

**IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. ANUHCV 2012/0144

BETWEEN:

SAMUEL WINSTON JAMES

Claimant

and

**[1] JUST CATERING INCORPORATED
[2] WAYNE GRUDEN**

Defendants

Appearances:

Mr. Hugh Marshall Jr. and with him Mrs. Chantal Thomas-Marshall, Counsel for the Claimant
Mrs. Lisa John-Weste and with her Mr. John Weste, Counsel for the Second Defendant

2021: Oct 26th
2022: Dec 22nd

JUDGMENT

Introduction

[1] Robertson, J.: The claimant (Lessee) entered into an agreement with Just Catering Incorporated (Lessor) for the business and the premise known as Castaways Beach Bar & Restaurant situated at Jolly Harbour. The contracted period was for one year from 15th day July 2007 to the 13th day of July 2008. The Lease was executed by "JUST CATERING INCORPORATED President WAYNE GRUDEN" on 25th November 2007. Wayne Gruden is the second named defendant in these proceedings. The agreement regarding the payment of rent and other charges are detailed in the fourth and fifth schedules of the Lease.

[2] The claimant contended that on 29th May 2008 the defendants dispossessed the claimant and assumed control of the claimant's equipment and goods which were used in the restaurant. The claimant also contended that at the relevant time the claimant was in lawful possession of the equipment and goods used in the restaurant. The claimant also indicated that after the defendants dispossessed the claimant, the defendants used the claimant's equipment and goods on the

premises. As a consequence of the foregoing the claimant sought delivery of equipment and goods. Alternatively, the claimant sought that the defendants pay damages for the value of the goods and equipment or pay damages for conversion of the claimant's goods and equipment. The claimant estimated the value of the goods and equipment to be EC\$189,975.00. The claimant also claimed consequential loss for loss of profit on the remainder of the leased period.

[3] The trial before this court is specifically related to the claimant and the second defendant. The action against the first defendant was stayed by an order of the court dated 5th June 2012.

[4] For the reasons indicated hereunder this court has determined that the claimant's claim ought to be dismissed against the second defendant and that costs be payable by the claimant to the second defendant.

The Relevant Facts

[5] The claimant leased the restaurant from Just Catering Incorporated for a period of one year from 15th July 2007 to 13th July 2008. The terms of the lease were captured in the Lease agreement dated 25th November 2007. The relevant terms of the Lease for the purposes of these proceedings are indicated hereunder:

- a. All rents and monies due under this Lease Agreement shall be payable monthly and be clear of all deductions as per Schedules IV and V. (See: Clause 1).
- b. The Lessee hereby covenanted with the Lessor:
 - i. To pay the rent and monies due as reserved in the agreement on the days and in manner indicated without any deduction. (See: Clause 2(a)).
 - ii. The premises are to be used and occupied only and for no other purpose than the operation of a bar and restaurant. The Lessee shall not occupy or use the leased premises or any part thereof, nor permit or suffer the same to be occupied or used for any purposes other than as herein limited, nor for any purpose deemed unlawful, or extra hazardous, on account of fire or other casualty. The Lessor agrees to permit the Lessee to operate with the existing Castaways Liquor License and ABST registration for a period of thirty (30) days from 16th day July until 15th day of August 2007 and if still required to extend that permission period subject to the Lessor's satisfaction that the relevant applications have since been submitted by the Lessee to the proper authorities. (See: Clause 2 (e)).
 - iii. To permit the Lessor and its agents, employees and servants with or without workmen and others and with all necessary appliances at all times with reasonable prior notice which shall (except in emergency) be not less than forty-eight (48) hours to enter into and upon the premises to examine the state and condition thereof and carry out and execute all such repairs as may be necessary in pursuance of the Lessor's obligations under this Agreement. This clause shall not be deemed to be

a covenant by the Lessor nor to be construed to create an obligation on the part of the Lessor to make such inspection or repairs. (See Clause 2 (m)).

- iv. To comply with all reasonable regulations made by the Lessor from time to time for the management of the premises or of the Lessor's adjoining or neighboring property or any land or premises used or to be used in common or jointly with any other person. (See Clause 2(p)).
- v. To pay to CDAL (Caribbean Development (Antigua) Ltd) Community Fees for sewage and refuse disposal, costs and maintenance of common areas of Jolly Harbour as assessed to the Premises and to pay all additional utility charges billed to the Premises with regard to sewer, electricity, gas, water, telephone and internet services used therein. In addition, Lessee shall pay the costs of the following exterior services: walkways; landscaping including grass cutting, weeding, mulching, watering and trimming of palms; maintenance of parking area; planting of flowers upon permission granted by the Lessor; and other outside maintenance and cleaning such as cleaning of roof ducts. (See: clause 2(t)).
- vi. The Lessee shall pay the costs of electricity to electrify the exterior lights illuminating and servicing the parking area, and other exterior common areas. If and when the Lessor wishes to occupy a portion of the land for various uses upon discussion with Lessee, the Lessor shall pay his appropriate percentage of cost with regard to water, electricity and other utilities consumed in this common area based upon the square footage of the usage by the Lessor. The Lessee shall be responsible for payment of the aforesaid common area maintenance charges and the Lessor shall be responsible for paying to Lessee its share of such charges as defined above, if applicable. (See Clause 2 (u)).
- vii. The Lessee shall pay the discounted costs of dry goods, food, beverages and supplies as itemized and provided for as per Schedule V. (See Clause 2 (v)).

c. The Lessor covenanted with the Lessee that:

- i. The Lessee, the claimant, paying rent and performing and observing the covenants and stipulations shall peaceably hold, possess, and enjoy the Premises during the term of the lease without disturbance or interruption by Just Catering Incorporated or any person rightfully claiming through under or in trust for Just Catering Incorporated. (See: Clause 3 (a)).
- ii. " If the rent hereby reserved as per Schedule IV or any part thereof or any part of the payment for supplies provided in advance by the Lessor shall at any time be unpaid for twenty eight (28) days after becoming payable (whether formally or legally demanded or not) and same is not remedied after fourteen (14) days' notice to do so from Lessor or if any of the covenants on the part of the Lessee herein contained shall not be performed or observed by the Lessee or if the Lessee shall become bankrupt or have a receivership of liquidation or any arrangement or composition for the benefit of its creditors or if any distress or process of execution shall be levied

upon the Lessee's goods on the premises or if he Lessee or any Director or Officer of the Lessee shall be convicted in a Court of Law in Antigua or elsewhere of any felony then in any of the said cases, it shall be lawful for the Lessor at any time thereafter to re-enter upon the premises or any part thereof in the name of the whole and seal and lock same and exclude the Lessee therefrom and thereupon this circumstance the Lease shall absolutely terminate but without prejudice to any right of action of the Lessor in respect of any antecedent breach of the covenants on the part of the Lessee herein contained". (See: Clause 4 (a)).

- d. Any notices under this Agreement shall be in writing. Any notice to the Lessor shall be sufficiently served if served by hand -to-hand delivery at 216 Marinavista Way, Jolly Harbour in the Parish of St. Mary's Antigua. Any notice to the Lessee shall be sufficiently served if sent to the Lessee to (his home address? (*sic.*)) or in the case of a Limited Company to the Premises hereby leased or its Registered Office or to its Solicitors." (See: Clause 4.b).
- e. If there should occur any default on the part of the Lessee in the performance of any conditions and covenants herein contained, or if during the term hereof the Premises or any part thereof shall be or become abandoned or deserted, vacated or vacant, or should the Lessee be evicted by summary proceedings or otherwise, the Lessor, in addition to any prosecution therefore for damages, may re-enter the said premises and the same have and again possess and enjoy; and as agent for the Lessee or otherwise, relet the premise and receive the rents therefore and apply the same, first to the payment of such expenses, reasonably attorney fees and costs, as the Lessor may have been put to in reentering and repossessing the same and in making such repairs and alterations as may be necessary; and second to the payment of the rents due hereunder. The Lessee shall remain liable for rents as may be in arrears and also the rents as may accrue subsequent to the re-entry by the Lessor to the extent of the difference between the rents reserved hereunder and the rents, if any received by the Lessor during the remainder of the unexpired term hereof, after deducting the aforementioned expenses, fees and costs; the same to be paid as such deficiencies arise and are ascertained each month. (See: Clause 9).
- f. The various rights, remedies, options and elections of the Lessor expressed herein are cumulative, and the failure of the Lessor to enforce strict performance by the Lessee of the conditions and covenants of this Lease or to exercise any election or option or to resort or have recourse to any remedy herein conferred or the acceptance by the Lessor or any installment of rent after any breach by the Lessee in any one or more instances, shall not be construed or deemed to be a waiver or relinquishment for the future by the Lessor of any such conditions and covenants, options, elections or remedies, but the same continue in full force and effect. (See Clause 11).
- g. The Lessor shall have the right to terminate this Lease Agreement upon fourteen (14) days written notice to the Lessee. The Lessee shall have the right to terminate this Lease Agreement upon fourteen (14) days written notice to the Lessor however, such notice shall not be given until eight (8) weeks from the commencement of the initial term of the Lease

Agreement and in all circumstances will incur a penalty of four (4) weeks Base Rent. (See: Clause 14).

- h. The Lease and the obligation of the Lessee to pay rents and monies hereunder and to comply with the covenants and conditions hereof, shall not be affected, curtailed, impaired or excused because of the Lessor's inability to supply any service or material called for herein, by reason of any rule, order, regulation or preemption by any government entity, authority, department, agency or subdivision or for any delay which may arise by reason of negotiations for the adjustment of any fire or other casualty loss or because of strikes or other labour trouble or for any cause beyond the control of the Lessor. (See: Clause 17).

[6] Thus, in accordance with the terms of the Lease the claimant was permitted to operate on the premises a restaurant and bar for the duration of the term of the Lease and the claimant was obligated to pay to the lessor, rent and to pay other charges which covered, among other things, sewage and refuse disposal, electricity, gas, water, telephone and internet services charged by Caribbean Development (Antigua) Ltd, (CDAL) arising from operating on the premises.

[7] **The evidence.** The claimant gave evidence, and the claimant's evidence was supported by Glenworth Prince, the executive chef of the claimant. Mr. Prince, transitioned from the employ of the claimant to the employ of the first defendant. He was an employee of the first defendant for approximately one month after the lease was terminated.

[8] The second defendant gave evidence on his behalf and his evidence was supported by Raymond Wayne Emard. Mr. Emard was employed to do maintenance work for the second defendant. The evidence of this witness, Raymond Wayne Emard, was not challenged by the counsel for the claimant.

[9] **Issues.** The issues before the court for determination are:

- a. Whether the second defendant, a director of the first defendant company, is personally liable in these proceedings.
- b. If the second defendant is liable, whether the second defendant is liable in conversion with respect to the claimant's goods and equipment.
- c. The quantification of any damages which are payable.

The Law, Analysis and Determination

The Law.

[10] Agreements are to be construed as a reasonable person with knowledge of the background context would construe the agreement. In *Investors Compensation Scheme Ltd v West Bromwich Building Society*¹, Lord Hoffmann noted that² :

“(1) Interpretation is the ascertainment of the meaning, which the document would convey to a reasonable person having all the background knowledge, which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything, which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent...

(4) The meaning, which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of the words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention, which they plainly could not have had...”

[11] In this case the words in the lease are given their natural and ordinary meaning.

Re-Entry onto the Demised Premises

[12] On the matter of re-entry, the second defendant indicated that by virtue of Clause 2(t) and Clause 4(a) of the Lease, the Lessor (the first defendant) was entitled to immediately terminate the Lease due to the claimant's non-payment of fees and charges to CDAL. Accordingly, the Lease was terminated as a consequence of the claimant not having paid the CDAL fees and charges.

¹ [1998] 1 All ER 98.

² [1998] 1 All ER 98, pp 114-115.

[13] On the matter of the non-payment of fees it is noted that in accordance with Clauses 2(t) and 4(a) of the Lease the claimant was obligated to pay rent and to pay CDAL community fees and charges. The claimant operated Castaway Restaurant and Bar from 15th July 2007 to on or about 29th May 2008, and would have been expected to make payments during this period. Several statements presented in evidence showed that the claimant owed sums to CDAL.

[14] By correspondence dated 30th January 2008 the Lessor indicated to the claimant that the Lessor was of the view that the claimant was in arrears of base rent, percentage rent and inventory as well as the unpaid water and utility obligations. Through that correspondence the claimant was informed of certain payments required and the requirement to make full payment within 14 days of 30th January 2008. Specifically, the correspondence indicated that:

“Re:

Just Catering Inc & Winston James (Mircle Catering Services) Lease signed and dated 25th November 2007.

Though we have met on an ongoing basis with regard to your non-payment of base rent, percentage rent and inventory as well as our concerns with regard to your unpaid water and utility obligations, you have still not fulfilled any of these under our lease.

The following constitutes our lease obligation under paragraph 4a) to provide you written notice of the following amounts past due and to demand full payment of same by cash and/or certified cheque within fourteen (14) days of the above date. This payment must indicate the payment of Percentage Rental and your gross sales records for the entire period from which to calculate the amounts owing.

As per **Schedule IV:**

Base Rent due on the first day of the four week period each month from 16th July 2007 to 28th January 2008

Total Incurred Debt by You:	US\$16,100.
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Less Total Paid:	(9,000.)
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Balance Base Rent Past Due:	US\$7,100.
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Percentage Rental:

10% of the Excess of EC\$150,000 for every EC\$150,000 for every Four (4) Weekly Period Gross Sales from 16th July 2007 to 30 December 2007, each Percentage Rental of the Four (4) Weekly Period due by the third last Monday of the following month. You have neglected to furnish us with any figures in this regard and as well have made no effort to pay the existing arrears and are therefore **100% in default of your legal obligation**. The Percentage Rental for the four week period ended the 30th of December 2007 was due on **14th January 2008**.

As per our conversation on 01 January, 2008, you told me that you did \$30,000 in sales for the one day alone- New Year's Eve. The Percentage Rental for the four week period 31 December to 27th January 2008 will be due on 11th of February 2008.

Schedule V

Payment of Existing Inventory Total Amount:	EC\$11,948.65
Paid to date:	(5,000.00)
Balance of Inventory Past Due:	EC\$6,948.65

You indicated that you would pay all arrears once your business was underway. We have shown extreme patience in regard to your promise to pay, however have been placed in an untenable position with regard to your non performance of your lease obligations. We look forward to your full payment of the amounts in arrears by the 13th day of February, 2008."

[15] The correspondence does note that the Lessor was acting under the obligations of Clause 4 (a) of the Lease. Clause 4 of the lease makes provisions for re-entry in circumstance where there is a breach.

[16] The claimant disputes receipt of the correspondence dated 31st January 2008. The defendant has produced no evidence of the correspondence having been delivered to the claimant.

[17] By correspondence dated 23rd April 2008 CDAL acknowledged receipt of a payment of sums by the claimant to partially liquidate sums due to CDAL for fees and charges. In that correspondence CDAL also noted the existence of an outstanding balance and threatened the disconnection of the utilities if payments were not made by the claimant.

[18] The claimant acknowledged that he was informed that sums were due but disputed the sums as stated to have been owed by the claimant to CDAL. This court accepts the evidence that the claimant was aware that sums were due to be paid to CDAL under the terms of the Lease and the court has determined that, that sum was approximately EC\$188,425.26.

[19] Correspondence dated 23rd April 2008 from Customer Service Supervisor, CDAL, indicated that:
"Re: Terms and Conditions of Payment on Account- #JB006- Just Catering Inc.

Dear Mr. James

Please be reminded that as stated in your lease both rent and service charges are due in advance. All invoice amounts are due in full on or before 10th day of each month. Tenants are required to pay within the terms of their agreement at all times.

We thank you for your recent payment however this leaves a large outstanding account balance of EC\$158,848.77. Payment is required on or before, noon, on Wednesday 30th April 2008 to bring your account up to date. Failure to make payment will result in finance charges and the possibility of disconnection of utilities, without further notice.

If reaching the Administration Building is difficult and you require payment to be collected from the Commercial Center, we can certainly make arrangements for that service. Should you have any questions regarding this matter please do not hesitate to contact me directly. Thank you for your attention to this matter.
Yours sincerely,”

[20] The second defendant pleaded that the re-entry onto the premises by the Lessor was as a result of there being a breach in Clauses 2 (t) and 4 (a) of the Lease Agreement to pay CDAL fees. In this court's view the correspondence of 30th January 2008 notified the claimant of the default in the payment of the base rent, percentage rent, the default in the payment on the inventory and unpaid water and utility obligations. That correspondence notified the claimant of the specific action which was required to avoid re-entry by the Lessor. A similar correspondence was not sent from the Lessor with respect to the CDAL fees. It is noted that the correspondence dated 23rd April 2008 was from CDAL advising that fees/sums payable were outstanding to CDAL and indicating that the utility supply may be disconnection if the claimant did not liquidate the outstanding sums.

[21] In this court's view the claimant would not have been given the requisite notice prior to re-entry as contemplated by Clause 2 (t) of the Lease. An entry without the requisite notice would have been unlawful.

The Liability of the Second Defendant.

[22] The Lease specifically indicates that it is an agreement between the claimant and Just Catering Incorporated. The second defendant was, at the material time, the General Manager and the Managing Director of the Just Catering Incorporated. It is a well-established and foundational principle of company law that a company possesses a separate legal personality³. The applicability of the principle of law can again be seen in the case of ***W.T. Western Limited, Ian Simpson & Ann Simpson v Jeffrey Colen (lawful Attorney of Joan E. Kroehling)***⁴. In that case His Lordship, Byron CJ, as he then was, noted that, “persons *who sign as officers of a company are not liable for the obligations of the company for that reason only. The law is that a company is a separate and distinct legal person from its members and its officers*”⁵. This principle equally applies to liabilities as it does to obligations.

³ Salmon v Salmon & Co. (1895-9) All E. R Rep 33.

⁴ Civ App No. 9 of 2021, St. Christopher & Nevis.

⁵ Civ App. No. 9 of 2021, St. Christopher & Nevis, [9].

[23] It is clear that the second defendant, was an officer of the company and operated as the controlling mind of the company in the execution of the contract and the action taken was taken on behalf of the company. The claimant in his pleadings recognized this when the claimant stated that on “29th May 2008 the 1st Defendant by and through the 2nd Defendant dispossessed the Claimant of the premises”⁶.

[24] There is no basis to depart from the principle which recognizes the personality of the company and the obligations and liabilities which fall to the company. Consequently, when the second defendant entered on the premises he did so, not in his personal capacity, but as an officer of the first defendant company and acted for and on behalf of that company.

Whether the Second Named Defendant is Guilty of Conversion.

[25] **Items on Premises.** The evidence of the claimant is that he operated the restaurant until entry by the defendants. The claimant also indicated that prior to setting up the restaurant he paid the defendant for the stock items which were in the restaurant and then expended “*thousands of dollars to bring the restaurant and the surrounding property up to an operational and esthetically pleasing standard*”. The claimant indicated that in order to do this the claimant, among other things, purchased “large amounts of industrial scale food services equipment, kitchen utensils, and decorative items, which were necessary to ensure the efficient and effective management of the restaurant”. The further evidence of the claimant is that he travelled to St. Maarten and Miami, Florida and he purchased large quantities of equipment including large deep freezers, blenders, deep fryers, food processors, a five-burner stove and many other industrial kitchen items which were required to operate the restaurant. He also purchased decorative items which were needed to enhance the appearance of the restaurant such as lighting, large umbrellas and fishing nets, plants, two large concrete mirrored water fountains and turbo air refrigerators. The claimant also gives evidence that extra storage space was constructed for the installation of freezers which were purchased.

[26] The evidence that items were purchased for the restaurant was supported by the evidence of the claimant’s witness who was the executive chef of the restaurant. The evidence of the executive chef was that prior to the claimant opening the restaurant the claimant had several discussions with the chef about the items required for the restaurant and that the claimant travelled to the island of St Maarten to purchase materials, stock, and equipment for the restaurant.

[27] The evidence of the second defendant is that the restaurant was operational since 2002 and prior to the claimant entering into the Lease a fully equipped restaurant was being operated by the first defendant on the premises. The second defendant also indicated that the claimant operated the restaurant and utilized the equipment and goods which were already on the premises. The claimant

⁶ See [6] of Statement of Claim.

was also supplied with foods and dry goods supplies along with bar and beverage supplements at the commencement of the lease agreement and through the duration of the lease.

[28] This court accepts on a balance of probabilities that the claimant did acquire certain items and supplies including equipment for the restaurant which was used to operate the restaurant and bar. The court has formed this view after noting that the agreed document entered into evidence indicated items which the parties agreed belonged to the claimant. This court also notes some of the invoices submitted into evidence by the claimant. Further, there is evidence from the second defendant that a list of items which belonged to the claimant was compiled a few days after the re-entry.

[29] **Conversion.** The Halsbury's Laws of England describes the tort of conversion as being "concerned with cases where one person has misappropriated goods belonging to another". The basic features of the tort of conversion are:

- (1) The defendant's conduct was inconsistent with the rights of the owner (or other person entitled to possession),
- (2) The conduct was deliberate, not accidental, and
- (3) The conduct was so extensive an encroachment on the rights of the owner as to exclude him from use and possession of the goods."

[30] The Court of Appeal in **Chiverton construction Limited et al v Scrub Island Development Group Limited**⁷ ... referring to Clerk & Lindsell on Torts 19th Edition noted that this form of conversion is explained thus: 'The ordinary way of showing a conversion by unlawful retention of property is to prove that the defendant having it in his possession refused to surrender it on demand. Indeed, such a demand is generally a precondition of the right of action for detention: the mere unpermitted possession of another's chattel is not as such a conversion of it. Normally, though not exclusively, this form of conversion is used where an owner seeks to recover his goods or their value from a wrongful possessor, there being no proprietary action equivalent to that existing in other systems of law for this purpose. For this reason, this head of liability is wide: on principle, any detention clearly adverse to the rights of the owner, such as an assertion of a lien that does not exist will suffice to establish it'⁸.

[31] In the circumstances of this case the claimant claims damages for conversion. The claimant contends that the goods and equipment were, after re-entry, taken and used by the defendants. The evidence of the second defendant is that the items which belonged to the claimant were set aside or were placed into storage and that attempts were made, without success, to contact the claimant to settle sums owed to the CDAL and to the Lessor and to discuss the return of the items. The further

⁷ BVIHC2007/0157

⁸ See Paragraph 17-22.

evidence of the second defendant is that despite his efforts there was no contact between the claimant and the second defendant for more than 2 years after re-entry.

[32] This court is of the view that there was no attempt by the claimant to retrieve his property after re-entry. This is supported by the evidence of the claimant during cross-examination when he indicated that he decided to treat retrieval of the property as a legal matter. Additionally, it is noted that the claimant has offered no evidence of efforts made by him or made on his behalf to retrieve the property prior to the time indicated by the second defendant and/or prior to initiation of these proceedings. In this court's view the claimant has not demonstrated that the items were held to his exclusion. Additionally, given the period which elapsed after re-entry without there being an effort by the claimant to retrieve the items it was open to a person to adopt the position that the claimant abandoned the items.

Consequential Damages.

[33] The claimant claims damages for loss of profit from the period 28th May 2008 to 13th July 2008. In support of this the claimant indicated that on average the restaurant produced daily cash register generated sales revenue ranging from EC\$10,000.00 to EC\$15,000.00. The claimant also contends that additional revenue was also generated through the claimant's company, Mircles Catering Services, which catered to many offsite events for local businesses, boat charters and private individuals. The claimant further indicated that the catering events along with cash register sales from the restaurant produced an average monthly revenue of approximately EC\$290,000.00.

[34] It is noted that the only loss under the Lease which the claimant is entitled is the consequential loss in the form of loss of profit suffered through the operation of Castaways Restaurant and Bar. The Lease specifically restricts operations apart from the Castaways Restaurant and Bar. This was, during cross-examination conceded by the claimant. Accordingly, off-site catering services of Miracles Catering to third parties which is claimed by the claimant would not be included under the head of consequential damages. However, for the reasons indicated herein this liability does not fall to the second defendant personally.

Trespass of the Second Defendant and Right of Re-Entry due to Abandonment.

[35] Counsel for the claimant indicted in their submissions that the second defendant trespassed upon the demised premises, changed the locks to the building and committed the tort of conversion. It is however noted that the claimant has not specifically pleaded trespass against the second defendant and therefore the matter of trespass by the second defendant was not open for further consideration by the court.

[36] The second defendant in his evidence appears to raise the matter of the claimant having abandoned the premises thereby permitting re-entry under Clause 9 of the Lease. It is also noted that the matter

of abandonment was not pleaded by the second defendant and therefore it is not a matter which would be considered by this court.

[37] As a consequence of the forgoing this court has determined that this claim is to be dismissed against the second defendant, the second defendant not being liable in his personal capacity. It is also ordered that prescribed costs are payable by the claimant to the second defendant.

Justice Marissa Robertson
High Court Judge

By the Court

Registrar