

EASTERN CARIBBEAN SUPREME COURT  
TERRITORY OF THE VIRGIN ISLANDS  
IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV2015/023

BETWEEN:

EMPEROR INTERNATIONAL HOLDINGS LIMITED

Claimant

AND

JAMES YOUNG HARBOUR VIEW MARINE CENTRE LIMITED

Defendant

**Appearances:** Mr. Robert Nader, Counsel for the Claimant  
Ms. Hazel Hannaway-Boreland, Counsel for the Defendant

-----  
2021: January 19<sup>th</sup> – 21<sup>st</sup>  
March 15<sup>th</sup> – 16<sup>th</sup>  
2022: September 29<sup>th</sup>  
-----

JUDGMENT

[1] **ELLIS J:** At the heart of this claim and counterclaim is a lease agreement entered into by the Parties on the 8 October 2013 (“**the Lease**”). The Claimant’s case is grounded on alleged breaches of the Lease, resulting in loss and damage to the Claimant arising from the alleged interference with the Claimant’s right to quiet enjoyment of the demised premises, wrongful termination of the Lease without sufficient notice and within 3 years of the commencement of the term of the Lease in breach of the Lease, and for allegedly arranging to assign the Lease without notifying the Claimant. On the basis of these contentions the Claimant claims damages for loss of income and damage to items belonging to the Claimant, wasted expenditure, further or other relief as might be appropriate and costs.

- [2] The Defendant opposes the claim and maintains that it lawfully re-entered the demised premises pursuant to the provisions of the Lease due to the Claimant's repeated breaches and repudiation of the terms of the Lease and counterclaims against the Claimant for substantial damages.
- [3] The factual background in this action is protracted but it is critical to the determination of both the claim and counterclaim. The Court has therefore summarised it below:
- i. The Claimant is a Virgin Islands company the principal and sole director of which is Mr. Shawn Eddy. The Defendant is also a BVI company that is the registered owner of a Marina and associated buildings known as East End Registration Section, Block 3439B, Parcel 333/2 (the "Marina"). The Defendant's managing director is Mr. Dion Crabbe.
  - ii. Following lengthy negotiations which began in March 2013, the Claimant entered into a written lease agreement with the Defendant on 8 October 2013. Pursuant to the terms of the Lease the Claimant leased property at the Marina including the restaurant, pool deck, bar, lounge and "side room" ("the Premises"). The tenancy was to commence on 15 November 2013 and persist for a term of 5 years. Under clause 6 (6) of the Lease, the Parties agreed that the Premises would be used "as a Pool Bar, Lounge, Restaurant and Club."
  - iii. Prior to 15 November 2013, Mr. Eddy sought permission to store certain belongings at the Premises. Mr. Eddy was granted permission by Mr. Crabbe to bring these items from Fat Hog's Bay to the Premises.
  - iv. As agreed, in November 2013 the Claimant took possession of the Premises.
  - v. On 6 June 2014, the Defendant issued a written request for the Claimant to open the downstairs pool bar within one month of the date of that letter and asked the Claimant to clear the upper floor space of the storage within 14 days to permit the Defendant access for repairs.
  - vi. Over the course of the ensuing six weeks there was no response or compliance by the Claimant on either request. On 21 July 2014 (6 weeks later), the Claimant responded expressing a willingness to move on with works and an intention to open by October 2014.
  - vii. On 26 August 2014 (roughly 4 weeks 5 days later) the Defendant sought permission to enter the Premises in order to effect repairs. It was denied access. On 27 August 2014 the Defendant documented the exchange, asked to meet on 3 September 2014 and requested that the upper floor be cleared for works to commence.
  - viii. However, on 2 September 2014, the Claimant wrote to the Defendant stating *inter alia* - 'removing all of the contents is not an option for me as it took a lot of man power expense and machinery to get everything up there... As furniture and Equipment are

*here now I ask that we come to a mutual agreement to get the said work done. I am willing to clear half of the room while the other half is being tiled. Once one side is tiled shift everything to the other side and finish tiling.*' The letter continued with a list of work items that were requested and complained about the lack of communication about the tiles, bar design and about the Defendant allegedly entering and leaving lights on without notice and leaving doors unlocked.

- ix. On 3 September 2014, the Defendant went to the upstairs of the Demised Premises to conduct works at 8:45 am, but there was no evidence that the Claimant had cleared off even half of the upstairs space as promised in his letter. By letter dated 3 September 2014 the Defendant recorded incident and stated *inter alia* – '*Your letter on 2 September 2014 suggested how you propose our contractor should perform their task of conducting their work. Our contractor does not wish to compromise the integrity of the finished product by completing the works in the manner in which you have outlined.*' The letter pointed out that the Claimant was not in compliance with clauses 5 and 8 of the Lease and that the Defendant would now refer the matter to its lawyers.
- x. On 3 September 2014, the Claimant responded by letter indicating that he was willing to come to '*a reasonable resolution*' and set out a list of questions and demanded a detailed action plan on how the Defendant would be moving his goods.
- xi. On 12 September 2014, the Claimant was served with a letter of termination of the Lease and giving Notice to Quit the Premises within 30 days of receiving the letter and in any event no later than 30 October 2014.
- xii. On 8 October 2014 the Claimant was served with an Application for an injunction for the purpose of stopping the Claimant from continuation of further works, which the Defendant contended as being unauthorized and to prevent the Claimant from bringing further goods for storage on to the Demised Premises without the Defendant's permission. Following several communications and meetings to achieve an out of court resolution to their dispute, on 24 November 2014 the injunction application was eventually withdrawn with costs payable to the Claimant.
- xiii. The Claimant contended that on November 2014, the Defendant disconnected the Claimant's electricity supply. The Defendant denied disconnecting the Claimant's electricity or that it even had the power to do so. The Claimant in its Amended Reply admitted that the electricity was disconnected by the BVI Electricity Corporation for non-payment of an electricity bill but the Claimant maintains that the Defendant had re-wired the marina so that bills for areas not within the Premises were being charged to the Claimant resulting in substantial bills for which the Claimant was not responsible.
- xiv. On 2 December 2014, the Defendant by letter retracted the September 2014 Notice to Quit and proposed two options to the Claimant: [1] an option to expedite the opening and operation of the Premises and; [2] an alternative buy-out option. The letter maintained that the Defendant was treating the Claimant as still being in breach

of contract and relied on the matters enunciated in the September 2014 Notice to Quit and on additional matters irrespective of whether the Claimant opted for a buy-out or opted to remain and work towards opening of operations. Following this letter, the Parties via their respective counsel agreed to resolve their issues via a mediation meeting by 23 December 2014. However, that mediation never took place as it pointed out that the agreed mediator was conflicted.

- xv. By letter 5 December 2014, the Claimant rejected option [1] for opening as unrealistic and agreed in principle to option [2] for a buy-out. However, it indicated that it was seeking a much larger sum than proposed. On 8 December 2014 Mr. Eddy paid \$1750 for December 2014 rent for the downstairs of the Demised Premises.
- xvi. By email of 16 December 2014, the Defendant through counsel accepted the Defendant's election for a buy-out in principle and sought to flesh out the details of such terms to be agreed. The Defendant also sought the Claimant's agreement to items 2 (a) through (c) of the 2 December 2014 letter by vacating the premises by 20 December 2014 or alternatively that the Defendant be permitted to put the Claimant's good in storage.
- xvii. By email of 19 December 2014, the Claimant through counsel proposed a meeting of the parties and rejected the request to vacate stating inter alia *'our client stands by his and its terms and is and properly and remains in possession of the Demised Premises. He will not leave the Demised Premises on 20 December as requested by your client.'* The email of Claimant's counsel went on to recognise that, *'implicit in the arrangement, would be the premature termination of his commercial lease of the Demised Premises.'* The letter offered no alternative timeline for vacating.
- xviii. By email of 19 December 2014, the Defendant through counsel reserved its right to re-enter under the lease and seek compensation, but the email noted that instructions would be taken on whether the Defendant would be proceeding with the proposed meeting.
- xix. Upon the Claimant's return to the Territory on 4 January 2015 it was discovered that the Defendant had exercised the right of re-entry in respect of the upstairs restaurant portion of the Premises and removed the Claimant's goods and equipment. It appears that between 3 and 4 January 2015 the Defendant placed the Claimant's goods and equipment in storage containers.
- xx. On 6 January 2015, the Claimant paid the sum of \$1,750.00 for the January 2015 rent.
- xxi. On 4 March 2015 the Parties met at the Premises and at Fat Hog's Bay where the storage containers were located to arrange for the Claimant to collect his goods. The goods were not collected on that day. There followed correspondence between the Parties in which the Defendant contended that it sought the Claimant's confirmation that its servants or agents would be attending on 19 March 2015 to collect his goods. The Defendant further contends that there was no response to that email. The

Defendant further contends that on 19 March 2015 the Defendant and its representative still went to both the Premises and Fat Hog's Bay location to meet with the Claimant as agreed on 4 March 2015 but again there was no appearance of the Claimant or his representatives.

- xxii. On 27 January 2015 the Defendant issued a further Notice to Quit. By Order dated 24 February 2015 the Claimant was ordered to give up possession of the lower portion of the Premises. Around 25 March 2015 the Claimant adhered to the order to vacate and commenced the move from the downstairs of the Demised Premises.
- xxiii. By letter of 25 March 2015 the Defendant contends that it documented the Claimant's move from the downstairs part of the premises and requested a date for rescheduling the move of the goods from the containers. After months of silence with no date being provided for collection of the goods, on 25 August 2015 the Defendant wrote to the Claimant requesting that they revert with a date to collect the goods by 27 August 2015 and for the first time sought for compensation for storage costs incurred for March through August.
- xxiv. There was no response to this letter. Almost 1 year later, on 7 April 2016, the Defendant applied for an order which would compel the Claimant to remove its goods from the Premises and in the event that it failed to do so, an order which would permit the Defendant to dispose of such goods. The Defendant further sought damages which would compensate it for the extensive storage period.
- xxv. By Order of 19 April 2016 the Master compelled the Claimant to collect his goods within 7 days and the Claimant to hand over the container keys at the site visit with a default provision that in the event that the Claimant fails to collect the goods within 7 days as ordered it is to pay storage costs from that 7 day period up to the date when the goods are actually collected. Within days of the 19 April 2016 Order the Claimant's goods were eventually collected at an agreed site visit.

[4] In an agreed statement of facts, law and issues, which was decidedly prolix, the Parties agreed that a plethora of issues arise for determination on the claim and counterclaim. The Court has consolidated the issues as follows:

- (i) In construing the terms of the Lease
  - (a) Whether Schedules 1 and 2 to the Lease formed part of the contractual agreement between the Parties;
  - (b) The extent of the Premises (i.e. the square footage of the property that was leased to the Claimant); and
  - (c) Whether the Defendant was entitled to terminate the Lease within 3 years of the commencement of the term of the lease pursuant to clause 8 (2) of the Lease

(ii) On the Claimant's claim:

- (a) Whether the Defendant interfered with the Claimant's right to quiet enjoyment of the Premises by terminating the lease and initiating legal proceedings (injunction proceedings) and if so what damage or loss was occasioned thereby?
- (b) Whether the Defendant acted in breach of the terms of the Lease by terminating without notice and within the 3-year commencement of the term of the lease as averred by the Claimant, or was the Defendant entitled to terminate the Lease pursuant to paragraphs 4 (iv) and 8 (2) of the Lease by re-entry for breaches of the terms of the lease?
- (c) Whether the Defendant caused damage to and is liable to pay damage for the Claimant's equipment or goods which were removed from the Premises by the Defendant?

(iii) On the Defendant's counterclaim: whether the Claimant breached the Lease in the following ways and whether they are entitled to the heads of damages sought:

- (a) Whether the Claimant by its actions breached the terms of the Lease in denying the Defendant entry to or otherwise hindered the Defendant from having access to workspaces on the upstairs of the Premises and thereby contributed to the Defendant's inability to complete the works designated to the Defendant for the upstairs of the Premises by clause 7 (9) of the Lease to outfit the upstairs of the Premises?
- (b) Whether the Claimant kept the upstairs portion of the premises in an overcrowded, undecorated and a state of untenable repair in breach of the terms of the Lease?
- (c) Whether the Claimant was in breach of the prescribed terms of user under the Lease by the prolonged storage of its goods and equipment on the Premises, or did the Defendant give the Claimant indefinite authorisation to store goods and equipment on the Premises and on the areas identified by the Defendant as being outside of the Premises?
- (d) Whether and to what extent was the Claimant in breach of the purported joint venture's profit-share agreement by virtue of the Claimant's delay to the opening of any part of the Premises including a Pool Bar, Lounge, Restaurant and Club and the other breaches of the Lease as averred?
- (e) If the Claimant is found to be at fault in the delay in opening any part of the Premises and if the Claimant is also found to have kept the premises in an untenable condition and is found to have overcrowded the walk-ways and common areas by unauthorised storage of goods, is the Defendant entitled to

damages for the various heads of damages sought, including loss of marina traffic, lost rental income from the restaurant, marina and hotel, and or loss opportunity as it pertains to the loss of its contractual opportunity with prospective customers including Federal Express?

- (f) Whether the Claimant was liable to the Defendant for electrical arrears and other fees for the Premises and the extent to which either party is liable for the electrical arrears?
- (g) Whether the Claimant was in breach of any obligation to repair the pool and did clause (2)(iii) of the Lease apply in the circumstances and whether the Defendant is entitled to the sums averred as damages caused thereby?

### **THE PARTIES' CASES**

- [5] The Claimant contends that the Defendant was not entitled to terminate the Lease and moreover by a series of actions it hindered the Claimant from commencing its operations on the Premises as contemplated by the Lease.
- [6] First, the Claimant maintains that the Parties agreed that the Defendant would renovate the Premises so that they could be used as intended while the Claimant was mandated to undertake cosmetic renovations. The Claimant maintains that the downstairs renovation was to have been completed before the upstairs renovation commenced. The Claimant moved a number of items of furniture and equipment onto the Premises with the permission of the Defendant, which items were to be used in its operations at the Premises. The Claimant also obtained the approvals and licenses required to operate a bar, restaurant and club on the Premises. The Claimant maintains that it commenced renovating the downstairs area, however it asserts that renovations could not be completed because the Defendant failed to perform its renovations.
- [7] By October 2014, the relationship between the Parties had completely broken down and, in the Claimant's view, its efforts to begin trading at the Premises had been severely disrupted. By this stage, the Defendant offered a "buy out" option of the Lease. Attempts were also being made to mediate the growing dispute between the Parties but that had to be aborted due to the fact that the agreed mediator was conflicted.

- [8] The Claimant states that its principal Mr. Eddy left the Territory for a holiday on 23 December 2014. When he returned to the Territory on 4 January 2015, he discovered that the upstairs part of the Premises had been entered and the Claimant's items (with a total value of approximately USD \$85,000) had been removed. The Claimant contends that such re-entry was without any notice. On 5 January 2015, Mr. Eddy returned with the police and discovered that the locks to the Premises had been changed, and items had either been removed or damaged.
- [9] It then became clear that the Claimant's items were removed from the Premises by the Defendant and put into storage containers offsite at Fat Hog's Bay. These items were returned to the Claimant during the course of these proceedings, however, it is contended that some items returned to the Claimant by the Defendant, have been damaged by the Defendant or its servants or agents. The Claimant contends that all of this occurred when it is indisputable that the Claimant continued to pay its rent in full and on time. It is the Claimant's contention that in reality the Defendant was motivated by a desire to offer the Premises to another individual and to partner with him in operating the bar and restaurant. The Claimant's claim is grounded on the Defendant's multiple alleged breaches of the Lease, culminating in its purported termination and the Claimant's exclusion from the Premises, resulting in loss and damage to the Claimant. It contends that the Defendant has, interfered with its right to quiet enjoyment of the Premises when it wrongfully terminated the Lease without sufficient notice and arranged to assign the Lease without notifying the Claimant.
- [10] The claim was robustly opposed by the Defendant. First, the Defendant disputes the full remit of the agreement and maintains that the Claimant is not entitled to rely on the documents referred to as First and Second Schedules to the Lease because these documents were never agreed to by both Parties. Consequently, it disputes not only the subject matter of the Lease (the demised premises) but it also denies that the Claimant was paying the full contractual sums due to the Defendant under the Lease. The Defendant maintains that the Claimant paid a monthly rental of \$1,750.00 for a total area of 2,223 square feet of commercial space. However, the Defendant maintains that the remaining 2,719 square feet for the upstairs portion of the Premises intended to house the main restaurant was the subject of a profit share agreement which the Claimant breached when it failed to commence its operations (save for the one May/June 2014 Poker Run event (described as a soft opening)) with the result that customers at the Marina complained about a lack of facilities. The



Defendant maintains that the Claimant has failed to generate any income from the upstairs portion of Premises and in turn the Defendant has been unable to receive the agreed profit share from that portion of the Premises.

[11] The Defendant also maintained that it was entitled to terminate the Lease due to the Claimant's alleged breaches of the Lease. *Inter alia*, the Defendant claims that the Claimant:

- (i) Failed to outfit or keep the upstairs of the Premises in a tenable state of repairs and in keeping that area of the Premises in an overcrowded, undecorated state in breach of the terms of the Lease and denied the Defendant entry to that upstairs of the Premises following the Defendant's requests to complete works and thereby contributing to the Defendant's inability to complete the works designated to the Defendant by clause 7 (9) of the Lease;
- (ii) Breached the prescribed terms of user under Lease by the unauthorised works carried out on the Premises, the prolonged overcrowding and storage of its goods and equipment on the Premises and in other unauthorised areas outside of the Lease, including passageways and by these actions causing the Premises and the Defendant's Property to suffer waste and diminish in value;
- (iii) Failed to open any part of the Premises including the Pool Bar, Lounge, Restaurant and Club in breach of the prescribed terms of the Lease and joint venture forming part of the Lease;
- (iv) Failed to pay electrical arrears and other fees due and payable by the Claimant for the Premises; and
- (v) Breached its obligation to repair and maintain the pool.

[12] The Defendant concedes that renovations were undertaken on the Premises when the Claimant entered into possession, but maintains that the Premises (including the upstairs Restaurant) were fit and ready for the agreed use, prior to and at the time of the Lease and taking of possession. Paradoxically, the Defendant also maintains that the Claimant's alleged breach of its contractual obligation to outfit the upstairs portion of the Premises and the Claimant's alleged overcrowding of that area, as well as instances of refusing the Defendant entry to complete works and the general state of disrepair and failure to bring the Premises into good decorative order, were the actual cause of the upstairs being unfit for operation as either a bar, lounge or restaurant. In an apparent alternative argument, the Defendant contends that the renovations undertaken by the Defendant after possession was taken up by the Claimant, were purely matters of the Claimant's preference,

and unnecessary to make the premises fit for the agreed use. As such the Defendant maintains that any delay by the Defendant in undertaking renovations did not prevent the upstairs Restaurant from opening.

- [13] The Defendant maintains that whilst the Claimant sought permission around November 2013 to temporarily keep some items on the Premises, which were relocated by the Claimant's principal from the United States to the Territory, the Claimant sought to keep the said items in storage on the Premises indefinitely in breach of that permission and also sought to add more goods, furnishings and equipment to the upstairs of the Premises without the Defendant's permission as prescribed by the Lease.
- [14] The Defendant maintains that at the time of the Claim, the Defendant did not remove any of the Claimant's goods from (or in any way interfere with) the bottom floor of the Premises, which is the only area that for which the Claimant had paid rent. The Defendant maintains that it only removed goods from the lower floor, pursuant to an order of the Court in the proceedings. The Defendant denies causing any alleged damage to any of the Claimant's goods which were returned and maintains that the Claimant's antique furniture and chandelier were brought to the Premises on or about February 2014 in an already damaged state.
- [15] The Defendant has counterclaimed for possession of the downstairs portion of the Premises, but it accepts that the Claimant gave up possession pursuant to an order of the court during the course of these proceedings. The Defendant also seeks the sum of \$736,026.57 and accruing costs for loss, damage and property diminution suffered by the Defendant. This sum covers arrears accrued by the Claimant in respect of unpaid electricity bills. It also covers, the costs incurred by the Defendant in re-wiring the pool pump when the Claimant failed to maintain the swimming pool on the Premises; sums of money it says it "wasted" for renovations at the behest of the Claimant in particular in renovating the pool bar; sums of money it says it "wasted" for the transportation of goods, furnishing and equipment from Fat Hog's Bob to the Premises at the behest of the Claimant; costs associated with unloading the Claimant's equipment from the container from the United States shortly before the commencement of the Lease; costs in transferring the goods from that container to the upstairs of the Premises on the Claimant's instructions; the cost of removing and then storing the Claimant's goods from the upstairs of the Premises and the surrounding allegedly unauthorized areas and

storing them in the context of this dispute; loss of income resulting from in particular an alleged loss of marina traffic (the bulk of the counterclaim); loss of rental income from the restaurant and/or loss pursuant to an agreed profit-share as a result of the Claimant's breaches of the terms of the Lease; unauthorized use of space at the marina without the premises and loss of a contractual opportunity with Fedex.

- [16] In respect of the Counterclaim, the Claimants asserts that it did not breach the Lease and that no notice of the same was given to it at the material time(s). The Claimant also denied that it owes any money for electricity, which in any event is not payable to the Defendant. It also asserted that it maintained the Premises in good order, notwithstanding being excluded from the area where waste should have been disposed of and that any issues with the Pool were the result of the Defendant causing the disconnection of the electricity supply to the pump.
- [17] The Claimant denies that it breached its contractual obligation to outfit the upstairs of the Premises. The Claimant further asserts that all works undertaken by the Claimant were undertaken with the Defendant's permission. The Claimant says that substantial works were completed but the Defendant's failure to complete its renovations impeded progress. Moreover, the Claimant maintains that it was both understood and agreed that the Defendant would need to make substantial renovations before the Premises could be operated as a bar, restaurant and club. To the extent that works were delayed, it says that this was due to the Defendant's failure to undertake agreed renovations, with the result that the Claimant could not finish.
- [18] The Claimant also denies that the space was overcrowded. According to the Claimant, the Defendant agreed that the Claimant could store materials, goods and equipment on the Premises, without a limitation on time. It asserts that it was not obliged to pay for their storage either before or after the removal of the items at issue by the Defendant. Moreover, it contends that the equipment and furniture at issue was, equipment and furniture to be installed at the Premises.
- [19] In reply, the Defendant generally disputed many other averments in the Claimant's defence to the Counterclaim and maintained its position as set out in its pleadings.

## General Principles of Contract Interpretation

- [20] When called upon to construe contractual provisions, it is well established that the starting point for a court is to identify the intention of the contracting parties. This is an objective test; the court is concerned to identify the intention of the parties by reference to "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean*".<sup>1</sup> In ascertaining the objective meaning of a contractual provision, the courts will look to both the language of the clause and the commercial context in which it was drafted.<sup>2</sup>
- [21] The following considerations are relevant to a court's analysis: [1] The natural and ordinary meaning of the clause. The courts "do not easily accept that people have made linguistic mistakes, particularly in formal documents".<sup>3</sup> However, the worse the drafting of a particular clause, the more readily a court will depart from its natural meaning;<sup>4</sup> [2] any other relevant provisions of the contract; [3] the overall purpose of the clause and the contract; [4] the facts and circumstances known or assumed by the parties at the time the contract was executed; [5] commercial common sense.
- [22] The extent to which each is used will vary according to the circumstances. Greater emphasis is likely to be given to textual analysis where the dispute concerns complex agreements agreed between sophisticated parties and with the assistance of skilled professionals. Conversely, commercial context will play more of a role where the agreement is more informal, or lacking in detail. However, there are always exceptions and every case will be decided on its own facts.<sup>5</sup>
- [23] The court will not take into account any subjective evidence of either party's intentions. While the court must examine the full background to the contract, it cannot look at prior negotiations<sup>6</sup> or the parties' "declarations of subjective intent". This means that the court cannot look at extrinsic evidence such as antecedent agreements, oral negotiations, exchanges of letters, etc., preceding

---

<sup>1</sup> *per* Lord Hoffman in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 at paragraph 14

<sup>2</sup> *Wood v Capita Insurance Services Limited* [2017] UKSC 24

<sup>3</sup> *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 W.L.R. 896 at page 913

<sup>4</sup> *per* Lord Neuberger in *Arnold v Britton* [2015] UKSC 36, paragraph 18

<sup>5</sup> *Wood v Capita Insurance Services Limited* [2017] UKSC 24

<sup>6</sup> *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; *Arnold v Britton* [2015] UKSC 36

the contract.<sup>7</sup> However, the English Court of Appeal has held that in construing the meaning of an unusual combination of words not defined in the agreement and with no obvious natural and ordinary meaning, the court can “*explore the factual hinterland of the agreement*” to ascertain how the parties understood the phrase.<sup>8</sup> In so doing, the court is not taking into account the parties’ “*declarations of subjective intent*”, rather it is identifying the meaning shared by the parties and in effect incorporated into their agreement.

- [24] Having accepted these general legal principles, the Court will now consider the issues which arise in this claim and counterclaim.

### **Construing the terms of the Lease**

- [25] The Claimant maintained throughout these proceedings that both Schedules were incorporated by reference in the Lease. The Defendant however, maintains that contrary to the references in the Lease, the First and Second Schedules were never annexed to Lease when executed or agreed upon or signed off by the parties. During the cross examination of Mr. Crabbe maintained he maintained: ‘*I am saying that I didn’t sign off to it, if there is a legal jurisdiction that make it part of the lease.*’ When asked by the Court to clarify his true and accurate evidence Mr. Crabbe stated: ‘*My true evidence is that we were negotiating sections 1 and 2 and they were not signed on because we didn’t come to a full agreement on them.*”

- [26] Although recitals are less frequently used in commercial conveyancing, where they do obtain, their function is to narrate the history leading up to the main agreement in question or to express in general terms the intention with which the agreement is made. In many cases they are “*a preliminary statement of what the maker of the deed intended should be the effect and purpose of the whole deed when made.*”<sup>9</sup>

- [27] In the case at bar, the Parties have set out a number of recitals to their contract which are critical to the determination of the issues which arise in the claim and counterclaim. These recitals clearly

---

<sup>7</sup> *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 W.L.R. 896

<sup>8</sup> *Rugby Group Ltd v ProForce Recruit Ltd* [2006] EWCA Civ 69

<sup>9</sup> *Mackenzie v Duke of Devonshire* [1896] A.C. 400 per Lord Halsbury L.C

identify and incorporate by reference, two schedules to the Lease. At subsections (2), (4), (5) and (6) of the recitals the contract provides:

“WHEREAS

(1) ...

(2) The Lessor agreed to grant and the Lessee to take a lease of the marina commercial rental premises described in the First and Second Schedules hereto on the terms and conditions herein.

(3) ...

(4) The Lessor furnished the Lessee with a counter-proposal on 29<sup>th</sup> April 2013 in which counter ancillary terms by which its relationship with the Lessee would be governed (“the Counter Proposal”).

(5) The Lessee accepted the Counter Proposal as executed by the Lessor on 29<sup>th</sup> April 2013 and the Lessee on 29<sup>th</sup> April 2013, and which is contained in the Second Schedule hereto.

(6) Where any term of this Lease and any term of the Counter Proposal conflict the relevant terms of the Counter Proposal will override the conflicted terms of this Lease.

[28] Schedules are considered to be a substantive part of the definitive contract itself. They usually consist of information which would be important to the contract terms and frequently include lists or other information that would otherwise be too confusing or cumbersome to include in the main body of the contract. Schedules are normally agreed to when the contract is signed but generally need not be signed themselves. Where they include information essential to the contract, the contract should state that all schedules are incorporated into the contract.

[29] In the case at bar, the First and Second Schedules were presented at the end of the Lease and was referenced in these recitals bringing notice of the terms of these schedules to the attention of both Parties even if they would not have had the document in their possession.<sup>10</sup> They clarify that these schedules form an integral part of the main Lease. These subsections also include language that establishes an order of precedence in the event of a conflict between the main terms of the Lease and the schedules which are incorporated by reference.

---

<sup>10</sup> Thompson v London Midland (1903)

- [30] When the Court has regard to the schedules and compares their provisions to that of the main body of the Lease, the following findings are made:
- (i) The First and Second Schedule are incorporated by reference in recitals to the lease and the Parties having executed the Lease are deemed to have had notice of the terms or provisions of the Schedules which in any even do not materially differ or conflict from the terms set out in the main body of the Lease.
  - (ii) Notwithstanding the fact that they were not specifically signed by the Parties, the First and Second Schedule form part of the Lease.
- [31] There are critical consequences which follow from these findings. First, in the Court's judgment, the description or subject matter (or demised premises) of the Lease is clear and unambiguous. The total area comprising 4942 square feet is broken down as follows: pool bar - 2090 square feet; room by pool – 133 square feet and restaurant upstairs – 2719 square feet. Secondly, the Defendant had clear obligations to carry out certain works on the patio base and side room as well as the upstairs portion of the Premises intended to be used as the main restaurant subject to the Parties agreeing the design and materials to be used.
- [32] At paragraph 67 of its closing submissions, the Defendant concedes that the entire area of the demised premises was 4,962 square feet. However, it takes issue with the actual area which was covered by the agreed rental of \$1,750.00. Counsel for the Defendant has submitted that the \$1,750.00 rent only covered the downstairs under clause pursuant to clause 2 (1) of the Lease; whilst the upstairs of the premises was intended to be a space shared between the Claimant and Defendant pursuant to the joint venture/profit share agreement and that the Defendant would obtain its rent for upstairs by a profit share arrangement pursuant to clause 2 (2). According to him, the representatives for the Parties indicated in oral examination that their agreement was that both Parties would take over the upstairs and that the rent and security deposit for the upstairs would be generated by a shared profits arrangement. Whilst the rental for the downstairs was for a fixed monthly sum of \$1,750.00, the Defendant's representative Mr. Crabbe repeatedly referred to the upstairs as a 'shared space' and asserted that there was a clear distinction between the downstairs portion of the Premises in respect of which the Claimant had exclusive possession of the downstairs, and the upstairs portion of the Premises which was to be shared.

[33] The Court has had regard to unequivocal terms set out at clause 2 of the Lease which *inter alia* reads:

“The rent for the Demised Premises shall be as follows:

- (i) *Pool Deck/Bar/Lounge & Side Room, at the size of 2,223 sq ft – the annual sum of Twenty One thousand United States Dollars (US\$21,000.00) in the first years instance, calculated at one Thousand seven hundred and fifty United States Dollars (US\$1,750.00) per month with an Annual 2% increase each year for five years with two-five year renewal options; payable in advance on the 1<sup>st</sup> day of each month, provided that the first payment or a proportionate part thereof shall be payable on the 15 day of November 2013.*
- (ii) *Main Restaurant (Upstairs) – at the size of 2719 sq ft – calculated at 12.5 % of gross receipt sales from upstairs until security deposit is obtained of which 2.5% will be allocated to the security deposit and 10% rent. 10% of gross receipt sales thereafter payable on the last working day of each month with weekly sales reports submissions.”*

[34] The Court has also had regard to the dictum in the case of **Street v Mountford**,<sup>11</sup> in which the English House of Lords made plain that a lease is the grant of a right to the exclusive possession of land for a determinate term less than that which the grantor himself has in the land. This definition identifies three essential elements, which include exclusive possession, a determinate term and a term less than that of grantor. Exclusive possession is the right to use premises to the exclusion of all others, including the landlord himself. Thus, in **Appah v Parnccliffe Investments Ltd**<sup>12</sup>, in which the ‘landlord’ had reserved the right to come into the premises as and when he chose to empty meters and change linen, the arrangement was held to be a licence, since the occupier did not have exclusive possession.

[35] It follows that if the occupier has no right to exclusive possession of the premises then his right to use the premises cannot amount to a lease, although it may be some lesser right, such as a licence or possibly an easement. Having reviewed the totality of the evidence presented by the Parties as well as the legal submissions filed by Counsel, this Court has no doubt that the Parties intended to enter into a lease agreement in respect of demised premises which included both the upstairs restaurant area measuring 2,719 square feet and the downstairs pool bar area together with a room

---

<sup>11</sup> [1985] UKHL 4

<sup>12</sup> [1964] 1WLR 1064



which was located next to the pool. In their pleadings before this Court, neither Party has alleged anything less.

[36] On cross examination the Claimant's Mr. Eddy conceded that as part of the discussions between the parties when contracting was ultimately to split profits from the upstairs restaurant and said, *'yes, but downstairs bar and lounge I wanted to do that part, I wasn't interested in upstairs phase, the defendant was adamant in we taking it over, so we came up with months of negotiating scenario for a workable agreement.'* [Emphasis added].

[37] In the Court's judgment, Counsel for the Defendant's assessment of Mr. Eddy's oral testimony is flawed. It seems to the Court that Mr. Eddy could only be referring to his company, the Claimant. In the Court's judgment he would be doing so in a manner which was entirely consistent with the actual wording of the Lease which clearly contemplates that the rent and security deposit for the upstairs restaurant area would be generated from the profits accruing from the restaurant operations. This would not negate the fact the upstairs restaurant area was under the exclusive possession of the Claimant and therefore formed part of the Premises which was demised under the Lease.

[38] The Court is not satisfied that this matter presents any genuine contention between the Parties in any event. What is however in dispute is the application of that part of the Second Schedule which describes the "the Landlord's improvements". The Claimant asserts that the obligations set out at Schedule 2 were, clearly, incorporated into the Lease and are therefore binding. Counsel for the Claimant has submitted that the Lease contemplated substantial works occurring (including a refurbishment of the upstairs of the Premises) and other steps being undertaken before the Claimant would commence its business at the Premises (which steps were never completed by the Defendant). Counsel further submitted that the fact that Schedule 2 incorporated the need for the Parties to agree on the design of the enclosure of the covered bar area, and the specifications of the tile, reflects that it was never contemplated that the Premises would be operated immediately and that there would be a significant lead in time, to include time to procure licenses.

- [39] On the other hand, the Defendant's position throughout the proceedings is that the Second Schedule formed no part of the Lease. This, despite the clear terms of its letter of 6 June 2014 in which it clearly acknowledged the subsistence of obligations pursuant to the Second Schedule of the Lease *and* concedes that the Defendant had an obligation to make improvements consistent with the Second Schedule.
- [40] In its submissions, the Defendant further contends that it is doubtful that the First and Second Schedules have any import in any event, because it was demonstrated that irrespective of whether the schedules are construed as being incorporated in the Lease, on the facts, the Defendant did what it reasonably could to give effect to its obligations under the terms of the Lease. The Defendant asserted that the same cannot be said of the Claimant, who repeatedly failed and or refused to abide by the terms of the Lease even when expressly asked by the Defendant to rectify breaches.
- [41] In the Court's judgment and for the reasons already indicated, it cannot seriously be argued that the Second Schedule did not form part of the Parties' agreement. Counsel for the Claimant has submitted that the fact that the obligations set out in the Second Schedule formed part of the obligations created by the Lease is clear from the following:
- (i) The "Counter Proposal", which included the Second Schedule, was incorporated into the Lease on its terms as set out above;
  - (ii) The First and Second Schedules (though not signed in the version before the Court) were in fact appended to the executed Lease – and there is nothing in the terms of the Lease that required the schedules to be separately executed before their terms became binding;
  - (iii) The "Counter Proposal" at the Second Schedule (Mr. Crabbe appeared to accept) was authored by the Defendant, being a proposal which, on its own terms, was authored by the Defendant's agent and sent to the Claimant for agreement;
  - (iv) The Lease was authored by the Defendant's lawyers and (Mr. Crabbe said at trial) amended by Mr. Crabbe.
  - (v) The main body of the Lease, in any event, incorporated a number of terms from the Counter Proposal.

[42] The Court finds all of these matters to be highly persuasive. It is therefore clear to the Court that the Defendant's leasehold improvements would have included the following: for the patio base and side room downstairs – installation of deck between the storage room and pool deck; for the main restaurant upstairs - Floors (the Defendant was to cover the cost of the tiles) restrooms, gas lines and plumbing in the kitchen area, construct /install a bar (the design of which was to be done by the Claimant and submitted for the Defendant's approval). The full remit of these obligations; whether they were performed and if not whether this constituted breach of the lease fall to be determined are separate issues which will be determined below.

[43] The final aspect of the Lease which remains to be construed centres on the termination provisions which are set out at clause 8 of the Lease. Clause 8(1) provides as follows:

“8 (1) The term of this Lease shall begin on the Commencement date and end on the Termination date unless terminated earlier as provided in this Lease. Either party may terminate this lease by giving the other party six (6) months written notice. However, the parties agree that neither the Lessor nor the Lessee will issue such a notice to terminate within three (3) years of the commencement of this Lease.

[44] Clause 8 (2) went on to prescribe that the Lease may be terminated by the Defendant (the lessor) in instances of breaches by the Claimant (the lessee). It provides as follows:

“If the reserved rent or any part thereof shall be in arrears for twenty-one (21) days (whether formally demanded or not) or, if there shall be a breach of any stipulation or provision herein contained or if the Lessee shall cease to occupy the Demised Premises or shall cease to carry on business thereon for a period exceeding twenty-eight (28) days (where the lessee has not notified the Lessor in writing in advance of the seasonal nature of the conduct of its business), or if the Lessee or other person in whom for the time being the term hereby created shall commit any act of bankruptcy or shall enter into any agreement or composition for the benefit of creditors or being a company shall be put into voluntary liquidation (by way of reorganization of its business) or into involuntary liquidation or a receiver is appointed over any of the Lessee's assets, or the Lessee permits any execution to be levied upon goods owned by the Lessee or shall be in breach of any law which materially affects the Lessee's ability to hold the Demised Premises or to perform any obligation hereunder then the Lessor may (without prejudice to any right of action or remedy of the Lessor in respect of any antecedent breach of covenant by the Lessee but in accordance with the provisions of the Registered Land Act forthwith terminate this Lease by notice to the Lessee and re-enter upon the Demised Premises, and thereupon this Lease shall absolutely determine but without prejudice to the rights of the Lessor in respect of any arrears of rent or any breach of covenant.”

- [45] In the case at bar, it is clear from the termination provisions that: (a) either party could terminate the contract (b) termination need not be based on cause (or the fault of any party) (c) the party terminating needed to give 6 months' notice to the other party (d) such notice needed to be in writing. It is common ground between the Parties that the Fourth Defendant failed to adhere to the provisions of clause 8 (1) and did not fulfill the substantive conditions when it purported to terminate the Lease. Instead, the Defendant contends that it exercised its rights to terminate the Lease under clause 8 (2) of the Lease.
- [46] Where a contract contains express provisions entitling one or both parties to bring the contract to an end, it is clear that while the clause itself will not be construed strictly any condition precedent to its exercise must be strictly fulfilled.<sup>13</sup> Where the purported contract is a lease agreement however, the position is somewhat complicated.
- [47] Courts are clear that '*[a] lease is a demise. It conveys an interest in land. It does not come to an end like an ordinary contract on repudiation and acceptance*' per **Lord Denning MR in Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd.**<sup>14</sup> In **Clays Lane Housing Co-operative Ltd. v Patrick**<sup>15</sup> the English Court of Appeal accepted the submissions that: "*a right to determine a lease by a landlord is a right of forfeiture if (a) when exercised , it operates to bring the lease to an end earlier than it would "naturally" terminate; and (b) it is exercisable in the event of some default by the tenant.*"
- [48] Court will therefore treat as a forfeiture clause, any arrangement which possesses these characteristics. The case of **Clarke and Co Ltd. v Widnall**<sup>16</sup> illustrates this. In that case, a tenancy was terminable by 12 months' notice. It contained a clause which entitled the landlord to terminate the tenancy on 3 months' notice in the event of a breach of covenant by the tenant. The English Court of Appeal held that it took effect as a forfeiture clause.

---

<sup>13</sup> Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia [1997] A.C. 850 at page 870

<sup>14</sup> [1972] 1 QB 318 at 324

<sup>15</sup> (1984) 49 R. & C.R 72

<sup>16</sup> [1976] 1 W.L.R. 845

[49] As with other rights to terminate contracts, any condition precedent must be strictly complied with. It follows that the breach of covenant giving rise to the forfeiture must be proved on a balance of probabilities. In **Croft v Lumley**<sup>17</sup> the English court observed:

“I think that the condition ought to be construed with this amount of strictness, that it ought clearly to appear the condition was meant to include and did incorporate the covenant on the breach whereof the right to re-enter is claimed; but that the question whether the covenant itself is broken (having once ascertained that the condition for re-entry applies to and includes it) is to be determined by reference to the rules which prevail in construing ordinary contracts between party and party.”

[50] Once it has been determined that the condition for re-entry applies to the particular covenant, then the question whether the covenant has been broken is to be determined on ordinary principles of construction. The Court must put a fair construction on them according to the apparent intention of the contracting parties.<sup>18</sup> In **Bristol Corp v Westcott**<sup>19</sup> Cotton LJ stated the position in the following terms:

“I agree that, although it is equation of forfeiture, we must construe the covenant fairly, ascertain its meaning without regard to forfeiture, and then see whether upon that ascertained meaning a forfeiture has occurred.”

[51] Having considered the terms of the Lease, the Court will now turn to assess the purported or alleged breaches by each Party commencing with the Claimant. In so doing, the Court recalls the specific provisions of clause 8 (2) of the Lease. The Court has also considered the provisions of clause 15 of the Lease which provides that:

**“Events of Default**

Each of the following events shall constitute an event of default ....

- (i) All or any part of the Rent hereby reserved is not paid when due and upon written notice by the Lessor, default continues for 5 days after notice thereof; or
- (ii) The Lessee fails to observe, perform and keep each and every of the covenants, agreements and conditions herein contained to be observed, performed and kept by the Lessee and persists in the failure after 30 days notice by the Lessor requiring the Lessee to remedy, correct, desist or comply (or if any breach would reasonably require more than 30 days to rectify, unless the Lessee commences rectification within the 30 day

---

<sup>17</sup> (1858) 6 H.L. Cas. 672

<sup>18</sup> *Goodtitle d Luxmore v Saville* (1812) 16 East 87, 104 ER 1022

<sup>19</sup> (1879) 12 Ch. D. 461 at 467

notice period and thereafter promptly and effectively and continuously proceeds with the rectification of the breach).”

[52] These clauses have been colloquially referred to as “events of default clauses.” Their main purpose and objective is to provide certainty to both parties as to what may be considered a “default” but also define the procedures and processes that may apply when the event of default takes place. What is also important is that when an event of default occurs, the parties have a legally binding document to leverage to try to resolve the issue and find a common ground. As in the case at bar, the default provisions may provide details about notification obligations, the delays the defaulting party may have to cure a breach, and the possible consequences of the default such as fines, injunctive relief, liquidated damages, or termination of contract.

[53] In the case at bar, the consequences on default are set out at clause 16 of the lease which provides as follows:

**16. Remedies on Default**

Upon the occurrence of one or more Events of Default, the Lessor may, at its option, and in accordance with the provisions of the Registered Land Act cap 229, and in addition to and without prejudice to all rights and remedies of the lessor available to it either by any other provisions of this Lease or by statute or the general law:

- (1) Be entitled to demand payment from the Lessee in the amount outstanding under the remaining lease terms, payable, together with any arrears then unpaid;
- (2) Pursue legal recourse for collecting payment outstanding in 16 (i) and past [sic] all such costs associated in collections to the Lessee.”

[54] In the Court’s judgment, the plain reading of the clause 15 discloses that the Parties had specified that even if the factual circumstances described as an event of default have arisen, no “event of default” will occur until it has been determined that the purported breach persists after 30 days’ notice by the Defendant requiring the Claimant to rectify or remedy such breach. The Lease therefore mandates a grace period which would start from the date on which the Defendant provides notice of the circumstances resulting in the event of default. This presupposes that if the Claimant is able to remedy the factual circumstances of the breach during that period, no further action can be taken by the Defendant.

## THE CLAIMANT'S ALLEGED BREACHES

[55] The Defendant's counterclaim against the Claimant alleged a number of breaches which are also relied upon in support of its defence to the Claimant's claim which inter alia seeks damages for the wrongful termination of the Lease. As indicated, these breaches include:

- (i) Failing to outfit or keep the upstairs of the Demised Premises in a tenable state of repairs and in keeping that area of the Demised Premises in an overcrowded, undecorated state in breach of the terms of the Lease;
- (ii) Denying the Defendant entry to that upstairs of the Demised Premises following the Defendant's requests to complete works and thereby contributing to the Defendant's inability to complete the works designated to the Defendant by clause 7(9) of the Lease;
- (iii) Breaching the prescribed terms of user under Lease by the unauthorised works carried out on the Demised Premises, the prolonged overcrowding and storage of its goods and equipment on the Demised Premises and in other unauthorised areas outside of the Lease, including passageways and by these actions causing the Demised Premises and the Defendant's Property to suffer waste and diminish in value;
- (iv) Storage of goods in areas not included in the Lease or otherwise authorised by the Defendant for use by the Claimant;
- (v) Failure to open any part of the Demised Premises including the Pool Bar, Lounge, Restaurant and Club in breach of the prescribed terms of the Lease and Joint Venture forming part of the Lease;
- (vi) Failure to pay electrical arrears and other fees for the due and payable for the Demised Premises; and
- (vii) Breach of its obligation to repair and maintain the pool.

The Defendant seeks substantial damages in the sum of \$736,026.57 which includes, the cost of wasted investments, storage and transportation costs, damage to property, property income and diminution in value including loss of rental income and accruing costs related to the utility services connected to the Premises.

**i. Covenant to Repair**

[56] Dealing with each in turn, the Defendant maintains that the Claimant failed to maintain the Demised Premises in a tidy state as prescribed by Clause 6 (3) and 6 (4) of the Lease. These clauses provide *inter alia* that the Claimant should:

**Lessee's Covenants and Obligations:**

To fit out the demised premises with such fixtures as may be necessary to operate the Lessee's business and to keep the same in good and substantial repair and condition save for the matters that the Lessor has agreed to do hereunder.

**Maintenance and Repairs**

- (i) At all times during the term to keep and maintain the interior of the Demised Premises including windows doors conduits all fixtures fittings and contents and other appurtenances in good and substantial repair and condition.
- (ii) To maintain and keep the interior of the Demised Premises in decorative repair and condition and make good any defects or repairs or decoration for which the Lessee is responsible within a reasonable time of discovering such defects to a standard reasonably satisfactory to the Lessor.

[57] The Defendant contends that contrary to these requirements, the Claimant kept the Demised Premises overcrowded with used goods, furnishings and equipment, uninstalled fittings and other items in a dilapidated and untenable state and has failed to use the Premises in a tenant like manner. Counsel submitted that between 6 June 2014 up to 2 December 2014, the Defendant repeatedly engaged the Claimant about the overcrowded and poor condition in which the Premises were being kept both orally and in writing. However, up to the period of re-entry, Counsel submitted that the Defendant took no steps to rectify those breaches save for a series of letters between June and 3 September 2014 which gave the indication of willingness to rectify the breach. However, the Defendant contends that these were never followed by positive action by the Claimant in actually clearing or effecting works on the space.



[58] The Claimant does not accept that it breached the Lease as alleged by the Defendant such that it would be liable in damages. In respect of the matter at failure to outfit the premises with the necessary fixtures and keep the same in good and substantial repair, the Claimant first submits that no notice was sent in respect of the same. The Claimant further submitted that it is not at all clear on what basis the Defendant avers that the Premises were not kept in “good and substantial repair” as there is no evidence to suggest that the Claimant had allowed the Premises to degrade. Counsel submitted that the fact that the Premises were full of restaurant furniture – it does not follow that the Premises were not in good repair or not being maintained. It only follows that the Premises contained a lot of “stuff”.

[59] He argued that the assertion that the “greening” of the pool caused the damage to the pump is improbable because there is no evidence before the Court, from an appropriately qualified person, to indicate any causal link. Moreover, the Claimant contended that the issues with the electricity were the result of the Defendant wrongly wiring its lights to the Claimant’s meter. In any event, the Claimant contends that no notice was sent to it in respect of the condition of the pool.

## **ii. Unauthorized structural works**

[60] The Defendant also contends that the Claimant made alterations to the Premises without consent of the Defendant in breach of clause 6 (9) of the Lease. The Defendant’s position is that the Claimant, without express permission and in breach of the Lease:

10.....

- (1) *Erected a satellite dish on the exterior of the pool bar without the Defendant’s prior knowledge or consent;*
- (2) *Placed a grill on the landing of the pool bar without the Defendant’s prior knowledge or consent;*
- (3) *Conducted electrical works for lighting of the pool deck area, without the Defendant’s consent or prior knowledge. The Defendant simply came in one day and found that the Claimant had installed electrical lights in the area, without the Claimant providing the Defendant with any prior notice or specifications on which electrician was used for the works and no specification on whether the electrical fittings were properly certified or inspected. Factors left the Defendant exposed to the risk of fire hazards or government electrical inspection violations.*

- [61] Counsel for the Defendant submitted that the Claimant admits to undertaking these works but has been either dismissive as to whether they were authorised by the Defendant (as seen in the case of the electrical lights installed right next to the pool which Mr. Crabbe attests to discovering when he came to the premises one day without prior notice), or has simply said that its actions were authorised by the Defendant. However, he submitted that there is no evidence of any of these items being authorised by the Defendant which has repeatedly denied giving the Claimant consent do any of these works.
- [62] Counsel for the Defendant further submitted that any suggestion that the Claimant never received notice of the authorised works being done on the premises is simply false because it has never been disputed either on the pleadings or in examination. Moreover, the Injunction, proceedings which were initiated in October 2014 and served on the Claimant, notified the Claimant in writing that the Defendant was complaining about the unauthorised and hazardous works carried out on the property without its consent. Secondly, and more importantly, although the letter of 2 December 2014 from the Defendant outlined all of those breaches, none of those issues were rectified between that date and the Defendant's re-entry between 3 and 4 January 2015. Instead, the Claimant's 5 December 2014 response to the Defendant's letter was dismissive of the Defendant's complaints and gave no assurance that any of these breaches would be rectified. Counsel for the Defendant also submitted that even up to date of the Defendant's letter of 25 March 2015 which came after the Claimant vacated the downstairs the unauthorised light fixtures installed by the Claimant without the Defendant's consent were still not removed. The Defendant therefore maintained that the Claimant was also in breach of clause 6 (9) of the Lease.
- [63] With regard to the allegation that the Claimant had breached the Lease by making additions and structural alterations, again the Claimant contends that no notice was sent requiring it to rectify that purported breach within 30 days. It also asserted that no structural alterations or additions in fact occurred because while the essence of the complaint appears to be that the Claimant affixed a satellite dish to the bar area and undertook some exterior electrical wiring to a pergola this is not a structural alteration or addition. Counsel submitted that the ordinary legal interpretation of the words "structural alteration or addition" is that they relate to something involving a substantial alteration to the fabric of a building. He relied on the dictum in **Pearlman v The Keepers and Governors of**

**Harrow School**<sup>20</sup> under the subheading “Structural Alteration” and concluded that and no such alteration occurred here.

### iii. Nuisance and Obstruction

- [64] Counsel commended to the Court, Mr. Dion Crabbe’s evidence that the grill and other items left in unauthorised areas on its Property and remained there for months up to the date when the Defendant re-entered in January 2015. During the course of examination photographic evidence was shown of the common passage ways where it is contended that the following Claimant’s goods were left: a barbeque grill, a rusted grill top which belonged to an industrial stove left beneath a window (the Claimant alleged it was only there on a cleaning day, but Mr. Crabbe maintains that it was left there for months). The Defendant also asserts that there were appliances left on the wooden deck which was built at the joint cost of both the Defendant and Claimant and was intended to be a common area for guest and general marina staff.
- [65] Counsel for the Defendant submitted that following the removal of the Claimant’s goods, there was a stark difference in the appearance, ambiance and overall quality of the marina areas which led to and are adjacent to the Defendant’s docks. He argued that the photographs of the unsightly appearance of the areas where these items were left speak for themselves in terms of the impact on a tourist and commercial area.
- [66] In response to the contention that the Claimant was causing a nuisance or obstruction in breach of clauses 6.7 and 6.8 of the Lease, again the Claimant submitted that no notice providing 30 days to comply was sent in respect of the purported breaches as required. The Claimant further states that there is no evidence that it was causing a nuisance in a context where the Parties had agreed that the Premises were to be subject to a scheme of renovations (and where there is no evidence of any complaints). Counsel submitted that it is important in this context to recognize that the activities the Defendant now complains of (for example cleaning kitchen equipment or upholstering furniture) are ordinary activities that ought to have been in the contemplation of the parties given the agreed fit-

---

<sup>20</sup> [1978] EWCA Civ. 5

out, it is impossible to characterize such activities as a “nuisance” in that context. See: **Mike v Isaac & Others Saint Christopher and Nevis Civil Appeal No.17 of 2005 at paragraph 7.**

[67] Counsel for the Claimant further submitted that the photographs which were produced by the Defendant show no access being impeded and there is no evidence of any complaints from tenants or guests. In respect of the purported obstruction within the Premises, he posited that the Claimant was perfectly entitled to store its furniture within the Premises and to the extent that the furniture obstructed the tiling of the restaurant premises, he submitted that such obstruction could have been avoided had the Defendant not waited more than seven months before even beginning to address the issue. The Claimant takes issue with the fact that the Defendant could not begin by tiling the kitchen in the manner suggested by the Claimant and it suggested that had the Parties come to an agreement about storage, the issue could have been resolved. Instead, the Defendant broke off the discussion and shortly thereafter served a Notice to Quit.

#### **COURT’S ANALYSIS AND CONCLUSION**

[68] The Defendant contends that by letter dated 6 June 2014, it issued written notice of the Claimant’s breaches and requested rectification of the same. The Defendant also relies on its letter of 2 December 2014, in which it purported to generally identify a number of breaches as a prelude to setting out its settlement offer aimed at finally resolving the dispute between the Parties.

[69] Having reviewed the terms of 6 June 2014, correspondence, this Court accepts the Claimant’s submissions that the letter makes no suggestion that the Claimant had breached the Lease. The letter simply suggests that “*it was contemplated by now... the Pool Bar and restaurant would be up and running*” and suggests, for the first time, that the Marina is suffering lost revenues which are “*in all likelihood*” a result of “*the non-functioning pool bar and restaurant*”. The Defendant made a request that the pool bar be opened within the month and that details of the hours of operation be submitted to the property office; and it purported to afford the Claimant two weeks to clear the Restaurant and bathrooms so that repairs could be undertaken.

[70] Before a repairing obligation can bite, so as to require the tenant to carry out any remedial work, there must be some evidence of disrepair. In **Post Office v Aquarius Properties**<sup>21</sup> an office building had been constructed with a defect which allowed water ingress into the basement car park; the car park was regularly inches deep in water, and unusable. While that was undoubtedly inconvenient, the court held that until the fabric of the building had deteriorated in some way as a result, there was no disrepair which might oblige the tenant to do anything about the situation. The English court defined disrepair as a “*deterioration from a previous physical condition*”. The dictum in this case provides a useful reminder that the purpose of the repairing covenant is to require the tenant to address disrepair, rather than other problems arising from the physical state of the property. In this Court’s judgment, the evidence advanced by the Defendant in the case at bar does not approach this threshold.

[71] What is clear is that the correspondence does not purport to be, and is not in terms consistent with, a form of notice required under the Registered Land Ordinance. The letter makes no reference of clause 6 of the Lease and provides absolutely no particulars of the alleged disrepair or of the Claimant’s purported failure to keep and maintain the Premise in good and substantial repair and condition (for the avoidance of doubt, this Court is not satisfied that the consensual storage of the Claimant’s belongings at the Premises could qualify as breach of clause 6 of the Lease). Similarly, the letter does not complain of additions and structural alterations which are now alleged to have been made to the Premises. All of the purported breaches mentioned are capable of remedy and yet the letter does not specify a reasonable period by which the Claimant is mandated to remedy the same. It is also notable that no mention is made of the 3-month period that the Defendant later maintained had been agreed for renovations, and indeed the letter is inconsistent with that notion.

[72] This Court can only conclude that the letter of 6 June 2014 does not support the Defendant’s case that these breaches can be made out. The Court further finds that the Defendant’s letter of 2 December 2014 does little to advance the Defendant’s case. The full text of that correspondence discloses that it was an attempt to achieve a resolution of the Parties ongoing dispute. At its highest that correspondence makes no more than a glancing reference to purported breaches of clause 6 of the lease. It failed to particularise the evidence of disrepair or indeed the purported additions or

---

<sup>21</sup> [1987] 1 ALL ER 1055

structural alternations which were complained of. Indeed, the only matter which could possibly come to that threshold would be the pool and in that regard, there appeared to be common ground that the general condition and discolouration would have occurred because the electricity was cut to the Premises in circumstances and for reasons which are at the very least indefinite.

[73] The Defendant has also complained that the lack of pool maintenance may have also damaged the pump. The assertion appears to be that the “greening” of the pool damaged the pump. However, there is no evidence before the Court, from an appropriately qualified person, to indicate any causal link between the condition of the pool and damaged sustained to the pump. It is also unclear why the pump would need to be rewired simply because BVIEC had shut the power off and there is no material to support the idea that rewiring was required. The Court is therefore not satisfied that the Defendant has made out this claim for relief on a balance of probabilities.

[74] The Defendant has also complained that the failure to keep the Premises in a manner which created obstructions and nuisance to the lessor and other occupants were continuing breaches which continued after the Claimant’s last rental payment of 6 January 2015. However, it is clear that the first occasion when this complaint would have come to the attention of the Claimant would have been in the letter of 2 December 2014, by which the Defendant attempted to resolve the Parties’ dispute and after the Defendant had issued and recalled its notice to quit. For the reasons already indicated, the Court finds that even if the Defendant could prove that a nuisance had been created, the Defendant’s correspondence would not satisfy as providing the requisite notice to the Claimant.

[75] The Court is also not satisfied that the matters complained of were such as to amount to an obstruction or nuisance contemplated by clause 6 (7) and (8). Reasonableness is the overriding principal in establishing a nuisance claim. Courts must consider how reasonable the activity is as against the impact that such an activity has had on the complainant’s property rights. If the perpetrator is deemed to be using their property reasonably, then there is nothing which can be considered a nuisance.

- [76] The Court has considered the several photographs advanced by the Defendant in support of its contention that the Claimant was causing an obstruction to passageways outside the Premises. The crux of the complaint appears to be that the presence of a barbeque grill, a rusted grill top which belonged to an industrial stove left beneath a window (the Claimant alleged it was only there on a cleaning day, but Mr. Crabbe maintains that it was left there for months), appliances left on the wooden deck which was built at the joint cost of both the Defendant and Claimant and was intended to be a common area for guest and general marina staff. It maintains that following the removal of the Claimant's goods there is a stark difference in the appearance, ambiance and overall quality of the marina areas which led to and are adjacent to the Defendant's docks.
- [77] In the Court's judgment these complaints are *de minimis* and the photographs do not demonstrate that persons traversing these passageways would have seriously been impeded. Certainly, the Defendant advanced no evidence of any complaints from tenants or guests of the Marina and this was confirmed during the forthright testimony of Mr. Eddy.

#### **iv. Breach of User Covenant**

- [78] The agreed user of the Premises is set out at Clause 6(6) of the Lease. It provides that the Premises was designated for use "as a Pool Bar, Lounge, Restaurant and Club." The Claimant argued that any 'operation' contemplated in the Lease must be in accordance with the expressed user under clause 6 (6) of the Lease for the Premises to operate as a pool bar, lounge, restaurant and club. It submitted that there was no provision in the Lease permitting the Premises to be used for long-term storage or the refinishing of furniture, two activities that the Claimant admits engaging in between November 2013 when it took possession and January 2015 when the Defendant re-entered.
- [79] It is not disputed that the Claimant was granted permission to temporarily store goods at the Premises. The Defendant also concedes that there were some agreed additional storage spaces which the Defendant gave the Claimant permission to use and for which the Defendant even upgraded to facilitate Claimant's request for additional storage. However, the Defendant says that the Claimant went well beyond the agreed additional storage areas and began leaving goods and debris all over the general marina including in common passage ways without the Defendant's

consent. It is also maintained that the Claimant failed to use the property for purposes for which it was let, in breach of clause 6 (6) (i) of the Lease in both failing to operate as a pool bar, lounge or restaurant and also by using the property for extended storage, a dumping station for construction debris and for undertaking upholstery and other works which were not authorised under the terms of the Lease.

- [80] The Defendant further maintained that its letter of 2 December 2014 specifically outlined each area of unauthorised use and requested that those areas be cleared irrespective of whether the Claimant opted for an option 1 opening or an option 2 buy-out. However, the Claimant made no attempt to honour those requests between 2 December 2014 and 3 January 2015.
- [81] If the Claimant is found to have used the Premises and areas outside of the Premises for storage in breach of the agreed user and or without the Defendant's authorisation, the Defendant maintains that it is entitled to also recover, *mesne* profits for the Claimant's use of the areas outside of the Premises, (this includes but is not limited to the alleged use of storage unit below the pool deck, storage of items in container prior to court order). see: **Earl Hodge v Albion Hodge, Violet Delville**.
- [82] In the Court's judgment, this claim has no merit. The Court is persuaded by the Claimant's submissions that it would have taken onto the Premises a number of items which may have been used and which may have been shipped from the United States but were in due course to be installed pursuant to its refurbishment obligations. These comprised furnishings, kitchen equipment, sound systems, and lighting. Those items were clearly stored at the Premises with the Defendant's permission. The Defendant contends that such permission that some of the items were only to be stored on a temporary basis but it is clear that there was no finite term expressed or agreed.
- [83] In the case at bar there can be no doubt that the Parties would have contemplated that the Premises were to be subject to a scheme of renovations and it seems to the Court that the activities which the Defendant complains of (for example cleaning kitchen equipment or upholstering furniture) are ordinary activities that ought to have been in the contemplation of the parties given the agreed fit-out.<sup>22</sup>

---

<sup>22</sup> Mike v Isaac & Others St. Christopher and Nevis Civil Appeal No.17 of 2005 at paragraph 7



[84] Given that these items would likely be used as part of the fit-out, the Court is not satisfied that the presence in the Premises would convert the Claimant's user to that of a "storage facility" such that clause 6 (6) (i) (which mandated that the restaurant be used as a restaurant) had been breached. During cross examination, Mr. Crabbe accepted that the Defendant consented to the Claimant placing additional seating so as to increase the number of persons that could be served in the downstairs bar area. To the extent that the claim concerns the outdoor kitchen, the Court finds that that equipment was placed there with permission of the Defendant and there never was a formal demand to move it.

[85] While the Claimant has conceded that there were incursions over areas which would not have fallen **within** the defined Premises but it says that this would not comprise 592 square feet. In any event there is no contemporaneous evidence in respect of a complaint made in relation to any of the **alleged** use and certainly no notice of the breach was ever issued. Certainly, there is no evidence that it was at any time agreed that the Claimant would pay any additional monies for such usage. In these premises, the Court is not satisfied that the Claimant could be characterised as a trespasser who would, arguably, have been liable for the lettable value of any space pursuant to a *mesne profits* analysis.<sup>23</sup>

#### **v. Access for Inspection**

[86] This Lease shall at all times be subject to the following reservations and exceptions:

The right of the Lessor at all times upon reasonable notice (or in emergency without notice) for the Lessor and all persons authorised by him to enter upon the Demised Premises for the purpose of:

- (i) inspecting its state and condition;
- (ii) carrying out construction repairs, maintenance and improvements to the Demised Premises where the Lessee has made default after (14) days' notice of defects in such matters;
- (iii) installing, repairing, renovating or maintaining any public services or utilities on or under the Demised Premises;

---

<sup>23</sup> Geddes Meyer v Kehvin Dickinson ANUHCVP 2014/0005

(iv) verification that the covenants on the part of the Lessee herein contained are being duly observed and performed;

(v) any reason under the terms of the Lease.

[87] Under clause 6 (3) (iv) of the Lease, the Claimant was obliged to:

“To permit the Lessor and the Lessor's duly authorised surveyor or agent with or without workmen and others upon giving reasonable notice in writing at reasonable times (or in an emergency without notice), to enter upon and examine the condition of the Demised Premises and thereupon the Lessor may serve upon the Lessee a notice in writing specifying any repairs necessary to be done and require the Lessee forthwith to execute the same. If the Lessee shall not within fourteen (14) days after service of such notice proceed diligently with the execution of such repairs then to permit the Lessor and her surveyor and/or agent to enter upon the Demised Premises and execute such repairs, and the cost thereof shall be a debt due from the Lessee and shall be forthwith recoverable as if the same were rent in arrears.”

[88] The Defendant contends that by letter dated 6 June 2014, it provided notice of its intention to re-enter to inspect and for effecting renovation works given to the Claimant. It further contends that on 26 August 2014 (roughly 4 weeks 5 days later) the Defendant spoke with Mr. Eddy and asked to enter for effecting repairs, but was denied access. Again, on 27 August 2014, the Defendant documented the exchange and asked to meet on 3 September 2014 and requested that the upper floor be cleared for works to commence.

[89] The Claimant denies these contentions and asserts that no specific notice was given by the Defendant for the purpose of entering to inspect the premises and examine their state of repair (although the Claimant contends that the Defendant's principal or employees or agents were in any event entering the Premises at will. It noted the fact that multiple photographs of the interior of the Premises, were relied upon by the Defendant, and submitted that this is illustrative of that fact.

## **COURT'S ANALYSIS AND CONCLUSION**

[90] In the Court's judgment, the precise wording of clause 6 (3) (iv) is fatal to this claim. It is clear that the Parties contemplated that the purpose of the entry is to examine the condition of the Premises in order to determine and address any repairs which may have been necessary. This right to entry is typically necessary because should any repairs need to be made to rental property, the lessor

will naturally need to gain access in order to carry them out. This falls under the umbrella term of 'reasonable access', which also covers emergency situations such as where the smell of gas is emanating the property or where there is structural damage that requires immediate attention.

- [91] The Court has carefully considered the Defendant's case and it is clear to the Court that the complaint would not fall within the remit of clause 6 (3) (iv). It is therefore not surprising that the Claimant would argue it never received any notice along those lines. Instead, on the way in which the claim is pleaded, the Defendant sought access (or more accurately the removal of the Claimant's belongings to facilitate construction) to the upstairs portion of the Premises in order to carry out the renovations which would have hastened the commencement of operations at the main restaurant. In the Court's judgment this presents a different scenario in that such access would have to be pre-agreed by both Parties and covered in the Lease. It is clear to the Court that this would have been a matter of ongoing negotiation when the Defendant would have moved to terminate the Lease. For the reasons set out herein, the Court is not satisfied that this purported breach has been made out.

#### **vi. Payment of utilities**

- [92] Under clause 6 (2) (ii) the Claimant was obliged to pay all utilities and services connected to the Premises including electricity. The Defendant maintains that the Claimant failed to pay utilities and other expenses to be borne by the Claimant. While the Defendant agrees that lights were wrongly placed on the meter for which the Claimant was responsible, it says that this situation was rectified and that the Defendant paid for the charges attributed to the Defendant's lights. However, it contends that the Claimant has failed and or refused to pay for its proportionate share of the electrical arrears and other fees for the Demised Premises and claims the sum of \$2,742.42 which is reflected on the BVI Electricity Corporation's (BVIEC) disconnection notice dated 26 November 2014.
- [93] Consequently, as noted in handwritten manuscript by the Defendant on the 23 March 2015 BVIEC bill from that period the Defendant began the process of incrementally paying off the BVIEC arrears, beginning with the 23 February 2015 payment of \$200.00 and the other payments reflected on the bills. The Defendant contends that the Claimant has never compensated the Defendant for these payments or for any portion thereof.

- [94] The Claimant has contended that it had no notice of this default but it is clear that it would have been communicated in the letter of 2 December 2014. The Claimant however appears to dispute liability on the following bases. First, it contends that it was only provided with the material it needed to transfer the account into its name in March 2014 but that it was unable to do so because the account has a history of arrears which meant that the proposed deposit was excessively high. In the Court's judgment, this would not be a legitimate excuse for failing to ensure that it was in a position to comply with its financial obligations under the Lease. However, the Claimant goes on to state that in any event, the Defendant and Mr. Crabbe accepted that the Defendant had wired its lights to the restaurant meter and this generated a dispute which was never completely resolved.
- [95] The Claimant further contends that although the Defendant and Mr. Crabbe assert that BVIEC assessed the portion of the unpaid bills attributable to the Defendant at US\$ 10.00 per month, there is no material before the Court to support that assertion. Moreover, it asserts that an analysis of the bills indicates an approximate tripling of the bills from the period 20 April – 20 May 2014 and 20 May 2014 – 20 June 2014, notwithstanding the fact that it is Mr. Crabbe's evidence that by summer 2014 there was little activity on the site. The Claimant say that the astronomic bills continued into June/July (when they are in excess of US \$1,000.00) through to October at which point it is clear that little was taking place on site because of the subsistence of the 12 September 2014 Notice to Quit and the then extant injunction proceedings. The Claimant asserts that it is only in November/December, after the discovery of the issue and the disconnection of the Defendant's lights that the bills return to a level of about 1/10 of those incurred in the preceding month (US \$83.92). Counsel for the Claimant submitted that this is very strongly suggestive that the Defendant's assertion that only US \$10.00 of the monthly bill was attributable is wrong. In light of this the Claimant concluded that there is no basis to find that it breached the Lease on that ground.
- [96] When the Court has had regard to the totality of the evidence which included the utility bills, the evidence reveals that by September 2014, the electrical bill was at \$2,380.88 and yet in September and October no payments were made by the Claimant to BVIEC in respect of the restaurant's BVIEC account. The bills also reveal that the Claimant made two final payments before the Defendant's 2 December 2014 letter - a payment of \$466.51 on 12 November 2014 and a payment of \$1,500.00 made on 28 November 2014. These two payments match the Claimant's payments in the schedule

to Mr. Eddy's second witness statement. However, the evidence does not disclose that any payments were made for December 2014 or January 2015. Whilst the Claimant in evidence claims that two payments were made to BVIEC: \$94.99 on 19 May 2015 and \$145.00 on 20 April 2015, these payments do not match the payments reflected on the Harbour View Marina (Restaurant) Account between April and May.

- [97] When the Court weighs the evidence, it is incontrovertible that the Claimant would have some level of indebtedness in respect of the electricity consumed at the premises prior to forfeiture. The Claimant would have been in possession of the Premises at the material time and it is ultimately responsible for electricity charges incurred during this period. While the Court is satisfied that there may well have been some initial irregularity, it would not negate the fact that the Claimant should have been making regular monthly payments in respect of the electric bills accruing at the Premises. It is clear that it did not. In doing so, the Claimant would be liable for the outstanding sums which are a debt which is due and owing. However, for the reasons which are hereinafter set out, this Court finds while the Defendant may be entitled to recover this debt, it would have effectively waived its right to forfeiture of the Lease under the terms of the Lease and the statutory provisions set out in the Registered Land Ordinance.

#### **vii. Breach of Profit Share agreement - Failure to Commence Operations**

- [98] The Defendant contends that the Claimant is in breach of what it termed the joint venture's profit-share agreement. It submitted that having taken possession of the Premises, the Claimant failed and or refused to open any portion of the Demised Premises and operate it for the purpose let, for a prolonged period of over 15 months (except for 1 special Poker Run Event) until the Defendant was forced to forfeit. The Defendant asserts that the Claimant's principal was very much aware of the impact of such delay in commencing operations as it was in the contemplation of the Parties at the time of contract that if renovations were not completed to facilitate opening the Parties would be deprived of the benefits of the joint venture income/profit share aspects of the lease.

- [99] In support of this contention, the Defendant relied on clause 4 (2) of the Lease which permitted the Claimant a grace period of 3 months to pay that part of the security deposit owed for the restaurant to facilitate the completion of the leasehold improvements to that part of the Premises. The Defendant maintains that this provision came about because the Parties contemplated that this would be a reasonable timeframe for completion of the works and the opening of the restaurant space as a special events center for dining events.
- [100] The Defendant contends that the Claimant was obliged to honor the terms of the Lease, clear the upper floor from the clutter and excessive storage, and afford the Defendant unobstructed access so that the renovations could have been completed as early as February 2014. The Defendant asserts that the Claimant was asked for months to clear the space in order to do the measurement and assessment process for commencement of works and that it only began to document its position in June 2014 when those discussions proved fruitless. Even when the Defendant provided the Claimant with written notice to clear the upper floor on 8 June 2014 some 3 months later this still was not done.
- [101] In the premises, the Defendant argued that if the Claimant is found to be at fault for the failure to open any part of the Demised Premises, then this is a breach which goes to the root of the joint venture and so the Defendant is entitled to compensation from the Claimant for the works and costs undertaken in contemplation of the joint venture relationship between the Parties.
- [102] The dispute between the Parties provides yet another illustration of the importance of utilizing language which is clear and unambiguous in the drafting of contracts. Good drafting should provide certainty and reduce the risk of disputes arising. Conversely, poor drafting may create obligations that do not work in practice, or do not reflect the commercial deal, requiring the parties to waste time clarifying ambiguity and significantly increasing the risk and likely cost of litigation. The Defendant contends that the Lease is much more than a lease. It asserts that the Parties entered into a joint venture agreement which was incorporated into and formed part of the Lease when it was executed in November 2013. Having reviewed and considered the terms of the lease, the Court is satisfied

that this presents an exaggerated view of the actual legal relationship between the Parties. The Parties were at all material times in a relationship of lessor and lessee.<sup>24</sup>

- [103] Rather than presenting a strategic arrangement between the Parties, where resources are pooled, to work together on a specific project or an ongoing basis, the contract which is executed by the Parties has all of the characteristics of a lease agreement albeit a lease agreement with an unusual provisions regulating the payment of rental and the security deposit in respect of part of the Premises. It is clear from clause 2 (2) that the Parties contemplated that the rental and the security deposit for the upstairs restaurant area was to be defrayed from gross sales receipts generated from the restaurant business.
- [104] In responding to this claim, the Claimant maintained that there is no fixed term in the Lease that mandates when the Premises were to be opened for business or that prescribed a date by which renovations were to be completed. It therefore also follows that no specific time period was agreed upon by the parties within which the required renovations were to be completed or the restaurant opened. The Claimant further asserted that the Lease reflects, that substantial works were required before the Premises could be operated as a pool bar, lounge, restaurant and club and that there was seasonality in the business that would dictate when opening could happen.
- [105] The Claimant further contends that it is completely unclear what “failures to outfit” are referred to and say that in fact it was the Defendant that failed to discharge its obligations in that regard. To the extent that the Claimant had not completed its cosmetic work in restaurant, the fact that the Defendant had not discharged its most basic obligations under Schedule 2 would necessarily have precluded the same.
- [106] According to the Claimant, the terms of Schedule 2 and the Lease generally reflect that a high degree of flexibility was agreed on in the context of a joint venture that required agreement on design decisions and the completion of mutual obligations before the Claimant would (and/or could) begin trading from the Premises. What is also clear is that there is no specific reference to it under the

---

<sup>24</sup> See: clause 18 (1) of the Lease

Claimant's covenants at Clause 6 of the Lease or under the "Events of Default" set out in the Lease at Clause 15.

- [107] The Claimant takes issue with Defendant's application of clause 4 (ii) of the Lease. He submitted that clause 4 (ii) logically cannot apply to the payment of the deposit (or profit share) for the upstairs restaurant because that deposit and profit share only became due and payable once the restaurant was operational (and then flexibly out of revenue) – it would be a nonsense to provide for a "grace period" that pre-dated the date on which an obligation (being here the obligation to pay a deposit and profit share and not some obligation to open) became due.

### **COURT'S ANALYSIS AND CONCLUSION**

- [108] In the Court's judgment the Defendant's reliance on clause 4 of the Lease and the suggestion that the Claimant was fixed with an obligation to open for business within 3 months of taking possession is misconceived. Clause 4 of the Lease provides that:

***"Security Deposit***

.....

*(1) The total security deposit will be \$6,000 to be paid as outlined herein:*

- (i) The security deposit for the Patio Deck of \$1,750 will be due at the signing of the Agreement;*
- (ii) A grace period of three (3) months will be allowed during the leasehold improvements upstairs;*
- (iii) The security deposit for the main restaurant upstairs will be received by deducting an additional 2.5% from the gross receipts until obtained."*

- [109] An ordinary reading of this clause makes plain that is not a term that purports to fix an agreed opening date for the business. The clause is, in fact, directed only at the "security deposit" (that it is clear on its terms and because of its sub-heading) and then only that part of the security deposit which concerns the restaurant. In the Court's judgment, it would be stretching the remit of this provisions to suggest that it imposed an obligation to commence business operations within that time. The Court agrees that there is no specific provision in the Lease that regulates this matter.



- [110] It follows that there is no express date by which the Claimant would be obliged to commence the payment of the relevant rental calculated at 12.5% of the gross receipt of sales. This is unfortunate, because given the fact that the payment of the rental and security for the upstairs portion of the Premises (the restaurant) depended on profits generated by that enterprise, it is obvious that this would be critical to the business efficacy of the Parties' agreement.
- [111] In construing the Lease, this Court has to have regard to the commercial purpose of the agreement. Although the Lease does not expressly fix any time for the commencement of this contractual obligation. This Court must imply that it would have to commence within a reasonable time. The delay in performance in the case at bar is some 15 months. Prima facie, this could not be characterized as reasonable.
- [112] However, it is clear that in assessing reasonableness that the whole circumstances of the case must be weighed. In **Hick v Raymond & Reid. [1893] AC. 22 at 32**, Lord Watson made the following sage observation:
- “When the language of a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time. The rule is of general application, and is not confined to contracts for the carriage of goods by sea. **In the case of other contracts the condition of reasonable time has been frequently interpreted; and has invariably been held to mean that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably.**” Emphasis added
- [113] It follows that the Court must consider whether what can only be described as a protracted delay in commencing operations which would facilitate the fulfilment of the primary obligation of paying the relevant rental and security deposit was reasonable, negligent or otherwise attributable to causes beyond the control of the Claimant. In that regard, the Court has noted the Claimant's argument that Defendant was fixed with obligations which it did not discharge, which obligations clearly had to be completed before the Premises were opened.

- [114] The Defendant maintains that whilst some renovations were agreed, the Premises were fit and ready for the agreed user prior to and at the time of entering into the Lease and so it denied that the renovations agreed upon were necessary to make the Premises fit for the agreed user. Instead, the Defendant maintains that the renovations requested by the Claimant were only facilitated to accommodate the aesthetic preferences of the Claimant's principal, Mr. Eddy and that the Premises had previously been occupied and used by another tenant as a restaurant before he took possession with the contention that the previous tenancy was not functional, short-lived and unsuccessful.
- [115] In the Court's judgment, the Defendant's arguments were implausible or not maintainable. Whether the condition of the Property may or may not have been acceptable to the previous tenant is frankly irrelevant. There can be no doubt that the Parties understood that the leasehold improvements were absolutely critical to the agreed user. It is in the Court's view incongruous for the Defendant to maintain this argument while at the same time advancing that the Claimant was in breach by failing and/or refusing to remove the obstructions from the upper floor to facilitate works, by failing to effect the Claimant's side of renovations and decorative works for the upper floor and in failing to operate the upstairs restaurant/club within a reasonable time or at all.
- [116] The Defendant argued that if the Claimant honoured the terms of the Lease and cleared the upper floor from the clutter and excessive storage, which prevented the Defendant from having unobstructed access, the Defendant's renovations could have been completed as early as February 2014. The Defendant asserts that the Parties were in discussions for months about the need to clear the space in order to do the measurement and assessment process for commencement of works. Eventually, the Defendant began documenting their position in June 2014 when those discussions went nowhere. Even when the Defendant provided the Claimant with written notice to clear the upper floor on 8 June 2014, some 3 months later the Claimant still did not clear the upper floor or even permit the Defendant to do so on its behalf.
- [117] Having considered the evidence and the submissions advanced by Counsel, the Court is satisfied that both Parties must share some of the blame for the protracted delay. Despite its objection to the incorporation of the Second Schedule to the Lease, that the Defendant had substantial obligations to renovate the restaurant pursuant to Schedule 2. By its own argument, these works would have had to have been completed within 3 months of the execution of the Lease or by February 2014. It

is nevertheless clear from the evidence that the Defendant would not have been ready to undertake the works prior to June 2014, and did not obtain the tiles before the end of August 2014.

- [118] The Court agrees with the Claimant that following the execution of the Lease and the entry into possession that it was perfectly entitled to store its furniture and other belongings within the Premises. Certainly it has been permitted to do so by the Defendant. The Defendant has suggestion that the presence of the furniture impeded the commencement of works and that this was communicated to the Claimant. In the normal course, the Parties' implied obligation to cooperate would have necessitated some discussions to achieve a practical resolution and there appears to be some attempt at this in the Claimant's letter to the Defendant on 2 September 2014 *which indicated that 'removing all of the contents is not an option for me as it took a lot of man power expense and machinery to get everything up there.... As furniture and Equipment are here now I ask that we come to a mutual agreement to get the said work done. I am willing to clear half of the room while the other half is being tiled. Once one side is tiled shift everything to the other side and finish tiling.'* The letter continued with a list of work items that were requested and complained about the lack of communication about the tiles, bar design and about the Defendant allegedly entering and leaving lights on without notice and leaving doors unlocked.
- [119] Without indicating its approval of this proposal, the Defendant says that it entered into the Premises on the next day with the apparent intention of commencing works only to find that the site had not been cleared. Nevertheless, on that same day, the Defendant wrote to the Claimant indicating that its suggestion had been rejected by the Defendant's contractor with no indication of the rationale. Indeed, it was only during the trial that Mr. Crabbe would have proffered the most unconvincing suggestion that this would cause the Claimant's furniture to be covered in dust.
- [120] What followed is the Claimant continuing to urge some amicable resolution until the Defendant precipitously terminated all further discussions and issued a Notice to Quit. In these premises, the Court cannot be satisfied that the Claimant's failure to fulfil its primary obligation of paying the relevant rental and security deposit was entirely unreasonable.

[121] For the avoidance of doubt, the Court further finds that even if the Defendant's case could have been made out, the only recovery available to the Defendant, would be for its share of the projected profits generated which was to serve as the security deposit and rent. Given the clear terms of the Lease, there could be no basis upon which it could be suggested that liability could extend to heads of damage claimed for lost rental income from the restaurant<sup>25</sup>, marina and hotel, for the loss of marina traffic arising from the diminishing of the Defendant's property value due to the deplorable conditions emanating from the Claimant's conduct and loss of its contractual opportunity with prospective customers including hotel, marina guests, Federal Express and other special event opportunities.

### **DID THE DEFENDANT IN ANY EVENT WAIVE THE PURPORTED BREACHES?**

[122] Counsel for the Claimant has submitted that in any event the Defendant's counterclaim cannot be maintained because the Defendant's continued acceptance of the rent from the beginning of the term of the Lease through to 6 January 2015, a date beyond the date on which it excluded the Claimant from the Premises, constituted a waiver of a right to forfeit in respect of any putative breach. The Claimant relied on the judgment of Slaughter LJ in **Greenwich v Discreet Selling Estates**<sup>26</sup> and section 55 (3) of the Registered Land Act in support of its contention that acceptance of rent as well as other aspects of the Defendant's conduct constituted a waiver to the extent that such conduct was inconsistent with the idea of the Defendant's right to forfeit. Counsel argued that the proposed buyouts which are an example of a well-established ground for finding that a waiver has taken place. See: **Bader Properties v Linley Property Investments (1968) 19 P&CR 620**. Counsel also pointed to the Parties' later agreement to mediate, which was extant when the Claimant was excluded from the Premises, would also constitute a waiver of the Defendant's right to forfeit for any alleged breach. See: **Church Commissioners v Nodjoumi (1986) 51 P&CR 155**.

---

<sup>25</sup> Reichman v Beveridge [2007] 1 P&CR 358 per Lloyd LJ "There is, however, no case in English law that shows that a landlord can recover damages from a former tenant in respect of loss of future rent after termination, and there is at least one case which decides that he cannot. In those circumstances, either damages are not an adequate remedy for the landlord, or at least the landlord would be acting reasonably in taking the view that he should not terminate the lease because he may well not be able to recover such damages."

<sup>26</sup> (1991) 61 P. & C.R. 405 at 409

- [123] Finally, Counsel for the Claimant argued that the presentation of the purported notice to quit on 27 January 2015, after the Claimant had been excluded from the Premises is completely fatal to any alleged right to forfeit that existed at the time of the Claimant's exclusion. See: **Marche v Christodoulakis** (1948) 64 TLR 466.
- [124] The Defendant trenchantly defended these contentions and maintained that they are not made out on the facts. First, Counsel for the Defendant submitted that **David Blackstone Ltd v Burnetts (West End) Ltd** is distinguished from the facts of this case and from **Greenwich v Discreet Selling Estates**. In **David Blackstone Ltd v Burnetts (West End) Ltd**, the landlord was forfeiting for the breach of a covenant not to sublet without consent, which is treated as a 'once and for all' breach a point recognised at p.1493H of the judgment consequently once the landlord had knowledge of that breach which was incapable of remedy – so it created an immediate right to forfeit, so demanding rent thereafter waived the right of forfeiture.
- [125] Counsel pointed to the discussion in **Greenwich v Discreet Selling Estates** which Neill LJ at page 413 addressed the English equivalent to the Registered Land Ordinance (s.55 the forfeiture provisions) and the s.146 English equivalent to the Registered Land Ordinance s.56 (notice before forfeiture provision). Counsel argued that issuing a notice to remedy breaches is actually a statutory pre-requisite to exercising the right to forfeit and the issuing of such a notice does not amount to a waiver, particularly in cases of continuous breaches.
- [126] Counsel further noted the following principle explained in **Greenwich v Discreet Selling Estates** at p.412 last 2 paragraphs to p.413 that;
- “...it would be grafting a bad exception to state that ‘acceptance of rent necessarily and in all circumstances amounts to a waiver of forfeiture. But Mr. Colyer submits that the true doctrine is this. All that is waived is the right to forfeit and not the breach. In the case of a continuing breach, he submits that the right to forfeit arises afresh on the very next day, and can then be exercised. That may well be the right analysis. It seems to me that a notice under section 146 asserts not only that the tenant is presently in breach but also that he will continue to be in breach unless and until he carries out the repair required...In those circumstances I see no practical need for any fresh notice if a landlord wishes to rely on that continuing breach as a ground of forfeiture in the future, and no legal reason why a fresh notice should be required in respect of the same defects.’ **[Emphasis added]**.”

- [127] Consequently, in **Greenwich** the court found that as the breach of the covenant to keep the premises in a state of repairs was a continuing breach, the fact that the landlord accepted rent after it issued a notice to remedy the breach did not amount to a waiver of the right to forfeit. *‘All that was waived by the acceptance of rent was the right to forfeit not the breach and in the case of a continuing breach a right of forfeiture arose fresh each day.’*
- [128] Counsel argued that on the facts of this case, the nature of the breaches outlined by the Defendant’s notices of 6 June 2014 and 2 December 2014 were continuing breaches, not ‘once and for all’ breaches incapable of remedy. Consequently, on an application of the principle in **Greenwich v Discreet Selling Estates** to the facts of this case, the Defendant was entitled to rely on the matters set out in the notices of 6 June 2014 and 2 December 2014 once the listed breaches remained unremedied when the notice to quit was ultimately issued on 27 January 2015.
- [129] Therefore, the acceptance of rent meant that the Defendant could not rely on any ‘once and for all’ breach occurring before rent was accepted, but if the breaches were continuing breaches they would be renewed and actionable for each day that they remained unresolved. So it is maintained that this case is distinguished from the facts of **David Blackstone Ltd v Burnetts (West End) Ltd** because the breaches of the failure to open the operations for which the premises were let, the failure to keep the premises in a tidy state of good repair, the failure to pay electrical utilities, failure to maintain the pool, and in continuing to keep the premises in a manner which created obstructions and nuisance to the lessor and other occupants were continuing breaches which continued to arise after the Claimant’s last rental payment of 6 January 2015. Therefore, the acceptance of that payment did not amount to a waiver.
- [130] Thirdly, Counsel submitted that while it is correct that a Notice to Quit was initially issued on 12 September 2014, as early as 14 October 2014 the Defendant through its attorney at the time indicated its willingness to resolve the parties’ disputes without legal proceedings. Ultimately, the September 2014 Notice to Quit was officially retracted and replaced with a new request for rectification of breaches via the Defendant’s letter of 2 December 2014. Whilst this letter did include a buy-out offer, it made it clear that the Defendant was not waiving its right to enforce the breaches

listed in the letter. In fact, requests for rectification of breaches were an implicit aspect of the Defendant's offers.

[131] Moreover, Counsel argued that this offer came before and not after a new Notice to Quit was issued on 27 January 2015. At that point on 2 December 2014 the Defendant did not elect to treat the contract as terminated, but decided to give the Claimant a further opportunity to rectify breaches and either continue relations or move towards a buy-out position. Applying the principle in **Church Commissioners for England v Nordjoui and Others**, Counsel submitted that there was no issue of waiver at that point. Additionally, there is nothing in the **Church Commissioners for England** case to support the Claimant's contention that the parties' agreement to mediate constituted a waiver.

[132] Fourthly, as to whether the Defendant's re-entry of the upper floor on 3 to 4 January 2015 destroyed any alleged right to forfeit that existed at the time, Counsel for the Defendant submitted that there is nothing in the dicta in **Marche v Christodoulakis** to support of the contention that the re-entry destroyed any right of forfeiture.

[133] In his witness statement, Mr. Crabbe made plain that the Company exercised its right of re-entry pursuant to clauses 4 (iv) (*sic* 5 (iv)) and 8 (2) of the Lease. On cross examination Mr. Crabbe articulated his own view on the re-entry because he treated the upper floor differently from the lower floor of the Demised Premises. As the Defendant's principal saw it, re-entry of the upstairs was a necessary step pursuant to clause 5 (iv) in mitigating losses arising from the Claimant's actions of refusing to remove its furnishings and goods from the upstairs to facilitate renovations, because he saw the upstairs as a shared space, as distinct from the lower floor which was paid for and exclusively occupied by the Claimant. Whilst Mr. Crabbe for the Defendant agreed, when asked on cross examination that there was only one lease in respect of the upstairs and lower floor portion of the Demised Premises, to the Defendant the two areas of the Demised Premises were treated differently (as seen in clause 2 of the lease), so to him it was a two-stage process.

[134] Counsel for the Defendant argued that as there was no legal re-entry to the downstairs, the 27 January 2015 Notice to Quit initiated the forfeiture process for the lower floor only. The Defendant denies that the re-entry of the upstairs, (which was permissible under the terms of the lease both for the purpose of completing works (clause 5 (iv)) and for forfeiture (clause 8 (2))) had the effect of

preventing the Defendant from exercising any further acts of forfeiture. Instead, as stated in paragraph 98 above, the position of Mr. Crabbe on cross examination was that it was the court's judgment in February 2015 granting the Defendant possession of the lower floor which effectively ended the parties' relationship and completed the forfeiture process.

- [135] The Defendant relied on the judgment in **Sinty Stemp, Tiffany Stemp v Ladbroke Gardens Management Limited [2018] UKUT 375 (LC)** where at paragraph 82, the court recognized that if a landlord needed to take steps to re-enter in order to complete works under the terms of that lease, such actions whilst there was a right of forfeiture did not amount to a waiver.

### **COURT'S ANALYSIS AND CONCLUSION**

- [136] For the reasons indicated herein, this Court does not accept the Defendant's attempt to redraft the terms of its bargain to suit its narrative. The Court maintains that although, the subject matter of the lease is made up of multiple areas together they form the demised Premises. The Court further finds that although the Parties had agreed to share the profits earned from the operation of the upstairs restaurant, it is clear that a portion of these profits was to serve as the rental payment for the upstairs or restaurant portion. It follows the Parties bargain was essentially a lease agreement by which the Claimant would have had exclusive possession of the demised Premises.

- [137] Throughout its legal submissions, the Defendant has advanced that the relationship between the Parties was something more than that of lessor and lessee— something perhaps akin to a joint venture partnership. However, the express provisions of the Parties' agreement belie this. Clause 18 (1) of the Lease is unusual clause to be sure but it makes the position plain. It provides that:

*"Relationship between the Parties*

Nothing contained in this Lease shall create any relationship between the Parties hereto other than that of Lessor and Lessee."

- [138] Having considered the totality of the evidence before the Court and having observed the witnesses during their oral testimony, this Court also has no reservation in rejecting Mr. Crabbe's evidence at trial that entry into upstairs portion of the Premises without the knowledge, approval or consent of



the Claimant and the removal of the Claimant's belongings to a storage facility was not done for the purpose excluding the Claimant from that area of the Premises but was only done for the purpose of enabling works to take place (which works were in any event, on Mr. Crabbe's evidence, not completed in accordance with Schedule 2). The fact that the notice to quit of 27 January 2015 is expressed to apply only to the downstairs area simply reinforces the Court's view that the Defendant clearly intended that the Claimant should be ejected from the upstairs part Premises without any notice because it wrongly concluded that it did not form part of the demised Premises.

- [139] Turning to the question at hand, it is accepted that a common defence to claims for forfeiture of a lease is that the landlord has waived his/her right to forfeit by acting in a way that implies that the lease continues. The law on waiver of forfeiture can be summarised in the words of Buckley L.J. in **Central Estates (Belgravia) v Woolgar (No. 2)**<sup>27</sup>:

"If the landlord by word or deed manifests to the tenant by an unequivocal act a concluded decision to elect in a particular manner, he will be bound by such an election. If he chooses to do something such as demanding or receiving rent which can only be done consistently with the existence of a certain state of affairs, viz. the continued existence of the lease or tenancy in operation, he cannot thereafter be heard to say that that state of affairs did not then exist".

- [140] It follows that where a lessor discovers a lessee's breach of covenant – for example, a failure to pay the rent – a landlord has a choice. He/she can decide either to forfeit (terminate) the lease or treat the lease as continuing notwithstanding the breach, in which case he waives his right to forfeit. This is known as "the doctrine of election." The purpose of this doctrine is that it enables the parties to a lease to know where they stand following a breach.

- [141] However, waiving the right to forfeit is not tantamount to waiving a breach of covenant full stop. Rather, it simply means that forfeiture is removed from the list of available remedies. The lessor may still issue a money claim or injunction application. It follows that in the case at bar, in the event that a breach of covenant could be made out on a balance of probabilities that the Defendant could have pursued its claim in damages. In the case at bar, save for the claim for nonpayment of utility bills, this Court is not satisfied that the Defendant has made out its case on a balance of probabilities.

---

<sup>27</sup> [1972] 1 W.L.R. 1048, 1054

[142] In so far as the remedy of forfeiture is concerned, this Court is satisfied that the acceptance of rent which fell due after the date on which the right to forfeit arose will waive the right to forfeit for any breach of which the landlord was aware on the date on which the rent fell due. Receipt of rent “without prejudice” or under protest will still amount to a waiver. In **George Henry Davenport v Her Majesty the Queen, 1878 (3) AC 115**, a lease of Crown Lands for eight years having been granted by the respondent under 31 Vict. No. 46 subject to the terms and conditions contained in the Agricultural Reserves Act of 1863 and the Leasing Act of 1866, the lessee failed to perform his covenant to cultivate one-sixth of the said lands within a year from the allotment thereof. Rent, however, for the whole term of year was subsequently received by the Government, the latest being in 1873 with full knowledge of the above breach of covenant, but after notification in the Gazettes of 1869, 1870 and 1871, that the same would be received conditionally and without prejudice to the rights of the Government. Thereafter, the Government brought a suit in ejectment on the ground that a forfeiture had accrued. After quoting the case of House of Lords in **Croft v Lumley, 1858 (6) HLC 672** the Privy Council observed thus-

“Without finding it necessary to invoke this opinion to its full extent in the present case, it is enough for their Lordships to say that where money is paid and received a rent under a lease, a mere protest that it is accepted conditionally and without prejudice to the right to insist upon a prior forfeiture, cannot contravene the fact of such receipt.”

[143] The Privy Council took the view that "assuming a forfeiture had accrued, it was waived by the receipt of rent, notwithstanding the conditional acceptance."<sup>28</sup>

[144] In the case at bar, the non-payment of utilities, unauthorized alterations to the Premises, the purported failure to remove its belongings to facilitate work and the failure to commence operations by a specified date<sup>29</sup> as well as the purported refusal to allow a landlord to inspect a property<sup>30</sup> are all one time breaches, waiver of which would prevent the Defendant from forfeiting for that breach.

[145] While the court accepts that in the case of a continuing breach (such as failure to repair) the breach arises afresh each day and will survive an act of waiver, it is also true that acceptance of rent which fell due after the date on which the right to forfeit arose, will waive the right to forfeit for any breach

---

<sup>28</sup> See also -- *Windmill Investments (London) v Milano Restaurants* [1962] 2 Q.B. 373; *Central Estates (Belgravia) v Woolgar* (No.2); *Croft v Lumley* (1858) 6 H.L. Cas. 672

<sup>29</sup> *Stephens v. Junior Army and Navy Stores Ltd* [1914] 2 Ch. 516)

<sup>30</sup> *Iperion Investments Corporation v Broadwalk House Residents* [1992] 2 E.G.L.R. 235

of which the landlord was aware on the date on which the rent fell due. This is consistent with the statutory provisions set out in section 55 (3) which provides that;

“The right of forfeiture shall be taken to have been waived if—

- (a) the lessor accepts rent which has become due since the breach of agreement or condition which entitled the lessor to forfeit the lease or has by any other positive act shown an intention to treat the lease as subsisting; and
- (b) the lessor is, or should by reasonable diligence have become, aware of the commission of the breach:

Provided that the acceptance of rent after the lessor has commenced an action in the court under subsection (2) of this section shall not operate as a waiver.”

[146] In the case the Court accepts that the purported breaches would have been well within the knowledge of the Defendant and that its continued acceptance of the rent from the beginning of the term of the Lease through to 6 January 2015, a date beyond the date on which it excluded the Claimant from the Premises, certainly would have constituted a waiver of a right to forfeit in respect of any putative breach. The Court further finds that service of the fresh notice to quit on the 27 January 2015 would also amount to waiver of a right to forfeit, since it effectively recognised that there is an interest to be terminated by that method: **Marche v Christodoulakis (1948) 64 T.L.R. 466**. The Court is equally persuaded that the 2 December 2014, offer to buy the tenant’s interest recognises the continuing existence of the lease and would amount to a waiver.<sup>31</sup>

### **Costs of storage fees**

[147] For completeness the Court finds that the Defendant is not entitled to recover the cost incurred in wrongly removing the Claimant’s goods and storing the same in containers without its knowledge consent or approval. In any event, although the Defendant has been able to produce invoices for the cost of storage and transportation, having considered the oral testimony of the Defendant’s witnesses, the Court has no doubt the invoices have been rendered only for the purpose of the proceedings and do not reflect an authentic liability of the Defendant. Certainly, there is no evidence

---

<sup>31</sup> Bader Properties v Linley Property Investments (1968) 19 P. & C. R. 620

that those invoices were ever in fact paid (and indeed they do not appear to have been because the invoices are for headline cumulative amounts and do not reflect any monthly payment).

## THE DEFENDANT'S ALLEGED BREACHES

- [148] First, the Court notes the Claimant contends that the Defendant breached the Lease by disconnecting the electricity supply. However, in written submissions, Counsel for the Claimant has submitted that this aspect of the claim can at this stage be disregarded and so the Court will not address its mind to that aspect of the claim.
- [149] The critical issue to be determined is whether the Defendant was entitled to terminate the Lease and re-enter the Premises. It is clear that the Defendant exercised its right of forfeiture in January of 2015. The Defendant's position is that it was justified in entering the Premises as the portion of the property which was entered into by the Defendant was not part of the Premises for which the Claimant paid rent. The Defendant contends that the re-entry was in respect to the upper floor which was subject to a joint venture income sharing arrangement under the Lease.
- [150] For the reasons already indicated, the Court does not accept this. When called upon to construe contractual provisions, it is well established that the starting point for a court is to identify the intention of the contracting parties. This is an objective test; the court is concerned to identify the intention of the parties by reference to "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean*".<sup>32</sup> In ascertaining the objective meaning of a contractual provision, the courts will look to both the language of the clause and the commercial context in which it was drafted.<sup>33</sup>
- [151] The following considerations are relevant to a court's analysis: [i] The natural and ordinary meaning of the clause. The courts "do not easily accept that people have made linguistic mistakes, particularly in formal documents".<sup>34</sup> However, the worse the drafting of a particular clause, the more readily a

---

<sup>32</sup> *per* Lord Hoffman in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 at paragraph 14

<sup>33</sup> *Wood v Capita Insurance Services Limited* [2017] UKSC 24

<sup>34</sup> *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 W.L.R. 896 at page 913

court will depart from its natural meaning;<sup>35</sup> [2] any other relevant provisions of the contract; [3] the overall purpose of the clause and the contract; [4] the facts and circumstances known or assumed by the parties at the time the contract was executed; [5] commercial common sense.

[152] When the Court has regard to the plain wording of the Lease, it is clear that the subject matter of the demise includes what has been described as “main restaurant (upstairs)” measuring 2719 square feet and that the apportioned security deposit for the same was agreed at US \$4250.00.<sup>36</sup> It is further clear that this portion of the premises attracted an ascertainable rental calculated at 10% of the gross receipt of sale once the security deposit had been paid. It follows that if the Defendant wished to exercise the right of forfeiture and reenter the Premises, it would have to ensure that it was lawfully entitled to do so under clause 8 of the Lease or pursuant to the relevant statutory provisions under the Registered Land Ordinance.

[153] The Defendant has framed its amended defence<sup>37</sup> in the following terms:

“The Defendant maintains that it was not in breach of paragraph 8 of the Lease, which had two provisions for termination: 8 (a) by 6 month notice by either party; of 8(b) by breach of the terms of the lease or the matter as specified by subparagraph b giving rise to a right to “forthwith terminate this Lease shall be absolutely determined...” The Defendant had already issued a Notice to Quit with an expressed intention to reenter on 12<sup>th</sup> September 2014, but the Defendant withdrew the proceedings issued by the Defendant on 8 October 2014 as the parties entered into negotiations for the Claimant to either open and operate the restaurants or for a buy-out. However, by email of 19 December 2014 the Claimant expressly refused to entertain opening and operating the restaurants and repudiated the Lease and refused to vacate 20 December 2014 or provide any alternative timeframe for vacating. Due to the Claimant’s repudiating, by email of the same date the Defendant expressly reserved its right to proceed with reentry.”

[154] Given the relevant case law, this Court has some concern about the way in which the defence has been framed as it appears to conflate the common law right of repudiation with the right of forfeiture which appears at clause 8 of the Lease.

---

<sup>35</sup> *per* Lord Neuberger in *Arnold v Britton* [2015] UKSC 36, paragraph 18

<sup>36</sup> See clauses 1 ad 4 (1) of the Lease

<sup>37</sup> Paragraph 20.3

[155] In the past there has been case law which has seriously doubted whether a lease could be terminated for repudiatory breach. In **Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd** [1972] 1 QB 318 the English Court of Appeal supported the view that it was not possible. At page 324 of the judgment, Lord Denning MR observed:

“A lease is a demise. It conveys an interest in land. It does not come to an end like an ordinary contract on repudiation and acceptance”.

[156] The rationale for this view is that a lease is not simply a contractual agreement between parties – it also creates an interest in land – and so if the doctrine of repudiatory breach applies to leases it must presumably operate so as to terminate both a contract and a legal estate in land. Leases have therefore been described as ‘a hybrid, part contract, part property’<sup>38</sup>, the legal estate taking on an ‘existence as a species of property independently of the contract’.<sup>39</sup> Leases, unlike other contracts, have a complex method by which they can be terminated for breach, which is heavily regulated by statute – that process is termed forfeiture.

[157] However, in recent years there has been a something of a trend within the English courts to reconsider the issue as to whether a lease could be terminated for repudiatory breach. In **Hussein v Mehlman**<sup>40</sup>, Stephen Sedley QC (as he then was) considered that the doctrine of repudiation did apply to a tenancy. He considered that the House of Lords decision in **National Freight Carriers v Panalpina**<sup>41</sup> showed that leases could be terminated by frustration, and that the House of Lords’ decision in **United Scientific Holdings Ltd v Burnley Borough Council**<sup>42</sup> showed that the law of landlord and tenant was, essentially, the law of contract, with certain special requirements.

[158] Most recently in **Grange v Quinn**<sup>43</sup> Jackson LJ stated without considering any argument, that:

“...although there were earlier indications to the contrary, it is now clear that a lease may be brought to an end by repudiation and acceptance: see Woodfall. In the present case the defendant’s conduct in unlawfully and permanently evicting the claimant was a repudiation which necessarily brought the lease to an end without any need for acceptance.”

---

<sup>38</sup> Linden Gardens Trust Ltd v Lenester Sludge Disposals Ltd [1994] 1 AC 85 at 108 per Lord Browne-Wilkinson

<sup>39</sup> City of London Corp’n v Fell [1993] QB 589 per Nourse LJ at 604

<sup>40</sup> [1992] 2 EGLR 287

<sup>41</sup> [1981] AC 675

<sup>42</sup> [1978] AC 904

<sup>43</sup> [2013] 1 P & CR 18

[159] These cases left the **Total Oil** unsupportable in law as a matter of principle, freeing courts to consider it impliedly overruled.

[160] However, the question remains as to whether relying on the doctrine of repudiation would allow the landlord to get around the complex and comprehensive statutory protection imposed on forfeiture? The Court has considered and applied the judgment in **Hussein v Mehman** where Sedley LJ observed:

‘I recognise that the proposition that a contract of tenancy can be repudiated like any other contract has a number of important implications, which it is not appropriate to explore on the facts of this case. For example, if the obligation to pay rent is as fundamental as the obligation to keep the house habitable, it will follow that a default in rent payments is a repudiatory act on the tenant’s part...[This] will, however, have effect subject not only to all the statutory provisions which now hedge the right to recover possession but also, I would think, to the provisions contained in the contract of letting itself in relation to forfeiture (where there is a term certain): in other words the right to terminate by acceptance of repudiatory conduct may itself be modified by further contractual provisions which lay down conditions, supported by statute, for the exercise of the right’.

[161] Having reviewed the authorities, this Court is satisfied that a lessor should not be permitted to use repudiatory breach to get round the statutory protection imposed on forfeiture. This position was supported by the courts in **Bashir v Commissioner of Lands**<sup>44</sup> and more recently the Court of Appeal case **W G Clarke (Properties) Ltd v Dupre Properties Ltd and Abidogun v Frolan Health Care Ltd**<sup>45</sup> in which it was held that the requirement to serve a s.146 notice applies to forfeiture for a tenant’s denial of title:

‘I can well accept the first point in [the appellant’s] argument that relations between a landlord and tenant under his lease, are governed by the ordinary law of contract as well as by the more specific doctrines of landlord and tenant. It does not, however, follow from the interaction of those two parts of the law that the protection for a tenant, as has been provided by Parliament in section 146 can be avoided by recourse to a purely contractual doctrine such as that of repudiatory breach’.

[162] It follows that the provisions of sections 55 – 56 of the Registered Land Ordinance (set out below) would in any event have to be adhered to by the Defendant in the case at bar;

“55.

(1) Subject to the provisions of section 57 of this Act and to any provision to the contrary in the lease, the lessor shall have the right to forfeit the lease if the lessee—

---

<sup>44</sup> [1960] AC 44

<sup>45</sup> [2001] EWCA Civ 1821

- (a) commits any breach of, or omits to perform, any agreement or condition on his part expressed or implied in the lease; or
- (b) is adjudicated bankrupt; or
- (c) being a company, goes into liquidation.

(2) The right of forfeiture may be –

- (a) exercised, where neither the lessee nor any person claiming through or under him is in occupation of the land, by entering upon and remaining in possession of the land; or
- (b) enforced by action in the court.

(3) The right of forfeiture shall be taken to have been waived if –

- (a) the lessor accepts rent which has become due since the breach of agreement or condition which entitled the lessor to forfeit the lease or has by any other positive act shown an intention to treat the lease as subsisting; and
- (b) the lessor is, or should by reasonable diligence have become, aware of the commission of the breach: Provided that the acceptance of rent after the lessor has commenced an action in the court under subsection (2) of this section shall not operate as a waiver.

(4) The forfeiture of a lease shall terminate every sub-lease and every other interest appearing in the register relating to that lease, but –

- (a) where the forfeiture is set aside by the court on the grounds that it was procured by the lessor in fraud of the sub-lessee; or
- (b) where the court grants relief against the forfeiture under section 57 of this Act, every such sub-lease and other interest shall be deemed not to have terminated.

56. Notwithstanding anything to the contrary contained in the lease, no lessor shall be entitled to exercise the right of forfeiture for the breach of any agreement or condition in the lease, whether expressed or implied, until the lessor has served on the lessee a notice—

- (a) specifying the particular breach complained of; and
- (b) if the breach is capable of remedy, requiring the lessee to remedy the breach within such reasonable period as is specified in the notice; and



- (c) in any case other than non-payment of rent, requiring the lessee to make compensation in money for the breach, and the lessee has failed to remedy the breach within a reasonable time thereafter, if it is capable of remedy, and to make reasonable compensation in money.

[163] What is however clear is that repudiation of a contract takes place where one party to a contract, whether by his words or conduct, communicates to the other party to the contract that he no longer intends to be bound by the contract, usually by committing a major breach of a significant contractual obligation. Not every breach of a contract will amount to a repudiatory breach. Case law makes it plain that the breach must be one which, by its nature, communicates an intention no longer to be bound by the contract. Where, as in the case of a lease, there is a failure to perform one of many obligations, this will often present a difficulty because the court has to look to the significance of the term breached and the enormity of the breach in order to decide whether or not the effect of the breach is sufficient to repudiate the contract as a whole.<sup>46</sup> The purported breach must therefore be of a condition of the lease.

[164] In the case at bar the Defendant's pleadings clearly set out the basis upon which it purported to treat the Lease as terminated. At paragraph 20.3 of its amended defence, reliance is placed on the email of 19 December 2014 in which the Defendant says the Claimant expressly refused to entertain opening and operating the restaurants and repudiated the Lease and refused to vacate. Given that the Defendant places such a premium on this issue, it is surprising that the Parties made no express provision which expressly mandates a date by which the purported "opening and operating (of the) restaurants" was to occur. Consequently, it is equally surprising that the Defendant would seek to rely on this purported failure as evidence of repudiation.

[165] For the reasons already indicated, the Court did not find the Defendant's attempt to stretch the bounds of clause 4 (2) (ii) of the Lease to fit its narrative to be particularly persuasive. Moreover, even if the Court were to find that the 3 month period for opening amounted to a reasonable period

---

<sup>46</sup> Federal Commerce and Navigation Co Ltd v Molena Alpha Inc [1979] AC 757, HL; Woodar Investment Development Ltd v Wimpey Construction (UK) Ltd [1980] 1 WLR 277, HL

for performance and thus is a condition of the Lease, for the reasons already indicated, the Court is not satisfied that the protracted delay in commencing operations which would facilitate the fulfilment of the primary obligation of paying the relevant rental and security deposit was unreasonable given that it was partially attributable to the fact that the Defendant's obligations [which clearly had to be completed before the Premises were opened] under the Lease were unfulfilled.

[166] In any event, it is clear to the Court that as at 12 September 2014, the Defendant determined that the Claimant's failure to commence operation amounted to a repudiation of the Lease which entitled the Defendant to terminate the Lease by Notice to Quit. This was later recalled or cancelled in its correspondence of 2 December 2014 which essentially affirmed the Lease contract.

[167] There is now settled precedent which prescribes that where a repudiatory breach is alleged, the 'innocent' party may seek to have the contract performed, and the breach rectified, or may accept the repudiation and treat the contract as at an end. The innocent party's choice is unfettered, however, he cannot change his mind once he elects to accept a repudiation or affirm the contract<sup>2</sup>. In **Payman v Lanjani**<sup>47</sup>, the English Court of Appeal relied on the following dictum from **Clough v London and North Western Ry Co**<sup>48</sup> where the Court of Exchequer Chamber had to consider the effect of a contract which had been induced by fraud. Mellor J, in delivering the judgment of the court, written by Blackburn J, said (LR 7 Exch 26 at 34, [1861–73] ALL ER Rep 646 at 651):

“And we further agree that the contract continues valid till the party defrauded has determined his election by avoiding it. And, as is stated in Com. Dig. Election, C.2, if a man once determines his election it shall be determined forever; and, as is also stated in Com. Dig. Election, C.1, the determination of a man's election shall be made by express words or by act. And, consequently, we agree with what seems to be the opinion of all the judges below, that if it can be shewn that the London Pianoforte Company have at any time after knowledge of the fraud, either by express words or by unequivocal acts, affirmed the contract, their election has been determined forever. But we differ from them in this, that we think the party defrauded may keep the question open so long as he does nothing to affirm the contract. The principle is precisely the same as that on which it is held that the landlord may elect to avoid a lease and bring ejectment, when his tenant has committed a forfeiture. If with knowledge of the forfeiture, by the receipt of rent or other unequivocal act, he shews his intention to treat the lease as subsisting, he has determined his election for ever, and can no longer avoid the lease. On the other hand, if by bringing ejectment he unequivocally shews his intention to treat the lease as void, he has determined his election, and cannot afterwards waive the forfeiture ...”

---

<sup>47</sup> [1985] Ch 457

<sup>48</sup> (1871) LR 7 Exch 26, [1861–73] ALL ER Rep 646

[168] In **China National Foreign Trade Transportation Corp v Evlogia Shipping Co SA of Panama, The Mihalios Xilas** [1979] 2 ALL ER 1044 Lord Scarman said ([1979] 2 ALL ER 1044 at 1058, [1979] 1 WLR 1018 at 1034 –1035:

“The present case is concerned with the process of election. The consequence of the election, if established, is the abandonment, i.e. the waiver, of a right. The principle of the common law is well settled. When a man, faced with two alternative and mutually exclusive courses of action, chooses one and has communicated his choice to the person concerned in such a way as to lead him to believe that he has made his choice, he has completed his election. Lord Blackburn so stated the principle in **Scarf v Jardine (1882) 7 App Cas 345 at 361, [1881– 5] ALL ER Rep 651 at 658** and then added: “... whether he intended it or not, if he has done an unequivocal act ... the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election.”

[169] In the Court’s judgment, by issuing the notice to quit in September 2014, the Defendant would have unequivocally elected to determine the Lease and would be bound by such election. That this was followed by legal proceedings further reinforces that view. It is therefore not open to the Defendant to change its mind. Nevertheless, it is clear that in December 2014, the Defendant did precisely that when it purported to retract the Notice to Quit, propose options which would have the effect of affirming the Lease and then continue to accept rent in January 2015. Counsel for the Claimant has submitted that the Defendant breached the Lease by serving the defective 12 September 2014 Notice to Quit and pursuing an application for injunctive relief that it later withdrew.

[170] The Court does however accept the Claimant’s submission that it was excluded from the Premises in circumstances where the purported repudiatory breach had not been made out and, in the event that it could be made out, in circumstances where the Defendant had clearly waived its right to terminate the Lease in particular by, *inter alia*, its conduct in offering options which included a buyout and in accepting rent payments. The Court further accepts that prior to re-entering the Premises, the Defendant would not have sent any formal notice of its intentions. In fact, it was only by letter dated 27 January 2015 that the Defendant belatedly sought to serve the Claimant with a Notice to Quit, notwithstanding the fact that it had by this stage effectively ejected the Claimant from the Premises and unilaterally removed its belongings and equipment in containers outside of the Premises.

- [171] The Court has no reservation in rejecting Mr. Crabbe's evidence at trial that the ejection of the Claimant from the upstairs portion of the Premises was not done for the purpose excluding the Claimant from that area of the Premises but was only done for the purpose of enabling works to take place (which works were in any event, on Mr. Crabbe's evidence, not completed in accordance with Schedule 2). The fact that the notice to quit of 27 January 2015 is expressed to apply only to the downstairs area simply reinforces the Court's view that the Defendant clearly intended that the Claimant should be ejected from the upstairs part Premises without any notice. In the Court's judgment there is no factual, evidential or legal basis which would support this contention.
- [172] The purported notice to quit of 27 January 2015, the Defendant further sought to identify a number of purported historic breaches of the Lease, none of which had been subject to a required notice under section 56 of the Registered Land Ordinance whilst at the same time maintaining that the Claimant had repudiated the Lease in the letter of 5 December 2014. First, although in that letter the various assertions as to breaches of the Lease were denied, the Claimant then went on to deal with the options which had been presented by the Defendant in its letter of 2 December 2014 and made clear that the proposals at Option 1 were unrealistic given the presentation of the 12 September 2014 notice to quit and the application made for injunctive relief. Instead, the Claimant was prepared to agree to a buyout pursuant to Option 2 at a higher figure than indicated and suggested that the matter might benefit from mediation.
- [173] By no means could this correspondence be construed as evidence of repudiation of the Lease, which could be accepted by the Defendant. The letter itself was a positive response to a proposal that had been made by the Defendant – it is extraordinary, as a matter of basic principle, for a party to suggest that another party breached its agreement by seeking to agree a proposal that the first party had made. The Parties continued to negotiate through December 2014. By 16 December 2014, and contrary to the characterization that the Defendant has sought to advance, it appears that the Parties had (in principle) agreed, to a buyout, with the only matter to be resolved being quantum and the manner in which Emperor would vacate if agreement was reached. As at 19 December 2014 the Claimant maintained its rights, that the Lease had not been terminated but that it wished to discuss a possible buy out at a meeting and it is not in dispute that the parties were to mediate on 23 December 2014 but that in light of a conflict on the part of the mediator (whose firm had drafted the

Lease) that mediation could not take place. While the question of mediation remained a live issue, it is not in dispute that the Defendant continued to accept rent in January 2015, on which basis it is apparent that the Defendant accepted that there had been no repudiatory breach of the Lease or had elected to waive the same.

[174] In any event, the purported assertion that the Claimant had breached the Lease by failing to carry out business at the Premises for a period of 28 days without the Defendant's written consent is clearly misconceived because apart from opening at the Defendant's request for the Poker Run (described as a soft opening), business operations never truly commenced because the necessary renovations were never completed.

[175] In these premises, and given the Court's findings on the issue of waiver, the Court can only conclude that the Defendant's actions in purporting to re-enter the Premises were on any analysis a clear breach of the Lease. The Claimant is entitled to damages by virtue of the Defendant's breach in purporting to accept repudiatory breaches of the Lease which were not made out on a balance of probabilities and effectively terminating the Lease by entering onto the Premises, removing the Claimant's furniture and equipment without complying with the statutory provisions set out in section 56 of the Registered Land Ordinance. The Court further finds that the Defendant did not comply with the termination provisions set out in the Lease, when it issued the Notice to Quit of 27 January 2015.

### **Remedies**

[176] Given its findings the Court must now go on to consider the appropriate relief. The Claimant claims that it is entitled to loss of income from the operation of the business in the amount of US\$314,937.00 for a period of 2 years of operation being profits of US\$14,490.00 for the first year and US\$300,347.00 for the second. It also claims the reimbursement for what is termed wasted expenditure or expenditure thrown away which includes administrative expenditure US\$8,481.05, Equipment US\$25,298.74, fixtures and furniture US\$53,258.51, improvements/building work US\$44,371.76, utilities and rent US\$28,296.28 and Stock US\$2,791.47 - all totaling US\$162,497.81. The Defendant has trenchantly disputed these claims.

[177] In the case of a wrongfully evicted lessee, the Court is of the view that the recovery of damages would be governed by the general rule applicable to all breaches of contract namely, that the party wronged is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. The Court is satisfied that the following general factors will apply on any assessment:<sup>49</sup>

- i. The assessment is governed by the general rule applicable to all breaches of contracts, i.e. the party evicted is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed.
- ii. Compensation will not be confined to the value of the term, but will include all loss naturally resulting. Compensation to the lessee will not be confined to the value of the unexpired term, but will; include all loss naturally resulting from the eviction. So that anticipated profits earned in the operation of a business conducted on leasehold premises may in case of wrongful eviction be taken into account in assessing damages for wrongful eviction. See: **Safforn Limited v Angel Estates Limited ANUHCVP 2012/0045 Corbin v. Thompson (1907), 39 S.C.R. 575.**
- iii. Events which happen between the date of the commission of the wrong and the time of the trial must be taken into account in estimating the loss for which the plaintiff is entitled to compensation and in determining what actually was the value of the contract to him at the date of the breach.
- iv. It is not to be forgotten that any amount of damages awarded is to be paid at once and can be put to profitable use immediately, while the money earned in the operation of the leasehold premises would be available only by fractions and from year to year.
- v. It is obviously impossible to assess the damages with mathematical accuracy but that is not necessary and such impossibility does not relieve the wrongdoer of the necessity of paying damages for his breach of contract. The court may award an amount though it may be to some extent speculative.
- vi. A duty is imposed on the party evicted insofar as is reasonably possible to mitigate his loss.

[178] It is apparent that the Claimant does not seek compensatory damages relative to the value of the unexpired term. Certainly no evidence has been advanced in this regard. Instead, the Claimant seeks damages which represent the anticipated profits which could have been earned in the operation of the business which was intended to be conducted on the Premises. At paragraph 22 of its closing legal submissions, Counsel for the Claimant expressed that in the alternative (i.e. in the

---

<sup>49</sup> Haack v. Martin [1927], 3 D.L.R. 19, S.C.R. 413

event that its claim for lost profits is not accepted) then it maintains that it is entitled to be reimbursed for what is termed wasted expenditure or expenditure thrown away.

### **Claim for loss of profits**

- [179] The fundamental rule of damages, in contract, is *restitutio in integrum*, that is, a money award is ordered that serves to restore a party, whose rights have been violated, to the position that would have been had the contract been performed. This expresses a basic aim of the law of contract, namely, protection of the expectation of the Parties to an agreement. However, where for one reason or another, the claimant is unable to prove what, if any, profit he would have made as a result of the due performance of the contract he may elect either to pursue a claim in restitution for the return of the benefit conferred on the party in breach or pursue a claim for recovery of any expenditure on his part which will be wasted as a result of the breach. An action for recovery of wasted expenditure is generally referred to as an action for recovery of reliance damages.
- [180] The Claimant herein has correctly advanced its claim in the alternative. At paragraph 1 of the Particulars of Loss and Damage and the Schedule of Loss and Damage appended to the amended statement of claim, the Claimant seeks damages in the sum of USD \$314,937.00 to reflect a loss of income (being profits) for two years of the operation of the business, which operation did not take place because of the Defendant's various breaches of the Lease. The methodology described in Mr. Eddy's second witness statement at paragraphs 12 – 16 is said to have its genesis in (a) Mr. Eddy's experience in the restaurant business, including his experience in operating a business at the Pier Park on Tortola; and (b) the Claimant's business plan (the "Business Plan"). A time period of 2 years has been deployed to reflect: (a) the subsisting term of the lease including notice periods; (b) the reality that business would likely have ceased in September 2017 due to the effects of hurricane Irma; and (c) the delays to opening caused by the Defendant's conduct. The Claimant contends that this loss arose naturally from the Defendant's breach, was foreseeable and accordingly is recoverable. see: **The Attorney General of the Virgin Islands v Global Water Associates Limited BVIHCMAP 2016/0007 at paragraph 83 onwards.**

- [181] The Defendant vigorously disputed this claim. It denied that the Claimant suffered any loss of profit by virtue of its actions and further argued that there is no evidence that the Claimant ever earned or was able to attract profits of \$14,490 for the first year of operation or profits of \$300,347 for the second year of operation. Counsel for the Defendant argued that this particularly so when the Claimant failed and or refused to open or operate the restaurant, bar, lounge, side room or club for more than one full year of its tenancy.
- [182] Counsel for the Defendant relied extensively on the case in **Saffron Limited v Angel Estates Limited ANUHCVP 2012/0045** in which the appellant commissioned a fiscal professional - an economist and chartered accountant to perform an analysis and prepare an estimate of projected income that could have been generated up by the completion of the duration of the lease. At paragraph 45 of the judgment, the court at first instance found that the report was based on the assumptions that the operations would have remained as a profitable going concern for the duration of the lease and viewed it as *'speculative and concluded that Saffron had failed to prove its loss.'* However, at paragraph 47 of the judgment the appellate court examined whether the lower court should have made an assessment of the report despite the fact that it was speculative. Having assessed the report and the facts, at paragraph 48 the Court concluded that Saffron could have avoided loss by *'having regard to the available options'* and disallowed the claim.
- [183] Counsel for the Defendant argued that based on the fact that the Claimant had no practical restaurant experience in the Virgin Islands' market at the time having not even been in actual restaurant operation within the territory at the time of termination and there being no raw data as to the viability of the Claimant's operations it is maintained that the report and figures produced based on other BVI businesses with established track records are too speculative and are unfair comparatives for the Claimant's business. The Claimant's business was entirely untested by the fact that it was never actually in operation. Counsel further argued that the Claimant also failed to take reasonable steps to mitigate its loss. It was given the option of either opening or pursuing an orderly termination of relations with a buy-out, but instead the Claimant opted to be dismissive incurring the breaches attached to the buy-out option and refused to surrender possession even when it stated in writing that it was no longer interested in operating a business in accordance with the contracted 'user.'



According to the Defendant these were all viable options for mitigating loss and the Claimant simply opted to take none of the opportunities presented.

[184] The case of **Hawkins v Woodhall and another**<sup>50</sup> concerned a claim for breach of the covenant of a lease in which the lessor brought an action for unpaid rent and the lessee counterclaimed for diminution in value of the lease and loss of profit. In that case there was no permission to file expert evidence on this but the Respondents filed the witness statement of Mr. Robertson, their accountant. It was noted that there were no separate records kept of sales from the company's three shops. Mr. Robertson calculated that the figure to be attributed for gross profit for the premises for the first year of trading was £12,760. In doing this he made certain assumptions about growth of sales in the company's other shops. He applied a percentage of 25% for this. He then assumed that sales remained static in the other company's shops for the next two years and then declined by 20% in the final year as a result of general trading conditions of that time: that is, adverse trading conditions. That resulted in an estimated actual gross profit for the premises of £46,980 for the period June 2001 to March 2005. He then calculated the projected gross profit. He used actual sales and gross profit percentage achieved for the other shops as his starting point and he expressed the view that that was not unreasonable, given the location and size of the premises. He concluded that the estimated loss of gross profit for the period up to 31 March 2005 for the premises is £132,675, the figure appearing in the pleadings.

[185] At paragraph 53 of the judgment after considering the claim for loss of profit Arden LJ of the English Court of Appeal had this to say:

“It was a fundamental assumption of the loss of profits claim that the company could prove the sales that had taken place from the premises but, as I have explained, the company had no separate written records which showed what those sales were. Mr Woodhall was unable to provide this information to Mr Hawkins when under cross-examination. The figures also were based on assumptions as to the percentage growth in the sales of the company. These assumptions had been made by Mr Robertson without explaining the basis. In my judgment this was an inadequate way to prove the loss and the judge was in error in accepting that the claim had been duly proved. There was no adequate basis on which to estimate the actual sales at the premises and there was no investigation of the assumptions which were made for the projected profit that the company would have made if there had been no breach of the repairing obligations. The figures were large. The resultant figure also took no account of the adverse trading conditions in the final year to which Mr Robertson had referred in his

---

<sup>50</sup> [2008] EWCA Civ 932

witness statement. Mr Hawkins did not object to Mr Robertson's evidence going in evidence at the trial on the basis that it was expert evidence; however, he clearly did challenge Mr Robertson's ability to give evidence of the loss of profits. In my judgment the judge failed to give proper weight to his objection. All the relevant information about the loss of profit was in the Respondents' hands. Had there been no objection to the adequacy of the documentation or the evidence about loss of profits the position might have been different, but as it happens Mr Hawkins did make strenuous objection; the Respondents failed to produce an expert's report containing a proper calculation of loss of profit and spelling out all the assumptions that had been made and the reasons why those assumptions were reasonable ones. In my judgment that evidence would have been expert evidence and I thus reject Mr Birks's submission that Mr Robertson gave no expert evidence. That expert evidence was simply not there. In my judgment the judge should have held that there was no proper basis for an award on the basis of loss of profits."

[186] **Hawkins v Woodhall** was considered by the Judicial Committee of the Privy Council in **Brown's Bay Resort Ltd v Pozzoni**<sup>51</sup>. The point of distinction was succinctly expressed at paragraph 15 of the judgment in the following terms:

"In the Board's view, *Hawkins v Woodhall* does not assist BBR. In that case the Court of Appeal of England and Wales rejected a claim for an award of damages based on loss of profits from shop premises where there was no factual evidence to explain how the party's turnover in those premises had been calculated and where the party's accountant in his expert report had failed to justify the basis on which he had made his assumptions to support his estimate of future profits from those premises. By contrast, Mr Pozzoni's evidence, although not vouched by records, was straightforward and was accepted as reliable by the trial judge."

[187] At paragraph 10 of the judgment the Board carefully considered the evidence before the first instance judge which included the witness statement of Mr. Pozzoni listed in which he listed his drawings per month from the business and his business expenditure, which he said were paid out of the earnings from the restaurant in the first season. He also gave evidence in chief, on cross-examination and on re-examination that he earned US\$2,100.00 monthly on average. He accepted on cross-examination that he did not have any records, such as Inland Revenue Department records, to vouch those earnings but explained, as he had done in his witness statement, that his receipts and records, which were in Excel files, were in BBR's control after it changed the locks on his premises in about December 2007.

---

<sup>51</sup> [2016] ALL ER (D) 26

[188] The Board noted that appellant did not ask for further or better particulars of Mr. Pozzoni's statement of claim nor did it seek disclosure of documents or computer files relating to this element of his claim. The first instance judge accepted Mr. Pozzoni's evidence and treated his earnings in the first season as an acceptable measure of his likely earnings in the second season and this decision was upheld by the Eastern Caribbean Court of Appeal which concluded that there was no legal basis for interfering with that finding. A conclusion which found favour with the Board agreed.

[189] In the case of **Saffron Limited v Angel Estates Limited**<sup>52</sup> the appellant commissioned an economist and chartered accountant to perform an analysis and prepare an estimate of projected income that could have been generated up by the completion of the duration of the lease. The court at first instance found that the report was based on the assumptions that the operations would have remained as a profitable going concern for the duration of the lease and viewed it as '*speculative and concluded that Saffron had failed to prove its loss.*' The Court of Appeal determined that Saffron's claim for special damages for loss of profit was unsustainable due to its failure to take reasonable steps to mitigate its loss and dismissed the appeal on that ground. The court considered that the appellant's loss could have been avoided by simply having regard to the available options which included securing alternative premises to operate their business. The court noted that there was no evidence that any attempt was made to secure alternative premises and further that there was no evidence that the premises occupied by Saffron had a distinctive feature which no other premises could provide, or that the ambience could not be duplicated elsewhere.

[190] As a matter of principle, it is accepted that a court may award an amount of damages for loss of profits although it may be to some extent speculative. The fact that the loss of profits may depend upon many speculative factors is simply not a sufficient reason for denying an assessment. Where the claim is not capable of precise calculation, the Court is entitled to make a reasonable assessment.

---

<sup>52</sup> ANUHCVP2012/0045 unreported 1 February 2019 par 14

[191] However, in applying these authorities to the evidence in the case at bar, the Claimant has presented no expert evidence before this Court which addresses this issue. Instead, it commends to the Court a business plan intituled “BVI Yacht Club CEO Shawn Eddy James Young Harbour View Marina Tortola BVI”. The Claimant contents that this plan was prepared in reference to the Claimant’s business at the premises. The Claimant further asserts that this plan was prepared by Excel Solutions, a company in Boston, USA. The plan reveals some level of analysis and at paragraph 13 of his second witness statement, Mr. Eddy explained the methodology applied which he described as a well-known business standard. The business plan indicated as follows:

- i. the net profit for year 1 would be US\$14, 490.00
- ii. the net profit for year 2 would be US\$285,857.00
- iii. the net profit for year 3 would be US\$854,104.00

However, it was clear that Mr. Eddy does not agree that the business would realistically have realised profit at the level contemplated in the plan. He offers this evidence on the basis of his unsubstantiated experience in the restaurant business.

[192] The Court accepts the Defendant’s submission that there is no evidence that the Claimant ever actually earned or was able to attract profits of \$14,490.00 for the first year of operation or profits of \$300,347.00 for the second year of operation. This is particularly so when the Claimant never actually commenced operation of the restaurant, bar, lounge, side room or club at any point in the term. There can be no doubt that this evidence is speculative. However, the Court cannot ignore the Defendant own evidence filed in support of its claim for loss of rental income and diminution in value. At paragraph 13 of the further witness statement of Mr. Dion Crabbe, he asserts that an aggregate of \$1,404,797.97 in restaurant revenue was collectively generated for the upstairs and downstairs restaurants over the 37 months period between December 2016 to December 2019. This equates to \$37,967.51 in reviewed per month even if the 4 months post hurricane months of October 2017 through to December 2017 when the restaurants were closed. In view of this unsubstantiated evidence, it is invidious for the Defendant to suggest that the Claimant projections are entirely unrealistic.

[193] Applying the dictum in **Brown's Bay Resort Ltd v Pozzoni**, the Court is satisfied that any amount awarded would be to some extent speculative. There is however some evidence which can assist in quantifying an appropriate award. In arriving at such award, the Court is of the view that based on the significant delay in the commencement of the operations and the equivocal and the general lack of commitment revealed in the Claimant's correspondence that it is unlikely that business operations would have commenced at the Premises before 2015. The Court has also taken into account that from September 2017 to January 2018 Hurricanes Irma and Maria would have closed off operations in any event. The Court further finds that in the wake of these storms that it is unlikely that the projections would have reached or maintained the projected sums for the final few months of the term. If the court applies the figures advanced by both sides, the Court is satisfied that an amount of \$37,000.00 covering of the unexpired term of 31 months is justified upon the evidence in the record.

### **Mitigation**

[194] In closing legal submissions Counsel for the Defendant sought to argue that the Claimant simply failed to take reasonable steps to mitigate its loss. Counsel pointed out that the history of this matter demonstrates that the Defendant repeatedly pressed the Claimant to commence the restaurant, bar, lounge, club and side room operations for months on end to no avail. He further submitted that the Defendant gave the Claimant options for either opening or pursuing an orderly termination of relations with a buy-out, but the Claimant was dismissive and refused to surrender possession even when it stated in writing that it was no longer interested in operating a business in accordance with the contracted 'user.' According to the Defendant these were all viable options for mitigating loss which Claimant ignored.

[195] The Court has several difficulties with this contention. The principle of mitigation imposes a duty on the plaintiff to take all reasonable steps to mitigate the loss consequent on the breach and debars him from recovering damages which he could thus avoid but has failed, through unreasonable action or inaction, to avoid. Put shortly, the claimant cannot recover for avoidable loss.<sup>53</sup> However, the legal burden in establishing a failure to mitigate lies on the party asserting such a failure. The burden is therefore on the defendant to show that the claimant did not take reasonable steps to mitigate his

---

<sup>53</sup> McGregor on Damages 19<sup>th</sup> Edn., Sweet & Maxwell: London (2014)

losses. The defendant has to establish that the claimant failed to act reasonably. In that regard, there is binding legal precedent<sup>54</sup> which prescribes that if a claimant's entitlement to damages is to be affected by the question of mitigation, this was a matter which was required to be pleaded and examined through admissible evidence. It was not something which regard could be had on a speculative and ad hoc basis.

- [196] In **Geest Plc v Lansiquot**<sup>55</sup> the defendant raised a point on mitigation of loss during the course of an assessment of damages hearing. The assessment proceeded without any pleading and without any evidence beyond the plaintiff's affidavit and oral evidence. Had there been pleadings, it would have been the clear duty of the company to plead in its defence that the claimant had failed to mitigate her damage and to give appropriate particulars sufficient to alert the claimant to the nature of the company's case to enable the claimant to direct her evidence to the real issues of dispute and avoid surprise. No complaint was made by the claimant's counsel when the company's counsel advanced the argument on mitigation and no point was taken in the Court of Appeal or before the Board on the procedure adopted. The Board stated at paragraph 16:

"It should however be clearly understood that if a defendant intends to contend that a plaintiff has failed to act reasonably to mitigate his or her damage, notice of such contention should be clearly given to the plaintiff long enough before the hearing to enable the plaintiff to prepare to meet it. If there are no pleadings, notice should be given by letter."

- [197] Unlike the case of **Saffron Limited v Angel Estates Limited**, the issue of mitigation by way of an alternative location was not raised in the Defendant's pleaded case or in its evidence. Moreover, the duty to mitigate is a duty not to expose a contract breaker or tortfeasor to additional expense by reason of the claimants not doing what they ought reasonably to have done. That principle is qualified for it does not impose an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business.<sup>56</sup> The mitigating actions relied upon by the Defendant are the proposals which it set out in its letter of 2 December 2014. These proposal actually predated its reentry and termination of the Lease and in the Court's judgment could not support its arguments. In circumstances where the Defendant would have unequivocally elected to determine the Lease it would be bound by such election and cannot then advance that the Claimant should have proceeded

---

<sup>54</sup> Calix v The Attorney General [2013] UKPC 15; [2013] 1 WLR 3283 at paragraph 16

<sup>55</sup> [2002] 1 WLR 3111; [2002] UKPC 48

<sup>56</sup> Saffron Limited v Angel Estates Limited per Baptiste JA

to nevertheless continue with the opening and operation of the business (essentially ignoring the fact that the Lease was effectively at an end). Neither could there be any obligation imposed to accept a supposed orderly termination of relations with a buy-out on terms which would not have been agreed. The Claimant's apparent willingness to engage in negotiations to arrive at such terms was in any event roundly ignored when the Defendant would have precipitously moved to reenter the Premises and terminate the Lease.

[198] In the premises and given the way in which the Defendant would have pleaded and advanced its case, the Court is not satisfied that appropriate notice was given of this issue and it is no wonder that the Claimant would have been caught on the back foot such that the matter did not feature in the Claimant written legal submissions.

[199] Given the findings herein the Court does not need to go on to consider the alternative claim for reliance damages and will decline to do so.

### **Damage to Property**

[200] Finally, the Claimant claims in respect of damage caused to three items damaged as the result of the Defendant's faulty storing of the same. Chief among those items is the coffee machine which the Claimant contends was degraded beyond repair in the storage containers. In respect of that item US\$ 35,000 is claimed although the Claimant identified a comparator for sale online for US\$ 21,666 excluding shipping costs and duty. The Claimant also seeks to receive compensation for damage sustained to the Claimant's chandeliers during the moving process as well as the degraded condition of the armchairs in the containers.

[201] As with the other aspects of the claim, the Defendant denies this head of damage and put the Claimant to strict proof of its contention that the Defendant damaged items stored on the Premises, whether at the Premises or in transit to the storage facility when the items were removed from the Premises by the Defendant. Counsel for the Defendant submitted that no proof has been provided by the Claimant to support its allegations because the evidence reflects that items stored by the

Defendant were in water-proof containers and there was no visible signs of water or any damage to the Claimant's goods at the time of return to the Claimant in April 2016.

[202] The Court has had an opportunity to review the written evidence of the witnesses in this case and has also observed them when they were examined under oath. It is clear to this Court that the items in question would have been brought into the Virgin Islands as used items. The age of these items as at the date of importation is however unknown. It is also clear to the Court that the items would have been kept in on the Premises for at least 1 year before they would have been removed and relocated to the Defendant's storage containers. In regard to the chandeliers, their condition at the time of storage is unknown. However, the Court is persuaded by the evidence of Mr. Anthony Daniels that they would have been kept in a sheet on the floor of the Premises in a haphazard fashion and that they would nevertheless have been carefully removed. If there were in fact loose crystals which were gathered in a bag, this Court is not satisfied that this would have been at the instance of the Defendant's action of its servants or agents. Further, the Court has considered the Claimant's scheduled value of this item and finds that the absence of any cogent documentary evidence of the actual value for the chandelier would in any event have presented a grave difficulty for assessment.

[203] The claim in regard to the degraded condition of the armchairs was pursued with little enthusiasm by the Claimant. Although the Claimant presented photographs to the Court showing what appeared to be some tears to what is obviously used furniture. The original state (or the extent to which these used items suffered wear and tear prior to coming on to the Premises) cannot be ascertained as there was no evidence which could provide verification of their condition prior to these items being stored at the Premises (whether by way of photos or other means of record). Furthermore, the Court is not satisfied that the purported damage (which was in any event imprecise) were due to the Defendant's irresponsible handling and storage of the items.

[204] The Court has no reservation in dismissing the claims made in respect of these items.

[205] With regard to the cappuccino maker machine however, although it was clearly used, it is apparent that the Claimant had laid out substantial sums to service the machine in 2014. Mr. Eddy avers that at that time it would have been in good condition. He testified it would have been in pristine condition



until it was taken out of the restaurant and placed in a container. Mr. Eddy contends that that container was damaged and had a missing roof which permitted moisture to enter in and damage the contents of the container. He alleges that the machine would have been exposed to the elements: moisture and salt.

- [206] The Defendant's witness, Mr. Anthony Daniel confirmed that indeed one of the container was damaged (though not to the extent indicated) but he asserted that at the time, he (Mr. Eddy) removed the items, there was no major deterioration of the storage containers. According to Mr. Daniels, one container was externally damaged, he was given instructions and materials to repair the insulation inside. The following exchange is noteworthy:

Mr. Daniels *"The container is a two-layer insulation, exterior and interior, and we got the interior part of it renovated and was fit enough at the time for the storage of the items."*

Counsel, *'When you say when you renovated the interior explain?*

Mr. Daniels, *'We used ¾ inch form plywood and construction plywood 4ft by 8 ft and 2 x 4 lumber. Renovated interior as requested...'*

Counsel, *'What was the object of the renovation?*

Mr. Daniels, *'To keep out the inclement weather, rain and dust particles.'*

- [207] What is startling is that when he was examined about the storage of this machine, he had no recollection of the coffee maker machine. The following exchange was recorded:

Counsel, *'Do you remember packing a coffee machine into the fat hogs bay container?'*

Mr. Daniel, *'I wouldn't say I can identify specifically a coffee machine, can't remember specific coffee maker, it was a lot of stuff.'*

Counsel, *'Did you put mostly kitchen equipment, in fat hogs bay?'*

Mr. Daniel, *'A few stuff I can remember like cutlery, but I can't remember every item I wasn't asked to identify or keep a record, he didn't ask me to list everything.'*

- [208] In the circumstances in which the Defendant relocated the Claimant's belongings without appropriate notice consent or approval, it is remarkable that it would not have taken appropriate steps to accurately record the items and their condition. The Court can only conclude on a balance of probability that the machine would have been removed and placed in the container. Given the admitted damage to that container, it is apparent that the machine would have been placed in a container which was in need of repair. Having considered the totality of the evidence, in the Court's

judgment, it is entirely plausible that the machine would, have been exposed to the elements and consequently would have sustained damage.

[209] At paragraph 10 (d) of his second witness statement, Mr. Eddy contends that this machine was destroyed because water entered the mechanism and as a result it cannot be repaired. This contention is repeated in his third witness statement where he also claims the replacement cost of US\$26,666.00 which he described as a very conservative value. In support of this contention he advance an undated screenshot of a comparable machine which appears on the Amazon website.

[210] The measure of damages for injury to personal property is the difference between the market value immediately before and after the injury, unless the property is destroyed, in which case it is simply the fair market value of the item at the time and place of the destruction. In principle, the claimant is entitled to such a sum of money as would enable him to purchase a replacement in the market at the prices prevailing at the date of destruction or as soon thereafter as is reasonable. See: **Liesbosch Dredger v S.S. Edison [1933] A.C. 449**. Generally, the best evidence will normally be that of the amount which a willing buyer would be prepared to pay to a willing seller of the same item immediately prior to the loss. If such evidence is not available, it is necessary to investigate the price at which comparable items were being sold at the relevant time and place. Certainly in the case at bar, there is neither evidence of the attempt to sell the item prior to the loss, or evidence as to the market value of comparables or any expert evidence opining on valuation. It is also clear that the Claimant has made no attempt to advance evidence as to the depreciated value of the coffee maker machine as at date of importation and then one year later when it would have been moved to the container.

[211] In the Court's judgment there is no basis to deviate from the normal measure of damages in this case. The absence of such critical evidence presented a difficulty for this Court which made an appropriate assessment of damages impossible. In the case the burden of proof lay with the Claimant to prove the value of the coffee maker machine as at the date of the destruction. The Claimant having failed to discharge its burden, applying the dicta in **Da Rocha-Afodu and Another v Mortgage Express Ltd. And Another [2014] EWCA Civ. 454**, this Court can only award a sum to represent that fact of the loss but nominal sum in the sum of \$1,000.00.

## **Costs**

[212] Costs are in the discretion of the Court but will generally follow the event. Given the partial success of the Claimant on the claim and the counterclaim, the Court is satisfied that it would be entitled to recover 2/3 of its costs quantified on a prescribed basis on the damages recovered.

[213] **It is therefore ordered as follows:**

- i. **Judgment is entered for the Claimant on the claim in the sum of:**
  - (a) **\$37,000.00 representing loss of profits**
  - (b) **\$1,000.00 a nominal sum for damage to property**
- ii. **Judgment is entered for the Defendant on the claim in the sum of \$2,742.42 for unpaid utility bills.**
- iii. **The Claimant is entitled to recover 2/3 of its costs quantified on a prescribed basis on the damages recovered.**

[214] Finally, the Court conveys its sincere regrets for the inordinate delay in rendering the judgment in this matter and must thank Counsel and the Parties for their patience.

**Vicki Ann Ellis  
High Court Judge**

**By the Court**

**Registrar**