[2017] JMCA Civ 25

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 99/2013

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA

BETWEEN	**GARFIELD SEGREE**	**APPELLANT**
AND	**JAMAICA WELLS AND SERVICES LIMITED**	**1st RESPONDENT**
AND	**NATIONAL IRRIGATION COMMISSION LIMITED**	**2nd RESPONDENT**

Miss Martina Edwards and Mrs Joan Thomas instructed by Shelards for the appellant

Robert Fletcher instructed by Douglas Thompson for the 1st respondent

Miss Cheryl-Lee A Bolton instructed by the Director of State Proceedings for the 2nd respondent

9, 10, 23 June 2015 and 31 July 2017

MORRISON JA

Introduction

[1] This is an appeal from a judgment of K Anderson J ('the judge'). By his judgment given on 18 October 2013[1], the judge dismissed the appellant's claim against the respondents for damages for negligence and/or breach of statutory duty. The judge

[1] [2013] JMSC Civ. 204

also awarded costs to the respondents to be agreed or taxed. The basis of the judge's decision was that the appellant had failed to lead sufficient evidence to make out his claim against the respondents; and, in any event, had also failed to prove the losses for which he claimed damages. The issues on this appeal are therefore whether the judge was right to find for the respondents ('the liability issue'); and, if he was not, what damages is the appellant entitled to recover as a consequence ('the damages issue').

[2] We heard argument from counsel on the liability issue on 9 June 2015. On 10 June 2015, we announced that (i) the appeal would be allowed and the judge's judgment would be set aside; and (ii) judgment should be entered for the appellant against the respondents, with damages to be assessed. In consultation with counsel, it was subsequently agreed that the parties would provide the court with written submissions on damages and that the court would assess the damages to be awarded to the appellant.

[3] On behalf of the court, I wish to apologise profusely to the parties for the delay in producing these judgments. For my part, I will attempt to give reasons for the court's decision on the liability issue, while my sister McDonald-Bishop JA will address the damages issue. As I understand it, McDonald-Bishop JA and I are in full agreement with each other, while Phillips JA agrees with both of us.

Background

[4] First, a word about the parties. The appellant ('Mr Segree') is a farmer and taxi operator. At the material time, the plot of land which he farmed, estimated by him to

be approximately 2.3 acres in size, was situated at New Forest in the parish of Manchester. The 1st respondent ('Jamaica Wells') carries on the business of drilling wells for water and holds itself out as a specialist in the well-drilling business. The 2nd respondent ('NIC') was at the material time the duly licensed Irrigation Authority for the purposes of the Irrigation Act ('the Act')[2]. Its core functions include delivering irrigation water to farm gates, maintaining irrigation infrastructure and developing new irrigation systems.

[5] Much of the factual background to the case is uncontroversial and the summary which follows is largely based on the witness statements furnished by Mr Segree[3], Mr Windward Lawrence[4], the Operations Manager of Jamaica Wells, Mr Milton Henry[5], the Director of Engineering and Technical Services at NIC, and Mr Sydney Beckford[6], a Consultant Hydrogeologist engaged by NIC.

[6] In October 2009, Mr Segree entered into a written contract with Couples Resorts, a hotel in Ocho Rios, St Ann, for the supply by him to the hotel of a variety of, as he put it, "high quality, fresh local produce" ('the Couples contract'). The first delivery in performance of this contract, which was for 12 months, was to commence in the week of 5 January 2010. Immediately upon the signing of the Couples contract, Mr Segree started to prepare his plant nurseries, in respect of the produce to be supplied to

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[2] See The Irrigation Authority (Licensing of the National Irrigation Commission Limited) Order, 2001, section 4(1)
[3] Filed 28 February 2013
[4] Filed 29 May 2013
[5] Filed 11 June 2013
[6] Filed 11 June 2013

Couples, as well as other produce for sale on the local market. Mr Segree's estimate was that he stood to earn a minimum of $300,000.00 per month from the Couples contract.

[7] By a contract dated 8 December 2008, NIC engaged the services of Jamaica Wells to undertake the construction of three wells on sites at Plumwood, Lane and New Forest in the parish of Manchester ('the well construction contract'). The scope of works also included yield-testing and disposal of test discharge from the said wells. This case is concerned with the well known as Lane Well, which was intended by NIC to supply irrigation water to farmers in the area.

[8] All matters relating to the drilling of the wells, inclusive of the method of drilling, location and dimensions, were determined by NIC, which also determined and approved the disposal of any test discharge. The well construction contract provided for (i) the appointment of a project manager by NIC, who would be responsible for supervising the execution of the works and administering the contract; and (ii) the drilling of the wells by Jamaica Wells under the supervision of an engineer/hydrogeologist appointed by NIC. The persons who were appointed by NIC to perform these functions were Mr Henry and Mr Beckford. For its part, Jamaica Wells was required to provide, in the joint names of itself and NIC, public liability insurance, from the start date of the contract to the end of the defects liability period.

[9] As between NIC and Jamaica Wells, the well construction contract allocated various risks ("Contracting Agency's Risks"/"Contractor's Risks") as follows:

Contracting Agency's Risks[7]:

"(a) The risk of personal injury, death, or loss of or damage to property (excluding the Works, Plant, Materials, and Equipment), which are due to

(i) use or occupation of the Site by the Works or for the purpose of the Works, which is the unavoidable result of the Works or

(ii) negligence, breach of statutory duty, or interference with any legal right by the Contracting Agency or by any person employed by or contracted to him except the Contractor.

(b) The risk of damage to the Works, Plant, Materials, and Equipment to the extent that it is due to a fault of the Contracting Agency or in the Contracting Agency's design, or due to war or radioactive contamination directly affecting the country where the Works are to be executed."

Contractor's risks[8]

"From the Starting Date until the Defects Correction Certificate has been issued, the risks of personal injury, death, and loss of or damage to property (including, without limitation, the Works, Plant, Materials, and Equipment) which are not Contracting Agency's risks are Contractor's risks."

[10] At some point in November 2009, while the well tests were being conducted, Mr Segree observed that representatives of Jamaica Wells and/or NIC had dug a trench on one side of the road next to his farm. The purpose of digging this trench, which terminated beside Mr Segree's farm, appeared to be to channel water from the test

[7] Clause 11.1
[8] Clause 12.1

which was to be conducted on the Lane Well, which was approximately 5.6 chains to the north of his farm. In answer to Mr Segree's enquiry, Mr Beckford assured him that, in the event of any water damage to the crops on his farm, he would be fully compensated. A few days later, after the well test had begun, the water was actually directed into a trench that was dug on Mr Segree's land. An issue in the case was whether or not this trench had been made without his permission, as Mr Segree contended.

[11] By Mr Segree's account, this overflow of water onto his land destroyed approximately 2,500 sweet pepper seedlings, 2,000 pak choi seedlings, 1,000 callaloo seedlings and a cabbage nursery of about 2,000 seeds. In addition, a bearing pumpkin garden and a melon garden were affected. Mr Segree's complaint to Mr Beckford was again met with the assurance that he should not worry, as "everything will be compensated"; and he was also given a similar assurance by Mr Henry.

[12] Mr Segree was one of four farmers in the area who complained of crop damage arising out of the well-testing exercise. Shortly afterwards, a representative of the Rural Agricultural Development Authority ('RADA'), acting on the instructions of Mr Beckford, carried out a valuation of the damage done to Mr Segree's crops as a consequence of the well tests. The RADA representative estimated Mr Segree's losses at $271,932.00. Mr Segree's evidence was that, while he was not satisfied that the RADA valuation took into account all of his losses, he nevertheless agreed to it on the basis that his claim would be dealt with expeditiously. Therefore, on or about 1 April 2010, Mr Segree

submitted a claim to NIC, expressly based on the RADA valuation, for $271,932.00, "for damages and lost [sic] of income sustain [sic] by pump test". The claim was in turn forwarded by NIC to Jamaica Wells for submission to its public liability insurers, but no settlement was forthcoming. As a result, Mr Segree claimed that he was unable to meet the requirements of the Couples contract and therefore lost the benefit of it.

Mr Segree goes to court

The pleadings

[13] By claim form filed on 9 February 2011, Mr Segree commenced action against Jamaica Wells and NIC, claiming damages for negligence and/or breach of statutory duty on the part of Jamaica Wells, acting as "servant/agent/employee" of NIC, and also on the part of both of them. In particulars of claim filed on the same day, Mr Segree set out "Particulars of negligence and breach of statutory duties and/or wrongful acts" in respect of both Jamaica Wells and NIC as follows:

> "i) Failing to carry out any or any site investigations to determine the proximity of the Claimant's farm in relation to the well test area and the likely damage(s) to be caused to the Claimant's farm from the testing;
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> ii) In the circumstances, failing to carry out any or any adequate site investigations;
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> iv) [sic] Failing to acquire any or any adequate geological data concerning the Claimant's farm and its proximity to the well testing area;
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> v) Failing at all material times to give sufficient notice and/ or accurate advice to the Claimant about the likely risks to his farm of the well test being conducted in the vicinity of the farm;

vi) Failing to give the Claimant an opportunity to reap this farm produce before conducting the well testing;

vii) In the premises, failing to exercise all reasonable skill, care and diligence in the discharge of their duties as public bodies."

[14] Summarising the claim, the particulars of claim concluded that Mr Segree had not only been deprived of the agreed compensation of $271,932.00, "but he has also been deprived of the benefits under the contract in which he had entered into with Couples Resort, in which he could have earned an estimated minimum of Three Hundred Thousand Dollars ($300,000.00) per month". Mr Segree accordingly claimed $3,600,000.00 for the loss of the value of the Couples contract for one year, loss of opportunity, loss of profits and interest at such rate and for such period as the court might think just.

[15] In its further amended defence, Jamaica Wells denied any liability to Mr Segree. Among other things, it pleaded the following:

"5. Save insofar as the first Defendant admits that acting as servant and/or agent of the second Defendant it conducted a well test in the vicinity of the Claimant's farm the first Defendant denies responsibility for any or any major damage done to the seedlings and produce that were on the Claimant's farm.

6. The first Defendant denies any negligence or breach of Statutory Duty in its conduct towards the Claimant; and denies the Particulars stated in paragraph 9 of the Particulars of Claim.

7. The first Defendant further states that it took all due care in relation to the works it performed and in fact had full

and detailed discussions with the Claimant and other land owners in the vicinity of the works and informed the Claimant of the nature and extent of the works thereby providing the Claimant with ample opportunity to safeguard anything that might have been susceptible to damage.

8. The first Defendant did exercise due and reasonable skill, care and diligence in the discharge of its duty and gave the Claimant every opportunity to safeguard his farm and provide [sic] Claimant with sufficient notice and full and accurate advice as to the operations of the first Defendant and of any risk that were likely to the Claimant's farm.

9. That the Claimant after having discussions with the first Defendant and being told the nature and impact of the work to be performed by the first Defendant agreed that the first Defendant could carry out the works without objection.

10. The first Defendant is under no duty to indemnify the Second Defendant and/or the Claimant against any loss of or damage to property in connection with the Contract which were due to or the responsibility of the Second Defendant under Clause 11.1 of the Contract of/for works made between the First Defendant and the Second Defendant dated 8th December, 2008 and the Second Defendant will rely on the said Contract for its full force and effect and attached hereto and marked JS1 is a copy of Clauses 10 - 12 of the said Contract.

11. The first Defendant does not deny or admit paragraph 11 of the Particulars of Claim but states that it did not enter into any agreement with the Claimant to compensate him for any loss he may have suffered to the crops on his farm; or make award of any sum of money to the Claimant and specifically not the sum of Two Hundred and Eighty Seven Thousand Dollars ($287,000.00)[9]." (Emphasis supplied)

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[9] This figure arose because of an error in paragraph 11 of the Particulars of Claim as originally filed. It is common ground that, based on the RADA valuation, the correct figure is $271,932.00.

[16] In its amended defence, NIC also disputed Mr Segree's claim. In so far as is now relevant, the amended defence stated the following:

> "7. The 2nd Defendant denies paragraph 7 of the Particulars of Claim and states that at all material times the 1st Defendant was acting as an independent contractor contracted by 2nd Defendant for the purposes of constructing, developing and pump testing of three production wells at Plumwood, Lane and New Forrest in the parish of Manchester.
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> 8. The 2nd Defendant states further that if any damage as alleged in paragraph 7 of the Particular of Claim was in fact suffered by the Claimant then is [sic] was while work was being undertaken by the 1st Defendant.
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> 9. The 2nd Defendant also states that the 1st Defendant was under a duty to indemnify the 2nd Defendant against any loss of or damage to property, in connection with the contract, which were due to the Contractor's risk. Therefore, the 2nd Defendant contends that if the Claimant suffered any damage, such damage would fall under the Contractor's risk and as such the 1st Defendant would be responsible and would indemnify the 2nd Defendant against such damage.
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> 10. Paragraph 8 of the Particulars of Claim is denied and Paragraphs 7, 8 and 9 of this Defence are repeated.
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> 11. Paragraph 9 of the Particulars of Claim, outlining the Particulars of Negligence and Breach of Statutory Duties and/or Wrongful Act is specifically denied; the 2nd Defendant fulfilled all of its responsibilities whether statutory or otherwise in relation to the Claimant and providing the sites for the 1st Defendant to undertake its duties under the contract.
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> 12. The 2nd Defendant further states that its representatives met with the farmers of the area including the Claimant to indicate the works that were to be carried out in said

area in the [sic] relation to the wells and the details of the work.

13. The 2nd Defendant, as far as it was in its responsibility, carried out all the relevant investigations including acquiring adequate geological data in relation to the sites and the proximity of the farmers including the Claimant.

14. The 2nd Defendant also states that it has been informed that farmers, including the Claimant, gave permission for drains to be established through their property for the proper disposal of the water from the well tests.

15. Paragraph 10 of the Particulars of Claim is denied as the 2nd Defendant was not responsible for the scheduling of the Well Test and the 2nd Defendant repeats paragraphs 7, 8 and 9 of its Defence.

16. Paragraph 11 of the Particulars of Claim is denied save and except the 2nd Defendant did provide a hydro geologist [sic] to aid the Rural Agriculture Development Agency [sic] in the determination of the value of any loss that may have been suffered. Consequent on this determination a value of Two Hundred and Seventy One [sic], Nine Hundred and Thirty Two Dollars ($271,932.00) was arrived at by the hydro geologist [sic].

17. The 2nd Defendant states further that it received a letter from the Claimant on the 1st day of April, 2010 claiming Two Hundred and Seventy One Thousand, Nine Hundred and Thirty Two Dollars ($271,932.00) as representing the Claimant's total amount for damages and loss of income in relation to the well test. A copy of the letter is attached for its full terms and effect and marked **NIC 1** for the purposes of identification.

18. That the Claimant was advised through his Attorneys at Law by virtue of a letter from the legal officer of the 2nd Defendant, dated June 18, 2010, that his Claim has been passed to the 1st Defendant so that the 1st Defendant might remit to their insurers. A copy of the letter is attached for its full terms and effect marked **NIC 2** for the purposes of identification.

19. That in relation to Paragraph 12 of the Particulars of Claim it is admitted that the 2nd Defendant has not paid any sums over to the Claimant in relation to the figures claimed and the 2nd Defendant repeats paragraphs 9 of its Defence.

20. That Paragraph 13 is denied, the Claimant has neglected to provide any contract between the Claimant and Couples Resort or any loss thereof.

21. The 2nd Defendant denies the Claimant's loss and damage and specifically denies the Particulars of Loss and Damages as outlined in the Claimant's Particulars of Claim.

22. In the premises, the Defendant is not liable to the Claimant whether as set out in the Particulars of Claim or at all."

[17] Both Jamaica Wells and NIC therefore (i) denied any negligence or breach of statutory duty; (ii) relied on Mr Segree's prior knowledge of, and presumed consent to, the well testing process; (iii) asserted that, under the terms of the well construction contract, each of them was entitled to be indemnified by the other; and (iv) put Mr Segree to strict proof of the damages which he claimed.

The evidence

[18] At the trial, evidence was given by way of detailed witness statements, as amplified and supplemented by further examination-in-chief and cross-examination. Much of it has already been foreshadowed and it is therefore not necessary to rehearse the contents of the witness statements or the oral evidence in full detail. I will, however, highlight a few additional aspects of the evidence given on either side of the case.

[19] In his witness statement, Mr Segree stated that, after his nurseries had been destroyed by flooding from the well tests, and while he awaited the compensation which he had been promised by Messrs Beckford and Henry, he was obliged to borrow money and to buy produce on the open market at higher costs in order to fulfil his obligations under the Couples contract.

[20] Cross-examined, Mr Segree denied a specific suggestion that the making of the trench on his farm was done with his permission. But he agreed that he was aware of the work that was proposed to be done by NIC before it started. He also agreed that he could not "accurately state" that NIC failed to carry out any or any adequate site investigations, or to acquire any or any adequate geological data in relation to his farm and its proximity to the well testing area.

[21] At the end of the cross-examination, Mr Segree was questioned by the judge about the trench which he had said was put on his farm without permission:

> "Q. Did you make any complaint to anyone about the trench which you have said was put on your farm without your permission?
>
> A. Yes, I did.
>
> Q. Who did you make that complaint to?
>
> A. Mr. Beckford.
>
> Q. When did you make that complaint?
>
> A. On observing the trench.
>
> Q. Did you observe that trench before or after the well test was done?

A. During the well test.

Q. How long did the well test last for?

A. I can't recall.

Q. Was it within a day, or a matter of days?

A. To the best of my recollection, there were three phases. It went for eight hours at first, twenty-four hours and then a longer period, to the best of my recollection I can't quite remember the phases.

Q. When you saw the trench, was it during the earliest phase, of that well test, the middle phase, or the last phase?

A. The early phase.

A. I made complaint about the trench that was going through my farm without my permission and the water that was going through the trench and damaging the gardens at one and the same time.

Q. What was Mr. Beckford's response?

A. His response was that I would be compensated.

Q. If the escallion that was on your farm when the well test was conducted had been reaped, how much would you have been able to earn from the escallion if you had sold it?

A. I don't know."

[22] In his witness statement given on behalf of Jamaica Wells, Mr Lawrence gave evidence directed at establishing what steps had been taken to ensure that "interested parties", such as Mr Segree, were aware of the planned well tests and the possible impact which they might have. He said that during the course of the contract, Jamaica Wells and NIC "had meetings and discussions with interested parties and occupiers and

owners of adjoining lands which might have been affected by the 'works' including meetings and discussions with Mr Garfield Segree". Mr Lawrence added that Mr Segree was fully aware of the nature of the work being conducted in the vicinity of his premises, was told of any possible impact it might have on his land and raised no objection to the work being carried out. Nor did he make any complaint "that crops on his land were in jeopardy of damage".

[23] Under cross-examination[10], Mr Lawrence explained the objective of the well testing process and what it entailed:

> "It is to find out the hydraulics that the well can produce as well as water quality and it's done in two phases, one is a step test which entails pumping the well at increasingly higher capacity and taking water quality samples at those different parameters and the other is pumping the well consistently for 72 hours taking samples and water levels at 24 hour intervals."

[24] In the case of the Lane Well, the process involved the digging of a trench to facilitate the flow of water from the well. Mr Lawrence agreed that that trench was dug through Mr Segree's land. However, he did not speak to Mr Segree himself beforehand, nor was he aware whether anyone from Jamaica Wells got Mr Segree's permission to dig that trench on his land. Mr Lawrence agreed that the trench that was dug on Mr Segree's land was not adequate to contain the water that was discharged from the Lane Well.

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[10] Notes of Evidence, page 20

[25] Finally, in answer to extensive questioning by the judge, Mr Lawrence confirmed[11] that he had never had any direct communication with Mr Segree ("Nothing more than just in here, saying 'hi' "); that the trench sloped through Mr Segree's land; and that "[t]he farms were flooded because of where the trench ended". However, he maintained that the trench had been prepared in accordance with the engineer's instructions, "at which time, we were assured by the engineer that we had full permission to do so by the landowner".

[26] For NIC, Mr Henry's witness statement was almost entirely directed at the relationship between NIC and Jamaica Wells. He outlined the process by which Jamaica Wells, which he described as an independent contractor, came to be the successful bidder for the well construction contract. He also stated that, on 28 January 2010, he was informed by Mr Beckford of crop damage suffered by four farmers, including Mr Segree, as a result of flooding from the Lane Well during testing by Jamaica Wells in November 2009. And he explained that, after the RADA valuation was obtained, it was forwarded to Jamaica Wells "to honour the claim". Permitted to amplify the witness statement at the trial, Mr Henry was concerned to emphasise the leading role played by Jamaica Wells in relation to the test on Lane Well and the disposal of the test discharge.

[27] Under cross-examination by counsel for Mr Segree, Mr Henry said that he was not aware whether NIC got permission from Mr Segree to dig a trench through his farm. Though he maintained that NIC was not responsible for digging "any trench", he

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[11] Notes of Evidence, pages 34-35

agreed that, if NIC had needed to dig a trench at Lane Well, it would have required the permission of the land owner/occupier in order to do so.

[28] Mr Beckford was the final witness to give evidence at the trial. In his witness statement, he spoke to the steps taken by NIC "to minimize, if not eliminate, any form of dislocation to practicing farmers in the well establishment environment". In fairness to Mr Beckford, I must quote him at length[12]:

> "8. During the drilling and construction of the well I, Winward [sic] Lawrence and Mr. Griffiths of JWS had toured the community and identified all areas including Mr. Segree's, that were potentially at risk of flooding from disposal of test discharge from the well during yield test on October 14, 2009.
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> 9. We identified all farmers, including Mr. Segree, concerned/relevant and engaged in dialogue and obtained their permission to prepare flow routes through their farms/properties to minimize flood damage.
>
> 10. At the time Mr. Segree's farm was in very poor state, unmaintained and overgrown by bush and shrubs.
>
> 11. I, Windward Lawrence and representatives from the Water Resources Authority met with farmers during the test and observed and discussed on site the unavoidable and unforeseen deviation from water flow expectation in so far as any crops, etc. were affected and decided on the solution procedures that would be followed.
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> 12. Mr. Segree could not always be contacted, therefore we either spoke by telephone or by messages by way of his neighbors.

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[12] Paras 8-29

13. JWS prepared approximately 200m of earthen drain to control test disposal flow.

14. On October 23-28, 2009 installation of pumping equipment for pumping tests as well as preparation of the earthen drain works to take away the discharge from the Well pumping.

15. This had proved inadequate and so on November 3, 2009 myself and Mr. Rennie Smith, who was an Engineer from NDIP, had visited Lane Well and identified and specified the extent and rout of the earthen drain works for test charge disposal.

16. From November 4 to 14th 2009 the well was developed which included pumping the Well and the disposal of the test discharge to make the Well suitable for use. This also included the multiple rate pumping test for 24 hours at a maximum of 1250 US gpm.

17. Mr. Segree's property was still in shrubs except for small section north of property cleared to allow movement of pumped water.

18. Between November 17-20, 2009 JWS executed a Constant Rate Test for 72 hrs at 1250USgpm. During the test, I and Water Resources Personnel toured a route/path of test disposal water which had affected Mr. Segree's property.

19. At the end of the pumping test, Mr Segree identified a Pack Choi nursery about 4 feet x 3 feet just germinated, pumping [sic] vines that had stopped producing (before time of testing), a small calalloo bed, all crops covered in grass and shrubs (un-maintain [sic] garden) and a tank at ground level which got filled from overland flow of test discharge. Mr Segree was provided with free water for future farming.

20. The yield testing of Lane Well would have dislocated a single crop of vegetables, of which at most three months of earnings could have materialized.

21. The northern portion of the property had been cleared under the test exercise to allow free flow of pumped water.

22. That the yield testing that was conducted by JWS was of the required standard and was not carried out negligently or carelessly by JWS.

23. I had on-site discussion with Mr. Segree and other farmers including Zaro Jones and Mr. Mulgrave (on their farm site) and advised them that the services of RADA would be engaged to help assess and evaluate damages with a view to adequate compensation.

24. Representatives of JWS were not present at the on-site discussion regarding property damages. However JWS had necessarily engaged heavy-duty equipment to make trench and clear the northern sections of Mr. Segree's property during the yield testing of the well in order to facilitate run-off of the disposed water.

25. JWS were therefore aware of the property disruptions generated by the yield testing exercise.

26. Because of the previous engagements of RADA personnel and NIDP's Hydrogeologist Consultant, the assessment was made on site on January 14, 2010.

27. On January 14, 2010 I and RADA Representatives as well as farmers Mr. Mulgrave and Mr. Segree had a site meeting where RADA assessed the damage and valuation of the affected farmer's [sic] crops.

28. The assessment of RADA was retrieved on January 29, 2010 and handed over to NIDP with recommendations from me.

29. The usual procedure is that NIDP would then forward the farmer's [sic] claim and the RADA Assessment to JWS for compensation."

[29] Permitted to amplify his witness statement, Mr Beckford confirmed that the test at Lane Well was conducted by Jamaica Wells and monitored by him as the consultant hydrogeologist.

[30] Under cross-examination by counsel for Mr Segree, Mr Beckford was asked whether the trench to allow for the runoff of the water from Lane Well ended on Mr Segree's land. His answer was that it actually ended "on the depression in the road", but that "[t]he overflow from the depression is going to take the water onto Mr Segree's land". Mr Beckford accordingly agreed with the suggestion that when the trench was built he knew that the overflow would have gone onto Mr Segree's land. He maintained that he got permission from Mr Segree to carry out the well test on his land and he did not agree that the trench which was dug was inadequate. But he agreed that he did promise Mr Segree that he would be compensated for the damage to his farm.

[31] Then in re-examination, in answer to counsel for NIC's question whether he had obtained Mr Segree's permission before the well test was conducted by Jamaica Wells, Mr Beckford said this:

> "The responsibility to get permission is the responsibility of the contractor by the contract document but we do co-operate for environmental purposes".

The judge's decision

[32] In a judgment given orally on 18 October 2013, and subsequently reduced to writing, the judge found against Mr Segree. The essence of the judge's reasoning may be seen in the following passage of his judgment[13]:

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[13] Paras [24]-[26]

"[24] Both the claimant and the first defendant alleged that it is the second defendant that conducted the well test and the court accepts their evidence in that respect. Mr. Blake from National Irrigation Commission was informed of the claimant's contract with Couples Resort only after the well test had been conducted and after the relevant damage to the claimant's farm had already been caused. It was at that time that Mr. Blake told the claimant that he would be compensated. After R.A.D.A. conducted an assessment of the extent of damage and loss suffered by the claimant with respect to the crops allegedly on his farm, as a consequence of the well test, R.A.D.A. estimated the loss at $271,000.00 [sic]. Not all crops planted were ready for reaping or had even begun growing, when the well test was conducted. This means that it is uncertain that those crops that had been planted but had not yet begun to bear produce, as and when the well test was conducted, would have in fact resulted in the production of such produce much less, that such produce would have yielded such amounts and quality that same not only could, but would, have been sold to Couples Resort pursuant to the contractual agreement that existed between the claimant and that hotel. The hotel, it should be noted, under that contract, had reserved the right to reject produce that was not considered by them, solely as a matter of its own discretion, as being of suitable quality. The claimant did not know and lead no evidence as to what the costs of rearing the produce on his farm would have been. He instead said that the costs vary depending on the weather. The only crop the claimant had harvested prior to October, 2009, was escallion. He did not know how much he would have earned if he had been able to sell the escallion. Thus, it is clear that the claimant had no real farming history with respect to the farm which was the subject of this claim. This is what in turn assists the court in reaching the conclusion that the claimant's claim for loss of profit and earning is too speculative. The claimant also failed to recall the amount of irrigation expenses he had incurred. The claimant has failed to prove any of the particulars of negligence laid out in his statement of case. He also failed to establish whether the second defendant carried out any adequate site investigations. He was also unable to lead any evidence that the second defendant failed to acquire any adequate geological data concerning his farm.

> [25] This court does not accept the claimant's evidence that he did not give permission for the trench to be dug on his farm. The claimant gave evidence that he visited his farm quite regularly. Surely then, he would have seen the trench when it was being dug on his property and he would have queried the doing of same. It is certain that he authorized the building of such trench on his property. This though does not mean that he had at the same time, consented to the overflow of water from the trench onto his farmland. Nonetheless, it was for the claimant to prove the particulars of negligence which he has averred. Having failed to do so, the overflow of water from the trench onto the claimant's farmland, cannot avail the claimant in respect of his claim for damages for negligence.
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> [26] The claimant was a taxi operator prior to October, 2009 and later gave evidence that he was also a farmer before October, 2009. Even if the claimant was farming prior to October 2009, he was either not selling what he was then farming, or alternatively, what he was selling was not then providing him with enough funds to meet a suitable living. If it were otherwise, he would not also, in this court's considered view, then have been operating a taxi service."

The grounds of appeal

[33] Dissatisfied with this outcome, Mr Segree appealed on the following grounds:

> "i. The learned Trial Judge eared [sic] in law when he found that the [Respondents] gave sufficient notice and/or accurate advice to the Appellant about the likely risks to his farm of the well test being conducted in the vicinity of [his] farm when there was no evidence that the [Respondent] [sic] had warned the Appellant of the risk of significant flooding and consequent damage to his crops.
>
> ii. The Learned Trial Judge erred when he found that the Appellant gave permission to the Respondents to dig the trench on his farm when the evidence clearly showed that the Appellant knew nothing about the trench and in particular that the trench was to end on

the Appellant's farm and consequently any water let into that trench would of necessity have flooded the farm and damaged his crops;

iii. The Learned Trial Judge erred when he found that the Appellant had not proven that 'but for' the acts or omissions of the Respondents, his farm would not have been damaged notwithstanding the fact that the Respondents' witnesses Milton Henry and Sydney Beckford both admitted that the Appellant suffered loss from the well test that the first Respondent carried out;

iv. The Learned Trial Judge erred when he found that there was no evidence to prove that the site investigations were not sufficient when the evidence clearly showed that the trench that was dug was inadequately terminated on the Appellant's farm and was constructed in such a way as to release water on the Appellant's farm. Further there was no evidence led by the Respondents to show that they conducted any sufficient site investigations to ensure that the steps taken by them were adequate to protect the Appellant's farm from flooding;

v. The Learned Trial Judge erred when he found as a fact that the Respondents were not negligent notwithstanding that the First Respondent's witness Windward Lawrence admitted that the trench was inadequate and that it terminated on the Respondent's [sic] farm. Further that the evidence was that the intended quantity of water to be extracted in the well test was such that the steps taken to protect the Appellant's farm were patently inadequate;

vi. The Learned Trial Judge erred when he found that the Appellant had failed to prove his loss as particularized in his Particulars of Loss notwithstanding the fact that the Appellant gave sufficient evidence of the crops he had planted and its values, that there was a contract with Couples Resorts and that the Respondents had given the evidence through Sydney Beckford and Milton Henry acknowledging the loss of the Appellant's crops and

of the assessment of the loss of the said crops and its [sic] value;

vii. The Learned Trial Judge erred when he found that having been given notice of the well test the Appellant failed to do anything to protect his farm when there is nothing that the Appellant could have done to protect the crops given that a significant portion of crops were seedlings at the material time.

viii. The Learned Trial Judge erred when he found that the Appellant failed to prove that the Respondent did not acquire adequate geological data concerning the Appellant's farm and its proximity to the well testing area when the evidence clearly showed the testing caused massive flooding and loss which is overwhelming evidence that the geological data if any which was acquired was inadequate and/or incorrect.

ix. The Learned Trial Judge erred when he found that the Appellant failed to prove causation when the evidence is clear from all sides that the well test caused the flooding which caused the damage to the Appellant's crops;

x. The Learned Trial Judge erred when he found that there was no pleading as to the direct liability of the First Respondent when paragraphs 2, 7, 8 and 9 clearly pleaded that the First Respondent was liable for the negligent acts particularized in paragraph 9 of the Particulars of Claim and further when the admitted evidence by the Respondents was that the well test was carried out by the First Respondent and the results of the well test caused loss to the Appellant;

xi. The Learned Trial Judge erred in law in finding that the Appellant's claim for loss of opportunity was too speculative when the uncontroverted evidence was that the Claimant had obtained a written contract with Couples Resort to supply them with crops and further, that he could have made a living from selling the crops in the market."

[34] Ground (x) was abandoned at the hearing before us and therefore calls for no further discussion. As I have already indicated, Grounds (i)-(v), (vii), (viii) and (ix) will be dealt with by me, while grounds (vi) and (xi), which address issues relating to damages, will be dealt with by McDonald-Bishop JA.

The submissions on grounds (i)-(v), (vii), (viii) and (ix)

[35] Miss Edwards for Mr Segree relied on her written submissions[14]. On ground (i), she pitched her submissions in two ways. First, she referred us to section 6(3)(a) of the Act, which prescribes the method of service by the Irrigation Authority of notice of a proposed entry onto the land of a landowner outside of an irrigation area. She submitted that the prescribed method of service had not been complied with in this case and that it is therefore not open to NIC to rely on the fact that Mr Segree had notice of the proposed entry onto his land. But in any event, Miss Edwards submitted, given the evidence that Jamaica Wells/NIC knew fully well that the trench that was dug on Mr Segree's land would not be adequate to contain the water that was discharged from Lane Well, they were under a duty to warn Mr Segree of the likely risks to his farm from the well test.

[36] On ground (ii), while frankly acknowledging this court's traditional reluctance to interfere with a trial judge's findings of fact, Miss Edwards urged us to set aside the judge's finding that Mr Segree must have authorised the digging of the trench on his land. She submitted that, not only was the finding contrary to the evidence in the case,

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[14] Dated 26 February 2015

but that it was "inconceivable that [Mr Segree] would have given permission to the Respondents to dig a trench on his land knowing full well the risks posed that water from the trench would empty onto his land thereby causing damage to his crops".

[37] Grounds (iii), (iv), (v), (viii) and (ix) together challenged the judge's findings that Mr Segree had not proved that the respondents' acts or omissions caused his losses, that their site investigations were insufficient, or that they were negligent. In her submissions on these grounds, Miss Edwards pointed out the evidence that (i) it was known beforehand that the overflow of water from the well test would have affected Mr Segree's farm; (ii) respondents were unaware that there were crops on Mr Segree's farm; (iii) the trench that was dug on Mr Segree's farm was inadequate to cope with the overflow; (iv) Mr Segree, as well as other farmers in the area, sustained crop damage as a result; and (v) the stated objective of commissioning the RADA valuation was to provide compensation to Mr Segree for his losses. In these circumstances, Miss Edwards submitted that the case for Mr Segree had been fully made out, both as regards causation and proof of negligence.

[38] Finally, ground (vii) challenged the judge's finding that, having been given notice of the well test, Mr Segree failed to do anything to protect his farm. Miss Edwards submitted that, given the stage at which Mr Segree's crops were at the time of the well test, there was little that he could have done in the circumstances, beyond asking Mr Beckford whether he would be compensated.

[39] For Jamaica Wells, Mr Fletcher also relied on his written submissions[15]. In essence, Mr Fletcher urged us to defer to the judge's findings of fact, given that it was his "core function" to choose between the competing accounts. It was submitted that those findings were consistent with the evidence and, therefore, that the judge "may not be faulted in this regard".

[40] Mr Fletcher also briefly addressed the position as between Jamaica Wells and NIC, making the point that the former carried out work designed and closely supervised by the latter. In these circumstances, Mr Fletcher submitted, Jamaica Wells ought not to be held liable for any losses suffered by Mr Segree. Alternatively, it ought to be liable for a proportion only of such losses as Mr Segree was able to prove.

[41] For NIC, Miss Bolton also relied on her written submissions[16]. In essence, Miss Bolton's position on all the grounds put forward on behalf of Mr Segree was that the judge came to the correct conclusion, for the reasons which he gave. But, in relation to ground (i), and Miss Edwards' submissions based on section 6(3)(a) of the Act, Miss Bolton made two points. First, she observed that, although breach of statutory duty was pleaded by Mr Segree, it was not until during closing submissions at the trial that it became clear that the statute to which reference was being made was the Act and that section 6 was the section being relied on. But in any event, Miss Bolton submitted, section 6 should not be taken out of context, since the Act created a discrete regime for

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[15] Dated 28 March 2015
[16] Dated 27 March 2015

the making of claims against the Irrigation Authority. Since Mr Segree did not avail himself of these provisions in this case, it was submitted that he "cannot now at this late stage, seek to rely on the said Act, when he has failed to fulfill the requirements of same".

[42] However, Miss Bolton submitted, if the court was minded to find for Mr Segree, Jamaica Wells should be held solely liable for his losses, as it was engaged as an independent contractor and, under the terms of the well construction contract, was under a duty to indemnify NIC. In the alternative, any award to Mr Segree should be apportioned equally between the respondents.

Discussion and conclusions

[43] Grounds (i)-(v), (vii), (viii) and (ix) appear to me to give rise to the following issues:

> (i) the extent of Mr Segree's prior knowledge of the proposed well testing exercise and the fact that it was intended to dig a trench on his farm, and whether he consented to it ('the prior notification issue');
>
> (ii) whether the respondents carried out any or any adequate site investigations, and/or acquired any or any sufficient geological data in preparation for the well test ('the site investigation/geological data issue');
>
> (iii) whether Mr Segree took any or any adequate steps to protect his farm from flooding ('the self-protection issue');
>
> (iv) whether the respondents were guilty of negligence and whether their acts or omissions caused the alleged damage to Mr Segree's crops ('the negligence/causation issue').

The prior notification issue

[44] Section 6(1) of the Act deals with the power of NIC, as Irrigation Authority, to execute reclamation, irrigation or drainage works in an irrigation area, which is defined in section 2 as "any area declared to be an irrigation area under section 3". Section 3(1) empowers the Minister to specify by order a particular area to be an irrigation area, while section 3(3) declares the areas specified in Part I of the Schedule to the Act to be irrigation areas.

[45] The Plumwood, Lane and New Forest areas of Manchester are not among the areas listed in the Schedule as irrigation areas and there is no evidence that they, or any of them, has been declared to be an irrigation area. Miss Edwards therefore quite properly calls attention to section 6(3), which deals with the Irrigation Authority's right of entry to any land which lies outside an irrigation area for the purpose of reclamation, irrigation or drainage works:

> "(3) (a) Whenever it appears to the Authority that it is necessary to enter upon land which lies outside an irrigation area for any purpose set out in subsection (1) the Authority shall (after giving notice in writing accordingly to the occupier of such land) with the approval of the Minister cause a notification to that effect to be published in the *Gazette*; and thereupon the Authority may enter by their servants or agents upon such land and there do such acts as may be necessary for the purpose aforesaid:
>
> Provided that it shall not be necessary before entering to cause such notification to be published in the *Gazette* in any case where the occupier of such land gives written permission to the Authority to enter, or in the case of an emergency.

(b) Before granting approval for the publication of a notification as aforesaid the Minister shall consider any objection which the occupier of such land may make in writing within fourteen days after receiving notice from the Authority.

(c) The notice required to be given by the Authority to the occupier of such land shall -

(i) state the time within and the manner in which objection (if any) to the entry of the Authority on such land may be made;

(ii) be served either by delivering it to the occupier or by sending it in a prepaid registered letter addressed to him at his usual or last known place of abode."

[46] The objective of this section appears to be to extend the reach of NIC, as the Irrigation Authority, beyond the areas designated in the Schedule as irrigation areas, subject to the requirement of written notice to occupiers of land and the provision made for objection where appropriate. Since it is common ground that in this case no written notice was served by NIC as required by section 6(3)(a), Miss Edwards contended that no reliance can be placed on any oral notification to Mr Segree.

[47] In answer to this submission, Miss Bolton directed us to the procedure established under section 29 of the Act for the recovery by any person of compensation "… in respect of any act or neglect by any servant or agent upon any land on which such servant or agent has entered in the exercise of any powers conferred by this Act". Section 30 provides that compensation shall not be awarded under the Act unless the claimant gives not less than 14 days' notice in writing of his intention to file such a

claim and files his claim within six months after the occurrence of the act or neglect in respect of which compensation is payable. And section 31 prohibits legal proceedings, other than proceedings for compensation under the Act, "to recover damages or compensation from the Authority or any servant or agent of the Authority in respect of any act by the Authority or of any act or neglect by such servant or agent in the exercise of any power conferred under this Act …". Accordingly, Miss Bolton submitted, Mr Segree cannot pray in aid section 6(3), not having availed himself of the compensation procedure set out in sections 29-31.

[48] But this, with the greatest of respect, appears to me to put the cart in front of the horse. It seems to me that, had NIC served notice under a section 6(3)(a) on Mr Segree, it might have been possible to contend that, by instituting proceedings otherwise than as provided for in sections 29-31, he acted in breach of the statutory prescription. I therefore think that the question whether NIC was obliged to give notice to Mr Segree in accordance with section 6(3)(a) must turn entirely on the language of the section, read in the context of the Act as a whole.

[49] While, on the face of it, the language of the section may seem to support Miss Edwards' contention, it is important to note that NIC did not purport to exercise its powers under the Act. Indeed, this is no doubt why it did not seek to defend Mr Segree's claim for damages on the basis that he ought to have proceeded in accordance with sections 29-31. Therefore, the question of a section 6(3)(a) notice not having been

made an issue in the case on either the pleadings or the evidence, I would hesitate to determine whether Mr Segree was given adequate notice on that basis alone.

[50] It seems clear from the evidence, his included, that Mr Segree must have had some kind of advance notice of the well testing exercise. But the real issue, as it seems to me, is whether he was aware of and, as the judge found, consented to, the digging of the trench on his farm. His evidence was that he was not advised of this, and neither Mr Lawrence nor Mr Henry was able to contradict him on the point. Mr Beckford, on the other hand, gave evidence of speaking to all the farmers concerned, Mr Segree included, and obtaining their permission "to prepare flow routes through their farms/properties to minimize flood damage". This was, of course, an issue for the judge to resolve and, ordinarily, I would naturally defer to his explicit finding that "[i]t is certain that [Mr Segree] authorized the building of the trench on his property".

[51] But, as the judge himself immediately went on to observe, this did not mean "that [Mr Segree] had at the same time, consented to the overflow of water from the trench onto his farmland". This was an important caveat, since Mr Segree's pleaded case was that Jamaica Wells/NIC "[failed] at all material times to give sufficient notice and/or accurate advice … about the likely risks to his farm of the well test being conducted in the vicinity of his farm". Therefore, the real issue raised on the pleadings was not simply whether Mr Segree had notice of the impending well test or not, but whether he was given notice in sufficient detail to enable him to appreciate the peril which might be caused to his farm from the overflow of water from the trench. From

the evidence, it is clear that Jamaica Wells/NIC were aware that the trench that was dug on Mr Segree's land would not be adequate to contain the overflow of water from Lane Well. It therefore seems to me that it is to this possibility that they ought to have alerted Mr Segree, so as to enable him to assess the likely risks to his farm from the well test.

[52] This naturally leads to the question whether Mr Segree could be taken to have consented to the digging of the trench on his farm, to the extent that he cannot now complain about the damage caused by the overflow of water. In this regard, I unhesitatingly accept Miss Edwards' submission that it is highly unlikely that, had Mr Segree been fully apprised of the risk of damage to his nurseries, which were being carefully cultivated to enable him to fulfil the Couples contract in the near future, he would have given permission to Jamaica Wells/NIC to dig a trench on his land.

[53] Miss Edwards very helpfully referred us to **Hilzer v Farmers Irr Dist**[17], a decision of the Supreme Court of Nebraska. That was a case in which water from the defendant's irrigation canal escaped and caused damage to the plaintiff's personal property, consisting of farm machinery, equipment and tools. The plaintiff based his claim on the defendant's failure to warn him of a break in the canal and to open waste gates along the canal, thereby preventing him from taking timely steps to avoid damage to his property arising from the escape of water from the defendant's irrigation

[17] (1953) 56 N.W. 2d 457, 560 156 Neb. 398

canal. Speaking for the court on an appeal from the decision of a jury in the defendant's favour, Wenke J said this:

> "We think, if it becomes apparent to those operating an irrigation canal that a dangerous condition has developed in the operation thereof which is liable to cause injury, where a warning would be effective to prevent that injury, there is a duty to warn.
>
> As stated in 65 C.J.S., Negligence, # 89, p. 598: 'Where a person is performing an act or engaging in an operation which is likely to be dangerous to persons in the vicinity, it is his duty to warn such persons of the danger.' "

[54] While I fully accept that the circumstances in **Hilzer v Farmers Irr Dist** may not be entirely analogous to those in this case, I think that Wenke J's dictum is sufficient to indicate an important dimension of this case which the judge left completely out of his analysis. I therefore think that this omission renders his finding that Mr Segree must have consented to the digging of the trench on his land vulnerable to challenge, on the ground that it fell short of a full consideration of all the issues in the case.

[55] In coming to this conclusion, I have not lost sight of the well-known principle, recently restated in **Rayon Sinclair v Edwin Bromfield**[18],that an appellate court "will not lightly disturb findings of fact made at first instance by the tribunal charged with that responsibility". Thus, in **Beacon Insurance Company Limited v Maharaj**

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[18] [2016] JMCA Civ 7, per Brooks JA at paragraph [7]

Bookstore Limited[19], addressing the proper role of an appellate court in an appeal against findings of fact by a trial judge, Lord Hodge emphasised that, in order to disturb such findings, "[t]he court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions". In this case, I respectfully consider that, for the reasons which I have sought to explain, the error in the judge's approach on this point falls squarely into this category and therefore justifies this court's intervention.

The site investigation/geological data issue

[56] The judge held that Mr Segree failed to establish whether NIC carried out any adequate site investigations, or to lead any evidence that it failed to acquire any adequate geological data concerning his farm. Taking the view that it is for a claimant to prove his case, the judge therefore concluded that Mr Segree could not succeed on this basis.

[57] It is true that there was no evidence of what site investigations or geological data were carried out or acquired by NIC. But negligence in every case must be, it seems to me, an inference from proved facts. In this case, the evidence showed that although NIC was unaware of the presence of crops on Mr Segree's farm, it nevertheless proposed and proceeded to dig a trench on his land to carry excess water from Lane Well. In the result, as it turned out, the trench that was dug was inadequate to cope with the water, thereby resulting in an overflow onto Mr Segree's land. In this

[19] [2014] UKPC 21, paragraph [12]

regard, it must be recalled that Mr Beckford's evidence was that, although the trench actually ended "on the depression in the road", he knew when the trench was built that the overflow from the depression would take the water onto Mr Segree's land.

[58] In my view, this is an outcome which might have been avoided by adequate site investigation and planning before the well tests were conducted and the trench was dug. It therefore seems to me that there was sufficient evidence in the case, albeit not expansive, to lead to the conclusion that the level of site investigations undertaken by Jamaica Wells/NIC before the well testing exercise was commenced was inadequate in all the circumstances.

[59] But while it may be possible to approach the issue of the adequacy of site investigations on a common sense basis in the light of the evidence, I would be hesitant to do the same in respect of the adequacy of geological data. In the absence of any evidence to suggest how such data might have impacted the outcome of the well testing exercise, I would therefore not disturb the judge's finding that Mr Segree failed to lead any evidence that NIC failed to acquire any adequate geological data concerning his farm.

The self-protection issue

[60] Ground (vii) complained specifically that the judge erred in finding that, having been given notice of the well test, Mr Segree did nothing to protect his farm. However, despite the fact that counsel all addressed the point in their written submissions, I have been completely unable to find any statement to the effect complained of in the judge's

judgment. This leads me to think that it may have been something said at the time of delivery of his oral judgment, but not repeated in the written version.

[61] But be that as it may, and assuming that I have misread the judgment, I am content to say that I accept Miss Edwards' submission that, given the stage at which Mr Segree's crops were at the time of the well test, there was little that he could have done in the circumstances. The uncontroverted evidence is that when he became aware that his crops may have been exposed to flooding, he approached Mr Beckford and was assured that he would be compensated.

The negligence/causation issue

[62] This issue obviously lies at the heart of the case. I have already expressed the view that the judge erred in his assessment of the evidence relating to the notice/advice which was given to Mr Segree of the well testing exercise, as well as his conclusion on the site investigation issue. Mr Lawrence's evidence, given on behalf of Jamaica Wells, was that "[t]he farms were flooded because of where the trench ended". Mr Beckford's evidence was that he knew that the overflow of water from the well testing would have gone onto Mr Segree's farm. When asked by Mr Segree about this, Mr Beckford responded with the assurance that he would be compensated. This was followed by the RADA valuation, which NIC duly sent on to Jamaica Wells for submission to its insurers. The combination of all of this evidence was, in my view, plainly sufficient to ground a finding of negligence against Jamaica Wells, which executed the works, and NIC, which was responsible for its commissioning and design.

[63] As regards causation, Miss Edwards referred us to the decision of the Supreme Court of Canada in **Clements v Clements**[20], in which McLachlin CJ stated as follows[21]:

> "[8] The test for showing causation is the 'but for' test. The plaintiff must show on a balance of probabilities that 'but for' the defendant's negligent act, the injury would not have occurred. Inherent in the phrase 'but for' is the requirement that the defendant's negligence was *necessary* to bring about the injury - in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.
>
> [9] The 'but for' causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury. See **Wilsher v Essex Area Health Authority**; [1988] A.C. 1074 (H.L.), at p.1090, per Lord Bridge; **Snell v Farrell**, [1990] 2 S.C.R. 311.
>
> [10] A common sense inference of 'but for' causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss. ..."

[64] It seems to me that, in this case, there can be no question that it is the negligence which caused the damage to Mr Segree's farm. The nature and extent of the damages which he is entitled to recover as a result is, of course, the further question which will be addressed in the judgment of McDonald-Bishop JA. But it is not in

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[20] [2012] 2 S.C.R. 181
[21] At paragraphs [8]-[10]

controversy that, as the RADA valuation confirms, Mr Segree suffered crop damage as a result of flooding from the well test.

Conclusion on liability

[66] For the reasons which I have attempted to give, I came to the clear conclusion that the judge's decision that Mr Segree had failed to lead sufficient evidence to make out his claim against the respondents could not be sustained. It is on this basis that I therefore concurred with my sisters in the judgment on liability which the court announced on 10 June 2010.

PHILLIPS JA

[67] I have had the opportunity to read both the learned President's draft reasons for the decision on the liability issue and my learned sister McDonald-Bishop JA's draft reasons on damages and I agree with both of them and have nothing further to add.

MCDONALD-BISHOP JA

Introduction

[68] I have had the privilege of reading in draft the comprehensive reasons for judgment of the learned President and found that the reasons he has given for allowing the appeal, and entering judgment on liability in favour of the appellant, accord with my views. There is therefore nothing that I could usefully add in relation to grounds of appeal (i-v), (vii), (viii), and (ix) and so I am content to adopt the reasons given by the learned President in treating with those grounds in disposing of the issue of liability.

[69] This aspect of the judgment, with which I am particularly concerned, focuses attention on the issue pertaining to the damages to which the appellant is entitled, consequent on judgment on liability having been entered in his favour.

[70] The factual background and the chronology of events leading to this point in the proceedings have already been disclosed in extensive detail in the judgment of the learned President and so there is no real benefit to be gained in repeating them in any detail at this juncture. However, a brief reminder of some salient background facts will suffice for the purpose of providing the factual context within which the assessment of damages has taken place.

The background

[71] At all material times, the appellant was a taxi-operator and farmer. He operated his farm in New Forest District in the parish of Manchester. In November 2009, the 1st respondent conducted a well test in the vicinity of the appellant's farm, upon instructions and with the authorization of the 2nd respondent. During the course of the well test , damage was done to the appellant's farm. Subsequently, at the request of the 2nd respondent, and in the presence of their representative and the appellant, the Rural Agricultural Development Authority ("RADA") conducted a valuation of the damage that was done to the farm. The damage was assessed at $271,932.00. It was agreed that the appellant would have been compensated in that sum for the losses he sustained. The appellant was not compensated and so, by way of a claim form and particulars of clam filed on 9 February 2011, he brought his claim against the respondents claiming damages for negligence and/or breach of statutory duty.

[72] In his particulars of claim filed on 9 February 2011, the appellant claimed against the respondents:

> "(i) The sum of Three Million Six Hundred Thousand Dollars ($3,600,000.00) being loss of earnings from January 2010 to December 2010 under the contract;
>
> ii) Loss of opportunity;
>
> iii) Loss of profit;
>
> iv) Interest at such rate and for such period as this Honourable Court thinks fit; and
>
> v) Costs."

[73] The appellant provided further particulars of the claim for $3,600,000.00, representing the loss of the value of a contract he had entered into with Couples Resort in October 2009 for the supply of farm produce to Couples Tower Isles and Couples San Souci ("the resorts"). He also pleaded that the sum of $287,000.00 was agreed to be paid to him based on the assessment done by RADA for the damage done to his farm, which was not paid. This figure was subsequently restated to be $271,932.00, in keeping with the assessment contained in the RADA report. He did not, however, specifically claim that sum as special damages or at all. During the trial, he made an application to amend his statement of case to include that sum, among others, as special damages but the application was denied by the learned trial judge.

[74] The respondents denied liability and also put the apppellant to strict proof of his damages.

[75] At the end of the trial, the learned trial judge concluded that even if the appellant had proved liability, he (the appellant) had failed to prove his loss as particularized in his particulars of loss and that his claim for loss of opportunity was too speculative. On those bases, he said, the appellant would not have been entitled to an award of damages.

[76] This conclusion of the learned trial judge had led to the complaints embodied in grounds of appeal (vi) and (xi), which state:

> "(vi) The Learned Trial Judge erred when he found that the Appellant had failed to prove his loss as particularized in his Particulars of Loss notwithstanding the fact that the Appellant gave sufficient evidence of the crops he had planted and its values, that there was a contract with Couples Resort and that the Respondents had given the evidence through Sydney Beckford and Milton Henry acknowledging the loss of the Appellant's crops and of the assessment of the loss of the said crops and its [sic] value;
>
> ...
>
> (xi) The Learned Trial Judge erred in law in finding that the Appellant's claim for loss of opportunity was too speculative when the uncontroverted evidence was that the Claimant had obtained a written contract with Couples Resort to supply them with crops and further, that he could have made a living from selling the crops in the market."

[77] Both grounds (vi) and (xi) were found to have merit and so have served to inform the overall findings of this court that the learned trial judge had failed to properly and sufficiently evaluate all the evidence in the case and was plainly wrong in depriving the appellant of compensatory damages. The opinion of the learned trial judge that the appellant had not proved any loss entitling him to some form of remedy by way of

damages had ignored some critical facts, not least of which is the undisputed evidence of the RADA valuation of the damage which was promised to be paid as compensation by the 2nd respondent. The RADA report had also acknowledged that the appellant had proved the contract with Couples Resort, which was taken into account in assessing the loss to him. By failing to have regard to these matters, in addition to those that touch and concern the question of liability, as discussed by the learned President, the learned trial judge would have been plainly wrong in finding that the appellant was not entitled to the judgment of the court and an award of damages. This, therefore, justifies the intervention of this court in assessing the damages to which the appellant is entitled. The material question for this court now is: to how much damages is he entitled?

Assessing the damages

A. Special damages

[78] The appellant contends that the claim for $271,932.00 should be treated as special damages, representing the value of the damage done to his farm as assessed by RADA and contained in the damage assessment report, which was exhibited in the court below and which forms part of the record of appeal. It is his contention that the amount being claimed was the sum agreed to be paid and it has been strictly proven and so should be allowed with interest at 3% per annum from 1 November 2009 to 10 June 2015.

[79] There is no dispute that the appellant's farm was damaged and that he suffered losses as assessed by RADA and, in any event, the RADA assessment and the claim

based on it are not challenged by any of the respondents. In the submissions made on its behalf, the 1st respondent has agreed that it is "unable to resist an award of special damages" for $271,932.00, based on the assessment done by RADA, as the assessment was "implicitly" accepted when the assessment was referred to its insurers for consideration and in the absence of an ancillary claim brought by it against the 2nd respondent. The 2nd respondent, for its part, has also conceded that the appellant is entitled to special damages in the amount of $271,932.00. We are in no position, therefore, to deny the appellant the sum of $271,932.00 he has claimed as special damages.

[80] With respect to the other amendments sought by the appellant in the Supreme Court to allow a claim for special damages for other items, we observe that no submissions were made in relation to these items. The submissions specifically stated that the claim for special damages is confined to the sum of $271,932.00. Therefore, there being no satisfactory pleading and proof of any other item that could properly be regarded as special damages, and with there being no arguments presented in relation to any other item, the appellant is only entitled to recover the sum $271,932.00 (plus interest, which will be detailed later) under the head of special damages.

B. General damages

[81] The details of the damages being claimed by the appellant under the heading of general damages are as follows:

Annual income		$3,600,000.00
Less:		
Payment to farm workers	$ 90,000.00	
Cost to prepare farm	$150,000.00	
Cost of delivery for duration of contract $12,000 per week*4 weeks*12 months	$576,000.00	
		($816,000.00)
Net earnings		$2,784,000.00

The appellant's submissions

[82] Based on the above claim, the appellant submitted that he would have earned approximately $2,784,000.00 per year or $232,000.00 per month under the contract. However, at paragraph 57 of his written submissions, there was a concession that it could not be said **"that the Appellant would have been able to honour the contract for the full twelve months"** (emphasis supplied). At the same time, it was also submitted that there was "**no evidence before this Court and no evidence …in the Court below to suggest the Appellant would not have been able to perform the contract for the full twelve months**" (emphasis supplied). Having said that which appears to be contradictory, however, counsel speaking on the appellant's behalf, Miss Edwards, ultimately submitted that a range of seven to nine months would be appropriate and so the appellant would be deserving of an award of general damages in the region of between $1,624,000 to $2,784.000.00 plus interest from 9 February 2011 to 10 June 2015 at 6% per annum.

[83] In advancing this argument for an award of general damages in the sum proposed, Miss Edwards submitted that the respondents were conducting a well test in an area surrounded by farms and so it was not unreasonable or remote to expect that those farmers would ultimately sell their crops to the public to make a profit to sustain themselves and their families. Counsel pointed out that the appellant's contract with Couples Resort simply proves that he had a guaranteed market for his produce and that the contract was affected by the respondents' actions, including their failure to compensate the appellant. She argued that the loss of profits that resulted from the respondents' conduct has a value, which is ascertainable for the purposes of damages to be assessed.

[84] In support of these submissions, the appellant placed reliance on the RADA report to confirm the extent of the damage to the farm and on invoices and receipts evidencing the supply of produce to the resorts by the appellant and payments made to him, in keeping with his contractual arrangements. Miss Edwards argued that the loss of opportunity, loss of profit and loss of earnings under the contract that resulted from the appellant's inability to perform his contractual obligations, as a consequence of the respondents' breach, were foreseeable or ought to have been reasonably foreseeable, and as such are not too speculative or remote.

[85] It was also submitted on behalf of the appellant that if he had been compensated by the respondents in a timely manner, he would have tried to mitigate his losses by replanting his seedlings and repairing the damage done to the farm in an

effort to honour his contractual obligations to Couples Resort. Instead, he had to purchase and resell his produce to the resorts, which was not financially viable.

[86] In support of the contention that the appellant is entitled to general damages under the subheadings as claimed, reliance was placed on **Overseas Tankship (UK) Ltd v M**; **Victoria Laundry (Windsor) Ltd v Newman Industries Ltd** [1949] 2 KB 528; **Orinthia Hanson v Alcoa Minerals of Jamaica Incorporated** [2012] JMISSC Civ 150 and dicta from this court in **Leighton McKnight & Jamaica Mortgage Bank** [2012] JMCA Civ 44 at paragraph [34].

[87] It was further submitted by the appellant that he had lost the opportunity to renew the contract beyond the intial one year period, for which he ought to be compensated.

The 1st respondent's submissions

[88] In relation to general damages, the 1st respondent, through its counsel, Mr Fletcher, submitted that the quantum of damages for loss of contract/profit/ opportunity would be dependent on whether there were crops on the land at the time of the flooding which related to the contract, what crops were there, in what quantities and whether the quantity of crops on the farm at the time would have been able to satisfy the contract. Counsel highlighted the differences between the RADA report and the appellant's evidence concerning the types of crops that were found on the land during the week of 5 January 2010, which would have been the first week for him to make his delivery to the resorts in performance of the contract.

[89] It is the contention of the 1st respondent that due to the uncertainties relating to the crops on the farm, the quantities on the farm and the inputs into the farming process, it is constrained to accept the RADA report as the basis of the consideration for general damages as it is the only evidence accepted "in any measure by all parties in the matter".

[90] The 1st respondent ultimately relied on the appellant's evidence about the crop cycles to propose an appropriate sum to be awarded for general damages. Based on the cycles of the contract crops that were on the farm: callaloo – one month; pak choi – one month and sweet peppers – 5 months, the 1st respondent quantified the potential deliverables as follows:

Loss of one month's potential supply of callaloo	$ 15,840.00
Loss of one month's supply of pak choi	$ 64,064.00
Loss of five months potential deliverables of sweet peppers	$197,120.00
Total	[$277,024.00]

[91] In the written submissions, this total sum was stated as $274, 874.00, however, the calculation of this court has shown it to be $277,024.00. The award of general damages proposed by the 1st respondent is, therefore, as follows:

Special damages	$271,932.00
General damages	$277,024.00
Total	$548,956.00 plus interest

[92] The 1st respondent's contention is that it should not pay more than a quarter of the damages awarded because, although in strict contractual terms, it was an

independent contractor, it exercised no control over the design and execution of the work that was done.

The 2nd respondent's submissions

[93] In relation to general damages, the 2nd respondent, like the 1st respondent, highlighted the difficulty in arriving at a figure for general damages due to the paucity of evidence from the appellant. The 2nd respondent has refused to accept the appellant's contention that he is entitled to the sum of $232,000.00, being claimed as his net earnings per month. The 2nd respondent, speaking through Miss Bolton, submitted that this sum claimed is speculative and it could not be "purely profit" as the appellant would have incurred expenses in servicing the contract and in reaping and replanting the crops, which had to be deducted. Learned counsel, within this context, highlighted expenses such as: transportation costs per delivery; irrigation and pest control expenses; and costs for vitamins, minerals and plant food. She noted that the appellant was not able to provide evidence as to the costs of his expenses. The appellant, learned counsel argued, could not state with certainty how much money he would have earned under the contract and in the absence of sufficient evidence to enable a proper assessment of the loss, the appellant "fell into the danger of throwing figures at the court and speculating".

[94] Regarding the claim for loss of opportunity, Miss Bolton submitted that the failure of the appellant to put a value to this sum results in him not being entitled to it. However, it was also observed by her that he had started to perform the contract and so it could not be said that he had lost the opportunity to perform it. Counsel further

submitted that the contract is "precarious" as it was subject to variations such as the weather, whether the resorts accepted the quality of the produce sold as well as the resorts' contractual rights to terminate the contract. The claim for loss of opportunity is, therefore, speculative in this regard, she contended.

[95] On the issue of the appellant's duty to mitigate, the 2nd respondent maintained that the appellant gave evidence that on 5 January 2010, two months after the well test, several crops were present on the farm and this is an indication that the appellant had an opportunity to utilize his farm to satisfy his contract. According to Miss Bolton, the appellant had failed to do so and has failed to explain why he was unable to do so. Therefore, there was failure on his part to mitigate his losses, she argued.

[96] The 2nd respondent relied on the exhibited invoices and receipts which prove the delivery of produce for the month of January 2010, in trying to arrive at an appropriate sum for the award of general damages. The invoices amounted to $261,895.80. Miss Bolton submitted that using an expense factor of 75%, the remaining amount of $65,473.95 would represent the appellant's net monthly earnings/profit that would have been lost.

[97] The 2nd respondent posited that three months was a reasonable time for the appellant to have recovered from any damage done to his farm and that he was under a duty to mitigate his losses. On the 2nd respondent's computation, a total loss for the three months would be $196,421.85 (on computation of the court restated from

submitted figure of $196,419.00). Accordingly, the proposed award of the 2nd respondent would be:

Special damages	$ 271,932.00
General damages	[$196,421.85]
Total	$ 468,353.85

[98] The 2nd respondent further argued that the award should be apportioned equally between it and the 1st respondent because the 1st respondent did not join issue with it in relation to the apportioning of liability or seek to be indemnified.

Discussion and findings

[99] In assessing general damages, the governing principle is *restitutio in integrum*, which means, in effect, that the court must endeavour, so far as money can do it, to place the appellant in the position he would have been in had his farm not been destroyed by the acts and/or omissions of the respondents.

[100] It is interesting to note from the outset that, although the appellant had given evidence that the physical damage to his farm extended beyond what the RADA assessment has indicated, he has provided no independent proof of that assertion. He also said, by way of explanation of the discrepancy between his evidence and the RADA report, that he had agreed to accept a lesser sum (which is the sum reflected in the RADA assessment) so that the claim could be settled expeditiously. It is noted, however, that in the submissions made on his behalf, nothing was said about any other

damage than that stated by RADA and these assertions of the appellant were not relied on in the arguments relating to the quantum of damages to be awarded. Indeed, the appellant has relied on the RADA report as showing the extent of the physical damage he suffered.

[101] Under paragraph 17 of the appellant's written submissions, treating with the issue of special damages, it is stated, in part:

> "It is an agreed fact that the Damage Assessment Report prepared by R.A.D.A. was commissioned by the 2nd respondent. The Report was not challenged by any of the two Respondents. **The Damage Assessment Report from R.A.D.A. is documentary proof of the damage done to the Appellant's farm as a consequence of the Respondents [sic] negligent actions. The Report confirms the extent of the damage that was done to the seedlings on the Apellant's farm and to his nurseries. The Report from R.A.D.A. establishes with certainty the actual physical losses suffered by the Appellant to is [sic] farm.**" (Emphasis added)

[102] Then again at paragraph 29 of those submissions, in treating with the claim for general damages, the same arguments are repeated in these terms:

> "**The damage assessment report prepared by R.A.D.A. which was marked as exhibit 18 and which has been referred to in paragraph 16 above, confirms the extent of the damage that was done to the appellant's farm. The report from R.A.D.A. establishes with certainty the actual physical lossess suffered by the Appellant...**" (Emphasis added)

[103] Based on the state of the the appellant's case, and his reliance on the RADA report as establishing "with certainty" the actual physical damage he suffered on his farm, there is no credible basis on which to extend the physical damage he suffered on

the farm beyond the RADA report. The appellant is held bound by the RADA report as proof of the actual damage done to his farm, in the absence of any documentary or other cogent proof from him of any other loss that had been suffered. The damages to which he is entitled under the heading of general damages are therefore assessed based on the damage to the farm as disclosed in the RADA report.

[104] On an analysis of the evidence given by the appellant in the court below, I am constrained to agree with the submissions of the respondents about the insufficiency and absence of cogency of the evidence given by the appellant. The appellant's evidence left much to be desired and is practically unhelpful to the court in several material respects. This limitation, however, is not treated as a deterrent in the assessment of the damages to which he is entitled, since it is obvious that he did suffer physical damage to his farm and he did, in fact, have a contract to supply farm produce to the resorts, which give rise to a relevant consideration as to whether, and the extent to which, he was affected in his business venture as a result of the respondents' breach.

[105] In **Jamalco (Clarendon Alumina Works) v Lunette Dennie** [2014] JMCA Civ 29, this court, dismissed an appeal against the decision of the trial judge to award general damages for breach of contract by the appellant, although faced with the complaint as to the insufficiency of evidence establishing general damages. The appellant complained that the learned judge, in making separate awards for general damages in favour of the respondent, had no evidential basis for the figures used in his

assessment. Phillips JA, at paragraphs [52]-[59] of the judgment of the court, explored, in detail, the authorities relating to the assessment of damages, where the court is faced with limited evidence of the loss. After summarizing the authorities, Phillips JA arrived at the following considerations at paragraph [60]:

> "(1) The Court of Appeal is hesitant to interfere with an award of damages made in the lower court and will only do so in specific circumstances.
>
> (2) A person claiming damage must be prepared to prove their damage.
>
> (3) **If the damage sustained is clear and substantial, but the assessment of the same is difficult, the court must do the best it can in the circumstances.**" (Emphasis added)

[106] In concurring in the decision of the court not to disturb the award for general damages, Phillips JA, at paragraph [81], cited the case of **Chaplin v Hicks** [1911] 2 KB 786, where the court, in that instance, grappled with the lost opportunity of the plaintiff, due to the negligent actions of the defendant, to participate in a competition where the entrants had been reduced from thousands to 50 with a potential of winning 12 prizes. Vaughan Williams LJ made it clear that because precision could not be arrived at did not mean that damages could not be assessed. He stated at page 792:

> "In such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that the damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract."

Fletcher Moulton LJ, for his part, stated at page 795:

> "I think that, where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case."

[107] It stands to reason therefore, in the circumstances of this case, that although there is evident difficulty in having a precise assessment of the damages to which the appellant is entitled, it ought not to be used to deprive him of redress, when it is plain that he had sustained actual damage to his farm that clearly affected his earning potential. The RADA assessment had taken that into account upon the assessor being shown proof of his contractual obligations to supply farm produce to Couples Resort. In fact, RADA had assessed one week contractual loss to him as a result of the damage to his farm in the sum of $29,832.00. It cannot be denied then that the appellant had suffered actual damage and that the damage had affected his contractual obligations to third parties, which justifies an award of damages over and above nominal damages. The losses he suffered as a natural and direct consequence of the respondents' breach of duty are, therefore, not remote and are recoverable.

[108] As counsel for the appellant pointed out, "it is an age-old doctrine of the law of negligence that for damages to be recovered they must have been reasonably foreseeable": **Overseas Tankship (U.K.) v Morts Dock and Engineering Co (The Wagon Mound)** [1961] 2 WLR 126, [1961] 1 All ER 404. Foreseeability is, indeed, the essential test. It must have been reasonably foreseeable, or at least, it ought to have

been reasonably foreseeable, that if the farms within the vicinity of the area of the well were damaged during the course of the test, then, the farmers would have been affected in their livelihood, which could reasonably have included the sale of their farm produce to third parties. A contract for the delivery of produce grown on the appellant's farm, and from which he could have earned money to fulfil the terms of the contract, would have fallen within the realm of reasonable forseeability.

[109] In the circumstances, the court will have to do the best it can to ensure that the appellant is duly and reasonably compensated, regardless of the evidential deficiencies in his case.

[110] It is noted that the appellant has claimed general damages under three subheadings: loss of the value of the contract ($3,600,000.00), loss of profit and loss of opportunity (while indicating that total general damages are to be assessed, given the absence of figures provided for loss of profit and loss of opportunity). There seems to be some measure of overlap among the items claimed, which could result in double counting and overcompensation, if the appellant were awarded damages under the separate subheadings. This, it seems, was recognised by his counsel who, on their computation, had deducted his expenses and claimed one net sum as the damages to which he is entitled. Also, in their written submissions, they have stated the claims under the separate subheadings, in the alternative. This seems to be a more realistic position.

[111] It is considered necessary to clarify this aspect of the claim because there was no amendment to the pleadings (included in the record of appeal) to reflect a claim for damages under the three subheadings, in the alternative, although the submissions were along that line.

[112] In any event, even if the claim for loss of opportunity and loss of the value of the contract could be treated separately, the appellant's arguments that he ought to be awarded damages under one or the other of these subheading is rejected. Alhough he has claimed for the loss of the opportunity to have the contract or the full value of the contract for 12 months, he did not, at any time, plead that the contract was, in fact, terminated and when it was terminated. He was put to strict proof of his case as to the existence and loss of the contract by both respondents in their pleaded defence. While he responded in his reply to the amended defence of the 2nd respondent that the contract existed and that it was inspected by the 2nd respondent's representative, nothing was pleaded in reply about any loss or termination of it.

[113] Furthermore, in giving evidence at the trial, the appellant adduced evidence of the existence and terms of the contract by exhibiting it but he adduced no evidence to establish its termination to prove that he had lost it and that he lost it as a result of the respondents' acts or omissions. Even more specifically, the contract stipulated that it was terminable by three months notice in writing. However, no written notice of termination, as required under the contract, was produced in evidence, or at all. The

only evidence from the appellant touching the issue of termination was to this effect at paragraph 33 of his witness statement:

> "This was not sustainable and lead [sic] to significant financial losses to me. As a result of this, I had to inform Couples Resort of the difficulty. Couples Resort then informed me that if I was unable to meet my obligations as stipulated in the contract, the contract would be terminated."

[114] This evidence was insufficient to establish termination of the contract to ground loss of opportunity or loss of the value of the contract for 12 months. The appellant has the onus to prove his case on a balance of probabilities that the damage to his farm had led to the loss of the contract, which he has failed to do. No damages would therefore be awarded for what he termed loss of opportunity or loss of the value of the contract for 12 months.

[115] In relation to the loss of an opportunity for a renewal of the contract, it would be highly speculative and arbitrary to award the appellant any damages for loss of opportunity of a renewed contract. There is no guarantee that Couples Resort would have continued in contractual relationship with him or he with them, even during the relevant contractual year, much more upon the expiration of that contractual period. The appellant's evidence was that the contract was up for review after the end of the contractual period. There was no express provision for an automatic renewal. Furthermore, the appellant had started experiencing difficulties during the first month, and given the numerous vagaries surrounding the performance of the relevant contract, it is not reasonably foreseeable that there would have been a renewal of it at the end of

12 months. Such a loss of opportunity would, therefore, be remote. There is thus no proper basis to make an award for loss of opportunity for a renewed contract.

[116] The critical issue for consideration now is the quantum of damages to which the appellant is entitled for what he claims as loss of profits or what may be called loss of earnings. It must be stated from the very outset that in considering the appellant's entitlements under this head, any loss he has suffered will not be taken as extending over the full period of the contract, given that there is no proper and adequate proof that it was terminated before the expiration of 12 months, as already indicated above, during the course of treating with the issue of loss of opportunity.

[117] The approach recommended by each of the parties to be employed in the assessment of damages and the sums they have proposed are duly considered but each approach is not without its own inherent challenges. Nevertheless, the submissions have been helpful as they have served to direct the court’s attention to the material issues that arise for consideration and resolution in the assessment exercise.

[118] It is recognised that the only evidence which proves particularly useful to the assessment process is the documentary evidence as contained in the RADA assessment report, the signed contract with Couples Resort, and the invoices and receipts, which show the quantity and costs of the produce delivered over a one month period, being January 2010.

[119] From the contract, it is seen that the appellant's potential gross earnings from his supply of produce to the resorts would have been $419,408.00, per month as illustrated in the table below.

PRODUCE	PRICE PER KG	ESTIMATED WEEKLY QUANTITY FOR CTI & CSS*	TOTAL
Callaloo	$ 66.00	60	$ 3,960.00
Tomato (slicing)	$ 110.00	430	$ 47,300.00
Escallion	$ 77.00	50	$ 3,850.00
Thyme	$ 110.00	15	$ 1,650.00
Hot Pepper	$ 110.00	12	$ 1,320.00
Green Sweet Pepper	$ 88.00	112	$ 9,856.00
Cabbage	$ 110.00	190	$ 20,900.00
Pak choy	$ 88.00	182	$ 16,016.00
			$ 104,852.00
Total per month			**$ 419,408.00**
*CTI - Couples Tower Isles			
*CSS - Couples Sans Souci			

[120] The earning of that gross sum, however, would have been dependent on the appellant supplying all the produce at the quantities and prices stated.

[121] The appellant claims that he is entitled to a minimum of $300,000.00 as his gross earnings from the contract, which would amount to $3,600,000.00 per year. This estimated gross earnings advanced by the appellant is, indeed, in keeping within the band of his full potential gross earnings as shown in the table above.

[122] His actual gross earnings, however, for January 2010 is borne out on the invoices and receipts on which he has relied to prove that he had actually commenced the performance of the contract with Couples Resort. It is seen that the total sum represented in those documents for that month was $261,895.80. That figure, however, contained the costs of delivery (an expense for which he was compensated by Couples Resort under the contract) at $10,000.00 per delivery (made eight times for the month) which when deducted amount to a gross sum of $181,895.80. The monthly earnings based on the invoice for January are, therefore, detailed as follows:

Total earned from supplies	to hotel	$261,895.80
Less: Delivery cost		($80,000.00)
Earnings for January 2010		$181,895.80

[123] As can be seen from this figure representing the appellant's earnings in January 2010, no other deductions were made for expenses that would have been incurred by him in servicing the contract. Therefore, his actual net earnings/profits would have been less, when other inevitable expenses are taken into account. The sum of $181,895.00 therefore stands as proof that there was no guarantee that the appellant would have always earned the full potential earnings under the contract and also that an earning of $300,000.00 was the minimum gross earnings he would have earned under the contract per month, as contended by him. So, the figures for both the full potential gross earnings and the actual earnings for January 2010 do serve to provide a useful guide as to what sum may be used as the predicate gross earnings for the

purposes of determining a fair and reasonable award of damages to the appellant for the loss he sustained in connection with his contract. It seems fair to state that his estimated gross earnings for the purposes of assessment of damages should fall somewhere between $182,000.00 (January 2010 earnings) and $420,000.00 (estimated monthly gross earnings as depicted in the table above). The evidence will now be examined in an effort to arrive at an appropriate sum between these two figures, which would fairly represent his estimated gross earnings for the purposes of the assessment.

[124] In determining the appellant's estimated gross earnings under the contract and the damages to which the appellant is reasonably entitled, it seems necessary to begin with the crops that were on the farm at the material time ("farm crops") and those that were to be delivered under the contract ("contract crops"). These are depicted in the table below.

Farm crops	**Contract crops**
Sweet pepper	Green Sweet pepper
Pak choi	Pak choi
Callaloo	Callaloo
Melon	Tomato (slicing)
Pumpkin	Escallion
	Thyme
	Hot pepper
	Cabbage

[125] It is clear from the table that of the eight contract crops, only three were on the farm. It means then that the appellant, from the very outset, would have had to fulfill his contractual obligations by purchasing over half of the contract crops on the open market. Also, as Mr Fletcher correctly observed, there is no evidence that the appellant

had a 12 month supply of the contract crops he had on the farm to satisfy the contractual demand for those crops.

[126] The non-contract crops (melon and pumpkins) were to be sold, and the returns from them used to purchase contract crops to fulfil his contractual obligations and to reorganise his farm. These non-contract crops would have generated an income of $220,000.00 (based on the appellant's evidence and the RADA assessment).

[127] The appellant testified that he had intended to reap all the farm crops (contract and non-contract crops) between December 2009 and January 2010, which would mean that after the first fulfilment of the contract, he would have had no crop on the farm to reap for the subsequent months to supply to Couples Resort and to finance his venture, unless he replanted them or planted other crops to satisfy the contract.

[128] This means also that after the reaping of that cycle of crops that were on the farm, the appellant would have had to replant crops and await their maturity in order to reap them to satisfy the contractual demand. If they were not replanted, he would have had to purchase them on the open market for resale in order to satisfy the contract. Importantly too, even if he replanted them, he would have to wait for them to reach maturity for reaping which means that during the interval, he would have had to purchase crops on the open market at varying times depending on the cycles of the crops. One thing that is readily evident from these observations is that the purchasing of produce on the open market was, and would have been, a prominent feature of his

enterprise, since he did not produce all the crops himself and it is also not clear that he was producing the ones he planted in the requisite quantities.

[129] The appellant said he had to borrow $280,000.00 (albeit that he has provided no evidence of this loan) but it does seem that he is saying that he borrowed almost the same sum that he was promised as compensation in order to offset the cost of his contractual obligations. Whatever was the source of the appellant's initial outlay of funds, he did make deliveries to the resorts amounting to a gross earning of roughly $182,000.00 for January. The appellant has offered no explanation for his actual earnings for January 2010 falling so far short of what was projected as his potential monthly earnings under the contract. The actual gross earnings for January ($182,000.00) stood at roughly 43% of his potential gross monthly earnings under the contract ($420,000.00). He had indicated that he bought some contract crops at higher prices than the contractual prices but he has not directly indicated that as being a reason for his deliveries and earnings falling short of the contractual projection in January, the first month of the contract.

[130] The important thing that is noted from this evidence is that the prices of the crops (at least those not grown on the farm) would have been the same whether he was compensated or not or his field was damaged or not because he would have had to buy them on the open market to service the contract in full, in any event. That was his plan from the very outset, as he explained. So, the high cost of the produce on the open market was a hazard of his operation. He would have had to face high prices on

the open market in January 2010 and at some other point during the course of the contract. This could have affected the quantities he would have had to purchase for the purposes of carrying out his contractual obligations. He, in fact, stated that purchasing crops at such prices was "unsustainable and lead [sic] to significant financial losses to [him]".

[131] Against this background, it seems reasonable to conclude that a figure close to his actual earnings in January would be an apt figure on which to peg his estimated gross earnings per month, in the absence of any satisfactory evidence from him. In this regard, the sum of $210,000.00, representing 50% of his full potential gross earnings, seems to be an appropriate estimated potential gross earning per month for the purposes of assessment, in the light of the numerous vagaries and uncertainties of the appellant's enterprise, on the one hand, and on the other, the possibility (even if, seemingly, slight) that he could have supplied more produce than he did in January 2010. This sum is actually $90,000.00 less than what the appellant had suggested to be his estimated gross earnings per month.

[132] It is clear that the appellant had expenses and so there has to be, of necessity, some deductions from his estimated gross monthly earnings of $210,000.00. It is observed that the only evidence given by the appellant relates to the expenses he would incur to pay workers, to prepare the farm and to deliver the produce to the resorts. The appellant's discount to make allowance for the expenses he identified represented roughly 23% of the figure that he had proposed as the gross monthly

earnings. It must be noted, however, that the expenses identified by the appellant were not the only deductibles and it is for that reason that the sum of $232,000 proposed by him as his net monthly earnings cannot be accepted.

[133] One of the deductions for which allowance must be made is the cost of purchasing crops on the open market because that was inevitable, whether or not he had sustained damage to his farm. This stands to be deducted, albeit that it is noted that the appellant's evidence was that the non-contract plants that were on the farm at the time of the well test would have been sold to provide funds to assist in the operation. The purchase of crops on the open market was left out of the consideration of the appellant in making an allowance of approximately 23% from his gross earnings.

[134] The appellant also accepted that the farm crops had varying cycles and so there would have had to be reaping, purchase of seeds/seedlings, pesticides, among other things, and the preparation of land for replanting during the course of the year. This would have necessitated added material and added labour with, concomitant costs, not only at the beginning of the contract but throughout the currency of the contract. These were all expenses that he woud have had to incur in fulfilling his contractual obligations over time, which would have had to be deducted from his gross earnings. He could not assist the court, however, as to the cost of some of these expenditures. These matters were also not taken into account in his accounting process in arriving at a net figure.

[135] Quite apart from other expenses that have not been factored in the equation, there are, indeed, other variables that were not taken into account by the appellant in arriving at his net earnings but which must be considered. There would have been other variables such as weather conditions and other natural occurences that could have adversely affected the survival of the crops and the output of the farm. There was also the contractual right of the resorts to reject produce of inferior quality or which they found to be unsatisfactory. All these matters have to be taken into account in arriving at a fair award of damages.

[136] The appellant himself had indicated that he suffered significant financial losses in the first month of his venture. There is really nothing to suggest it would have been significantly better after the first month, given the risk he faced of high prices of produce on the open market, among other things. The fact is that the appellant had just undertaken that venture and so was not so established in his farming venture and in his contractual arrangement so as to be in a position to definitively show that he would have earned far more under the contract had his farm not been damaged. In short, the appellant has no history of earnings from the farm to assist him in his claim. Also, there is no evidence that the damage to his farm was to such an extent that he could not have recommenced the planting of crops shortly after the well test . He proffered no explanation of how he was affected after January in pursuing his activities on the farm so as to minimise his losses and fulfil his contractual obligations given the evidence that in January 2010 (less than two months after the well test), he had some crops on the farm.

[137] The learned trial judge had given the appellant no damages because of the unsatisfactory state of his evidence on matters relevant to the proof of damages. It is important to point out that the evidence remains the same before this court but, as already indicated, the difficulty in assessment should not preclude recovery, once the fact of damage is proved. This court has to struggle to do the best it can in all the circumstances.

[138] So, taking into account the relevant expenses and other variables, as detailed above, as well as the vagaries, vissciitudes and imponderables that would have been attendant on the farming business, which could have affected the appellant's earnings under the contract, either positively or negatively, and the less than satisfactory state of his evidence, it is believed that a discount of 45% of the gross monthly earnings would be fair and reasonable in arriving at the damages for loss of earnings/ profit. In all the circumstances, the net sum which would represent his monthly loss of earnings/profit under the contract would be put at $115,000.00.

[139] The appellant submitted that the court should consider a range of seven to nine months as the period for the award. The 2nd respondent posited that this amount should be for three months. The contract states that it is subject to termination "without cause by either party giving three (3) month's notice in writing" (see clause 14 of the contract at page 89 of the record), which means that the contract could have been terminated prior to the expiration of 12 months. The prospect of termination of the contract at any time; the subjective nature of the contract as it relates to the

resorts being at liberty to reject the produce; the possibility of price fluctuations, weather conditions and other variables having an adverse impact on output; the fact that there was no permanent damage to the land as a result of the well test that would have prevented the appellant from utilising his land within a short time after the damage (by three months, at most); and the fact that the appellant was finding it difficult, from the very outset, to purchase produce on the open market, which he found to be unprofitable (and which cannot at all be fully attributable to the respondents), there is no proper basis for the appellant to be awarded compensation for between seven to nine months as submitted on his behalf.

[140] Taking all the foregoing matters into account, it would seem that compensation for no more than five months seems fair and reasonable in all the circumstances. I would hold accordingly.

[141] A reasonable sum to be awarded as general damages for loss of earnings/ profits would therefore be $115, 000.00 per month * five months = $575,000.00.

Conclusion

[142] The combined award of damages would be as follows:

Special Damages	$ 271,392.00
General Damages	$ 575,000.00
TOTAL	**$846, 392.00**

[143] I would, therefore, make the following order in favour of the appellant on the issue of the quantum of damages, against both respondents, jointly and severally:

(i) Special damages in the sum $271,392.00 with interest thereon at 6% per annum from 1 November 2009 to 31 July 2017.

(ii) General damages in the sum of $575,000.00 with interest thereon at 6% per annum from 21 February 2011 to 31 July 2017.

I would also award the appellant costs of the appeal and in the court below.

MORRISON P

ORDER ON ASSESSMENT OF DAMAGES

1. Damages are assessed and awarded to the appellant against both respondents as follows:

(i) Special damages in the sum $271,392.00 with interest thereon at 3% per annum from 1 November 2009 to 31 July 2017.

(ii) General damages in the sum of $575,000.00 with interest thereon at 6% per annum from 21 February 2011 to 31 July 2017.

2. Costs of the appeal and in the court below to the appellant to be agreed or taxed.