

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

SVGHCV2016/0167

BETWEEN

DEAN MULZAC

CLAIMANT

AND

RICHARD COX

DEFENDANT

Appearances:

Mr. Richard Williams and Ms. Danielle France for the Claimant

Mrs. Kay Bacchus-Baptiste for the Defendant

Claimant present

Defendant present

2022: 1 February
3 February
7 April

JUDGMENT

Byer, J.:

- [1] This case took place on the furthestmost Southern Grenadine Island of Union Island between two gentlemen who had made the Western world their home of choice but had not forgotten their roots in Union Island and who wished to retain an interest and presence there.

Background Facts

- [2] In 2012 the claimant and the defendant entered into a written lease agreement (herein after referred to as “the Lease Agreement”) whereby the claimant leased a parcel of land from the defendant at Clifton, Union Island for a period of ten years.

- [3] Under the said lease agreement, the claimant agreed to pay rental sums over the ten-year period of various sums, which were specified for the entirety of the ten-year period. There was provision made for the said sums to be increased yearly by approximately \$100.00 per year.
- [4] The claimant also covenanted to do the following: he was given permission to build a wooden building only; he was to pay the rent on the first of each month and he was not to sublet any portion of the demised premises without the written consent of the defendant.
- [5] The claimant assumed occupation of the parcel of land and built a concrete foundation with a wooden building thereon. Whether he obtained consent to do so is an issue that the court has to resolve.
- [6] The claimant also fell into arrears of the rent. This was not specified as with regards to the period but a final figure as of 6 January 2016 the rent amounted to the sum of \$58,522.45 to which the claimant has not taken issue.
- [7] The claimant also breached the lease agreement by subletting portions of the building and the land which he rented, the main ones having been to Mr. Giancarlo Tiezzi for the purpose of a restaurant, a mobile bakery and a boutique/arts and crafts centre.
- [8] The defendant issued formal indication of re-entry on 6 January 2016 by correspondence through his attorney at law. There was no evidence given as to the exact nature of the re-entry that was undertaken by the defendant but the letter of counsel for the defendant stated clearly that the lease was being forfeited and that the letter evidenced the defendant exercising his right of re-entry¹.
- [9] There is also no indication as to what transpired after that letter of 6 January 2016 until 20 January 2016² when counsel for the claimant wrote to counsel for the defendant referring to correspondence of 9 January 2016 (which was not produced or explained) and offered three options for the defendant to consider resolving the matter of the impasse. Those options were that the claimant was to arrange to pay the arrears, that the parties were to terminate the lease agreement and the claimant would remove his building and give vacant possession or the defendant was at liberty to purchase the building from the claimant at market value.
- [10] In response, the defendant accepted payment of the arrears by letter of 28 January 2016³ and gave a date for payment by 8 February 2016.
- [11] There was no evidence forthcoming as to what transpired on 8 February 2016 but the clear inference was that the monies were not paid and on 29 February 2016, the defendant effected re-entry again by the locking out of the sub-tenant Mr. Giancarlo Tiezzi on 29 February 2016. This action was accepted as having been done by the correspondence dated 29 February 2016⁴, which

¹ Page 34 TB#2 filed 22/5/2019

² Page 13 to 14 TB#2 filed 22/5/2019

³ Page 15 TB#2 filed 22/5/2019

⁴ Page 38 TB#2 filed 22/5/2019

was sent to both counsels for the parties from the firm of Marks and Marks representing the sub-tenant.

- [12] Again, there was no evidence led as to how long the lock out lasted in relation to this sub-tenant and in the evidence of Mr. Tiezzi at the trial of the matter, he made no mention of that action of the defendant. However, on the deciphered time line of this matter the next step that were recorded took place on 10 March 2016 when there were several emails between the claimant's counsel, the defendant's counsel and counsel for the sub-tenant Mr. Tiezzi.
- [13] On 10 March 2016 counsel for the claimant at 9:58 a.m. wrote to counsel for the defendant that as "per our agreement" to bring the lease to an end, he informed her that Mr. Tiezzi was to pay the rent that he was entitled to, to the defendant and that the defendant was to pay the claimant for the value of the building less the back rent owed. In response, counsel for the claimant agreed on behalf of the defendant to pay the claimant "the reasonable value" of the place he built less the back rent. Counsel for Mr. Tiezzi was also informed to make payments to the defendant going forward⁵.
- [14] The matter apparently once again went into abeyance and in May 2016, counsel for the claimant wrote again to counsel for the defendant on 27 May 2016 sending two valuations that they were relying on for the defendant to consider paying the claimant for his building⁶.
- [15] By September 2016 the claimant having not heard from the defendant, filed this claim seeking the following relief:
1. Damages in the sum of \$580,000.00.
 2. Interest pursuant to Section 27 of the Eastern Caribbean Supreme Court Act Cap 24 of the Laws of Saint Vincent and the Grenadines Revised Edition 2009.
 3. Interest from Bank (BOSVG) from the 10th March 2016 to date of \$12,624.00 and continuing at \$65.75 per day.
 4. Interest from Bank (RBTT) interest from the 10th March 2016 to date of \$7,872.00 and continuing at \$41.00 per day.
 5. Interest on the sum of \$230,000.00 from the 10th day of March 2016 of \$4,234.52 to date and continuing at \$37.80.
 6. Alternatively interest on the full sum of \$580,000.00 at the rate of 6% per annum from the 10th day of March 2016 to date \$18,305.28 and continuing at the rate of \$95.34 per day.
 7. Prescribed Costs.
 8. Such further or other reliefs.

⁵ Emails at pages 19-20 TB#2 filed 22/5/2019

⁶ Page 39 TB#2 filed 22/5/2019

- [16] Before the Defence could be filed, however, the defendant sent correspondence to the counsel for the claimant on 7 October 2016⁷ offering a figure much lower than the valuations sent to the defendant in May.
- [17] There apparently being no response, the defendant filed their Defence and Counterclaim in January 2017 counterclaiming for the following:
- i. Arrears of rent in the sum of \$59,265.00EC
 - ii. Interest of \$5,926.00 or
 - iii. Alternatively interest pursuant to Section 27 of the Eastern Caribbean Supreme Court Act CAP 24.
 - iv. That the claimant's claim be struck out for an abuse of process or be dismissed.
 - v. Loss of use of the property and full rental value.
 - vi. Judgment on the counterclaim for the defendant.
 - vii. Cost.
 - viii. Save as is hereinbefore expressly admitted or not, the defendant denies each and every allegation of fact or law contained in the Statement of Claim as though the same were set forth herein and traversed seriatim.
- [18] The position of the claimant in response was that even though there may have been *negotiations* as between the claimant and the defendant as to the payment of arrears that there was an *agreement* between the parties that the defendant would pay the value of the building less the outstanding rents.
- [19] It is the existence of that agreement that the claimant now relies upon at trial of this matter.
- [20] It must be noted at this juncture that the claimant in his submissions at the end of trial, has made it clear that he is no longer pursuing the claim (and in this court's mind rightly so) for the payment of interest on the loans he claimed he had obtained from the Bank of Saint Vincent and the Grenadines and RBTT Bank for the purpose of constructing the building of the structure on the defendant's land.
- [21] The claimant has therefore conceded that the sole issue for the court is therefore whether or not an agreement existed between the parties for the defendant to pay the claimant the value of the building constructed and the court would add as a corollary issue to this that there must be a determination of the quantum of the outstanding rent due and payable to the defendant as arrears.

⁷ Page 40 TB# 2 filed 22/5/2019

Was There A Binding Agreement Between The Claimant And The Defendant For The Defendant To Pay The Claimant The Value Of The Building As Constructed?

[22] The nub of this issue surrounds the documents which the claimant relies upon as establishing this agreement and whether those documents attain the threshold of a settled and binding agreement.

[23] The agreement as considered by the claimant was contained in an email exchange that took place on 10 March 2016. It is therefore imperative that that exchange be examined in detail:

“Thu, Mar 10, 2016 at 12:01pm

Dear Richard

I am confirming that my client Mr Cox has agreed to pay your client the reasonable value of the place he built less all outstanding rents

He has already commissioned a valuation. I am awaiting same

Kay”

“Thu, Mar 10, 2016 at 9:58am

Dear Kay

As per our agreement to bring this lease at an end, We have advised Ms. Marks to have the clients pay the rents to your chambers on behalf of Mr. Cox who would take over as Landlord.

We would then deal with the issue of payment to Mr. Mulzac of the value of the building less the back rent that is owed to Mr. Cox.

Please confirm receipt of my email and the contents and let us put this matter to rest once and for all.”

[24] When one considers the emails, the questions that must be asked are, was there: i) a valid offer, ii) which was accepted and iii) for which valuable consideration passed.

[25] In the text Commonwealth Contract Law⁸ the learned authors described offer as “expression of willingness to contract on certain terms made with the intention (actual or apparent) that it shall become binding as soon as it is accepted by the person to whom it is addressed.”⁹ When one therefore considers the email from counsel for the claimant the operative portion is stated as thus ***“we would then deal with the issue of payment to Mr. Mulzac of the value of the building less the back rent that is owed to Mr. Cox” (My emphasis added)***. When this court considers this statement in the context of what was said by the claimant and his “willingness” (in the word of the claimant) to cede his rights as landlord to the defendant, this court is not satisfied that this could have amounted at this stage to anything more than an invitation to come to an agreement on the

⁸ Gilbert Kodilinye and Maria Kodilinye

⁹ Ibid page 7

issue of the payment by the defendant for the building of the claimant. An offer in this court's mind to do business and conclude business as between the parties.

- [26] This court is even more convinced of this when the court examines the response of the defendant to this email by his counsel, who the court accepts would have had the authority to bind her client. By return email a few hours later, the defendant's counsel responds, "***I am confirming that my client has agreed to pay your client the reasonable value of the place he built less the outstanding rents.***" (*My emphasis added*)
- [27] In this court's mind, even if there had been a valid offer, this response could not have amounted to an acceptance. When the defendant responded that he would pay the "reasonable value" as opposed to the open-ended option given by the claimant of simply "the value", it was open to the claimant to then agree to that proviso that the value to be paid had to amount to being reasonable. There was no such indication that this was in fact conveyed. What the claimant states he did instead was then to instruct his "tenants" to pay the rental sums to the defendant to "seal the deal" that the defendant was now responsible for the building and the claimant would now await payment for the same.
- [28] That may have well been the claimant's intention, but this act of the claimant failed to take into consideration one major event that had taken place by that point. The re-entry of the defendant under the terms of the lease some ten days previously.
- [29] The claimant has contended that the action of the defendant on 29 February 2016 could not have amounted to re-entry when the same only lasted a day and only consisted of acting against one of several sub-tenants that taken up occupation of the said premises. Additionally the claimant contended that the acts of the defendant were not carried out with the requisite intention to determine the lease but was merely an attempt to stop the one sub-tenant (Mr. Tiezzi) from paying rent to the claimant.
- [30] However, when the court considers the evidence of all the witnesses that attended at trial and the documents that were provided in the trial bundle the court finds on a balance of probabilities the following:
- a) On 29 February 2016, the defendant effected re-entry onto the premises in Union Island. This was admitted by the claimant at trial¹⁰. Additionally at the time of re-entry, there was at least one sub-tenant in actual occupation of the building that was constructed on the land belonging to the defendant. Under the terms of the lease, the building was therefore the sole issue with which the defendant would have been entitled to take action. The fact that the claimant had sub tenanted other portions of the land to other individuals was of no moment to the defendant who would not have had access. These were the mobile bakery¹¹ a container¹² and a building housing a boutique/

¹⁰ Evidence elicited on cross-examination of the claimant on 1/2/2022

¹¹ Admitted in cross-examination of the claimant on the 1/2/2022

¹² Admitted in cross-examination by the claimant on the 1/2/2022

arts and crafts business. In any event, the court accepts that the act of the defendant in entering the sole building over which the defendant was legally entitled under the lease and locking out the tenant housed therein amounted to a sufficient act of re-entry on his part to determine the lease¹³. This further also accepts that in any event, a landlord may forfeit the lease in part¹⁴. However, in the final analysis this court accepts that the act of the defendant amounted to effective re-entry.

b) That the extent of the defendant's re-entry was never established by the claimant to have lasted only one day. Nowhere is that stated in the claimant's evidence, nowhere is that stated in the evidence of Mr. Giancarlo Tiezzi and in fact, that question was never directed to him, nor is this stated in the evidence of the defendant. Rather what is clear and what the court accepts is that counsel for the tenant on 29 February 2016 reached out to counsel for the claimant making it clear that re-entry had occurred and that they wished to resolve the matter¹⁵. There is no communication on the issue as to when the re-entry was resolved until there was email correspondence from counsel for the claimant on 10 March 2016 representing that the lease had been amicably determined and instructing the tenant to pay to the defendant directly¹⁶. This court accepts that at the very earliest the re-entry therefore lasted until 10 March 2016 upon the issue of the payment of rent being resolved in favor of the defendant.

[31] This court therefore accepts that taken into consideration that there was no offer on the part of the claimant, there was no acceptance by the defendant but rather a willingness or in his words being "amenable" to have a valuation done to which they could then agree and there was no consideration passed by the claimant, he having already been dispossessed from the property by the re-entry of the landlord, the defendant, there was no agreement binding the parties at that stage upon which the claimant was entitled to enforce as against the defendant.

[32] This court is even more fortified in this view when it considers the following-

i) That the claimant in his own evidence on cross examination told this court that the parties had tried to mediate but had not come to an agreement of a reasonable value,

ii) That after March 2016, the claimant by his counsel in May 2016¹⁷ wrote to the counsel for the defendant submitting two valuations that he had commissioned on the property asking for the matter of payment to be resolved and,

iii) That before the defendant could respond, this claim was filed. However, on 7 October 2016 the defendant did respond not accepting the valuations proffered but submitted their value and an offer, which was never accepted.

¹³ Halsbury's Laws of England Vol 27(1) (4th Re-issue)

¹⁴ **G.M.S. Syndicate Ltd v Gary Elliott Ltd** [1982] Ch 1

¹⁵ TB#2 page 38 filed 22/5/2019

¹⁶ TB#2 page 20 filed 22/5/2019

¹⁷ TB#2 page 39 filed 22/5/2019

- [33] I therefore find that there was no binding agreement as of March 2016 for the defendant to pay for the building that was constructed by the claimant.
- [34] However, that cannot be the end of the matter. Two other extant issues must be addressed. What is the extent of the arrears as are owed by the claimant and can the defendant take possession of the building, which he has had since 2016 without compensating the claimant for the same?

The Extent of the Arrears Due to the Defendant

- [35] There is no doubt in this court's mind that the claimant has admitted that he owes rental sums to the defendant. He admitted it in his examination in chief; *"I failed to pay the Defendant the rent for several months at the end of 2015 and fell into arrears [sic] of \$21,595USD. I had conversations with the Defendant to attempt to settle the arrears of rent but he refused the settlement and told me he wanted the matter to go to court."*

In cross examination he further stated that he could not say what was the total amount of arrears owed to the defendant¹⁸ and again that he always intended to pay the arrears¹⁹, the clear inference being that he knew that he owed monies, but just could not confirm the quantum. However, as the cross-examination continued, he then went on to accept that the arrears were in the sum of \$21,950 United States dollars as contained in a letter of 6 January 2016²⁰.

- [36] It was however, telling to this court that having made several "concessions" in his case the claimant, in his submissions never made any acceptance of the sum that was owed for rent for the period before the defendant assumed responsibility for the building on the land.
- [37] This court however accepts that the claimant does owe the defendant for outstanding rents up to the period of re-entry in March 2016 as being \$59,265.00 Eastern Caribbean Dollars as claimed in the counterclaim which was filed on 4 January 2017 or \$22,211.60 United States Dollars²¹. This court does not accept that the defendant is due interest on that said sum at the rate of ten per cent per annum and makes no order in those terms.

Is the Claimant Entitled to Be Paid For the Building As Constructed On The Defendant's Land?

- [38] In this court's mind, the answer to that must be a resounding yes. The more pressing issue however must be the quantum of that payment to the claimant. Indeed, it is clear, that it was also

¹⁸ Elicited at trial on the 1/2/2022

¹⁹ Elicited at trial on the 1/2/2022 on amplification led by claimant's counsel

²⁰ RC 2 Page 24 TB#1

²¹ Page 11 TB#1 filed 22/5/2019

the defendant's position ²² that the claimant is due to be paid for the building. The disagreement is on the question of quantum.

- [39] Both the claimant and the defendant have made this a central issue for their respective cases and the court heard from their respective valuers on this issue, Mr. Franklyn Browne and Mr. Duane Bailey. In that regard, this court makes the following observations on those witnesses. The court, in spite of Mr. Browne's years of experience and qualifications, was once again struck by the complete lack of candor of this witness as he gave his evidence. He answered the questions on cross examination vaguely and evasively lending credence to the allegation of counsel for the defendant that perhaps Mr. Browne had had no personal contact with the building in Union Island but relied solely on the information provided to him by his employee who he admitted had made the initial measurements and assessment.
- [40] Mr. Bailey on the other hand although enthusiastic and had obviously visited the premises personally was woefully ill prepared to defend his valuation and his admitted lack of experience and qualifications in some fields did not assist the court.
- [41] That being said, this court was only given these two figures to work with as were presented by the claimant and the defendant and it is this that the court must work with to determine a figure to be paid.
- [42] When one considers the valuation presented by Franklyn Browne²³ the appraised value he submitted of the building was \$580,000.00 in April 2016, one month after the defendant had re-entered the premises and in this court's mind assumed responsibility for the building.
- [43] A close inspection of the valuation of Mr. Browne mentions certain issues that he admitted on cross-examination that would not have been relevant. Firstly, he identified that the interest to be valued was the "unencumbered fee simple estate as at April 2016". On cross-examination, he admitted that he was not aware that the person who owned the land was not the same person who owned the building. It was however telling that after a short recess by the court the witness was quick to add and qualify his first answer that in valuing a building where the land is not owned by the same person who owns the building, that it will not necessarily make a difference in the value of that building. Secondly, he referenced the description of the parcel of land and the utilities and services to the location and the area analysis in which he spoke to the nature of the area in which the building was constructed. On cross-examination, he told the court that he was describing the land but that he did not consider those factors when he produced his valuation. Additionally, he tried to convince the court that reference to utilities is part and parcel of the building but then again changed his answer when pressed and said that the value of the land would not affect the value of the building and that elements in relation to the land would only affect the value of the land. Thirdly, he made mention that the construction of the building was a masonry two storey building. In his

²² By submissions paragraph 15 (filed 18/2/2022); by evidence of the defendant paragraphs 5, 6, 7 and 8 of the Witness Statement filed 20/6/18 and in evidence elicited in cross-examination on the 3/2/2022

²³ TB#2 page 21

breakdown, he then stated that the walls were concrete blocks and timber. On cross-examination, the witness then admitted that the building was mostly timber but that the walls were concrete and timber. This was quite alarming to the court as the claimant himself in his evidence in chief said that it was a plywood building with a concrete foundation²⁴. Further in that same witness summary which was entered as the examination in chief of the claimant, he sought to rely on the valuation of Mr. Arthur Guy produced as DM1²⁵. Although Mr. Guy was not brought as a witness and therefore the utility of his valuation is limited as he did not defend the same, it was instructive to consider his notations of the specifications of the building:

“6.5 Specifications

The Specifications for the building is as follows:

Substructure:	Reinforced concrete foundation and floor
Frame:	Timber farming generally
Upper floors:	Timber suspended floor slab
Roof:	Timber framing covered with galvanize sheeting
Stairs:	Timber external staircase
Balustrade:	Timber banister; painted finish
Walls:	Timber internal & external walls
Windows:	Aluminum framed sash windows
Doors:	Timber panel external & internal doors
Walls fins:	Painted timber walls
Floor fins:	Ceramic tiled ground floor
Ceiling fins:	Painted plywood ceiling
Fixtures:	Timber kitchen counters & OH cupboard with tiled counter top....”

[44] When the court therefore considers the valuation of Mr. Browne as whole, it has legitimate concerns as to the integrity of the same in spite of the witness’ attempt to justify the same. The court also takes note of the concession again made by the claimant that he would accept that in fact the enclosed area of the building was lower than the total square footage as given by Mr. Browne and in using that square footage of a first floor of 992 square feet and a lower floor of 2.186 square feet at a rate of \$175.00 per square foot the claimant was willing to accept the sum of

²⁴ Paragraph 11 of the Witness Summary of the claimant filed 9/2/18

²⁵ Page 42 TB#1

\$439,358.50 as the replacement value of the building having taken into consideration a twenty one percent depreciation for the value of the building at the time of the valuation in 2016.

- [45] On the contrary, the defendant relied on the valuation of Mr. Duane Bailey. The court notes the observation that was made by counsel for the claimant at the commencement of the evidence being given by Mr. Bailey as to his failure to adhere to the provisions of Part 32.14 CPR 2000. Indeed, this was a relevant consideration to be raised as to the reliance that the court could place on the report of the witness Mr. Bailey. However, this court is satisfied that the issue of the report of Mr. Bailey goes to the weight to be ascribed to the report and not to its admissibility²⁶. This oversight on the part of the witness and counsel for the defendant was indeed unfortunate as the court was left with very little assistance from the defendant in this essential element of the claimant's case. This was even more apparent when on cross examination the witness Mr. Bailey indicated he was not even aware of the provisions of the CPR that were applicable to the presentation and creation of a report upon which the court was to rely on. My sister Ellis J in the **Elton Scatliffe**²⁷ case put it thusly;

*"In cases where an expert fails to comply with the Court's requirements both as to formality and timescale, the Court has the power to penalize instructing parties in costs. Where such breaches are particularly egregious a court may also order that the evidence may not be used. Such actions are justified because when a court appoints a certified expert, it is anticipated that such expert will provide advice to the court that conforms to the best standards and practice of the expert's profession. This position was usefully summarized in **Oldham MBC v GW and Others**:*

"Once instructed, experts in their advice to the court should conform to the best practice of their clinical training and, in particular, should describe their own professional risk assessment process and/or the process of differential diagnosis that has been undertaken, highlighting factual assumptions, deductions there from and unusual features of the case. They should set out contradictory or inconsistent features. They should identify the range of opinion on the question to be answered, giving reasons for the opinion they hold. They should highlight whether a proposition is a hypothesis (in particular a controversial hypothesis) or an opinion deduced in accordance with peer reviewed and tested technique, research and experience accepted as a consensus in the scientific community. They should highlight and analyse within the range of opinion an 'unknown cause', whether that be on the facts of the case (e.g. there is too little information to form a scientific opinion) or whether by reason of limited experience, lack of research, peer review or support in the field of skill and expertise that they profess. The use of a balance sheet approach to the factors that support or undermine an opinion can be of great assistance."

²⁶ Blenman J (as she then was) in **Everton Cornelius Trading as VEC Construction Company v Allan Stevens and Christine Stevens** ANUHCv2006/234; **Louise Matthias and anr v Lennie DeGale** GDAHCv2006/0291 per Michel J (as he then was); **Elton Scatliffe and anr v Dwite Flax and anr** BVIHCv2010/0053 per Ellis J

²⁷ Ibid paragraph 71

- [46] The court therefore must look at the evidence of Mr. Bailey through this lens. When the court considers the report of Mr. Bailey it must be noted that the same was undertaken in August 2017 over a year after the defendant had assumed responsibility of the building upon the determination of the lease, a fact that seemed to have been lost on the defendant. In March 2016, all responsibility for the upkeep of the building was in the hands of the defendant, therefore any maintenance items identified must rest at the feet of the defendant.
- [47] That being said, Mr. Bailey noted on inspection the following:
- Water damage to the wooden structure internally and externally and may be need to be changed.
 - Signs of corrosion on the galvanize caused by the roofing nails.
 - Water marks in the ceiling, which is a clear indication that the roof is leaking.
 - Signs of termite damage
 - External stair case shaky and showing signs of detrition.
- [48] On cross-examination, the witness indicated that he had been instructed to value the building minus the windows, which he was told had been installed by the claimant. He relied on the market value to provide his valuation in which he did not take into consideration the concrete foundation. He further indicated that he would have ascribed a building cost of \$130.00 to \$140.00 a square foot based on building in St. Vincent but that based on the condition of the building of the claimant he would have used a value of \$15.00 to \$25.00 per square foot. However, it was of some note to the court that this witness also indicated that his qualifications were limited in that regard as he was not himself a quantity surveyor, who would be able to make such indications, and readily agreed that Mr. Browne was a quantity surveyor, and would have been in a better position to give those figures.
- [49] Finally, this witness admitted that he did not know when the building came into the care of the defendant but at the time of inspection in 2017, he recorded what he saw. Unfortunately, due to the fact that Mr. Bailey did not indicate as he should have, the help of others and how he computed his figures, the court is unable to ascribe much weight to this valuation. It was of note as well that the witness did however admit that the method of calculation used by Mr. Browne of the cost approach with a rate of depreciation ascribed to it based on condition was also a sensible approach to the value of the building.
- [50] The final witness that the court has to consider with regard to the value to be ascribed to this building was the subtenant, Mr. Giancarlo Tiezzi.
- [51] The evidence of this witness centered on what he said was the additional works he had carried out on the premises and the maintenance of the building. This witness also indicated that the lease he had with the claimant came to an end in February 2017, however this is not a date that has been confirmed by the claimant and this court is unsure how that date was relied upon when in 2016 the head lessor had already re-entered the property as a result of the breach of his tenant the claimant.

The only inference the court can make that this date is referable to the actual expiration of the lease if it had continued uninterrupted.

- [52] This witness claimed that at the time that he rented the premises from the claimant in 2014 the building was not in a good state and in his words "it was poor construction...it was not made to last a long time and I told this to the claimant."²⁸
- [53] In the examination in chief of the witness it was clear that the monies that Mr. Tiezzi said he expended on the building were to make the same more attractive to his customers and as he said in cross examination that he made changes to make the building adaptable to his idea of a restaurant, to his vision. What he did in essence say was that the building he rented in 2014 is basically the same building as was handed over in 2016.
- [54] What was of concern to him however was that the claimant, previous to 2016, had not done any maintenance work on the building and that the upper floor which he does not rent and which he does not use, was so neglected that it started to cause problems for him downstairs on the floor that he does rent. Unfortunately, for the claimant however, is that although he claimed on cross examination that he did do maintenance on the building during the tenancy of Mr. Tiezzi he also admitted that he had no evidence to substantiate that claim.
- [55] In the final analysis, the court is therefore left with very little information as it relates to the ascribed value of this building. Even though the court has indicated its dissatisfaction with the value given by the claimant's valuer, it is even more dissatisfied with the value of the witness for the defendant, although Mr. Bailey did indicate that the methodology used by Mr. Browne was a valid one that could in fact be appropriate in the circumstances.
- [56] It is for the claimant to establish the case on this point and this court on a balance of probabilities accepts that given the failings of the witnesses for both parties in this regard that the value to be ascribed to this building must lie in a murky middle ground between the two. Therefore, in an attempt to do justice between the parties, this court makes the following calculation:

Value as given by the claimant (in submissions) -	439,348.00
Value as given by the defendant -	133,000.00
Difference between the 2 values -	306,348.00
Split in half -	153,174.00
Subtracted from the claimant's value -	286,174.00

- [57] This court therefore orders that the claimant should be paid the sum of \$286,174.00 for the value of the building at Union Island.

²⁸ Elicited in cross-examination on the 3/2/2022

[58] This court was given no value for the concrete slab that on a balance of probabilities this court accepts was placed there without the permission of the defendant.

[59] As a final point to note in this regard about experts being used by parties, I wish to endorse the words of my sister Ellis J in the **Elton Scatliffe**²⁹ case where she stated:

*"In the future, it would be useful if experts would be guided by the dicta in **National Justice Cia Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer**. At page 81 of the judgment the following passage by Creswell J., was subsequently adopted in the Court of Appeal by Stuart-Smith LJ.*

"The duties and responsibilities of expert witnesses in civil cases include the following:

- i. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.*
- ii. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate.*
- iii. An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.*
- iv. An expert witness should make it clear when a particular question or issue falls outside his expertise.*
- v. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.*
- vi. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.*
- vii. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports."*

²⁹ Supra at paragraph 89

The court therefore makes the following orders:

On the claim (in relation to the indication as to what was abandoned by the claimant)

1. No order is made as to paragraphs 2 - 6 of the claim.
2. The defendant is ordered to pay the sum of \$286,174.00 as damages to the claimant for the value of the building.
3. Prescribed Costs to the claimant to be calculated on the net sum awarded to him pursuant to Part 65.5 CPR 2000. Discounted by 25% he being only partially successful on his claim.

On the counterclaim

1. The claimant is ordered to pay arrears of rent in the sum of \$59,265.00.
2. Interest on the said sum pursuant to the Eastern Caribbean Supreme Court Act CAP 24 from the date of re-entry until trial of this matter on 1st February 2022.
3. Paragraphs 4-6 of the counterclaim are dismissed.
4. Prescribed Costs to the defendant on the counterclaim on the sum awarded to him pursuant to Part 65.5 CPR 2000.
5. The court further orders that the parties are to set off the relative amounts as due as between themselves.

Nicola Byer
HIGH COURT JUDGE

By the Court

Registrar