Appeal No. JCPC/2025/0062

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THE SUPREME COURT OF MAURITIUS
B E T W E E N :

RISK REDUCTION INTERNATIONAL LTD

Appellant

—and—

ABSA BANK (MAURITIUS) LIMITED

Respondent

RESPONDENT'S WRITTEN CASE

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A. INTRODUCTION

1. This is an appeal against a decision of the Court of Civil Appeal of Mauritius (Devat SPJ and Oh San-Bellepeau J) (the **CCA**) dated 13 December 2024, itself sitting on appeal from a first instance decision of Mungly-Gulbul J (as she then was)[1] dated 5 November 2018, [HB/731-751] reached after hearing five days of evidence and submissions.[2] [HB/707-730]

2. The appeal is presented as being on a point of the law of mitigation, and as not seeking to disturb the concurrent findings of fact made by both courts below against the Appellant (**Risk**). Risk's written case asserts (in a section headed "*The Nature of This Appeal*")[3] that [HB/35] *"[t]his appeal concerns the application of accepted mitigation principles to the facts found by the courts below"*,[4] and that *"Risk Reduction does not challenge the primary findings of fact accepted by the courts below. The appeal proceeds on those findings"*.[5]

3. That is entirely incorrect. At the heart of the appeal is a decision made by Risk's principal (Mr Lutzkie) to reverse a conversion made by the Respondent (the **Bank**) of his South African Rands (ZAR) into United States Dollars (USD) on 31 January 2012 at a rate of ZAR 7.80 to USD 1. Mr Lutzkie contended at trial that that reconversion was made on advice from an employee of the Bank, Ms Hema Kishto. The trial judge found on the basis of detailed oral evidence – including listening to audio tapes of the recorded conversations between the Bank and Mr Lutzkie – that that was not the case as a matter of fact, in the following terms (emphasis added):[6] [HB/727-729]

> "On the issue of damages counsel for the plaintiff submitted that even after 22 September when Mr. Lutzkie had informed the defendant of his intention to close the plaintiff's account, the bank was still under a duty to execute the plaintiff's instructions to convert at 7.32 inasmuch as the plaintiff had remained at the bank after having been convinced by Mr. Bhoyroo to do so. **Regarding the reversal of the transaction of 31**

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1 The trial judge, Mungly-Gulbul J, is the current Chief Justice of Mauritius. Devat SPJ, who delivered the CCA's judgment, is the Senior Puisne Judge.

2 The transcripts of the hearing days are at Reproduced Record pp 25–269 and 334–353. Unless otherwise stated, references in this Written Case to the 'Record' are to the Reproduced Record. In a few instances, it has been necessary to refer to the Certified Record; where so, this is made clear in the footnotes.

3 Risk's Case, section 3, page 7.

4 Risk's Case, [3.1].

5 Risk's Case, [3.3].

6 Trial judgment, pp 20–22; Record, pp 593–595.

January 2012, counsel submitted that the plaintiff had all along followed the advice of Hema Kishto, the defendant's treasury dealer. He pointed out that Mr. Bhoyroo had testified to the effect that Hema Kishto and himself had guided Mr. Lutzkie and informed him that the rate would go down to 7.25 ZAR the plaintiff could get a better deal in US dollars once the market reached that level, a level which was however never reached; this evidence has remained unrebutted. **According to counsel given that both the conversion at 7.80 and the subsequent reconversion was done under the advice of the bank, it cannot be said that the plaintiff has failed to mitigate its loss.**

Counsel also argued that the defendant did not advise Mr. Lutzkie that the ZAR was depreciating and that it was in the plaintiff's interests to convert the Rands. The conversion was only effected when the defendant requested the plaintiff to close its account in June 2015, at which time the market rate was 12.48 and this is the rate at which the transaction was done.

[…]

The evidence has revealed that subsequent to the plaintiff's instructions in September to convert at 7.32, the bank had converted the plaintiff's Rands at the rate of 7.80 on 31 January 2012. On the same day however Mr. Lutzkie requested that the transaction be reversed, which reversal was effected by the bank (Doc. D5). Thereafter the money remained in Rands a fact of which Mr. Lutzkie was well aware. Yet his only instructions after the 31 January 2012 was to convert at 7.25 (Doc. P23), a rate which was never reached.

Given that Mr. Lutzkie followed the market trends on television and he was briefed regularly about the trading rates of the Rand by Mr. Bhoyroo, he would have been aware of the evolution of the Rand and was thus in a position to give appropriate instructions to convert the Rands at the best possible rate and minimise the dollar loss. Had he done so, it would thereafter have been possible for him to claim the loss between the rate obtained and the 7.32 rate achieved in September 2011, from the defendant.

However as from January 2012, Mr. Lutzkie's only instruction was for conversion at 7.25, a rate which was never achieved. The money was only converted in June 2015 when the defendant asked him to close the plaintiff's account, at the then prevailing rate of 12.48. **I find Mr. Lutzkie's version that Hema Kishto had advised him that the rate of 7.25 would be achieved and that he was waiting for Hema Kishto's advice throughout this period, difficult to accept given that ever since September 2011. Mr. Lutzkie had lost trust in Hema Kishto as is apparent from his letter to the bank on 22 September 2011.**

Further **whilst Mr. Lutzkie was undoubtedly first introduced to the forex trade in 2009 by Mrs. Kishto from the defendant's Treasury**

Department, the evidence has revealed that as from August 2011, Mr. Lutzkie engaged in substantial transactions on the exchange markets.

Mr. Lutzkie himself stated that he followed the exchange market on television (Doc. D18). Further the tenor of the exchange between Mr. Lutzkie and the defendant's préposés and the instructions which he gave, reveal that Mr. Lutzkie is not an unsophisticated investor who would act blindly upon the information that H. Kishto or Mr. Bhoyroo gave him. The recorded conversations reveal that he took an active part in the conversation with Hema Kishto when he issued his instructions for conversion and the conversation between the two is a spontaneous flow without any prompting. **From the tenor of the language used by Mr. Lutzkie, it is clear that he is not a novice in the subject, he appears conversant with the foreign market exchange and is knowledgeable about its volatility. He speaks of "playing on the market for the next couple of days" because he has information "that the market is gonna be very unstable" and his desire to make up for some of his loss (Doc. 16). He expresses his opinion about the market trend and he states inter alia that he is "patient that the ZAR is definitely going to get there 7.25 and that he is "watching about it all the time on the exchange as well" (Doc 18).**

It is also clear that even though he discussed foreign exchange trading with the officers at the bank, at the end of the day he was the one who ultimately made the decisions and gave instructions concerning the money in the plaintiff's account.

In the circumstances I find that the plaintiff has failed in its duty to mitigate its loss.

4. The CCA concurred, in the following terms (emphasis added):[7] [HB/746]

Insofar as Risk Reduction's appeal is concerned, we were not persuaded by learned Senior Counsel's submission that the court's finding that it was Mr Lutzkie's who had decided to reconvert the USD into ZAR on the 31st of January 2012 (after the ZAR was initially converted into USD at the rate of R 7. 80) was wrong and unsupported by the evidence. We have carefully examined the evidence referred to by Mr Pursem and we are unable to reach the conclusion that the learned judge misapprehended the evidence, formed a wrong opinion or made a substantial and overriding error in her appreciation. <u>Her findings as to whose decision it was to reverse the ZAR/USD transaction on the 31st of January 2012 cannot therefore be described as perverse, unreasonable or unsupported by the evidence.</u>

7 CCA judgment, [61]; Record, p 612.

5. Before the Board, Risk repeatedly seeks to reverse that finding, arguing *inter alia* that: [HB/36-43]

5.1. The findings of the trial judge were inconsistent with general "*credibility findings*" which the learned judge had made as to Risk's two witnesses of fact (Mr Lutzkie and Mr Bhoyroo),[8] with the documentary record which was before her,[9] with the oral evidence of Risk's witness (Mr Bhoyroo),[10] and with the fact that Ms Kishto (who, on Mr Lutzkie's account, had left the Bank in acrimonious circumstances)[11] [HB/220] and other employees were not called by the Bank;[12]

5.2. *"[Mr Lutzkie's] 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"*;[13]

5.3. *"It was reasonable for Risk Reduction to follow [Ms Kishto's alleged] advice."*[14]

5.4. The trial judge's *"reject[ion of] Mr Lutzkie's version on the reconversion … is illogical"*;[15]

5.5. *"the reconversion finding cannot stand"*.[16]

6. The extent of the interference Risk invites to the Mauritian courts' concurrent findings is apparent from even a cursory glance at its Grounds of Appeal. By way of (non-exhaustive) example, Risk submits that: [HB/6-9]

6.1. "*No reasonable court*" could have concluded that Risk had failed to mitigate when it was "*at all material times following the advice of the Respondent*" (a factual premise rejected by both courts): Ground 1(a).

6.2. "*No reasonable court*" could have rejected Mr Lutzkie's evidence that he was waiting for Ms Kishto's advice throughout the relevant period, in light of:

(a) Mr Lutzkie's "*unrebutted evidence*" and the trial judge's finding that he was a "*credible and convincing witness*" (Ground 1(c)(i));

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8 Risk's Case, [4.2.3].
9 Risk's Case, [4.2.4].
10 Risk's Case, [4.2.5], including quotes from the transcripts of evidence before the trial judge.
11 See Record, p 86.
12 Risk's Case, [4.2.7].
13 Risk's Case, [4.3.3].
14 Risk's Case, [4.5.2].
15 Risk's Case, [4.6.2].
16 Risk's Case, [4.6.5].

(b) the "*unrebutted evidence*" of another of Risk's witnesses, Mr Bhoyroo (Ground 1(c)(ii)); and

(c) a particular piece of documentary evidence viewed in isolation—an email (Ground 1(c)(iii)).

6.3. "*No reasonable court*" could have found a failure to mitigate on 31 January 2012 having also found that Risk did not act unreasonably in failing to convert in the period after that date (Ground 2(c)).

7. Those attacks on the Mauritian courts' findings of fact are groundless, as the Bank explains in the alternative in the body of this Written Case. But they betray the true nature of this appeal. Risk is not seeking to apply *"accepted mitigation principles to the facts found by the courts below"*, as stated at [3.1] of Risk's Case. It is seeking to reverse the central factual finding [HB/35] on which the courts below determined the issue of mitigation—namely, that when he reversed the mitigating transaction on 31 January 2012, Mr Lutzkie was not relying on advice from the Bank but exercised his own judgment. That—challenging concurrent findings of fact of the courts below—is a course of action which the authorities proscribe absent exceptional circumstances (which are not alleged here), as the Board will be well aware. That is the short (and complete) answer to Grounds 1 and 2 of this appeal.

8. What is more, the basis on which Risk seeks to circumvent the application of the rule prohibiting the reopening of concurrent findings of fact—the alleged application of *"accepted mitigation principles"*—is itself based on a complete misapprehension as to the law applicable on this appeal. This is an appeal to the Privy Council from the courts of Mauritius, not an English appeal. Mauritian law, not English law, applies. As the Board will again be well aware, Mauritian contract law, including the rules applicable to contractual damages, is based on civil law, not on the English common law. In particular (and as set out further below):

8.1. The recoverability of damages in contract is governed by Article 1150 of the [HB/771-775] Mauritian Civil Code, which provides (in summary, and in translation) that the defendant "*is only liable for damages and interests that have been foreseen or could have been*

foreseen when the contract was formed, when it is not due to the "dol" of the debtor that the obligation is not performed".[17]

8.2. In applying the Civil Code in Mauritius, the courts have regard to French doctrine and jurisprudence ("*Inasmuch as our Civil Code is derived from the French Civil Code, the decisions of the French Courts have continued influencing our jurisprudence in areas where the articles in both Codes are identical and the wording the same. That has not prevented our law from developing its own jurisprudence which sometimes has demarcated itself from what obtains in French law*": **General Construction Co Ltd v Ibrahim Cassam & Co Ltd** 2011 SCJ 19 at [21]). [HB/779-818]

8.3. Under civil law, the trial judge has a *pouvoir souverain d'appréciation* (a sovereign power of appreciation), including as to the existence of the causal link between the breach and the damage and in the assessment of damages. The appellate court's role is limited to ensuring that the trial court's decision was reasoned and does not contain internal inconsistencies.

8.4. The Mauritian courts also have regard to decisions from the English courts, which can have persuasive authority, including on matters governed by the Civil Code. Some decisions of the Mauritian courts have drawn on a passage from **McGregor on Damages** when considering mitigation in the exercise of their sovereign power of appreciation under Article 1150. The trial judge adopted that approach in the present case.[18] [HB/727]

9. That final point does not alter the character of this appeal as one from the courts of Mauritius, applying civil law principles. Still less does it import wholesale into Mauritian law the entirety of the English law of damages, as Risk appears to assume.[19] The Board is thus invited to take note of the fact that the effect of Risk's approach to this appeal is to invite the Board to impose on the Mauritian courts, for the future, the approach of the English court to damages (in particular, mitigation). In this regard: [HB/34-45]

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17 A wider rule of remoteness applies in cases of dol (*intentional contractual fault*) under Article 1151, but the same principles otherwise apply. Reference is accordingly made to civil law commentary on both Articles (1150 and 1151) in Part B of this Case.

18 Trial judgment, p 20; Record, p 593.

19 Risk's Case, [2.2.5], [5.1.1], [5.2.1].

9.1. Experienced learned Senior Counsel for Risk (Rishi Pursem SC) never submitted to the two lower courts that the approach and tests developed by the English courts should apply. Whilst conceding that the Bank's defence of mitigation was "*well taken*",[20] Risk's argument was one of fact: namely, that it was under no duty to mitigate its loss in the circumstances of the case, because it was supposedly acting on the advice of the Bank's employee, Ms Kishto. On the evidence (and for detailed reasons), both lower courts rejected that Risk or Mr Lutzkie were in fact acting on such advice on 31 January 2012 or thereafter. [HB/471]

9.2. Risk never submitted before the lower courts that the approach and rules of mitigation developed by the English courts should apply wholesale in Mauritian courts; if so, how they were to be reconciled with the applicable civil law rules including the sovereign power of appreciation of the judge under civil law; or why they should be suitable as binding precedent for all Mauritian courts in the future. The Board is being asked to determine that question without "*having the considered opinion on the topic of the Courts in the country from which the question comes to it*", an opinion which the Board has described as being of *"great desirability"* in **De La Haye v Air Mauritius Ltd** [2018] UKPC 14 at [18]. [HB/892]

9.3. The Board is, in effect, being asked to set a precedent binding on all magistrates and trial judges in Mauritius, and one that would (the Bank submits) cut across their sovereign power of appreciation on the question of recoverability of damages under Article 1150 of the Civil Code. If the Board is to import English law principles into Article 1150 of the Mauritian Civil Code, that should only happen (if at all) in an appeal with reasoned judgments from the Mauritian courts on the desirability of that course, and where the issue has actually been raised and argued in the courts below. [HB/771-775]

10. Risk may not have intended any of this, but it is the unfortunate consequence of the approach it has taken on this appeal. Consistently with that approach, Risk also appears to have overlooked the basis on which this appeal now proceeds:

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20 Record, p 337. In one of its skeleton arguments before the CCA, Risk also stated that it "*has no qualm with the principle whereby a plaintiff is under a duty to take all reasonable steps to mitigate his loss arising from the defendant's wrongdoing and that he will not recover avoidable loss*" (Certified Record, p 702).

10.1. When it applied for conditional leave to appeal to the Board against the CCA's judgment, Risk relied on two provisions of the Constitution of Mauritius: section 81(1)(b) (appeal as of right) and section 81(2)(a) (point of law of great general or public importance). [HB/769-770]

10.2. At the court sitting of 13 January 2025,[21] counsel for the Bank objected to the appeal proceeding under section 81(2)(a) (i.e. public importance), and Risk's attorney confirmed that the appeal would proceed under section 81(1)(b) only. [HB/753]

11. There is, therefore, no basis for considering the wholesale importation of English precedents on damages into Mauritian law on this appeal, and this would be a wholly inappropriate occasion for the Board to do so for the reasons set out above.

12. There is in any event no question of general or public importance about how the Mauritian courts ought to apply the principles of causation, remoteness of damage and the duty to mitigate losses to the facts that are before them. Instead, it is respectfully submitted that Risk is seeking to use its appeal as of right to (a) argue points that it never raised before the Mauritian courts about the test to apply to the duty to mitigate, and (b) re-open the concurrent finding of fact of both lower courts that Risk did not act on the Bank's advice when rejecting and reversing the 31 January 2012 conversion.

13. Given the manner in which the appeal has been presented by Risk, the Bank addresses the position under English law on Ground 4 in the alternative. As explained below, even if the Board were to import the English law on damages into Mauritian law, that would not assist Risk on the facts as found by the courts below.

B. LEGAL FRAMEWORK

B1. The Board's practice: findings of fact and new arguments

14. Two aspects of the Board's practice are relevant to the disposal of this appeal.

15. The first is the long-standing practice of the Board not to interfere with concurrent findings of fact by two courts below, save in very limited circumstances. As Lord Mance

21 Certified Record, p 939; and see the judgment at Record, p 619.

explained in **Central Bank of Ecuador v Conticorp SA** [2015] UKPC 11 at [4] (emphasis added): [HB/874]

> *"… the Board will as a matter of settled practice decline to interfere with concurrent findings of pure fact, save in very limited circumstances. The well-established position remains as stated in Devi v Roy [1946] AC 508, where the Board said: "(4) That, in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure.* […] *(5)* […] *The question of the value of evidence is not a sufficient reason for departure from the practice. (6) That the practice is not a cast-iron one, and the foregoing statement as to reasons which will justify departure is illustrative only, and there may occur cases of such an unusual nature as will constrain the Board to depart from the practice."*

16. The practice "*applies as much to appeals to the Board as of right (like this one) as it does to appeals where permission is required*": **Al Sadik v Investcorp Bank BSC** [2018] UKPC 15 at [43]. Its effect is "*not just to treat the scales as loaded against an appellant* […] *but altogether to decline to interfere with concurrent findings of pure fact*": **Al Sadik** at [44] (emphasis added). [HB/847]

17. The kind of case in which the Board will depart from its practice is illustrated by **Devi v Roy**: a case which involved (as the Board explained in **Al Sadik** at [45]) "*such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all*". Risk does not suggest that anything of that kind occurred here (and no such suggestion could credibly be advanced). [HB/847]

18. The second relevant aspect of the Board's practice is that it will not normally entertain an argument that was not advanced in the courts below, unless that can be done without injustice: **Grewals (Mauritius) Ltd v Koo Seen Lin** [2016] UKPC 11 at [24]. One important reason for this is "*the great desirability of the Board having the considered opinion on the topic of the Courts in the country from which the question comes to it*": **De La Haye v Air Mauritius Ltd** [2018] UKPC 14 at [18]. The Board is invited to bear this in mind when considering Risk's invitation to apply English law to the issues of Mauritian civil law before it (a question of potentially far-reaching implications, on which neither court below was addressed). [HB/892]

B2. Mauritian law on the assessment of damages

19. Mauritian contract law is found in the Mauritian Civil Code, which in turn derives from the French *Code civil* (as it stood before the 2016 reforms). The recoverability of damages in contract is governed by Article 1150 of the Civil Code, which provides: [HB/771-775]

> *« Le débiteur n'est tenu que des dommages et intérêts qui ont été prévus ou qu'on a pu prévoir lors du contrat, lorsque ce n'est point par son dol que l'obligation n'est point exécutée. »*
>
> **In translation:** "The debtor [in the civil law sense of debtor of a contractual obligation] is only liable for damages and interests that have been foreseen or could have been foreseen when the contract was formed, when it is not due to the "dol" of the debtor that the obligation is not performed."

20. A wider rule of remoteness applies in cases of *dol* (intentional contractual fault) under Article 1151, but the same principles otherwise apply. Reference is accordingly made to civil law commentary on both Articles 1150 and 1151 in this Part B.

21. In **General Construction Co Ltd v Ibrahim Cassam Co Ltd** 2011 SCJ 19 at [21], the Mauritian Supreme Court (sitting as an enlarged bench of five judges) explained the relationship between the Civil Code and French law as follows: [HB/779-818]

> *"We shall start with an obvious fundamental point. Inasmuch as our Civil Code is derived from the French Civil Code, the decisions of the French Courts have continued influencing our jurisprudence in areas where the articles in both Codes are identical and the wording the same. That has not prevented our law from developing its own jurisprudence which sometimes has demarcated itself from what obtains in French law."*

22. Under French civil law (and, by extension, under the Mauritian Civil Code), once breach has been established, the assessment of the damage flowing from the breach (whether any damage was suffered as a result of the breach, to what extent and how reparation should

be made) falls within the sovereign power of appreciation of the trial judge, subject only to review of the trial judge's reasoning. As Professor Casson explains:[22] [HB/1008-1010]

> *"**18. Plan.** – Le juge dispose d'un pouvoir souverain pour apprécier tant l'existence que l'ampleur du préjudice ainsi que les modalités de sa réparation* […] *sous réserve du contrôle de la motivation exercé par la Cour de cassation* […].
>
> ***19. Pouvoir souverain d'appréciation des juges du fond.** – Quant au pouvoir reconnu aux juges du fond pour apprécier le dommage, il est souverain.* […] *« les juges du fond apprécient souverainement les divers chefs de préjudice qu'ils retiennent et les modalités propres à en assurer la réparation intégrale »* […].
>
> ***20. Contrôle de la Cour de cassation sur la motivation.** – La Cour de cassation pratique en la matière un contrôle réduit qui porte sur la motivation adoptée par les juges du fond* […]. *Ceux-ci* […] *doivent rendre des décisions motivées exemptes d'insuffisance ou de contradiction de motifs* […]."
>
> **[In translation:**
>
> > "**18. Outline. –** The judge has a sovereign power to assess both the existence and the extent of the loss and the manner of its reparation […], subject to the review of the reasoning exercised by the Cour de cassation […].
> >
> > **19. Sovereign power of assessment of the trial judges. –** The power recognised to the trial judges to assess the damage is sovereign. […] 'the trial judges assess sovereignly the various heads of loss which they accept and the means appropriate to ensure full reparation [réparation intégrale]' […].
> >
> > **20. Review by the Cour de cassation of the reasoning. –** In this area the Cour de cassation exercises a limited review, which is limited to the reasoning adopted by the trial judges […]. They […] must give reasoned decisions free of any insufficiency or contradiction in their reasons […]."]

23. That sovereign power extends to all aspects of damages, from their recoverability to their quantum, including the facts on which the existence or absence of a causal link between the breach and the loss depends, including whether a loss is a consequence of the breach or of the claimant's own conduct. Thus, in their classic treatise on *Obligations*, Prof. Terré [HB/1011-1014]

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22 Ph. Casson, "Dommages et intérêts", *Répertoire de droit civil* (Dalloz), nos 18–20 (2017, updated as at 2026).

and Simler conclude their discussion of such concepts as *"cause adéquate"* and *"cause générique"*, *"conséquence directe" and "conséquence indirecte"* as follows:

> *"Reste à savoir où finit le direct, où commence l'indirect. La réponse dépend très largement de l'opinion du juge, la Cour de Cassation considérant généralement qu'elle relève du pouvoir souverain des juges du fond"*
>
> [**In translation:** There then remains the question of where direct consequence ends and where indirect consequence starts. The answer depends largely on the view of the trial judge, the *Cour de Cassation* generally holding that it is a matter for the sovereign power of trial judges.][23]

24. The findings which Risk attacks on this appeal (i.e. whether Mr Lutzkie relied on advice from the Bank when he reversed the 31 January 2012 conversion and thereafter, or whether those decisions were his own) are findings of pure fact falling squarely within that sovereign power.

25. The Mauritian courts apply the same concept. This is clear from the CCA's judgment, in which it held the trial judge "*was sovereign in her appreciation of Mr Lutzkie's evidence regarding the reversal*".[24] [HB/746]

26. The corollary of this is that the role of the reviewing court is to ensure that the decision of the *juge du fond* is reasoned and free of any insufficiency or contradiction in its reasons. Where the trial judgment contains an internal contradiction, the reviewing court must correct it. That is what the CCA did in this case in relation to the trial judge's finding that Risk had not *also* acted unreasonably *after* 31 January 2012. The CCA did not disturb the trial judge's finding that Risk had acted unreasonably in refusing the conversion on 31 January 2012.

27. As part of the assessment of damages under the Civil Code, the Mauritian courts have made reference to the fact that a plaintiff is expected to mitigate its loss.[25] [HB/831-844]

28. In **Scalcione v HSBC** 2011 SCJ 22 at p 11, as in the present case, the court referred to the following passage of **McGregor on Damages**: [HB/829]

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23 F. Terré, Ph. Simler, Y. Lequette and F. Chénedé, *Droit civil – Les obligations* (13th ed), para 860.

24 CCA judgment, [62]; Record, p 612.

25 See, e.g., **Scalcione v HSBC** 2011 SCJ 22, 2011 MR 209 at p 11; and **Société S. Sawon et Fils et Cie v The Moka Flacq District Council** 2012 SCJ 394 at p 13.

> *"The first and most important rule is that the plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid. Put shortly, the plaintiff cannot recover for avoidable loss."*

29. The recognition that a plaintiff must take reasonable steps to mitigate its loss has never been accompanied by any analysis of whether English cases setting out detailed rules of mitigation (e.g. those on the 'available market rule') should serve as precedents to determine how mitigation operates in Mauritius. Rather, the Mauritian judgments show trial judges applying a general principle to the evidence before them, as part of the exercise of their sovereign appreciation under Article 1150.

30. The citation of **McGregor** in **Scalcione** (or in the present case) does not constitute a wholesale importation of English mitigation case law into Mauritius. For instance, and of direct relevance to the way the appeal is framed, nothing in Mauritian law requires the *juge du fond* to fix the measure of damages by reference to a single date (e.g. the first reasonable opportunity to sell or acquire a substitute in the market) to the exclusion of considering other opportunities that were in fact available to the plaintiff to mitigate its loss. The governing aim is *réparation intégrale*: the plaintiff is to be fully compensated for the loss caused by the breach, and no more, having regard to all the circumstances of the case.

B3. English law

31. As noted above, the Bank does not accept that English authorities on mitigation fall to be applied to the assessment of loss under Mauritian law. However, given the manner in which Risk has presented its appeal, the Bank addresses the English law position in the alternative.

32. First, under the 'first rule' of mitigation, the court assesses the claimant's loss on the *assumption* that the claimant took the reasonable steps that a reasonable person in its position would have taken, irrespective of what it in fact did.[26] That raises a counterfactual enquiry: what reasonable commercial steps would a reasonable person in the claimant's

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26 **Thai Airways International Public Co Ltd v KI Holdings Co Ltd** [2015] EWHC 1250 (Comm), [2016] 1 All ER (Comm) 675 at [33]–[34] (Leggatt J); approved by the UK Supreme Court in **Sainsbury's Supermarkets Ltd v Mastercard Incorporated** [2020] UKSC 24, [2020] 4 All ER 807 at [214]. [HB/988-989] [HB/953]

position have taken in response to the defendant's breach? If a reasonable claimant would counterfactually have bought or sold an asset on a particular date (e.g. in the available market,[27] or in response to an offer from the defendant),[28] then damages are generally (but not always) assessed by reference to that date, with later events being ignored.

33. Second, under English law, this counterfactual enquiry is an issue of fact. See **Payzu Ltd v Saunders** [1919] 2 KB 581: "*It is plain that the question what is reasonable for a person to do in mitigation of his damages cannot be a question of law but must be one of fact in the circumstances of each particular case*" (Bankes LJ at 588); "*it is always a question of fact*" (Scrutton LJ at 589); **Sotiros Shipping Inc v Sameiet Solholt (The Solholt)** [1983] 1 Lloyd's Rep 605, 608: "*whether a loss is avoidable by reasonable action on the part of the plaintiff is a question of fact not law*"; and **URS Corp Ltd v BDW Trading Ltd** [2025] UKSC 21, [2026] AC 409 at [60] ("*clearly a fact-specific enquiry*", requiring a trial). [HB/970] [HB/995-996]

34. Third, and for this reason, "*It is therefore rarely appropriate to interfere with the conclusions of the trial judge based as they are on the evidence (or lack of satisfactory evidence) before him*": **Standard Chartered Bank v Pakistan National Shipping Corp** [2001] EWCA Civ 55, [2001] 1 All ER (Comm) 822 at [47] (Potter LJ). [HB/976]

B4. Inaccuracies in Risk's written case

35. It is respectfully submitted that Risk's written case contains some inaccuracies, which risk obscuring the analysis. This section addresses those.

The 'obliteration' test

36. First, Risk's written case wrongly suggests that applying the 'first rule' of mitigation under English law involves enquiring as to whether the claimant's subsequent conduct "*obliterates*" the defendant's breach of contract, and whether the defendant's breach is an "*effective concurrent*" cause of the loss.[29] For example, Risk's case suggests at [1.4] that "*The question is not whether Risk Reduction acted reasonably in the abstract but whether its conduct displaced* [HB/30-44]

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27 See, e.g. **Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)** [2007] UKHL 12, [2007] 2 AC 353 at [79] (Lord Brown), citing **Kaines (UK) Ltd v Österreichische Warenhandelsgesellschaft Austrowaren GmbH** [1993] 2 Lloyd's Rep 1, 11 (Bingham LJ); **Koch Marine Inc v D'Amica Societa di Navigazione arl (The Elena d'Amico)** [1980] 1 Lloyd's Rep 75, 88–89 (Robert Goff J); **Bunge SA v Nidera BV** [2015] UKSC 43, [2015] 3 All ER 1082 at [80]–[81] (Lord Toulson); and **Jamal v Moolla Dawood Sons & Co** [1916] 1 AC 175, 179. [HB/917-918] [HB/938] [HB/869] [HB/929-935]

28 **Payzu Ltd v Saunders** [1919] 2 KB 581, 589.

29 Risk's Case, [2.1.2]–[2.1.4], [4.3.3], [4.4.2] and [4.7.2].

the Bank's breach as the operative cause of the loss". This leads Risk to criticise the courts below for failing to ask that question.[30]

37. That is not the test. The question is simply whether the defendant has established that a reasonable person in the claimant's position would, on the balance of probabilities, have taken reasonable steps to reduce its loss.[31] Risk's 'obliteration' formulation derives from **Borealis AB v Geogas Trading SA** [2010] EWHC 2789 (Comm), [2011] 1 Lloyd's Rep 482 at [44]. In that case, Gross LJ (sitting as a judge of the High Court) referred to a passage of Clerk & Lindsell for the proposition that a *novus actus interveniens* (i.e. subsequent event breaking the "*chain of causation*") is "*an event of such impact that it 'obliterates' the wrongdoing*" of the defendant. He was not thereby suggesting that this is the question to be answered under the first rule of mitigation; he went on to address mitigation entirely separately at [49]–[50], adopting the orthodox approach in **The Solholt**—the question is whether the loss was avoidable by reasonable action on the part of the plaintiff.[32] [HB/856-858] [HB/967-970]

38. The Bank of course accepts (as the Board emphasised in **Credit Suisse Life (Bermuda) Ltd v Ivanishvili** [2025] UKPC 53, [2026] AC 533 at [101], citing **The Elena d'Amico** at 88) that mitigation and causation are not two separate principles, and that mitigation is an aspect of the principle of causation. As the Board put it in **Ivanishvili** at [104]: [HB/887-888]

> *"In each case the question is whether the plaintiff is to be regarded as having made a voluntary choice to act in a particular way following the defendant's breach of duty, such that the plaintiff alone should be held responsible for the consequences of that choice. The plaintiff's conduct is usually viewed through the lens of mitigation, rather than intervening act, when the action which the plaintiff takes or fails to take is one calculated to avoid damage that the plaintiff might otherwise have suffered from the defendant's breach."*

39. This is precisely the enquiry which the trial judge conducted in the present case: she asked herself the question—hotly disputed between the parties at trial—whether Mr Lutzkie made a voluntary choice on 31 January 2012 when he chose to reverse the transaction. She made a detailed factual finding that he did (quoted in the Introduction to this Written Case), based not simply on the fact that Mr Lutzkie had lost confidence in Ms Kishto (as Risk's appeal portrays), but also (*"Further"*) on the facts that (a) Mr Lutzkie engaged in [HB/728-729]

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30 Ibid.

31 **Thai Airways** at [33]–[34] (Leggatt J); approved by the UK Supreme Court in **Sainsbury's** at [214].

32 **Borealis** at [49]–[50]; **The Solholt** at 608.

substantial transactions on the exchange markets, (b) he was "*not an unsophisticated investor who would act blindly upon the information that H. Kishto or Mr. Bhoyroo gave him*" – he was not a novice in the subject, was conversant with the foreign market exchange and knowledgeable about its volatility so that (c) *"it [was] also clear that even though he discussed foreign exchange trading with the officers at the bank, at the end of the day he was the one who ultimately made the decisions and gave instructions concerning the money in the plaintiff's account"*. Risk's attempted importation of the test from the *novus actus* authorities seeks to avoid the correct analysis (with the aim, it is submitted, of circumventing that finding of fact). In the specific context of mitigation, the (well-established) answer to the question of whether the defendant's breach caused the loss is supplied by the counterfactual question 'what steps would a person in the claimant's position, acting reasonably, have taken to mitigate the loss'? There is no additional threshold of 'obliteration', and that supposed requirement is not referred to in any of the mitigation cases on which Risk relies (save for **Borealis** where, as noted, it was not addressed in the mitigation part of the judgment).

40. Risk's "*effective concurrent cause*" language fares no better. In every case of avoidable loss flowing from a breach of contract, the defendant's breach will remain a 'but for' cause of the loss (and so concurrent). The law decides which causes are to be deemed 'effective' by asking whether a person in the claimant's position could, acting reasonably, have avoided the loss. If so, the defendant's "*breach is not causative of that additional loss*" (**Kaines** at 11, per Bingham LJ). The suggestion that the Court should *also* ask whether the defendant's breach was an "*effective concurrent cause*" in the abstract obscures the analysis, and the courts below cannot be criticised for failing to ask that question. [HB/938]

The so-called 'crystallisation principle'

41. Second, Risk refers in its written case to a so-called "*crystallisation principle*", which it derives from **Kaines**. Risk suggests that **Kaines** establishes that "*once a court identifies the point at which a claimant first failed unreasonably to mitigate, that fixes the measure of damages*".[33] [HB/34-45]

42. It is important to put **Kaines** in its proper context, namely as one of a number of cases on the 'available market rule'[34] (sometimes referred to, erroneously, as the 'breach date rule'). This is not a legal rule in the strict sense but one of the settled "*norms of reasonable conduct*"[35]

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33 Risk's Case, [2.2.5] and [5.2.1].

34 See, e.g. **The Golden Victory** at [79] (Lord Brown); **Sharp Corp Ltd v Viterra BV** [2024] UKSC 14, [2024] Bus LR 871 at [94]–[95]. [HB/960]

35 **Thai Airways** at [35]. [HB/989]

(i.e. it is an example of the way reasonable people can generally be expected to behave in a certain type of factual situation, namely where there is an available market for substitute performance). The 'available market rule' is thus an *application* of the 'first rule' of mitigation to cases involving a particular fact pattern. It is also reflected in the measure of damages under section 51(3) of the (English) Sale of Goods Act 1979.

43. Where the Court chooses to apply the available market rule, the claimant is expected to enter the market at the earliest reasonable opportunity; if it does not do so, "*future speculation is to his account*" (**The Golden Victory** at [79] per Lord Brown), and later movements in the market price are irrelevant, whichever way they go: **Jamal v Moolla Dawood Sons & Co** [1916] 1 AC 175, 179 at 179. This means both (a) the claimant does not benefit (by an award of higher damages) if the market moves against him, and equally (b) the defendant does not benefit (by reducing the damages he is liable to pay) if the market moves in the claimant's favour. [HB/917-918] [HB/929-935]

44. The 'available market rule' is, however, simply a manifestation of a broader principle, namely that a claimant's loss is assessed on the assumption that he has taken the steps a reasonable person would have done in his position, even if he has not in fact done so.

45. As noted above, the 'available market rule' is not a rule *per se*, but a heuristic or "*technique*": **Bunge v Nidera** at [16]–[17] per Lord Sumption. It is a *prima facie* presumption (and, even then, only in certain types of case) and is not to be applied mechanistically in circumstances where assessment at another date may more accurately reflect the compensatory principle: **County Personnel (Employment Agency) Ltd v Alan R Pulver & Co** [1987] 1 WLR 916, 926 (Bingham LJ). [HB/865]

46. Understood in the context of the above authorities, Risk's so-called "*crystallisation principle*" is not a freestanding rule of law at all. Rather, it is a description of the *effect* of the application of the 'available market rule' in cases where the Court chooses to apply it. There is no 'crystallisation' in an automatic or concrete sense (cf. the 'crystallisation' of a secondary right to liquidated damages following the breach of a primary obligation).

C. THE DECISIONS (AND FINDINGS) BELOW

47. The account of the facts presented in Risk's written case is largely disconnected from the judgments below, and refers back to transcripts of the oral evidence heard by the trial judge. As the Bank noted in the Statement of Facts and Issues, the facts on this appeal are [HB/11]

those found in the judgments below.[36] This section therefore sets out only the findings of the trial judge and the CCA (or the agreed facts), as recorded in their judgments.

C1. The key facts (as found)

48. Risk had operated an account with the Bank since 2001. Risk's principal, Mr Lutzkie, was the only signatory to the account, and the only person authorised to give the Bank instructions in relation to it.[37] Mr Lutzkie had first been introduced to foreign exchange trading in 2009 by Ms Hema Kishto,[38] an officer of the Bank's International Banking Division.[39] [HB/728, 732-733]

49. On 19 August 2011, acting upon Ms Kishto's advice, Risk instructed the Bank to convert USD 37,058,882.44 into ZAR at a rate of 7.25.[40] On 1 September 2011, Mr Lutzkie instructed the Bank to withdraw USD 2.5 million from Risk's account to acquire a helicopter.[41] On 9 September 2011, the Bank converted Risk's USD into ZAR at 7.2510, and Risk instructed the Bank on the same day to convert the ZAR back into USD at 7.10. The ZAR then depreciated against the USD.[42] [HB/709, 733]

50. On 15 September 2011, Mr Lutzkie instructed Mr Harish Bhoyroo, a Senior Relationship Manager at the Bank, to convert all of Risk's ZAR into USD at 7.32. Mr Bhoyroo warned that Risk would incur a loss in USD terms. Mr Lutzkie's secretary replied that he was willing to take the loss and to "*play at a higher conversion rate, between R 7. 30 and R 7. 50 per USD*". The Bank confirmed that it would proceed in accordance with the instruction.[43] [HB/733]

51. The Bank was able to achieve the rate of 7.32 on 19 September 2011. However, on the instruction of Mr Mungroo, the Bank's Head of Treasury, the matter was kept on hold, and the transaction was not executed. In failing to give effect to Risk's instruction, the

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36 Statement of Facts and Issues, fn 2.
37 CCA judgment, [2]; Record, p 598.
38 Trial judgment, p 21; Record, p 594.
39 CCA judgment, [3]; Record, p 599. The trial judge described Ms Kishto as being "*from the defendant's Treasury Department*" (p 21; Record, p 594). Neither court found that she was the "*Head of the Bank's forex department*", as Risk asserts (Risk's Case, [1.1]).
40 CCA judgment, [3]; Record, p 599.
41 Trial judgment, p 2; Record, p 575.
42 CCA judgment, [4]; Record, p 599.
43 CCA judgment, [5]; Record, p 599.

Bank was in breach of contract.[44] That finding is not challenged on this appeal (as it was not before the CCA). [HB/724-725, 733-736]

52. On 22 September 2011, Mr Lutzkie wrote to the Bank to express his dissatisfaction and his intention to close Risk's account, stating that he had realised, among other things, that Ms Kishto had been trading to the Bank's advantage, which had resulted in losses to him over the years. On the same day, Mr Bhoyroo called Mr Lutzkie and offered new products in an attempt to dissuade him from closing the account.[45] Risk ultimately kept its account with the Bank open until 2015.[46] [HB/733, 724]

53. On 28 January 2012, the Bank sent a message stating: "*We confirm that the order has been hit (R 7.80) Please confirm if we credit the USD a/c with the USD equivalent*".[47] On 31 January 2012, the Bank converted Risk's ZAR into USD at 7.80. On the same day, Mr Lutzkie requested that that conversion be reversed, and the Bank reversed it. Thereafter Risk's money remained in ZAR, a fact of which Mr Lutzkie was well aware. His only instruction after 31 January 2012 was to convert at 7.25, a rate which was never reached.[48] [HB/733] [HB/724]

54. Between 10 and 29 February 2012, Mr Bhoyroo informed Mr Lutzkie's secretary that the rate was moving between 7.60 and 7.70.[49] On 1 March 2012, he informed her that the rate had traded at 7.35 the previous day and was trading between 7.45 and 7.50 that morning.[50] On 5 March 2012, the rate was between 7.55 and 7.65.[51] On 9 April 2012, it was between 7.87 and 7.90.[52] [HB/734]

55. On 18 March 2015, the Bank asked Risk to close its account. On 17 June 2015, the Bank converted Risk's ZAR into USD at 12.4835.[53] Risk claimed USD 10,534,278.07, being the difference between the USD it would have obtained at 7.32 in September 2011 and the USD it ultimately obtained in June 2015.[54] [HB/734-735] [HB/725]

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44 Trial judgment, pp 17–18; Record, pp 590–591; CCA judgment, [6] and [18]; Record, pp 599 and 601–602.
45 CCA judgment, [7]; Record, p 599.
46 Trial judgment, p 17; Record, p 590.
47 CCA judgment, [8]; Record, p 599.
48 Trial judgment, p 21; Record, p 594.
49 CCA judgment, [10]; Record, p 600.
50 CCA judgment, [11]; Record, p 600.
51 CCA judgment, [12]; Record, p 600.
52 CCA judgment, [13]; Record, p 600.
53 CCA judgment, [14]–[15]; Record, pp 600–601.
54 Trial judgment, p 18; Record, p 591.

C2. The trial judge's findings on mitigation

56. On the issue of mitigation, the trial judge found that: [HB/728-729]

56.1. Mr Lutzkie followed the exchange market on television and was briefed regularly by Mr Bhoyroo about the trading rates of the ZAR. He would therefore have been aware of the evolution of the ZAR, and "*was thus in a position to give appropriate instructions to convert the Rands at the best possible rate and minimise the dollar loss. Had he done so, it would thereafter have been possible for him to claim the loss between the rate obtained and the 7.32 rate achieved in September 2011, from the defendant*".[55]

56.2. Mr Lutzkie's evidence that Ms Kishto had advised him that the rate of 7.25 would be achieved, and that he was waiting for her advice throughout this period, was "*difficult to accept*", given that he had lost trust in Ms Kishto since September 2011, as was apparent from his letter of 22 September 2011.[56]

56.3. In addition ("*Further*"), from August 2011, Mr Lutzkie engaged in substantial transactions on the exchange markets. He was "*not an unsophisticated investor who would act blindly upon the information that H. Kishto or Mr. Bhoyroo gave him*". The recorded conversations showed that he took an active part in his conversations with Ms Kishto when he gave instructions, in "*a spontaneous flow without any prompting*".[57]

56.4. Mr Lutzkie was "*not a novice*", but "*conversant with the foreign market exchange*" and "*knowledgeable about its volatility*". He spoke of "*playing on the market for the next couple of days*", and said that he was "*patient that the ZAR is definitely going to get there 7.25*" and was "*watching about it all the time on the exchange as well*".[58]

56.5. "*even though [Mr Lutzkie] discussed foreign exchange trading with the officers at the bank, at the end of the day he was the one who ultimately made the decisions and gave instructions concerning the money in the plaintiff's account*".[59]

57. The trial judge concluded that Risk had failed in its duty to mitigate its loss.[60] She drew a distinction between the events of 31 January and the period afterwards: "*The situation however is different in January 2012 when the bank took the concrete step of converting the Rands into* [HB/729-730]

55 Trial judgment, p 21; Record, p 594.
56 Trial judgment, p 21; Record, p 594.
57 Trial judgment, pp 21–22; Record, pp 594–595.
58 Trial judgment, p 22; Record, p 595.
59 Trial judgment, p 22; Record, p 595.
60 Trial judgment, p 22; Record, p 595.

US Dollars at the rate of 7.80".[61] She found that "*in January 2012 the plaintiff acted unreasonably when Mr. Lutzkie gave instructions to the bank to reverse the 7.80 transaction which decision on the part of Mr. Lutzkie resulted in avoidable dollar loss to the plaintiff*",[62] and awarded Risk USD 1,669,243.05, being the difference between conversions at 7.32 in September 2011 and at 7.80 in January 2012.[63]

58. However, the trial judge rejected the Bank's further argument that Risk had ***also*** failed to mitigate ***later*** by not giving instructions for conversion when more favourable rates were available after 31 January 2012. She held that, "*[i]n view of the unforeseeable and fluctuating nature of the exchange rate for ZAR during the early months of 2012 and the reassurance given by Hema Kishto it cannot be said that Mr. Lutzkie acted unreasonably in omitting to give instructions for conversion at any precise point of time during that period. There is no evidence as to the rate which the Rand achieved during the remaining months of 2012 or the following years and at which Mr. Lutzkie could have given instructions for conversion to mitigate the plaintiff's loss*".[64] [HB/729]

C3. The CCA's judgment

59. Both parties appealed. Risk pursued two grounds, contending that the unrebutted evidence showed that the Bank's officers had advised Mr Lutzkie to reconvert into ZAR, and that it should be awarded USD 10,534,278.07. The Bank pursued a single ground: that Risk's damages should have been *further* reduced because of its additional failures to give instructions to convert *after* 31 January 2012.[65] [HB/738-739]

60. The CCA dismissed Risk's appeal. It was unable to conclude that the trial judge had misapprehended the evidence, formed a wrong opinion or made a substantial and overriding error in her appreciation; and it held that her findings as to whose decision it was to reverse the 31 January 2012 conversion could not be described as perverse, unreasonable or unsupported by the evidence.[66] It observed that (a) the trial judge was "*sovereign in her appreciation of Mr Lutzkie's evidence*"; (b) that "*[a]mple reasons*" had been given for her finding that the reversal was Mr Lutzkie's independent decision; and (c) her finding [HB/746]

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61 Trial judgment, p 22; Record, p 595.
62 Trial judgment, pp 22–23; Record, pp 595–596.
63 Trial judgment, pp 22–23; Record, pp 595–596.
64 Trial judgment, p 22; Record, p 595.
65 CCA judgment, [30]–[32]; Record, pp 604–605.
66 CCA judgment, [61]; Record, p 612.

that he "*ultimately made the decisions and gave instructions*" was "*unimpeachable in the light of the evidence adduced*".[67]

61. The CCA allowed the Bank's appeal. Having summarised the trial judge's findings,[68] it held that: [HB/748-750]

61.1. the trial judge's conclusion at page 22 (i.e. that Risk did not act unreasonably in failing to give instructions to convert after 31 January 2012) did "*not resonate*" with her earlier findings at page 21 regarding Risk's failure to mitigate its loss on 31 January 2012;[69]

61.2. her reliance on "*the reassurance given by Hema Kishto*" was "*flawed, contradictory, and difficult to reconcile*" with her earlier rejection of Mr Lutzkie's evidence that he was waiting for Ms Kishto's advice;[70]

61.3. the trial judge had erred in rejecting the Bank's argument that Mr Lutzkie had *further* failed to reduce the USD loss by not giving instructions for conversion when the rates became favourable after January 2012;[71]

61.4. the trial judge "*ought to have extended her findings*" on Risk's failure to mitigate to the period beyond January 2012, and the base rate of 7.80 was "*in the face of the evidence on record, unfounded*";[72] and

61.5. the rate on 1 March 2012 was between 7.45 and 7.50; and, having regard to Mr Lutzkie's willingness since September 2011 to "*play in high margins of R 7.30 and R 7.50*", it was fair and reasonable to adopt a rate of 7.50.[73]

62. The CCA accordingly reduced the award to USD 357,023.96, with interest save for the period from 3 October 2019 to 2 February 2023.[74] [HB/750]

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67 CCA judgment, [62]; Record, p 612.
68 CCA judgment, [68(a)–(h)]; Record, p 614.
69 CCA judgment, [68]; Record, pp 614–615.
70 CCA judgment, [69]; Record, p 615.
71 CCA judgment, [70]; Record, p 615.
72 CCA judgment, [71]–[72]; Record, p 615.
73 CCA judgment, [74]–[76]; Record, p 616.
74 CCA judgment, [77]–[78]; Record, p 616.

D. THE BANK'S RESPONSE TO GROUNDS 1 AND 2

D1. Grounds 1 and 2 seek to challenge concurrent findings of fact

63. As framed by Risk in the Statement of Facts and Issues, the issue raised by Grounds 1 and 2 of this appeal is (emphasis added): [HB/24-25]

> *"Whether the CCA and the trial court erred in holding that Risk Reduction had failed to mitigate its loss, in circumstances where* ***the evidence established that Risk Reduction had followed the Bank's own advice throughout the relevant period and that the ZAR exchange rate was "unforeseeable and fluctuating… during the early months of 2012"*** *and where the Bank's breach of contract in September 2011 was the operative and unbroken cause of the entirety of the loss"*

64. The underlined text above makes plain that these Grounds seek to attack concurrent findings of primary fact made by the courts below. Indeed, as noted in the introduction, that is even more plain from the Grounds actually formulated in Risk's Grounds of Appeal. [HB/6-9] Although Ground 1 is framed as an error of "*law*", each of the sub-grounds (save Ground 1(b))[75] is expressed in terms that "*no reasonable court*" could have reached the conclusion it did. As noted above, Risk's written case nevertheless suggests that the appeal concerns "*the application of accepted mitigation principles to the facts found by the courts below*" and that Risk "*does not challenge the primary findings of fact accepted by the courts below. The appeal proceeds on those findings*".[76] [HB/35] For the reasons explained in the introduction, that is incorrect.

65. The question for both courts below was whether Risk acted unreasonably in response to the Bank's breach of contract and, if so, when. That was an issue of fact. The trial judge found that Risk acted unreasonably in reversing the 31 January 2012 conversion. She did so because of her finding that Mr Lutzkie had not in fact relied on the Bank's advice when taking that course, but had made his own independent commercial decision. That was a finding on a pure issue of fact, which was upheld by the CCA.

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75 Ground 1(b) is that the courts below "*permitted the Respondent to rely on its own wrong in pleading a failure to mitigate and failed to apply the reasonableness test generously towards the Appellant having regard to the fact that its predicament was caused by the Respondent's wrongdoing*". That is a thoroughly misconceived point because the defendant's wrong (i.e. breach of contract) will be a but for cause of the claimant's loss in literally every case where the court applies the first rule of mitigation in assessing the claimant's loss.

76 Risk's Case, [3.1] and [3.3].

66. Risk's case thus involves attacking the concurrent factual findings of the courts below on **two** cumulative levels.

67. First, Risk challenges the ultimate conclusion of the trial judge and the CCA that a party in Risk's position, acting reasonably, would have kept the conversion at 7.80 effected by the Bank on 31 January 2012 (Ground 1(a) and Ground 2). That was the *overall* conclusion of both courts below on the mitigation issue which, as noted above, is an issue of fact under both Mauritian and English law. [HB/6-8]

68. Second, for the purposes of attacking that *overall* conclusion, Risk is driven to challenge several *subsidiary* findings of pure[77] fact made by the trial judge, after hearing the witnesses over four days: [HB/728-729, 746-748]

68.1. Ground 1(a) asserts that Risk "*was at all material times following the advice of*" the Bank. The trial judge found that it was not: Mr Lutzkie would not act blindly on information from Ms Kishto or Mr Bhoyroo, and ultimately made his own decisions.[78]

68.2. Ground 1(c) attacks the trial judge's rejection of Mr Lutzkie's account that Ms Kishto had advised him that 7.25 would be achieved and that he was waiting for her advice.[79]

68.3. Ground 1(d) attacks the trial judge's finding that Mr Lutzkie had lost trust in Ms Kishto since September 2011.[80]

68.4. Ground 2(a) and (b) attack the finding that the reversal of 31 January 2012 was Mr Lutzkie's own decision, rather than one taken on the Bank's advice.[81]

69. The CCA upheld these findings on appeal, rejecting Risk's submission that they were perverse, unreasonable or unsupported by the evidence.

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77 i.e. findings about the facts as they happened (in contrast to a finding about what Risk would counterfactually have done if it had acted in the way a reasonable claimant would have).

78 Trial judgment, pp 21–22; Record, pp 594–595; CCA judgment, [62] and [68(g)–(h)]; Record, pp 612 and 614.

79 Trial judgment, p 21; Record, p 594.

80 Trial judgment, p 21; Record, p 594; CCA judgment, [68(e)]; Record, p 614.

81 Trial judgment, p 22; Record, p 595; CCA judgment, [61]–[62]; Record, p 612.

70. Accordingly, and contrary to the way the point is presented in Risk's written case, it is obvious that Risk does in fact seek to reverse concurrent findings of fact on this appeal. The disposal of the appeal must be approached on that basis.

D2. Submissions on Grounds 1 and 2

71. Risk's appeal on Grounds 1 and 2 should be dismissed for **two** reasons.

72. **First**, as explained above, these Grounds seek to attack concurrent findings of fact made by the trial judge and the CCA. The Board's long-standing practice is not to review concurrent findings of fact made by two courts below, save in special circumstances. Risk does not suggest that there are any special circumstances which would justify a departure from that practice in this appeal. Under Mauritian law, those findings were in any event within the sovereign appreciation of the trial judge, whose reasons on them were unimpeachable, as the CCA held.[82] [HB/746]

73. That is the short, and complete, answer to Grounds 1 and 2.

74. **Second**, in any event, Risk's sub-grounds do not, on analysis, identify any error in approach. Many of them were not taken below, and they take Risk nowhere now:

74.1. Ground 1 ("*unrebutted evidence*"): The passages on which Ground 1 proper relies ("*the exchange rate for ZAR was going down very quickly*" and "*7.25 could be achieved*") are taken from the trial judge's summary of Mr Bhoyroo's testimony.[83] They are not findings that Risk acted or **relied on** any such advice, if given. The question of fact for the trial judge was not only whether advice was given, but whether Mr Lutzkie in fact relied on it when rejecting the 31 January 2012 conversion. On that question, she found against Risk.[84] [HB/728-729]

74.2. Ground 1(b) (the courts below "*permitted the Respondent to rely on its own wrong in pleading a failure to mitigate and failed to apply the reasonableness test generously towards the Appellant*"): Risk presents no argument of Mauritian law on this point. If English law is to be applied (*quod non*), the Bank accepts that mitigation is an aspect of causation, but that does not assist Risk: see paragraphs 36 to 40 above. The complaint that the courts below permitted the Bank to "*rely on its own wrong*" is [HB/852]

82 CCA judgment, [61]–[62]; Record, p 612.
83 Trial judgment, p 22; Record, p 595.
84 Trial judgment, pp 21–22; Record, pp 594–595.

misconceived: every case of avoidable loss involves a defendant who has committed a wrong (viz. a breach of contract), and the rule against recovery of avoidable loss presupposes one has occurred. As to the "*generous*" standard: the principle in **Banco de Portugal v Waterlow & Sons Ltd** [1932] AC 452, 506[85] concerns the Court's assessment of "*the measures*" a claimant in fact adopts "*to extricate himself*" from the position in which the breach has placed him. In short, it means that if the claimant does in fact take commercial steps to try and minimise its loss, the Court will not hold him to an unrealistically high standard when assessing the reasonableness of the steps he took. That principle has no application here because Risk did not take any measures to reduce its loss. On 31 January 2012, the Bank's conversion at 7.80 had placed Risk's funds in USD; Mr Lutzkie's decision to reverse it put them back into ZAR. This is a counterfactual 'should have mitigated' case, not a factual 'attempted to mitigate' case where the question is whether the measures in fact taken were reasonable. In any event, the argument that the trial judge failed to apply the test "*generously*" was not advanced before the CCA and should not be entertained now.

74.3. Ground 1(c) (rejection of Mr Lutzkie's evidence):

(a) As a preliminary point, this ground accepts that "*it was ultimately the Appellant's decision to reconvert*"—the very finding which Ground 2 attacks.

(b) The trial judge's *general* findings on the credibility of Mr Lutzkie and Mr Bhoyroo did not oblige her to accept every part of their evidence, particularly where it was contradicted by Mr Lutzkie's contemporaneous letter of 22 September 2011[86] and the recordings of his conversations.[87] The target of 7.25 was Mr Lutzkie's own independent figure, as Mr Bhoyroo recorded at the time ("*Frikkie [Lutzkie] is looking for R7.25*").[88] [HB/514, 728-729, 734]

(c) Ground 1(c) is directed to advice from Ms Kishto. Risk's written case now goes further, relying on Mr Bhoyroo's email and evidence as a "*professional recommendation*" from Mr Bhoyroo, in whom Mr Lutzkie had not lost trust.[89] [HB/31-44]

85 See Risk's Case at [2.2.2].
86 Record, p 380.
87 Trial judgment, pp 21–22; Record, pp 594–595.
88 CCA judgment, [10]; Record, p 600.
89 Risk's Case, [1.5.1], [4.2.4], [4.4.3], [4.5.2], [4.6.3] and [4.7.1].

That case goes beyond Risk's Grounds of Appeal, and was not Risk's case at trial, where it relied on advice from Ms Kishto.[90] It is also contrary to Mr Bhoyroo's own evidence, which Risk asks the Board to accept as truthful, namely (i) that the suggestion to reverse the conversion and wait for 7.25 came from Ms Kishto, (ii) that he had no expertise in foreign exchange, and (iii) that he did not advise Mr Lutzkie on the currency in which to hold Risk's money or when to convert it.[91] In any event, the trial judge found that Mr Lutzkie would not act blindly on information from Ms Kishto "***or Mr. Bhoyroo***".[92] [HB/296-334, 471-473, 728, 748]

74.4. Ground 1(d) (no loss of trust):

(a) There is no contradiction in this part of the trial judgment. The trial judge's observation that Mr Lutzkie did not give effect to his letter of 22 September 2011 was made in the context of deciding whether Risk's instruction to convert at 7.32 had lapsed because he had asked for the account to be closed.[93] It is entirely consistent for a customer to keep his account with a bank while no longer trusting the foreign exchange advice of one of its officers (and no longer relying on its advice). This is yet another point that was not taken below. [HB/724]

(b) In any event, the trial judge's conclusion that Mr Lutzkie was not acting on the Bank's advice but took his own decisions did not rest on his loss of trust in Ms Kishto alone. She gave several further important and independent reasons, including (i) that from August 2011, Mr Lutzkie engaged in substantial transactions on the exchange markets; (ii) that he followed the market on television and was regularly briefed on the rates; (iii) that the tenor of his exchanges with the Bank's officers, and the recorded conversations, showed an active and knowledgeable participant who would not act blindly on information from Ms Kishto or Mr Bhoyroo; and (iv) that his own words ("*playing on the market*", "*patient that the ZAR is definitely going to get there 7.25*") showed that he was conversant with the [HB/728-729, 746]

90 Record, pp 337–339.
91 Record, pp 162, 166, 167, 169, 179, 187, 190, 193–196 and 200.
92 Trial judgment, p 21; Record, p 594; CCA judgment, [68(g)]; Record, p 614.
93 Trial judgment, p 17; Record, p 590.

market and its volatility.[94] Those are the "*ample reasons*" to which the CCA referred[95] when refusing to reverse the trial judge on this point.

74.5. Ground 2 (the trial court's finding that it was unreasonable for Risk to reject the 31 January 2012 conversion was perverse, and the CCA erred in concluding otherwise): [HB/729, 746]

(a) Grounds 2(a) and (b) attack the trial judge's primary finding that the reversal was Mr Lutzkie's own decision—that is a finding of pure fact.[96]

(b) Ground 2(c) relies on the trial judge's statement that the exchange rate was "*unforeseeable and fluctuating*" in early 2012. But the trial judge herself explained why 31 January 2012 was different: on that day, "*the bank took the concrete step of converting the Rands into US Dollars at the rate of 7.80*".[97] Reversing a conversion which had already been effected is not the same as omitting to give a fresh instruction at a particular moment in a fluctuating market. Further, the statement on which Ground 2(c) relies was itself the product of the contradiction in the trial judgment which the CCA corrected (as to which, see the submissions on Ground 3 below).

75. Grounds 1 and 2 therefore fall to be dismissed, whether the Board rejects them in accordance with its long-established practice of not overturning concurrent findings of fact (as it is invited to do), alternatively because no argument of Mauritian law has been presented on them, alternatively, on their substance if English law principles are to apply.

E. THE BANK'S RESPONSE TO GROUNDS 3 AND 4

76. Grounds 3 and 4 are advanced by Risk in the alternative to Grounds 1 and 2. They necessarily proceed on the footing that Risk was not acting on advice from the Bank, and that it *was* Mr Lutzkie's own independent decision, in January 2012 and thereafter, (a) to reject the conversion at 7.80 on 31 January 2012, and (b) to remain in ZAR until June 2015 without giving instructions to convert at a more favourable rate.

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94 Trial judgment, pp 21–22; Record, pp 594–595.
95 CCA judgment, [62]; Record, p 612.
96 Trial judgment, p 22; Record, p 595; CCA judgment, [61]–[62]; Record, p 612.
97 Trial judgment, p 22; Record, p 595.

E1. Ground 3: the CCA's intervention

77. Ground 3 contends that the CCA applied the wrong test, namely by asking whether "*the weight of the evidence was plainly incompatible*" with the trial judge's findings (rather than whether no reasonable court could have reached them) and whether there was "*no contradiction in favour of the Respondent*" in the trial judgment.[98] There is nothing in this Ground. [HB/8]

78. The CCA directed itself in accordance with the settled Mauritian approach to appellate review of findings of fact, which draws on both the Mauritian authorities and the decisions of the Board: **Currimjee Jeewanjee (Properties) Co Ltd v Société Thayefoh** 1951 MR 158; **Lesage v The Mauritius Commercial Bank Ltd** [2012] UKPC 41 at [34]; and see also **Volcafe Ltd v Compania Sud Americana de Vapores SA** [2018] UKSC 61, [2019] AC 358 at [41].[99] It asked itself whether the findings under appeal were "*so evidently and inherently wrong or unfounded in the face of the evidence adduced […] that no reasonable court would have reached similar conclusions*".[100] [HB/776-778] [HB/944] [HB/1006] [HB/744-746]

79. The error which the CCA identified was a paradigm case for appellate intervention, however the standard is formulated. The trial judge's conclusion at page 22[101] contradicted her own reasoned findings at page 21:[102] [HB/728-729]

79.1. she relied on "*the reassurance given by Hema Kishto*", having rejected, on page 21, Mr Lutzkie's evidence that he was waiting for Ms Kishto's advice[103] (i.e. she had concluded that Mr Lutzkie was not relying on Ms Kishto's advice from at least January 2012 onwards); and [HB/749]

79.2. she held that Mr Lutzkie had not acted unreasonably in failing to give instructions for conversion at any point in early 2012, having found on page 21 that he was aware of the evolution of the ZAR and "*in a position to give appropriate instructions to convert the Rands at the best possible rate and minimise the dollar loss*".[104] Her statement that there was "*no evidence as to the rate which the Rand achieved*" overlooked the rates reported to Mr Lutzkie at the time.[105] [HB/728, 734-749]

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98 Grounds of Appeal, Ground 3(a), (b) and (d).
99 CCA judgment, [55]–[60]; Record, pp 610–612.
100 CCA judgment, [60]; Record, p 612.
101 Trial judgment, p 22; Record, p 595.
102 Trial judgment, p 21; Record, p 594.
103 CCA judgment, [69]; Record, p 615.
104 Trial judgment, p 21; Record, p 594; CCA judgment, [34] and [68]; Record, pp 606 and 614–615.
105 CCA judgment, [10]–[13]; Record, p 600.

80. Under civil law, a judgment vitiated by a contradiction in its reasons (*contradiction de motifs*) is one which the reviewing court must correct. Under English law, the same error is an "*identifiable error*" justifying intervention without any need to show irrationality, being a finding with no basis in the evidence and a demonstrable failure to consider relevant evidence: **Henderson v Foxworth Investments Ltd** [2014] UKSC 41, [2014] 1 WLR 2600 at [67]. [HB/928]

81. Contrary to Ground 3(d), the contradiction was plain: Risk itself contends that the trial judge's conclusion at page 22 is "*irreconcilable*" with her finding on the January 2012 reversal.[106] [HB/43]

82. Faced with two irreconcilable findings, an appellate court must resolve the contradiction; it cannot leave both undisturbed. Risk's real complaint is not that there was no contradiction, but rather that it disagrees with the manner in which the CCA resolved it.

83. The CCA resolved the contradiction in favour of the trial judge's reasoned findings at page 21, which it had itself just upheld on appeal, rather than the conclusion at page 22, which rested on a premise the trial judge had rejected. The phrases "*does not resonate*" and "*plainly incompatible*",[107] on which Risk fastens, are measured language describing a direct contradiction. They do not indicate the application of any lower standard of intervention. To the extent relevant, the contradiction was also resolved the right way, i.e. by leaving undisturbed the primary finding (which itself rested on evidence going well beyond the fact that Mr Lutzkie had lost faith in Ms Kishto, as noted in paragraph 74.4(b) above) and correcting the secondary finding. [HB/748-749]

84. Nor was the rate of 7.50 adopted by the CCA without evidential foundation. It was taken from the rates reported to Mr Lutzkie at the time,[108] and was consistent with the range within which Mr Lutzkie had himself said, in September 2011, that he was willing to convert at.[109] [HB/734-750]

E2. Ground 4: the so-called "crystallisation principle"

85. Ground 4 contends that, in circumstances where the trial judge found that Risk should (acting reasonably) have converted the ZAR on 31 January 2012 at 7.80, its subsequent [HB/8-9]

106 Risk's Case, [4.6.5].
107 CCA judgment, [68] and [71]; Record, pp 614–615.
108 CCA judgment, [10]–[11] and [74]; Record, pp 600 and 616.
109 CCA judgment, [5] and [76]; Record, pp 599 and 616.

failures to convert the ZAR at a more favourable 7.50 rate on 1 March 2012 were irrelevant and should have been ignored by the CCA when assessing Risk's loss.

The 'crystallisation principle' does not form part of the law of Mauritius

86. In its written case, Risk formulates Ground 4 as an issue of law, relying on the "*crystallisation principle*" said to derive from **Kaines**.[110] As explained above, the 'crystallisation principle' is not a rule (or principle) of English law at all, but is rather a consequence of the application of the 'available market rule' to specific facts. As also explained above, the 'available market rule' is an English legal presumption, developed in English sale of goods and charterparty cases. It was not relied on before either court below, and it forms no part of the assessment of damages in Mauritian law under Article 1150 of the Civil Code. [HB/34-46, 936-940]

87. Nor is there any basis for importing the 'available market rule' into Mauritian law. The Mauritian courts have adopted the general principle that a plaintiff cannot recover loss which it could reasonably have avoided, as part of their sovereign appreciation under Article 1150 of the Civil Code. They have not adopted any English presumptions for fixing the date of assessment. [HB/771-775]

88. Under the Civil Code, the assessment of Risk's damages, including of the opportunities which Risk had to limit its loss, was a matter for the sovereign appreciation of the *juge du fond*, with a view to *réparation intégrale*, subject only to review of her reasoning. Nothing in the civil law required the courts below to fix a single date and to disregard Risk's conduct after it. On the contrary, once the contradiction in the trial judgment was corrected, the trial judge's own reasoned finding at page 21 (that Mr Lutzkie was in a position to give instructions to convert "*at the best possible rate and minimise the dollar loss*", and could then have claimed the difference from the Bank) permitted Risk's later failure to convert to be taken into account. That is what the CCA did. [HB/728]

89. Further, neither **Kaines** nor the (purported) 'crystallisation principle' was relied on before the trial judge or the CCA, and neither judgment refers to them. Risk's case below was that it was entitled to the full measure of its loss, calculated by reference to the conversion in June 2015. The CCA cannot have erred in failing to apply a rule of English law which no party put to it. Moreover, whether such a rule forms part of the assessment of damages under Article 1150 of the Civil Code is precisely the kind of question on which the Board

110 Risk's Case, [2.2.5] and [5.1]–[5.2].

would wish to have the considered views of the Mauritian courts. Due to the manner in which Risk chose to argue its case in both courts below, the Board does not have the benefit of that in this appeal. If there were to be an appropriate occasion for the Board to consider whether English mitigation authorities should be transposed into Article 1150, this appeal is not it.

The position on Ground 4 if English law applies

90. Even if (contrary to the Bank's primary case) the English authorities on the 'available market rule' were to govern (or be imported into) the assessment of damages under Article 1150, it would not follow that the CCA was precluded from taking into account events after 31 January 2012. Risk's so-called 'crystallisation principle' misdescribes the English law principles and, in any event, the premise of that 'principle' is absent on the facts as found below.

91. First, as noted above, the 'available market rule' is a *prima facie* heuristic, not a rule of law. The measure of damages in section 51(3) of the Sale of Goods Act 1979, and its common law analogues (cf **Kaines**), provide only a *prima facie* answer to the assessment of damages. [HB/936-940] It is a "*technique*" for giving effect to the overriding compensatory principle, not a rule in its own right: **Bunge** at [16]–[17] per Lord Sumption. The date by reference to which [HB/865] damages are assessed is not to be "*mechanistically applied in circumstances where assessment at another date may more accurately reflect the overriding compensatory rule*": **County Personnel** at 926 (Bingham LJ), approved in **The Golden Victory** at [33] (Lord Scott). [HB/913]

92. Second, later market movements are only disregarded if justified on the particular facts. In the 'available market rule' cases, later movements in the market are generally disregarded because the claimant, having been expected to go into the market and obtain a substitute from a third party, chooses instead to hold its position. Its subsequent dealings are then speculation "*for his own account*": the decision is "*down to him*" and "*not a decision from which the seller can either suffer or profit*" (**Kaines** at 11, per Bingham LJ; **Jamal** at 179; **The Golden Victory** at [79], Lord Brown). Whether that rationale applies in a given case is a question of fact, as mitigation always is (see paragraphs 33 and 34 above). Bingham LJ himself fixed the date in **Kaines** "*on the facts of this case*", and noted that counsel had been unable to find a case "*with these peculiar features*" (at 11). [HB/938, 929-935, 917-918]

93. Third, the rationale for disregarding the 1 March 2012 movements in this case does not apply on the facts as found below:

93.1. Unlike the claimants in **Kaines** and **Jamal**, Risk never turned to the market for a substitute for the Bank's performance. In **Kaines**, the buyers accepted the sellers' repudiation and had to buy a substitute cargo from third parties. In **Jamal**, the buyer refused to take the shares, and the seller had to sell them elsewhere. In each case, the claimant's only route to a substitute for the defendant's performance was a transaction with a third party in the market. That transaction, or its hypothetical equivalent, ended the defendant's involvement. Anything the claimant did afterwards was to its own account.

93.2. Here, Risk did not treat its relationship with the Bank as at an end following the breach. It kept its account and its mandate with the Bank.[111] After 31 January 2012, it gave the Bank a further instruction to convert at a 7.25 rate.[112] The Bank continued to monitor the market and to report the rates to Risk, so that it could convert on Risk's instruction.[113] Any conversion after 31 January 2012 would have been effected by the Bank under the same mandate. In the **Kaines** sense, the Bank was not "*the market*". It was the contracting party whose performance Risk continued to seek. In this sense, Risk chose to recruit the Bank in its course of mitigation, by giving it a fresh mandate to convert at a specific rate. That makes the position materially different when compared with a typical available market case like **Kaines** or **Jamal**. [HB/724-728 and 734]

93.3. The trial judge herself framed the counterfactual in exactly those terms. She found that Mr Lutzkie "*was thus in a position to give appropriate instructions to convert the Rands at the best possible rate and minimise the dollar loss. Had he done so, it would thereafter have been possible for him to claim the loss between the rate obtained and the 7.32 rate achieved in September 2011, from the defendant*".[114] That is a measure of damages by reference to the rate actually obtainable through the Bank at a later date. It is not a measure frozen at an earlier point of time. [HB/728]

93.4. Having chosen to keep the Bank's performance alive, a prudent party in Risk's position would have taken reasonable commercial steps to manage that continuing performance. The CCA's finding that a reasonable customer in Risk's position [HB/750 and 914]

111 Trial judgment, p 17; Record, p 590.
112 Trial judgment, p 21; Record, p 594; CCA judgment, [9]; Record, p 600.
113 CCA judgment, [10]–[13]; Record, p 600.
114 Trial judgment, p 21; Record, p 594.

would have converted through the Bank at 7.50 on or about 1 March 2012[115] gives effect to the compensatory principle: it awards Risk the loss which the Bank's breach caused, "*no less but also no more*".[116]

94. The point can be tested by two hypotheticals:

94.1. First, suppose that Risk had, in fact, converted at 7.50 on 1 March 2012. In that situation, it would not be open to Risk to recover damages based on the difference between the promised rate of 7.32 and the 31 January 2012 rate of 7.80. Rather, Risk would have been limited to the difference between the promised rate and the actually achieved rate of 7.50; the benefit accruing to Risk from the hypothesised 1 March 2012 transaction would not have been discounted as a 'collateral benefit' (or *res inter alios acta*),[117] but would have been credited to the breach of duty so as to reduce Risk's damages. Risk should not be left in a better position, as a result of having behaved *unreasonably*, as compared with the position it would have been in if it had behaved reasonably by converting on 1 March 2012. That would be to permit a windfall to accrue to Risk as a result of its unreasonable behaviour (and to punish the Bank for that behaviour, over which it had no control).

94.2. Second, suppose that the rate had reached Risk's instructed target of 7.25 in March 2012 and the Bank had then converted on Risk's instruction. Risk would have received more USD than it would have obtained at 7.32 in September 2011, and would have suffered no loss. It could not sensibly have claimed USD 1,669,243.05 from the Bank. That gain would not have been the fruit of a speculative dealing with a third party (cf. **Jamal**). It would have been the Bank's own, late, performance of the very conversion it had failed to effect. Again, it would have been attributed to, and credited when assessing the loss caused by, the Bank's breach.

95. The intuitions prompted by those examples suggest that a mechanistic application of **Kaines** would fail accurately to reflect the overriding compensatory rule in this case, with the consequence that the 'available market' presumption should be displaced: **County**

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115 CCA judgment, [74]–[76]; Record, p 616.

116 The Golden Victory at [36] (Lord Scott).

117 **Swynson Ltd v Lowick Rose LLP** [2017] UKSC 32, [2018] AC 313 at [11] per Lord Sumption; and see **Globalia Business Travel SAU v Fulton Shipping Inc (The New Flamenco)** [2017] UKSC 43, [2017] 1 WLR 2581 at [16] (quoting Popplewell J at [64]). [HB/981-982] [HB/899-900]

Personnel at 926 (Bingham LJ); **The Golden Victory** at [33] (Lord Scott). That is in effect what the CCA did in its judgment, albeit applying Mauritian law (and not English law).

96. Finally, even if the Board were both to hold that the English 'available market rule' authorities govern the assessment of Risk's damages and to reject the Bank's case alternative English law case in paragraphs 90 to 95 above, the appropriate disposal of Ground 4 would be to restore the trial judge's award of USD 1,669,243.05. It would not assist Risk's primary case under Grounds 1 and 2. That case depends on the Board overturning the concurrent findings of the courts below that the rejection of the 31 January 2012 conversion was Mr Lutzkie's own decision.

F. CONCLUSION

97. It is clear from the record that the case was conducted carefully, and that the trial judge took the time to consider the evidence and reached her conclusions on the basis of her first-hand dealing with the witnesses of fact.

98. Her judgment went wrong in one respect, and one respect only, as identified by the CCA. [HB/728-729] There was a clear contradiction between her finding at page 21 of the Judgment[118] that Mr Lutzkie was not relying on Ms Kishto's advice by January 2012 because he had lost trust in her, and her finding at page 22[119] that his failure to convert Risk's ZAR into USD after 31 January 2012 was (at least in part) because he was receiving "*reassurance*" from Ms Kishto as to the rate he could achieve. Risk seeks to exploit that contradiction by contending that it must be resolved on the basis of "*unrebutted evidence*" that Ms Kishto advised Mr Lutzkie to reverse the conversion on 31 January 2012. That confuses two separate issues: (a) whether Ms Kishto *gave* such advice (which the Bank was not in a position to rebut, given Ms Kishto's departure from the Bank);[120] and (b) whether Mr Lutzkie in fact relied on that advice when taking the decision to reverse the transaction. On the second point, the trial judge clearly made a factual determination in favour of the Bank to the effect he did not. That conclusion was more than open to her on the evidence and was one with which the CCA agreed. There are no grounds for the Board now to revisit that factual issue.

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118 Trial judgment, p 21; Record, p 594.
119 Trial judgment, p 22; Record, p 595.
120 See Record, p 86, recording what Mr Lutzkie says Ms Kishto told him when leaving the Bank in 2015.

99. Stepping back from the detail of the case, the notion that an account holder can sit on his hands for three and a half years (as Risk did), watch the ZAR fall massively against the USD, take no steps whatsoever to stop his losses, and then claim against the Bank for all the consequences of the ZAR's depreciation on the basis of an uncompleted instruction given three and a half years earlier, is neither plausible nor attractive. Indeed, Mr Lutzkie himself appears to have realised the difficulties with that position, which he sought to meet by alleging in Risk's plaint that he had not become aware that Risk's money was being held in ZAR until 2015.[121] That was untrue, as he himself admitted in his oral evidence;[122] and as his counsel accepted, and sought to explain, in submissions before the trial judge.[123] [HB/140, 279-281, 477]

100. The Bank respectfully invites the Board to dismiss the appeal and award the Bank its costs.

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121 Second Amended Plaint, [19] (Record, p 6).
122 Record, pp 145–147.
123 Record, p 343.