JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 98/2000

BEFORE: **THE HON. MR. JUSTICE HARRISON, J.A.**
THE HON. MR. JUSTICE LANGRIN, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN **WATER SPORTS ENTERPRISES LTD.** **PLAINTIFF/APPELLANT**

AND **MICHAEL DRAKULICH** **DEFENDANT/RESPONDENT**

Richard Mahfood, Q.C., Frank Phipps, Q.C., Raphael Codlin, and Conrad George, instructed by Hart, Muirhead & Fatta for appellant

Dennis Morrison, Q.C., Donovan Walker, and Samuel Harrison instructed by DunnCox for respondent

December 3, 4, 5, 6, 7, 2001 and April 3, 2003

HARRISON, J.A.:

This is an appeal against the enquiry and assessment of damages by Theobalds, J. on July 28, 2000, in the sum of U.S.$847,362.00 with interest at the rate of 10% and costs to be taxed or agreed, consequent on the interlocutory injunction granted by Chambers, J. on March 14, 1980.

The relevant facts are, that both the appellant and the respondent were engaged in offering water sports recreational activities in the resort areas of the north coast parish of St. Ann. They both carried out their operations in competition at various hotels in the said parish. As a result of

an altercation between one Ernest Smatt, the managing director of the appellant, and the respondent, the appellant filed a writ against the respondent on December 18, 1979. He claimed damages for the inducement of a breach of contract and sought an injunction restraining the respondent from interfering with the performance of the appellant's contract "... either to the premises of Ocho Rios International Hotel or Mallard Beach Hyatt Hotel or wheresoever the performance of the said contract may take place ..". As a consequence, the appellant obtained an interlocutory injunction against the respondent granted by Chambers, J. on March 14, 1980, in the following terms:

> "1. ... the interim injunction which is granted in this joint hearing is that Smatt Water Sports interest shall be confined to the use of a portion of the shores and hotel facilities at the National Hotels & Properties Ltd. as is mentioned in the suit and Mr. Michael Drakulich confined to the use of the shore and hotel facilities, at the other portion, such portions to be agreed now between the parties, approved by Mr. Justice Chambers or Mr. Justice Chambers shall arbitrarily set out which portion apply to each.
>
> **2.** An injunction is further granted that neither of these two parties, namely, the Smatt interest or Mr. Drakulich interest shall in any way restrict or interfere with the other in such limited performance, and the hotel interests are also required to allow both parties to carry out such portion of the contract and/or the supposed other contract in accordance with the proper regard to this order.

> **3.** This order to remain in force until the determination of the trial or until or till further order.
>
> **4.** Each party namely, Mr. Michael Drakulich and the Smatt Enterprises undertake to pay such damages as the other may have suffered as a result of this order.
>
> **5.** Court orders that the Smatt Enterprise interest to operate for and on behalf of the Inter-Continental and Mr. Drakulich to operate from the Mallards Beach Hyatt and each to have the joint use of the water sports center at the Inter-Continental without interference one from the other."

The substantive action filed by the appellant on December 18, 1979, resulting in the said injunction restraining the respondent, was heard by Theobalds, J. on July 14, 1989, and determined in favour of the respondent. Judgment was entered for the respondent on the claim with costs and on his counterclaim in the sum of $2,000.00 with costs, to be paid by the appellant.

On August 2, 1989, the respondent filed a summons seeking an order for an inquiry as to the damages sustained by the said respondent as a result of the said injunction granted on March 14, 1980 on the basis of the undertaking given by the said appellant to pay such damages. The injunction had been ordered to remain in force until the termination of the trial of the action.

On December 20 1989, the Master ordered:

> "That there be an inquiry as to what damages have been sustained by the defendant by reason of the interim injunction granted by this Honourable Court in favour of the plaintiff in an Order dated the 14th day of March 1980, which the plaintiff ought to pay according to its undertaking contained in the said Order."

Thereafter, a series of events resulted in an extended delay in the matter. Appeals by the appellant were finally dismissed in 1993, for want of prosecution. The file was displaced in the registry of the Supreme Court for two successive one-year periods. Objections by the appellant to the Deputy Registrar of the Supreme Court conducting the enquiry and requests that the matter be heard by Theobalds, J. spanned a period from 1993 to 1997. On February 16, 1998, a notice of inquiry was filed for the hearing, which commenced before Theobalds, J. on November 17, 1998. After several days of hearing, the said order was made on July 28, 2000. The latter is the subject of the current appeal.

The appellant filed the eighteen (18) grounds of appeal following:

> **"1.** That the learned trial judge misdirected himself when he rejected the plaintiff's/ appellant's preliminary submission which was repeated at the end of the assessment, that a judgment of the Supreme Court which was pronounced more than six (6) years cannot be executed after the expiration of that period, unless before proceeding to such execution leave is granted by that said court to do so.
>
> **2.** That the learned judge in evaluating the evidence took into account evidence which was

not before him in the assessment of damages which said evidence actually relates to the trial of the action which was in fact conducted by him and which he had already used to arrive at his conclusion that the plaintiff-appellant had in fact assaulted the defendant/respondent by slapping him with a newspaper and which had no relevance to the question as to whether the defendant/respondent was able to prove that he suffered loss.

3. That the learned judge having correctly stated on page 6 of his judgment as follows:

"As a feature of Michael Drakulich claim which initially caused me some concern was the well recognized principle of law that both actual loss and the quantum thereof fall in the category of special damages and require strict proof before they can be recovered" which statement properly represents the law went on to make findings on behalf of the defendant/respondent which were quite contrary to that correct statement of the law and relied on the case of **Biggin vs Permanite** 1951 which authority does not have any relevance to the principle neither did it enable His Lordship to do what he did namely ignore the proper statement of the law and went on to assess damages without proper proof.

4. The learned judge having come to the conclusion that he formed a favourable impression of the late Mr. Leo Wyman and Mr. Lionel Reid went on to describe the evidence of those witnesses as being given on behalf of Mr. Michael Drakulich when it is a matter of record that both the late Mr. Wyman and Mr. Reid's evidence were given on the behalf of the plaintiff/appellant.

5. The learned judge misdirected himself when he held that Mr. Drakulich was entitled to assessment of damages against Water Sports

Enterpises Limited when Drakulich up to the time of assessment, has never made any claim against Water Sports Enterprises with regard to any contract that Water Sports has interfered with thus causing him injury.

6. The learned judge clearly misdirected himself when he awarded the defendant/respondent sums of US$343,128.00, US$102,256.00, and US$60,000.00 as set out in terms 2-4 of his judgment when even if the defendant/respondent could be said to have lost those earnings, those earnings had nothing to do with the grant of the injunction for the plaintiff/appellant to operate at the Intercontinental Hotel.

7. The learned judge misdirected himself when he held that there was evidence before him upon which he could have properly found that the defendant/respondent has suffered loss in the amount of US$361,978.00.

8. The learned judge clearly misdirected himself when he awarded sums in U.S. currency when in 1980-1981 it was unlawful to make payment of debts in U.S. currency under the Exchange Control Act.

9. The learned judge erred in awarding damages to the defendant/respondent which were not caused by the interim injunction granted in favour of the plaintiff/appellant in Order dated the 14th day of March 1980.

10. The learned judge erred in treating the inquiry as to damages which commenced on the 16th March 1998, as a continuation of the trial which was concluded by the final judgment dated 14th day of July 1998.

11. The learned judge erred in treating the inquiry as to damages as "an inquiry as to damages suffered by the defendant Michael

Drakulich arising from a long standing feud between the plaintiff company Water Sports Enterprise Ltd. ... and the defendant" and then proceeding to award damages allegedly suffered in the long standing feud excluding only the damages awarded at the trial for "assault only".

12. The learned judge erred in castigating the appellant for introducing evidence at the trial as to the "altercation on the beach" although the evidence was not part of the evidence introduced at the inquiry as to damages.

13. The learned judge erred in failing to evaluate or address the evidence as to loss and damages presented at the inquiry as to damages and instead made his award on the basis of his conclusions ~~on the~~ factual issues at the trial, such as the "gun" issue.

14. Having stated that "he had no difficulty whatsoever in recalling with clarity and precision the demeanor of the witnesses in both sides of this drama" and that "favourable impression was formed by me" as to the defendant's credibility and that of his witnesses, the learned judge erred in listing among those witnesses Mr. Leo Wyman (now deceased) and Mr. Lionel Reid, forgetting the elementary fact that these witnesses testified on behalf of the plaintiff/appellant.

15. The learned judge erred in apparently disregarding the unchallenged evidence of the plaintiff/appellant that "about 1981 it was invited to and took over operations at both hotels to the exclusion of Drakulich. The management also invited me and from 1981 up to today I operated at both hotels". This evidence established that the defendant/respondent's business interest at Mallards ceased in 1981. Thereafter, he had no business which could be affected by the interim injunction.

16. The learned judge erred in awarding interest at the rate of 10% per annum since that figure was arbitrary, based on irrelevant evidence and not supported by relevant evidence, namely, the rate at which the defendant/respondent could borrow U.S. dollars from commercial banks.

17. Having regard to the excessive delay in delivering the judgment, the grave factual and other errors in the judgment and the confused and incomprehensible notes of the evidence, the finding of the learned judge cannot be relied on and to allow it to stand would be unfair to the appellant.

18. The Learned Master exceeded his jurisdiction in making the Order on 20th December 1999, for an enquiry as to what damages have been sustained by the defendant/respondent and accordingly the learned judge had no jurisdiction to conduct the enquiry."

Whenever an injunction is granted to restrain a party before trial, an undertaking is usually extracted by the court from the party seeking to restrain the other. The primary object is to compensate the person restrained, if it subsequently turns out that the said injunction was wrongfully imposed and some damage was occasioned, and also for the purpose of discouraging frivolous applications for injunctions.

The undertaking is extracted by, and given to the court, not to the party restrained.

Consequently, the party restrained who alleges that he has suffered damage as a result of the injunction, may apply to the court to exercise its

discretion whether or not to order an inquiry, and if necessary, to assess such damages. In **Smith v Day** (1882) 21 Ch. D 421, an injunction granted restraining the defendant from building so as to abstract the plaintiff's light, was subsequently discharged as having been improperly granted. A subsequent application for an inquiry as to damages was refused, in the discretion of the court. Jessel, M.R. at page 425, said:

> "... where the Court, by granting the injunction, has said that what the defendant is doing is *prima facia* an infringement of the Plaintiff's rights, and where the circumstances of the property are such that the Defendant may reasonably cease building altogether for fear of the consequences, and sustains damage by so doing, then if the Court is of opinion that the injunction was improperly obtained, the defendant ought to have damages. But the Court has a discretion, and before it will grant damages it must be satisfied that the injunction was improperly obtained, and that the defendant reasonably abstained from going on with his building, and that under all the circumstances damages ought to be given."

Brett, L.J. at page 427, suggested:

> " ... I am strongly of opinion that the question whether an inquiry as to damages should be granted is within the discretion of the Judge who originally tries the case, and that his discretion ought not lightly to be interfered with."

In alluding to the principle governing such an assessment of damages, he continued, at page 427:

> "In exercising this discretion the Court should act as nearly as may be on fixed rules or by analogy to fixed rules. Now in the present case there is no

> undertaking with the opposite party, but only with the Court. There is no contract on which the opposite party could sue, and let us examine the case by analogy to cases where there is a contract with, or an obligation to the other party. If damages are granted at all, I think the Court would never go beyond what would be given if there were an analogous contract with or duty to the opposite party. The rules as to damages are shown in **Hadley v Baxendale**, 9 Ex. 341. If the injunction had been obtained fraudulently or maliciously, the Court, I think, would act by analogy to the rule in the case of fraudulent or malicious breach of contract and not confine itself to proximate damages, but give exemplary damages. In the present case there is no ground for alleging fraud or malice. The case then is to be governed by analogy to the ordinary breach of contract or duty, and in such a case the damages to be allowed are the proximate and natural damages arising from such a breach ...".

Cotton, L.J. expressed some flexibility in making the application for an enquiry as to damages. At page 430, he said:

> "As regards the time of the application, there is no doubt that the failure to apply earlier does not deprive the Court of its jurisdiction founded on the undertaking. It is certainly desirable that the application should be made either at the time when the injunction is dissolved or at the hearing of the cause. No rule, however, has been laid down that it must be made at one or other of those time, and I do not say that the Court ought to lay down any express limit as to time, still I think that a long delay might of itself be fatal to the application."

As to the discretion of the court and the nature of the damages, at page 430 he continued and said:

> "Now the Court has a discretion, it is not bound to grant an inquiry because some damages have been sustained, they may be trivial. ... I think that the damages must be confined to loss which is the natural consequence of the injunction under the circumstances of which the party obtaining the injunction has notice as for instance a claim by the builder in consequence of the injunction under the circumstances of which the party obtaining the injunction has notice, as for instance a claim by the builder in consequence of the injunction compelling the defendant to break his contract with him."

Because the enquiry and assessment is analogous to an assessment of damages for breach of contract, the principle of restitution in integrum ~~applies~~. ~~Namely~~, as far as money can compensate, to restore the person restrained to the position in which he would have been, if the injunction had not been ordered: (**British Transport Commission v Gourley** [1956] A.C. 185, 197). Consequently, damage must be shown to have been incurred and the losses must be strictly proved: **(Bonham-Carter v Hyde Park Hotel** [1948] 64 T.L.R. 178, 179). All the facts need to be known. The enquiry and assessment is more appropriately conducted after the substantive action is concluded.

The court exercises its discretion to enforce the undertaking on equitable principles. It will usually do so, unless special circumstances exist in the particular case, to cause a court to decline to do so, for

example, where no damage is shown to have been caused, as in **Smith v Day** (supra), or the damage is minimal.

The assessment based on the undertaking was explained in the case of **F Hoffman La-Roche and Co. A.G. and others v Secretary of Trade & Industry** [1974] 2 All E.R. 1128, by Lord Diplock. Referring to **Smith v Day** (supra), at page 1150, he said:

> "The court has no power to compel an applicant for an interim injunction to furnish an undertaking as to damages. All it can do is to refuse the application if he declines to do so. The undertaking is not given to the defendant but the court itself. Non-performance of it is contempt of court, not breach of contract, and attracts the remedies available for contempts, but the court exacts the undertaking for the defendant's benefit. It retains a discretion not to enforce the undertaking if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so, but if the undertaking is enforced the measure of the damages payable under it is not discretionary. It is assessed on an enquiry into damages at which principles to be applied are fixed and clear. The assessment is made upon the same basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contract between the plaintiff and the defendant that the plaintiff would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction."

In **Cheltenham v Gloucester Building Society v Ricketts et al** [1993] 4 All E.R. 276, in which the principles outlined in **Smith v Day** (supra), were followed and re-formulated, Neill L.J. at page 281 inter alia said:

> "... Save in special cases an undertaking as to damages is the price which the person asking for an interlocutory injunction has to pay for its grant.
>
> The court cannot compel an applicant to give an undertaking but it can refuse to grant an injunction unless he does.
>
> The undertaking, though described as an undertaking as to damages, does not found any cause of action. It does, however, enable the party enjoined to apply to the court for compensation if it is subsequently established that the interlocutory injunction should not have been granted.
>
> The undertaking is not given to the party enjoined but to the court.
>
> In a case where it is determined that the injunction should not have been granted the undertaking is likely to be enforced, though the court retains a discretion not to do so.
>
> The time at which the court should determine whether or not the interlocutory injunction should have been granted will vary from case to case. It is important to underline the fact that the question whether the undertaking should be enforced is a separate question from the question whether the injunction should be discharged or continued.
>
> In many cases injunctions will remain in being until the trial and in such cases the propriety of its original grant and the question of the enforcement of the undertaking will not be considered before the conclusion of the trial."

In the instant case the order that the undertaking should be enforced was properly made, in the circumstances. Some damage was clearly incurred by the grant of the injunction.

Because the damages are assessable on the same basis as in a breach of contract, the attendant principles of causation and remoteness in contract will arise, interpreted as, whether it was in the reasonable contemplation of the parties, as expressed in **Hadley v Baxendale,** (supra). Losses suffered during the perioid in question but which were not occasioned by the grant of the injunction would therefore be regarded as too remote and not recoverable as damages in the relevant assessment. The party claiming an entitlement to damages must show that his losses would not have occurred if the injunction had not ~~been granted~~, i.~~e.~~ ~~that such losses~~ were caused as a direct result of the grant of the injunction restraining his activities.

In **Financiera Avenida S.A. v Shiblaq** [1988] The Times Law Report dated November 21, 1988, Saville, J. sitting in the Queen's Bench Division said that a defendant seeking damages arising out of a cross-undertaking given by a plaintiff who had been granted a Mareva injunction, must show that the damage suffered would not have occurred were it not for the injunction. He must establish a *prima facie* case that the injunction was the exclusive cause of the damage. The absence of evidence to the contrary would serve to satisfy the court that the damage would not have occurred but for the injunction.

The question of taxation in the context of losses in a business venture cannot be ignored. Since the decision in **British Transport Commission v**

Gourley (supra), a court in awarding damages must consider whether or not the amount recoverable must be calculated taking into consideration the income tax component. In that case it was held, in the House of Lords, that the plaintiff's damages in respect of his loss of earnings both past and future, in an action for damages for personal injuries, must reflect the tax which would have been payable on such earnings and reduced appropriately. On the same analogy therefore, damages recoverable for loss of profits, arising in a business transaction, would themselves be subject to a consideration of the tax payable. It would therefore apply in the instant case.

Arguments were advanced in the grounds undermentioned. Grounds 1, 5 and 8 were abandoned.

Ground 2

Mr. Mahfood, Q.C., argued that Theobalds, J. at the hearing of the assessment improperly considered evidence led at the trial, for example, the assault by the appellant, which evidence was irrelevant to the said hearing. Theobalds, J. in his reasons for the sum assessed as damages, at page 40 of the Record of Appeal, referring to the affidavit evidence of one Ralph Purcell, a witness for the appellant of the events of December 15, 1979, inter alia, said:

> "Drakulich approached Smatt and himself and was accompanied by about ten men. Smatt simply swore that Drakulich "had a gun in his waist." Purcell adds to that somewhat by saying

> 'Drakulich had a gun in his waist under his shirt." Slight inconsistency one might urge, but more importantly, a tribunal of fact is being asked to accept that about 10 men, the leader of whom is armed with a gun, approach 2 unarmed men (Smatt & Purcell) and one of the 2 exchanged blows with Drakulich, (the leader) and Purcell and Drakulich had scuffle. That is all we are ever told about a gun although the police came on the scene. I accept Drakulich as truthful when he says he had no gun."

and at page 43 said:

> "In the opening pages of this judgment I had dealt with a specific finding of fact in relation to the statement by Smatt and his witness that the ~~defendant~~ Drakulich was armed with a gun. It may ~~be untidy in a written judgment~~ such as this to deal with the subject of this gun, divert from it, and return to it later on as regrettably I find myself doing. One asks, why introduce it at this trial? The only answer must be: to cast Drukulich in an unfavourable light before this court. Why not have brought this gun to the attention of the police who attended at the scene for them to ascertain whether or not it was a legal or illegal firearm although there was no evidence adduced as to it having been brought into play at all on the 15th December, 1979, by the so-called "aggressor"."

Theobalds, J. adverted to the events of December 15, 1979, and the presence of a gun, in the context of considering the credibility of the respondent and that of Ernest Smatt, managing director of the appellant. He did not refer to these bits of evidence as material to be utilized in this assessment of the quantum of the losses awarded, nor did he do so. The

parties themselves, at the hearing of the assessment, referred to the events of December 15, 1979. The respondent at page 66, said:

> "15/12/79, incident on beach was day prior to my start of the contract with both Intercontinental and Mallards. I was attempting to introduce my staff to the areas they would occupy next a.m. and we were going in direction of Water Sports center, but never completed that exercise."

Ernest Smatt for the appellant, at page 85, said:

> "About 15/12/79, plaintiff and I had altercation. Plaintiff said then he had come to take over and I believe he said he had a 3 years contract with the hotel."

No one can maintain that reference to the events relevant at the trial was introduced by the parties as material in the assessment of damages caused by the injunction. Although the evidence of the altercation on December 15, 1979, as adverted to, was irrelevant to the assessment of the loss suffered as a result of the injunction ordered, Theobalds, J. did not include it as a feature of the sum awarded. Accordingly, there was no prejudice caused thereby to the appellant. This ground therefore fails.

Ground 3

Counsel for the appellant further complained that Theobalds, J. correctly recognized that an assessment of damages, the actual loss must be ascertained requiring strict proof, but thereafter erroneously relied on the case of **Biggin v Permanite** [1951] 1 K.B. 422 and assessed the damages without proper proof.

The basic principle governing the assessment of damages at common law was stated by Viscount Dunedin in **Admiralty Commissioners v S.S. Susquehanna** [1926] A.C. 655. At page 661, he said:

> "... the common law says that the damages due either for breach of contract or for tort are damages which, so far as money can compensate, will give the injured party reparation for the wrongful act."

To this general principle is the added fact that losses claimed must be strictly proved [**Bonham-Carter v Hyde Park Hotel,** (supra)]. When Devlin, J. in **Biggin v Permanite** (supra), a case relied on by Theobalds, J. referring to the award of damages, at page 438, said:

> " ... where precise evidence is obtainable, the court naturally expects to have it. When it is not, the court must do the best it can"

he was relying on a statement by Vaughan Williams, L.J. in **Chaplin v Hicks** [1911] 2 K.B. 786, discussing the measure of damages recoverable in breach of contract in elation to the difference between the contract price an the market price of goods. Vaughan Williams, L.J. at page 792, said:

> "Sometimes however, there is no market for the particular class of goods; but no one has ever suggested that, because there is no market, there are no damages. 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 damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract."

In a claim for prospective loss of earnings or loss of profits caused by the action of the defendant, the plaintiff, of necessity, will have to rely on projections or rationalization of what his earnings or profits would have been, if his earning activities had not been curtailed by the action of the defendant. This same approach is applicable in the instant case, where the imposition of the injunction wrongly interrupted the business activities of the respondent.

The learned authors in the **Quantum of Damages** by **Kemp and Kemp** 3rd Edition, at page 21, said:

> "In the case of a self-employed or professional man, whose earnings fluctuate, the court will have to estimate this loss and make an award of damages in respect of it."

In the instant case, the respondent was engaged in the business of water sports at first, as "... a hotel employee in '76 and '77 ... at Mallards ..." The respondent thereafter, seemed to have been actively involved in providing water sports entertainment, namely scuba diving, snorkelling services, as also by means of fishing boats, speed boats , and sail boats. He said, at page 57:

> "I was at Hilton, I believe for 8 years 1977-1983. In 1979 I had a concession at Couples, St. Mary 1979-1990 11 years. In 1980 I had concession at Jamaica Hilton I can't remember if it was 1980 or 1981 and none since 1996. Shaw Park concession for 15 years ... ending 1996 not by

> mutual agreement. Couples ended in 1991 by mutual agreement, I can't be sure."

With that degree of experience shown by the respondent, Theobalds, J. could properly as he did, accept the evidence of the respondent of his earnings and consequential losses, as a result of the injunction imposed. Smatt himself, in one instance, said in evidence, at page 92, "I am prepared to accept Drakulich's figures." Theobalds, J. in his judgment, referring to exhibit 1, a statement produced by the respondent, and admitted by consent, at page 44, said:

> "Drakulich uses his years experience in the water sport's business coupled with his previous experience as an operator at the Jamaica Hilton Hotel to provide the court with some figures. These figures must be classified as helpful and instructive .."

The learned judge having heard the evidence of the respondent and his witnesses and the appellant's witnesses, and assessed their credibility, could not be faulted in having accepted the respondent's evidence, reduced into the documented report, to arrive at an assessment of the damages recoverable consequent on the injunction granted in favour of the appellant. I find no merit in this ground.

Ground 4

Mr. Mahfood, Queen's Counsel, complained that the learned judge expressing himself to have been favourably impressed, erroneously described the appellant's witnesses Leon Wyman and Lionel Reid as

witnesses for the respondent whose credibility he accepted. The learned judge thereby displayed forgetfulness and was in error.

The learned judge did incorrectly describe the said witnesses as those of the respondent whereas they were in fact the witnesses of the appellant. However, an examination of the evidence reveals that both witnesses, who had undoubted wide experience in the hotel industry, agree somewhat with the evidence of the respondent of the decline of the tourist industry during the relevant period. Speaking of the earnings and occupancy, the respondent, at page 53, said:

> "... ~~80-81 figures lower~~ ..."

and at page 63, in cross-examination, he said:

> " ... 1979 December to December 1981 were not unprofitable ... not so tourism was at its lowest. It was booming December 1980 there was an election with violence and hurricane in 1980. The hurricane affected tourism but not the election. ... After 1981 there was a "comeback to Jamaica" programme to improve tourism."

Leo Wyman, at page 75, said:

> "Problems with occupancy levels and upkeep – due to bad reports to consumers. These were not boom years 1980-1981 for the trade and we had to work on tourism during the problematic period of the 70's. Hotel ran down."

Lionel Reid, at page 98, said:

> "In late 70's and early 80's tourism very depressed in Jamaica at lower end of economic scale ..." (Emphasis added)"

Both witnesses Wyman and Reid coincide in their views and the aspect of the evidence of the respondent that there was a degree of decline in the tourist industry for the period 1980 to 1981. In that regard there was no inconsistency in the evidence of these witnesses. Consequently, the error in the categorization of the witnesses Wyman and Reid by the learned judge could not detract from nor fault the finding of the said judge with respect to the credibility of the evidence of the respondent. This ground also fails.

Ground 6

In this ground, counsel for the appellant challenged the awards of US$343,128.00; US$102,256.00 and US$60,000.00 maintaining that those said losses did not result from the injunction granted to permit the appellant to operate at the Intercontinental Hotel.

The damages recoverable must be as a result of the damage caused as a direct consequence of the imposition of the injunction. Therefore the respondent must prove "that the injunction was the exclusive cause of the damage": [**Financiera Avenida v Shiblaq** (supra)]. Despite this however, the respondent has an obligation to prove that he took reasonable steps to mitigate his damages, and he cannot recover for any losses due to his own neglect: see **McAuley v London Transport Executive** [1957] 2 Lloyd's Rep. 500, where the Court of Appeal held that the unreasonable refusal by the claimant to undergo a surgical operation,

in rejection of medical advice amounted to a neglect to mitigate. See also **Selvanayagam v University of the West Indies** [1983] 1 All E.R. 824, P.C. where doubtfully the onus was reversed.

The terms of the injunction in favour of the appellant barred the respondent from operating at the Intercontinental Hotel, despite the fact that the respondent held an exclusive contract to operate at the said hotel for a period of two years commencing from October 1979. The said injunction did not debar the respondent from operating at Mallards Beach. On the contrary it expressly recognized the respondent's right to do so, in these terms:

> " ... Mr. Drakulich to operate from the Mallards Beach Hotel and each to have the joint use of the water sports center at the Interncontinental without interference one from the other."

Consequently, the damages of US$343,128.00 assessed by the learned judge as losses suffered at Mallards Beach Hyatt as a result of the injunction ordered on March 14 1980, are not recoverable. The respondent himself, in evidence, at page 52 said:

> "I confined to Mallards ... I complied with injunction and did business (attempted to) at Mallards."

He, however, at page 54, said:

> "I did, do limited operation at Mallards Beach, as I was to have un-interfered access --- to guests by way of the Court's injunction and that was never the case ... at the desk every day plaintiff employees set up a temporary desk adjacent to

> my area and would offer his services for sale to my clients most times at a lower price."

Recognizing that he had the injunction in his favour in respect of his operations at Mallards Beach Hyatt, it was his obligation, if he claimed that the appellant was impeding him, to approach the Court to treat the appellant as being in contempt of its order. The respondent was not entitled to remain passive in the face of the appellant's breach of the injunction, do nothing and then seek to pursue his rights in damages. The respondent's inaction in this regard amounts to a failure to mitigate his damages, a duty cast on every claimant in law [**McAuley v London Transport Executive,** (supra)]. Furthermore, the respondent's inaction amounts to acquiescence on his part, in the contemptuous conduct of the appellant. Such a posture precludes the respondent from voicing any subsequent complaint.

The further awards:

> "(iii) For lost earnings outside of his contract .... US$102,256.00
> (iv) For incentive travel and scuba group .... US$ 60,000.00"

are not recoverable. There was no evidence led before the learned judge to prove any such losses or that any such losses were caused by the imposition of the said injunction. The evidence of the respondent, at page 59 –

> "I saw 'walk-ins' from outside and purchase from Smatt at Water Sports .. I have personal knowledge – but it is hard to remember. I

> deduced the $102,256.00 could have come to me"

is vague and speculative in the extreme and is insufficient to show any loss caused by the injunction. Both parties had the right to operate at the Water Sports centre at the Intercontinental Hotel. Clients were free to choose the services of one or the other. However, similarly, it is my view, that if the respondent genuinely thought that he was being excluded from the said centre, in breach of the injunction, as stated previously, he had a duty to deal with such contemptuous conduct promptly. There is merit in this ground for the reasons stated.

Ground 7

Counsel argued that there was no evidence to prove that the respondent incurred a loss of US$361,978.00 by being barred from operation at the Intercontinental Hotel.

The respondent's evidence was accepted as credible by the learned judge. As I observed previously, the respondent gave evidence of his potential earnings and consequential losses, as a result of the injunction. He produced a statement, exhibit 1, of the relevant figures, in support of his calculations and deductions. The learned judge rejected the contrasting evidence of the said witness Smatt, as not credible. Having seen and heard the witnesses, the learned judge could properly do so. It was a question of fact for the said judge. There was therefore ample evidence from which a finding of the loss at the Intercontinental

Hotel may be supported. Nothing has been shown to indicate that the said judge erred in this regard. However, it should be noted that the injunction was granted on the 14th day of March 1980, whereas the sum of US$361,978.00, is an amount claimed as damages from the 15th of December 1979. Prior to March 14, 1980, no losses incurred are referable to the injunction imposed. Such losses therefore were not caused by the injunction and are accordingly irrecoverable. This ground, in part, also fails.

Ground 9

For the reasons advanced ~~in respect of~~ grounds 6 and 7, this ground also fails.

Grounds 10, 11, 12 and and 13

For the reason advanced in respect of ground 2, those grounds also fail.

Ground 14

For the reasons advanced in respect of ground 4, this ground also fails.

Ground 15

Counsel argued that because the unchallenged evidence of the appellant is that "... about 1981 ..." it took over operations at both hotels up to the date of trial, the respondent had no business at Mallards which the injunction could have affected, as his business there "... ceased in

1981." The respondent's exclusive contract to operate at both hotels for two years ran from December 14, 1979 to December 14 1981. The injunction was ordered on March 15 1980. The respondent's business at the said hotel would have ceased on December 14, 1981. No claim for losses was made by the respondent as being incurred after December 15, 1981. This ground is clearly misconceived and accordingly fails.

Ground 16

The contention that the award of interest at the rate of 10% per annum by the learned judge was excessive has some merit.

Section 3 of the Law Reform (Miscellaneous Provisions) Act authorizes the award of interest on any judgment by the court for damages, in the discretion of the court.

The principle usually adopted by the court is to employ a rate of interest at which money would have been borrowed: **British Caribbean Insurance Co. v Perrier** (unreported) S.C.C.A. 114/94 delivered on May 20, 1996. The party entitled may adduce such evidence and may rely on statistics from recognized agencies or on other documentary means.

The respondent put in evidence, by consent, exhibit 2, reciting calculations of the average rates of interest " ... taken from U.S. Treasury ..." and " ... based on long-term U.S. Government bank yield ..." These, however, are rates of interest derived from deposit investment, which are usually lower rates than that at which money is borrowed. The respondent

arrived at an average rate of 8.73% per annum. There was no other reliable evidence placed before the learned judge. The award of 10% is accordingly quite arbitrary and unsupportable. An award of 8.73% per annum is appropriate in the circumstances.

Ground 17

Learned counsel argued that the excessive delay in delivering judgment coupled with the consequential errors created an unfairness to the appellant sufficient to warrant that the judgment be set aside.

The hearing in this matter was concluded on February 1, 1999, and judgment was delivered on July 28, 2000, a delay of eighteen months. Such a delay is undesirable. However, delay per se will not vitiate a judgment. A court must look at the circumstances and ascertain whether the fact of the delay had such an influence on the outcome of the judgment that the court will find such delay to have been excessive: **Cobham v Frett**, Privy Council Appeal No. 41/99 delivered December 18, 2000. The principal error complained of, in the instant case, is the erroneous reference by the learned judge to the witnesses Wyman and Reid, as witnesses for the respondent. As I maintained in my reasons in respect of ground 4, that error did not detract from the finding of the learned judge as to the credibility of the parties. Furthermore, because the learned judge had before him the documented notes of the hearing showing the said Wyman and Reid, as witnesses for the appellant, that

error in description did not seem to have been caused by forgetfulness due to delay. Because it was not so attributable, an appellate court will not disturb the finding of the learned judge: **Cobham's** case (supra). This ground also fails.

Ground 18

Mr. Phipps, Q.C., argued that the learned Master had no jurisdiction to order the enquiry which, consequently having been so ordered, was invalid.

The jurisdiction and powers of the Master is conferred by section 8(1) of the Judicature (Supreme Court) Act. The section reads:

> **"8-(1)** There shall be attached to the Supreme Court a Master who shall exercise such authority and jurisdiction of a Judge in Chambers as shall be assigned to him by rules of court."

The Master in Chambers Rules 1966, published in the Jamaica Gazette Supplement dated December 16, 1966 in Rule 2, reads:

> **"2.** Jurisdiction:
>
> The Master in Chambers may transact all such business and exercise all such authority and jurisdiction in respect of the same as may be transacted or exercised by a Judge at Chambers ..."

Thereafter, certain exceptions follow, which are irrelevant to this issue. I agree with the submission of Mr. Morrison, Q.C., that the Master had the jurisdiction to order the enquiry as to damages, on the basis of the

undertaking. The undertaking is given to the court not to the opposing party: **Cheltenham and Gloucester Building Society v Ricketts et al,** (supra). The court, therefore, whether a judge or master, has the discretion to determine whether or not that undertaking should be enforced. Neither is there any inflexible rule, as Mr. Phipps contends, that the application for enforcement of the undertaking should be made to the trial judge at the conclusion of the trial.

If an application is made for the discharge of an interlocutory injunction, prior to the trial, a judge discharging the said injunction may, then and there, order an enforcement of the undertaking and an enquiry as to damages: **Cheltenham's** case, (supra). The said judge discharging such an injunction, may well not be the same judge who tries the substantive issue. Although it is desirable that the application for the enforcement of the undertaking and the enquiry as to the damages incurred, be made to the judge at the conclusion of the trial, I agree with the submission of Mr. Morrison that the authorities do not support the view that that should invariably be so. In **Smith v Day** (supra), and **Yap v Union Bank** (unreported) S.C.C.A. 58/98 delivered November 22, 2001, the application was made to a judge other than the trial judge. There is no merit in Mr. Phipps' contention.

In all the circumstances, therefore, the respondent is entitled to the damages incurred as a result of the injunction imposed, from the date of the imposition of the said injunction, on March 14, 1980, to the date of the determination of his exclusive contract at the said hotels namely on December 15, 1981. The respondent's claim and consequent award of US$361,978.00 is in respect of his net losses for the period from December 15, 1979 to December 15, 1981, which includes a period prior to the grant of the injunction by Chambers, J. I agree with the submission of Mr. Phipps, Q.C., that that latter period should be excluded. Excluding the period December 15, 1979, to March 13, 1980, a period of three months, the said sum claimed should be reduced by US$45,247.25 resulting in a net loss for the relevant period of US$316,730.75.

The respondent's recoverable earnings, being earnings as an individual, must be computed as earnings after payment of income tax. Although the respondent, in his calculations, in exhibit 2, describes his losses as "net profits", in evidence, at page 53, he said:

> " ... gross income minus costs gave me that net figure."

The respondent's "net figure" therefore merely took costs into account and not income tax payable. On the basis of the principle in **Gourley's** case, income tax liability must be taken into account.

The "net" amount of US$316,730.75 must therefore be further reduced by 25%, representing income tax payable, resulting in an actual

net loss to the respondent of US$237,548.07. The latter sum will attract interest at the rate of 8.73%.

The appeal is therefore allowed, in part. The damages awarded are accordingly reduced. The awards at items (ii), (iii) and (iv), of the judgment are disallowed and accordingly set aside. Judgment is entered In the sum of US$237,548.07 plus interest at 8.73% from December 15, 1981, to July 28, 2000, and half costs to the respondent to be agreed or taxed.

LAGRIN, J.A:

I agree.

PANTON, J.A:

I agree.