[2021] JMCA Civ 14

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 19/2017

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN	**THE ATTORNEY GENERAL OF JAMAICA**	**APPELLANT**
AND	**BRL LIMITED**	**1ST RESPONDENT**
AND	**VILLAGE RESORTS LIMITED**	**2ND RESPONDENT**

Patrick Foster QC and Miss Tavia Dunn instructed by Nunes, Scholefield, DeLeon & Co for the appellant

Richard Mahfood QC, Dr Lloyd Barnett and Weiden Daley instructed by Hart Muirhead Fatta for the respondents

21, 22 February 2018 and 25 March 2021

MCDONALD-BISHOP JA

[1] The Attorney General of Jamaica ("the Attorney General"), the appellant, brings this appeal from orders made by Batts J ("the learned judge") in the Commercial Division of the Supreme Court on 17 February 2017. The orders were made upon an application brought by the respondents, BRL Limited ("BRL") and Village Resorts Limited ("VRL"), for the Attorney General to provide further information and specific disclosure, pursuant to rules 34.2 and 28.6 of the Civil Procedure Rules, 2002 ("the CPR"), respectively.

[2] Rule 34.2 of the CPR states:

> "(1) Where a party does not give information which another party has requested under rule 34.1 within a reasonable time, the party who served the request may apply for an order compelling the other party to do so.
>
> (2) An order may not be made under this rule unless it is necessary in order to dispose fairly of the claim or to save costs.
>
> (3) When considering whether to make an order the court must have regard to-
>
> (a) the likely benefit which will result if the information is given;
>
> (b) the likely cost of giving it; and
>
> (c) whether the financial resources of the party against whom the order is sought are likely to be sufficient to enable that party to comply with the order."

[3] Further, rule 28.6(2) of the CPR endows the court with the power to make orders for specific disclosure on or without an application. Rule 28.6(5) provides that an order for specific disclosure may require disclosure only of documents that are directly relevant to one or more matters in issue in the proceedings. Rule 28.1(4) explains what is meant by a document being "directly relevant". It states:

> "For the purposes of this Part a document is '**directly relevant'** only if-
>
> (a) the party with control of the document intends to rely on it;
>
> (b) it tends to adversely affect that party's case; or

(c) it tends to support another party's case." (Emphasis as in original)

[4] Rule 28.7 indicates the matters the court should consider in determining whether to make an order for specific disclosure. It reads:

> "(1) When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs.
>
> (2) It must have regard to-
>
> (a) the likely benefits of specific disclosure;
>
> (b) the likely cost of specific disclosure; and
>
> (c) whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order.
>
> (3) Where, having regard to paragraph (2)(c), the court would otherwise refuse to make an order for specific disclosure , it may however make such an order on terms that the party seeking that order must pay the other party's costs of such disclosure in any event."

[5] The gravamen of the Attorney General's complaint, against the orders of the learned judge, is that they are not in keeping with the dictates of the relevant provisions of the CPR, set out above, as well as the overriding objective in Part 1. In sum, the Attorney General says that the orders made by the learned judge are not necessary for the fair disposal of the proceedings or for saving costs and neither are the documents ordered to be specifically disclosed, directly relevant to any issue in the proceedings.

[6] The core issue that arises for determination on the appeal (which may be further divided in two sub-issues) is this: whether having regard to the issues raised for determination on the parties' statements of case, the learned judge erred in his decision that:

a) an order compelling the Attorney General to provide the information requested by the respondents is necessary to dispose fairly of issues in the proceedings or to save costs; and

b) the documents ordered to be specifically disclosed by the Attorney General are directly relevant and necessary to dispose fairly of issues in the proceedings or to save costs, and so, ought to be disclosed.

[7] A clear understanding of the circumstances that have given rise to these issues is imperative. I will, therefore, begin with the factual background and the procedural history of the case.

The factual background

[8] BRL is a company incorporated under the laws of the Cayman Islands and is the claimant in the proceedings in the Supreme Court. It is a member of the SuperClubs group of companies which owns, leases and manages a number of hotels in Jamaica and other countries. On 22 October 1997, it entered into a lease agreement with Braco

Resorts Limited ("Braco Resorts") for rental to it of a hotel in Trelawny. The lease was for the duration of 15 years and was due to expire on 30 November 2012.

[9] At the commencement of the lease, the name of the hotel was Grand Lido Braco but in the year 2009, it was rebranded as Breezes Resort and Spa, Rio Bueno.

[10] The second respondent, VRL, was the guarantor under the lease. It is a company incorporated under the laws of Jamaica.

[11] Before the expiration of the lease, Braco Resorts sold the property to the Government of Jamaica. The National Insurance Fund ("the NIF") provided the purchase money. By way of transfer registered on 5 December 2000, the property was transferred to the Commissioner of Lands for and on behalf of the NIF and was subject to the lease.

[12] The Commissioner of Lands became the landlord under the lease for and on behalf of the NIF. Notwithstanding the position of the Commissioner of Lands as the landlord, the NIF will be referred to as the landlord (and defendant) when necessary for the purposes of this judgment, given the circumstances which led to the litigation between the parties.

[13] A dispute arose between BRL and the NIF; both alleging breaches of the lease agreement by the other, with each, at the same time, maintaining that it had acted in accordance with its terms.

The procedural history in the Supreme Court

(i) <u>The claim</u>

[14] On 27 February 2013, BRL brought a claim in the Supreme Court in which it named the Attorney General as the defendant, pursuant to the Crown Proceedings Act, on the basis that the NIF is an agent or servant of the Crown.

[15] In its amended particulars of claim form filed 27 February 2013, BRL detailed the reliefs it is seeking, in these terms (as summarized):

> (1) The sum of US$39,683,000.00 (now equivalent to the sum of J$3,849,020,838.60) being damages for breach of the collateral contract made in or about October 1997 and/or breach of the contract contained in Lease.
>
> (2) Alternatively, the sum of US$29,357,000.00 (now equivalent to the sum of J$2,847,458,729.40), being damages for breach of the collateral contract made in or about October 1997 and/ or breach of the contract contained in a lease dated 22 October 1997.
>
> (3) Interest at the usual commercial rate, or at such rate and for such period as to the Court deems just.
>
> (4) A Declaration that due to the direct effects or consequential results of market conditions external to the

> SuperClubs Group affecting occupancy or obtainable rates in all hotels in Jamaica of a similar standard for the period of six (6) continuous months of 1 June to 30 November 2008, the operation of the hotel "was uneconomic or impractical or not reasonably practical according to accepted practice of sound and good hotel operation, after reasonable steps taken by [BRL] to counteract same, and accordingly that [BRL] lawfully terminated the Lease".
>
> (5) Costs.
>
> (6) Further or other reliefs as the court deems just.

[16] BRL avers that when the NIF agreed to purchase the property, it was agreed between the NIF, Braco Resorts and it, that the obligations of the lessor to provide facilities so that the hotel could be operated at the prevailing standards of a SuperClubs/ Grand Lido/ Lido property, would be assumed by the NIF. The terms of the collateral agreement, according to BRL, was that the NIF as the landlord would make all such expenditure as was required to bring the hotel up to the prevailing standards to be operated as a SuperClubs/Grand Lido/Lido property and maintain it at that standard for the duration of the lease. It relies on recital E of the lease agreement, which reads:

> "The Lessor agrees that the Leased Property requires certain modifications and improvements in order for it to be to the standards required by the Lessee and to be operated by the Lessee as a 'SuperClubs/Grand Lido/Lido' property."

[17] BRL's contention is that the parties to the lease, including Braco Resorts' successors-in-title, have always accepted that the lessor had this obligation and that it was a collateral agreement and/or an express or implied or fundamental term of the lease agreement. It was on this basis that it agreed to continue the lease. BRL alleges further that the NIF, in breach of the collateral agreement and/or express or implied or fundamental term of the lease agreement, failed to make the requisite capital expenditure to maintain the property at the standard agreed upon. This breach, it alleges, has caused it to suffer substantial losses and damage, including damage to reputation. These circumstances, along with poor economic conditions, it contends, caused it to terminate the lease on 30 April 2011, for *force majeure*.

(ii) The defence and counterclaim

[18] The Attorney General filed a defence and counterclaim on 30 November 2016 on behalf of the NIF. VRL is named as the defendant to the counterclaim. The NIF denies the case alleged by BRL as to the existence of an obligation on its part to make improvement to the property and to bring it up to the standard to be operated as a SuperClubs/Grand Lido/Lido property. The NIF also denies knowledge of BRL's assertion that prior to the execution of the lease, Braco Resorts and BRL had agreed that Braco Resorts would have carried out improvements and modifications for the hotel to be operated at the standard alleged. It denies that it accepted that obligation even though it accepts the existence of recital E in the lease agreement.

[19] NIF avers in its defence that its obligations under the lease agreement were discharged by Braco Resorts with the expenditure of US$1,000,000.00 towards making the requisite improvements and modifications to the property. It avers further that BRL had discharged Braco Resorts by deed dated 20 November 2000. It relies on clause (m) of that deed, in which BRL "covenanted, warranted and agreed" that Braco Resorts and its affiliate companies (named in the deed) "have not done anything which could give rise to the right to BRL to terminate any of the agreements or which will give rise to a dispute or complaints". The NIF relies on this clause for its full terms and effect to aver that, even if there was an obligation on the lessor to maintain the property at the standard alleged, that obligation was discharged by Braco Resorts.

[20] In its further amended counterclaim, the NIF alleges that BRL owes outstanding rental; rental for the unexpired portion of the lease as damages; and the cost of repair, replacement and maintenance. It counterclaimed for, among other things:

> "1. The sum of **US$4,185,473.01** together with interest at the rate of 12% per annum from the 1st day of September 2009 to the date of judgment or sooner payment.
>
> 2. The sum of **US$3,800,000.00** together with interest at the rate of 12% per annum from the 1st day of May 2011 to the date of judgment or sooner payment.
>
> 3. The sum of $423,780,000.00
>
> 4. The sum of $23, 410,426.00 and continuing.
> ..." (Emphasis as in original)

[21] The NIF avers that it has made demands on VRL, as the guarantor under the lease, to satisfy the alleged breaches of BRL in respect of the outstanding rental and the breach or non-observance of the covenants. VRL, it says, has failed, refused and/ or neglected to fulfil the demands.

(iii) The defence to the counterclaim and ancillary claim

[22] BRL, in its defence to the counterclaim, apart from repeating matters contained in its amended particulars of claim, denies the counterclaim of the NIF. BRL asserts, among other things, that the NIF took possession of the property and earned income and, therefore, had an obligation or duty to maintain it or to arrange with subsequent lessees or occupants for its maintenance.

[23] On 27 February 2014, VRL filed a defence to the counterclaim and also brought an ancillary claim against the Attorney General. It says that BRL is not in default and that, for other reasons detailed in the defence to the counterclaim, it sees no basis for the demand of the NIF. It contends that even if BRL is in default, which it denies, it is not liable as guarantor.

[24] On the ancillary claim, it seeks remedies in the form of declarations to the effect that it is not liable on the guarantee.

(iv) The application for request for information and specific disclosure

[25] On 6 February 2014, VRL's attorneys-at-law filed and served on the Attorney General a request for information, pursuant to rule 34.1 of the CPR. The Attorney

General complied with portions of the request but disputed other aspects of it on the basis that, among other things, the information was not relevant to the issues between the parties or necessary for the fair disposal of any issue in dispute between them. The Attorney General had promised to provide other information requested but failed to do so by the scheduled date.

[26] On 28 June 2016, the respondents filed an amended notice of application for court orders relating to the request for information and the specific disclosure of certain documents. It should be noted that the judgment as well as the formal order refer to an amended notice of application filed on 20 July 2016, but that application does not form part of the record compiled for the benefit of this court. It suffices to say, however, for present purposes, that amendments were made to the application over time up to 11 November 2016. The Attorney General claimed the right to withhold disclosure of some of the information or documents requested on the application filed before 11 November 2016, on the basis that disclosure would be injurious to the public interest as it would reveal the deliberations of Cabinet or matters put to the Cabinet, which in some instances may be confidential. Additionally, the disclosure, the Attorney General said, would be harmful to inter-governmental relations. In putting forward the objection, the Attorney General relied on an affidavit of Audrey Deer-Williams filed on 5 October 2016.

[27] Following that response from the Attorney General, the respondents applied for permission to delete the requests for the earlier documents to which objection was taken and to seek specific disclosure of other information. This was done by way of document dated 11 November 2016 and bearing the title, notice of intention to apply

for amendment of the relisted amended notice of application for court orders. The application was contested by the Attorney General.

(v) The orders of the learned judge

[28] The learned judge permitted the respondents to further amend the amended notice of application in the terms as prayed in the November 2016 application. He then made these orders, as set out in the formal order dated 17 February 2017:

> "1. ...
>
> 2 Upon [BRL] providing security for costs in accordance with paragraph 3 of this Order, the [Attorney General] shall, on or before the 21st July 2017 (or such other date to which the parties may in writing agree), supply to the attorneys-at-law representing [BRL] and [VRL] in this litigation the further and better particulars and specific disclosure as detailed below:
>
> a. State the material terms under which the premises were occupied for the period 7th February 2012 to 31st May 2013, and provide copies of all documents evidencing such terms;
>
> b. State whether since 30th April 2011 there has been any expressions of interest in respect of the hotel including any offers to manage, lease or purchase the hotel premises, and if so please state the material terms thereof;
>
> c. State whether the [Attorney General] or the registered proprietor of the hotel (including [the NIF]) has since the 30th April 2011 entered into any agreement(s) for [sic] in relation to the possible sale or for the sale management or lease of the hotel premises;
>
> d. If the answer to (c) is in the affirmative, state the material terms of all such agreement(s), and when any such sale was completed or is scheduled to be completed, as the case may be;

e. State the total sums, if any, expended since 30th April 2011 and by whom in repairing or refurbishing the hotel and the material terms of all agreements pursuant to which any such repairs or refurbishing works were carried out;

f. State the nature and extent of all such repairs or refurbishing works, and the period over which the same were carried out;

g. State the total sums, if any, expended since 30th April 2011 and by whom to make improvements and modifications to the hotel premises, and the material terms of all agreements pursuant to which any such improvements and modifications to the premises were carried out;

h. State the nature and extent of all such improvements and modifications to the premises, and the period over which the same were carried out;

i. Provide specific disclosure of the following:

(i) All leases, operating or management agreements with Melia Hotels International SA and with such other the [sic] entity or entities trading as Melia Braco in respect of the hotel;

(ii) All memoranda, correspondence (including electronic mails) and presentations from [BRL] to the [Attorney General] or the registered proprietor of the hotel (including [the NIF]) and any responses thereto concerning the renovation, improvement or upgrading of the hotel property;

(iii) All documents including memoranda and all minutes of all meetings of board of directors of [the NIF] and all committees or subcommittees thereof reflecting or containing any plans for making renovation, improvement or upgrading to the premises upon or after the Lessor took possession thereof and subsequent to the Lessee vacated [sic] the premises.

3. ..."

The appeal

[29] Aggrieved by these orders, the Attorney General filed an appeal with these complaints (amended notice of appeal filed 15 March 2017):

> "a. The learned judge erred as a matter of law and/or fact in finding that the request for information as to the terms under which the premises were occupied from December 1, 2012 to May 31, 2013 is relevant and necessary for the fair disposal of the claim and/or relevant to the issue of mitigation of damages.
>
> b. The learned judge erred as a matter of fact and/or law in finding that the request for information as to the terms under which the premises were occupied for the period of December 1, 2012 to May 31, 2013 if they involve bringing the hotel to a particular standard would be relevant to whether the hotel was at the required standard prior to the date that [BRLS's] lease was to have expired.
>
> c. In respect of the information ordered namely:
>
> 1. State the total sums, if any, expended since 30th April 2011 and by whom to make improvements and modifications to the hotel premises and the material terms of all agreements pursuant to which any such improvements and modifications to the premises were carried out.
>
> 2. State the nature and extent of all such improvements and modifications to the premises, and the period over which same were carried out;
>
> (i) The learned judge erred as a matter of law and/or fact in finding that the aforementioned request for information was necessary in order to dispose fairly of the claim and save costs:
>
> (ii) The learned judge erred as a matter of fact and/or law in finding that the said request for information to ascertain whether the agreements

between [the NIF] and third parties contained an agreement for [the NIF] to improve the property as such agreements with third parties would have been irrelevant and further would have been influenced by commercial considerations and circumstances peculiar to those parties.

d. The learned judge erred as a matter of fact and/or law that the information in relation to agreements, if any, between third parties and [the NIF] for [the NIF] to upgrade the property was relevant and/or necessary for the determination of whether there was a continuing obligation on [the NIF] to maintain the hotel at a Grand Lido standard.

e. In respect of the request for information ordered, namely:

1. State whether since 30th April 2011 there has been any expression of interest in respect of the hotel including any offers to manage, lease or purchase the hotel premises, and if so please state the material terms thereof;

2. State whether the [Attorney General] or the registered proprietor of the hotel (including [the NIF] has since the 30th April 2011 entered into any agreement(s) in relation to the possible sale or for the sale management or lease of the hotel premises;

3. If the answer to (c) is in the affirmative, state the material terms of all such agreement(s), and when any such sale was completed or is scheduled to be completed, as the case may be;

4. State the total sums, if any, expended since 30th April 2011 and by whom in repairing or refurbishing the hotel, and the material terms of all refurbishing works carried out;

5. State the nature and extent of all such repairs or refurbishing works, and the period over which the same were carried out.

(1) The learned judge erred as a matter of fact and/or law in failing to find that the request for the following information was not proportionate and/or reasonably necessary to enable [BRL] to prepare its case or to understand the case that it has to meet:

(2) The learned judge erred as a matter of fact and/or law in finding that the following information was necessary to resolve the issue of mitigation of damages:

f. The learned judge erred as a matter of fact and/or law in finding that the extent of refurbishing carried out by [the NIF], after [BRL] gave up possession of the property goes to the issue of whether the hotel had been maintained to the Grand Lido standard with no evidence before him that the "Superclubs/Grand Lido/Lido" standard was an objective standard universally applicable to other non 'Superclubs/Grand Lido/Lido' managed hotel properties.

g. The learned judge erred as a matter of fact and/or law in finding that the following categories of documents were relevant to the matters in issue between the parties:

1. All leases, operating or management agreements with Melia Hotels International SA and with such other entity or entities trading as Melia Braco in respect of the hotel

2. All documents including memoranda and all minutes of meeting of the board of directors of [the NIF] and all committees or subcommittees thereof reflecting or containing any plans for making renovation, improvement or upgrading to the premises upon or after the Lessor took possession thereof and subsequent to the Lessee vacating the premises.

> h. The learned judge erred as a matter of law and/or fact in failing to consider whether the following documents were directly relevant to the issues between the parties." (Emphasis as in original)

[30] The Attorney General now seeks orders, that, among other things, the appeal be allowed and the order of the learned judge be set aside in respect of paragraphs 1, 2a. to h. and 2i.(i) and (iii).

The counter-notice of appeal

[31] The respondents filed a counter-notice of appeal on 14 March 2017, in which they contend that the orders of the learned judge should be affirmed on the following ground in addition or alternatively to those stated in the decision:

> "The [Attorney General], in the affidavit of Audrey Deer-Williams filed in the Court below on 5th October 2016, contended that disclosure would be harmful to departmental communications. However, in the context of the new dispensation of transparency which has been provided for by the **Access to Information Act**, documents of this type have been rendered accessible to the public on a general basis so that such objections are clearly not sustainable." (Emphasis as in original)

Discussion and findings

A. The issues in dispute between the parties in the Supreme Court

[32] Before determining whether the learned judge was correct to have granted the orders in the terms and for the reasons he did he did, it is necessary to establish what the issues are that arise from the parties' statements of case to be resolved by the court at trial.

[33] The learned judge correctly identified some of the key issues for determination in paragraph [23] of his judgment. However, the pertinent issues to which regard must be had, in assessing the merits of the appeal, are summarised as follows (this is without prejudice to any other or different issues that may be identified by the trial court):

a) whether there was a collateral agreement entered into before the execution of the lease agreement that placed on the NIF an obligation as lessor to improve and maintain the property to the prevailing standards of a SuperClubs/Grand Lido/ Lido property;

b) alternatively, whether there was an express, implied or fundamental term of the lease agreement that placed such an obligation on the NIF;

c) whether the NIF had an obligation to cover the expenditure of improving and maintaining the property to the prevailing standards of a SuperClubs/Grand Lido/Lido property in accordance with the collateral agreement or express or implied or fundamental term of the lease agreement;

d) if these obligations existed on the part of the NIF, whether it is in breach of those obligations and, if so, the damages to be awarded for the breach;

e) whether BRL is liable to the NIF for rental, costs of repairs and maintenance and, if so, the damages to be awarded;

f) whether BRL was in breach of its covenant to repair and maintain the leased premises as well as keep all the items of plant, machinery, equipment, furniture and fixtures in good and substantial repair and operating condition and if there was such a breach of the covenant, the damages to be awarded; and

g) if BRL is in breach of the lease agreement as alleged, whether VRL is liable to the NIF on the guarantee for those breaches of BRL.

B. The request for information

(i) <u>Grounds of appeal a. and b. (challenging paragraph 2a. of the learned judge's order)</u>

> *"a. State the material terms under which the premises were occupied for the period 7th February 2012 to 31st May 2013, and provide copies of all documents evidencing such terms;..."*

[34] According to the respondents, the information requested is relevant to the determination of two issues. The first is an issue on the claim, which is whether there was an obligation on the NIF to maintain the property at the SuperClubs/Grand Lido/ Lido standards in accordance with the collateral agreement or an express, implied or fundamental term of the lease agreement. The second is that the information is

relevant to the counterclaim for rental under the lease, particularly, the issue of mitigation of damages.

[35] The Attorney General challenges those assertions, contending that the information pertaining to how, by whom and under what terms the property was occupied after 30 November 2012, is not relevant to any issue on the claim or counterclaim and ought not to be provided.

[36] The learned judge did not accept the contention of the Attorney General. He ruled that the information should be disclosed as it was relevant and necessary for a fair disposal of the matter as, "such information [would] shed light on the issue of mitigation of damages". Additionally, he said, the terms under which the premises were occupied after the expiry of the lease may, if they involve bringing the hotel to a particular standard, go to show whether the hotel was at the required standard before the date the lease was to have expired.

[37] The contention of the Attorney General before this court is that the learned judge erred in so far as he found that the request for this information, as to the terms under which the premises were occupied from 1 December 2012 to 31 May 2013, is relevant and necessary for the fair disposal of the claim and the counterclaim. The respondents, however, contend that the learned judge is correct.

[38] The arguments of the Attorney General are preferred to that of the respondents for reasons that will now be outlined.

(i) *Relevance to mitigation of damages*

[39] An undisputed fact is that the lease in question was for a fixed period of 15 years and was scheduled to end on 30 November 2012. BRL brought the tenure to a premature end when, for whatever reason, it delivered up possession on 30 April 2011. It means that the unexpired portion of the lease would have been from 1 May 2011 to 30 November 2012. Had BRL continued to the end of the lease as agreed between the parties, the NIF would have been at liberty to enter into a new lease agreement as of 1 December 2012.

[40] Another undisputed fact of prime importance on the counterclaim is that for the period 16 July 2009 to 30 April 2011, BRL failed to pay the rental. BRL would have been obliged, on the terms of the lease agreement, to pay rental up to 30 November 2012, which would have been for the duration of the lease. A claim has been brought against it for arrears of rental for the period commencing 16 July 2009 to the date it delivered up possession as well as the rental that would have been payable for the unexpired portion of the lease commencing 1 May 2011. In the second further amended defence and second further amended counterclaim, the NIF had put the end of the period to which the counterclaim relates to be 30 November 2012. The original pleading of "and continuing" in relation to the claim for rental no longer exists.

[41] As it relates to the claim for damages for the unexpired portion of the lease, the applicable measure of damages would be to place the NIF, in so far as money can do so, in a position it would have been had the contract been performed by BRL as agreed.

The operative period for any consideration of damages for premature determination of the lease must be up to 30 November 2012, when the lease would have expired.

[42] As counsel for the Attorney General correctly submitted, it is settled law that in a fixed term lease, the tenant is liable in damages for the remaining portion of the lease, where there is premature termination of the lease by him without lawful justification. Damages are usually assessed by reference to the rental that would have been payable for the period. See **Leighton Chin-Hing v Wisynco Group Limited** [2013] JMCA Civ 19.

[43] The pleading of BRL in response to the counterclaim for rental is that the NIF failed to take reasonable steps to mitigate any losses by "unreasonably refusing [its] offer to lease the hotel at an annual rental of US$1,200,000.00" and for "failing to take reasonable steps to obtain alternative lessees for the relevant period" (paragraph 23 of the second amended defence to the second further amended counterclaim). The duty to mitigate any damages in relation to the rental would, therefore, end on the date the lease was scheduled to expire on 30 November 2012, because BRL would have had no further obligations under the lease after this date.

[44] It stands to reason then that any request for information concerning what the NIF did with the property after 30 November 2012 is not necessary to fairly dispose of the counterclaim as it relates to the assertion in its defence to the counterclaim that the NIF had failed to mitigate its losses as it relates to the counterclaim for rental.

[45] There is also the counterclaim for liquidated damages arising from BRL's alleged failure to discharge its obligations under the covenants to maintain and repair the property, furniture and fixtures. The specific sum of $23,410,426.00 is claimed for maintenance and expressed to be "and continuing". It is incomprehensible that this claim was pleaded to be "and continuing", when no such continuing obligation would have existed on the part of BRL after the termination of the lease on 30 November 2012. The operative period for the claim relating to maintenance must be for the agreed term of the lease, which would mean an ending date of 30 November 2012. Any argument regarding mitigation of damages as it relates to maintenance of the property must relate to that period.

[46] The claim for the sum of $423,780,000.00 for costs of repairs and replacement is specifically pleaded and must be specifically proved as arising from the occupation of the property by BRL. No issue regarding mitigation of damages properly arises in relation to this aspect of the counterclaim and to be fair to the learned judge, he did not, at any time, expressly state otherwise. The authorities have established that the normal measure of damages for breach of the covenant to repair at common law is the cost of the repairs and the person who has caused the damage is not the less liable because the damage is made good by third parties. See McGregor on Damages, Seventeenth Edition, at paragraph 7-148.

[47] In **Joyner v Weeks** [1891] 2 QB 31 at 33-34, Wright J explained the relevant principles in this way:

> "Many cases may be put in which it is plainly immaterial that at the commencement of an action for a breach of contract the plaintiff is in fact no worse off than he would have been if the contract had been performed. ...The person whose breach of contract has caused damage is not the less liable because the damage has been made good, or its effect compensated by an extraneous event of such a kind that if it had operated the other way it would not have increased his legal liability. Nor does it seem to us that the relation between the plaintiff and the defendant is directly, if at all, affected by the terms of an agreement made by the plaintiff with a third person before the expiration of the defendant's term. That agreement might be rescinded, or might never be performed. When it was made the parties to it could not foresee, and did not contract on the basis, that there would at the end of the defendant's term be any breach of the contract to deliver up in repair. ...[A]t the moment of the termination of the defendant's tenancy, and before the new agreement was performed, a cause of action vested in the plaintiff against the defendant, and this could not be taken away or affected by the subsequent res inter alios acta."

[48] The cause of action for breach of the covenant to repair would have vested in the NIF upon BRL delivering up possession of the property and before any new agreement with a third party for lease of the property. The NIF's position with a viable cause of action for breach of covenant to repair would not be affected by any subsequent agreement between the NIF with third parties who occupied the property after BRL gave up possession. An order for information to be given, regarding the occupation of the property for the period 1 December 2012 to 1 May 2013, cannot properly apply to the counterclaim for costs of repairs and replacement on the basis that it is relevant to the issue of mitigation of damages.

[49] The contention of the Attorney General that the relevant period for mitigation of damages cannot go beyond 30 November 2012, on any account, is therefore correct.

[50] In so far as information pertinent to the occupation of the property during the relevant period is concerned (that is between 1 May 2011 and 30 November 2012), counsel for the Attorney General have indicated that the defence had already stated the periods during which the hotel was occupied in response to the request for information made in February 2014.

[51] Given the operative period for the purpose of assessment of damages on the counterclaim, it is not at all discernible from the learned judge's reasoning what applicable legal principle led him to the conclusion that the information requested, which extended from 1 December 2012 to May 2013, is necessary to fairly dispose of the issue of mitigation of damages on the counterclaim.

[52] I would, therefore, hold that the learned judge erred in concluding that the information requested as to the occupation of the premises, beyond 30 November 2012, was necessary for the fair disposal of the issue regarding mitigation of damages on the counterclaim.

(ii) *Relevance of the information regarding the standard at which the property was to be improved and maintained*

[53] The learned judge concluded at paragraph [15] of the judgment that the terms under which the premises were occupied, after the expiry of the lease, '***may*** ' go to show whether the hotel was at the required standard up to the date the lease was to have expired, if they involve bringing the hotel to a 'particular' standard.

[54] The learned judge's reasoning, is, with all due respect, insupportable in fact and law. From a close examination of the background of BRL's averments of the parties' dealings, it does appear on BRL's case, that the critical times for the crystallisation of the alleged obligation on the NIF (as the successor lessor), would have been prior to the execution of the lease agreement in 1997 (based on the agreement with Braco Resorts, its predecessor-in-title) and/or at the time the NIF agreed to purchase the hotel in 2000. The material background facts for the resolution of the question as to the existence of a contractual obligation on the NIF, to improve and maintain the hotel at the standard alleged, would have been those existing at the time the original parties were negotiating the lease in 1997 and at the time the NIF was negotiating the purchase of the hotel. All this would have been before April 2011, when BRL delivered up possession.

[55] The question for the court to resolve at trial is not whether BRL expected that the NIF would have done the improvements and modifications to operate the hotel at the standard it required but rather whether there was a contractual duty or obligation on the part of the NIF to do so, which arose from an oral collateral agreement or from the express or implied terms of the written lease agreement.

[56] The resolution of the issue, regarding the existence of this alleged oral collateral agreement, will depend on the credibility of the parties as to the circumstances surrounding their discussions and negotiations at the material times. At any rate, the material times would have been earlier than April 2011, when the property was vacated by BRL.

[57] Further, the averment in the alternative that an express, implied or fundamental term establishing such an obligation on the NIF, arises on the terms of the written lease agreement, would necessitate construction of the written agreement, itself. The construction of the terms of the written agreement, while not solely dependent on the words used in it, would have to be approached objectively. That would necessitate an examination of the 'matrix of facts' that existed at the time the parties were negotiating or entering into the contract. This would be in order to see whether there was a common intention that the NIF would have assumed the obligation alleged by BRL. The authorities are clear that the relevant consideration is the meaning that a reasonable person, with knowledge of all the background facts that were reasonably available to the parties at the time of the negotiations, would ascribe to the words used in the written document. See Chitty on Contract 30th edition, paragraphs 12-042 and 12-043, and **Investors Compensation Scheme v West Bromwich Building Society** [1997] UKHL 98 (relied on by the Attorney General on grounds of appeal c and d).

[58] Accordingly, it is not open to BRL to rely on the nature and terms of the occupation of the hotel, following the termination of the lease agreement, to prove that there was an agreement that the property was to be maintained at the standard it alleges. Once the focus of the court's enquiry is the contracting parties' intention at the time of entering into the alleged oral collateral agreement or the written contract, the subsequent conduct of the parties, and especially in contractual arrangements with unconnected third parties after the termination of the lease, would be irrelevant to that enquiry.

[59] The learned judge has not shown in his reasoning that there is a nexus between the NIF's dealing with the property after the lease had expired and the prior negotiations and discussions relating to the execution of the lease agreement in 1997 and the purchase of the property by the NIF in 2000. The existence of such a nexus would be necessary for establishing the relevance to the claim of the information requested. Unfortunately, this nexus has not been shown to exist.

[60] The fact that the learned judge cannot put it any higher than that the information requested "**may**" go to show whether the hotel was at the required standard before the expiration of the lease serves to indicate that the requisite necessity for the information is not established. The learned judge was to have been satisfied that the order for that information, in so far as it relates to the period after the expiration of the lease, "**is necessary to fairly dispose**" of the issue in the proceedings that he has identified. He has not demonstrated that necessity on his reasoning and it is not, at all, evident on an objective consideration of the case.

[61] Any information requested about the occupancy of the hotel and the NIF's dealings with the property, following the end of the contract between it and BRL, on 30 November 2012, is not relevant to the issue of the alleged obligations assumed by the NIF for the maintenance of the property at the particular standard. For that reason, the information cannot be necessary to fairly dispose of that issue on the claim as the learned judge concluded.

[62] For completeness, it is noted that the learned judge, quite fittingly, made no finding that the information was necessary to save costs. It means that the alternative legal basis, on which the court could properly have compelled the Attorney General to respond to the information, was also not made out.

[63] I conclude that the prerequisites under rule 34.2(2) of the CPR for the respondents to secure an order in the terms of paragraph 2a. of the learned judge's order, to compel the NIF to provide the information requested for the period, 7 February 2012 to 31 May 2013, were not satisfied. The order has gone beyond that which is reasonably required for the respondents to prepare and deploy their claims and to respond to the counterclaim. Accordingly, there is no justification for the learned judge's order compelling the Attorney General to provide this information to the respondents for a period that extended beyond 30 November 2012. There is merit in grounds of appeal a and b; they succeed.

(ii) <u>Grounds of appeal c. and d. (challenging paragraphs 2g. and 2h. of the learned judge's order</u>

> "*g. State the total sums, if any, expended since 30th April 2011 and by whom to make improvements and modifications to the hotel premises, and the material terms of all agreements pursuant to which any such improvements and modifications to the premises were carried out;*
>
> *h."State the nature and extent of all such improvements and modifications to the hotel premises and the period over which the same were carried out; ..."*

[64] In granting the order that the Attorney General should provide the above information, the learned judge noted at paragraph [17] of the judgment that the

Attorney General had said that the request for information is specifically related to paragraph 41 of the counterclaim, which relates to the rental claim. He, however, noted that the respondents had stated that they did not intend to so limit the application and requested an amendment for it to relate to "the claim generally". He granted that amendment for the reference to paragraph 41 of the counterclaim to be deleted. It is taken to mean then that the information is required for matters pertaining to the "claim generally". Out of an abundance of caution, I have treated this as including the counterclaim also.

[65] The notation by the learned judge at paragraph [18] of the judgment, that "[BRL] says that the information requested is relevant to assist in the determination of whether there was a breach of the collateral agreement", is helpful in identifying, at least one specific issue on the claim to which the information is said by the learned judge to be relevant.

[66] The learned judge then proceeded to opine:

> "[18] ...I do believe that the information and documents requested are necessary in order to dispose fairly of the claim and save costs at the trial. Third parties may have entered into contracts with the [NIF] in which the [NIF] agreed to improve upon the property. The nature and extent of such improvements or modifications may indicate whether the hotel was or had been brought to the standard which [BRL] alleges it ought to have been."

[67] The Attorney General's challenge to this aspect of the learned judge's decision is that the request for information was outside the scope of the issues between the parties. Counsel argued that the request for this information "casts a wide net instead

of being strictly confined to matters which are reasonably necessary and proportionate to enable the [r]espondents to prepare their case or to understand the case [that] has to be met".

[68] In seeking to illustrate the merit in its arguments, counsel drew on authorities regarding the construction of a written contract, including the well-known statements of law of Lord Hoffmann in **Investors Compensation Scheme v West Bromwich Building Society** as well as of the learned authors of Chitty on Contracts, volume 1, paragraphs 12-042 to 12-043, which have already been referred to above. Counsel argued that if from the document itself and the admissible background, the intention of the parties can reasonably be discerned, then the court will give effect to that intention. They submitted that the reliance on subsequent conduct is discouraged, when the focus of the court's inquiry is the parties' intention at the time of the contract.

[69] Counsel referenced the case of **James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd** [1970] AC 583 to make the point that one ought not to use, as an aid to construction of a written contract, anything that the parties said or did after it was made. Counsel noted that, barring certain situations, which are recognised exceptions, subsequent actions are inadmissible to interpret a written agreement. None of those exceptions, they contended, arise in this case. Therefore, the general rule would apply to render inadmissible, any evidence of what the NIF did in contractual agreements with third parties after the termination of the lease.

[70] The respondents have found it sufficient to rely on the reasons given by the learned judge for granting the order. Therefore, they have not provided this court with any law, pointing in a contrary direction, from that relied on by the Attorney General. The question, therefore, is whether I accept the learned judge's reasoning, or that of the Attorney General, on this issue under review. I find the submissions of counsel for the Attorney General to be well-grounded in law and there is nothing on the learned judge's explanation for granting the orders he did, which has served to dilute the legal accuracy and persuasiveness of those submissions.

[71] The only information regarding sums expended in repairing or refurbishing the hotel after 30 April 2011 or 30 November 2012, that would be relevant and necessary, would be that which relates to the counterclaim for liquidated damages for the costs of repairs and maintenance, consequent on the alleged breach of the covenants to maintain and repair. The learned judge, however, did not use that aspect of the counterclaim as the basis for the orders he made. He explicitly tied the request for the information to the issue regarding the standard at which the hotel was to be maintained, which is alleged to have arisen on the alleged collateral agreement and the written contract.

[72] Therefore, it is unfathomable how any subsequent and unrelated undertakings or contractual arrangements by the NIF with third parties for improvements or modifications to the property, could be used as an aid to interpret the written contract or to establish the existence of an oral collateral contract entered into by the parties prior to the execution of the written agreement. It is equally unfathomable how it can

be said that information as to the NIF's undertaking and expenditure in modifying or improving the property, under contractual arrangements with unrelated third parties, is relevant to show whether or not the property was at the prevailing SuperClubs/ Grand Lido/ Lido standards before the lease had expired.

[73] As counsel for the Attorney General pointed out, the subsequent contract between the NIF and third parties that led to improvements and modifications to the property, after BRL vacated or after termination of the lease, would be underpinned by commercial considerations and circumstances peculiar to those parties. Those considerations have not been alleged to be connected in any way to the operational standards required by BRL.

[74] I accept, on the basis of the applicable law, that the court, in order to determine what the agreement was between the NIF and the respondents, would not be entitled to broadly examine all the dealings of the NIF with the property, following BRL's departure. I share the views expressed by Viscount Dilhorne, in **James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd**, that one cannot "properly have regard to the parties' conduct after the contract has been entered into when considering whether an inference can be drawn as to their intention when they entered into the contract, though subsequent conduct by one party may give rise to an estoppel". It is the parties' conduct at the time of entry into the contract that would be the more relevant consideration and to which the court should have regard.

[75] I conclude that the information ordered to be provided under paragraphs 2g. and 2h. of the order of the learned judge, is not required for disposing fairly of the claim, on the basis found by the learned judge, nor is it required for saving costs in the proceedings. The learned judge, therefore, erred in making those orders in the terms and for the reasons he did. Grounds of appeal c. and d. also succeed.

(iii) Grounds of appeal e. and f. (challenging paragraphs 2b. to 2f. of the learned judge's order

> *"b. State whether since 30th April 2011 there has been any expressions of interest in respect of the hotel including any offers to manage, lease or purchase the hotel premises, and if so please state the material terms thereof;*
>
> *c. State whether the [Attorney General] or the registered proprietor of the hotel including (the NIF) has since the 30th April 2011 entered into any agreement(s) for [sic] in relation to the possible sale or for the sale, management or lease of the hotel premises;*
>
> *d. If the answer to (c) is in the affirmative, state the material terms of all such agreement(s), and when any such sale was completed or is scheduled to be completed, as the case may be.*
>
> *e. State the total sums, if any, expended since 30th April 2011 and by whom in repairing or refurbishing the hotel and the material terms of all agreements pursuant to which any such repairs or refurbishing works were carried out;*
>
> *f. State the nature and extent of all such repairs or refurbishing works, and the period over which the same were carried out;..."*

[76] The learned judge found, to the satisfaction of the respondents, that the information requested in orders 2b. To 2f., "...relates to and is necessary to resolve the issue of mitigation on the counterclaim" and that, "[t]he extent of refurbishing required

will also go to the issue of whether the hotel had been maintained to the standard [BRL] says it ought to have been" (see paragraph [20] of the judgment).

[77] The contention of the Attorney General that the learned judge erred in seeking to compel the provision of this information at orders 2b. to 2f., in the terms he did is, once again, accepted. For information to be necessary for the fair disposal of the claim, it must first be relevant. Relevance is the test for not only admissibility but necessity. In so far as it relates to the finding that the information is relevant to the issue of mitigation of damages, I cannot accept that without modification. The information which the learned judge seeks to compel the Attorney General to provide is stated in wide terms. The order encompasses matters that are outside the period relevant to the determination of the counterclaim on which the issue of mitigation of damages would arise. Each aspect of the order will now be examined in turn.

(i) *Orders 2b., 2c. and 2d. – (expression of interest in the hotel for lease, sale or management)*

[78] As already posited in treating with the requested information in order 2a., any period to be taken into account, concerning the counterclaim involving outstanding rental, should end on 30 November 2012. It follows, therefore, that any matter going to the issue of the duty to mitigate, regarding rental and the unexpired portion of the lease, must also be confined to that operative period.

[79] While information as to whether there was any expression of interest to lease or manage the hotel after 30 April 2011 and up to 30 November 2012 is, in itself, unobjectionable, the Attorney General states that information about the periods during

which the hotel was occupied had already been provided upon the request for information. This is not refuted. It is fair to say then, that information as to whether and on what terms the hotel was occupied up to 30 November 2012, especially the rental at which it was leased, cannot be said to be irrelevant. However, the learned judge's order went outside that relevant zone and is, therefore, not confined to that which is reasonably and proportionately required for the resolution of the dispute between the parties.

[80] It is accepted, as contended by the Attorney General, that information as to the sale or purchase of the hotel would not be necessary to fairly dispose of the counterclaim on the issue of mitigation of damages relating to the lease of the property. This is, particularly so, in circumstances where the counterclaim is for unpaid rental and damages for premature termination of the fixed-term lease. The claim for damages is not in relation to an allegation of breach of an agreement for sale of land. The duty to mitigate imposed by law is not to take any or all steps to minimize one's losses but rather to take reasonable steps to do so. To require a lessor to sell his property because of a breach by the lessee in the payment of rental or due to premature termination of the lease may, arguably, not be reasonable and proportionate.

[81] Furthermore, and even more importantly, information as to contract for sale or interest in sale of the property is irrelevant in the light of the respondents' pleading regarding failure to mitigate at paragraph 23 of its further amended defence to the counterclaim. The pleading is restricted to matters regarding the lease of the property. BRL is bound by those pleadings. Therefore, in my view, the issue of the sale of the

property, which does not arise for consideration on the pleadings, ought not to be raised as a basis for requesting information from the Attorney General.

[82] Information in respect of the sale of the property falls outside the ambit of the case for determination by the court, and as such, is not necessary to fairly resolve the issue of mitigation of damages (or any other issue in the case). The request for such information ought not to have been sanctioned by the learned judge.

[83] The information that would assist the court in fairly dealing with the issue of mitigation of damages must relate to expressions of interest or agreement in respect of any offers or contracts to lease or manage the property between 1 May 2011 and 30 November 2012. Therefore, information regarding those matters for any period beyond 30 November 2012 is not necessary for a fair disposal of the issue of mitigation of damages.

[84] The learned judge would have also erred in stating that the information would have been relevant to the question of whether the hotel had been maintained to the standard BRL says it ought to have been. The critical questions are, firstly, whether there was a collateral agreement that imposed that obligation on the NIF; or secondly, whether there was an express, implied or fundamental term of the lease agreement, which imposed such an obligation on the NIF. Expression of interests by third parties in the property or arrangements with third parties for the lease, management or sale of the property, after BRL delivered up possession, cannot assist with those questions for reasons that have already been discussed.

(ii) *Orders 2e. and 2f. (expenditure on repairs and refurbishing works on the hotel)*

[85] The next question for consideration is what is the relevance and importance of information regarding repairs and refurbishing of the hotel after BRL gave up possession in April 2011? In my view, any information regarding repairs and refurbishing works on the property, after BRL vacated the premises on 30 April 2011, in order to be relevant, must relate to the alleged breach by BRL of the covenant to maintain and repair in the lease agreement. The learned judge, however, has not cited this aspect of the counterclaim as his reason for his orders at 2e. and 2f. Instead, he found that it was relevant to the issue of mitigation of damages and the issue regarding the standard of maintenance of the hotel. I have already discussed the issue of the duty of mitigation as it relates to the breach of covenant to repair in paragraphs [46] to [48] above.

[86] Further, the NIF has alleged that it had expended a specific sum to remedy alleged breaches by BRL under the covenant to repair. This is pleaded as special damages, which must not only be specifically pleaded but also specifically proved. Therefore, the Attorney General is obliged to provide information regarding any expenditure made by the NIF, which is connected to the counterclaim for repairs and replacement costs. This could properly be done as part of its duty of standard disclosure. The Attorney General is required by law to serve all documents on which it seeks to rely to prove the special damages being claimed. Therefore, the respondents are not placed in any danger, as it relates to the preparation of their case, prior to an order for standard disclosure. If following standard disclosure, certain information is not

provided for the respondents to properly prepare their case to meet the case being advanced by the Attorney General on this issue, then a request for further information would be appropriate. The Attorney General need not be compelled to provide the information at this stage of the proceedings.

[87] In **David John Hall v Sevalco Limited; William James Crompton v Sevalco Limited** (1996) the Times, 27 March 1996, Sir Thomas Bingham MR, in speaking of the same test of necessity that was required with respect to interrogatories under the United Kingdom's Order 26, rule 1(1), the former equivalent rule, usefully opined:

> "The guiding principle in this field must be that laid down in RSC Order 26 r 1(1), **that interrogatories must be necessary either for disposing fairly of the cause or matter or for saving costs. Necessity is a stringent test**. **It cannot be necessary to interrogate to obtain information or admissions which are or are likely to be contained in pleadings, medical reports**, **discoverable documents or witness statements unless, exceptionally, a clear litigious purpose will be served by obtaining such information** or admissions on affidavit. As a general statement we would agree with the statement in the Guide to Commercial Court Practice,... that:
>
> > **'Suitable times to interrogate (if at all) will probably be after discovery and after exchange of witness statements**.'" (Emphasis supplied)

[88] In my view, the information relative to repairs and refurbishing of the hotel arising from the lease agreement between the parties is likely to be contained in discoverable documents or witness statements. Any repairs or refurbishing not

connected to that agreement between the parties is irrelevant and would fail the test of necessity. The order made by the learned judge, for the provision of information as to repairs and refurbishing works since 30 April 2011, is too wide and imprecise to be permitted to stand. The request for information must be concise. I see no exceptionally clear litigious purpose that would be served by the Attorney General being compelled, through the use of the Part 34 procedure, to provide the information requested at this stage of the proceedings.

[89] Furthermore, an irresistible argument advanced by counsel for the Attorney General is that the learned judge would have erred in finding that the information as to the nature and extent of the repairs and refurbishing works carried out by the NIF, after BRL gave up possession of the property, goes to the issue of whether the hotel had been maintained to the SuperClubs/Grand Lido/Lido standard. This finding of the learned judge cannot be endorsed in the absence of evidence that the "SuperClubs/Grand Lido/Lido standard" was, at the time, an objective standard that was universally applicable to hotels that are not of the SuperClubs/Grand Lido/Lido brand.

[90] The third parties that would have entered into agreement with the NIF, in the period following the exit of BRL, are not shown to be of the SuperClubs/Grand Lido/ Lido brand. Therefore, refurbishing the hotel in accordance with or further to arrangements with those entities cannot be taken as evidence of the alleged collateral agreement or the terms of the written contract between the parties that the NIF had an obligation to maintain the property at the standard claimed by the respondents. As already indicated, this subsequent conduct on the part of the NIF, in its relationship

with third parties, can shed no light on what was intended between the parties to the lease agreement at the time it was entered into or at the time the property was sold to the NIF.

[91] The information concerning subsequent repairs and refurbishing of the hotel after 30 April 2011, is not necessary to fairly dispose of the issue on the claim of whether there was a contractual obligation on the NIF to maintain the property at the prevailing standard alleged by the respondents. It is also not necessary for saving costs.

[92] In Blackstone's Civil Practice 2004, at paragraph 30.1, it is stated:

> "The doctrine of proportionality and the more 'utilitarian' approach to statements of case generally, **should mean that requests for information should be used with some caution. Although they can be used to advantage in some claims, considerable care must be taken to selecting the areas to be investigated by a request, and in formulating the questions to be put. Experience has shown that the CPR have been effective in severely curtailing, if not extinguishing altogether, the use of the request for further information for tactical purposes, and request for information appear to be employed much more rarely than the old request for further and better particulars.**" (Emphasis supplied)

[93] The orders made by the learned judge in paragraphs 2b., 2c., 2d., 2e. and 2f. are too broad and encompassing information that has no relevance to the issues to be determined at trial. The orders are not in keeping with the requirements of the relevant law pertaining to the use of the Part 34 procedure. Therefore, the Attorney General succeeds on grounds of appeal e. and f.

C. Orders for specific disclosure

(i) Grounds of appeal g. (challenging paragraphs 2i.(i) and (iii) of the learned judge's orders):

> *"(i) All leases, operating or management agreements with Melia Hotels International SA and with such other entity or entities trading as Melia Braco in respect of the hotel;*
>
> *(ii) ... ;*
>
> *(iii) All documents including memoranda and all minutes of all meetings of board of directors of the NIF] and all committees or subcommittees thereof reflecting or containing any plans for making renovation, improvement or upgrading to the premises upon or after the Lessor took possession thereof after the Lessee vacated the premises."*

[94] It was contended on behalf of the Attorney General before the learned judge, that those documents ought not to be disclosed as they relate to documents which concern the period after BRL had vacated the property, and so, will have no bearing on the issues in dispute between the parties. The learned judge disagreed with those submissions. In his view, the documents are directly relevant to the issue of mitigation of damages and to the issue of the agreed standard (if any) at which the hotel was to be maintained (paragraph [25] of his judgment).

[95] The learned judge made a bald assertion as to the relevance of the documents to the matters he identified but failed to demonstrate, by reference to the meaning of the term "directly relevant" as provided by the CPR, how he arrived at his conclusion that the documents in question should be specifically disclosed. The respondents have failed to assist this court in this regard.

(i) *Documents and information relating to Melia Hotel International/ Melia Braco ("the Melia entities") (order 2i. (i))*

[96] There was no indication on any statement of case or affidavit in support of the application for disclosure that the Attorney General, from whom those specific documents and information are being sought, intends to rely on them in proof of damages or any other issue on the counterclaim. Neither is it shown that there is an intention on the part of the Attorney General to rely on them to disprove the respondents' case. In such circumstances, the documents would not be directly relevant within the meaning of rule 28.1(4)(a).

[97] Similarly, there is nothing on the parties statements of case, in the evidence filed in support of the application for specific disclosure or in any submissions made by the respondents that reveal that the documents ordered to be disclosed tend to adversely affect the Attorney General's case on the issue of damages, given the operative period for the purpose of assessment. For that reason, the information and documents are not shown to be directly relevant under rule 28.1(4)(b).

[98] Also, there is nothing that definitively shows, directly or inferentially, that the information ordered to be disclosed '*tends to support*' the case of the respondents on the issue of damages, within the provisions of rule 28.1(4)(c).

[99] The learned judge erred in his conclusion that the documents pertaining to the Melia entities were directly relevant to the issue of mitigation of damages.

[100] The second limb of the learned judge's reason for granting disclosure is that the documents are directly relevant to "...the issue of the agreed standard (if any) at which the hotel was to be maintained". This finding of the learned judge is also problematic for the respondents' case on appeal, for the same reasons discussed above regarding the issue of mitigation of damages as well as the grounds of appeal relating to the request for information.

[101] At the risk of being repetitive, it is considered necessary to reiterate within this context that the operations of the NIF in its arrangements with third parties after BRL vacated the property in 2011, or after the expiration of the lease in 2012, can have no bearing, whatsoever, on the question of the existence of the alleged collateral agreement. That agreement, it is alleged, would have been completed before the execution of the lease agreement in 1997, and accepted by the NIF at the time it was purchasing the hotel in 2000. Also, those post-contractual arrangements between the NIF and the Melia entities (unrelated third parties) cannot assist the question of whether there was an express or implied term of the written agreement as to the standard at which the property was to be maintained by the NIF.

[102] Again, in conducting an analysis of the learned judge's findings, within the ambit of rule 28.2, it cannot be properly concluded that the documents in relation to the Melia entities are directly relevant to the issue regarding the existence of an agreement to maintain the property at the specified standard required by BRL. The Attorney General is not relying on those documents to prove the NIF's case. It is hard to fathom on the pleadings or evidence presented by the respondents in support of their application, how

the contractual arrangements between the NIF and the Melia entities (in 2013 or so) would "**tend to**" adversely affect the Attorney General's case or would "**tend to support**" the respondents' case on this issue regarding the alleged obligation of the NIF to maintain the property at the standard alleged by the respondents. The direct relevance of the documents to the matters in dispute between the parties on the claim and counterclaim is not demonstrated by the learned judge in his analysis of the material before him and it has not been established on any material presented to this court by either party.

[103] The fact that the documents "may" be relevant, or merely "relate" to an issue in dispute is not sufficient to render them specifically disclosable within the ambit of the CPR; they must be 'directly relevant' as defined by the CPR. I endorse the view of the court as expressed by F Williams JA in **Miguel Gonzales and Suzette Saunders v Leroy Edwards** [2017] JMCA Civ 5 at paragraph [22], that:

> "[22] ... **[A] pre-requisite for disclosure is a finding that a document is, not just relevant in the usual layman's sense, but "directly relevant" within the meaning of the rule**. The rule uses the phrase "only if" in delimiting the matters to be considered in deciding whether a document satisfies the definition. This means that a finding that a document is directly relevant can only be made in the three circumstances outlined in the rule." (Emphasis supplied)

[104] I would also reiterate my reasoning in **Branch Developments Limited T/A Iberostar Rose Hall Beach Hotel v The Bank of Nova Scotia Jamaica Limited** [2014] JMSC Civ 003, that in the light of the absence of anything put forward by the respondents, or arising objectively on the facts of the case, to establish that the

documents required to be disclosed fall within rule 28.1(4) of the CPR, the learned judge would have had no legal basis to hold, as he did, that the documents in question are directly relevant to the issues he identified. He did not demonstrably determine whether they were directly relevant within the meaning of the relevant rule.

[105] Having reviewed the issues that arise for investigation on the claim and counterclaim, within the context of the law, I agree with the contention of the Attorney General that the documents ordered to be disclosed in paragraphs 2i.(i) are not directly relevant to the matters in dispute which are to be resolved at trial. The learned judge would have erred when he made the order for specific disclosure of documents pertaining to the Melia entities in paragraph 2i.(i).

(ii) *Documents/information of meetings of the NIF containing plans for the renovation, improvement or upgrading of the property (order 2i.(iii))*

[106] The order for specific disclosure of these documents and information is also assessed by reference to the provisions of rule 28.6 of the CPR. For the reasons detailed above, relative to the meaning of "directly relevant" for the purposes of the CPR (as well as for other reasons already discussed in treating with the grounds related to the request for information), I would accept the Attorney General's argument that the order for specific disclosure of these documents and information was too wide, thereby rendering it improper.

[107] The simple reason is that any plans for renovating, improving or upgrading the property by the NIF, after November 2012, would have fallen beyond the operative period for the assessment of damages. The NIF's dealing with the property that would be relevant to mitigation of damages, as it relates to the fixed term lease would be from 30 April 2011 to 30 November 2012.

[108] The documents and information sought on the application for specific disclosure relate to plans for the renovation or upgrading of the hotel after BRL delivered up possession. There is no expressed time limit. It is not readily apparent how such documents and information are directly relevant to the issue of mitigation of damages. Neither is it established how they are directly relevant to the claim of a collateral agreement entered into prior to the execution of the lease agreement. Likewise, improvement to the property, after the termination of the lease, cannot of itself or in any way prove the existence of the oral agreement alleged by the respondents to have been made in or around 1997, which they say binds the NIF. The learned judge has not demonstrated that the documents he ordered to be specifically disclosed are directly relevant as defined by the CPR and I have not found them to be so.

[109] Even if the documents were directly relevant within the legal sense of that term, that would not have been the end of the enquiry. The CPR makes it clear that a finding that documents are directly relevant does not end the enquiry as to whether an order for specific disclosure should be made. The matters stated in rule 28.7 must also be considered. Those matters involve a consideration of the benefits to be derived from disclosure. This rule embodies the concept of proportionality, which is comprised, in

part, in the overriding objective. There is no real benefit to be gained from the disclosure of these documents in respect of time, costs and resources.

[110] The specific disclosure of the documents and information that form the subject matter of order 2.i (iii) would not be proportionate and in keeping, generally, with the overriding objective. Accordingly, the application for specific disclosure ought to have been refused. There is merit in grounds of appeal g. and h.; they too succeed.

Order 1. of the learned judge's order

[111] For completeness, it should be noted that the Attorney General sought to challenge the permission granted by the learned judge to the respondents to further amend their notice of application upon the application filed on 11 November 2016. This is indicated under the heading, "The Details of the Order Appealed are..." In the section of the notice of appeal headed, "Orders Sought", it is stated that paragraph 1. of the order of the learned judge should also be set aside. No ground of appeal, however, was filed concerning this order and no arguments were advanced in relation to it. Therefore, it is treated as having not been pursued as part of the appeal. In the result, paragraph 1. of the learned judge's order stands.

The counter-notice of appeal

[112] The respondents' counter-notice of appeal is for the order of the learned judge to be affirmed on another ground, which is stated in this way:

> **"**The [Attorney General], in the affidavit of Audrey Deer-Williams filed in the Court below on 5th October 2016,

> contended that disclosure would be harmful to departmental communications. However, in the context of the new dispensation of transparency which has been provided for by the **Access to Information Act**, documents of this type have been rendered accessible to the public on a general basis so that such objections are clearly not sustainable."

[113] The Attorney General has objected to the counter-notice on two bases: irrelevance and that it is being raised for the first time on appeal, which ought not to be permitted. The Attorney General stands on good ground with this objection on both bases. There are thus compelling reasons for the dismissal of the counter-notice of appeal.

[114] The primary reason emanates from the provision of rule 1.16(1) of the Court of Appeal Rules ("the CAR"), which provides that an appeal to this court is a re-hearing. This means, in effect, that unless there are compelling reasons, this court must make its decision on matters that were placed and argued before the court below. I cannot improve on the clarity of the simple statement of F Williams JA in **Humphrey Lee McPherson v The General Legal Council** [2020] JMCA Civ 14, at paragraph [29], regarding the approach of the court on this issue of new matters being raised on appeal for the first time. He stated that, "it has long been recognized that an appellate court frowns upon the raising of new arguments on appeal that were not raised below".

[115] There is nothing on the record that shows that the respondents had put forward any arguments on the basis of the Access to Information Act ("the Act") in the court below. Indeed, the respondents did not raise the Act as a ground on which the application for disclosure was based. The application was made pursuant to the CPR

only. Consequently, there was no argument before the learned judge, regarding the Act, so that issues relating to it could have been properly ventilated and a decision taken in relation to it. This is regardless of the fact that the point involves a question of law only.

[116] It has not escaped attention that the learned judge has made some reference to the existence of the Act, at paragraph [31] of the judgment. According to him, "... in an era where legislation provides for access to information and where 'transparency' is in vogue disclosure could not possibly preclude 'free and candid discussions'". He evidently made reference to "access to information legislation," without any serious thought having been given, or any clear pronouncements made, as to the relevance of the Act in the context of the proceedings before him, which was based on the CPR.

[117] Indeed, the respondents have not pointed to any particular provision in the Act on which they are relying to ground their argument on the counter-notice of appeal. They appear to be suggesting that the mere existence of the Act is sufficient to override, supplement or complement the provisions of the CPR relative to specific disclosure, thereby rendering the Act an alternative gateway to the disclosure of documents in civil proceedings. The question as to whether the Act should be treated as having that effect on the CPR's provision for specific disclosure is a totally new issue, which ought to have been raised and ventilated in the court below.

[118] In the case of **Nicholas Jones v MBNA International Bank** [2000] EWCA Civ 514, which is relied on by the Attorney General, May LJ stated at paragraph 52 of the judgment:

> "Civil trials are conducted on the basis that the court decides the factual and **legal issues** which the parties bring before the court. Normally each party should bring before the court the whole relevant case that he wishes to advance. He may choose to confine his claim or defence to some only of the theoretical ways in which the case might be put. If he does so, the court will decide the issues which are raised and normally will not decide issues which are not raised. Normally a party cannot raise in subsequent proceedings claims or issues which could and should have been raised in the first proceedings. Equally, a party cannot, in my judgment, normally seek to appeal a trial judge's decision on the basis that a claim, which could have been brought before the trial judge, but was not, would have succeeded if it had been so brought. The justice of this as a general principle is, in my view, obvious. It is not merely a matter of efficiency, expediency and cost, but of substantial justice." (Emphasis added)

[119] This principle, which is one of substantial justice, as May LJ stated, was earlier given expression by Lord Herschell in **The Tasmania** (1890) 15 App Cas 223. His Lordship made it clear that a point not taken at first instance, and being advanced for the first time in the appellate court, must be viewed with great scrutiny. He opined at at page 225 of the judgment, in so far as is immediately relevant:

> "It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial;..."

[120] Even if the affidavit of Audrey Deer-Williams and the Act could be said to be relevant to the issues on appeal, I would have dismissed the counter-notice of appeal, in any event. This would be on the basis that the potential interaction (if any) between the Act and Part 28 of the CPR, would have had to be specifically raised and considered before the Act could properly be accepted by the court as an alternative gateway for the disclosure of documents in civil proceedings. Counsel for the Attorney General, in oral arguments, sought to urge on the court the inapplicability of the Act to the circumstances of the case. They contended that nowhere in the Act is it contemplated that the Act would be an avenue for disclosure in civil litigation before the court. This is, indeed, a very valid point that was not addressed by the respondents in advancing the ground in their counter-notice of appeal.

[121] The need for a proper and more detailed investigation into the question of the interplay (if any at all) between the Act and Part 28 of the CPR becomes even clearer in the light of the relatively recent decision of the Privy Council in **Bergan v Evans (St Christopher and Nevis)** [2019] UKPC 33. This case has fortified my view that the relevance of the Act to disclosure in civil proceedings under the CPR is too important an issue to be raised for the first time on appeal and without full arguments being deployed in relation to it, especially on the part of the respondents who have raised it. Reference is, therefore, made to the case for the limited purpose of demonstrating the basis for the view that the question raised on the counter-notice of appeal is not a proper one to be addressed by this court.

[122] In **Bergan v Evans**, the Privy Council had to examine, among other things, the interplay between section 163 of the Evidence Act and Part 32 of the CPR (St Kitts and Nevis) as it relates to the admissibility of expert medical evidence in civil proceedings. The argument of the respondent (the claimant) in that case was that he did not have to obtain the court's prior approval to rely on expert reports at trial, pursuant to Part 32 of the CPR, because of the provision of section 163 of the Evidence Act that rendered the written medical reports admissible into evidence. The trial judge accepted that position. However, in rejecting that viewpoint, their Lordships opined:

> "39. The Board respectfully disagrees with that analysis. Section 163 is about the admissibility, or otherwise, of documentary medical evidence, as opposed to the traditional requirement to adduce oral testimony. That is a cold question of law about admissibility. **It has nothing at all to do with the quite <u>separate case management question as to what evidence a party is to be permitted to adduce (whether in oral or documentary form) by way of expert evidence, within the general duty of the court and the parties to limit expert evidence to that which is reasonably required to resolve the proceedings justly, under rule 32.2.</u> That may be described as a deployment question rather than a matter of admissibility**. The two concepts are entirely distinct, and the provision for admissibility of documentary medical evidence in section 163 does not override the requirement of permission for its deployment under rule 32.6 because the two provisions are not in any way inconsistent with each other.
>
> 40. ...
>
> 41. ...
>
> 42. **To treat section 163 as a separate gateway to the deployment of medical expert evidence in civil proceedings (rather than merely rendering documentary medical evidence admissible) would be**

> **in the Board's view to drive a coach and horses through the beneficial effect of the introduction of court case management control of expert evidence under rule 32.6, when there is nothing in the language of section 163 to suggest that this is what was intended**.
>
> 43. **If section 163 were to constitute a by-pass around rule 32.6, then any party could (if the other party failed to object in time) use it as a means for the deployment of any amount of medical expert evidence from any number of registered practitioners, without the court being able to do anything about it apart from require the persons tendering the documents to attend court and give evidence. This would, in particular, enable parties, by non-objection to each other's tendered documents under section 163(2)(c), to burden the court and the proceedings, at their own whim, with a riot of disproportionate expert evidence, leaving the court powerless to do anything about it. Yet it is central to the new civil procedural culture introduced by the CPR that the parties are no longer at liberty to conduct their civil disputes in a disproportionate or inappropriate manner, because of the court's power and duty actively to case manage the proceedings in furtherance of the overriding objective**." (Emphasis supplied)

[123] The attempt now being made by the respondents to use the Act as a separate gateway to rule 28.6 of the CPR or to bypass the rule is no different from the attempted use of the Evidence Act to circumvent the procedural requirements of the CPR in **Bergan v Evans**. The question of whether the Act should be used to override the case management powers of the court to restrict an order for specific disclosure to the circumstances delineated by Part 28 of the CPR is serious and cannot be properly examined in this manner, as is contemplated by the respondents.

[124] I conclude, in all the circumstances that the issue raised in the counter-notice of appeal ought not to be entertained as another basis on which to affirm the decision of the learned judge. For all the foregoing reasons, I would dismiss the counter-notice of appeal.

Disposal of the appeal

[125] The Attorney General, in my view, succeeds on the appeal. The only information ordered by the learned judge to be provided, which would be relevant and reasonably required for a fair disposal of the issue of mitigation of damages on the counterclaim, would be that which relates to (a) the material terms on which the premises were occupied; and (b) any expressions of interest, offers or agreement to lease or manage the hotel. The relevant period to which that information should relate would be between 1 May 2011 and 30 November 2012. The periods specified in the learned judge's orders, are too wide and in some instances, open-ended, to be accepted as having been properly made.

[126] In sum, the impugned orders under paragraph 2. of the learned judge's orders all extend to irrelevant matters that are not required to fairly dispose of the issues in dispute between the parties or for saving costs. Therefore, they cannot be said to be within the permissible bounds of the applicable law. For these reasons, the orders made at 2a. to 2h. and 2i. (i) and (iii) cannot, in my view, be allowed to stand.

[127] I would, therefore, allow the appeal and dismiss the counter-notice of appeal.

[128] I would set aside the impugned orders made by the learned judge at 2a. to 2h. and 2i.(i) and (iii) and in lieu thereof, I would propose that only these orders are made under paragraph 2:

> a. State the material terms under which the premises were occupied for the period 7 February 2012 to 30 November 2012.
>
> b. State whether between 1 May 2011 and 30 November 2012, there has been any expressions of interest, offers or agreements in respect of leasing or managing the hotel premises and if so, please state the material terms thereof.
>
> c. State whether the Commissioner of Lands, acting on behalf of the NIF, had entered into any agreement(s) for the lease or management of the hotel premises for the period 1 May 2011 to 30 November 2012.

[129] The application for request for information and specific disclosure in respect of the remaining information and documents enumerated at paragraphs 2a. to 2h. and 2i. (i) and (iii) is refused.

[130] As it relates to the costs of the appeal and counter-notice of appeal, the court must order the unsuccessful party to pay the successful party's costs in accordance with rule 64.6, unless circumstances dictate that a different order be made. This would mean that, *prima facie*, the Attorney General should be awarded the costs of the appeal and counter-notice of appeal.

[131] The Attorney-General has indicated that the costs order should be made against BRL only. There has been no submissions explaining the basis for this request by the Attorney General and there are no submissions in response from the respondents.

[132] In the circumstances, I would propose that this court invites written submissions from the parties on the issue of costs. The parties should file and serve written submissions on costs within 14 days of the date of this order. If they should fail to do so, then the order of the court on costs shall be, costs of the application in the court below and of the appeal and counter-notice of appeal to the Attorney General against BRL to be agreed or taxed.

[133] I close by saying, on behalf of the court, that the delay in the determination of this appeal is sincerely regretted. Unavoidably, it was caught in a queue of complex cases that occupied the court's attention for longer than was anticipated. We are, nevertheless, mindful that no apology will erase the inconvenience the delay has caused.

SINCLAIR-HAYNES JA

[134] I have read in draft the judgment of McDonald-Bishop JA and agree with her reasoning and conclusion. I have nothing to add.

F WILLIAMS JA

[135] I too have read in draft the judgment of McDonald-Bishop JA, I agree with her reasoning and conclusion and I have nothing useful to add.

MCDONALD-BISHOP JA

ORDER

1. The appeal is allowed.

2. The counter-notice of appeal is dismissed.

3. Orders 2a. to 2h. and 2i.(i) and (iii) of the order of Batts J made on 17 February 2017, are set aside. In lieu of orders 2a., 2b. and 2c. of the said order, these orders are made under paragraph 2 as the orders that ought properly to have been made by the learned judge:

    a. State the material terms under which the hotel premises were occupied for the period 7 February 2012 to 30 November 2012.

    b. State whether between 1 May 2011 and 30 November 2012, there has been any expressions of interest or offers in respect of leasing or managing the hotel premises and if so, please state the material terms thereof.

    c. State whether the Commissioner of Lands, acting on behalf of the NIF, had entered into any agreement(s) for the lease or management of the hotel premises for the period 1 May 2011 to 30 November 2012 and if so, state the material terms thereof.

4. The application for request for information and specific disclosure in respect of the remaining information and documents enumerated at paragraphs 2a. to 2h. and 2i. (i) and (iii) is refused.

5. The parties are to file and serve written submissions on the issue of costs within 14 days of the date of this order, failing which, the order of the court on costs shall be as follows:

    Costs of the application in the court below and of the appeal and counter-notice of appeal to the Attorney General against BRL to be agreed or taxed.