that in mind and the other investments (repainting the restaurant and

boutique and cleaning and repainting the pool) were done with the expectation that he had a guaranteed lease for two years.

[12] The Claimant stated that he had a meeting with Mr. Poli in early October at which Mr. Poli offered him US\$10,000 for termination of the lease. That he did not accept this offer and Mr. Poli agreed to meet with him to discuss the situation further. That he met with Mr. Poli on 31<sup>st</sup> October 2007 and gave him a letter informing him that an appropriate amount for compensation was US\$50,000. That Mr. Poli took the letter and said that he would have his lawyer look at it and get back to him (the Claimant). That he heard from Mr. Poli's lawyer by virtue of a letter delivered to him (the Claimant) in the last week of November 2007. That the letter stated that he had breached the agreement by failing to open the restaurant on 1<sup>st</sup> November 2007 for the new season and demanded that he compensate the Defendant in the sum of US\$4,000 by 23<sup>rd</sup> November 2007 for interrupting the contract. That he received the letter after 23<sup>rd</sup> November 2007 and by the time he received it the Defendant had already permitted other persons to park several trailers with sailboats on part of the leased premises. That the restaurant and bar could not have opened for the second season on 1<sup>st</sup> November 2007 because the grass was very high and there was no maid provided by the Defendant to work at the premises and, because of what Mr. Poli had told him and because of the condition of the place, he was without a chef. That further, after his meeting with Mr. Poli on 31<sup>st</sup> October 2007, it was clear to him that the only thing to be discussed between the Defendant and himself was the quantum of the compensation to be paid to him by the Defendant for terminating the lease before the end of the term of the lease. That the Defendant had already been in breach of the contract and/or had already forced the termination of the lease by not providing a maid, not cutting the grass, facilitating the entry of a third party into the leased premises and having the grounds obstructed.

[13] The Claimant stated that he is asking the Court to find that the Defendant breached the lease agreement and/or unlawfully terminated the agreement, which resulted in financial loss to the Claimant for which he should be compensated beyond the amount stipulated by the contract. That the contract provides a penalty for interruption of the agreement by

either party, but the situation created by the Defendant by deliberately breaching the agreement to force the termination of the lease is not an interruption.

[14] By way of amplification of his witness statement, the Claimant testified that he left the villa occupied by him on 10<sup>th</sup> December 2007 and returned the keys to the villa on that day. That he did not return the keys to the restaurant because he was concerned about his stove and other things inside the restaurant. That he never returned the keys to the restaurant because (after a couple of months) the gardener told him that the locks were changed. That the Defendant was aware that he was running a fishing business from the leased premises. That on average he made US\$2,100 per month in the restaurant and US\$1,000 per month in the fishing business. That these figures are based on the difference between the income and expenses from the operation of these businesses. That his expenditure on cleaning the pool and repainting the pool, the restaurant and the boutique was made at the beginning of the lease and during the first season. That he spent approximately US\$5,000 doing these things. That he spent about US\$500 putting up lights along the walkway to the beach.

[15] Under cross examination, the Claimant testified that the contract he had with the Defendant provided for the restaurant to operate for ten months in the year and that during the months of September and October it would be closed for maintenance and would restart in November. That it was in October 2007 that he was told of the intended change of ownership of the property. That his case is that he wanted the restaurant to continue but it did not continue. That it is correct that he did not open the restaurant in November 2007.

[16] Under further cross examination, the Claimant was referred to a letter in the core trial bundle dated 15<sup>th</sup> November 2007 and testified that he remembered receiving the letter on 27<sup>th</sup> November 2007. When the second paragraph of the letter was read to the Claimant, he testified that he did not open the restaurant in November because of the situation between himself and the Defendant, who had put him and his staff in a position where they could not open the restaurant. The Claimant was then referred to paragraph 5 of his

witness statement whereupon he testified that it was not until December 2007 that the premises were padlocked, preventing him from operating the restaurant. The Claimant was then referred to a letter in the core trial bundle dated 31<sup>st</sup> October 2007 whereupon he testified that his attorney was expressing the view in that letter that the lease could continue even after a change of ownership. Upon being referred to the demand made on him in the letter dated 15<sup>th</sup> November 2007 (together with the accompanying notice of forfeiture) for compensation of US\$4,000 and to paragraph 19 of the lease agreement, the Claimant testified that he understood from the correspondence that US\$4,000 was what the Defendant was asking. He testified that both he and Mr. Poli are businessmen; that the lease agreement came from Mr. Poli; that before signing the lease agreement he had an opportunity to think about it first; that he understood it; and that his signing of it meant that he felt comfortable with it.

[17] The Claimant reiterated that he was earning US\$2,100 monthly from the restaurant, although admitting that there is nothing in the documents in evidence in this case which supports his income and that he has not supplied any document from the Inland Revenue Department to show that taxes were paid on an income of US\$2,100.

[18] In the witness summary filed on behalf of the Defendant's witness, Dr. Vincent Richards, it was stated that he will give evidence that at the material time he was a corporate officer of the Defendant. That he knew and interacted frequently with Mr. Poli, who was in charge of the day-to-day affairs of the Defendant. That he knew the Claimant, who operated a restaurant from the Defendant's premises pursuant to a lease dated 13<sup>th</sup> November 2006. That the Defendant's position is that the Claimant's failure to re-open his restaurant was a matter of his own choosing. That there were talks of the Defendant being owned by a new person who might redevelop the property, but the rental contract was between the Claimant and the Defendant and not between the Claimant and the prospective owner of the Defendant. That the rental contract remained, as did the parties' obligations under it. That there was no change of landlord who, under the contract, was the Defendant. That the decision of the Claimant not to open his restaurant is independent of the ownership of the Defendant. That the ownership may change but the corporate entity remains. That in

any event, the contract under which the [Claimant] sues provides compensation of US\$4,000 if there is a breach by either party. That the Defendant is prepared to abide by the terms of the rental contract. That the [Claimant] remained in possession of the property until March 2008 when he returned the keys. That the fact that the Claimant did not operate his restaurant until March 2008 cannot be placed at the foot of the Defendant. That both sides are bound by the contract which limits the damages payable by either side where there is default or interruption of the contract. That quite apart from any dispute with the restaurant, the Claimant rented a villa from the Defendant at a rental of US\$1,000 per month, but has from October 2007 been in default of his obligation to pay rent and that he needs to pay up and settle his long-standing arrears.

[19] Under cross examination, Dr. Richards testified that he could not really say whether Mr. Poli told the Claimant that agreement or no agreement the restaurant will be closed next season. That he is aware that discussions took place with Mr. Carlo Falconie (who manages the Antigua Yacht Club at English Harbour) concerning a sale of the property, but he is not aware that there was an agreement for sale between Mr. Falconie and Mr. Poli and that as a result of this agreement Mr. Poli told the Claimant that Tamarind will not open next season. That even if this were so, it seems to him that Mr. Poli would have been aware that there was a subsisting agreement with the Claimant.

[20] Dr. Richards was referred to paragraph 19 of the lease agreement whereupon he testified that it would be his lawyer's interpretation that whatever part of the agreement was breached – whether it was trifling or substantial – the Defendant could invoke the penalty clause. That it is his lawyer's interpretation that clause 19 of the lease agreement could kick in as a result of any violation of the agreement, no matter how trifling.

[21] Dr. Richards testified that the contract was for two years. That at the outset both parties would have expected the contract to go on for two years. That he would say that if there was no breach by one party then it would be wrong for the other party to interrupt the contract.

- [22] Under re examination, Dr. Richards testified that it is his lawyer's understanding of clause 19 that US\$4,000 would be the amount that one party would get if the lease did not go through and one party was responsible for this.
- [23] After both witnesses had given their evidence and the case for the Claimant and the Defendant had been closed, Counsel for the parties each made brief oral submissions to be supplemented in due course by written submissions.
- [24] Learned Counsel for the Claimant submitted that this was a straightforward case. That the Claimant's case is that he had a lease for two years. That the first year went fine and the restaurant closed at the end of August 2007. That between September and October 2007 the Claimant was informed by the Defendant (through Mr. Poli) that there was to be a new owner of the premises and the Claimant would not be allowed to continue with the lease of the restaurant. That Mr. Poli told the Claimant that in no uncertain terms. That the Claimant was given his marching orders. That the contract provided that during the months of September and October certain repairs were to be carried out by the Claimant and the Defendant and that the Defendant – in keeping with its representation that the lease will not continue – failed to carry out repairs and maintenance to the property during September and October 2007. That as the Claimant said in his Witness Statement, the Defendant caused the gardener to stop cutting the grass, the maid was transferred and the Defendant allowed persons to go into the restaurant to take an inventory – all without the Claimant's consent. That the Claimant, for his part, had every intention of opening the restaurant for the second season – that he packed the items away for the next season, he scrubbed the kitchen and restaurant, he paid the gardener to put up garden lights along the walkway and, most importantly, he arranged for a new chef and his family to come from overseas to work as chef and hostess/manager of the restaurant for the second season. That the Claimant was forced therefore to abandon his plans and, as a result, he suffered loss.
- [25] Learned Counsel asked the Court to find that the Defendant evinced an intention not to carry through the second year of the contract. That the Defendant, without any breach on



the part of the Claimant, therefore repudiated the contract, which repudiation gave the innocent party (the Claimant) the right to treat the contract as discharged and to claim damages. That the damages claimed would be as per the evidence given by the Claimant.

[26] Learned Counsel submitted that on the question of the interpretation of clause 19 of the lease agreement and the word "penalty," the leading case is *Dunlop Pneumatic Tyre Company Limited v New Garage And Motor Company Limited*. That Dr. Richards agreed that a single sum of US\$4,000 was payable for any breach of the lease, whether the breach was trifling or otherwise. That the presumption is that this is a penalty and a penalty is irrecoverable under English law and under Antigua law. That there are other authorities referred to which state that a penalty is irrecoverable. That according to the cases and to the evidence, it is submitted that the amount of US\$4,000 was a payment of money stipulated in terrorem of the Claimant and is not a genuine pre-estimate of damage and that the damage caused by the breach of contract in this case is capable of being ascertained under the normal laws governing the recovery of losses in contract. That the amount of the said losses was given in evidence by the Claimant.

[27] Learned Counsel for the Defendant submitted that the central issue in this case is the meaning of clause 19 of the lease agreement and if clause 19 is to have effect. That the parties signed the agreement and there is nothing to suggest that either of the signatories (the Claimant or Mr. Poli on behalf of the Defendant) is trained in the law. That the signatories are ordinary business persons and the language of the agreement itself suggests that it was not prepared by a lawyer. That it is clear that the lease agreement is a layman's agreement.

[28] Learned Counsel for the Defendant adopted the position of Counsel for the Claimant that the *Dunlop* case is the leading case on the issue of penalty versus liquidated damages. That the following extract from the opinion of Lord Dunedin in the House of Lords was quoted by Learned Counsel for the Defendant – "The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the

making of the contract, not as at the time of the breach.” The principle – according to Counsel for the Claimant – is that no matter what name is given, the Court must look at the terms of the contract and make a determination as to what the truth is. In fact, the necessity of the Court making a determination as to what the truth is goes back to the very first proposition of Lord Dunedin, as follows – “Though the parties to a contract who use the words ‘penalty’ or ‘liquidated damages’ may prima facie be supposed to mean what they say, yet the expression is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case.” Counsel further submitted that it ought not to be the case where we latch on to a word.

- [29] Learned Counsel then referred to Chitty on Contract, which says (at paragraph 24-002, Volume I, 30<sup>th</sup> edition) that - “An innocent party, faced by a repudiatory breach, is therefore given a choice: he can either treat the contract as continuing (‘affirmation’ of the contract) or he can bring it to an end (‘acceptance of the repudiation’). He must ‘elect’ or choose between these options.” Learned Counsel submitted that, in the present case, the Claimant – who protests that he is the innocent party – wants to bring the agreement to an end and says “pay me my damages.” Counsel then referred to and quoted from paragraph 24-048 of Chitty where the author states that – “Of course, in assessing damages the court must have regard to the terms of the contract in order to ascertain the performance promised in it, including performance which would have fallen due after the date of discharge. It must also give effect to the terms of the contract which, for example, liquidate the damages recoverable or exclude or restrict the damages otherwise available for breach.” Counsel then referred to and quoted from a footnote to paragraph 26-125 of Chitty headed “Damages Fixed by the Party,” where it is stated that the purpose of the parties in fixing a sum is to facilitate recovery of damages without the difficulty and expense of proving actual damage or to avoid the risk of under compensation where the rules of remoteness of damage might not cover consequential, indirect or idiosyncratic loss or to give the promisee an assurance that he may safely rely on the fulfilment of the promise.

[30] Learned Counsel for the Defendant submitted that Counsel for the Claimant made repeated reference to paragraph (c) on page 87 of the Dunlop case where Lord Dunedin said – “There is a presumption (but no more) that it is a penalty when a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage.” Counsel however submitted that the situation in the present case is covered by paragraph (d) on page 87 and not paragraph (c). Paragraph (d) reads – “It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties.” The parties - he contended – do not know; they are laymen; they are unable to say what will happen if a breach occurs, what will be the precise estimate of the damage; it may be trifling, it may not be; they decide that, given that they do not know what it is going to be, they agree on an amount, which may be more or less than the actual damage; but the Claimant is now saying - even though he had time to study the agreement and did not think it was unfair – forget the agreement, he wants something else; he is basically saying that he wants relief from clause 19 of the agreement. Counsel however referred the Court to a 1962 dictum of Lord Radcliffe that the Court of Equity never agreed to serve as a general adjuster of men's bargains.

[31] Learned Counsel for the Defendant returned to the Dunlop case and quoted the words of Lord Dunedin at paragraph 4 (a) on page 87, as follows - “It will be held a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.” Counsel then submitted that clause 19 was not a penalty clause; that it is not extravagant compared to the greatest possible loss that could follow from a breach of the agreement; that clause 19 is a clause to be properly construed as a liquidated damages clause and not a penalty clause.

[32] Learned Counsel for the Defendant submitted that what transpired in this case was not a breach by the Defendant, but rather a breach by the Claimant, because the letters

contained in the core trial bundle, which were shown to the Claimant when he was giving evidence in this case, particularly the letter of 31<sup>st</sup> October 2007, indicated that the Claimant accepted that a change in the ownership of the Defendant would not affect the lease. That it was clearly stated by the Claimant's attorney that a change of ownership would not affect the Claimant. That this was known and accepted and the lease stipulated that the Claimant should start up the restaurant in November, but the Claimant did not do so. That he had the keys but did not open the restaurant for a number of weeks, so – as evidenced by the letters referred to – the Defendant exercised its rights under section 56 of the Registered Land Act to forfeiture of the lease and gave the appropriate notice in accordance with the Act. That the Defendant also asked for compensation in the stipulated sum of US\$4,000.

- [33] Counsel for the Defendant further submitted that clause 19 is a clause that is enforceable and that the Claimant ought to be content, if it is indeed the case that there was a breach on the part of the Defendant - which the Defendant says there was not – to be paid the stipulated sum of US\$4,000; that it is not an extravagant or unconscionable amount in relation to the gravest possible damage.
- [34] With these oral submissions having been made on behalf of the parties, the Court then ordered the Defendant to file and serve written submissions (with authorities) by 3 p.m. on 16<sup>th</sup> December 2009 and the Claimant to file and serve a response thereto (with authorities) by 3 p.m. on 22<sup>nd</sup> December 2009.
- [35] Written submissions on behalf of the Defendant were filed and served by the date ordered, while the submissions in response on behalf of the Claimant were filed on the date ordered, as extended by Order of 4<sup>th</sup> January 2010.
- [36] Having seen and heard the witnesses and considered all of the evidence in this case – both oral and documentary – this Court finds as a fact that there was a lease agreement between the Claimant and the Defendant, which agreement was repudiated by the Defendant when (1) it failed to carry out its repair and maintenance obligations under the

lease in the period between September and October 2007; (2) it discontinued the services of the gardener and the maid to the Tamarind Restaurant & Bar from September 2007; (3) it committed acts inconsistent with its implied obligations to give to the Claimant exclusive occupation and quiet enjoyment of the demised premises when it permitted other persons to come into the Tamarind Restaurant and Bar, without the consent of the Claimant, to undertake an inventory of items there; and (4) its representative (Mr. Poli) told the Defendant that "agreement or no agreement, Tamarind will be closed next season." All of these things were specifically alleged by the Claimant in evidence and were never denied by the Defendant in the witness summary or oral testimony of its witness or even challenged in the cross examination of the Claimant.

- [37] These acts of the Defendant taken together and all occurring in the period between September and October 2007 when the Claimant should have been preparing to open for the second season starting on 1<sup>st</sup> November 2007, would suffice to constitute a definitive repudiation of the lease agreement by the Defendant. The Claimant's attempts in October 2007 to negotiate with the Defendant the quantum of compensation to be paid to him as a result of the repudiation of the agreement and his non opening of the restaurant on 1<sup>st</sup> November 2007 were his own definitive acts of acceptance of the Defendant's repudiation of the agreement, notwithstanding language in his attorney's letter of 31<sup>st</sup> October 2007 suggesting an assertion of a right to continue the lease even if the property was sold to a third party; this was probably nothing more than a negotiating tool employed by his attorney in his claim for compensation. So too the Claimant's retention of the keys to the restaurant while he sought to negotiate the quantum of compensation to which he was entitled for the Defendant's breach of the lease agreement. The acceptance by the Claimant of the Defendant's repudiation of the agreement was clear and unequivocal and was effectively communicated to the Defendant by the actions of the Claimant. The attempt therefore by Learned Counsel for the Defendant to latch on to the suggestion in the letter of 31<sup>st</sup> October and to the Claimant's retention of keys to the restaurant as negating acceptance by the Claimant of repudiation by the Defendant and the non opening of the restaurant on 1<sup>st</sup> November as constituting repudiation by the Claimant - skilful though it was - must fail.

- [38] This leads straight on to the issue of damages for breach of contract and, in particular, to the question of whether clause 19 of the lease agreement provides for liquidated damages of US\$4,000, which alone the Claimant is entitled to as a result of the Defendant's breach of the agreement, or whether that clause is a penalty clause not enforceable under the laws of Antigua and Barbuda.
- [39] Again I would wish to commend Learned Counsel for the Defendant, this time for the industry and scholarship which he displayed in making the case for the Defendant that clause 19 is a binding and enforceable pre-estimate of liquidated damages for any breach of the lease agreement between the Claimant and the Defendant. Again, however, Counsel's skills will not avail his client. The fact is that clause 19 of the lease agreement is not a clause which provides for a pre-estimate of damages likely to result from a breach of the agreement, but is a clause which stipulates an agreed penalty for any interruption of the contract by either party. In accordance with the wording of the clause, it would appear that an interruption of the contract may or may not lead to the termination of the contract and one cannot therefore read the clause as providing a pre-estimate of the damage which a party is entitled to from the termination or repudiation of the contract by the other party.
- [40] In any event, the principles to be extracted from the case of *Dunlop Pneumatic Tyre Company Limited v New Garage And Motor Company Limited*, which both sides accepted as the pre-eminent authority on the determination of whether an amount stipulated in a contract is a penalty or liquidated damages, lead in the Court's view to a conclusion that the sum of US\$4,000 stipulated in clause 19 of the lease agreement is not a genuine pre-estimate of the damages likely to accrue from a breach of the agreement so as to be characterised as liquidated damages - the amount is stated in the agreement to be "a penalty fee" and not liquidated damages; it is a single lump sum made payable by way of compensation on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage; and the damages caused by a breach of the agreement (as in the present case) are quite capable of being ascertained by the normal measure of damages.

[41] To the measure of damages the Court now turns.

[42] The Claimant is entitled to such amount by way of damages as will put him in the position that he would have been in had the contract not been breached. The Claimant is therefore entitled to the profit he would have earned from the operation of the lease had the contract not been repudiated by the Defendant. The Claimant's evidence, which was not controverted and which the Court accepts, is that he earned a monthly sum of approximately US\$2,100 from the operation of the restaurant and approximately US\$1,000 from the operation of his fishing/charter boat, both of which businesses were carried on from the leased premises. In the absence of any evidence that the profit in the second season would have been different from the first season, the Claimant can be held to have lost profits totalling US\$31,000 ( $\text{US\$2,100} + \text{US\$1,000} \times 10$ ) for the ten months during which the businesses would have been conducted up to the end of the term of the lease, and is entitled to this amount in damages. The Claimant is also entitled to the sum of \$38,297.02 which he paid by way of compensation to Mr. Paul Francis Bevez and his wife for the aborted contract to work in the restaurant and bar for the second season as chef and hostess/manager. The Claimant is entitled as well to the sum of US\$500 he paid to the gardener to help put up lights for the second season which never was. The Claimant is not however entitled to reimbursement of amounts expended towards the improvement of the leased premises at the commencement of the lease, which expenditure would have helped to generate the profits which he earned in the first season and the profits he would have earned in the second season (US\$31,000). The Claimant is entitled to interest on the damages awarded from the date of the filing of the claim (17<sup>th</sup> March 2008) to the date of judgment (7<sup>th</sup> May 2010) at the rate of 5% per annum and to prescribed costs on the amount of this order (damages plus interest).

[43] The Defendant is not entitled to the relief claimed in its Counterclaim because the Claimant did not breach the agreement so as to entitle the Defendant to damages for its breach, nor is the Defendant entitled to any amount by way of rental that would have been paid by the

Claimant from the operation of the restaurant, which operation was thwarted by the Defendant's breach.

[44] As to the Claimant's liability for income taxes, which was raised in the submission by Learned Counsel for the Defendant, this liability subsists, not just in respect of the profit of US\$31,000 in respect of the period from November 2007 to August 2008, but so to for the profit of a like amount in respect of the period from November 2006 to August 2007, as well as income tax on salary of US\$20,000 (US\$2,000 x 10) that the Claimant had paid himself in the period from November 2006 to August 2007. The Defendant is not entitled to have the amount of the tax deducted from the amounts payable by the Defendant to the Claimant, nor is the Court entitled to order payment of it to the Inland Revenue Department. The aforesaid department can however be put on notice (by a copy of this judgment) of the liability of the Claimant to it in respect of income taxes for the income years 2006, 2007 and 2008, as per the amounts quoted above.

[45] The Court's Order is as follows:

1. The Defendant shall pay to the Claimant general damages of \$99,234 representing \$83,700 (US\$31,000) for loss of revenue resulting from the Defendant's breach of a lease agreement between the parties, \$14,184 for the cost of an aborted contract of service resulting from the Defendant's aforesaid breach and \$1,350 (US\$500) by way of reimbursement for expenses incurred in putting up garden lights for the second season of the lease.
2. The Defendant shall pay to the Claimant interest on the sum of \$99,234 at the rate of 5% per annum from 17<sup>th</sup> March 2008 to 7<sup>th</sup> June 2010.
3. The Defendant's counterclaim is dismissed.



4. The Defendant shall pay to the Claimant prescribed costs on the damages and interest hereby ordered as per Rule 65.5 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000.



**Mario Michel**  
High Court Judge