[HALLINAN, C.J., AND ZEKIA, J.]
(April 9, 1954)

ANTONAKIS AGROTIS, *Appellant*,

v.

ATHANASSIS SALAHOURIS, *Respondent.*

(*Civil Appeal No.* 4061)

Damages for prospective loss—Change of circumstances between judgment and hearing of appeal—When minimizing of loss may mitigate damages.

The respondent claimed specific performance or damages for breach of an agreement whereby the appellant was to lease certain premises to the respondent as a cabaret. The trial Court allowed the claim and awarded £1,400 damages for the loss of prospective profits. After judgment the respondent by expending £2,500 had secured other accommodation for his cabaret business for the coming season. The appellant applied for leave to call fresh evidence concerning this new development and submitted that the damages should be reduced.

Upon appeal,

Held: (1) As a matter of principle it is competent for the Supreme Court upon the hearing of an appeal to take into account any events occurring between judgment and the date of the hearing of an appeal which might have an important influence on the assessment of damages where damages fall to be assessed not as on the date of the breach but during a period in which the plaintiff may suffer loss of prospective profits.

(2) The business arrangements of the respondent since judgment involved considerable risk; it would be unreasonable to increase damages if the new venture failed or mitigate damages if it succeeded.

(3) Pending the result of the season's business, it was uncertain whether or not the respondent had mitigated his loss.

Appeal dismissed.

Appeal by defendant from the judgment of the District Court of Nicosia (*Action No. 2015/53*) *in favour of plaintiffs.*

P. N. Paschalis with *E. Emilianides* for the appellant.

Chr. P. Mitsides with *G. Constantinides* for the respondent.

Judgment was delivered by :

HALLINAN, C.J.: In this case the respondent (who is the second plaintiff in the suit) had entered into an agreement with the defendant-appellant for the lease of the basement underneath the appellant's premises known as the Antonakis Bar for the winter season of 1953-1954. The respondent had carried on a cabaret in this basement during the preceding winter season and had made a substantial profit. The appellant later denied that there had been any such agreement between himself and respondent and as a

result the respondent commenced these proceedings on the 1st August, 1953, claiming specific performance or in the alternative damages. The trial Court found in favour of the agreement upon which the respondent relied and that the appellant had broken this agreement. The claim for specific performance was refused but damages were awarded. In assessing damages the Court stated:—

"We are fully convinced that there existed and that there exists no premises similar or resembling that of the winter cabaret 'Femina' in which the plaintiffs could successfully run a cabaret and in view of these facts it was not possible for the respondent to minimize his loss."

The loss of prospective profits was assessed at £1,400.

The ground for appeal against this decision is that the trial Court failed to take into account circumstances whereby the respondent might minimize his loss. Section 73 (3) of the Contract Law (Cap. 192) provides:

"In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."

This provision is the same as that contained in section 73 of the Indian Contract Act, and Pollock and Mulla, 7th Edition, page 424, in a note on section 73 state:

"The rule must of course be applied with discretion; a man who has already put himself in the wrong by breaking his contract has no right to impose new and extraordinary duties on the aggrieved party. That party can be expected only to use ordinary and reasonable diligence; much less can he be expected to warrant success where the result of diligent endeavour is in its nature doubtful."

The rule as to the plaintiff's duty to minimize his loss reproduces the common law rule.

Now it is contended first for the appellant that the respondents might have obtained a lease of the "Ambassadeurs" cabaret although the proprietor leased these premises to another person at the end of September. The trial Court found that the respondent could probably not have obtained a lease of the "Ambassadeurs" even had he tried; but in any event, since he was suing for specific performance, it is difficult to understand how he could be under any obligation to minimize damages before he knew whether the Court would decree specific performance or award damages. It might have seriously embarrassed the respondent were he to find himself lessee of both the "Ambassadeurs" and the "Femina" cabarets at the same time.

But the main contention of the appellant is that, contrary to the prognostication of the trial Court, the respondent has in fact found premises to carry on a cabaret during the winter of 1953-1954; and the appellant is applying for leave to have fresh evidence of this fact admitted on the hearing of this appeal.

The first point which falls to be decided on this application to admit fresh evidence is whether a Court of Appeal can re-open an assessment of damages based on a loss of prospective profits, where the respondent between judgment and date of the hearing of the appeal has succeeded in taking action which may minimize his loss. Upon this point the practice upon the hearing of appeals is the same in Cyprus as in England. In the Annual Practice, 1953, under the caption "Power to draw inferences of fact and to give any judgment", there is the following note to Order 58, rule 4:—

> "An appeal to the Court of Appeal is by way of re-hearing and the Court may therefore make such order as a Judge at first instance could have made if the case had been heard before him on the date on which the appeal was heard. The Court of Appeal has jurisdiction to discharge an injunction granted to restrain a breach of a statutory duty where the breach has ceased to exist before the hearing of the appeal ..... (*Attorney-General* v. *Birmigham, Tame and Rea Drainage Board*) (1913) (A.C. 788). Upon the same principle the Court of Appeal may apply a statute passed after the pronouncing of the judgment appealed against. (*Quilter* v. *Mapleson*) (1882) (9 Q.B.D. 672)."

As a matter of principle in our view it is competent for the Supreme Court upon the hearing of an appeal to take into account any events occurring between judgment and the date of the hearing of an appeal which might have an important influence on the assessment of damages where damages fall to be assessed not as on the date of the breach but during a period in which the plaintiff may suffer loss of prospective profits. But we consider that this Court should be slow to admit fresh evidence as to an event which has happened after judgment; more especially where the events are alleged to affect an estimate of loss arising from prospective profit. In the case of *Brown* v. *Dean* (1910) (Appeal Cases 373) which concerned this question of admitting fresh evidence, Lord Loreburn, L.C., spoke of—

> "the extreme value of the old doctrine *interest republicae ut sit finis litium* remembering as we should that people who have means at their command are easily able to exhaust the resources of a poor litigant ..... when a litigant has obtained judgment in a Court of Justice .....

he is by law entitled not to be deprived of that judgment without very solid grounds."

This matter was again considered in the case of *R.* v. *Copestake* (1927) (1 K.B. 468) where Scrutton, L.J., said that "fresh evidence must be of such weight as if believed would probably have an important influence on the result."

The appellant has put in affidavits to show that the respondent has been, from the 23rd December, 1953, running a winter cabaret in premises where the Femina cabaret had been carried on during the summer. The respondent in a counter affidavit states that in order to convert the summer Femina cabaret into a winter cabaret he has expended the sum of £2,500 and has in addition taken the risk of failing to obtain a permit for this building from the municipality. He also states that up to the date of the affidavit (9th March, 1954) he has lost £1,000, on his cabaret business. This affidavit is supported by the affidavit of his architect. The appellant has not put in any affidavit to deny the expenditure alleged by the respondent but has merely filed an affidavit by another proprietor of a cabaret stating that in fact cabaret business in Nicosia this year is bad.

In our view had the respondent not attempted to convert the summer cabaret into a winter cabaret it could not be said that there was any duty upon him to minimize his loss by doing so. However, he has in fact done so and we must now decide whether this is a circumstance which should be taken into account in assessing his loss of prospective profit. In a leading case on this subject of mitigating damages Lord Haldane, L.C., at page 690 of his speech in *British Westinghouse Electric and Manufacturing Co. Ltd.* v. *Underground Electric Railways Co. of London Ltd.* (1912) (A.C. 693), after considering the decision in *Staniforth* v. *Lyall* (9, Chancery Div. 20) said:—

> "I think that this decision illustrates the principle which has been recognised in other cases, that, provided the course taken to protect himself by the plaintiff in such an action was one which a reasonable and prudent person might in the ordinary course of business properly have taken, and in fact did take whether bound to or not, a jury or an arbitrator may properly look at the whole facts and ascertain the result in estimating quantum of damage."

This passage from Lord Haldane's speech is authority for the proposition that under certain circumstances where a plaintiff has in fact mitigated his damages by taking steps which he was not bound to take, his action must be taken into account when estimating damag~s. But the transaction (in the words of Lord Haldane)—

"must not be *res inter alias acta*, but one in which the person whose contract was broken took a reasonable and prudent course quite naturally arising out of the circumstances in which he was placed by the breach."

The stipulation that the course taken must be "reasonable and prudent" is particularly important in the present case. The efforts of a plaintiff to minimize loss may not always operate in favour of a defendant: provided the plaintiff's action is reasonable and prudent and is taken in consequence of the breach of contract, the defendant may be liable for loss incurred by the plaintiff in trying to minimize loss. It would be unjust for the Courts to say to a plaintiff in such circumstances: "if you succeed in minimizing your loss we shall reduce the damages, and if your efforts result in further loss you must bear additional loss." In deciding whether a transaction was reasonable and prudent it is therefore very relevant to inquire whether the defendant should bear the additional loss if the transaction proves a failure.

Now, in the present case the transaction involves a big element of risk. A large sum (£2,500) has been expended in converting a summer into a winter cabaret; apart from the risky nature of the cabaret business, there is the risk that the municipality may not approve of the building as converted. In these circumstances if the plaintiff should lose money in this venture because of his capital expenditure or because of a failure to obtain a permit, would the Court order the defendant to pay the loss? Surely not. It follows, conversely, if the plaintiff is lucky enough to make a profit, the defendant cannot avail himself of this in mitigation of damages.

But even if it is assumed that the fact of the plaintiff having set up a winter cabaret is an event to be taken into consideration in estimating loss of prospective profits, can it be said that this fact would probably have an important influence on the result? Again the Court would have to consider the risky nature of the plaintiff's venture. It is difficult to see how any Court find it more probable that the plaintiff as a result of this venture will make a profit this season, or if he did, what such profit is likely to be.

We conclude therefore that the application to admit fresh evidence must be refused. In the absence of fresh evidence no valid ground has been adduced by the appellant for distributing the estimate of damage made by the trial Court; nor has the respondent on the cross-appeal done so either.

Both appeal and cross-appeal are therefore dismissed. Respondent is entitled to his costs on the appeal. Since the appellant has not been put to extra expense by reason of the cross-appeal, we make no order for costs against the respondent.