

**BARBADOS**

[Unreported]

**IN THE SUPREME COURT OF JUDICATURE  
HIGH COURT  
CIVIL JURISDICTION**

**No: 635 of 1991**

**BETWEEN**

**NYLOTEX LIMITED**

**Plaintiff**

**AND**

**BARBADOS INDUSTRIAL  
DEVELOPMENT CORPORATION**

**Defendant**

**Before the Honourable Mr. Justice William J. Chandler, Judge of the High Court**

**2007: February 1, 26, 27 and 28;**

**March 1, 8, 20, 27;**

**June 22, 25;**

**2008: March 10 and 11,**

**2010: May 7**

**2012: May 30**

**Mrs. Faith A. Seale Q.C. for the plaintiff**

**Mr. Theodore A. Walcott Q.C. with Ms. Verla Depeiza for the defendant**

**JUDGMENT**

**Introduction**

[1] This is an application by writ of summons filed 17 May 1991 in which the plaintiff claimed damages for breach of contract made on or about 1 June 1990. The plaintiff, **Nylotex Limited (Nylotex)** is a limited liability company incorporated under the *Companies Act Cap 308* as Company No. 5727 with its registered office at No. 2 Newton Industrial Park in the parish of Christ Church. The defendant corporation, **Barbados Industrial Development Corporation (BIDC)**, is incorporated by an Act of Parliament with its principal place of business situate at Pelican House, Princess Alice Highway in the City of Bridgetown.

[2] The action is based on breach of a term which the plaintiff alleged ought to be implied into the contract of tenancy that the premises would be connected to the public supply.

**The pleadings**

[3] The plaintiff, in its still further amended Statement of Claim filed on 26 February 2007, alleged that on 2 May 1990 the defendant offered to rent to the plaintiff, and on the 23 May 1990 the plaintiff accepted, the tenancy of factory premises situate at Newton Industrial Park in the parish of Christ Church. The plaintiff further

- alleged that it was an implied term of the tenancy that the premises would be able to be connected to the public electricity supply in order to allow the plaintiff to carry on its business of manufacturing light goods using its industrial sewing machines.
- [4] In breach of this term, the premises could not be connected to the public electricity supply and as a result the plaintiff was unable to commence full production and suffered loss and damage. The particulars of special damage are:
- (1) Loss of net profits for 10 months (\$382,103.00 and overdraft interest for 1 year \$5,545.47 making an aggregate total of \$387, 648.47;
  - (2) The Plaintiff claimed that sum as damages and interest and costs.

### **The Defence**

- [5] In the defence filed on 22 July 2001, the defendant did not admit that on 2 May 1990 it offered to rent the factory premises or that the plaintiff accepted the offer of rent as alleged in paragraph 3 of the Statement of Claim. The defendant denied that there was a tenancy agreement between the parties or that there was an implied term or breach thereof as alleged in the Statement of Claim.
- [6] The defendant further stated that if a tenancy came into being and the premises could not be connected to the public electricity supply (which it denied) such inability to be connected was caused by or contributed to by the Plaintiff and/or independent contractors employed by the defendant.
- [7] The defendant made no admission as to any loss or damage allegedly sustained by the Plaintiff. It further pleaded that, if the Plaintiff suffered any loss (which it denied) it failed to mitigate its loss. The rest of the defence was a general omnibus clause denying and traversing all of the other allegations in the Statement of Claim.
- [8] A series of correspondence was tendered in evidence between the parties relating to the Plaintiff's occupancy of the premises and it is out of that correspondence that the claim of a tenancy agreement arose.

### **Issues**

- [9] The issues for determination, therefore, are:
- (1) Whether a contract of tenancy of the premises came into existence between the parties?
  - (2) Whether there was an implied term in the contract that the premises would be connected to the public electricity supply?
  - (3) Whether there was a breach of that term and consequently a breach of contract?
  - (4) If there was a breach, was the plaintiff's loss occasioned by that breach?

- (5) Did the plaintiff cause or contribute to this loss;
- (6) Did the Plaintiff fail to mitigate its loss?
- (7) What is the measure of damages?

### **Issue 1**

#### **Whether a contract of tenancy of the premises came into existence between the parties?**

- [10] The plaintiff's evidence was given by **Mr. Leeward Barrington Pearson** (Mr. Pearson), its Managing Director and Chairman of the Board of directors. He said that he was encouraged by traders in Barbados to remove his investments in Dominica and set up business in Barbados. He made application to the Industrial Development Corporation (IDC) and this was approved. He also said that he had made an application for the company to be housed in one of the defendant's estates and that he received correspondence granting him a tenancy. He said he was invited to visit the defendant's industrial estates and was escorted to those estates by Mr. Pearly Drakes, the defendant's manager with responsibility of industrial estates.
- [11] He was taken to the Newton Industrial Park, Christ Church and shown a building in which there was an open space of 4,725 sq ft on the top floor. He had discussions with Mr. Drakes about the roof, toilet facilities and the provision of a sink. They spoke about the arrangement for electricity from the general supply and Mr. Drakes outlined the conditions under which the defendant leased spaces. Mr. Drakes said that the venture capital investor would have to see after the divisions of the space for cutting rooms, the defendant would seal the roof but the plaintiff would have to provide its own crane or lift. The defendant would provide additional toilet facilities for both sexes.
- [12] He was told that the plaintiff had to register for its own water supply. It had to run its own electrical wiring to suit where the equipment would be located but the defendant would be responsible for bringing the external voltage once the plaintiff had completed its internal wiring.
- [13] Mr. Drakes outlined the cost of rental of the premises at \$5 per sq ft per annum with a grace period of 3 months allowing the defendant to set up its operations but one month's rent had to be paid. They would have possession of the premises and the keys in order to conduct their internal works so as to commence.
- [14] He was taken to a part of the building and showed an electrical junction box consisting of heavy duty cables leading to the outside of the building and into the yard of compound. The end of the cable was covered with a mound of earth which he surmised was from excavation work. They went outside and he saw several lines of cable and was told by Mr. Drakes that the Defendant had already paid to have this work done and that current was on the building. The only cables he saw were coming from the junction box of unit 3C. He saw no other cables coming

from any other unit. On 3 or 4 August he went to the defendant's offices, paid one month's rent and got the keys to the unit.

[15] The plaintiff thereafter began to source raw material and to engage the services of electricians for the purposes of preparing to start their operations. He said he received a letter from the IDC confirming some of the conditions outlined by Mr. Drakes. This letter NI 2 is dated 2 May 1990 and is set out later in this decision.

[16] Mr. Pearson signed and returned this letter to the defendant. He also wrote a letter to the IDC dated 23 May 1990 (NI 2, BIDC6) which is also reproduced in this decision for its full purport and effect. At the time this letter was written, works had commenced. The plaintiff's application under the *Fiscal Incentives Act Cap 71A* was approved by a letter received in evidence and marked NI 3. The issue as to whether or not there was a completed contract centred around the interpretation of these letters and the factual matrix in which they came to be written.

**Exhibit BIDC 5**

"Ref: ID 222/500/287

May 02, 1990

NYLOTEX INDUSTRIES LIMITED

Round Rock Road

Silver Sands

CHRIST CHURCH

Dear Sirs:

Re: Rental of 4,704.15 Square Feet of  
Factory Space at Unit 3C, Building No.2  
Newton Industrial Park

Our Corporation is pleased to inform you of its decision to rent your company 4,704.15 square feet of factory space at Unit 3C, Building No.2, Newton Industrial Park for a period of three (3) years commencing June 01, 1990.

The rental for this Unit is \$5.00 per square foot per annum. However, in accordance with the Corporation's decision to grant temporary assistance to certain of its manufacturing tenants, you will be granted a subsidy of twenty per cent (20%) of the basic rate for this space.

Your business will therefore be charged at the rate of \$4.00 per square foot per annum, that is \$18,816.60 per annum or \$1,568.05 per month for the rental of this space. The rent is payable in advance on or before the first day of the month for which it is due. A finance charge of one per cent (1%) per month shall be added to all rental arrears. Your company shall be granted three (3) months rent free in order to set up your operations. Your first payment will therefore be due on September 01, 1990.

Further, your occupancy is subject to the signing of a formal lease document, embodying the above terms, which our Corporation hopes to be soon in a position to issue to you.

I should appreciate if you would sign and return the enclosed copy of this letter thereby acknowledging receipt of the keys to this Unit and indicating your acceptance of the terms and conditions contained herein.

Yours Faithfully

**BARBADOS INDUSTRIAL DEVELOPMENT  
CORPORATION**

**Cyrellene Thomas-Worrell**  
Attorney-at-Law  
CTW: rlg

Enc.

Cc. Deputy General Manager (C.O.)  
Manager, Construction & Estates Management  
Chief Accountant  
Manager, Local Operations”

**Exhibit BIDC6**

“May 23<sup>rd</sup> 1990  
Cyrellene Thomas-Worrell.  
Barrister-at-Law.  
Barbados Industrial Development Corporation.  
Pelican House  
Princess Alice Highway.  
Barbados, West Indies.

Dear Mrs. Thomas-Worrell.

Re: Rental of 4,704 Square Feet of Factory Space  
Newton Industrial Park

Your letter dated the 2<sup>nd</sup> May 1990, confirming the Corporation’s decision to rent this Company 4,704, Square Feet of Factory space at Unit 3C, Building No.2 Newton Industrial Park for a period of three (3) years commencing June 1, 1990 was received today 23<sup>rd</sup> May 1990.

I confirm my Company’s acceptance of the rental terms outlined in this writing and herewith enclosed the attached copy with my

signature on behalf of “NYLOTEX INDUSTRIES LIMITED”.  
Accepting same and look forward to signing of the formal lease.

I must here mention that this premises as it stand require certain correction as to the ceiling of the roof, and other adjustment, as discussed between myself and your Mr. Thomas, of Construction & Estates Management, at this premises. And apart these matters we agree to accept the premises and keys when these works are completed.

Very Truly Yours

Leeward B. Pearson

Encl:”

[17] Mr. Pearson gave evidence that a deposit was paid in respect of the rent. Evidence was given by Ms. Diana Brooks, Chief Accountant of the defendant, that one payment of \$1,568.05 was made and was posted to the credit of accounts receivable. The funds were still in that account because the defendant was unable to place a debit to that account. No notification was ever received from the industrial service department and no other payments were made.

[18] Mr. Pearson’s evidence was that the sum of \$1,568.05 was paid to get possession of the property and he agreed, under cross-examination, that only one payment had been made.

**Plaintiff’s Submissions**

[19] The plaintiff submitted that there was a tenancy between the parties and it was constituted by the initial letter dated 2 May 1990 from the defendant to the plaintiff offering the tenancy and setting out its terms. The letter requested the plaintiff to signify agreement to its terms by signing and returning a copy of the letter; paying the initial deposit of one month’s rent and then collecting the keys to the premises. That by letter, dated 23 May 1990, the plaintiff indicated acceptance of the terms by returning a signed copy of the letter paying the rent and having the keys delivered to it on 15 June 1990. Mrs. Seale submitted, further, that the fact that a tenancy existed was always understood between the parties.

[20] Mrs. Seale submitted that a proper construction of these 2 letters would show that a contract of tenancy was concluded between the parties, notwithstanding that the defendant’s letter stated that the plaintiff’s occupancy was subject to formal lease being signed. It was her submission that the term “the occupancy is subject to the signing of a formal lease” differed from the words “subject to contract” which normally meant that no tenancy came into existence until a formal contract was drawn up.

[21] Counsel referred to **section 149** of the *Property Act Cap 236* (the *Property Act*) which required a lease of over one year to be in writing and submitted that the two letters under reference satisfied the requirement of **section 149**. She also submitted

that, at common law, entering into possession of premises pursuant to an agreement to let, whether parol or in writing, gave rise to an implication that a tenancy at will existed. If, in addition, a tenant paid rent he was a periodic tenant according to the manner in which the rent was rated, so that, if the court held that there was no valid lease created, the plaintiff held the premises under a yearly tenancy. Reliance was placed on *Metcalf & Eddy v Edgehill* (1963) 5 WIR 417 at 420.

- [22] The plaintiff's case was that, in the event that the above two submissions failed, there was an agreement for a lease which was enforceable in equity. In *Walsh v Lonsdale* (1882) 21 Ch. D9, Jessup MR said there was only one court and equity was to prevail and that the tenant would hold under an agreement for a lease. The tenant therefore held the lease in equity on the same terms as if the lease had been granted. An agreement for lease was just as good as a lease which could be specifically enforced.

#### **Defendant's Submissions**

- [23] With reference to the lease counsel submitted that the occupancy was subject to the signing of a formal lease. Mr. Walcott for the defence submitted that no contract came into existence because of the presence of those words (subject to the signing of a formal lease document, embodying the above terms...). Counsel opined that no relationship of *lessor* and *lessee* could come about until the formal lease was signed. He relied upon *Cohen v. Nes* [1982] 2 All ER 97, *Graham Wilson v. Orange Scaffolding, Confetti Records v. Warner Music, Harvey v. Gratt* [1965] 2 All ER 786. Reference was also made to section 149 of the *Property Act* to suggest that there was no lease in writing as required by the Act. In any event, he submitted that the parties were still in a state of negotiation having regard to the fact that the defendant required remedial work to be done to the ceilings and roof. He relied upon the statement in the letter that apart from these matters the plaintiff agreed to accept the premises when the works were completed.

- [24] Counsel further submitted that there was no evidence that the defendant handed over keys to the tenant or that the lease was prepared. Counsel suggested that the plaintiff was a licensee and not a tenant since they had been given the premises 3 months rent-free.

#### **Discussion**

- [25] **Section 149 (1) of the Property Act** provides:

The relationship of lessor and lessee shall, subject to subsection (2) and (3) be created only by an instrument in writing executed by the lessor or his agent thereunto authorised in writing.

- (3) An instrument in writing is not necessary for the creation of the relationship
- (a) for a term of one year certain; or
- (b) for a fixed term for a period less than one year certain; or

(c) from year to year or for any other periodic tenancy.

(4) Authorisation of the lessor's agent need not be in writing in any case where an instrument in writing is not necessary for the creation of the relationship of lessor and lessee.

- [26] The letter of 2 May 1990 from the defendant to the plaintiff informed the plaintiff of the defendant's decision to rent the plaintiff a defined space at its industrial park. It contained a commencement date, the duration of the tenancy, the rental rate of the unit and the method of calculating the rent. It stated "Your business will therefore be charged at the rate of \$4 per sq. ft. per annum, that is, \$18, 816.60 per annum or \$1,568.05 per month for the rental of this space. The rent is payable in advance on or before the first day of the month for which it is due." These matters are the basic terms which both parties had negotiated in their oral discussions. There is no real difference in the evidence of Mr. Pearson and Mr. Thompson who spoke about the conditions upon which tenancies were granted. The terms also accord with what Mr. Pearson said that Mr. Drakes told him in relation to the proposed terms.
- [27] The letter of 23 May 1990 confirmed the plaintiff's acceptance of the terms outlined in the letter of 2 May 1990 and referred to certain corrective measures to the roof and "other adjustments which were discussed between Mr. Pearson and the plaintiff's Mr. Thomas". It went on to say 'Apart from these matters we agree to accept the premises and keys when these works are completed.' The letter also stated that the plaintiff was looking forward to the signing of the formal lease.
- [28] With reference to the remedial work the defendant's letter did not state that they did not accept the tenancy but would accept the premises and keys on completion. In addition, the defendant's letter provided a date when the first payment of rent was due, namely 1 September 1990. In short the terms of the lease were contained in the defendant's letter.
- [29] There was no challenge to the fact that the defendant went into possession of the premises and paid the first month's rent as calculated by the defendant in its letter B IDC 5.
- [30] This court is of the opinion that on a proper construction of the 2 letters, a concluded contract of tenancy came into existence when the defendant signed and returned the copy of the letter embodying the terms of the tenancy. This was cemented by the paying of the first month's rent which was calculated by the plaintiff and which was paid into the plaintiff's offices.
- [31] I therefore hold that a contract of tenancy came into existence between the parties when the plaintiff signed and returned the letter B IDC 6 indicating its acceptance of the terms of the defendant's letter B IDC 5. **Section 149** of the *Property Act* was satisfied by the defendant's letter.
- [32] I will now consider the submission that the words "subject to the signing of a formal lease document embodying the above terms..." prevented a valid contract from coming into existence. The distinction must be made between the use of the

- words “subject to contract” and the words which were actually used in this case. The words “subject to contract” have been held to mean that no contract comes into existence until a formal written contract is drawn up and signed by the parties. In other words, that the validity of what the parties have agreed is conditioned upon a formal contract being executed. Every case must be decided on its own facts and whether or not the words used prevent a formal contract from coming into existence is a matter of interpretation.
- [33] In *Branca v Cobarro* [1947] 1 KB 854, Lord Green MR held that the words “this is a provisional agreement until a fully legalised agreement drawn up by a solicitor and embodying all the conditions herewith stated is signed” meant that the agreement remained effective until the formal document was signed. Unlike the words “subject to contract” which are words of condition, that no legal effect is to be given to the arrangement until the document is signed, these words meant that the efficacy of the document was not made conditional on the happening of any event. They meant that the agreement was to have operation until the formal agreement was prepared and signed.
- [34] The words used in this case must be taken in context. The letter said “Further, your occupancy is subject to the signing of a formal lease document embodying the above terms...” The proper interpretation to be placed on this statement is that the plaintiff’s occupation of the premises was subject to the signing of a formal lease document; not that the efficacy of the agreement was to be conditioned by the signing of a formal lease. Occupancy of the unit was given to the plaintiff in any event.
- [35] The court, therefore, holds that the use of the words referred to above, did not prevent a valid contract of tenancy from coming into existence between the plaintiff and the defendant.
- [36] It remains only to deal with an issue which was not fully canvassed by counsel but was alluded to by counsel for the defendant when he submitted that the parties were in a state of negotiation.
- [37] In exhibit BDC 6, the plaintiff said  
“I must here mention that this premises as it stand require certain correction as to the ceiling of the roof, and other adjustment, as discussed between myself and your Mr. Thomas, of Construction & Estates Management, at this premises. And apart these matters we agree to accept the premises and keys when these works are completed.”
- [38] The Court is of the opinion that these words merely recited the conversation between Mr. Thomas and Mr. Pearson which preceded the conclusion of the contract and were not words which suggested that the plaintiff was seeking to impose a new term into the contract. The Court must take an objective view of the dealings between the parties and the context in which those dealings occurred. In *G. Percy Threntham Ltd v Archital Luxfer Ltd and others* [1993] 1 Lloyd’s Rep. 25 at page 27 Steyn LJ said  
“Before I turn to the facts it is important to consider briefly the approach to be adopted to the issue of contract formation in

this case. It seems to me that four matters are of importance. The first is the fact that English law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed mental reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men. And in the present case that means that the yardstick is the reasonable expectations of sensible businessmen. Secondly, it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But it is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance. See *Brogden v. Metropolitan Railway* (1877) 2 A.C. 666 ; *New Zealand Shipping Co. Ltd. v. A.M. Satherwaite & Co. Ltd.* [1975] A.C. 154, at 167 D-E ; *Gibson v. Manchester City Council* [1979] 1 W.L.R. 294 . The third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels. See *British Bank for Foreign Trade Ltd. v. Novinex* [1949] 1 K.B. 628, at 630 . The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. In this case fully executed transactions are under consideration. Clearly, similar considerations may sometimes be relevant in partly executed transactions. Fourthly, if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance. See *Trollope & Colls Ltd. v. Atomic Power Construction Ltd.* [1963] 1 W.L.R. 333 .”

- [39] On the facts of this case, the plaintiff paid the first month’s deposit, went into possession and commenced work on the building. The defendant accepted the rent and delivered the keys to them. The corrective work mentioned by Mr. Pearson in BIDC 6 was done so that there was no doubt that a contractual arrangement based upon the terms of the correspondence between the parties came into existence and I so hold.

**Issue 2**

**Whether there was an implied term in the contract that the premises would be connected to the public electricity supply?**

- [40] Mr. Pearson said in evidence that Mr. Drakes had outlined the conditions under which the defendant leased spaces to tenants, that the plaintiff had to register for its own water supply, run its own electrical wiring to suit where its equipment would be and that the defendant would be responsible for bringing the electrical voltage once the plaintiff had completed its internal wiring. He further gave evidence that he was taken to a part of the building and shown an electrical junction box consisting of heavy duty cables leading to the outside of the building and he was told, by Mr. Drakes, that the Defendant had already paid to have electrical work done and that electrical current was on the building.
- [41] Mr. Thompson gave evidence that the policy of the BIDC was to bring its power supply to a unit in the building and then require the tenants to make their own arrangements for the electricity supply that they required in their manufacturing process. There would be two applications to the **Government Electrical Engineering Department (GEED)**, one by the landlord and the other by the tenant who was responsible for the inside of the unit. Both installations required approval by GEED. Where the tenant was concerned, the certificate of GEED was required by the Barbados Light and Power Co. Ltd. (BL&P) before they could energise the installation. Inspection was done by the BL&P before electricity was connected.
- [42] He admitted that it was true that the defendant was required to complete an installation bringing electrical power to a panel in the unit and the plaintiff was required to complete its own internal installations to be connected to the panel which would be supplied by the defendant. He said that to the best of his knowledge the plaintiff had never completed what they were required to do as was evidenced by a certificate from the Government Electrical Engineer. He said there was a time when the other tenants had completed their inspections but the defendant had not completed its inspection. Furthermore he said that when the defendant had completed what was required of it the plaintiff had not done what was required of it.
- Submissions**
- [43] The plaintiff's counsel submitted that there was an implied term that electricity would be supplied to the building as pleaded in paragraph 4 of the Statement of Claim. She relied on *Moorcock* [1889] 4 PD 157 and *Reigate v Union Manufacturing Company* [1980] 1 KB 592 where **Scrutton LJ** said that the Court implied terms where it was necessary to give business efficacy to the contract. Counsel submitted that the defendant knew the business which the plaintiff intended to undertake since the defendant was instrumental in facilitating the arrival of the business in Barbados and was aware of the Fiscal Incentive allowances granted to the company. She submitted further that the defendant knew it was impossible for the plaintiff to begin production without electricity and that, of necessity, the rental unit had to be connected to the public electricity supply.
- [44] Mr. Walcott submitted that the plaintiff, in its application, specified the type of electricity it wanted as phase 1 and it eventually got phase 3 electricity. He further stated that the defendant leased factory shells and it was the responsibility of the

tenant to obtain the type of electricity suitable to its operations and accordingly paragraph 4 of the plaintiff's Statement of Claim was not proved.

**The Law**

- [45] The courts will imply a term into a contract between parties where it is necessary, in the business sense, to give efficacy to the contract. This principle was laid down by **Bowen LJ** in *The Moorcock (1889)* LR 14 PD 64 at 68

“Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.”

**Discussion**

- [46] The court is of the opinion that Mr. Walcott's submission did not adequately deal with the issue as to whether or not a term was to be implied in the contract of tenancy that the unit would be able to be connected to the public electricity supply in order to allow the plaintiff to carry on its business of manufacturing of light goods using its industrial sewing machines. Mr. Thompson gave evidence that it was the responsibility of the tenant to see to the internal electrical arrangements within the unit but that the policy of the BIDC was to bring its power supply to a unit in the building. This also accords with what Mr. Pearson said that he was told by Mr. Drakes when he applied for the provision of space in the defendant's industrial complex.

Mr. Thompson was also aware of the nature of the business the plaintiff intended to carry on.

- [47] Having regard to the fact that the building was owned by the defendant and the defendant's policy as outlined by Mr. Thompson, it is clear that to give business efficacy to any contractual arrangement between the defendant and the plaintiff for the manufacturing of goods using industrial sewing machines, that a term must be

implied into the contract of tenancy that the business would be able to be connected to the public electricity supply and I so hold. In the absence of such a term the main purpose for which the plaintiff's business was established would be unattainable. In the circumstances such a term would be in the nature of a condition rather than a warranty.

**Issues 3 and 4**

**3. Whether there was a breach of that term and consequently a breach of contract?**

**4. If there was a breach, was the plaintiff's loss occasioned by that breach?**

[48] The evidence in relation to these two issues are so inextricably linked that the court considers it expedient to deal with the two of them together.

[49] It has already been stated that both the plaintiff and the defendant had imposed on them obligations with respect to the electricity supplied to the building and to the business housed within the building, the responsibility of the plaintiff was to ensure that power was supplied to the building and the responsibility of the defendant was to ensure that it complied with the requirements of the Government Electrical Engineering Department so that its installations could pass inspection.

**ELECTRICAL SUPPLY TO UNIT**

**The evidence**

[50] Mr. Pearson gave evidence that after he paid the first month's rent and got the keys he went ahead and did the electrical installation. He reported that there was a deficiency and that there was no electricity in the area shown to him by Mr. Drakes. The electrician said that there was no voltage and he so informed the defendant. A Mr. Lewis came from the defendant the following day and examined the problems reported by him and the defendant said that it had paid to have the work done, apologised and asked for 2 weeks to correct the situation.

[51] Mr. Pearson said, further, that he wrote the General Manager and copied it to the Minister. He recalled receiving a letter in September 1990 (exhibited (NI 8) which informed him that the contractors had completed the work and he was to apply for inspection of his premises and the defendant would apply for inspection of their work at the same time. He requested inspection in July/August prior to receipt of the defendant's letter and again after receipt of the defendant's letter, a second inspection was made in July 1992 which was approved. The first inspection was not approved because an 18 inch flexible cable should have been attached to the adjoining feeder rails which carried the voltage to each machine. The other reason that the inspection failed was for a mark in red on some point on the conductor; these were the reasons in respect of the internal installation. He said he did not know if there had been an inspection of the external wiring at the same time but he had written to Mr. Campbell (the Chief Electrical Engineer) who had replied by letter (NI 9) which stated that 2 supplies were not allowed on 1 building and that 225 amps could not be obtained from an overhead supply. These were the reasons relative to the external electrical installations.

[52] In this regard, a letter dated 27 October 1990 from Mr. Neville Lewis, the defendant's Technical Officer to the plaintiff with respect to the electrical installation on the building (exhibit B IDC 17), informed the plaintiff that the defendant had been advised that the plaintiff's electrical installation was not approved for the following reasons:

- (1) Flexible p.v.c. conduit was preferred by the Government Electrical Engineering Department to the rigid p.v.c. conduit which is used to feed chain-suspended feed rails.
- (2) Conductors of one phase 3 circuit was not colour coded;
- (3) Only one electrode was visible and the size of the earth conductors could not be determined;
- (4) The size of the entrance conductor could not be determined due to the BL&P seals on the switchgear

[53] The letter further informed that the defendant would be contacting their electrical contractors with a view to remedying items 3 and 4 to the satisfaction of the Government Electrical Engineer. Mr. Lewis further cautioned that, even when these 2 items had been taken care of, the installation would not be approved if nothing was done about items 1 and 2. He continued "these latter 2 items refer to faults with the internal installation which you have provided and you should get your electrician to attend to these."

[54] By letter dated 4 October 1991 (exhibit B IDC 25) the defendant, through Mr. Neville Lewis, wrote informing the plaintiff that the upgrading of the electrical installation had been completed and that the plaintiff could pursue the inspection certificate for its installation. There is a note attached to that letter signed by Mr. George King for the Chief Electrical Engineer that inspection was done on the internal line 3 times between 23/8/1990 and 3/7/1992 and that a certificate dated 8/7/1992 (exhibit B IDC 26 ) had been issued.

#### **Submissions**

[55] The plaintiff's counsel submitted that the defendant knew it was impossible for the plaintiff to begin production without electricity; that of necessity the rental unit had to be connected to the public electricity supply and that all the correspondence show that the defendant was trying to remedy the situation after the fact. In this regard she referred to the evidence of Mr. Thompson who stated that the defendant had commenced upgrading of electricity supply on all its estates since 1985. She submitted that this led to a conclusion that the defendant was aware that its current installations could not pass inspection because the rules had changed. With reference to Mr. Thompson's statement that two supplies were allowed previously, she submitted that it was because of the change in the rules prohibiting more than one supply to any building that the electrical upgrades became necessary.

[56] Further, that the upgrades having commenced in 1985, when this unit was offered to the plaintiff, the defendant must be taken to have known of the difficulty with the electricity. Counsel submitted the evidence showed that there were 2

inspections in 1990, that is, on 8 and 9 November; the first was as a result of a letter sent by the defendant stating that the electrical contractors had completed work and requiring the plaintiff to obtain inspection. The letter dated 22 October 1990 (BIDC 17) gave the reasons for the failure of the first inspection. Two of these reasons were attributable to the plaintiff and two to the defendant. The plaintiff's evidence is that it rectified the defect and paid for another inspection on 9 November 1990, the results of which are set out in BIDC 18, a letter dated 3 January 1991, which showed that the failure was due to two supplies not being allowed on one building and that 225 amps could not be obtained from an overhead supply. She further submitted that these were both in respect of the supply to the building which is the responsibility of the defendant.

[57] In summary, she submitted that the failure to have electricity delivered to the plaintiff's unit for the period for which damages were claimed was due solely to the failure of the defendant to comply with the regulations of the GEED.

#### **Defendant's Submissions**

[58] Mr. Walcott submitted that the plaintiff in its application specified the type of electricity it wanted as phase 1 and it eventually got phase 3. The defendant leased factory shells and it was the responsibility of the tenant to obtain the type of electricity suitable to its operations. Therefore, paragraph 4 of the Statement of Claim was not proved.

[59] Counsel referred to the fact that the plaintiff applied for phase 1 current and was granted phase 3. He said four reasons were given for the failure of the inspection, two were the responsibility of the plaintiff and two of the defendant and that, even if the defendant had completed its requirements, the plaintiff was not in a position to comply. The failure of the plaintiff to satisfy the two conditions in the letter of the Government's Chief Electrical Engineer caused their inability to be connected to the public supply. He submitted, further that on 4 October 1991, a letter from the plaintiff to the defendant showed that a year after the plaintiff had started to lose profits they had not applied for the inspection certificate. The certificate was dated 9 July 1992 and it was the responsibility of the plaintiff to obtain it. Counsel further submitted that the plaintiff could not have legally operated its business without approval. Therefore, paragraph 4 of the Statement of Claim was not proved. The failure to be connected to the supply as alleged in paragraph 5 of the statement of claim could not be the fault of the defendant.

#### **Discussion**

[60] The evidence revealed that there were 2 reasons why the plaintiff was unable to commence its operations (1) the failure of the defendant to complete its upgrades in time for the plaintiff to be connected to the supply and (2) the failure of the plaintiff to complete its own internal electrical installations to the satisfaction of the Government Electrical Engineer so that a certificate of approval could be obtained.

[61] In its application for factory space BIDC 2 dated 20 November 1988 under paragraph 30 the plaintiff was asked to list requirements for utilities and therein stated electricity single phase. Mr. Pearson said that the company required phase 3 current for the running of its machines. Mr. Walcott suggested that this was one of the reasons why the plaintiff could not start up operations. Though the plaintiff

ought to have known what kind of current it required and ought to have correctly pointed this out to the defendant in its application, one of the reasons given for the failure of inspection in the letter (BIDC 17) was that “conductors of one phase 3 circuit (is) not colour coded”. It was never suggested that the plaintiff’s failure to specify the current it required did not prevent the defendant from being able to carry out its upgrades so as to provide for phase three current. Similarly, it was never suggested that the plaintiff’s change in its requirements for phase 3 electrical current rather than phase 1 in any way contributed to the defendant’s delay in having the external wiring pass inspection. As counsel for the plaintiff rightly pointed out some upgrades were completed which were required to properly facilitate the other tenants of the building.

[62] The failure to colour code the phase 3 electrical circuit is given as one of the reasons for the failure of inspection but no where in the evidence is it stated or suggested that phase 3 electrical current could not lawfully have been obtained from the public supply.

[63] It is beyond doubt that the failure to colour code the phase 3 circuit was the plaintiff’s failure which contributed to the failure to pass inspection. Likewise the failure to meet the GEED’s standards with respect to flexible p.v.c conduit on the chainrails was also the plaintiff’s default. The defendant informed the plaintiff by letter dated 4 October 1991 that its upgrade had been completed. The plaintiff had three inspections done between 23 August 1990 and 3 July 1992 and finally received the certificate on 9 July 1992. The defendant’s non compliance would have subsisted up to October 1991 whilst the plaintiff’s would have continued up until July 1992. Both parties were responsible for the failure to pass inspection. The defendant cannot be held accountable for any failures occurring after October 1991.

**Did the Defendant’s breach cause the Plaintiff’s loss?**

[64] I have already found that between May 1990 and July 1992 both parties contributed to the failure to have electricity installed. If the defendant had completed their electrical works and the plaintiff had not, the plaintiff would have been in breach of the implied term of the contract. Mr. Pearson gave evidence that the plaintiff fulfilled its obligations and applied for inspection, however, this is inconsistent with the note of Mr. George King which says that there were three inspections of the internal wiring between 23 August 1990 and 3 July 1992. There would have been no need for three inspections if the internal wiring was done in compliance with the requirement of the Government engineer. It appeared that the plaintiff had not completed its electrical installation up until 1992. The evidence of Mr. Pearson is that Mr. Drakes told him that the tenant would have its installation done and the landlord would then have the public supply brought to the building. The evidence as to the system employed was given by Mr. Thompson and has already been outlined in this decision.

[65] Mr. Thompson gave evidence that he tried to have the defendant’s upgrade done in such a manner that both parties could have applied for inspection at the same time.

[66] The pleadings do not refer to the time at which the term would be implied that the premises would have been able to be connected to the public supply. As a matter of common sense that can only be a reasonable time and certainly a reasonable time

so as to allow the tenant to start up its business once the tenant had completed its upgrades. In this case, the tenant could only lawfully commence its operations when it had obtained the certificate of inspection and be lawfully connected to the supply by the Barbados Light and Power Company Limited. It is a matter of law, as well as common sense that the electricity would have to be lawfully supplied to the building and lawfully used by the tenants, thus, in the absence of an approved electrical inspection, the plaintiff still could not have lawfully carried on its business so as to generate profits. Mr. Pearson's evidence was that the Mr. Drakes said that the plaintiff would have had possession of the premises and the keys in order to conduct their internal works so as to commence.

[67] The importance of this evidence is that the plaintiff was put into possession to do work preparatory to starting up business. Instead the plaintiff started before the internal installations had been completed to the satisfaction of the Government's Chief Electrical Engineer. This reinforces the point that the plaintiff could not lawfully claim for loss suffered during a period of time where it could not lawfully operate.

[68] Mr. Pearson, when it was suggested to him, that he could not have started business until he had received the inspection certificate date 8 July 1992 said "I did start(ed) business illegally".

**Did the Plaintiff cause or contribute to this loss?**

[69] The evidence revealed that the plaintiff wrote a letter to the Chief Electrical Engineer dated 3 December 1990 requesting the results of the re-inspection which was done on the 9 November 1990. The response (BIDC 18), a letter dated 3 January 1991 showed that the failure was due to the fact that –

1. Two supplies are not allowed on one building and
2. 225 amps cannot be obtained from an overhead supply.

[70] These failures were not both the plaintiff's failures. Mr. George King the former Chief Electrical Engineer in his evidence said in relation to the letter W19 (BIDC 18) that the implication to be drawn from that letter was that the application was turned down because there was one supply to the building. Where there was already a supply to the building any new supply must be located the same place. For this installation to be passed he continued it would have to be routed through the connection which was already there.

[71] Mr. Pearson gave evidence that he took the certificate of approval to Barbados Light & Power (BL&P) to make a payment for the connection but it was returned to him after some waiting. He was told that they were awaiting a report for the external connection. Mr. George King was accepted as an expert electrical engineer. His evidence was that the certificate of approval which was issued would have allowed electricity to be supplied to the building in relation to Unit 3. He said that the only reason why, after getting a certificate, the occupant of Unit 3 would not be able to get electricity was if the certificate was not carried to the BL&P. He further gave evidence that if BIDC agreed to carry electricity to the metering panel, it would be the tenant's responsibility to employ an electrician to take electricity from the metering panel to the inside of the unit. He said he was not aware of any

- difficulty in relation to Newton Industrial Park and that any problem would more than likely have been a Barbados Light & Power problem.
- [72] Mr. King also gave evidence that in relation to the 225 amps, it could not be obtained from an overhead supply. He said the BL&P would only allow an overhead supply of up to 200 amps. If you wanted more than that, you would have to install an underground supply with a transformer. He said that he assumed that the building had a main breaker that was 225 amps. This was with reference to the second cause of failure. It appears, therefore, that between 9 November 1990 and the 4 October 1991 both the plaintiff and the defendant were in default.
- [73] Mr. Pearson's evidence is in conflict with the professional opinion of Mr. King. He (Mr. Pearson) gave evidence that BL&P said they were awaiting a report on the external connection. In spite of not being connected, his company remained on the location until 1992 when a fire occurred in the building. No evidence was led from any personnel of BL&P as to the reason for the non-connection. It is for the plaintiff who bore the burden of proof to establish to the satisfaction of the Court, on a balance of probabilities, that the failure by the Plaintiff to be connected was caused by the defendant.
- [74] I accept the evidence of Mr. King in preference to that of Mr. Pearson that there was no reason except a reason referable to the BL&P, why the plaintiff could not be connected to the supply. If, as Mr. Pearson said, the BL&P was awaiting a report on the external connection, who was to provide this report and on what? The only persons who could answer these questions were the persons who ordered the report. Mr. Pearson did not state that the BL&P were awaiting a certificate of inspection on the external installation.
- [75] I hold on balance of probabilities that there was no satisfactory evidence that the failure of the plaintiff to be connected to the public supply was the fault of the defendant and not as a result of a matter connected to the plaintiff itself or the BL&P.
- [76] On the state of the evidence, I am of the opinion, and I hold, that the failure of the plaintiff to be able to commence its business operations was contributed to by both parties but that the defendant's breach did not cause the plaintiff's loss. This loss was occasioned by the plaintiff's own failure to complete the internal wiring to the satisfaction of the Government Electrical Engineer up until July 1992 so as to operate its business within the requirements of the GEED.
- Did the Plaintiff fail to mitigate its loss?**
- [77] The plaintiff submitted that it had done all it reasonably could to mitigate its loss. (*Geest plc v. Lansicuot* [2002] 1 WLR 3111 at p 3116). The terms of the *Fiscal Incentives Act* mandated that it had to operate in a specific location and it could not operate elsewhere. The managing director of the company did everything he could as far as the installation was concerned. A generator was provided by the defendant in March 1991, which the plaintiff used. It produced dirty current which proved a physical hazard to the operators of the machines and the machines themselves. Mr. Pearson gave evidence of the machines jumping, stopping, going backwards and also spoke of the advice of his electricians that if the generator was used the machines would be destroyed. It was reasonable, therefore, for the plaintiff to discontinue its use.

[78] She said that the onus was on the defendant to prove failure to mitigate the loss and that the defendant had. There was no evidence to support the contention that the plaintiff had failed to mitigate its loss. Mrs. Seale submitted that the plaintiff had been sacrificed in this matter and that Ripples Ltd, which had been a tenant for a number of years, had a supply of 230 Volts whilst all the other tenants had 200 Volts. She said the implied term was breached by the defendant because the defendant chose not to inconvenience Ripples Ltd for the sake of the plaintiff but to try to resolve the problem by keeping the plaintiff out of production until the transformers which their consultants recommended could be put in place, and this was not done until 4 October 1991.

#### **Defendant's Submissions**

[79] The defendant submitted that the plaintiff failed to mitigate its loss. It could have moved to another location to operate its factory. The defendant did all it could to assist the plaintiff by providing generators to run its operations which proved unsuitable through no fault of the defendant.

#### **Discussion**

[80] Whilst there was a duty on the plaintiff to mitigate its loss, it is difficult to see how it could have done so in the peculiar circumstances of this case. Mr. Thompson gave evidence that the terms of the plaintiff's approval of status under the *Fiscal Incentives Act* required it to operate on the defendant's property. In the absence of the defendant having another location available for the plaintiff's use, it would be impossible for the defendant to mitigate its loss by moving as counsel for the defendant suggested. I am also of the view that to have continued to use the generators, which proved unsuitable and potentially harmful to the machines and their users, would have been foolhardy and the plaintiff rightfully discontinued their use.

#### **Damages**

[81] In the event that I am wrong on the issue of liability, I will now deal with the measure of damages which would have been applicable in the event that the plaintiff was successful in its claim.

[82] In the Statement of Claim, the plaintiff claimed damages for 10 months loss of profits but did not specify the period for which those 10 months ran. It is incumbent on the plaintiff to prove its loss and the period for which those losses are claimed to have been sustained.

#### **THE EVIDENCE**

##### **Evidence of Charles Worrell**

[83] Mr. Worrell stated that he was an accountant who practiced general accounting but who had no professional qualifications since he was unable to complete his professional exams because of the pressure of work. He is authorised to audit under s. 153 (3) of the *Companies Act* and was the holder of a licence authorising him to conduct audits given on 24 June 1987. He was working in the field of accounting since 1971 and had experience in the preparation of audits and financial statements. Based on the licence and his experience, he was accepted as an expert for the purposes of giving evidence in relation to audits and giving of financial statements.

[84] Mr. Worrell gave evidence that he audited the accounts of the plaintiff company and that he spoke to a Mr. Williams who requested him to do an audit (**Statement of Profit and Loss for the period October 1, 1990 to December 31, 1990**). A copy of the audited statement was entered into evidence. The witness further stated, that in his opinion, it disclosed the fair estimate of the profit and loss situation of the company. The report however was qualified because there were certain documents which were required to carry out the audit which were not available. He said he was not present at the stock taking because the client came to him after the fact some time in 1998 or 1999 and that it was possible that there could have been adjustments which were necessary. He said the statements would have been presented fairly with the exception of any possible adjustments that he would not have known about. He stated that the statement of profit and loss and the sales from 1 October to December were \$12,297 was correct, but he could not recall the number of days in that period when production took place.

**Evidence of Mr. Philmore Alleyne**

[85] Mr. Alleyne gave evidence that he was a chartered accountant with a BSc. in Accounts from the University of the West Indies (UWI) 1986 and an MBA from Oxford – Brooks University in the UK, 2003; he was a fellow of the Association of Certified Accountants of the UK and a Fellow of the Chartered Accountants of Barbados. He was a final year doctoral student in the School of Management of the University of Bradford in the UK and a full time lecturer in Accounts in the Department of Management Studies of UWI for the last 9 years. He had published extensively in both international and local journals on the accounting and auditing profession. He had been an accountant for the last 16 years and had been auditing accounts for the same period of time. By virtue of his experience and qualifications he was accepted as an expert witness in the area of preparation of financial statements and auditing of accounts.

[86] He gave evidence that he had examined the report of Mr. Worrell and that he had been asked to prepare a report which he did, and which was dated 19 April 2007 and marked exhibit PA1. He noted that there was no Balance Sheet in the documents he received and he considered the financial statements to be incomplete. He said that to do an audit you needed all the sales information, journals and invoice books, all bank statements, cheque books, deposit books, wages records and supporting documentation such as bills and receipts to verify the accuracy of expenditure and income.

[87] He opined that a Balance Sheet would show the assets, liabilities and the equity of the company, that is, its financial position at a specific point in time and that was what was required for him to assess the level of investment, indebtedness as well as the equity (money put in by the shareholders) in the company.

[88] He took issue with Mr. Worrell's statement and noted the deficiencies therein and stated that Mr. Worrell had made qualification that he was unable to attend the taking of the physical inventory as well as verifying the sales information. He said that from generally accepted accounting principles, as well as under the **Companies Act**, a full set of accounts would include the auditor's report, a balance sheet, and an income statement (profit and loss statement), a statement of cash flows, and notes to the financial statement. Such information would allow users,

- including the court, to easily understand the level of the investment into the company, its indebtedness as well as its net worth. He said that, in addition, items which are shown in Profit and Loss are inextricably linked to items shown on the Balance Sheet.
- [89] He was of opinion that Mr. Worrell ought not to have opined that “these financial statements present fairly in all material respects the net profits of Nylotex for the period stated.” He noted that not being able to observe the taking of the inventory meant that one could not state that one of the major assets (inventory) was correct and did exist. Thus the income statement could not be verified. He noted that the date of the auditor’s report was 8 June 1999 relating to the period October to December 1990, some 9 years after and that the author of the statement, Mr. Worrell, stated that he was unable to verify the sales as all the supporting documentation was not available.
- [90] He further gave evidence that he did not see information to support the cost of goods manufactured except for the financial statements of Mr. Worrell. No documentation existed on (a) stock of unfinished goods at end of period, (b) Goods sold, (c) Gross profit, (d) Administration and staffing expenses, and (e) Net profit; and none of these items could be verified. He noted that the financial statements did not show the cost of debt capital and that to calculate depreciation you needed fixed assets, which would be shown in the balance sheet, and that in his opinion, a Balance Sheet could have been prepared.
- [91] He reiterated that from the information provided there was no way to ascertain the net worth of the company. He agreed that in 1990 the economic situation in Barbados was such that the country was going through structural adjustment. He said that as far as the cost of goods manufactured was concerned he found that for 20 workers over a 3 month period it was quite low at \$325.67 per week for 3 months. In his report Mr. Alleyne said “an examination of the statement of cost of goods manufactured revealed that direct labour was \$5,862 for the three months. Based on information provided by Mr. Theodore Walcott QC, that there were 20 employees, this translated to approximately \$325.67 per worker for the period under review. This average wage for worker seems quite low.”
- [92] As far as cost of goods manufactured were concerned, there was no documentation for any of the information shown. Likewise he did not see any documentation in relation to general administration expenses. He said he reviewed the loss of profit claim prepared by Mr. G. Williams and when asked if there was any basis on which an accountant could arrive at \$12,297 net profit for the period, he said the claim was based on information which had some uncertainties such as the inability to see inventory or to have any sales records.
- [93] He noted further, that “it is acceptable practice that any loss of profits claimed may be recovered where the company can show that (a) the loss was a direct result of some action or breach (b) the lost (loss) of profits were foreseeable and (c) the loss of profits were estimated with reasonable certainty.”
- [94] The witness noted that he was unable to deal with (a) but with respect to (b), given that the claim was prepared on incomplete information, (i.e. the auditor’s qualification on the sales and the missing balance sheet) previously referred to, he was unable to make a satisfactory assessment of the claim. As far as point (c) was

concerned, he said that the assumptions underlying the preparation of the claim needed to be better explained to convince users that the profits were estimated with reasonable certainty and quoted an assumption made by Mr. Williams in his report “for the purpose of quantifying the comparable results of the first years operations, I have prepared in summary form, a statement using the actual results of the 50 days production activity which occurred within the audit period as the base data and extrapolating therefrom, utilising given factors of production, capacity, existing and potential markets, labour and materials availability, in computing the net profit forecast and loss of profit statements on the following pages.”

[95] Mr. Alleyne noted that the accountant’s calculation showed that the company was operating at 1/3 capacity, and that it had not been shown how that capacity had been established. There was not sufficient information in the report to justify the one third as an estimate of capacity. He drew attention to another quotation from Mr. Williams’ report “in producing these forecasts I am guided by my knowledge of the potential of Nylotex industries Ltd as the sole manufacturers within **CARICOM** of household rugs, bathroom sets, bedroom slippers, travel luggage, bags, car seat covers, and related products under the *Fiscal Incentives Act*.”

[96] Mr. Alleyne said that he imagined that the business had some potential but the problem was how much; that at the time the business operated, it was a trying economic time for the Caribbean and that the length of time in business (3 months) was still a very short period for him to give a reasonable assessment of the forecast. Of importance was the fact that the loss of profits claimed did not include obvious expenses as for example, professional fees, such as accounting and auditing services, which would necessarily have been incurred in the preparation of the company’s financial statement.

[97] While not directly saying so, his conclusion seemed to be that the claim put forward was not a reasonable one as he said “given the above comments on the missing balance sheet and the auditor’s qualification on the sale, this claim should be reviewed within the realms of reasonableness.”

[98] When asked if it was unusual not to have all the documents present he said there were times when you did not have all the information but the guidelines for accountants stated that there were not to sign off unless they had seen the documents. There were seven forms of evidence.

1. Documentation and certification which is the strongest
2. The weakest form is represented by the audit since dishonesty may exist but that is not to say that the client is dishonest
3. Confirmation
4. Observation
5. Physical examination
6. Re-performance which involves checking behind the client
7. Enquiries of the client

[99] When asked about his statement that Mr. Williams did not put the reasons for his 1/3 capacity and shown the projective results which said that the company had capacity for 18 machines and had only utilised 6, he stated that there was need to provide further justification. He noted that he was not saying that the claim should be discounted but that it should be reviewed in terms of reasonableness.

**The Plaintiff's submissions**

[100] The plaintiff's counsel submitted that the plaintiff was entitled to loss of net profit claimed as \$382,103 plus overdraft interest for one year up to the date when the plaintiff was informed by the defendant that they had complied with the requirements of the GEED (BIDC 25) dated 4 October 1991 plus interest at the rate of 8% from the date of the writ until payment under **s. 35 (1)** of the *Supreme Court of Judicature Act Cap 117A*. This time period was important because it suggested the time at which the defendant had fulfilled its obligations by complying with the Government Engineer's requirements.

[101] Reference was made to the case of *The Heron (No. 2)* [1967] 3 All ER 687 and *Hadley v. Baxendale* [1854] 9 Exch. 341 which set out the measure of damages. She referred to the case of *Jacques v Miller* [1877] 6 Ch. D 153, which she considered to be similar to this case. Counsel for the plaintiff submitted that the difficulty of proof of damages did not mean that damages were not to be awarded and that the court must be satisfied that damages were payable. She said the standard of proof only demanded evidence from which the existence of damage could be reasonably inferred and that there was adequate data for calculating it (*Biggin & Co Ltd v. Permanent Ltd* [1951] 1 KB 422 at 438, *Ratcliffe v. Evans* [1892] QB 524 at 532). She further submitted that the plaintiff had produced audited reports which showed what the actual profits were for the period the factory carried on production.

[102] Counsel submitted that the court ought to accept the audited statements and the projected loss of profits therein, having heard the auditor and having assessed his demeanour and having regard also, to his knowledge and experience. She further submitted that the auditor saw the books and cheques and his report was a fair representation of the company's position. She urged the court not to accept the evidence of Mr. Philmore Alleyne (the defendant's witness) since he did not audit the company's books and was not in the best position to assess the company. Mr. Alleyne, she submitted, indicated that the decision to have a qualification of disclaimer of opinion on the audited statements was a matter for the judgment of the auditor and did not mean that the auditor was not to be believed.

[103] She stated, further, that Mr. Alleyne was not in the best position to assess the company. The auditor saw the books and cheques and urged the court to accept the auditor's report as a fair representation of the company's position. She said the net profit claimed was \$382,103 plus overdraft interest for one year. Interest was also claimed at the rate of 8% from the date of the writ until payment under **section 35(1)** of the *Supreme Court of Judicature Act*. She urged the court to award the sum claimed, and costs.

**Defendant's submissions**

[104] Counsel for the defendant urged the court not to award any damages. He submitted that any loss incurred by the plaintiff was occasioned by its own default. Further, the plaintiff had relied upon the evidence of Mr. Williams and Mr. Worrell which was unreliable in the light of the criticisms in the report of Mr. Philmore Alleyne. He further submitted that legally the plaintiff could not have operated without approval. He asked the court to accept the evidence of Mr. Alleyne in preference to that of Mr. Williams and Mr. Worrell, and to find that the plaintiff had not proved any loss which would result in damages.

#### **The Law**

[105] The burden was on the plaintiff to establish its loss to the satisfaction of the court on a balance of probabilities. The measure of damages was to be ascertained by applying the principles established in *Hadley v Baxendale* where **Alderson B.** noted:

“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them.”

#### **Discussion**

[106] The evidence led in support of damages leaves a lot to be desired. The claim was based on projections for a period of ten months using a three month period as the basis for the projection. The auditor was unable to verify crucial components of his profit and loss analysis because there was no documentation on (a) stock of unfinished goods at end of period, (b) Goods sold, (c) Gross profit, (d) Administration and staffing expenses, and (e) Net profit. Furthermore, none of

these items could be verified. Of importance as well is the observation of Mr. Alleyne that he imagined that the business had some potential but the problem was how much and that, at the time the business operated, it was a trying economic time for the Caribbean. Despite the several criticisms, Mr. Alleyne opined that he noted that he was not saying that the claim should be discounted but that it should be reviewed in terms of reasonableness.

[107] In light of the uncertainty in the accounting evidence and that no account was taken of the impact of the economic realities of the time in preparing the profit and loss account, I would have discounted the claim by 30% to reflect the vicissitudes of business in the then prevailing economic times. This leaves a sum of \$267,472.10 on loss of profits which would have been the damages I would have awarded.

[108] No award would have been made in respect of overdraft interest since in the circumstances, no overdraft facilities were actually utilised. Interest, if awarded, would have been at the rate of 6 % per annum from the date of judgment until payment.

**Final observation**

[109] Counsel for the plaintiff submitted that the plaintiff's inability to be connected was also occasioned by a change in the law with reference to electrical installations. I have already found that both the plaintiff and the defendant were in default of their obligations. If the change in the law relating to two supplies being on one installation was instituted after the parties were in default, this could not occasion a breach by the defendant since such a change would be a supervening event beyond the control of the parties and which both parties would be obliged to comply with.

**Illegality**

[110] As previously noted, Mr. Pearson, the plaintiff's Managing Director admitted in evidence that he had commenced business illegally. Having set out the damages which I would have awarded, in the event that I may be found to be incorrect in my finding of liability, I must consistent with my duty state that the court could not have awarded damages to a party which was in breach of the law. To do so would be tantamount to the court ratifying the illegality. The maxim of law being *ex turpi causa non oritur actio*.

**Disposal**

[111] Having regard to my findings above, the court dismisses the plaintiff's claim for damages for breach of contract and consequential loss and damage in its further amended statement of claim.

[112] The defendant will have its costs of the application certified fit for two counsel to be taxed if not agreed.

**William J. Chandler**  
Judge of the High Court.