**Appeal No: JCPC/2025/0062**

**IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL**
**ON APPEAL FROM THE SUPREME COURT OF MAURITIUS**
**BETWEEN:**

**RISK REDUCTION INTERNATIONAL LTD**

**Appellant**

and

**ABSA BANK (MAURITIUS) LIMITED**

**Respondent**

# APPELLANT'S WRITTEN CASE

*References in this Written Case to the Reproduced Record are given in the following form: [RR/ bundle pdf page number]*

## 1. OVERVIEW

1.1. The Appellant ["**Risk Reduction**"] was a customer of the Respondent ["**the Bank**"]. In 2009 Mr Fredrik Lutzkie of Risk Reduction was introduced to foreign currency exchange trading ["**forex**"] by Mrs Hema Kishto, then Head of the Bank's forex department. She advised him to convert US dollar ["**USD**"] funds into South African Rand ["**ZAR**"] and back at a profit. In August 2011, acting on Mrs Kishto's advice, Risk Reduction converted USD funds into ZAR through the Bank's forex desk. On 15 September 2011 Mr Lutzkie instructed the Bank to convert all the ZAR funds back to USD at an exchange rate of ZAR 7.32. That rate was achieved in the market on 19 September 2011 and the next day the Bank's Treasury Dealer, Ms Shenaz Busawon, emailed the Bank's Senior Relationship Manager, Mr Harish Bhoyroo, referring to "*the transaction effected yesterday*". He requested confirmation of the ZAR amount "*for which order below is valid*" (i.e. his 16 September confirmation of Mr Lutzkie's order to convert at ZAR 7.32). Six minutes later the Bank's Head of Treasury, Mr Oumesh Mungroo, instructed Ms Busawon and others: "*Just keep on hold for now any order*

*from that client*." Risk Reduction was not informed that its instruction was not completed and that the transaction had not been carried out as the Respondent had confirmed. The funds stayed in ZAR, which began to devalue. When Risk Reduction discovered that the transaction had not been carried out and Mr Lutzkie complained the Bank advised him to wait until the exchange rate improved. When the Bank changed the money into USD without warning on 31 January 2012 at ZAR 7.80, Mr Lutzkie questioned the transaction and the Bank advised him to convert back to ZAR and wait until a better rate was achieved.

1.2. In early 2012, Mr Bhoyroo and Mrs Kishto monitored Risk Reduction's position, providing assurances that a target rate of ZAR 7.25 was achievable. The Bank recommended that Risk Reduction continue to wait for a better rate. Risk Reduction followed that advice. In April 2012 the exchange-rate communications ceased. The Bank did not withdraw its earlier advice to continue holding for ZAR 7.25, nor did it suggest any alternative course. Time passed and the exchange rate continued to be volatile. Eventually the Bank closed the Risk Reduction account in June 2015 and the conversion was finally effected at ZAR 12.4835. The full measure of the resulting loss (subject to the Bank's argument on mitigation) is USD 10,534,278.07.

1.3. The Bank's breach of contract in failing to carry out Risk Reduction's instruction was contested at first instance and found proved. It is not challenged on this appeal. The sole question before the Board is mitigation of damages, specifically, whether the courts below were correct to find that Risk Reduction failed unreasonably to mitigate its loss, and whether the Court of Civil Appeal ["**the CCA**"] was entitled to substitute its own assessment of the appropriate mitigation rate for that of the trial judge in the Commercial Division.

1.4. Risk Reduction's primary case is that no failure to mitigate was established at any point. Both the Commercial Division, in its judgment delivered on 5 November 2018 ["**Judgment**"] [**RR/573 – 596**] and the CCA, in its judgment dated 13 December 2024 [**RR/597 – 617**], failed to apply the principle that avoidable loss is an aspect of causation. The question is not whether Risk Reduction acted reasonably in the abstract but whether its conduct displaced the Bank's breach as the operative cause of the loss. [HB/707-730] [HB/731-751]

Both courts below treated Risk Reduction's commercial sophistication as imposing a higher standard of reasonableness than the law allows.

1.5. Two features make the Bank's mitigation case particularly difficult to sustain.

1.5.1. First, the communications on which both courts below relied to establish Risk Reduction's awareness and opportunity to act, also recorded the Bank's own professional recommendation to pursue the very course that both courts characterised as unreasonable. Mr Bhoyroo's February 2012 email (relied on as evidence of what Risk Reduction knew about market rates) reads: "*May I suggest that we hold on the ZAR until the rates to USD moves closer to R7.25*": [**RR/412**]. [HB/546] By April 2012, with the rate at ZAR 7.87 to 7.90, the Bank's own officer was still monitoring for 7.25 and had suggested no alternative course: [**RR/414]**. [HB/548] Mrs Kishto was providing oral assurances throughout the same period that ZAR 7.25 was achievable [**RR/187, 190**]. [HB/321, 324] Neither court asked whether Mr Lutzkie's decision to wait was an independent choice breaking the chain of causation or the very consequence of reasonably following the Bank's own advice.

1.5.2. Secondly, the credibility findings of the court below contradict the finding on the January 2012 reconversion. The trial judge found both Mr Lutzkie of Risk Reduction and Mr Bhoyroo of the Bank to be wholly credible witnesses of truth [**RR/580 – 581]**. Both gave evidence that the reconversion was on the advice of the [HB/714-715] Bank's officers, who explained to Mr Lutzkie what to write [**RR/97, 188**]. [HB/231, 322] Those credibility findings were not overturned on appeal and it was therefore perverse to characterise the reconversion as Mr Lutzkie's independent decision rather than his simply following the Bank's forex advice.

1.6. The submissions are structured as follows:

1.6.1. Section 1: Overview.

1.6.2. Section 2: Legal Framework.

1.6.3. Section 3: Grounds 1 and 2 - no unreasonable failure to mitigate at any point; primary relief of USD 10,534,278.07.

1.6.4. Section 4: Grounds 3 and 4 – the CCA applied the wrong appellate standard and failed to ask whether the January 2012 finding had already crystallised the damages at ZAR 7.80 before substituting a later and less favourable figure without evidential foundation; secondary relief of USD 1,669,243.05.

1.6.5. Section 5: Disposal.

## 2. THE LEGAL FRAMEWORK

### 2.1. The Foundation: Mitigation as an Aspect of Causation

2.1.1. The rule against recovery of avoidable loss is not a duty owed by a claimant to a wrongdoer. It is an aspect of the principle of causation: a contract-breaker does not cause loss which was loss that a claimant could reasonably have avoided. The principle is that if the claimant chooses to respond to the defendant's breach in a way that would not reasonably be expected, damages will be assessed as if the claimant had responded in the expected way: *BDW Trading Ltd v URS Corporation Ltd* [2025] UKSC 21; [2026] AC 409, per Lord Leggatt at [175]-[180]. [HB/997-999]

2.1.2. For a claimant's subsequent conduct to break the chain of causation (or be a failure to mitigate), it must constitute an event of such impact that it "obliterates" the wrongdoing of the defendant: *Borealis AB v Geogas Trading SA* [2010] EWHC 2789 (Comm); [2011] 1 Lloyd's Rep 482, per Gross LJ at [44]. He held that "If the [HB/856] defendant's breach of contract remains an effective cause of the loss, at least ordinarily, the chain of causation will not be broken". The test is a demanding one: "the true cause of the loss must be the conduct of the claimant rather than the breach of contract on the part of the defendant".

2.1.3. The principle operates on a claimant's independent and voluntary response to breach, not on conduct still influenced by the defendant's conduct. Where the defendant's continuing conduct after the breach remained an operative cause of the claimant's position, the claimant's response is not an independent choice.

2.1.4. Where a defendant's breach remains an effective cause of the loss even if the claimant's subsequent conduct is a concurrent cause, it is unlikely that the chain of causation is broken. A claimant "will be judged sympathetically, in context and will not lightly be treated as unreasonable": *Borealis* at [44] (citing *County Ltd v Girozentrale Securities* [1996] 3 All ER 834 and shipping cases). Even negligent conduct by the claimant will not necessarily break the chain of causation as a claimant is judged sympathetically and there is a high threshold for unreasonable conduct. The same underlying principle applies whether the claimant's conduct is characterised as a failure to mitigate or as a new intervening act as the courts sometimes use the two principles interchangeably: *BDW v URS*, per Lord Leggatt at [179] – [180]. [HB/856] [HB/998-999]

**2.2. The Generous Standard and the Burden of Proof**

2.2.1. The burden of proving unreasonable failure to mitigate lies throughout on the defendant: *Geest Plc v Lansiquot* [2002] UKPC 48; [2002] 1 WLR 3111 at [13] – [14].

2.2.2. The standard applied in assessing reasonableness is deliberately generous to the claimant.

> "Where the sufferer from a breach of contract finds himself, in consequence of that breach, placed in a position of embarrassment, the measures he adopts to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach has occasioned the difficulty. The law is satisfied if the innocent party has acted reasonably; he will not be held disentitled merely because the party in breach can suggest that other measures less burdensome to it might have been taken": *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452, per Lord Macmillan at 506, approved in *BDW v URS* at [59] (Lord Hamblen and Lord Burrows). [HB/852] [HB/995-996]

2.2.3. It is not enough for the defendant to show that it would have been reasonable for the claimant to take the steps it proposes. The defendant must show that it was unreasonable not to take them. Where there is more than one reasonable response open to the claimant, the defendant has no right to determine the choice: *Wilding v*

*British Telecommunications plc* [2002] EWCA Civ 349; [2002] ICR 1079 at [55] (per Sedley LJ).

2.2.4. Those principles mean that where a claimant adopts a course proposed or advised by the defendant, it will ordinarily be very difficult for the defendant to establish that the claimant acted unreasonably in doing so.

2.2.5. A further consequence of the causation basis of mitigation is that once a court identifies the first point at which a claimant failed unreasonably to mitigate, that finding crystallises the measure of damages. The date so fixed takes the place of the contractual performance date as the date at which damages are assessed, and any subsequent market movements are irrelevant to that assessment: *Kaines (UK) Ltd v Österreichische Warenhandelsgesellschaft* [1993] 2 Lloyd's Rep 1, per Bingham LJ at 11 and Dillon LJ at 13; endorsed in *Golden Strait Corporation v Nippon Yusen* [HB/938, 940] *Kubishika Kaisha ('The Golden Victory')* [2007] UKHL 12; [2007] 2 AC 353, per Lord Brown at [79] and *Sharp Corp Ltd v Viterra BV* [2024] UKSC 14; [2024] 4 [HB/917-918] All ER 273, per Lord Hamblen at [95]. The defendant has no right to insist that the [HB/960] claimant should have mitigated at a later and less favourable point.

**2.3. The Standard for Appellate Intervention**

2.3.1. The role of an appellate court reviewing findings of fact is supervisory, not substitutive. A trial judge's findings of fact should not be overturned simply because the appellate court would have found them differently. It must be shown that the judge fundamentally misunderstood the issue or the evidence, plainly failed to take the evidence into account, or arrived at a conclusion which the evidence could not on any view support: *Volcafe Ltd v Compania Sud Americana de Vapores SA* [2018] UKSC 61; [2019] AC 358, per Lord Sumption at [41]. The "plainly wrong" [HB/1006] standard, properly understood, means a conclusion that no reasonable judge could have reached, not one the appellate court disagrees with: *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600, per Lord Reed at [62]. The [HB/927] Board's own authority is to the same effect: *Lesage v The Mauritius Commercial Bank Ltd* [2012] UKPC 41, per Lord Kerr at [34]. [HB/944]

2.3.2. The categories of identifiable error that can justify appellate intervention were stated by Lord Reed in *Henderson* at [67]: [HB/928]

> "In the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

## 3. THE NATURE OF THE APPEAL

3.1. This appeal concerns the application of accepted mitigation principles to the facts found by the courts below. The Bank characterises the appeal as an attempt to re-open concurrent findings of fact under the guise of arguments about the proper approach to mitigation. That is not the case.

3.2. Risk Reduction does not seek to advance a novel test for mitigation and does not dispute the orthodox principles applied below. Its case is that those principles were misapplied to the facts found, that material considerations were not properly addressed, and that the conclusions reached cannot be reconciled with the courts' own findings and the evidence on which those findings were based. The appeal therefore concerns identifiable legal and evaluative error in the application of accepted principles, not a request that the Board substitute a different view of disputed primary facts.

3.3. Risk Reduction does not challenge the primary findings of fact accepted by the courts below. The appeal proceeds on those findings. The complaint is that the courts asked the wrong questions of those facts, failed to take proper account of material aspects of the evidence, and reached evaluative conclusions which do not follow from the findings made. Those are orthodox grounds of appellate intervention and do not involve a request to re-try the case.

## 4. GROUNDS 1 AND 2: NO UNREASONABLE FAILURE TO MITIGATE

4.1. Grounds 1 and 2 are addressed together. Both grounds raise the same fundamental question: whether, on the evidence, the courts below were correct that the Bank discharged its burden of proving an unreasonable failure to mitigate. The primary case is that the Bank did not (and could not) discharge that burden at any point in the relevant period. The secondary case (addressed under Grounds 3 and 4) arises only if that primary case fails.

### 4.2. Ground 1: Continued holding after January 2012

4.2.1. The issue under Ground 1 is whether the Bank discharged the burden of proving that Risk Reduction acted unreasonably in continuing to hold its funds in ZAR after January 2012. The evidence accepted by the courts below demonstrated that the Bank's own officers repeatedly recommended that course, provided continuing assurances that ZAR 7.25 was achievable, and suggested no alternative course. In those circumstances the findings of unreasonable failure to mitigate cannot be sustained.

4.2.2. The issue must be approached by reference to the evidence accepted by the courts below. The court's primary findings of fact are accepted, but those findings do not support the conclusion that the Bank discharged its burden of proving unreasonable conduct. Four aspects of the evidence are of particular significance.

4.2.3. Firstly, the credibility findings were comprehensive, unqualified, and were not disturbed by the CCA. The Commercial Division found Mr Lutzkie *"a credible and convincing witness who stood the test of cross-examination and candidly answered the questions put to him*" and accepted him *"as a witness of truth*": Judgment at 7: [**RR/580**]. Mr Bhoyroo, the Bank's own Senior Relationship Manager, was found [HB/714] to be "*a reliable and truthful witness*" on whose testimony the court had "*no hesitation in relying":* Judgment at 8: [**RR/581**]. [HB/715]

4.2.4. Secondly, the Bank's advice to Mr Lutzkie not to exchange the currency (and thus mitigate his loss) is established by the documentary record. Between February and

April 2012 Mr Bhoyroo sent a series of emails to Risk Reduction updating it on market rates and monitoring for ZAR 7.25: [**RR/412 - 417**]; CCA at [10]– [13] [**RR/600**]. The 10 February 2012 email reads: "*May I suggest that we hold on the ZAR until the rates to USD moves closer to R7.25*": [**RR/412**]. That is the language of a professional recommendation originating with the Bank's own officer. It does not indicate a client's independent decision. By 9 April 2012, with the rate at ZAR 7.87 to 7.90 (above even the ZAR 7.80 rate at which the Bank had itself effected the January 2012 conversion) Mr Bhoyroo confirmed that the Bank was "*far from the rate R7.25 for the time being*" and would "*continue to monitor the rates on a regular basis and inform you as and when the rates are closing to R7.25*": [**RR/414**]. The February recommendation to hold had never been withdrawn or modified. Read in that context, the April 2012 email confirms that the holding strategy remained the Bank's own position throughout: it was still monitoring for the target it had itself endorsed and it had suggested no alternative course, notwithstanding that the rate had moved further from 7.25 than at any point in the preceding months.

[HB/546-551] [HB/734] [HB/546] [HB/548]

4.2.5. Thirdly, as to the oral evidence: Mr Bhoyroo's accepted evidence was that Mrs Kishto had told Mr Lutzkie that the rate of 7.25 could be achieved and that the rate would go down: Judgment at 22 [**RR/595**]; CCA at [49] [**RR/609**]. This corroborated Mr Lutzkie's own evidence: [**RR/97**]. Mr Bhoyroo further gave evidence that the Bank advised Mr Lutzkie to hold for 7.25 and not to accept 7.80. In his oral evidence, he stated:

[HB/729] [HB/743] [HB/231]

"…
*Hema and myself, we went into a conversation with Mr Lutzkie to tell him that we should not go for the deal at 7.80, the rate is going down. So we could achieve 7.25, the way she sees the market...do another deal at 7.80 and give a new order at 7.25* [**RR/187**]

[HB/321]

…
*this is the letter that we, Hema and myself, discussed with Mr Lutzkie. We explained…how he should write the letter and he sent the letter to me to check* [**RR/188**]

[HB/322]

…
*Because the rate was going down and as Hema had promised to the client in many previous discussions that he would be able to achieve a rate of 7.25 and she sees the market going in that direction, so that was the purpose and basis of this letter*

*[,] to reverse or do another transaction for 7.80 and she would be able to achieve 7.25 and we had that discussion. So that letter dated 31st from Delanja reflects what was discussed with client on that day*
*…"*: [**RR/190**] [HB/324]

4.2.6. Taken together, the oral evidence of both witnesses (each found wholly credible) establishes that the advisory conduct extended beyond the documentary record and included direct oral assurances from Mrs Kishto and Mr Bhoyroo that the target rate remained achievable throughout the relevant period.

4.2.7. Finally, the Bank's most significant witnesses were never called. Mrs Kishto, Ms Busawon and Mr Mungroo (respectively the Head of the forex department, the Treasury Dealer who confirmed the rate had been achieved, and the Head of Treasury who gave the hold instruction) gave no evidence. The Commercial Division noted that Ms Busawon and Mr Mungroo were "crucial witnesses who were directly involved in the transactions and could have shed light in the matter and who are still working at the bank" and that "no reason was advanced" as to why they did not come forward: Judgment at 10: [**RR/583**]. The only positive oral [HB/717] evidence on the advisory relationship, the breach, and the Bank's post-breach conduct came from Mr Lutzkie and Mr Bhoyroo, both found wholly credible.

4.3. **The significance of the evidence**

4.3.1. The significance of the evidence set out above is twofold. First, it demonstrates that the Bank did not discharge the burden of proving unreasonable conduct. Secondly, it demonstrates that Risk Reduction's conduct never became an independent cause of the loss in the causation sense.

4.3.2. The principle against recovery of avoidable loss is not in dispute: a claimant who could by reasonable action have avoided loss cannot recover for it because that loss is treated as resulting from the claimant's own conduct rather than the defendant's wrong. Where the defendant's conduct shaped the claimant's inaction, the assessment of reasonableness must be undertaken in that context. On the facts of the present case, where the conduct relied upon as constituting a failure to mitigate

was repeatedly recommended by the Bank's own officers, the evidence accepted by the courts below admits of only one conclusion on the issue of reasonableness: the Bank did not establish that Risk Reduction acted unreasonably.

4.3.3. The same conclusion follows from the causation analysis. Nothing Mr Lutzkie did obliterated the causative effect of the Bank's original breach. His decision not to exchange the currency was in accordance with the Bank's advice; following a defendant's recommended course could not constitute a new and independent act. The chain was never broken as Mr Lutzkie did nothing unreasonable. The conduct was not an independent unreasonable choice and therefore did not 'obliterate' the defendant's wrongdoing as the operative cause of the loss: *Borealis* at [44]. [HB/856]

4.3.4. As Lord Leggatt stated in *URS v BDW* at [175], if the claimant chooses to respond [HB/997] to the defendant's breach in a way that would not reasonably be expected, damages will be assessed as if the claimant had responded in the expected way. Mr Lutzkie's continued holding of ZAR was not an independent market decision made against the background of a resolved breach. It was a direct, reasonable and normal response to the Bank's own continuing professional recommendation. The courts below nevertheless reached the opposite conclusion.

4.4. **Errors in the CCA's analysis:** the CCA's analysis at [64] to [72] drew perverse conclusions without applying the correct mitigation/causation framework: [**RR/613 – 615**]. Three errors compound each other: [HB/747-749]

4.4.1. First, the CCA's treatment of Mrs Kishto's role did not answer the causation question. At [69], the CCA treated the trial judge's finding—that it was difficult to accept that Mr Lutzkie had passively waited throughout the period for Mrs Kishto's advice, given his expressed loss of trust in her—as if it resolved the advisory-conduct issue as a whole. It did not. The trial judge's conclusion at page 22 ([**RR/595**]) rested on three separate matters: Mrs Kishto's reassurance; the [HB/729] unforeseeable and fluctuating nature of the exchange rate; and the absence of evidence about achievable rates after the early months of 2012. The CCA addressed only the first. It left the second and third untouched. Even if Mrs Kishto's role were discounted, that did not answer whether, in the circumstances created by the Bank's

advisory conduct as a whole, Risk Reduction's continued holding was an independent voluntary choice in the causation sense.

4.4.2. Second, the CCA made no finding that Mr Lutzkie's inaction was a free and independent choice in the causation sense required by the authorities. Under the framework established in *Borealis* and *Girozentrale*, the question of whether the Bank's breach remained an effective concurrent cause had to be addressed before any finding of unreasonable failure to mitigate could be made. The CCA did not address it. That is not a wrong application of the correct standard. It is a failure to apply the standard at all. The significance of that omission is that the question whether Risk Reduction's conduct had become independent of the Bank's own advisory conduct was never addressed.

4.4.3. Third, the CCA's reliance at [76] ([**RR/616]**) on Mr Lutzkie's pre-breach statement [HB/750] (that he was willing to accept rates between ZAR 7.30 and 7.50) as evidence that he had no reasonable basis for holding out for ZAR 7.25 in the post-breach mitigation period is a direct consequence of the failure identified above. The use of the pre-breach statement as the benchmark for reasonable conduct is only possible if the prior causation question has already been set aside. Had the CCA asked whether Risk Reduction's continued holding was shaped by the Bank's own post-breach professional guidance (including Mr Bhoyroo's written recommendation that he hold for ZAR 7.25: [**RR/412**]) it could not have used the pre-breach [HB/546] statement as the operative reference point, because that guidance superseded the pre-breach statement as the relevant context for assessing Risk Reduction's conduct. A pre-breach willingness to accept ZAR 7.50 cannot define a reasonable response to the Bank's own post-breach professional recommendation. The third error is therefore not independent of the second; it flows directly from the failure to apply the causation framework.

**4.5. The Generous Standard Applied to These Facts**

4.5.1. Independently of the causation analysis above, the generous standard leads to the same result. The Bank had to show not merely that conversion would have been reasonable, but that continued holding was unreasonable. Where more than one

reasonable response was open to Risk Reduction, the Bank was not entitled to dictate which reasonable course should have been taken: *Wilding*, Sedley LJ at [55]; *BDW v URS* at [59]. On the evidence accepted by the courts below, continued holding for ZAR 7.25 was at least one reasonable response available to Risk Reduction, and it was the response recommended by the Bank's own officers. [HB/995-996]

4.5.2. Both courts accepted Mr Bhoyroo as wholly truthful. His accepted evidence established that his professional recommendation to hold for ZAR 7.25 was genuine. A genuine professional recommendation from the Bank's own designated officer, never withdrawn and never supplemented by any alternative suggestion, is itself evidence that continued holding was a reasonable course, and where continued holding was a reasonable course, the standard does not permit a finding of unreasonableness merely because conversion might also have been reasonable.

4.5.3. It was reasonable for Risk Reduction to follow this advice. The burden lay on the Bank to establish that Risk Reduction acted unreasonably in continuing to hold its funds in ZAR. The Bank's own officers repeatedly advised that course and recommended continuing to wait for ZAR 7.25. Those facts are highly material to the assessment of reasonableness and, in the circumstances of the case, decisive. Where a defendant has itself recommended the conduct later relied upon as constituting a failure to mitigate, it will ordinarily be very difficult for that defendant to establish that the claimant acted unreasonably in following the recommendation. That is particularly so where, as here, the recommendation was given by the defendant's own professional advisers, was never withdrawn, and was not accompanied by any suggestion that a different course should be taken. On the evidence accepted by the courts below, the Bank did not discharge that burden.

### 4.6. Ground 2: The January 2012 Reconversion to ZAR

4.6.1. The CCA did not disturb the Commercial Division's finding that the January 2012 reconversion was Mr Lutzkie's decision: CCA at [62]: **[RR/612]**. The only evidence on the reconversion came from Mr Lutzkie and Mr Bhoyroo. Both gave 'truthful and credible' evidence that the reconversion was on the advice of Mrs Kishto and [HB/746]

Mr Bhoyroo, who told Mr Lutzkie that the rate would continue to fall and that ZAR 7.25 was achievable: see [**RR/97, 187, 188, 293**]. [HB/231, 321, 322, 427]

4.6.2. The Commercial Division rejected Mr Lutzkie's version on the reconversion because it found that by September 2011, he had lost trust in Mrs Kishto and therefore found it difficult to accept that he was relying on advice and waiting for her further advice. But that reasoning is illogical as it conflates two distinct questions:

4.6.2.1. Whether the reconversion was on the advice of the Bank's officers is a question of fact about what occurred.

4.6.2.2. If so, whether Mr Lutzkie was wise to have trusted Mrs Kishto is a question about the reasonableness of following her advice.

4.6.3. The only evidence before the Court was that the reconversion was on the advice of the Bank's officers. The loss of trust finding is irrelevant to whether or not Mr Lutzkie followed the Bank's advice. Also, it was directed at Mrs Kishto alone; there is no finding that Mr Lutzkie had lost trust in Mr Bhoyroo who also advised him to reverse the exchange. The Commercial Division accepted Mr Bhoyroo's evidence on the reconversion and so it was perverse to find that Risk Reduction was not following his advice. In any event, if Mr Lutzkie had lost trust in the Bank as the Court found, he would not have kept his money there, which is precisely what Mr Bhoyroo persuaded him not to do, as the Commercial Division found at page 17 [**RR/590**]. [HB/724]

4.6.4. The CCA at [62] upheld the finding on the ground that "[a]mple reasons were given to support her finding that it was as a result of Mr Lutzkie's decision that the bank proceeded to reverse the conversion" and endorsed the general finding that Mr Lutzkie "ultimately made the decisions and gave instructions concerning the money in the plaintiff's account": [**RR/612**]. But the distinction between being the final signatory of a decision and the decision being on the Bank's advice is material. Mr Lutzkie signed the reconversion letter, but the only evidence was that he made his decision in reliance on the advice of the Bank. Neither court addressed the consequence that flows directly from accepting Mr Bhoyroo's evidence nor the [HB/746]

specific evidence on how the reconversion decision was reached. That is a failure to consider relevant material within *Henderson* at [67] and is independently sufficient to sustain Ground 2. [HB/928]

4.6.5. There is a further reason why the reconversion finding cannot stand. The Commercial Division found at page 22 ([**RR/595**]) that, given the unforeseeable and fluctuating nature of the exchange rate during the early months of 2012 and the reassurance given by Mrs Kishto, it could not be said that Mr Lutzkie acted unreasonably in omitting to give instructions for conversion at any precise point during that period. That finding is irreconcilable with the conclusion that the January 2012 reconversion was itself an unreasonable failure to mitigate. The reconversion reinstated the ZAR position, but it did so in precisely the same factual context that the Commercial Division identified as making continued holding reasonable in the subsequent period. [HB/729]

4.6.6. Mr Bhoyroo gave evidence that at the time of the reconversion the rate was moving downward and that he and Mrs Kishto advised Mr Lutzkie not to proceed with the 7.80 conversion: "*the rate is going down. So we could achieve 7.25 ... Hema and myself, we went into a conversation with Mr Lutzkie to tell him that we should not go for the deal at 7.80"*: [**RR/187**]. The fluctuating rate and the Bank's advisory conduct were not features that emerged after January 2012; they were present and operative at the time of the reconversion itself. If those same features made continued non-conversion reasonable during the early months of 2012, they cannot simultaneously justify characterising the January reconversion as unreasonable. The Commercial Division assessed the reconversion in isolation from the very evidential context it had identified as relevant, and neither court addressed that inconsistency. [HB/321]

**4.7. Conclusion on Grounds 1 and 2**

4.7.1. The mitigation findings below rest on documents that record the Bank's own professional recommendation to pursue the very course both courts characterised as unreasonable. The April 2012 Bhoyroo email is particularly striking: with the rate at ZAR 7.87 to 7.90 (further from 7.25 than at any point in the preceding

months) the Bank's own officer was still monitoring for 7.25 and had suggested no alternative course. A defendant whose own officer at ZAR 7.87 to 7.90 was still recommending that Risk Reduction should hold off from converting its currency cannot prove it was unreasonable to do so.

4.7.2. Neither court engaged with the combined effect of the Bhoyroo written recommendations and the oral evidence (each corroborating the other) that the Bank's advisory conduct was an operative cause of Risk Reduction's continued holding throughout the relevant period. Neither court asked whether Risk Reduction's inaction was an independent voluntary choice or a consequence of the original breach and the Bank's own post-breach advisory conduct operating as concurrent causes. Those questions had to be answered before any finding of unreasonable failure to mitigate could be made. They were not.

4.7.3. The Respondent did not discharge its burden of proving any unreasonable failure to mitigate. On the evidence accepted below, no reasonable tribunal could have found otherwise. Risk Reduction is entitled to the full sum of USD 10,534,278.07.

## 5. ALTERNATIVE GROUNDS 3 AND 4 (IF GROUNDS 1 AND 2 FAIL): THE CCA APPLIED THE WRONG TEST FOR APPELLATE INTERVENTION AND SUBSTITUTED A FIGURE WITHOUT EVIDENTIAL FOUNDATION

### 5.1. The Error

5.1.1. The Commercial Division found that the January 2012 reconversion was an unreasonable failure to mitigate by Mr Lutzkie: Judgment at 22 – 23: [**RR/595 – 596**]. That finding was not disturbed by the CCA: CCA at [62]: [**RR/612**]. Under the crystallisation principle established in *Kaines*, that finding fixed the measure of damages at the rate obtainable in January 2012 - ZAR 7.80, the rate at which the Bank itself had effected the conversion that was reversed. Any subsequent market movements were irrelevant. Before substituting a different and less favourable rate, the CCA was required to address whether January 2012 had already crystallised the measure. It did not do so. [HB/729-730] [HB/746]

**5.2.The Crystallisation Principle**

5.2.1. *Kaines* establishes that once a court identifies the point at which a claimant first failed unreasonably to mitigate, that fixes the measure of damages. Dillon LJ stated (at 13): [HB/940]

> "In effect, in my judgment, when the judge fixes the date when the plaintiffs should reasonably have mitigated their damage by buying in a substitute cargo, that crystallises the position so far as the basis of a capital award of damages is concerned. The date so fixed by the judge takes the place of the contractual delivery date as the date at which the damages are to be assessed. Any further fluctuations of the market after the date so fixed are irrelevant."

5.2.2. Once that date is fixed, what the claimant does or fails to do thereafter is the claimant's own decision: it is not a decision from which the defendant can either suffer or profit.

5.2.3. The Commercial Division addressed the mitigation question in reverse chronological order:

5.2.3.1. the February to April 2012 period, first at page 22 (finding that given the fluctuating exchange rate and the reassurance given by Mrs Kishto it could not be said that Mr Lutzkie acted unreasonably in omitting to convert during that period),

5.2.3.2. then the January 2012 reconversion at pages 22 to 23: [**RR/595 – 596**]. [HB/729-730]

5.2.4. The CCA followed that ordering. At [68] it attacked the page 22 reasoning (finding it irreconcilable with the findings on Mr Lutzkie's awareness and capacity to give instructions and the finding that Mr Lutzkie had lost trust in Mrs Kishto) and substituted ZAR 7.50 at 1 March 2012: CCA at [74]: [**RR/614 – 616**]. At no point [HB/748-750] did it ask whether the January 2012 finding had already crystallised the measure of damages at ZAR 7.80, making the post-January 2012 analysis irrelevant.

5.2.5. Applying *Kaines,* the undisturbed Commercial Division finding that the January 2012 reconversion was an unreasonable failure to mitigate crystallised the damages at the rate of ZAR 7.80, the rate the Bank itself had achieved. The CCA's failure to ask the prior crystallisation question before deriving a substituted figure from its

attack on the page 22 reasoning is a legal error that requires the substituted figure to be set aside.

5.2.6. The force of this is underlined by the Bank's own conduct of the case below. Its primary mitigation argument before the Commercial Division was that the unreasonable failure occurred in January 2012: [**RR/325 (§§9.3 – 9.4)]; [RR/462]**. [HB/459] [HB/596] The Commercial Division accepted that primary case. If that primary case was right (as the Bank must maintain) then under *Kaines* the measure was fixed at ZAR 7.80 and the secondary case (for a further reduction based on subsequent inaction), whatever its merits, became irrelevant. Before the CCA the Bank pressed its secondary argument for a further reduction, without recognising that the primary case it had already won made that secondary case irrelevant under *Kaines*, and the CCA granted the further reduction without asking whether the already accepted primary case had fixed the measure. The substituted figure of USD 357,023.956 awards Risk Reduction less than the Bank's own primary case required.

### 5.3.The Wrong Standard — and Why *Kaines* Produces ZAR 7.80 on any Standard

5.3.1. The CCA applied a test for intervention it formulated itself at [71]: *"the weight of the evidence is plainly incompatible with the findings and computations of the court of first instance"*: [**RR/615**]. That test has no foundation in *Volcafe*, *Lesage* or *Henderson*. It asks whether the weight of evidence points against the conclusion with sufficient clarity. *Volcafe* asks whether a rational evidential basis for the conclusion exists at all. Those are categorically different questions. Adding the word "plainly" only intensifies the CCA's erroneous enquiry. It does not convert a test based on the ‘weight of evidence’ into the true test: whether there was any rational evidential basis for the judge’s conclusion. A conclusion can fail the CCA's test while the *Volcafe* threshold remains unmet. [HB/749]

5.3.2. Even applying the CCA's own lower standard, *Kaines* required it to ask the prior crystallisation question before reaching any substituted figure. On the undisturbed Commercial Division finding that January 2012 was the first point of unreasonable failure to mitigate, the answer to that question was ZAR 7.80 (the rate the Bank itself had achieved). There was no basis, on any standard, for moving to a later and

less favourable date without first addressing whether that undisturbed finding had already fixed the measure.

5.3.3. Even if the CCA was entitled to intervene against the Commercial Division's page 22 conclusion, the substituted figure it derived has no proper evidential foundation. It rests on two elements: the selection of 1 March 2012 as the mitigation date and the selection of ZAR 7.50 as the mitigation rate. Neither is supportable.

5.3.4. The rate was derived in part from Mr Lutzkie's statement in September 2011 that he was willing to "*play at the high margins of R7.30 and R7.50*": CCA at [76]: [**RR/616**]. That statement cannot bear the weight placed upon it. It was made on 15 September 2011 in a specific and identified context: Mr Bhoyroo had expressed concern that converting back to USD at that point would crystallise a loss on the August 2011 USD to ZAR conversion, and Mr Lutzkie's response expressed his willingness to absorb that specific loss on that specific pending transaction: [**RR/372, 374**]. It was an instruction about the rate at which he was prepared to execute the then pending conversion; the very conversion that became the subject of the breach. It was not, and could not reasonably be treated as, a general statement of his acceptable floor for any future conversion in any market conditions. It was made before the breach, in response to a specific question about a specific order and before receipt of the Bank's 2012 forex advice. It has no application to the question of what rate a reasonable person in Risk Reduction's position should have accepted in post-breach mitigation in March 2012. By that time the Bank itself had effected a conversion at ZAR 7.80, Mr Bhoyroo and Mrs Kishto had been advising throughout February and March 2012 that ZAR 7.25 was achievable, and the market had moved materially from the conditions prevailing in September 2011. The pre-breach statement was superseded as a reference point by the post-breach professional guidance and cannot discharge the burden of establishing the appropriate mitigation rate for the period governed by that guidance.

[HB/750]

[HB/506, 508]

5.3.5. The date of 1 March 2012 fares no better. The CCA selected it from the Bhoyroo emails, which recorded rates between ZAR 7.45 and 7.50 on that date: CCA at [11] and [72]: [**RR/600, 615**]. No finding was made as to why that date, rather than any other date in the February to April 2012 period, was the appropriate mitigation date.

[HB/734, 749]

That omission is significant. The trial judge found at page 22 that the exchange rate during the early months of 2012 was unforeseeable and fluctuating ([**RR/595**]); a finding the CCA did not disturb. The Bhoyroo emails record rates of ZAR 7.60 to 7.70 in mid-February [**RR/412**], ZAR 7.35 as the lowest point on 29 February, ZAR 7.45 to 7.50 on the morning of 1 March, and ZAR 7.55 to 7.65 on 5 March [**RR/414 – 415**]. As the exchange rate was 'unforeseeable and fluctuating' during that period it was so on 1 March just as on any surrounding date. The selection of 1 March 2012 at ZAR 7.50 was arbitrary: there was no principled basis in the record for preferring it over any other date within the relevant period, and a figure adopted without principled evidential support cannot stand. [HB/729] [HB/546] [HB/548-549]

**5.4.Conclusion on Grounds 3 and 4**

5.4.1. If Risk Reduction succeeds on Grounds 1 and 2, Grounds 3 and 4 do not arise. The alternative grounds are that the CCA made a sequencing error that was fatal to the substituted figure: it never asked whether the undisturbed January 2012 finding had crystallised the damages at ZAR 7.80 before moving to a later date. Under *Kaines* it was required to do so, and on the undisturbed Commercial Division finding the answer was yes. Additionally, it applied a lower appellate standard than *Volcafe* permits, and on the correct standard (and assuming Risk Reduction is not successful on Grounds 1 and 2) the Commercial Division's conclusion was not a conclusion that no reasonable judge could have reached. If Risk Reduction's primary arguments (Grounds 1 and 2) are unsuccessful, for the reasons set out above, the trial judge's award of USD 1,669,243.05 should be restored.

**6. DISPOSAL**

**6.1. Primary Relief: Full Recovery**

6.1.1. On the primary case Risk Reduction is entitled to the full measure of its loss. The Board is invited to allow the appeal on Grounds 1 and 2; set aside the judgment of the CCA dated 13 December 2024 and enter judgment for Risk Reduction in the sum of USD 10,534,278.07 together with interest from the date of the Judgment on

5 November 2018 as awarded by the trial judge and award the costs of the appeal and of the proceedings below.

**6.2. Alternative Secondary Relief: Restoration of the Trial Judge's Award**

6.2.1. Alternatively, under Grounds 3 and 4, the trial judge's award of USD 1,669,243.05 should be restored. The Board is invited to allow the appeal on Grounds 3 and 4; set aside the substituted award of USD 357,023.956; restore the trial judge's award of USD 1,669,243.05 together with interest as awarded by the trial judge, subject to any order as to the interest suspension for the period 3 October 2019 to 2 February 2023; award Risk Reduction its costs of the appeal and of the proceedings below.

**5 October 2026**

**ANDREW BURNS KC**
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