

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV 2017/0024

**IN THE MATTER OF A PARCEL OF LAND AND EDIFICES LOCATED AT LONG LOOK/EAST END,
TORTOLA, MORE PARTICULARLY DESCRIBED IN THE REGISTER OF LANDS AS BLOCK 3439B
PARCEL NUMBER 120 REGISTRATION SECTION LONG LOOK**

**IN THE MATTER OF AN INTEREST OWNED BY SANDRA FAHIE also known as CHERYL FAHIE IN THE
PARCEL OF LAND, CHATTELS, STRUCTURES AND EDIFICES LOCATED AT LONG LOOK/EAST END,
TORTOLA, MORE PARTICULARLY DESCRIBED IN THE REGISTER OF LANDS AS BLOCK 3439B
PARCEL NUMBER 120 REGISTRATION SECTION LONG LOOK**

BETWEEN

SANDRA FAHIE

Claimant

AND

GLORIA WHEATLEY

1st Defendant

DENISE STOUTT

2nd Defendant

DERON WALTERS

3rd Defendant

Appearances: Ms. Carmilita Jamieson and Ms. Nellien Bute of Maximea & Co., Counsel for the Claimant
Mr. Michael Maduro of Grace Chambers, Counsel for the First Defendant
Ms. Anthea Smith and Ms. Reisa Singh of Sabals Law, Counsel for the Second and Third
Defendants

2020: September 21st

2021: July 12th

JUDGMENT

- [1] **ELLIS J:** In the Claim herein, the Claimant principally seeks to enforce an agreement for sale of real property described as Block 3439B Parcel 120 Registration Section Long Look ("the Property"). The Claimant contends that the First Defendant breached the agreement when she sold the Property to the Second and Third Defendants who she alleges were at all material times aware of the existing agreement between the Claimant and the First Defendant.
- [2] The Claim seeks the following redress against the First Defendant, the initial owner of the Property and the current registered owners, the Second and Third Defendants.
1. A declaration/order that there is a binding agreement for sale and purchase of the Property.
 2. A declaration/order that she has a legal and beneficial interest in the land and or all edifices erected on the Property.
 3. An order that the transfer of the Property which the First Defendant purported to make the Second and Third Defendants to be declared null and void.
 4. An order for the specific performance of the agreement for the sale and purchase of the Property.
 5. An order that the Property be transferred to her in her personal capacity.
 6. In the event that this Court finds that it cannot grant specific performance of the agreement for sale and purchase, compensatory and aggravated damages.
- [3] In addition to the above mentioned relief, the Claimant also seeks compensation in the sum of \$7,000.00 for the losses incurred and resulting from the breach of covenant for quiet enjoyment which she says arises from the First Defendant's breach of the lease agreement executed by Mr. Berchel Wheatley (deceased) as lessor and the Claimant and her now deceased husband (Mr. Frankie Fahie) which was in place at the time when the Parties entered into negotiations for the sale of the Property. The Claimant also seeks her costs and such further and other relief as may be deemed appropriate.

Factual Background

- [4] By agreement dated 12th February 2013, Mr. Berchel Wheatley agreed to rent the Property to the Claimant and her now deceased husband, Frankie Fahie. The terms of Agreement are critical to the disposal of this claim are the set out verbatim below:

“I Berchel Wheatley of Long Look Tortola hereby agree to rent my property which is located in Fat Hogs Bay, Tortola to Mr. and Mrs. Frankie Fahie for a period of fifteen years at the price of eight hundred dollars per month. In regards that they have my permission to make addition and improvement to the trailer, if at any time they wish to give up the property I will refund the monies that was spent on my property or they will go rent free until the monies is full refunded.

In addition to that if within 15 years I should consider putting up the property for sale again I would give Mr. and Mrs. Fahie the first preference to purchase.”

- [5] The Agreement was signed by Mr. Wheatley, Mr. Frankie Fahie and the Claimant. However, at the time of Agreement, the Property was registered in the names of Berchel Wheatley and Gloria Wheatley, the First Defendant.
- [6] The Claimant asserts that after obtaining permission from Mr. Berchel Wheatley, she and her husband proceeded to develop the Property for the purpose of carrying on a business of a restaurant and bar. She contends that she expended a sum in excess \$45,000.00 to build a concrete structure comprising a kitchen, bathroom, restaurant, dining, lounge and entertainment and bar area. Mr. Wheatley died on 24th August, 2014 and following his death, the First Defendant, his widow took over responsibility for the Property. On 6th September, 2014, the First Defendant wrote to the Claimant mandating that she make no more additions to the Property without first consulting with her.¹ The Claimant asserts that she did not make any further improvements on the Property following Mr. Wheatley’s death. However, after the passage of Hurricanes Irma and Maria in 2017, the structure on which the Claimant was operating her business on the Property was severely damaged. The Claimant asserts that she needed to restore it to its pre-hurricane condition.²

¹ Trial Bundle filed on 16th September 2020, Tab 3, page 29 of Defence of the First Defendant filed on 7th June 2018

² Trial Bundle, Tab 9, Witness Statement of Sandra Fahie filed on 16th January, 2019, page 91 paragraph 63

- [7] Following the death of Mr. Wheatley, the Claimant remained in possession of the Property at a reduced rent. Sometime in early 2016, the First Defendant approached the Claimant and her husband about purchasing the Property. From this point, both Parties retained legal counsel. Negotiations concerning the sale and purchase of the Property continued via and exchange of emails and letters between their respective attorneys. By letter dated 12th February, 2016 from Harbour Chambers, Counsel for the First Defendant to Maximea & Co. Law Chambers, Counsel for the Claimant, the purchase price of \$45,000.00 was proposed.³ Following negotiation of the terms of payment of the purchase price, the First Defendant agreed to accept the sum of \$45,000.00 payable in two installments.⁴ Through her attorneys on 13th May, 2016 the Claimant did in fact tender a cheque in the sum of \$30,000.00 to the First Defendant's attorneys.⁵ Receipt was acknowledged by the attorney for the First Defendant on the same day.
- [8] Prior to the completion of the sale, the Claimant contends that a number of issues arose. First she contends that the water supply to the Property was disconnected between 11th May 2016 – 17th May 2016, in breach of the covenant of quiet enjoyment. The Claimant asserts that this disconnection was done pursuant to the direction of the First Defendant. The Claimant then contends that she received a written demand dated 15th August 2016, for outstanding rental payments in the amount of \$3,000.00). In this demand letter, Counsel of the First Defendant represented that in the event that the arrears were not paid immediately, then an application could be made for possession of the Property.
- [9] Finally, the Claimant contends that following a written request (letter on 24th June 2016) in which she sought formal notice of the boundaries of the Property so that the agreement could be concluded. Counsel for the First Defendant advised her that a licensed land surveyor would be retained to identify the boundaries of the Property. A copy of the surveyor's sketch was sent to the Claimant's attorney on 20th July, 2016.⁶ It reflected that a small encroachment on the adjoining property by the structure which was constructed on the Property. By letter dated 1st October, 2016, the Claimant's attorney indicated:

³ Trial Bundle, Tab 17, page 140

⁴ Trial Bundle, Tab 17, page 149

⁵ Trial Bundle, Tab 17, page 150

⁶ Trial Bundle, Tab 17, pages 162 – 164

- i. That in and around March 2012, the boundaries to the Property had been pointed out by the Wheatleys and on the basis of these representations, the Claimant had developed the Property in good faith. It was expected that the surveyor's report would correspond to these representations.
- ii. The surveyor's sketch does not in fact correspond to these representations and that the adjoining landowners are aggrieved.
- iii. The silence on the issue of the irregular boundaries has caused a delay in the purchase.

[10] The letters sought to have the First Defendant indicate when the boundary issues would be fully and finally addressed so that the purchase could be completed.

[11] However, in correspondence dated 24th October 2016, the First Defendant through her attorneys returned the deposit of \$30,000.00. In that letter, Counsel for the First Defendant referenced an earlier letter of 12th February 2016 in which the Property had been offered "AS IS" for the sum of \$45,000.00. Counsel further noted that all of the issues raised by the Claimant had moved away from the sale of the Property "AS IS". In these premises, Counsel for the First Defendant gave the Claimant notice to quit the Property by 23rd November 2016.

[12] In correspondence which followed, the Claimant's attorney, requested an urgent meeting/mediation to have the matter resolved and further enquiring about rumours that the First Defendant was seeking to sell the Property to a third party.⁷ No response was received, but on 20th January, 2017, Counsel for the First Defendant wrote the Claimant informing that the Property was sold to the Second and Third Defendants.⁸

[13] The Claimant filed her claim on 2nd February, 2017 and thereafter applied for an interim injunction on to inter alia, prevent the Second and Third Defendants from having any further dealings with the property until the matter was resolved. By order dated 14th March 2017, the Court granted an interim injunction restraining the First, Second and Third Defendants from having any further dealings whatsoever with the beneficial and further in the alternative the legal interest in the parcel of land and edifices located on the Property. The order further permitted the Claimant to continue to occupy

⁷ Trial Bundle, Tab 17, pages 172 – 175

⁸ Trial Bundle, Tab 17, page 179

the Property with quiet enjoyment, restraining the Second and Third Defendants from abusing, harassing, threatening and otherwise interfering with the Claimant and her employees, agents, servants, licensees etc. until further order of the Court.

[14] In her Claim Form and Statement of Claim filed on 2nd February 2017, the Claimant sought specific performance of the purported agreement for sale. However, in the event that the Court is not prepared to grant this relief, the Claimant sought damages by way of alternative relief. However, in legal submissions filed at the close of the trial, Counsel for the Claimant indicated that the Claimant's position had changed. Although the Claimant invested substantial sums of money in developing the Property, Counsel wisely represented that a successful claim for specific performance requires evidence to defeat the indefeasibility of title that is now vested in the current proprietors. Based on an assessment of the evidence led at trial, the Claimant has prudently and in the interest of not wasting the Court's time, elected not to pursue her claim for specific performance but represented that the Claimant now seek damages for breach of contract. The Court therefore does not need to consider the claim for specific performance. Consequently, it is clear that no further substantive relief is sought as against the Second and Third Defendants as the Claimant no longer seeks to have title in the Property transferred from them and conveyed to her. It follows that the order of 14th March 2017 granting interim injunctive relief against the Second and Third Defendants may properly be discharged at this time and the Court will so order.

[15] The following matters however, remain for determination:

- i. Whether there was an existing and binding agreement between the Claimant and the First Defendant for the sale of the Property;
- ii. If the court finds that there was an agreement, whether the Claimant has rejected the fundamental condition that the Property was being sold "**AS IS**" and thereby repudiated any purported agreement between the Parties;
- iii. Whether time is of the essence was a fundamental condition of the purported agreement;
- iv. If the Court finds that there was an agreement, whether the First Defendant was entitled to accept the Claimant's repudiation.

[16] The Court will now consider these issues in turn.

COURT'S ANALYSIS AND CONCLUSION

i. **Whether there is an existing and binding lease agreement between the Claimant and the First Defendant**

[17] During the course of the trial, Counsel for the First Defendant objected to the admissibility of the purported rental agreement on a number of grounds. First, Counsel for the First Defendant submitted that as the purported rental agreement constituted a commercial tenancy over land situated in the Territory for a term of fifteen (15) years, the Parties were therefore required to pay stamp duty on the same and register the executed agreement at the Land Registry. The failure to do so would result in certain adverse consequences as the document could not be admitted into evidence before the Court.

[18] Counsel noted that, under the Stamp Act, stamp duty on the executed rental agreement would have been assessed at a rate of 1% for *belongers* or 1.5% for *non-belongers* of the annual rental income multiplied by the term of years. Therefore, in order to comply with the provisions of the legislation, the Parties were required to pay either US\$1,440.00 or US\$2,160.00 in duty to the Inland Revenue Department, Government of the Virgin Islands, within two (2) years of the date of the document.

[19] Counsel for the First Defendant objected to the admissibility of the executed unstamped document on the grounds that it does not comply with section 21 of the Stamp Act⁹ which provides that:

“Save and except as aforesaid, no instrument executed, in any part of the Territory, or relating, wheresoever executed, to any property situates, or to any matter or thing done or to be done, in any part of the Territory, shall, except in criminal proceedings, be pleaded or given in evidence, or admitted to be good, useful, or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed.”

⁹ Cap. 212 of the Laws of the Virgin Islands

[20] Counsel relied on the dictum in **Soumitra Sengupta v Woods Development Limited**,¹⁰ in which Gordon JA stated the following:

“Let it be said at first that the law is clear that even where parties choose not to take the point of the inadmissibility of an unstamped document that requires stamping, there is a duty on the Court not to admit such a document. Undoubtedly, the thinking behind such a rule is that the Court should not lend itself to be a part of an action that is a fraud on the revenue of the State.”

[21] Counsel also relied on the judgment of Barrow JA in **King’s Casino Limited v Pizza House Limited**¹¹ in which he accepted the concession by counsel for the respondent that the trial judge erred in receiving the unregistered and unstamped lease into evidence and in allowing the respondent to place any reliance on it. This concession was advanced on the basis of the objection raised by Counsel for the Claimant who relied on the provisions of section 46 of the Antigua and Barbuda Registered Land Act, section 4 of the Antigua and Barbuda Registration and Records Act and section 21 of the Antigua and Barbuda Stamp Act as well as statements by Court of Appeal in **Soumitra Sengupta v Woods Development Limited** to show that it was not permissible for the judge to admit into evidence a document that failed to comply with the legal requirements as to form, that was not registered, and that was not stamped.

[22] Secondly, Counsel for the First Defendant submitted that the Parties were required to register the purported rental agreement. He relied on section 46 of the Registered Land Ordinance¹² which states that:

“A lease for a specified period exceeding two (2) years or for the life of the lessor or of the lessee, or a lease which contains an option whereby the lease may require the lessor to grant him a further term or terms which, together with the original term, exceed two years, shall be in the prescribed form, and shall be complete by:

- (a) Opening a register in respect of the lease in the name of the lessee; and
- (b) Filing the lease; and
- (c) Noting the lease in the encumbrance sections of the register of the lessor’s land or lease.

¹⁰ [2004] ECSCJ No. 96. (Antigua and Barbuda) at paragraph [7]

¹¹ Civil Appeal No. 5 of 2005, [2006] ECSCJ No. 55 (Antigua and Barbuda) at paragraphs [3] and [4]

¹² Cap. 229 of the Laws of the Virgin Islands

- [23] Moreover, Counsel for the First Defendant submitted that the failure to register the lease agreement goes to the issue of whether third parties can be deemed to have actual notice of the lease agreement. The First Defendant contends that she only became aware of the document on the death of her husband, long after the Property would have reverted to her under the principle of survivorship.¹³ The First Defendant submits that as the purported lease agreement was never registered by the Claimant, it cannot be assumed or accepted by the Court that she had any knowledge or notice of the document, nor can she be held liable to or incur liability as a result of the same.
- [24] Counsel argued that it is trite law that the purpose of registration of an interest in land on the register is for the protection of the interested parties, as third parties would then have knowledge of the said interest. The First Defendant submitted that the failure to register the rental agreement estops the Claimant from arguing that the First Defendant or any other third-party had knowledge of the existence of the said agreement.
- [25] After considering the relevant case law originating out of the Eastern Caribbean, Counsel for the Claimant submitted that based on the law, (which is clear on the application of section 21), the lease of 12th February, 2013 is not admissible before the Court. Despite this concession, Counsel argued that there is sufficient evidence before the Court that show that there was some form of oral agreement prior to 2013 by which the Claimant and her deceased husband came to be in possession of the Property. Further, there is evidence of the acceptance of a monthly rent of \$800.00 paid to Mr. Wheatley which was later reduced to \$750.00. This evidence is not in dispute and was even admitted by the First Defendant in cross examination. Based on those facts, Counsel submitted that the Claimant and her husband had a monthly tenancy.
- [26] This Court accepts the principles enunciated in **Soumitra Sengupta v Woods Development Limited** and **King's Casino Limited v Pizza House Limited** in so far as they hold it is impermissible to allow a claimant to rely on an unstamped agreement and unregistered instrument, which cannot be admitted into evidence, in order to prove his case. The Court therefore cannot receive the

¹³ Trial Bundle Tab 13 page 113 lines 22 to 27

unregistered and unstamped lease agreement into evidence or permit the Claimant to place any reliance on the same.

- [27] However, these cases also make it clear that while the Claimant cannot rely on the actual lease agreement, the Court must consider whether there is other evidence which may support the conclusion that there was a contract between the Parties. In **T-Tobba Company Limited v Thornton Smith Trust Corporation and Jamal Smith**,¹⁴ Ventose M acknowledged this approach in the context of an application for summary judgment in which he had to consider the effect of non-compliance with section 46 of the Registered Land Ordinance. The learned master recognized that this section makes it mandatory for the lease to be filed, and for a register to be opened in respect of the lease in the name of lessee. However, at paragraph 21 he declined to enter summary judgment for the following reason:

“Even if as a matter of law section 46 operates to prevent the Lease from being enforceable, the question then arises as to what type of lease, if any...Is a periodic tenancy thereby created? Is it a tenancy at will or an equitable lease? These too are issues that need to be determined at the trial of the matter.”

- [28] In **Villas At Del Rio Limited and Steve Blair v Alexandra Hauptli and Dave Hauptli**¹⁵ Abel J had to determine whether the cause of action should be struck out because they had failed to register a seven (7) year lease over registered land with section 49 of the Registered Land Act of Belize. At paragraphs [43] – [45] the learned Judge noted the following:

“[43] Assuming that non-compliance with the RLA renders any dealing, such as the purported creation of a lease in excess of 2 years without registration under and as required by (or not in accordance with) the RLA, the question arises what would be the effect of such invalidity for the purported transaction? Would it be a total nullity or would it just make such a transaction legally invalid and ineffectual such that the law would consider it (i.e. the lease in excess of 2 years) not to have existed?

[44] It is trite law that a lease can be created without any formality (orally or in writing) where, inter alia, exclusive possession is granted of land and rent is paid for the use and occupation of such land, and there exists other badges and incidences of a lease, and a periodic tenancy may be thereby created.

[45] The position of leases at common law or in equity is usefully set out in Hill and Redman's Law of Landlord and Tenant, where it states:

¹⁴ Civil Case No. 44 of 2014 (Territory of the Virgin Islands) (unreported) delivered 13th January 2017 at paragraph [21]

¹⁵ Belize Civil Case No. 545 of 2013 (unreported) delivered on 19th June 2014

“A lease for a term exceeding three years or at a rent less than the best which can be reasonably obtained without a fine, if created otherwise than by deed, is construed as an agreement for a lease, and specific performance of the agreement will be ordered... In equity the lease is deemed to have been effectively granted, and for practical purposes, the parties are in much the same position as if the lease were valid in law. Where the above equitable doctrine does not apply, the effect of entry under the void lease, if followed by payment of rent, is to create a tenancy from year to year upon the terms of the instrument so far as applicable to such a tenancy.”

[29] At paragraph [48] the learned Judge concluded:

“It does not therefore follow from the non-registration that nothing exists in law or equity. The written instrument may have no validity or effect, but the grant of exclusive possession, coupled with the payment of rent are sufficient to constitute a periodic tenancy.”

[30] This Court is guided by these dicta, which dovetails with the approach taken by Barrow JA in the appellate decision of **King's Casino Limited v Pizza House Limited**. There, the learned Justice of Appeal noted observed the consequence that would follow the finding of validity “...*the respondent therefore had only a tenancy from month to month. Those concessions amounted to a rout because it meant that the tenancy was terminable by giving one month's notice and the damages to be awarded, if any, would have to be limited to the injury caused by failure to give such notice.*”

[31] It follows that notwithstanding the invalidity and inadmissibility of the purported lease agreement, the Claimant having entered into exclusive possession under the void lease agreement and having paid a monthly rental in the sum of \$800.00 would have created a periodic tenancy from month to month.

[32] However, the First Defendant's objection goes further. Counsel for the First Defendant also noted that the rental agreement was executed on or about 12th February 2013 between the Claimant, the Claimant's husband, Frankie Fahie (now deceased) and Mr. Berchel Wheatley and does not bear the name nor signature of the First Defendant.

[33] Counsel for the First Defendant pointed to the certified copy of the land register dated 11th March 2019¹⁶; which notes that the Claimant and her deceased husband, Mr. Berchel Wheatley are registered as co-proprietors. He also pointed to the evidence set out at paragraph 10 of the First Defendant's witness statement, in which she states that:

“...at no material time prior to the death of Berchel, was there ever a written lease agreement between the parties for the Property [and that] the purported lease was initially received from the Claimant ...on 13 September 2014.”

[34] When she was examined under oath, the First Defendant testified that she was a registered joint proprietor of the Property, along with her husband, Berchel Evans Wheatley (now deceased).¹⁷ She further testified that she was not made aware of the existence of the lease agreement until some weeks after the death of her husband. As she was not a party to or had no knowledge or notice of the lease agreement, the First Defendant asserts that she cannot be held liable for or incur liability as a result of the same.

[35] Counsel relied on section 101 (1) of the Registered Ordinance¹⁸ which recognises that joint proprietors have 'unity of interest'. Unity of interest follows from the proposition that each joint tenant is “wholly entitled to the whole” and as such the consequence is that the full legal estate is jointly owned and cannot be effectually conveyed or leased to third parties without the active participation of all the joint tenants each of whom must put his signature to the document leasing or conveying the property. Section 101 (1) (a) of the Registered Land Ordinance provides that:

“Where the land, lease or charge is owned jointly no proprietor is entitled to any separate share in the land and consequently: -

(a) dispositions may be made only by all the joint proprietors, and

(b) on the death of a joint proprietor, his interest shall vest in the surviving proprietor or the surviving jointly. Emphasis mine

¹⁶ Trial Bundle Tab 18 pages 201 to 204

¹⁷ Trial Bundle Tab 13 pg. 112 lines 3 – 5

¹⁸ Cap. 229 of the Laws of the Virgin Islands

- [36] The land register for the Property does not unequivocally reflect whether the First Defendant and her deceased husband held the Property as joint tenants/proprietors and it is unfortunate that Parties not exhibit of copy of the instrument of transfer (No. 103 of 2006) which would perhaps have made the position plain. What is clear is that regardless of whether the Property was held jointly or in common, the deceased Mr. Wheatley could not purport to unilaterally deal with or dispose of the same. Even if the Wheatley's held the Property as tenants in common, Mr. Wheatley would at the very least have had to obtain the written consent of the First Defendant before agreeing to lease the Property to the Claimant.¹⁹ If they held the Property as joint tenants then the First Defendant should have been a party to the lease agreement.
- [37] Although the Court is by no means persuaded that the First Defendant had no knowledge of the arrangement between her husband and the Claimant, (the Court has drawn this conclusion having had a chance to observe the First Defendant when she was examined under oath but also from the clear evidence set out in paragraphs 2 – 4 of her witness statement), there is no evidence before the Court that Mr. Wheatley obtained the written consent of the First Defendant prior to entering into the agreement with the Claimant and her husband and it is clear that she was not a party to the lease agreement.
- [38] However, it not disputed that following the death of her husband in August 2014, the Claimant and the First Defendant signed a written agreement on 11th September 2014. This was entirely prudent given that she would not have been party to the 2013 agreement and given that she would have become the sole proprietor on her husband's death. Later (effective 1st October 2014), the First Defendant agreed to reduce the rent to \$750.00 per month. Although that written agreement was irregular in that it did not accurately describe the Property or the authorized use of the same, it is clear that the Parties intended to enter into a binding written lease arrangement with the Claimant. In fact, the First Defendant confirms this at paragraph 6 of her witness statement and this is confirmed by the Claimant at paragraph 18 of her witness statement.

¹⁹ Section 102 (2) of the Registered Land Ordinance

[39] The Court therefore finds that as at September 2014, the Parties had entered into a lease agreement for a period of 1 year at a monthly rental of \$750.00 per month. Following the expiration of this lease, it is apparent that the Claimant would have held over in possession of the Property, no doubt on the same terms. These terms would have included those which are implied by virtue of sections 52 and 53 of the Registered Ordinance. Section 52 (a) of the Ordinance provides that:

“Save as otherwise expressly provided in the lease, there shall be implied in every lease, an agreement by the lessor with the lessee binding the lessor—

(a) that, so long as the lessee pays the rent and observes and performs the agreements and conditions contained or implied in the lease and on his part to be observed and performed, **the lessee shall and may peaceably and quietly possess and enjoy the leased premises during the period of the lease without any lawful interruption from or by the lessor or any person rightfully claiming through him;**”

[40] It follows that the Claimant would have had the benefit of an implied covenant for quiet enjoyment. Quiet enjoyment is the right to peaceably and quietly enjoy the premises without interruption of possession and it is trite law that a lessor can only interfere with the use and benefit of the premises by a lessee if he has a lawful excuse. The Court must therefore now determine whether the First Defendant is liable in damages for a breach of that covenant.

ii. **Whether the Claimant is entitled to compensation in the sum of \$7,000.00 for the losses incurred and resulting from the breach of covenant for quiet enjoyment.**

[41] The Claimant seeks compensation in the sum of US\$7,000.00 for losses incurred and resulting from the breach of covenant for quiet enjoyment by the alleged disconnection of the water supply to the Property. The evidence which supports this contention is set out at paragraphs 32 – 39 of the Claimant’s witness statement. She asserts that the water supply to the Property was disconnected for a period of 7 nights and 6 days (between 11th May 2016 – 17th May 2016), as a result of which her business operations were interrupted. She stated that when she made contact with the local Water and Sewerage Department she was informed that although they were not in arrears, the First Defendant had instructed the Department to disconnect the water supply. The Claimant asserts that the First Defendant later called to inform her that she had contacted the Department and instructed them to reconnect the supply.

- [42] This evidence is disputed by the First Defendant who in correspondence sent on her behalf by her attorneys, categorically denied responsibility for the disconnection and any resulting loss. Instead, the First Defendant asserted that she gave instructions to that Department that there should be no disconnection on the Property until further notice. The First Defendant provided documentary proof from the Water and Sewerage Department which demonstrates that the water supply to the Property was never disconnected at the material time nor was any request for disconnection received in regards to the Property.
- [43] Counsel for the First Defendant therefore submitted that the Claimant has failed to discharge her burden to prove that the water supply was disconnected or disrupted during the period 11th May 2016 – 17th May 2016, or that the First Defendant was responsible for such disconnection or disruption of service.
- [44] This Court is inclined to agree.
- [45] In **Sanderson v Berwick-on-Tweed (Mayor)**²⁰ the English Court of Appeal pointed out that:
‘...it appears to us to be in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted...’.
- [46] In **Perera v Vandiya**²¹ the landlord was found to have committed a breach of the covenant for quiet enjoyment where they cut off the supply of gas and electricity to a flat, thereby forcing the tenant out. In that case, the court held that there was no doubt that where a lessor deliberately takes steps to interrupt the utilities to leased premises, this may amount to a breach his covenant of quiet enjoyment. However, whether an actual breach can be made out will turn on the factual circumstances behind the disconnection of the electricity supply and the terms of any express quiet enjoyment covenant in the lease.
- [47] When she was cross-examined, the First Defendant’s position remained unshaken. She denied giving instructions to turn off the water; she however, admitted giving oral instructions to a Mrs. Todman (purported employee of the Water and Sewerage Department) not to have it turned off.

²⁰ [1884] 13 QBD 547 at page [551]

²¹ [1953] 1WLR 672

Counsel for the Claimant urged the Court to draw an inference from this fact. However, the Claimant must contend with the uncontroverted evidence in these proceedings that the First Defendant was ordinarily resident in the United States Virgin Islands and that there was no rational or logical reason why the First Defendant would have communicated to the Water and Sewage Department (or the Public Works Department as they alleged) to disconnect the water supply to the Property. Indeed, there is no suggestion that at the material time, the First Defendant's motive or intention was to obtain possession of the business premises or to enforce outstanding arrears of rent and so there appears to be no motive which could inform the alleged actions by the First Defendant.

[48] Moreover, the First Defendant would have provided the Court with documentary evidence from the Water and Sewage Department dated 15th March 2017, detailing the disconnection history at the Property. This evidence has not in any way been impugned or traversed and in light of its unequivocal terms, the Court cannot ignore or give little weight to it as has been suggested by Counsel for the Claimant. The printout may not reflect oral instructions given by the First Defendant but it provides a history of the disconnections carried out by the Department at the Property since 2013 and it is clear that no disconnection was recorded beyond May 2015. The Claimant has provided no basis upon which the Department's records can be impugned and so in these premises, the Court finds that the Claimant has not made out her case on a balance of probabilities. This claim for relief is therefore denied.

iii. **Whether there is an existing and binding agreement between the Claimant and the First Defendant for the sale of the property.**

[49] It is common ground between the Parties that there was no formally executed written agreement for sale and purchase of the Property that existed between the Claimant and the First Defendant. However, the Claimant contends that what existed were letters, emails and the receipt of the deposit paid in relation to the Property which when taken together, meet the requirements of the formalities necessary for the existence of a contract and which constitutes a sufficient memorandum to fulfill the statutory requirements.

- [50] Counsel for the Claimant submitted that the letter of 27th April, 2016 contained an offer from the First Defendant for the sale of the Property for the purchase price of \$45,000.00 payable in two installments: \$25,000 on execution of a sale agreement within 7 days of the letter and the balance of \$20,000.00 payable no later than 30th June, 2016²². It is common ground that on 13th May 2016, the Claimant through their attorneys sent a cheque for \$30,000.00 to the First Defendant's attorney stating that it was the first of two deposits on the Property with the remainder of \$15,000.00 to follow in short order.²³ Counsel submitted that this correspondence served as acceptance by the Claimant.
- [51] Receipt of this cheque was acknowledged by the First Defendant's attorney, Mr. David Abednego who testified under cross examination that the money was only held in escrow until the transaction was completed. The Claimant on the other hand argued that the sum of \$30,000.00 represented a substantial part payment of the purchase price which when taken together with the fact that the Property was clearly and correctly identified, and known to the Parties and the fact that the attorney acted as agent for the First Defendant, all demonstrate that there was a valid and binding contract between the Parties.
- [52] The First Defendant however trenchantly disputes that any legally binding and enforceable contract arose out of these facts. Counsel for the First Defendant submitted that when the Court looks at the totality of the communication and actions between the Parties, there is no binding agreement and no intention to have a binding agreement without the exchange of signed written contracts. The First Defendant submitted that the case law on parole evidence and oral agreements offer no assistance to this Court, as the distinguishing feature in the case at bar is that the purported agreement was "*subject to contract*."
- [53] Counsel for the First Defendant submitted that the offer of 27th April 2016 was made "*subject to contract*" and so, was a conditional offer which could not be accepted unless all the terms and conditions of the agreement were reduced to writing. The actual terms of that letter are as follows:

"Having discussed the proposal with our client Mrs. Gloria Wheatley we are instructed to report that our client in an effort to end the back and forth is prepared to accept \$25,000.00

²² Trial Bundle, Tab 17 page 149

²³ Trial Bundle, Tab 17 page 150

on execution of the sale agreement signed between or on behalf of the both parties within 7 days of this dated letter and the balance of \$20,000.00 no later than 30th June 2016.”

- [54] Counsel for the First Defendant submitted that a provision to the effect that “*on execution of a sale[s] agreement signed on or behalf of both parties*” ought to have the same meaning and effect of “*subject to contract*” in that any offer of terms was a conditional offer and incapable of being accepted until it was reduced to writing and signed by the relevant parties. He relied on number of legal and judicial authorities commencing with **Halsbury’s Laws of England**²⁴ where the learned authors observed:

72. Sales of land “subject to contract”.

In contracts for the sale of an interest in land, apart from contracts made by auction, it is the almost invariable practice for the parties to strike a bargain **but to make it clear that they do not intend to enter into a binding contract until a formal agreement has been drawn up by their solicitors and contracts have been exchanged. Such an intention is commonly indicated by the parties expressly making their agreement 'subject to contract', although it is thought that, with respect to bargains concluded on or after 27 September 1989, this form of wording is no longer required in most cases.** Emphasis mine

- [55] Counsel for the First Defendant also quoted the following excerpt from the judgment of Benjamin J in the Grenadian case of **Dirk Burkhardt et. al. v Nelson Lewis et al**, in which the learned judge noted that it is often the case in “subject to contract” negotiations that the agreement is concluded on a conditional basis, the parties not being bound until some agreed condition is fulfilled:-

“For example, it has been a practice to render an agreement for the sale of land conditional by using the expression “subject to contract” **or some variation that connoted the intention of the parties not to be bound until a formal contract was prepared and signed by both parties or exchanged. Such a formal agreement would usually be prepared by a legal practitioner. In the absence of proof to the contrary, the Courts have consistently held that such contracts must be construed as being a mere proposal to contract not valid in law.**” Emphasis mine

- [56] In **Dirk Burkhardt**, Benjamin J considered the judgment in **Winn v Bull**²⁵, in which the English court found that the offer and acceptance were made “subject to the preparation and approval of formal contract,” and it was held that until the formal contract was executed, there was no contract.

²⁴ Volume 22 at paragraph 72

²⁵ [1877] 7 Ch. D. 29

- [57] The First Defendant submitted that it is unreasonable to infer that the Parties, who would have had a history of communicating through their solicitors and were negotiating an agreement in writing, would have entered and finalized an oral agreement for the sale of the Property. He further submitted that the record would indicate that there was no express written acceptance of the offer. Missing from the Claimant's letter of 13th May 2016, is a memorandum or note stating that the terms and conditions of the letter of 27th April 2016 were accepted or even memorializing that there was an orally binding agreement between the parties.
- [58] Moreover, he submitted that the Claimant's ensuing actions did not comply with the terms of the offer in that the Parties did not execute a written sale agreement or advance the payment of the deposit within the prescribed seven (7) day period. Instead, the Claimant's solicitors, Ms. Maximea wrote Mr. Abednego, some sixteen (16) days later, on or about 13th May 2016²⁶ indicating that she was enclosing for his attention a cheque in the amount of US\$30,000.00 in favour of Harbour Chamber (BVI),²⁷ and that this sum represented the first of two (2) deposits to be paid for the Property and that the second and final payment would follow in short order.
- [59] Counsel submitted that the Claimant's actions were inconsistent with there being a binding agreement between the Parties, as none of the terms or conditions of the offer of 27th April 2016 were complied with, no deposit of US\$25,000.00 was paid, the deposit was not paid on execution of a written sale agreement, there was no execution of a written sale agreement between the Parties, no written sale agreement signed within seven (7) days of the letter on 27th April 2016 and further, the balance US\$20,000.00 was not paid by 30th June 2016, or by 15th July 2016 or to date.
- [60] Counsel concluded that it is not open to the Claimant to now seek a declaration from this Court that there was a binding agreement, where there is no written agreement, no evidence that the conditional offer was accepted (much less within the stated time limit of seven (7) days) and no compliance with the terms and conditions of the conditional offer. Counsel argued that the facts of this case do not support the Claimant's contention that there was a binding contract between the Parties because the

²⁶ Trial Bundle Tab 17 page 130

²⁷ Trial Bundle Tab 17 page 180

Claimant by her actions acted as though the terms of the letter of 27th April 2016 were not binding or had no binding effect or obligation on the Claimant or the Parties.

[61] Alternatively, and in any event, Counsel for the First Defendant argued that no binding agreement arose between the Parties because in the subsequent correspondences between the Parties, particularly the letter accompanying the deposit cheque of US\$30,000.00 represented a counteroffer on the part of the Claimant, who had continued to negotiate the terms of a potential agreement long after the letter of 27th April 2016.

[62] In the Court's judgment, this case demonstrates the dangers of Parties purporting to dispose of real property without the benefit of a comprehensive and executed written agreement. The BVI legislature no doubt in recognition of these inherent risks has made clear its position. At section 4 of the **Conveyancing and Law of Property Act**²⁸ states that:-

- (1) No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by law authorised.
- (2) This section applies to contracts whether made before or after the commencement of this Act and does not affect the law relating to part performance, or sale by the Courts.

[63] Section 37 of the Registered Land Ordinance which repeats the provisions of section 4 of the Conveyancing and Law of Property Act provides:

- (1) "No land, lease or charge registered under this Act shall be capable of being disposed of except in accordance with this Act, and every attempt to dispose of such land, lease or charge otherwise than in accordance with this Act shall be ineffectual to create, extinguish, transfer, vary or affect any estate, right or interest in the land, lease or charge.
- (2) Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract, but no action may be brought upon any contract for the disposition of any interest in land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and is signed by the party to be charged or by some other person thereunto by him lawfully authorized:

²⁸ Cap. 220 of the Laws of the Virgin Islands

[64] However, the Ordinance included a critical proviso which is relevant. At section 37 (2), the proviso reads:

Provided that such an action shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract—

- (i) has in part performance of the contract taken possession of the property or any part thereof; or
- (ii) being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract

[65] On the facts of this case therefore and applying section 37 (2) (ii), it is certainly arguable that the Claimant would not be prevented from bringing this action solely on the basis that there is an absence of writing. Moreover, courts have considered what would suffice as a memorandum of the agreement for the purpose of such provisions. In the English case of **Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd and another**,²⁹ the court found several emailed correspondence taken together were sufficient to find the existence of a contract. The court further found that it was entitled to look at all documents which were said to constitute the agreement, however many they might be, in order to determine the terms of the agreement.

[66] In the Barbadian case of **Elias v George Sahely & Co (Barbados) Ltd.**,³⁰ the Court of Appeal found that two documents taken together, a letter and payment of deposit were sufficient to fulfill the formalities of the existence of a contract along with parole evidence. In that case, the receipt of deposit and letter of the attorney constituted a sufficient memorandum of sale for the purposes of the Statute of Frauds.

[67] In Grenada, in **BB Inc. v Hamilton**³¹, the court found that the memorandum or note did not need to be a document which was prepared to satisfy the statutory requirements. What was critical was that the memorandum or note was in existence before the commencement of the action. The court further held that where the writing relied on consisted of more than one document but only one document had been signed by the defendant or on his behalf, then, if the document that had been signed by

²⁹ [2012] EWCA Civ 265

³⁰ (1982), UKPC 801

³¹ [2018] 3 LRC

the defendant contained some express or implied reference to the other documents, oral evidence was admissible to identify the other documents and they could be read together. The court also held in that case that it was not necessary for every term agreed by the parties to be included in the note or memorandum. What it needed to show was that the contents of the memorandum or note evidenced that a binding contract had been concluded and the essential terms had to be included.

[68] It follows that to the extent that the exchange of correspondence between the Parties reflects a final and complete agreement as to the parties, the property, the consideration and the interest to be granted, then there is no necessity for a contract to be made by any formal document or phrase. Provided that the Parties intend to enter into a legally enforceable contract and there is an agreement upon the essential terms made for valuable consideration, then a contract would be made.

[69] However, if an offer is accepted not finally but conditionally, on terms which clearly indicate that the agreement is “*subject to contract*” or “*subject to the preparation and approval of a formal contract*” or “*subject to suitable arrangements being arranged between your solicitor and mine*” then the effect is that until the necessary contract or arrangements have been made, then there is no contract and either party can withdraw. If such a reservation is indicated, then both parties have complete freedom of action; and if one of them has paid a deposit then he can demand it return at any time. Similarly, the vendor remains at liberty to withdraw from the sale. It provides protection against legal liability in the preliminary stages of negotiations and is normally inserted in the exchange of correspondence between attorneys.

[70] Although, there may by any number of phrases utilized, what is critical is that the Parties understand that there was no unconditional acceptance so that the parties would be bound at once. In **Taylor v Inntrepreneur Estates (CPC) Ltd.**³² the claimant brought a claim seeking a declaration that a lease agreement had come into force, damages for breach of the lease, and damages for misrepresentation resulting from having entered the alleged lease. On the documents, it was clear that throughout the parties had negotiated on a “subject to contract” basis. It was held that as no

³² [2001] PLSCS 33, (2001) LTL 7/2/2001; applied in *Jannis Reynold-Greene v The Bank of Nova Scotia* Civil Case No. 443 of 2005 (Antigua and Barbuda) (unreported) delivered 20th November 2008 per Blenman J at paragraph [54]

written agreement had been signed, no lease had been entered. It followed that there was no reasonable cause of action, and the claim was struck out.

- [71] In **Trans Trust SPRL v Danubian Trading Co. Ltd.** ³³ Denning LJ considered the question of contingent conditions (in that case, a condition in the contract for the sale of goods in which the buyer agreed to open a line of credit for the seller. The learned judge stated:

“What is the legal position of such a stipulation? Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation ‘subject to the opening of a credit’ is rather like a stipulation “subject to contract.” If no credit is provided, there is no contract between the parties.”

- [72] In the case at bar, the Parties’ pleadings have put the position beyond doubt. At paragraph 16 of her defence, the First Defendant asserts that:

“Further by letter dated 27 April 2016, Mr. Abednego wrote Ms. Richards, indicating that the First Defendant was prepare (*sic*) to accept US\$25,000.00 provided it was accompanied by the execution of a sale agreement within 7 days of the said letter and the remaining balance of US\$20,000.00 to follow no later than 30 June 2016. ***That it was always understood by the parties that this offer was subject to contract, signed between or on behalf of the parties.***”

- [73] The Claimant’s response to this is telling. At paragraph 20 of her Reply, she responded:

“Paragraph 16 is admitted to the extent that both parties understood that the offer was subject to contract signed between the parties. However, it was the “AS IS” issue previous advanced by the First Defendant and pursuant to the discovery by the Claimant of the boundary dispute and encroachment that the Claimant brought the issue of the encroachment to the attention of the First Defendant and sought to have the First Defendant rectify the encroachment before the execution of the agreement for sale....”

- [74] The First Defendant therefore contends that the Claimant accepted that this was a fundamental condition of the offer that it ought to have been in writing and that any agreement was subject to exchange of written documents. However, this clear and unequivocal concession is entirely inconsistent with the conclusions which are later reflected in her Reply where she asserts that the Parties had a partially performed agreement for the sale of the Property which the First Defendant was not entitled to repudiate.

³³ [1952] 2QB 297 at page 304

[75] The Claimant, who never provided any formal written indication of its agreement, relies on the fact of the partial payment of \$30,000.00 as an essential component in finding that there was a valid contract. However, the fact that the Claimant paid a partial payment of \$30,000.00 in this context could not *without more* have been indicative of a binding legal contract. Sometimes a prospective purchase pays to a vendor, or the vendor's agent, a pre-contract (or 'holding') deposit as a demonstration of the purchaser's keen interest in buying the property. This was made clear in **Sorrel v Finch**³⁴ a case involving a pre-contract deposit paid to an estate agent before contracts had been exchanged.

[76] It seems to the Court that the circumstances of this case are more consistent with the latter explanation. In arriving at this conclusion, this Court had regard to the persuasive evidence of Mr. David Abednego, Counsel instructed by the First Defendant to assist with the sale of the Property. Under cross-examination, he trenchantly testified that the purported deposit of \$30,000.00 was held on escrow while the Parties continued their negotiations. According to him, the Parties never concluded a true negotiation and he denied that the acceptance of the sum reflected a valid contract between the Parties.

[77] The Claimant has asserted that the First Defendant was entirely at fault³⁵ because the First Defendant (or her solicitors) never provided a sale agreement. However, Carrington JA (as he then was) in **Lyra Sewer Collazo v Percival Williams**³⁶ commenting on F.2.1. of **The Law Society's Conveyancing Handbook 1999**,³⁷ noted that the duty of preparation of the agreement rest with the person who is likely to suffer the greatest detriment to their interest or potential interest and thus it would certainly have been appropriate for the Claimant or for the Claimant's solicitors to ensure that their client's position was memorialized by a written agreement:

It has been stated that the standard condition of sale in England, that completion is to take place at the seller's solicitor's office, mirrors the convention that the money goes to the deeds. Whether or not this convention obtains in this Territory, the convention at least demonstrates that in the absence of agreement to the contrary, it is a reasonable course for the buyer to seek out the seller and tender the money and transfer document for execution.

³⁴ [1976] 2 ALL ER 371

³⁵ Trial Bundle Tab 9 pg. 86 para 25 of her Witness Statement

³⁶ [2008] ECSCJ No. 90 (Territory of the Virgin Islands)

³⁷ Frances Silverman, *The Law Society's Conveyancing Handbook: 1999* (The Law Society; 7th Edition (17th Feb. 1999))

[78] In the Court's judgment, it would have been clear from the correspondence and the circumstances of this case that the First Defendant's position was not unconditional and that the Parties well understood and accepted that fact. In circumstances where no agreement has been executed then no binding contract arose and either Party was at liberty to withdraw. It is not disputed that neither Party in the case at bar took the necessary steps to secure and execute a written agreement and so for the reasons already set out the Court therefore finds that there was no binding agreement between the Parties.

iv. Whether the First Defendant breached of the agreement for sale

[79] In light of the Court's findings herein, it is not necessary for the Court to consider whether the First Defendant breached the agreement for sale since there would have been no valid and enforceable contract in play. It follows that the Claimant is not entitled to damages for breach of contract. For the avoidance of doubt, however, the Court will clearly state that the Claimant would have been entitled to the return of her deposit.

v. Whether the Claimant has a legal and beneficial interest in the land and or all edifices erected on the Property

[80] The Claimant asserts it would have been made clear to Mr. Berchel Wheatley that she and her husband wanted to set up a bar and restaurant business named 'F and S' Slice of Paradise and that this would have required substantial construction work on the Property. It is on this basis that the lease agreement contained not only an option to purchase/right of first refusal but it also addressed the issue of improvements to the Property.

[81] Notwithstanding its inadmissibility, the Claimant says that she and her husband would have developed the Property with the consent of Mr. Wheatley. The Claimant states that because of such permission, in around August 2012, she "poured in" a serious investment of some US\$15,000.00 of their personal funds into the building-up of the Property.³⁸ The Claimant further contends that all works on the Property were done openly in contemplation of the contract and she asserts that the First Defendant would have been fully aware of the same.

³⁸ Trial Bundle Tab 9 page 83 paras. 8 and 9

[82] The Claimant points to the letter of 1st October 2016 sent to Counsel for the First Defendant where at paragraph 2, the Claimant references the construction. Counsel for the Claimant notes these contentions were never rebutted or rejected as being untrue. Counsel therefore submitted that it would therefore have been evident, that the First Defendant would have been aware that the Claimant would have made substantial investments/improvements on the Property. Counsel for the Claimant submitted that this is evident in the written note/memorandum dated 6th September 2014 sent by the First Defendant to the Claimant after her husband's death in which the Claimant ordered her to make no more additions on the Property without her consent. Counsel argued that this was an admission that there were works that were done on the Property which were carried out by the Claimant.

[83] Moreover, Counsel pointed out that when the Claimant agreed to purchase the Property for \$45,000.00 that amount in no way included what she would have invested in the Property since it would be unreasonable to expect the Claimant to pay for her own investment.

[84] The extent of the improvements is addressed in the Parties pleadings. At paragraphs 9 – 10 of the Claimant's statement of claim, she asserted that:

"In or around August 2012, the Purchasers invested a personal sum exceeding \$45,000.00 to build up the Long Look Property. They improved it by building a concrete and wooden structure which comprised of a kitchen, bathroom, restaurant dining lounge and entertainment area and a bar section.

Subsequent to improving the Long Look Property, the Purchasers operated the Restaurant/bar on the Long Look Property. The Operation of the same was public knowledge; business was conducted from after 6 am through to late nights every week day, including holidays.

At all times, the Wheatleys acknowledged the tenancy of the Purchasers and consented to the improvements to the Long Look Property."

[85] At paragraph 9 of her defence, the First Defendant stated that:

"...at all material times there was an existing structure on the Property that had been used for purposes of selling electrical supplies and that there existed two containers, a concreted walkway and a bathroom prior to the Property being rented. When the property was first rented by the Claimant and Frankie, sometime in or around 2012, Berchel made some improvements to the property so that it could be used as a restaurant and dining, lounge.

The First Defendant acknowledges that some improvements were made to the Property by the Claimant but recognises that these additions or improvement were made subsequent to the death of Berchel and Frankie. The nature of these improvements was to enlarge the space available for the restaurant and other private rooms.”

[86] In her reply, the Claimant denied that there was an existing structure on the Property. She stated that:

“...There existed an incomplete structure on the property. The structure was not capable of being used for the purposes of retail or electrical supplies. There has never been a concrete walkway on the premises and the space to accommodate the bathroom was incomplete as well. The window and door were purchased and installed by my late husband. My husband was also the one who purchased the toilet bowl and he himself installed that toilet bowl. After installing the toilet bowl, Mr. Wheatley visited the said property and having seen the installation of the toilet, said he will purchase the face basin which he did.

When we initially rented the property they was absolutely no sanitary provisions and so my husband install them all to bring the property to a rentable position....

...the improvements to the property were done prior to Mr. Fahie’s death and states that the improvements were made by Mr. Fahie with the assistance of Mr. Lyon Jack immediately after the Lease Agreement was executed by the Parties...”

...Additionally I have photographs of my deceased husband and Mr. Jack on the undeveloped property, digging trenches, erecting blocks and plastering the floor.”

[87] Mr. Lyon Jack, the contractor who carried out the works on behalf of the Claimant addressed the issue in his written and oral evidence. The Court was satisfied that he was a forthright and truthful witness. It is Mr. Jack’s evidence that there was nothing on the Property except the empty containers and that when he visited the Property there was no evidence of any commercial activity. Photos of works that were carried out on the Property were also admitted into evidence unchallenged³⁹ which showed the container before it was transformed. Mr. Jack stated that he assisted the Claimant’s husband in transforming the container into a bar with a kitchen which was later extended. This extension included putting a foundation by paving the area from the container towards the wall. He also stated that the Claimant’s deceased husband constructed the necessary bathroom for the Property as there was none on the Property.

³⁹ Trial Bundle, Tab 11, Witness Statement of Lyon Jack and Tab 17, pages 188 – 193

[88] Mr. Jack's evidence was not significantly tested during the course of the trial. When he was cross-examined under oath, he simply testified that he was never hired by the Wheatleys (but rather only by the Claimant and her husband) to carry out works on the Property. Counsel for the Claimant further submitted that the Claimant's evidence also remains unchallenged with regards to the extent of the improvements made to the Property and the fact that such improvements were carried out with consent. The Claimant's evidence of what was done on the Property provides details of digging of the foundation, the old container being used as the base to put up a concrete and wooden structure which comprised of the kitchen, bathroom, restaurant, dining, and bar sections. The container was used as a base to erect a building of wood and concrete while the extension was added on with a concrete foundation. Supporting the Claimant's case were photographs of which were attached to the witness statement of Lyon Jack which together with his substantive evidence convinced the Court that when the Claimant and her husband went into possession, the Property had nothing on it save two containers.

[89] The Court has no difficulty in finding that Mr. Fahie and Mr. Jack would have transformed the original container into a building which would eventually house the Claimant's business. They would have dug a foundation, used one of the old containers as part of the base and put up a concrete and wooden structure which comprised a kitchen bathroom restaurant dining lounge and entertainment and bar. Later, they would also have paved an area leading from the container towards the wall which would become the extension for the foundation of the new addition which eventually included bathroom facilities. The Court therefore finds that there was substantial work carried out on the Property.

[90] The Claimant seeks a declaration that she has a legal and beneficial interest in the land and/or all edifices erected on the Property. The Court will first consider the claim made in respect of the legal and beneficial interest in the land. In that regard, the Court has noted that the Claimant seeks an order that title to the same be transferred to her in her personal capacity. The First Defendant trenchantly opposes this claim. She submitted that the Claimant has no legal or beneficial interest in the Property. Counsel for the First Defendant submitted that the evidence does not disclose that Mr. Wheatley had any intention of granting the Claimant and/or Mr. Fahie any legal and/or equitable interest in the Property apart from a leasehold interest. Even if he did, Counsel submitted that Mr.

Wheatley would not have had the authority to bind the First Defendant or dispose of her interest in the Property.

[91] The Court was invited to accept what he described as the undisputed propositions that at all material times, the First Defendant was a joint proprietor of the Property who had no knowledge of the purported lease agreement prior to Mr. Wheatley's death and who did not subsequently ratify its terms.⁴⁰ He noted that the Claimant admitted in her oral evidence, that the First Defendant was not present, nor did she assert that the First Defendant expressly consented to the initial construction and renovation works in August 2012.

[92] Counsel for the First Defendant submitted that any works completed by the Claimant was purely for the purpose of making the Property suitable for carrying out the intended business and that the Claimant did not act to her detriment in reliance on any statements or promises of the First Defendant who did not consent to the same. Counsel further asserted that shortly after the death of her husband, the First Defendant would have communicated to the Claimant, on or about 6th September 2014, that she and her husband were not permitted to make any further improvements, additions or alterations to the Property.⁴¹ Finally, Counsel submitted that an examination of the shifting evidence of the Claimant reveals no supporting evidence as to what value, if any, was added to the Property as a result of the purported improvements as the Claimant was renovating the existing structure.

[93] Although not expressly pleaded as such, this claim could only be based on the doctrine of proprietary estoppel. This doctrine stated in its simplest formation in **Re Basham Deed**⁴² is as follows:

“...where one person A has acted to his detriment on the faith of a belief, which was known to and encouraged by another person, B, that he either has or is going to be given a right in or over B's property, B, cannot insist on his strict legal rights if to do so would be inconsistent with A's belief”.

[94] This Court has no hesitation in finding that the claim for legal and beneficial interest in the land is not maintainable because critical elements for this claim have not been alleged or proved. In order to ground a claim to property in proprietary estoppel, three elements or ingredients must be proved,

⁴⁰ Trial Bundle Tab 3 page 30 Tab 17 page 139

⁴¹ Trial Bundle Tab 3 page 19

⁴² (1986) 1 WLR 11 at 1503

namely: (i) there must be an assurance or representation, whether express or implied, that the claimant has or would have an interest in the land of the defendant or his or her estate; (ii) reliance by the claimant on that assurance or representation; and (iii) the claimant must act to his or her detriment in reliance upon the assurance or representation. These three elements in combination must lead the court to conclude that it would be unconscionable or inequitable for the person who made or gave the assurance relied on, to resile from it.⁴³

[95] In the case at bar, the Claimant has not alleged or proved that either Mr. Wheatley or the First Defendant provided a clear enough assurance to her that she would be entitled to some estate, right or interest in the Property as a result of the improvements to the land. The Court has no doubt that the improvements were carried out with the full permission of Mr. Wheatley, but there is no indication that in doing so, he intended to give any assurance to the Claimant or her husband that they would be grant any legal or equitable interest in the Property. Rather, from all accounts, under the terms of the void lease agreement, Mr. Wheatley would have unilaterally permitted the Claimant and her husband to make improvements consistent with their intended use of the Property and with the understanding that *“if at any time they wish to give up the property I will refund the monies that was spent on my property or they will go rent free until the monies are refunded.”*

[96] The Court has no doubt that these improvements would have been carried out in contemplation of the Claimant and Mr. Fahie carrying on a business on the leased property. This construction would have been carried out with the express consent of Mr. Berchel Wheatley. There is no evidence that the First Defendant ever expressly gave permission or consented to the works which were carried out on the Property, however the Court finds that the works would have been carried out in the open and over a course of time. The Court has no doubt that the First Defendant would have been well aware that the Claimant and her husband would have been in possession of the Property and would have stood by in silence over a period of some years while the Claimant and her husband openly possessed the same and carried out significant construction and improvements.

⁴³ SLUHCVP2018/0002 Mathilda Nelson v Alexis Alcide which considered and applied Gillett v Holt [2001] Ch 210 applied; Thorner v Major [2009] UKHL 18 followed; Mohammed v Gomez and others [2019] UKPC 46 followed; Henry v Henry [2010] UKPC 3 considered.

[97] As regards the subject matter it must also be clear that the assumption or expectation in respect of it was one that Defendant could lawfully satisfy. It follows that even where the Claimant could prove that Mr. Wheatley provided her clear enough assurance to the Claimant that she would be entitled to the Property or some other estate in or right or interest in the Property, because the Property was jointly held, she would also have to demonstrate that he could lawfully satisfy this assurance in circumstances where it is not contended that the First Defendant was not a party to such agreement or consented to the same. She clearly has not done so and so this part of the Claimant's claim is dismissed.

[98] The Claimant's claim in respect of the actual improvements on the Property is however more complicated. Apart from the lack of cogent documentary evidence proving the amount of compensation sought, it requires that the Court first to determine whether the improvements are to be classified as tenant (lessee) or landlord (lessor) fixtures. This is because, at common law, the maxim *quicquid plantatur solo, solo cedit* prescribes that whatever is attached to the soil becomes a part of the soil. So that any fixture attached by a tenant during his lease prima facie belongs to the landlord and the tenant would be guilty of waste by removing it.⁴⁴ This principle can even extend to a building erected by the tenant on what was bare land when the lease was granted.⁴⁵

[99] The common law has however evolved to permit the removal of fixtures by a tenant. The now long established exception to this rule prescribes that an object may be removed if it meets a prescribed criterion. This position has long been a part of the common law and was summarised in the now well-known case of **Mitchell v Forde and Cowie**⁴⁶ where, at page 412, Fraser J of the High Court of Trinidad and Tobago observed:

"The general rule is that whatever is annexed to the realty becomes part of it, and the person who was the owner of it when a chattel loses his property in it, which immediately vests in the owner of the soil. The term fixture is properly used to denote things which by their annexation to land and so long as they are so annexed, have lost their character as personal chattels and become part and parcel of and subject to the incidents and rights of property attaching to the land to which they are so annexed—see ADKIN & BOWEN ON FIXTURES (3rd Edn), p 1. The maxim *quicquid plantatur solo, solo cedit*—is derived from the Roman Law and is expressed thus by GAIUS in Book 41 of the DIGEST—*quia omne quod inaedificatur*

⁴⁴ Bain v Brand (1876) 1 App Cas 762, HL; Wake v Hall (1880) 7 QBD 295 CA; Boswell v Crucible Steel Co [1925] 1 KB 119, CA

⁴⁵ Never-Stop Railway (Wembley) Ltd v British Empire Exhibition (1924) Inc [1926] Ch 877 and Elitestone Ltd v Morris [1997] 2 ALL ER 513

⁴⁶ (1963) 5 WIR 409; and see: Peel Land & Property (Ports No 3) Ltd v TS Sheerness Steel Ltd - [2014] 2 EGLR 21

solo cedit—with respect to the interpretation of which Lord WATSON said in *Wake v Hall* ((1883), 8 App Cas 195, 52 LJQB 494, 48 LT 884, 47 JP 548, 31 WR 585, HC, affg (1880), 7 ABD 295, CA; 31 Digest (Repl) 225, 3621) ((1883), 8 App Cas at p 207):

[100] However, in order to alleviate hardship and encourage trade, the courts have made exceptions to the general application of the rule— “*to suit the exigencies of modern life and modern progress, and numerous qualifications have been grafted on it in favour of trade, manufacture, and agriculture, and in furtherance of the rights of creditors*”. The result was that even though the personal chattel as between landlord and tenant became a part of the realty, it was nevertheless severable or removable at the end of the term if it had been affixed for the purpose of trade, or for mere ornament and convenience.

[101] The tenant's right to remove fixtures annexed by him for purposes of trade is discussed in detail in the case of **Elwes v Maw ((1802), 3 East, 38, 102 ER 510, 31 Digest (Repl) 213, 3454)**. Trade fixtures are those items which have been affixed for the purpose of carrying on a particular trade. They encompass those items that merchants annex to the premises to facilitate the storage, handling, and display of their stock such as booths, bars, display cases and lights. It has long been recognized by the **Poole's Case**⁴⁷, that a tenant is entitled to remove fixtures installed during the term of his lease for the purpose of carrying on his business. Domestic and ornamental fixtures consist of objects that a tenant has affixed to the land for the purpose to render it more convenient. Stoves, shelves, and lighting equipment are types of domestic fixtures. Ornamental fixtures include curtains, blinds, and beds fastened to walls. The tenant is allowed to remove any ornament and domestic fixtures provided that there is no substantial injury to the landlord's premises.

[102] The common law position is clearly summarised in the following dictum from **Peel Land & Property (Ports No 3) Ltd v TS Sheerness Steel Ltd**⁴⁸:

“Fixtures became sub-categorised as “tenant's fixtures”, which a tenant is entitled to remove, and as “landlord's fixtures”, which he is not. Woodfall, Landlord and Tenant, para 13.141, describes a “tenant's fixture” as a chattel which is:

⁴⁷ (1703) 91 ER 320

⁴⁸ [2013] EWHC 2689 (Ch) and see *Spyer v Phillipson* [1931] 2 Ch 183; *Spielplatz Ltd v Pearson* [2015] EWCA Civ 804, [2015] 2 P & CR 365, [2015] HLR 791. Tenant's fixtures which cannot be removed in this way become landlord's fixtures by operation of law: see *Boswell v Crucible Steel Co* [1925] 1 KB 119. Tenant's fixtures which the tenant chooses not to remove at the end of the term also become landlord's fixtures

“(a) annexed by a tenant to the land;

(b) is so annexed either for the purposes of his trade or for mere ornament and convenience; and

(c) physically capable of removal without causing substantial damage to the land and without losing its essential utility as a result of the removal.”

Emphasis mine

[103] At common law therefore, a tenant usually may remove a fixture before the end of the lease term if the fixture was installed for the purposes of trade, agricultural, ornament, or domestic use and if it can be removed without damage to the premises. Otherwise the fixtures become a gift to the landlord. However, the tenant who fails to make good damage to the land occasioned by the legitimate removal of fixture will therefore be liable to compensate the landlord for the damage occurred.

[104] Landlord's fixtures on the other hand, has been defined by Atkin LJ in **Boswell v Crucible Steel Co.**⁴⁹ in the following terms:

“...as I understand it, covers all those chattels which have been so affixed by way of addition to the original structure, and were so affixed either by the landlord, or, if by the tenant, under circumstances in which they were not removable by him.”

[105] The expression “landlord's fixtures,” therefore includes:

- i. items attached to the premises by the landlord and which are in situ at the date of the lease.
- ii. items attached to the premises by a previous tenant and which are in situ at the date of the lease – these become landlord's fixtures by operation of law;
- iii. items brought into the premises by the landlord during the term of the current lease; and
- iv. **items installed by the current tenant during the term and which, by operation of law, become landlord's fixtures.** Emphasis mine

⁴⁹ [1925] 1 KB 119

[106] At common law, there are two tests for determining when a chattel that has been on land, loses its characteristic as a chattel and becomes a fixture? The criterion for determining whether the chattel is affixed to the land and became a fixture was explored by Wooding C.J. in **Mitchell v Cowie**. In that case Wooding CJ clearly establishes the intention criterion as the controlling and guiding principle with which the object is affixed to the realty. The learned judge found that a house may be a chattel or a fixture depending on whether it was intended to form part of the land and that this intention is to be determined objectively rather than subjectively. Other factors such as: degree of annexation, purpose of annexation, the relation to the land of the party making the annexation, damage to the land and the chattel upon removal, and custom and usage are also used to ascertain intention. According to the degree of annexation test, an article is a fixture if it is attached to land or a building in a substantial manner, such as by nails or screws. The more firmly or irreversibly the object is affixed to the earth or a building, the more likely it is to be classified as a fixture. There must be a physical connection with the land or with something that is part of the land and object.

[107] In **Holland Hodgson**,⁵⁰ often been cited as establishing the rule with regard to chattels and fixtures, Lord Blackburn's suggests that, if there is no attachment, one can assume it is a chattel. He observed that:

‘...when the article in question is no further attached to the land by its own weight, it is generally considered to be a mere chattel’.

[108] In **Spielplatz Ltd v Pearson**⁵¹, the Court of Appeal was required to consider whether a chalet which had been built on a pitch at a naturist resort was a fixture or a chattel. The chalet had been built on the pitch by the defendant's predecessor in title, and was still there at the time of the letting to the defendant in 1992. If the chalet was a fixture, then it had been demised with the site on which it stood as a dwelling. If it was a chattel, then at all times it had belonged to the tenant, and hence the lease was of the site only under an unprotected common law tenancy which could be (and had been) determined by notice to quit. At the time at which the lease was granted, both parties believed that the chalet was a chattel.

⁵⁰ [1872] LR 7 CP

⁵¹ [2015] EWCA Civ [2015] 2 P & CR 365, [2015] HLR 791

- [109] The Court of Appeal concluded that the chalet was a fixture. In reaching that conclusion, the Court of Appeal followed the decision in **Elitestone Ltd v Morris**⁵² where the House of Lords held that the answer to the question of whether an item was a fixture or a chattel depended on the degree and purpose of its annexation to the land with the conclusion in **Spielplatz** being that, assessed objectively, a dwelling which had been built in such a way that (on the evidence) it could not be removed except by destruction could not have been intended to remain a chattel and so must have been intended to form part of the land. As a result, the parties' subjective understanding of the position was irrelevant, because as a matter of law the chalet had become part of the land).
- [110] The burden of proof is on anyone contending the existence of a fixture. If it is attached to the land even slightly, it is considered to be a fixture, the burden shifting to the person who contends that it is a chattel. In considering this burden of proof, the Court has considered the evidence as to the description of the construction and the improvements which resulted. After applying the following tests (see per Lord Blackburn in **Holland v Hodgson** and Wooding CJ in **Mitchell v Cowie**: (i) the degree of annexation test and (ii) the object or purpose of annexation test, used as a guide to determining whether there was an intention on the part of the annexor to create a fixture, this Court is satisfied that the structures on the Property had been physically affixed to land, that is by nails, screws or cement.
- [111] Turning now to the evidence in the case at bar, the Court notes that during cross-examination, the Second Defendant testified that she when she purchased the land she did not see anything that cannot be removed. She further testified that what she purchased was the land and not the structure thereon. However, the Claimant's position is that based on the nature of the works carried out by the Claimant and her husband that it will be impossible to remove the structure without causing damage. According to Counsel, the improvements on the Property included the transformation of the container into a restaurant and bar and the extension along with the improvement on the retaining wall forms part of the realty. When the structure was being constructed, the Claimant would not have had any intention that it was something that they would have had to remove, which explains that the continuous efforts to purchase the property and complete the sale. In applying a common sense

⁵² [1997] 2 ALL ER 513; applied by Pereira CJ in ANUHCVP2009/0014 Marie Makhoul v Cicely Foster and Louis Lockhart

view to the current structure on the Property, Counsel for the Claimant therefore submitted that the transformative works on the container and the extension outward ceased to be chattels and same became part of the land and therefore when the Property was sold, the structure became a part of the realty. She concluded that it will be impossible to remove all the works that was carried out by the Claimant and her husband from the container without causing damage.

- [112] Counsel relied on the case of **Elitestone Ltd. v Morris and Another**⁵³. That case did not address the question of compensation but the court reiterated the following basic principles;

“Where a house was constructed in such a way that it could not be removed, save by destruction, it could not have been intended to remain a chattel and must have been intended to form part of the realty; but where it was constructed in such a way as to be removable, whether as a unit or in sections, it might remain a chattel, even though it was connected temporarily to mains services such as water and electricity. Accordingly, if a structure could only be enjoyed in situ, and could not be removed in whole or in sections to another site, there was a strong inference that the purpose of placing the structure on the original site was that it should form part of the realty at that site, and should therefore cease to be a chattel. Applying a commonsense view, when the defendants' bungalow was built it became part and parcel of the land and the absence of any physical attachment to the land was irrelevant. It followed that the appeal would be allowed.”

- [113] The Claimant has therefore unreservedly contended that for the most part the improvements in question are landlord's fixtures. Notwithstanding this, in her statement of claim, the Claimant seeks a declaration that she has a legal and beneficial interest in all the edifices erected on the Property. However, the Court notes that this contention was not advanced in the legal submissions filed at the close of trial. Instead, the Claimant now advanced that she should be compensated for the costs of the improvements made to the Property.

- [114] Given the Claimant's contention that the structure is now a part of land, the Claimant must advance a plausible legal basis which supports this revised claim. This is because, at common law, any improvements made by a tenant (unless classified as 'tenants' fixtures' and, thereby, removable) form part of the freehold and, at the end of the lease, must remain for the reversioner. Subject to the law of waste and to any contrary stipulation in the lease, the tenant remains free to carry out improvements, but is not entitled to compensation.

⁵³ [1997] 2 ALL ER 513

- [115] This common law approach has been viewed as a potential benefit to landlords when the improvement adds to the value of the reversion. In other jurisdictions, Parliament has enacted legislation which is intended to provide redress for what is widely regarded as this lack of equity. Such statutes provide that compensation is payable for improvements made by the tenant which at the termination of the tenancy “*add to the letting value of the holding*”.⁵⁴
- [116] Unfortunately, there is no equivalent legislation enacted in the Virgin Islands. However, the common law makes it clear that parties are free to enter into an agreement within regard to the character and ownership of an item to be affixed to the land. In respect of what the parties may have themselves agreed, the Court is guided by the decision of House of Lords in **Melluish (Inspector of Taxes) v BMI (No 3) Ltd**.⁵⁵ in which the English court found that:
- “The terms expressly or implicitly agreed between the fixer of the chattel and the owner of the land cannot affect the determination of the question whether, in law, the chattel has become a fixture and therefore in law belongs to the owner of the soil. ... The terms of such agreement will regulate the contractual rights to sever from the land as between the parties to that contract and, where an equitable right is conferred by the contract, as against certain third parties. But such agreement cannot prevent the chattel once fixed, becoming in law part of the land and as such owned by the owner of the land so long as it remains fixed.”
- [117] **Mellusih** however also establishes that whereas parties may not decide what is (or is not) a chattel, their contractual arrangements may determine what can be done with it whatever may be its nature in law.
- [118] Unfortunately, in this case, the Claimant must contend with the fact that the only evidence which supports the purported contractual arrangements is to be found in the unenforceable and inadmissible lease agreement which the Claimant is not entitled to rely upon. The Claimant must also contend with the fact that there is no evidence that the First Defendant *qua* co-proprietor of the Property would have been aware of her husband’s specific agreement to pay compensation for the relevant improvements or would have acquiesced in or consented to the same. Indeed, the First Defendant’s evidence is that the first time she became aware of the document was on 13th

⁵⁴ English Landlord and Tenant Act 1954

⁵⁵ [1996] AC 454 at page 473

September 2014 after her husband had passed. She would in essence be a stranger to any purported agreement to compensate.

- [119] In the absence of any agreement between the Parties, these questions fall to be determined on the basis of the common law and at common law any improvements which the tenant makes - unless they fall within the classification of tenant's fixtures- become part of the freehold property. When the lease ends, the tenant must hand the whole property, including the improvements, back to the landlord. He is not entitled to any compensation, and it makes no difference that he paid for the improvements, nor that the landlord knew of them and expressly gave his consent.

Post September, 2017 Construction

- [120] Certainly, the improvements made and financed by the Claimant and her deceased husband may have potentially brought the First Defendant an unexpected, and perhaps unjustified, benefit. However, the Claimant's evidence is that these improvements were completely destroyed in the 2017 Hurricanes.⁵⁶ However, she further stated that following this destruction she took steps to rebuild the restaurant in order to bring it back to its pre-hurricane condition. At the time that the Claimant would have done so, the First Defendant would have been the sole owner of the Property it is her evidence that by letter dated 6th September 2014, she would have indicated to the Claimant and her husband that there were not permitted to make any further improvements or adjustment to the Property without first consulting her. She complains that they had habitually carried out works without her permission or consent.
- [121] There is no evidence that this post September, 2017 construction would have been carried out with the permission of the First Defendant who would at that time have been the sole proprietor. Moreover, there is certainly no evidence that she would have agreed to pay compensation on termination of the lease.

⁵⁶ Paragraph 63 of the Claimant's Witness Statement

- [122] Applying the relevant common law principles, it is clear that the Claimant has not advanced any arguable basis for compensation for improvements which are admittedly classified as landlord's fixtures. The claim for compensation in respect of the improvements to the Property has therefore not been made out and is dismissed.
- [123] The Claimant is however able to remove any fixture before the end of the lease if they were installed for the purposes of trade, agricultural, ornament, or domestic use and if they can be removed during the tenancy without damage to the Property. This is consistent with what was contemplated by the First Defendant, in correspondence sent on her behalf by her attorney on 8th September 2016. In that letter, the First Defendant made clear that in surrendering the premises the Claimant will be required "to remove all of her equipment and trade fixtures constructed and installed at the premises." The Court sees no basis why the First Defendant should be permitted to resile from that position.
- [124] In the Court's judgment, if the improvements are not removed, they would belong to the First Defendant unless they can properly be characterised as simply being 'chattels' which have always belonged to the Claimant.⁵⁷

The Counterclaim

- [125] By way of counterclaim, the First Defendant's prayer for relief claims arrears of rent in the amount of US\$4250.00, interests and costs. This notwithstanding that at in paragraph 33 of her counterclaim she alleged that the sum of US\$4,750.00 now remains due and owing by the Claimant to the First Defendant. The inconsistency has not been clarified by any subsequent amendment but at paragraph 44 of the Claimant's defence to counterclaim, the Claimant admits to the outstanding rent of \$4,750.00 which she stated that she is willing to liquidate. This position was later reiterated in oral testimony.
- [126] In light of this unequivocal concession the Court will order that the Claimant pay the First Defendant the sum of US \$4,750.00 representing arrears of rent.

⁵⁷ Poole's case (1703) 1 Salk 368

Costs

[127] The Court has considered the Parties submissions on the issue of costs and in particular addressing the factors which the Court should take into account under CPR Part 64.6 (6) (b) and (d). The Court is satisfied that there is no basis to depart from the normal rule that costs follow the event.

[128] **The Court's order is therefore as follows:**

- (1) Judgment is entered for the Defendants.**
- (2) The Claimant will pay the First Defendant the sum of US \$4,750.00 representing arrears of rent.**
- (3) The Claimant will pay interest on the said sum at the legal rate from the date of this judgment until payment.**
- (4) The Court's order of 14th March 2017 is discharged.**
- (5) The Claimant will pay the Defendants costs to be quantified on a prescribed basis, if not agreed.**

**Vicki Ann Ellis
High Court Judge**

By the Court

Registrar