COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 182 of 2016

B E T W E E N

JEROME FORBES
NORTH ANDROS FOOD SERVICES LIMITED
(Trading as "North Andros Seafood")
R & R HOLDING INVESTMENT COMPANY LIMITED
Appellants

AND

SCOTIABANK (BAHAMAS) LIMITED
Respondent

BEFORE: **The Honourable Mr. Justice Isaacs, JA**
The Honourable Madam Justice Crane-Scott, JA
The Honourable Mr. Justice Jones, JA

APPEARANCES: **Ms. Krystal Rolle, Counsel for the Appellant**
Mr. Leif Farquharson with Mr. John Minns, Counsel for the Respondent

DATES: **23 May 2017; 15 June 2017; 4 July 2018**

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Civil appeal - Assessment of damages – Damages – Loss of revenue and profits – Expert witnesses in civil cases

The appellants were in the business of purchasing, processing, wholesaling, retailing, exporting, and transporting seafood products between Andros and New Providence. In order to conduct their business the appellants established a banking relationship with the respondent at its Nicholls Town, Andros branch in 2006. On the 12th August 2008, without warning, notice, or any reason whatsoever, the respondent froze the appellants' personal and business accounts. As a result of the freezing of the accounts the appellants brought an action against the respondent claiming loss and damage. The accounts remained frozen up to the 29th January 2014 when all issues of liability were settled and the parties signed an agreement covering the amounts of damages and interest owed, except for the amounts due for loss of revenue and profits.

During the assessment hearing the appellant Forbes gave evidence and the appellants/plaintiffs relied on the expert opinion of accountant Kevin McDonald (McDonald); while the respondent/defendant relied on the expert opinion of accountant Edmund Rahming (Rahming).

The learned judge in the court below preferred Rahming's evidence to that of McDonald's and awarded the appellants $89,072.46 for loss of profits.

On appeal the appellants seek to set aside the order of the learned judge and ask this Court to undertake its own assessment of the appellants' loss of revenue and profits.

Held: appeal dismissed, judgment in the court below affirmed; costs to the respondent, to be taxed if not agreed.

The duties of expert witnesses in civil cases are as follows: "(a) The expert evidence should be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation; (b) The witness should provide expert unbiased opinion in relation to matters within his expertise and should never assume the role of advocate; (c) He should not omit to consider material facts which detract from his concluded opinion and he should make it clear when a question falls outside his own expertise; (d) The opinion should state if it is provisional only, or subject to any qualification; (e) If, after exchange of reports, the expert changes view, this should be communicated to the other side and the court without delay; (f) Where the expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents these must be provided to the other party at the same time as the exchange of reports; (g) A party who wished to call an expert with a potential conflict of interest should disclose details of that conflict at as early a stage in the proceedings as possible."

The learned judge was of the view that the appellants' expert McDonald placed reliance for his conclusions on source documents which lacked independence based on the aforementioned guidelines. From the tone of his judgment it was clear that the judge was plainly more impressed with and persuaded by the evidence of Rahming than that of McDonald as he felt that Rahming's opinion revealed a thorough analysis of the lost profits based on the level of profits recorded for the 4 years immediately preceding the freezing of the relevant accounts by the respondent. Both the statements by Rahming and that of McDonald were before the learned judge as a fact finder and he preferred the evidence of Rahming and gave reasons for his preference. Having read the judgment in its totality this Court cannot say that the judge was not mindful of the relevant principles as established by case law. Indeed, a trial judge may, in the face of competing expert reports, properly prefer the evidence of one expert to that of another. In the circumstances the judge was entitled to make the assessment of the facts that he did, and this court would be slow to interfere.

The appellants also complain that the judge failed to differentiate the losses suffered by each company. These contentions are contrary to the evidence that was before the judge as the first appellant's evidence did not distinguish between the Scotiabank accounts and the businesses to which they were connected. Furthermore, McDonald did not make reference to the appellants' businesses by the Scotiabank account numbers; McDonald referred to loss of profits only for "The Forbes Group of Companies".

Fiona Trust and Holding Corp and others v Privalov and others [2017] 2 All ER 570 applied

National Justice Companie Naviera SA v. Prudential Assurance Co. Ltd. [1993] 2 Lloyd's Rep. 68 *(sub nom. 'The lkarian Reefer')* applied
Parabola Investments Ltd and another v Browallia Cal Ltd and others [2010] EWCA Civ 486 applied
R v Soto [1975] RTR 357 considered
Ramsahoye v Lall and another [2017] 1LRC 351 applied
Ramzan v Brookwide Ltd [2011] EWCA Civ 985 applied

J U D G M E N T

Judgment delivered by the Honourable Mr. Justice Jones, JA:

Introduction

1. Jerome Forbes, North Andros Food Services Limited and R&R Holding Investment Company Limited ("the appellants"), appeal a decision arising from an assessment of damages heard by Stephen Isaacs, Senior Justice ("Isaacs SJ") (as he then was) in the Supreme Court on the 22nd June, 2016.

2. The assessment of damages arises from a consent judgment against Scotiabank (Bahamas) Limited ("the respondent"), for damages from the appellants' loss of revenue and profits, when the respondent froze the business bank accounts, and suspended the overdraft facilities of the appellants at the Nicholls Town, Andros branch of the respondent. The appellants operated several bank accounts with the respondent through which they supported a fishing business. The retail side of the fishing business was in Nassau, New Providence, but the purchasing of the seafood was done in Andros.

3. At the conclusion of the assessment hearing, the learned judge awarded the appellants $89,072.46 for loss of profits. I find agreement with the basis of the assessment, and this appeal to be unmeritorious for the following reasons.

The Facts

4. The appellants are in the business of purchasing, processing, wholesaling, retailing, exporting, and transporting seafood products. Their central focus is the supply of seafood to local retailers and restaurants, and international retailers. They purchase all their seafood supplies wholesale and in cash from local fishermen in North Andros. In order to conduct their business, the appellants established a banking relationship with the respondent at its Nicholls Town, Andros branch in 2006. In periods when there were huge sales, the appellants wrote large cash cheques on their account with the respondent without objection.

5. On the 12th August 2008, without warning, notice, or any reason whatsoever, the respondent froze the appellants' personal and business accounts. The appellants say that they were only

made aware that their accounts were frozen after they made attempts to transact banking business. The accounts remained frozen up to the date the matter was settled on the 29th January 2014.

6. Jerome Forbes ("the first appellant") had a mortgage contract with the respondent for $900,000 to build a house in Westridge, New Providence. He had drawn down just over $640,000 and was not allowed access to the balance of $256,805.42. In an exchange of correspondence with the respondent, the first appellant was advised by letter of the 28th October, 2008 that:

> **"…as a result of an ongoing review at our Nicholls Town Branch and in accordance with evidence on hand, we have frozen all accounts relative to Mr. Forbes...The investigation/review in the branch is still progressing, and we will advise you of any additional findings...as they are uncovered."**

7. At the end of the fraud investigations at the respondent's branch in Andros and a criminal trial, three of the respondent's former employees were convicted of fraud related offences. However, the first appellant was neither charged nor convicted for anything arising from the investigation at the respondent's bank.

8. The appellants began an action against the respondent, in the Supreme Court of The Bahamas, claiming loss and damage resulting from the freezing of their banking accounts. The respondent counter claimed against the first appellant, seeking to recover the outstanding balances on his outstanding mortgage and personal credit cards and on all the appellants' facilities with the respondent.

9. On the 29th January, 2014 the appellant and the respondent settled all issues of liability, and signed an agreement covering the amounts of damages and interest owed, except for the amounts due for loss of revenue and profits.

Issues and Ruling at Trial Below

10. Following the settlement, two outstanding issues remained unresolved. First, what was the extent of the loss of profits and revenue from the respondent's breach? Second, what was the appropriate rate of interest and the period of time required for the recovery of that interest?

11. At the hearing before Isaacs, SJ, the first appellant gave evidence together with the experts for both the respondent and appellants. Both experts were extensively cross-examined. At the end of the hearing Issacs, SJ, assessed $89,072.46 as the loss suffered by the appellants in respect of both businesses. The learned judge based his assessment principally by accepting the evidence of the respondent's expert, Edmund Rahming ("Rahming"). The learned judge was of the view that the appellants' expert Kevin McDonald ("McDonald") placed reliance for his conclusions on source documents which lacked independence based on the guidelines formulated by Cresswell J. in **National Justice Companie Naviera SA v.**

Prudential Assurance Co. Ltd. [1993] 2 Lloyd's Rep. 68 **(sub nom. 'The lkarian Reefer').**

12. From the tone of his judgment, Isaacs, SJ was plainly more impressed with and persuaded by the evidence of Rahming than that of McDonald. Isaacs, SJ evaluated the evidence of both Rahming and McDonald at para. 46 of his judgment in the following terms:

> **"Having considered the facts and the evidence of the opposing expert witnesses, I do not accept the method of measurement of lost profits relied on by the Plaintiffs. The opinion of the Defendant's expert reveals a thorough analysis of the lost profits based on the level of profits recorded for the 4 years immediately preceding the freeze (sic) of the relevant accounts by the Defendant. Those profits showed a steady decline between 2006 and 2010 as seen at sub-paragraph 3.22 of paragraph 32 above. In my judgment the figure calculated by the Plaintiffs for lost profits is manifestly excessive." [Emphasis added]**

13. He continued at para. 47:

> **"In the result the amount of $89,072.46, as calculated by Rahming, is awarded to the Plaintiffs for lost profits. Interest is awarded at 5% per annum on that figure for the period of 12 August 2008 to 29 January 2014 the date of judgment. Interest is to continue to accrue at 5% per annum from the date of this assessment until payment."**

The Relief Sought by the Appellants in this Appeal

14. In this appeal the appellants seek two things. Firstly, to set aside the order of Isaacs, SJ awarding $89,072.46, for loss of profits. Secondly, that this court undertakes its own assessment of the appellants' loss of revenue and profits for Paradise Fisheries Limited, J&J Seafood and Phil's Food Services over the four-year period of loss. Mrs. Rolle ("Counsel for the appellant") submits that we use the 2005, 2006 and 2007 financial statements as the basis for our assessment.

Legal Issues and Authorities

15. From the skeleton arguments submitted by the appellants and respondent, our attention has been drawn to several authorities. The first legal issue raised by the appellants in this appeal is, the circumstances in which an appellate court should interfere with a lower court's assessment of damages. The second legal issue is, whether there are any circumstances in which a court should nevertheless estimate loss suffered, where that loss is not capable of precise calculation.

16. The appellants referred us to the case of **Parabola Investments Ltd and another v Browallia Cal Ltd and others** [2010] EWCA Civ 486, in which the claimants took out proceedings against the defendants seeking damages in deceit. During the trial, liability was admitted by the defendants, leaving the issue of damages for lost profits after the period of the fraud to be decided. The judge took the view that the damages for loss of profits from an alternative investment were, in principle, capable of being recovered in an action for deceit. The appellants argued on appeal that the judge was wrong, as the date of the discovery of the fraud should be taken as the cut-off point for the assessment of damages. The appellants submitted that the loss should be assessed on the date when the fraud was discovered, and to allow a claim after that period would be in substance, to allow a claim for damages for delay in the payment of damages, which is normally covered by way of an award of interest. On the other hand, the respondent submitted that the fraud had a continuing effect on it after the truth had come out, and from which it could not extract itself, as it had a continuing direct effect on its ability to trade profitably.

17. In dismissing the appeal, the court took the view that the defendant's fraud might have an effect of continuing after the transaction was completed, and loss based on the hypothetical use by the claimant of the funds of which he was defrauded, was capable of being recoverable as damages in deceit, and was not necessarily too remote. Lord Justice Toulson (Toulson L.J.) in delivering the judgment of the court said:

> **"[22] There is a central flaw in the appellants' submissions. Some claims for consequential loss are capable of being established with precision (for example, expenses incurred prior to the date of trial). Other forms of consequential loss are not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the defendant's wrongful conduct, as distinct from things which have happened. In such a situation the law does not require a claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of the loss.**
>
> **[23] The claimant has first to establish an actionable head of loss...<u>The next task is to quantify the loss. Where that involves a hypothetical exercise, the court does not apply the same balance of probability approach as it would to the proof of past facts. Rather, it estimates the loss by making the best attempt it can to evaluate the chances, great or small (unless those chances amount to no more than remote speculation), taking all significant factors into account."</u> [Emphasis added]**

18. The issue also arose in **Ramzan v Brookwide Ltd** [2011] EWCA Civ 985, where the claimant's father was the owner of a building consisting of a restaurant, a function room and a store room in adjoining premises. The store room which provided a means of access to a fire escape was used in conjunction with the restaurant business. The defendant was not able

to have access and use of the store room because of misappropriation by the defendant. After the property was transferred to the claimant, he commenced proceedings against the defendant for damages for misappropriation, loss of the store room, mesne profits and account of the profits. In addition, he claimed aggravated and exemplary damages for the wrongful acts of the defendant, which continued after his acquisition of the property. The claimant was awarded damages in respect of:

> **"(a) the capital value of the store room;**
>
> **(b) mesne profits;**
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> **(c) the cost of restoring the fire escape;**
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> **(d) the loss of profits from the function room; and**
>
> **(e) the claimant was also awarded interest."**

19. On appeal, the defendant contended, *inter alia,* that the evidence had been insufficient to satisfy the judge as to extent of the loss of profits. In allowing the appeal Arden, L.J. in delivering the judgment of the court said:

> **"…as the loss of profits must necessarily be based on a projection as to what those profits would have been but for Brookwide's trespass, this is one of the situations in which the courts recognise that such claims are not capable of precise calculation and do the best they can to assess the amount of the loss:**
>
> > **'Where that involves a hypothetical exercise, the court does not apply the same balance of probability approach as it would to the proof of past facts. Rather, it estimates the loss by making the best attempt it can to evaluate the chances, great or small (unless those chances amount to no more than remote speculation), taking all significant factors into account: See Davies v Taylor [1974] AC 207, 212, per Lord Reid, and Gregg v Scott [2005] 2 AC 176, para 17, per Lord Nicholls of Birkenhead, and paras 67–69, per Lord Hoffmann."**
> >
> > **(per Toulson L.J. in Parabola Investments Ltd v Browallia [2010] EWCA Civ 486 at 23, [2011] QB 477, [2011] 1 All ER (Comm) 210).'**
>
> **[33] The judge thus had to make the best assessment that she could, provided that there was sufficient material before her to do that. That does mean that the judge had to be alert to the possibility that the circumstances may be such that she could**

not fairly assess the amount of the loss. In those circumstances, the judge has to reject the claim for damages under that head."

20. In **Fiona Trust and Holding Corp and others v Privalov and others** [2017] 2 All ER 570, a businessman and the companies controlled by him (together, the defendants), faced claims for damages in excess of US $577 million arising from claims of bribery, corruption and diversion of assets. The claimant was partially successful in the amount of US $16 million, plus interest, but otherwise they failed. The claimant obtained worldwide freezing orders in respect of the defendants' assets. The orders obtained by the claimants, had the effect of freezing assets far in excess of the sums for which the defendants were ultimately held liable. When they had applied for the orders, the claimants had committed serious and culpable breaches of their duty of full and frank disclosure. In order to obtain those freezing orders, the claimants were required to give the usual undertakings in damages. Following the claimants' unsuccessful appeal from the liability judgment, the defendants sought an order for the enforcement of the present undertakings, together with an order for an inquiry as to the damages suffered by them as a result of the freezing orders. An inquiry was ordered, and the claimants applied to set aside the inquiry. The ruling is taken from the headnote:

"…(d) a defendant was entitled to recover damages for the losses suffered by him as a result of an improperly obtained freezing order assessed by reference to ordinary contractual principles, including principles of causation, mitigation and remoteness.

(e) although those principles might need to be applied with some flexibility to take account of the fact that the analogy with breach of contract was not exact. A liberal assessment of the defendant's damages would be adopted.

(f) the court had to recognise that the assessment of damages, suffered as a result of a freezing order, would often be inherently imprecise;

(g) that in the light of those factors an eager scrutiny of a defendant's evidence and minute criticism of its methodology would not be appropriate; and that it was not an answer for a claimant to say that damages could not be awarded because the defendant's business venture was to some extent speculative and might have resulted in a loss."

21. Males J said at paragraphs [49] and [50] of the judgment:

"[49] There was some debate whether a 'liberal assessment' of damages is appropriate. The origin of this phrase is the speech of Lord Wilberforce in a case concerned with damages for patent infringement, General Tire and Rubber Co Ltd v

Firestone Tyre and Rubber Co Ltd [1975] 2 All ER 173 at 177, [1975] 1 WLR 819 at 824:

> **'There are two essential principles in valuing the claim: First, that the plaintiffs have the burden of proving their loss; second, that the defendants being wrongdoers, damages should be liberally assessed but that the object is to compensate the plaintiffs and not to punish the defendants.'**

[50] The principle of 'liberal assessment' was applied to an inquiry as to the damages caused by an interim injunction by Norris J in Les Laboratoires Servier v Apotex Inc [2008] EWHC 2347 (Ch), [2009] IP & T 600. This was endorsed by the Court of Appeal in AstroZeneca AB v Krka dd Novo Mesto [2015] EWCA Civ 484, (2015) 145 BMLR 188 (at [16]). The question arose in the context of a statement by Norris J, also endorsed by the Court of Appeal, that although it is for the party seeking damages to establish its loss, the court should not be over eager in its scrutiny of the evidence or too ready to subject its methodology to minute criticism, in part because the very nature of the exercise renders precision impossible. Kitchin LJ referred at [16] to the need for 'a liberal but fair assessment of loss'".

22. In **Ramsahoye v Lall and another** [2017] 1LRC 351 a case arising from the Court of Appeal of Guyana and the Caribbean Court of Justice ("CCJ"), the issue was whether the CCJ could interfere with an award made by the Court of Appeal, and if so, to what extent it should do so.

23. In that case, the appellants published an article and two caricatures which referred in disparaging terms to the respondent. He brought an action for defamation against the appellants in the High Court of Guyana and was awarded damages of G$4.5m by the trial judge. He appealed to the Court of Appeal of Guyana, contending that the award was too low. The Court of Appeal increased the award to G$l5m, on the grounds that the judge's award was inadequate and not a fair estimate of the compensation required to reflect all the aggravating factors and gravity of the reputational injury suffered by the respondent. The appellants appealed to the CCJ, contending that the Court of Appeal erred in making such a substantial increase in the award in the absence of a finding of perversity or fundamental violation of the relevant legal principles, by the trial judge. The respondent cross-appealed on the grounds that the award was still too low.

24. The court took the view that where damages were at large as in defamation cases, the discretion of the appellate court was not substituted for that of the trial judge. An appellate court would be unlikely to disturb a trial judge's finding on damages, particularly in a defamation case, where the appropriate award is a matter of impression and common sense.

The judge's award had to be a flawed evaluation of the amount of damages that should have been awarded before the appellate court could intervene.

25. Second, the CCJ said that the Court of Appeal could only exercise its discretion to interfere with an award of damages, if it was satisfied that the trial judge was wrong in principle or made an award that was so inordinately low or unwarrantably high, that it should be overturned. The court said that it was not enough that the appellate court would itself have awarded a greater or lesser sum.

26. Anderson, J speaking for the court said at paragraph 26 of the judgment:

> **"In such cases the review function of the apex court is to determine whether the exercise of the trial judge's discretion was plainly wrong having regard to the matters to be considered and the generous ambit to be accorded to the judge. It is to determine whether the Court of Appeal had regard to the narrow confines within which it could exercise its jurisdiction to interfere with the trial judge's exercise of his discretion in making the award. The trial judge's award can only be disturbed where it is an entirely erroneous estimate of the damages that ought to have been awarded to the person who was defamed."**

27. In the case of the **Ikarian Reefer**, relied on by the respondent, three issues arose for consideration. First, what types of conflicts of interest will cause an expert's evidence to become unacceptable to the court? Second, how and when should the litigants and the court respond to a potential conflict of interest? Third, what should the court do when it is established that an expert witness has not complied or cannot comply with the duty to the court?

28. In that case, the plaintiff's ship was insured with the defendant for perils of the sea, fire and barratry. The vessel ran aground, caught fire and the plaintiff claimed for an actual or constructive total loss. The plaintiff claimed that loss by fire included loss by deliberate fire, or that if fire must be accidental, the vessel was lost by the barratrous acts of the master and crew. The defendant alleged that the vessel was deliberately run aground and set on fire by, or with the connivance of, those beneficially interested in the plaintiff. After hearing expert witness evidence, the court held that the grounding was not deliberate but due to negligent navigation by the master and that the defendant had not satisfied the burden of showing that the vessel was deliberately set on fire, or that the plaintiff was privy to such an action. Creswell, J summarised the duties and responsibilities of expert witnesses in civil cases:

> **"(a) The expert evidence should be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation;**

(b) The witness should provide expert unbiased opinion in relation to matters within his expertise and should never assume the role of advocate;

(c) He should not omit to consider material facts which detract from his concluded opinion and he should make it clear when a question falls outside his own expertise;

(d) The opinion should state if it is provisional only, or subject to any qualification;

(e) If, after exchange of reports, the expert changes view, this should be communicated to the other side and the court without delay;

(f) Where the expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents these must be provided to the other party at the same time as the exchange of reports;

(g) A party who wished to call an expert with a potential conflict of interest should disclose details of that conflict at as early a stage in the proceedings as possible."

Analysis: The Submissions

29. I now turn to the appellants' grounds of appeal.

(a) First Ground of Appeal – Misapplication of case law principles

30. In the first ground of appeal, the appellants complain that the learned justice erred in law by failing to properly consider the principles enunciated in **Parabola** and **Ramzan**. The appellants argue that Isaacs, SJ should not have accepted Rahming's assertions that an estimate of the appellants' loss of revenue and profits should reach a standard of "reasonable certainty". They also argue that the authorities in the cases support the view that the court should not embark on a precise calculation for loss of profits. Once the court is satisfied on the evidence that there is a likelihood of loss occurring, the court should then do its best to assess the amount of the loss, provided that it has sufficient material to do so. In doing this assessment, the court should make a determination as to whether the business was profitable prior to the breach and determine whether it was likely to continue to be profitable; and use the evidence of the past profits to extrapolate potential future profits.

31. First, from a perusal of the judge's ruling, I am of the view that Isaacs, SJ applied the principles in **Parabola** and **Ramzan** when assessing the appellants' loss. After referring to the ruling of Toulson, L.J. (as he then was) in **Parabola**, in which the principles relating to the assessment of damages for loss of profits were discussed, the learned judge noted in his ruling that the trial judge's assessment was supported by the opinion of an expert whom he

said impressed him. Isaacs, SJ was also impressed with Rahming, preferring the evidence of that expert witness.

32. The following is taken from the evidence of Rahming on re-examination by Dorsette:

> **"A. *[Rahming]* Damages is all about reasonable certainty. It doesn't need to be precise, but one should try to use a methodology that would reasonably get what the estimate of the damage would be. To do that the financial statement represent the best source of information to make the estimation. It is not hypothetical, it is factual, it is not unproven data. This is what the company has been doing historically. Why not use the financial statement to come up with where we need to put Mr. Forbes at the end of the day because of the breach. Why would we come up with hypothetical unproven non-factual data, highly speculative, that has no support? Throughout my report I referred to these claims having no support. The report that has been put together has very limited support, so when you are looking at the fact that these financial statements represent Mr. Forbes and his entities in their totality, it is the best source of information to come up with a case as to what the damage represent. It is factual, it shows what has been happening historically, it's what he has submitted himself that they would give to the bank. There is no reason to go and come up with a hypothetical analogy to try to come up with what the damages would be. The hypothetical when you look at it, at the end of the day it is saying that he could have made 50 something million dollars if it was not an act of God and within 4 years he could have made 15 million dollars, here a market with a fishing GDP in The Bahamas is only 71 million dollars. How could this company that was making $2.5 million dollars at its peak in 4 years based on this hypothetical analysis go all the way up to 50 something million dollars. And with an act of God he's saying it could have been 20 million dollars. These assumptions which are basically with an act of God I will knock 50 percent here, with an act of God I will knock off another 50 percent here, that is not necessary we have financial statements.**
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> **Q. *[Dorsette]* Just so I understand that answer. You are saying that the assumptions that are made in the calculations by the plaintiffs experts that they are not in line with the actual history of the financial performance according to the financial record?**

A. *[Rahming]* They're far from it."

33. Mr. Farquharson ("Counsel for the respondent") submits that Rahming used the term **"reasonable certainty"** to refer to the lack of reliable information provided by the appellants to validate their large claims and McDonald's assertion that the bank account statements by themselves were a sufficient basis to establish loss. Both Rahming and McDonald gave expert evidence as professional accountants. The assessment of expert evidence is generally left to the fact finder as an issue of weight.

34. It is trite law that "he who asserts must prove". The appellants have the burden to prove the fact of their damage and the extent of their loss. However, as the learned authors of **('McGregor on Damages' (16th ed.**), at para.358) put it:

> **"…the standard demanded can seldom be that of certainty. Even if it is said that the damage must be proved with reasonable certainty, the word "reasonable" is really the controlling one, and the standard of proof only demands evidence from which the existence of damage can be reasonably inferred, and which provides adequate data for calculating its amount. The clearest statement of the position is that of Bowen in Ratcliffe v. Evans where he said:**
>
> > **'In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.'"**

35. Second an appellate court will not generally interfere with an assessment particularly where the trial judge has seen and heard witnesses. The learned authors **of 'Chitty on Contracts General Principles', Vol.1 (29th ed.), para.26-027** explained the legal position thus:

> **"Power of appellate court to reassess damages. When the Court of Appeal hears an appeal against the assessment of damages made by a judge sitting alone, without a jury, it applies similar principles to those followed previously in considering appeals against the award of damages by the verdict of a jury. <u>The court will interfere only if it is convinced that the trial judge acted upon some wrong principle of law, or</u>**

> **that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court of Appeal, an extremely erroneous estimate of the damages to which the claimant is entitled. Great attention is paid to the opinion of the trial judge and the appellate court should be slow to reverse the judgment of the judge who saw and heard the witnesses. In special situations the appellate court may take account of circumstances affecting the assessment of damages which arise after the first instance trial. If the fresh evidence showed that the "basis or fundamental assumption" underlying the judge's assessment had been "falsified by later events." [Emphasis added]**

36. In my view, both the statements by Rahming and that of McDonald were before Isaacs SJ as a fact finder and he preferred the evidence of Rahming and gave reasons for his preference. I am unable to say that Isaacs, SJ was not mindful of the principles in **Parabola** and **Ramzan** as he cited and discussed both cases and the leading judgment of Toulson L.J. when giving the reasons for his decision. Accordingly, for the above reasons, I am of the view that this ground of appeal is without merit and fails.

(b) Second, Third and Fourth Grounds of Appeal – Failure to differentiate losses

37. The second, third and fourth grounds of appeal will be considered together. In essence, the appellants complain that Isaacs, SJ erred by failing to differentiate between the loss resulting from the interruption of the Paradise Fisheries business, as distinct from the loss associated with the J&J Seafood business.

38. The appellants contend that Isaacs, SJ, did not appreciate that Paradise Fisheries operated its business account through Scotiabank Account Number 5136, while J&J Seafood and Phil's Food Services, operated their businesses through another Scotiabank Account Number 5138. This failure, they say, resulted in him making an improper award of damages with respect to the appellants' J&J Seafood business.

39. These contentions are contrary to the evidence that was before Isaacs, SJ. The appellants' Statement of Claim lacked any reference to the nature of the business that was conducted through either of the two Scotiabank accounts. Also, the first appellant's evidence did not distinguish between the Scotiabank accounts and the businesses to which they were connected. Furthermore, McDonald, did not make reference to the appellants' businesses by the Scotiabank account numbers. McDonald referred to loss of profits only for "The Forbes Group of Companies". Isaacs, SJ made clear reference to the Scotiabank accounts which was set out at tab 12 and 13 of the appellants trial bundle. The following passages are taken from the judgment of Isaacs, SJ:

> **"11. McDonald went on to say that the economic activity of the Plaintiffs over a four (4) year period averaged $35M, and when discounted by 60%, or $21m, for unforeseen events, the Plaintiffs suffered a loss of $2,102,256.44 using $4.4m as a base**

> **and discounting by 60%. Those figures, he said, are verified by Scotiabank statements, and the period he analysed was 2008 to 2012. Those statements at page 8 of tab 12 of the plaintiff's bundle show a credit of $4,432,745.26. That entry however, also shows an offsetting debit of $4,412,348.86.**
>
> **12. With regard to the Second Plaintiff specifically, again McDonald referred to bank statements and balance sheets seen at tab 13 and at pages 12 and 13 of tab 19 of the Plaintiff's bundle. He said that he calculated the loss of the Second Plaintiff to be $1.37m using Scotiabank statements at tab 13 as his source material. He said that the total loss is $3,139,771.50. On viewing the bank statements at tab 13, the period covered is 14 August 2007 to 2 July 2008. At the end of that period the Second Plaintiff's statement shows a debit of $1,936,426.96 and a credit of $2,025,483.32 with a balance of $90,056.36. These statements therefore do not support McDonald's calculation of loss of profits.**
>
> **13. When cross-examined McDonald was directed to page 13 of tab 19 of the Plaintiffs bundle and he confirmed that his figure of $1.259m in sales for 2001 is based on bank statements from Royal Bank of Canada (RBC) and Scotiabank, but those bank statements have not been produced**." **[Emphasis added]**

40. From this it is apparent that these grounds should fail as they are without merit.

(c) Fifth, Sixth and Seventh Grounds of Appeal – Treatment of expert evidence

41. Taken together, the fifth, sixth and seventh grounds of appeal all complain that Isaacs, SJ erred by rejecting McDonald's expert report. The appellants contend that learned trial judge was wrong to reject McDonald's use of the "Sales Approach" in assessing the appellants' loss of revenue and profits and in accepting Rahming's criticisms of this approach.

42. However, a trial judge may, in the face of competing expert reports, properly prefer the evidence of one expert to that of another. The learned authors of **Expert Evidence: Law and Practice** at paragraph 12-005 have this to say:

> **"Save that the court is usually in the former case dealing with opinions as well as facts, there is no difference in substance between the assessment of expert and other evidence. The credit of the witness, as revealed by the content of his evidence, his demeanour in court and his manner of answering questions are all relevant, though with experts the court is seldom concerned with the telling of specific deliberate untruths, but more often with either a predisposition towards the case of the party calling him, or towards a professional position which he**

has adopted and is reluctant to be shifted from, despite evidence to the contrary. The courts pay particular attention to whether or not the expert understands his duties to the court to give unbiased and objective evidence and not to become an advocate for the party calling them. The substance of the evidence, likewise, must be weighed and accorded value. Although the impressiveness of an expert's qualifications and experience are always relevant, they must not be employed as a substitute for the need to analyse the content of conflicting evidence by reference to the facts in the case. The true rule was stated by Jacob L.J. in Technip France SA's Patent:

> **'But just because the opinion is admissible, it by no means follows that the court must follow it. On its own (unless uncontested it would be) 'a mere bit of empty rhetoric' Wigmore, Evidence (Chadbourn rev) para. 1920. What really matters in most cases is the reasons given for the opinion. As a practical matter a well-constructed expert's report containing opinion evidence sets out the opinion and the reasons for it. If the reasons stand up the opinion does, if not, not.'"**

43. In **R v Soto** [1975] RTR 357 Lord Widgery said:

> **"Basic to the issues before us today is the proposition which one hears a great deal nowadays, namely, that if experts differ there must be a reasonable doubt in the jury's mind which will lead to an acquittal. This is heresy, and the more often it can be pointed to as heresy the better. To apply such a principle would be to have trial by expert instead of trial by jury. The truth of the matter is that juries are perfectly entitled, when experts before them differ, to decide, if they think fit, that one expert is telling them the right and proper answer and the other is not…"**

44. Isaacs, SJ approached the assessment of the evidence of McDonald and Rahming at paragraph 3 of his judgment;

> **"The evidence at the centre of this assessment is competing reports by accountants, one for each side, namely Kevin McDonald (McDonald) for the Plaintiffs, and Edmond Leander Rahming (Rahming) for the defendant."**

45. Then at paragraph 43 he said that:

> **"Counsel for the defendant correctly pointed out that in the instant case a comparative analysis of competing expert evidence must be made."**

46. The learned judge then, referred to a passage in **Parabola** where Toulson L.J. said (at para. 24) of his judgment:

> **"The judge had to make a reasonable assessment and different judges might come to different assessments without being unreasonable. An appellate court will therefore be slow to interfere with the judge's assessment. As Lord Wright said in Davies v Powell Duffryn Associated Collieries Ltd. [1942] 1 All ER 657 at 664, [1942] AC 601, 616-617:**
>
> > **'… an appellate court is always reluctant to interfere with a finding of a trial judge on any question of fact, but it is particularly reluctant to interfere with a finding on damages. Such a finding differs from an ordinary finding of fact in that it is generally much more a matter of speculation and estimate. No doubt this statement is truer in respect of some cases than of others... It is difficult to lay down any precise rule which will cover all cases, but ... the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered.'"**

47. In my view, Isaacs, SJ was entitled to make the assessment of the facts that he did, and this court would be slow to interfere. Accordingly, there is no merit in these grounds and these too must fail.

(d) Eighth, Ninth, Tenth, Eleventh, Fourteenth and Fifteenth Grounds of Appeal – Miscellaneous complaints

48. In grounds eight through eleven, the appellant, amongst other things, complains that the trial judge erred by accepting the evidence of Mr. Rahming as a **"thorough analysis of the loss of profits based on the level of profits recorded for the 4 years immediately preceding the freeze (sic) of the relevant accounts by the defendant"**. However, the quoted statement by Isaacs, SJ was simply a finding of fact made by him while comparing the expert report presented by McDonald with that of Rahming.

49. The appellant also complains that the trial judge erred by accepting Rahming's evidence that the assessed loss was $89,072.46. They say that the assessment was based on the net profit amounts in the financial statement for 2005, 2006 and 2007 of $52,699.00, $84,791.00 and $36,153.50 respectively, without reference to the income contained in the "Cost of Sales"

component of the statement. They argue that as 85% of the "Cost of Sales" is the cost of the product and 15% is commission's income to the first appellant, this was a crucial oversight on the part of Isaacs, SJ.

50. Isaacs, SJ had before him and accepted the evidence of Rahming, that any compensation paid to the first appellant was included within the financial statements prepared by McDonald, and would have been included in his analysis of the appellants claim. These were findings of fact by Isaacs, SJ, based on the evidence of Rahming which he accepted as credible. These grounds of appeal are without merit, and therefore fail.

51. Ground fourteen is unsustainable as Isaacs SJ, did not find the first appellant's use of a Bank of Bahamas overdraft contributed to their loss. The issues raised in ground fifteen relating to Isaacs SJ's preference for Rahming's assessment, are considered under sub headings (c) (d) and (e) of the above analysis and found to be without merit.

(e) Twelfth and Thirteenth Grounds of Appeal- Preferring the evidence of one expert over that of another expert

52. In the twelfth and thirteenth grounds of appeal, the appellant complains that the judge accepted Rahming's assessment and rejected McDonald's assessment by stating that the appellants' profits, **"showed a steady decline between 2006 and 2010."** They also complain that Isaacs, SJ erred, when he concluded that the bank statements **"do not support McDonald's calculation of loss of profits."**

53. The appellant argues that Isaacs, SJ was inconsistent with Rahming's evidence that a significant amount of revenue had not been included in his assessment.

54. First, the evidence given by McDonald also points to a decline in profits in the years 2006 to 2010. Second, Isaacs, SJ had before him the evidence of Rahming and McDonald and gave reasons for his preference. Here is what the learned judge said:

> **"29. What McDonald presented, he said, was a hypothetical exercise without any certainty. In his opinion the statement that $50,000.00 could yield $500,000.00 in 30 days is not supported by any documentation.**
>
> **30. Rahming, on the other hand, calculated loss of profit by analysing the financial statements going back 5 years. He took into account the monthly income statement, sales analysis and the economic activity of competitors.**
>
> **31. Rahming met with McDonald and made his concerns known. He also pointed out that the financial statements of the Second Plaintiff included information relative to the income of the First Plaintiff, household expenses and all of the companies formed by the First Plaintiff. Indeed the cover page of McDonald's report lists Jerome Forbes, North Andros Seafood**

> **Services, Forbes Seafood, Speed X-Press and North Andros Fisheries as the clients for whom loss of profit was being calculated. Obviously, they are not all parties to this action."**

55. Isaacs, SJ considered the evidence of both experts and gave reasons for his preference of the Rahming Report. These grounds of appeal also fail.

Conclusion and Disposition

56. For all the above reasons, this appeal is unmeritorious and is therefore dismissed. The judgment of Isaacs, SJ in the court below is affirmed, with costs to the respondents, to be taxed if not agreed.

The Honourable Mr. Justice Jones, JA

57. I agree.

The Honourable Mr. Justice Isaacs, JA

58. I also agree.

The Honourable Madam Justice Crane-Scott, JA