[2016]JMCC Comm. 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2013 CD 00166

BETWEEN	**CITY PROPERTIES LIMITED**	**CLAIMANT**
AND	**NEW ERA FINANCE LIMITED**	**DEFENDANT**

Nigel Jones, Kashina Moore and Shanique Crooks Instructed by Nigel Jones and Company for the Claimant

Leroy Equiano and Kadian Mcglashan Instructed by Rosemarie Duncan Ellis and Company for the Defendant

HEARD: March 16 and 17, April 29, 2015 and January 29, 2016

LANDLORD AND TENANT - AGREEMENT FOR A LEASE - DRAFT LEASE NOT EXECUTED AS SOME TERMS WERE FOUND OBJECTIONABLE BY THE TENANT - PARTIES OPERATING UNDER THE AGREED TERMS OF THE DRAFT LEASE - CLAIM BY LESSOR FOR RENT AND OUTSTANDING MAINTENANCE - WHETHER MAINTENANCE PROPERLY CHARGED TO THE TENANT AS ADDITIONAL RENT - WHETHER TENANT OBLIGED TO PAY INSURANCE AND DEPRECIATION ON THE BUILDING AS A COMPONENT OF MAINTENANCE

CIVIL PROCEDURE AND PRACTICE - PLEADINGS - COUNTER CLAIM FOR REFUND OF MONIES INAPPROPRIATELY CHARGED FOR MAINTENANCE - CLAIM MADE IN WITNESS STATEMENTS AND SUBMISSIONS FOR REFUND OF OVERPAYMENT ON RENT - NO CORRESPONDING CLAIM FOR OVERPAYMENT MADE-WHETHER OVERPAYMENT RECOVERABLE-CLAIM FOR DAMAGES FOR COMPENSATION FOR EXPENDITURE ON CHATTELS AFTER DESTRUCTION BY FIRE - NO BASIS SHOWN FOR THE CLAIM - NEGLIGENCE AND OCCUPIERS LIABILITY NOT SPECIFICALLY PLEADED - DECLARATION SOUGHT FOR PARTIES TO BE DECLARED JOINT OCCUPIERS - NO BASIS SHOWN FOR SUCH A DECLARATION-WHETHER THERE IS SUFFICIENT EVIDENCE TO GROUND A CAUSE OF ACTION IN DAMAGES FOR NEGLIGENCE OR OCCUPIERS LIABILITY OR FOR A CLAIM FOR COMPENSATION FOR FIRE DAMAGE

EVIDENCE - EXPERT EVIDENCE-NO PERMISSION SOUGHT BY DEFENDANT AT CASE MANAGEMENT TO RELY ON EXPERT EVIDENCE - QUANTITY SURVEYOR CALLED AT TRIAL TO GIVE EVIDENCE OF COSTS OF MATERIALS AND LABOUR - WHETHER EVIDENCE GIVEN

BY QUANTITY SURVEYOR FACTUAL EVIDENCE AND ADMISSIBLE AS SUCH-WHETHER EVIDENCE INADMISSIBLE AS HEARSAY - APPLICABILITY OF THE CIVIL PROCEDURE RULES 2000, PART 32 AND SECTION 31G AND F OF THE EVIDENCE ACT

EDWARDS, J

THE CLAIM

[1] This was supposed to be a simple claim for recovery of rent and maintenance charges along with interest accruing thereon. However, by the time the defence was filed the issues became somewhat more complicated. The claimant, City Properties Limited**,** a Company duly incorporated under the Laws of Jamaica and situated at 40 Duke Street in the parish of St. Andrew, claimed against the defendant, New Era Finance Limited, a Company duly incorporated under the Laws of Jamaica and situated at the said 40 Duke Street, Kingston in the parish of St. Andrew, sums owing for outstanding rent and maintenance. The claimant is the owner of the premises and the defendant was their tenant.

[2] The claimant agreed to lease part of the property to the defendant for the purposes of carrying out business in 2003. The unchallenged evidence before this court is that the defendant went into possession of a unit at 40 Duke Street in or around 1999 under an arrangement with an entity that previously occupied the premises as the claimant's tenants.

[3] By way of a draft lease agreement the claimant reduced into writing the terms on which it would allow the defendant to remain in occupation of the premises. This draft lease agreement was presented to the defendant for approval and signature. It was however, not signed as there was disagreement with certain terms. However, the defendant remained in possession and commenced paying rent and maintenance to the claimant on a monthly basis. Despite the objections to certain terms in the lease agreement the parties functioned based on those terms which were not objected to.

[4] In and around 2009 there was a fire at the premises which resulted in damage to the premises and to the defendant's property. As a result the defendant sought to claim on the insurance policy taken out on the premises by the claimant on the basis that there was an insurance component in the maintenance it had paid to the claimant. The claim on the insurance was unsuccessful since the defendant's assets were not insured and the claimant's policy of insurance only covered the building and not the contents owned by the tenants. As a result, feeling aggrieved, the defendant began paying less than the contracted rent and maintenance. The claimant served a notice to quit but the defendant failed to pay the sums due or to vacate the premises despite written demands to do so. By March 2012, the defendant was said to owe the claimant rent and maintenance in the amount of Three Million, Six Thousand, Four Hundred and Ninety Dollars and Forty Eight Cents ($3,006,490.48). As at this trial date the claim was for over five million dollars and counting.

[5] The claimant now having brought suit for the outstanding rent and maintenance, the defendant counterclaimed challenging the basis for the computation of the rent, the components of the maintenance charges and what would amount to compensation for a breach of agreement or restitution for unjust enrichment in relation to the fixtures and fittings left behind when they vacated the premises. The evidence of the claimant came from its witnesses; Mr. Dennis Chung and Ms. Carol Mussington. Mr. Chung was the property manager at the time of the tenancy. He gave four witness statements and was duly cross examined. Ms. Mussington, who was the claimant's accountant, gave two witness statements and was also duly cross examined.

THE DEFENCE AND COUNTERCLAIM

[6] The defendant filed an Amended Defence and Counterclaim which, to borrow the words of my brother Mr. Justice Batts in giving judgment in an earlier application between the same parties on January 17, 2013, is "clumsily worded and structured" and the language of the pleading has much to be desired". The essence of the Amended Defence and Counterclaim may be summarized as follows:

THE DEFENCE

1. That no documentation had been presented to show the Claimant was the owner of the premises in question.

2. That in 1999, it 'acquired' the month to month tenancy held by the previous tenant. No lease agreement was signed because some of the clauses in the quasi-lease agreement could not be agreed upon. The accuracy of the claimant's statement of account with regards to its indebtedness is disputed.

3. It denied that the parties conducted business based on the terms of the draft lease agreement and denied that only certain clauses were objected to.

4. That rent and maintenance are to be treated as separate charges, and denied that it had failed to pay the full payment of rent since 2004 as alleged. In relation to maintenance, it understood the same to be a reimbursable arrangement.

5. That items such as insurance, taxes and rates etc were never agreed to be paid as part of maintenance. That though some items in the third schedule of the draft lease were agreed to by conduct others were challenged verbally and in writing by letter dated September 30, 2004.

6. That there was no proper notice to quit and the notice to quit which was served was invalid.

7. That there was no agreement for interest to be charged on rent or maintenance.

THE COUNTERCLAIM

[7] The defendant's counterclaim may be summarized as follows;

1. The Defendant was a tenant at the multi-unit premises located at 40 Duke Street in the parish of Kingston, and occupied a suit abutting the main thoroughfare and a laneway. The laneway provides an entrance for the forested utility pipes and cable which run in the cavity between the false ceiling and the reinforced concrete ceiling, atop the suit occupied by the Defendant. These pipes and cables supply the property with utility services.

2. The Defendant has been paying rent and maintenance since 1999, having acquired a month to month tenancy.

3. The Claimant kept strict and tight control of the building and common areas, to the extent that the practice is that air conditioning unit is shut down at 5 pm and entry to the building itself is restricted outside ordinary office hours unless specially permitted by the Claimant.

4. On the 23rd day of January 2009 sometime after the agents of the Defendant left the building, the aforementioned suite was severely damaged by a fire which begun in the cavity atop the New Era Finance rental unit (a common area) and entered the suit through the manager's office and spread other areas of the suit. The Claimant assured the Defendant and the Defendant was made to believe that the building insurance extended to the Defendant's property as the Defendant was required to pay as part of maintenance charges a sum for insurance coverage.

5. The Defendant was made to realize after the fire on the 23rd of January, 2009, that the insurance it was paying to the claimant as part of the maintenance fee did not extend to the chattel of the Defendant. The Defendant had to stand the cost of replacing its damaged property in order to recommence its operations.

6. It cost the Defendant Three Million, Five Hundred and Twenty Eight Thousand, Seven Hundred and Seventy Five Dollars ($3,528,775.00) to replace, renovate and repair damaged property.

7. No money has been paid over by the Claimant to the Defendant as compensation for the damage suffered by the Defendant as a result of the said fire.

8. That at the commencement of the tenancy, the Defendant installed furnishings and other fixtures in the premises during its occupation thereof. The furniture and fixtures were further renovated or replaced after the fire at the sole expense of the Defendant.

9. Upon quitting the premises the, the Claimant agreed to purchase said furnishings and other fixtures from the Defendant as particularized in the Affidavit of Andrew Mais, and which the Defendant estimates to be valued at Two Million, Eight Hundred and Eighty Five Thousand, Six Hundred and Ninety Dollars ($2,885,690.00).

10. That to date the Claimant has failed to compensate the Defendant for the furniture and fittings. The said sum was communicated to the Claimant.

11. The Claimant continues to receive an economic benefit for the use of furniture and fittings.

12. At the commencement of the tenancy it was agreed that Defendant would pay a deposit of One Hundred and Forty Six Thousand, Seven Hundred and Twenty Three Dollars and Eighty Cents ($146, 723.80) to the Claimant and the Claimant did pay said sum. The said deposit was to be held on trust by the Claimant for the benefit of the Defendant and as security in favour of the Claimant.

13. The tenancy was terminated on the 2nd day of February 2013 and to date the Claimant has not refunded the deposit or paid the agreed interest.

[8] The Defendant sought a number of declarations and orders. In summary it asked the court to declare that;

1. The parties were joint occupiers of the premises.

2. The rent and maintenance payments be separated and the latter be declared a sum entrusted to the claimant subject to audited proof of its agreed use with any surplus being reimbursable and any deficit being payable.

3. The insurance sums paid to the extent it does not cover the properties of the Defendant be refunded to the Defendant.

4. There be a set off of any prepayment of maintenance against actual maintenance charges and the surplus be refunded to the defendant, if any.

5. The maintenance claimed for insurance, depreciation, property taxes, legal and professional fees, loan interest and bank charges be declared inappropriate and not part of the contract between the parties.

6. There be a refund of any such sums already paid.

7. The audit report be deemed the prima facie charge for maintenance for a particular year.

8. The rate of interest on the deposit remain and be calculated at 9.875% per annum.

9. Interest be awarded on the judgment at 6%.

10. Damages be awarded in the amount of Three Million, Five Hundred and Twenty Eight Thousand, Seven Hundred and Seventy Five Dollars ($3,528,775.00) for damage to the property of the Defendant by the fire

which took place on January 23, 2009, plus interest at a rate of 6% per annum.

11. There be a refund of all moneys which have been inappropriately charged as maintenance since acquiring the month to month tenancy in 1999, plus interest at a rate of 6% per annum.

12. The sum of Two Million, Eight Hundred and Eighty Five Thousand, Six Hundred and Ninety Nine Dollars ($2,885,699.00) being the estimated value of the furnishings and other finishing installed and agreed to be purchased by the claimants.

13. There be a refund in the sum of Three Hundred and Sixty Four Thousand, Nine Hundred and Eighty Nine Dollars and Forty Six Cents ($364,989.46) being the total deposit of One Hundred and Forty Six Thousand, Seven Hundred and Twenty Three Dollars and Eight Nine Cents ($146,723.89) plus interest thereon at the rate of 9.875%.

[9] The defendant's witness was Mr. Andrew Mais, Deputy Chief Executive Officer of the defendant who gave two witness statements and was cross examined. Although he held that position at the time of giving evidence, his evidence was that he was never stationed at 40 Duke Street, having held various positions in other branches during the relevant period.

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ISSUES ON THE CLAIM AND COUNTERCLAIM

[10] This claim and counterclaim raised the following issues;

1. What is the effect of the unexecuted lease agreement?

2. What is the sum owed for rent?

3. Can the defendant object to the rent invoiced and be refunded any overpayment found to have been made?

4. Was the claimant entitled to the sums charged for maintenance?

5. Is the claimant entitled to interest on the arrears for rent and maintenance?

6. Is the claimant liable to compensate the defendant for the damage to the defendant's property caused by fire to the premises?

7. Is the defendant entitled to a refund on the maintenance charges paid to the claimant?

8. Was there an agreement to purchase the defendant's fixtures and fittings?

9. Is the defendant entitled to a return of its deposit paid to the claimant?

WHAT IS THE EFFECT OF THE UNEXECUTED LEASE AGREEMENT?

[11] By letter dated June 3, 2003 the claimant and the defendant began negotiating the terms for a lease agreement for occupation of space on the ground floor of the property at 40 Duke Street. The defendant who had been in occupation under an agreement with a previous tenant, remained in occupation and made monthly rental payments to the claimant despite the terms of the lease not being finalized. The draft was never executed by either side but business was conducted between the parties on the terms to which there was no objection.

[12] The defendant does not dispute that the claimant was its landlord despite the averment in its defence that it had seen no documentation that the claimant is the owner of the premises. Mr. Mais in his witness statement filed July 31, 2014 stated that:

> *"Since 1999, the Defendants have a landlord/tenant relationship with the Claimant in the form of a month to month tenancy of shops located on the ground floor at 40 Duke Street Kingston at which location the Defendant carries on its business as financiers." (paragraph 4 of the Witness Statement of Andrew Mais filed July 31, 2014)*

Though the lease was never signed, the claimant averred that the only objection to the lease raised by the defendant prior to the filing of the claim had been set out in a letter from the defendant to the claimant dated September 30, 2004.

[13] The claimant asserted that the parties conducted business in accordance with the terms of the draft lease. The evidence of Mr. Chung was that the draft lease formed the basis upon which the parties operated. The claimant sought support for this contention in a letter written by the defendant's then Chief Executive Officer Ms. Sonia

Roache dated November 21, 2005. In that letter she stated under a heading "Is there a Valid Lease Agreement in place" that;

> *"New Era Finance Limited occupies the premises and have relied on terms of a submitted Lease Document; it is safe to say that New Era Finance Limited is bounded by the terms that they have not challenged. However, New Era Finance Limited has challenged the initial term to state "three years instead of two years for the first initial period".*

[14] Despite stating in his witness statement that there were other instances when they objected to the terms of the draft lease, Mr. Mais agreed in cross examination that the objections to the draft lease were contained in the letter dated September 30, 2004. He also said there were no other objections and he accepted that there was no objection to the claimant recovering maintenance as additional rent.

[15] The Third Schedule of the draft lease sets out the components of the maintenance and there was no objection raised as to that in the letter dated September 30, 2004. The claimant submitted therefore, that the defendant, by course of conduct, agreed to be bound by the terms of the draft lease, save and except those it objected to in its letter dated September 30, 2004. The letter of September 30th, 2004 in which the terms of the draft lease were perused by the defendant clause by clause contained mostly suggestions as to phraseology and clarification of the meaning of and necessity for other clauses. The only real objection as to the draft terms of the lease was to the life of the lease which in the draft was two years and which the defendant wished to be three years. It also objected to the term requiring the lessee to leave the fixtures and fittings for the defendants benefit and use or remove after termination with cost to the lessee for any damage done by the removal. There was no objection to the terms regarding maintenance and the manner of its recovery. Mr. Mais accepted in cross-examination that there was no objection to maintenance in the September 30th, 2004 letter nor was there any objection to the manner in which maintenance was calculated.

[16] Despite statements to the contrary, there was no evidence of any further terms of the draft lease that had been challenged by defendant outside of that in the September

30, 2004 letter. The claimant's further evidence was that the defendant stopped paying rent in or around 2009 (paragraph 10 of the witness statement of Mr. Chung filed on July 8, 2014).

FINDINGS

[17] Firstly, there is the settled law that an agreement for a lease is as good as a lease (see the doctrine of **Walsh v Lonsdale** [1882] 21 Ch D 9, CA. The claimant relied on the case of **Merrett Management Ltd. v Sellars** 76 A.R. 64. In that case a lease had been prepared by the claimant but never signed. Both parties thought it had been executed and conducted business on that basis. The defendants paid rent in accordance with that draft lease even though subsequent drafts were done and objected to. The court found that the terms in the unsigned lease agreement which were not the basis of objection had been followed by the parties and that they had elected to treat those terms as fully effective.

[18] The claimant asked the court to consider and apply **Merrett Management Ltd.** and submitted that the defendant's objections were all those found in September 30, 2004 letter and that the parties conducted business on all the other terms in the draft lease. Further, that the defendant having remained in possession paying rent had, by its conduct, agreed to the claimant's right to recover maintenance and to recover maintenance as additional rent.

[19] The claimant also relied on the case of **Empirnall Holdings Pty v Machon Paul Partners Pty Ltd** [1988] 14 NSWLR 523. In that case it was held that notwithstanding the failure or refusal by a property developer to execute the printed contract, agreement to the printed contract could be inferred from the whole of the circumstances of dealings between the parties.

[20] In this particular case the evidence is that the parties operated on the basis of the draft lease to the extent of those terms to which there were no objections. I found Mr. Mais' admission that to the extent that they had a common understanding at the time as

to the terms of the lease it represented the agreement between the parties, quite telling. I find therefore, that the defendant is bound by the draft lease to the extent of the terms for which there was no objection and the basis on which the parties conducted their affairs.

WHAT IS THE SUM OWED FOR RENT AND IS THE DEFENDANT ENTITLED TO A REFUND FOR OVERPAYMENT OF RENT?

[21] The parties being bound by the terms of the draft lease to that extent, how was rent to be calculated as per its agreed terms? The unexecuted lease provided that rent would be calculated as follows:

per year 1-11.5-

> *"Two hundred and twenty dollars (220.00) per square feet or $304,260.00 per annum or $304,260.00 per annum to be paid monthly on the 1st installments of $35,355.00 per month excluding General Consumption Tax (GCT)."*

Year iii – v

> *"to be determined each anniversary by the existing rate plus the percentage increase in the consumer price index (CPI) for the Kingston Metropolitan region."*

[22] The defendant asserted that rent was overbilled in excess of One Hundred and Eighty Four Thousand, Four Hundred and Eighty Four Dollars and Fifty One Cents ($184,484.51) between June 2003 and June 2012, based on an incorrect square footage (1,383 square feet as opposed to 1,319 square feet). The claimant on the other hand noted that the updated tenant ledger in evidence showed the defendant was billed rent of Twenty Five Thousand, Three Hundred and Fifty Five Dollars ($25,355.00) between December 2004 to November 2005 at $220.00 per sq. ft for a 1,383 sq. footage and not for the period 2003-2012.

[23] The claimant asserted that the defendant is deemed to have accepted the obligation to pay rent at that calculation for that period as it had at no time objected to rent based on those calculations. The ledger account for the defendant tendered in evidence by the claimant for the period 2005-2013 showed a total charge of Eleven Million, Two Hundred and Forty Two Thousand, One Hundred and Eight Dollars and

Eighteen Cents ($11, 242,108.18), total payments of Seven Million, Five Hundred and Seventy Thousand, Five Hundred and Forty Eight Dollars and Fifty One Cents ($7,570,548.51) with a balance of Three Million, Five Hundred and Seventy One Thousand, Four Hundred and Fifty Nine Dollars and Fifty Seven Cents ($3,571,459.57). The defendant challenged these figures on the basis of the audited maintenance costs and an incorrect rent charge. According to the defendant it was over charged by the sum of One Hundred and Eight Four Thousand, Four Hundred and Eight Four Dollars and Fifty One Cents ($184, 484.51) from June 2003 to January 2012. The defendant submitted that the true sums owed would be Three Million, One Hundred and Thirty One Thousand, Eight Hundred and Fifty Two Dollars and Thirty Eight Cents ($3,131,852.38). Thereafter, when the amounts charged for insurance (which was being objected to by the defendants) was deducted the true sums owed for rent, according to the defendant would be One Million, Six Hundred and Fifty Two Thousand, Three Hundred and Thirty Two Dollars and Forty Seven Cents ($1,652,332.47).

FINDINGS

[24] This base rent for the period December 2004 to November 2005 was never objected to by the defendants. In a letter from its former Chief Executive Officer Ms. Sonia Roache dated November 21, 2005 she sought to challenge the increase in rent for 2006 and requested the base rent remain the same until December 2005. There was no mention of the base rent being incorrectly calculated.

[25] Two questions arise from this. The first is whether the defendant is statute barred from claiming for sums over paid more than six years before the filing of the claim. The claim was filed in 2012. The period of over charge was in 2004-2005 almost 8 years. Where the claim is for money paid under a mistake of law time does not run until the mistake is, or could with reasonable diligence have been discovered. It does not apply to a mistake as to fact. In its amended defence to counterclaim the claimant pleaded the right to rely on the statute of limitation for any sums claimed for refund dating back more than six years.

[26] This leads to the second question, that is, whether, even if the defendant was not statute barred from claiming the sums over charged for rent as alleged, it could be refunded the sum in this suit where there is no claim for refund of sums paid in excess of rent. The claimant relied on **Lyndel Laing and anor. v Lucille Rodney and anor.** [2013] JMCA Civ. 27 to say that the defendant is not entitled to any relief it has not claimed.

[27] In **Lyndel Laing**, the facts of which are not important, Harris JA in disposing of the appeal was concerned to remark that:

> "Before departing from this appeal, it is necessary to mention a matter which raises grave concern. The order signing judgment is for an amount in excess of that which has been claimed. Unfortunately, no ground of appeal has been filed to challenge this anomaly. As a matter of law, a claimant cannot recover by a judgment, more than that which has been pleaded-see **Chantell v Daily Mail** [1901] 18 TLR 165 CA. It follows therefore, that even if as submitted by Mr. Earle, there was a consent for an amount in excess of that which was claimed, judgment for an increased amount ought not to have been entered unless the pleadings were amended to reflect the increase and the parties had consented to an amendment of the claim form prior to signing judgment."

[28] In **Jamaica Telephone Company Ltd. v Cynthia Rattray** 30 JLR 62 the court held that it was impossible to award damages for a loss for which there was no claim for such damages in the pleading. Also see **Rita Marley and ors v Mutual Security Merchant Bank and Trust Co. Ltd**. [1995] 32 JLR 9 PC, where it was said that a court will not order a relief which is not specifically claimed by the parties unless such an order is supplemental to the main order made by the court. In line with the authorities therefore, the answer to the first question therefore is that the defendant is indeed statute barred from claiming for recovery of any over payment for rent. The answer to the second question is that the defendant cannot recover sums for which there is no claim. Therefore, as regards any claim for overcharge in rent, I find firstly, that there was no evidence that there was in fact an over charge of the amount, secondly that the claim is statute barred and thirdly, even if it were not statute barred the defendant could not recover by virtue of the fact that there is no claim for over payment. The claimant is

therefore entitled on a balance of probability to the sums claimed as outstanding for rent.

WAS THE CLAIMANT ENTITLED TO THE SUMS CHARGED FOR MAINTENANCE AND TO RECOVER IT AS ADDITIONAL RENT?

[29] The draft lease states:

> "*By way of additional rent for each year or portion of year during the said term a sum equal to the lessees proportionate share, as hereinafter provided, of the aggregate amount of the operating costs of the lessor, as hereinafter defined, for such year or portion of year are hereby defined and shall (be) deemed to be such aggregate sums as shall enable the lessor from time to time during such year or portion of year to pay all* the estimated expenses and outlays of the lessor to the close of such year, as are specified in the third schedule hereto, incurred by the lessor under or by means of the and other leases."

[30] It can clearly be seen that in the draft lease the maintenance is classified as additional rent. The defendant challenged the claim for maintenance on the basis that:

(a) Rent and maintenance were separate charges

(b) It does not agree with certain components of the maintenance such as insurance, depreciation, taxes and rates, legal and professional fees, loan interest etc,

[31] On the issue of insurance, it challenged the insurance payment as part of the maintenance because it claimed that it had been of the neutral view that insurance would cover its own chattels. It was only after the fire when it had to stand the costs of replacing its damaged chattels that it knew that the insurance was of no benefit to it.

[32] The defendant also claimed that there was no agreement to pass on the cost of legal and professional fees to the defendant neither should the burden of bank changes or interest be placed on it since it made no agreement for a loan to be taken out. Additionally the defendant claimed that it was wrongfully billed for depreciation for period 2004–2008 to the sum of Sixty Four Thousand, Four Hundred and Four Dollars and Six Cents ($64,404.06). Most of these objections were withdrawn by the defendant during cross-examination and the only remaining objection was to the sum for insurance

and depreciation and loan charges. However, based on the unchallenged evidence of Mr. Chung that the charges for loan interest from 2004-2008 was an error for which credit notes were issued to the defendant, that claim too was abandoned. Bank charges were indicated to be with respect to the defendant's accounts and this too was abandoned by the defendant.

[33] There is no provision in the lease requiring the claimant to insure the defendant's chattel. The insurance provision in the draft lease requires the claimant to insure the unit leased by defendant as part of the general building inclusive of the claimant's fixtures and fittings. The clause reads as follows:

> *"To ensure and keep insured the leased premises and the lessors fixtures therein against loss of damage by fire, legating, explosion, riot and strike, civil commotion malicious damage, hurricane, earthquake, flood, impact and in case of destruction of or damage to leased premises or any part thereof from any cause covered by such insurance as to make the same unfit for occupation and use to layout all monies received in respect of such insurance … in rebuilding and reinstating the same as soon as reasonably practicable."*

The evidence was that the claimant reinstated the building as soon as reasonably practicable after the fire and allowed the defendant to use its lobby to operate its business during the time of reinstatement.

[34] The third schedule to the lease specifically provided for insurance to be a part of the maintenance payments. Depreciation is also expressly stated as a component of maintenance in the lease. The defendant claimed it was unable to object to the components in the maintenance before January 2009 because audit reports were late and in fact 2004 – 2008 were only presented in 2009. The claimant pointed out that the components of maintenance formed part of the third schedule to the lease which the defendant was fully aware of and did not depend on the audit. It was also pointed out that the defendant had been provided with a yearly budget and the maintenance invoiced to the defendant had been based on that budget.

[35] The claimant submitted that the defendant should not be allowed to unilaterally alter the terms of the contract, relying on dictum in **James Lumby v Paul Kelly/Stella Kelly** 2005 Canlii 32000 a case from the Ontario Supreme Court. In that case the court found that the contract was one for payment for time and materials but that the defendant had unilaterally attempted to convert it to one for fixed costs after it knowingly exceeded the estimated costs.

[36] The claimant also pointed out that the sums were being paid until the defendant arbitrarily began paying less than the billed amount. The claimant asked the court to note that the sums being withheld by the defendant were not consistent with sums being withheld for specific objectionable components of the schedule to the lease.

[37] The defendant alleged that the claimant wrongfully billed it an amount of One Million, Five Hundred and Forty Eight Thousand, Three Hundred and Thirty Seven Dollars and Eighty One Cents ($1,548,337.81) for insurance for period 2004 to 2012. The defendant's witness Mr. Mais accepted that insurance was provided for in the third schedule of the draft lease as part of maintenance. He also accepted that the defendant had not given the claimant a list of the contents of the unit for insurance purposes. The claimant submitted that the terms of the draft lease with reference to insurance was clear and that there were no grounds for the defendant to believe insurance was to cover the contents of the unit.

[38] The basis of the defendant's objection to depreciation is unclear but it was expressly stated as a component of the maintenance in the draft lease and had not been the subject of an objection hitherto. According to the evidence of Mr. Chung given in cross examination, things like air conditioning is supplied and it depreciates.

[39] In 2009 Mr. Mais wrote to the claimant's property manager indicating that he was in receipt of the projected budget and maintenance costs for 2009. He also indicated that there were no audited statements for 2004-2006 and requested those for 2007-2008 in order for the increases to be substantiated. He also requested that the invoice

be presented for the same sum for maintenance as in 2006, until their requests were met. There was no objection then to any component in the maintenance. After the fire the defendant wrote to the claimant indicating that rent would be withheld as of June 1, 2009. He also wrote to the claimant's insurers making a claim for damage to their chattels caused by the fire.

[40] On December 10, 2009, Mr. Chung wrote to the defendant indicating that there were short payments on the monthly invoices resulting in a balance of One Million, Two Hundred and Forty One Thousand, Five Hundred and Fifty Three Dollars and Ninety Four Cents ($1,241, 553.94). He also indicated that the audit adjustments were finalized in July so he was expecting payments at the end of December. On December 16, 2009 Mr. Mais wrote to the claimant with respect to its short payments of rent and maintenance indicating that his hope was that the short payments would cause the claimant to intercede with the insurance company on their behalf with respect to their claim for losses incurred in the fire. On October 2011 the insurers wrote to the defendant to indicate that there was no negligence on the claimant's part and therefore no claim would be entertained under their policy. In December of 2011 the insurers wrote back to the defendant to inform that the insurance only covered the claimant's property and that the claimant could not insure the defendant's property as they had no insurable interest in it.

[41] It is clear therefore, that the defendant's objection to the maintenance sums charged was retroactive to the fire when its claim was not honoured. This was the admission of Mr. Mais in his witness statement where he admitted that the sums charged were not initially disputed until they realized after the fire that the insurance payments did not cover their property. He claimed that as a result they were wrongfully billed One Million, Five Hundred and Forty Eight Thousand, Three Hundred and Thirty Seven Dollars and Eight One Cents ($1,548,337.81) for the period 2004-2012. He also claimed to have been wrongfully billed for depreciation in the sum of Sixty Four Thousand, Four Hundred and Four Dollars and Six Cents ($64, 404.06) from 2004-2008.

FINDINGS

[42] Where parties term a sum additional rent it is recoverable as rent. In **Escalus Properties Ltd. v Robinson and ors** [1996] QB 231 the issue whether such a sum should be treated as rent was considered. The court held that where provision in the lease provides that service charges should be deemed to be sums recoverable as additional rent, the court is to give full effect to the agreement between the parties by upholding that provision. In this particular case the draft lease entitles the claimant to recover from the defendant its proportionate share in the maintenance costs as additional rent. Mr. Mais in cross examination admitted that maintenance was referred to in the draft lease as additional rent. He also admitted that the defendant had raised no objection to that clause in the draft lease which classified maintenance as additional rent.

[43] It was also a term of the lease that the claimant was to insure the building and its fixtures and reinstate and rebuild as soon as practicable after destruction or damage using the insurance monies received. The third schedule to the lease provides for insurance to be a component of the maintenance. The defendant had full knowledge of this. I agree with the submission of counsel that there are no reasonable grounds on which the defendant could have believed that the insurance was to cover its chattels in its unit.

[44] I also agree with counsel for the claimant that there was no objection to depreciation being a component of maintenance and therefore there is no valid ground for that objection to be taken now. Mr. Mais in his witness statement indicated that the reason for not being able to object earlier was the backlog of audit reports for the years 2004-2008. However, apart from the fact that the lease and the schedules clearly outlined the components of maintenance, the defendant's were presented with budgeted figures on which the maintenance was invoiced and which had a breakdown of the components of the maintenance. When Mr. Chung wrote to Mr. Mais regarding the short payments based on the backlog of audit reports, Mr. Mais' response clearly

showed that it was not the backlog of audit reports which caused the short payment but the fire and the lack of response to its claim.

[45] The defendant therefore, having agreed to be bound by the terms of the unexecuted lease, also agreed to pay rent and maintenance as per the third schedule including insurance and depreciation and is bound by the agreement. The claimant is entitled to claim maintenance as additional rent and is entitled to be paid the sums claimed for maintenance including the components for insurance and depreciation.

INTEREST ON THE ARREARS

[46] The claimant claimed interest on the unpaid sums for rent and maintenance pursuant to the terms of the draft lease. The draft lease provided that:

> *"If and whenever the lessee shall pay the said rents or any of them after thirty (30) days after the day on which the same shall become due the lessor shall pay to the lessee interest upon and for such arrears of rent at the rate of 12 ½ percent per annum calculated from such day to actual payment thereof."*

[47] The defendant challenged the claim for interest on the basis that the sum was unreliable because credit notes had been issued by the claimant after an audit had been conducted for the relevant years. However, it was part of the lease agreement that the defendant was required to pay rent and an estimated sum for maintenance on a monthly basis which was subject to adjustments after an audit at the end of each year. Therefore, if there was a difference between the budgeted estimate and the actual maintenance, credit notes were to be issued after the audit. The claimant submitted that the fact that credit notes were to be issued did not affect the obligation to pay on the invoice, so that where there was a failure to pay, interest became accrued after 30 days and was payable.

FINDINGS

[48] The claimant admitted that before the audit adjustment was done the defendant's balances were incorrect from 2005 to 2009. In 2010 the defendant was given a credit

note for maintenance as they were over invoiced to the tune of One Hundred and Ten Thousand, Seven Hundred and Four Dollars and Sixty Eight Cents ($110,704.68). However, the defendant admitted that its obligation was to pay rent and maintenance on the due date although Mr. Mais claimed to be unable to recall the provision in the draft lease for interest to be applied if payment is late beyond 30 days.

[49] I find that the claimant's right to claim interest arises from the terms of the unexecuted lease to recover interest for late payments and is not dependent on the audit adjustments and credit notes. The obligation to pay arises from the agreement and if there was an intention to set off the interest accrued for late payment against the figures credited for maintenance after audit adjustment was done, the terms of the lease would so state. The claimant is therefore entitled to claim interest on the arrears.

THE COUNTER-CLAIM

Whether there was an agreement to purchase the defendant's for its fixtures and fittings

[50] The defendant left the premises in January 2013. The defence regarding the notice to quit appears to have been abandoned by the defendant and in any event there were no submissions made on it. This is not surprising in light of the fact that the defendant no longer occupies the premises. The claimant provided proof of ownership to the court in the form of a duplicate certificate of title for the premises registered in its name and that defence as to proof of ownership was also abandoned.

[51] The evidence of Mr. Mais was that whilst in the process of vacating the premises he had a discussion with Mr. Chung about what was to be done with the defendant's furnishings and finishing which were left on the premises. His evidence was that Mr. Chung was asked if the claimant wished to purchase them. According to Mr. Mais, Mr. Chung agreed to purchase them at a price to be agreed at a later date. Mr. Chung's evidence however, was to the effect that he never agreed to purchase the defendant's partitions, furnishings and fixtures. He admitted that he was approached to purchase the partitions and had indicated that it would be considered but there was no agreement. He

claimed that there was no further communication regarding the same and that the defendant had not been prevented from removing its partitions. He also indicated that he had to get permission from the claimant before he could purchase the partitions but that in the meantime the defendant had the right to take them, as no agreement had been reached. Mr. Chung denied telling the defendant to leave the fixtures and he would make an offer for it. He also could not recall putting a value on the fixtures or the defendant putting a value on it. It was his evidence that the space was now rented with the fixtures being used by the current tenant.

[52] He also noted that he was aware that a valuator had come to the premises but at the time work was being done on the space and he was refused entry. He admitted to since seeing a valuation on the fixtures. He also noted that the fixtures had been there since 2009 and had been through a fire so there should be some depreciation. Mr. Chung made these admissions in respect only to the partitions. He denied that any furniture or fittings were left on the premises. The claimant alleged that it was incumbent on the defendant to remove the partitions and fittings from the premises as there was no agreement to purchase them. It was submitted that there was no contract for the purchase of the partitions and fittings and that the defendant witness could not point to any definite terms of the agreement. It was also submitted that there was no certainty as to the subject of the agreement as Mr. Mais had said in his witness statement that it was furnishings and finishing. However, under cross examination he admitted that there was no agreement to purchase the furniture.

[53] The defendant in its counterclaim asserted that the claimant continued to receive an economic benefit for the use of the furniture and fittings. The defendant left the fittings on the premises. The evidence is that the claimant has now rented the unit with the fittings and that they are being used by the new tenant. The claimant submitted that the items were abandoned and there was no basis for the defendant's claim.

[54] In any event the claimant submitted that the valuation presented by the defendant cannot be relied on and was not a useful guide in determining the value of

the fittings. Counsel for the claimant noted that the valuation contained extraneous considerations which inflated the prices. He also pointed out that that there was no indication how the values were arrived at and whether it was discounted bearing in mind it was based on current values. The cost of items such as painting, carpeting, desks, electrical work, network and telephone work was also included and these, it was submitted, were not furnishings, fixtures and fittings.

[55] The claimant also submitted that the witness statement of Mr. Smith is tantamount to an expert report and that, no permission having been sought to treat him as an expert, the statement should not be relied on. Counsel relied on rule 32.6 (2) of the Civil Procedure Rules where it states that no party may call an expert witness or put in an expert witnesses report without the court's permission. The rule also states that it is the general rule that permission must be granted at case management conference. It was submitted that no such permission was sought nor was it agreed for the statement to be put in as an expert report and therefore it should be disregarded. On the other hand counsel for the defendant asked that the court apply the overriding objective to deal with cases justly and exercise its powers under rule 26.9 to rectify the error in procedure and allow the report of the expert to stand.

[56] The witness statement of Mr. Smith indicated that he is a quantity surveyor with 11 years experience. The claimant submitted that the evidence of Mr. Smith was synonymous with expert opinion and the witness statement was similar to that of an expert report. The claimant relied on the case of **Ricketts v Alcoa Minerals of Jamaica Incorporated** JM 2008 SC 130**,** where a Quantity Surveyor was called as an expert for the purpose of providing a report of costing to the court to say that the evidence of a Quantity Surveyor on costing was expert evidence. It was submitted that a similar attempt to put in expert evidence as to costs was being made by the defendant in this case without compliance with the rules.

[57] Counsel also cited **Fearon v New Era Homes 2000 Limited** JM 2010 SC 48 where Gayle J refused to allow counsel for the claimant to enter two witness statements

as expert evidence. The judge found that the omission to gain permission at Case Management Conference was a fundamental breach of the rules.

FINDINGS

[58] The crux of the defendant's claim is that the partitions were left on the claimant's premises by agreement for compensation and the claimant is deriving an economic benefit from it having rented the premises to tenants with it and those tenants are in fact using it. I accept from the evidence that the discussions applied to the fixtures and fittings and not furnishings left behind by the defendant and that they are the same items sometime referred to in evidence as partitions. I also find that the parties had agreed, as evidenced by letter dated September 30, 2004 requesting a change in the terms of the lease in that regard, that the defendant would either take the fixtures and fittings or leave them for the claimant to purchase by a formula to be created by it as lessor.

[59] I find as a fact that there was a discussion regarding the fixtures and fittings between Mr. Mais and Mr. Chung. I find as a fact that there was no concrete agreement in respect of the purchase, for as Mr. Chung said, he would have to get permission to purchase them and then ascertain and agree a price. Since as a matter of practicality it made no sense for them to be removed until the decision was made only to have them reinstalled, it is not surprising that they were left there until a decision was made by Mr. Chung. I find as a fact that the onus was on Mr. Chung to decide whether to accept the fixtures and fittings or not.

[60] The conduct of Mr. Chung and the claimant in not communicating its refusal to purchase the fixtures and fittings to the defendant and in renting the premises with them intact, thus allowing their new tenant to use them, is sufficient for me to find that they did in fact agree to take the partitions. However, the conversation between parties was too imprecise to result in a legally binding contract. Of course one could look for an implied contract, that is, an implied promise to pay for the goods retained. The result of that approach is that the court could find that there is an implied agreement to pay for them.

The fact that there was no price agreed meant simply that they must pay a reasonable price. There was an attempt by the defendant to have the fittings properly valued but this was thwarted by Mr. Chung. Even at that time when renovations were being done, it did not include a removal of the fittings by the claimant or any communication to the defendant to have them removed.

[61] In any event, even if there was no legally binding contract for sale and purchase, there may be no need for me to find an implied contract for the claimant is deriving some economic benefit from the use by their tenant of the fittings and are thereby, being unjustly enriched. They must make restitution. There is no sense in which it can justly be said that the defendant abandoned its fittings. In the case of restitution the defendant need not explicitly name it as a cause of action; it may be implicitly alleged and pleaded so long as all the factual basis on which it relies to ground the claim is specifically pleaded.

[62] The principles upon which the claimant can recover is grounded in restitution. This is a largely difficult and complex principle to apply even though it is more easily understood. The principles are largely to be found in the text and treatise on the subject most notably in Goff and Jones "The Law of Restitution", 5th edition (1998). In that text at page 15 the learned authors pointed out that the law of restitution presupposes three things. First, that there was enrichment from a received benefit; secondly, the benefit was derived at the claimants expense and thirdly, that it would be unjust to allow the defendant to retain that benefit.

[63] So a claimant must have given up something to the benefit of a defendant without it being a gift and the defendant must have freely accepted that benefit and had at least incontrovertibly benefitted from the claimant's loss. Restitution as a legal proposition can no longer be termed new and has firmly taken root in the common law. Text books have been written judgments have been delivered up to the Privy Council and the House of Lords on the principles applicable and legal treatise have been debated on its application to one case or another. From this jurisdiction the privy

Council has pronounced on it **in Dextra Bank and Trust Co Ltd. v Bank of Jamaica** Privy Council Appeal 26 of 2000 reported at [2002] 1 All ER (Comm) 193 and in **Blue Haven Enterprises Ltd. v Tully and Robinson** Privy Council Appeal 57 of 2004. The principles were also considered and applied in **Shim v Shim and anor** Claim No. 2005 HCV 02986 delivered, May 16, 2008 a judgment of Mr. Justice Brooks as he then was.

[64] How are the principles of restitution applicable here? Mr. Chung denied that New Era did much infrastructure work since that had been done by the previous tenant with whom they had a connection. He admitted that they did some infrastructure work because the former tenant used part of the space as a warehouse and the defendant turned that part into offices. He admitted the infrastructure did not belong to the claimant. He admitted Mr. Mais had a discussion with him as to what to do with the infrastructure. He said they were left there and he was asked whether he wanted to purchase them. He denied being asked to make an offer and denied telling Mr. Mais to leave the partitions and he would make an offer for it. He could not recall such a conversation. He said he had to get permission to purchase them but Mr. Mais had the right to take them. He could not recall either side putting a value on it. He said the bulk of the partitions were still there and were being used. He said the bulk of the infrastructure turned out to be of some value to the existing tenant. He said that he would not say that the claimant owned the partitions but they remained there for future use. He admitted that one of the factors for rent is infrastructure if it is there and of use to the tenant.

[65] He also admitted that he had not done a valuation and at the time the valuator came to do the valuation work was being done and he was refused entrance. He said they may or may not have a value as they were there from 2009 and had been through a fire. Therefore, according to him if he were to value it he would depreciate it. Although he claims the partition are of limited value he noted his doubt whether they could be returned as it would cause a disruption to the tenant. His final words on the matter was that he thought the matter had been dealt with.

[66] What is the benefit to the claimant in this particular case one may ask? The answer is clear from the evidence of Mr. Chung. The benefit lies in the savings to the claimant of an inevitable or necessary expense of outfitting the unit to suit another tenant or the provision of an already outfitted unit to a tenant at a premium or more attractive rate. The witness statement of Mr. Mais filed July 31, 2014, that portion of which was never challenged as untrue, indicated that the claimant by virtue of the office being now fully outfitted, was able to rent additional space which had remained unrented for a number of years. The evidence is that the claimant through Mr. Chung bargained to have the fittings remain in place for a price to be determined later. He freely accepted the chattel knowing payment was expected. The question the court must ask is whether, having received the benefit, is it conscientious for the defendant not to pay for it. If the answer is no then he must be disgorged and make restitution for the unjust enrichment. See Lord Wright in **The Fibrosa** [1943] AC 32 at 61 where he said

> *"It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep".*

[67] Accordingly, I find that the claimant did agree to take the fixtures and fittings at a price to be agreed at a later date. That having failed to communicate that they no longer wish to take the fixtures and having kept and used them and allowed their tenants to use them, they have in this way been unjustly enriched at the expense of the defendants. The claim for restitution is of course subject to available defences, such as change of position, estoppel, incapacity, illegality and bona fide purchaser. None of the above defences have been raised on the evidence. The defendants are therefore entitled to a reasonable price for the fixtures and fittings allowing for depreciation.

[68] The defendant is claiming Two Million, Five Hundred and Thirty Five Thousand, Six Hundred and Fifty Dollars ($2,535,650.00) based on the valuation done by Mr. Smith to which the claimant made the noted and valid objections. The first objection

was on the basis that the statement of Mr. Smith is an expert opinion and no permission to admit expert report was sought or granted at Case Management as required by the rules. It was therefore submitted that the court could not rely on this report. The second objection was that the statement contained extraneous material which had inflated the values and the third was that it was all hearsay evidence and could not be admitted.

[69] These objections were raised at the trial and I ruled that Mr. Smith could give oral evidence and his witness statement was allowed to stand as his evidence in chief. I deferred the ruling on his report until written submissions on the issue was received and judgment. It is true that no permission was sought to treat Mr. Smith as an expert and to tender his report into evidence, however, I find that the witness statement of Mr. Smith was not an expert report as contemplated by the CPR Part 32. Part 32 deals with the provision of expert evidence for the assistance of the court. Expert witness, according to the rules, is a reference to an expert who has been instructed to prepare or give evidence for the purpose of court proceedings. That evidence must be given in a written report and the report must be addressed to the court. Rule 32.13 speaks to the content and form the expert report should take. More specifically rule 32.13 (2) lists the requirements for a statement by the expert regarding his understanding of his duty to the court and that he has complied with that duty and so on. Mr. Smith's report did not conform in any way to the requirements of the rule. It is not surprising that the defendant failed to apply at Case Management Conference to allow that report to be tendered at trial as an expert report. I am therefore unable to grant any application at this late stage to exercise any discretion under rule 26.9 to allow the expert report to stand, as it is in fact not in the form required by the rules.

[70] Notwithstanding Part 32, a party to a case is not precluded from calling a witness to give factual evidence even if that witness is a qualified expert. A witness may happen to be an expert in a particular field but is called to give, not expert evidence, but factual evidence. See **Kirkman v Euro Excide Corporation (Cmp Butteries Ltd.**)

2007 ALL ER D 209 and see generally Stuart Simes "*A Practical Approach to Civil Procedure"* at p 420.

[71] There are certain matters such as those of a technical or scientific nature which the court cannot decide without the assistance of expert opinion. That evidence if given is subject to the issue of weight and a tribunal of fact is not bound to accept it. See the statements of Lord President Cooper in **Davie v Magistrate of Edinburgh** [1953] SC 34 quoted in Stuart Sime at p 421;

> *"Their duty is to furnish the judges…...with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge…to form (his or her) own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible convincing, and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the judge."*

[72] The need for expert evidence only applies where the issue calls for an established field of expertise and there is someone suitable qualified to be called to assist the court. In such a case, under the rules, permission to adduce such expert evidence must be obtained from the court.

[73] In this particular case Mr. Smith is a qualified quantity surveyor he gave a witness statement detailing the instructions he was given and what he did as a result. He also tendered for the court's consideration an estimated bill of costs received from the defendant and his own statement of the estimate of renovation works done to the defendant's former unit at the claimant's premises. However, to my mind the evidence he has given on behalf of the claimant and the estimate supplied is not an expert report necessary from a quantity surveyor or assessor but merely evidence of the fact of the cost of labour and materials to outfit an office area. This is evidence which the claimant could have given himself and which the court, if presented with invoices or bills, needs no assistance with quantifying. The claimant or its agent or employee could easily have gone to the hardware store and found out the cost of various items and produce an invoice or could have produced bills and receipts for labour and materials from when the

fittings had been first installed. The statement of Mr. Smith contains no opinion evidence but merely factual statements made with the hope the court will accept them as true and rely on them. In any event in form and substance it does not conform to the strict requirements for reports from experts mandated by the rules. I believe therefore the evidence of Mr. Smith can be treated as factual evidence.

[74] If I accept his evidence as merely that of a factual witness it then leads to the next issue complained of and that is the question of whether it is inadmissible as hearsay evidence. Mr. Smith's witness statement having been allowed to stand as his evidence in chief, parts of it and the report on costs he made were challenged by the claimant on the basis of hearsay. I reserved a ruling on the estimate of costs. It is true that there is no indication of where Mr. Smith got his information from. If his evidence had been accepted as expert evidence that would have been fine since the strict rules of evidence in that respect does not apply to expert reports. However, as a factual witness, he claimed to have researched current values and made contact with suppliers but no reference was made to where those checks were made and from which suppliers. The basis of his costing is therefore unclear. No factual witness is entitled to throw figures at the court without showing the basis for those figures.

[75] The defendant did not file or serve a Notice to Tender Hearsay Evidence in these proceedings pursuant to section 31E (2) of the Evidence Act nor is it clear on the evidence whether any of the other sections of the Act including section 31F (dealing with the admissibility of business documents) were complied with (See the case of **Fenella Kennedy-Holland v Dawn Paris** et al Claim 2008 HCV 01916, judgment of Sykes J where he discusses the operation of section 31E and 31F of the Evidence Act.). The claimant argued that it was severely prejudiced by the evidence since the defendant's witness did not identify the source of its pricing and the claimant was not thereby put in a position to respond. The maker of the statement contained in the document, in this case the statements on prices quoted in the estimate generated by Mr. Smith, must be known for the claimant to give a counter notice if desirable.

[76] I agree with counsel for the claimant that the statement of costs supplied by Mr. Smith in the circumstances of his being treated merely as a factual witness is based on hearsay and inadmissible. Does it mean the defendant is without recourse and the claimant can continue to be unjustly enriched? I think not. One remedy for restitution is a return of the benefit. The claimant says it is not possible without disrupting its tenant. Also, as I said earlier, in restitution for unjust enrichment one remedy is for the court to award the defendant a reasonable cost. The costs actually incurred will always be the first starting point for what is reasonable unless there is a reason to depart from actual costs. Of course the law sometimes takes the view that its baseline guide to restitution for unjust enrichment is to reverse the defendant's gain rather than to try to measure the claimant's loss. This is what is sometimes termed as disgorgement. Although sometimes the defendant's gain is synonymous with the claimant's loss, where the court orders disgorgement it measures the defendants gain and not the claimant's loss. As recognized by Brooks J in restitution approaches compensation differently than the law of contract.

[77] In this case based on the claimant's conduct I take the view it should be disgorged of all the benefits derived at the claimants expense achieved by keeping the fixtures and fittings knowing payment was required, failing to pay and renting the premises to a third party with the said fixtures. Restitution for unjust enrichment is gain centric and the defendants gain in my view consists not only in the value of the items but also in the improvements to the unit and the extent to which it contributed to its ability to rent the premises at the rate it did. In the realm of unjust enrichment it is quite justifiable for the gain returned to be more than the benefit given. In the absence of precise values the court must do the best it can in the circumstances. It may be possible to send the matter back for assessment but I think a clean break is better in this particular case. I consider that the claimant ought to pay the value of three years rent and maintenance from 2013, in the sum of Two Million, Six Hundred Thousand Dollars ($2,600,000.00) (calculated on the basis of the approximate rent of Twenty Five Thousand Dollars ($25,000.00) per month charged to the defendant as per the draft lease and maintenance of Forty Eight Thousand Dollars ($48,000.00) per month for

three years). I have deliberately not considered the increased rent and maintenance amount charged to the new tenants because I have no evidence of what that is.

REFUND OF THE DEPOSIT

[78] Mr. Chung agreed that a deposit had been made and had been placed on an interest bearing account which at the time was 9.875%. He admitted that it was still there but earning a very low rate of interest, meaning the rates are no longer 9.875%. He stated however, that although the tenancy was terminated, the arrears were still outstanding so that the deposit was not refundable until the arrears were cleared up. The claimant averred that its obligation to repay the deposit was predicated on the rent and maintenance being current which in this case they were not.

FINDING

[79] The basis for the return of the security deposit was set out in a letter from Mr. Chung to the Defendant dated June 3, 2003. In that letter Mr. Chung stated that:

> *"The security deposit referred to in clause no, 10 of One Hundred and Forty Six Thousand, Seven Hundred and Twenty Three Dollars Nine Eight Cents ($146,723.98) is to be placed in an interest bearing account from June 1, 2003 One Hundred and One Thousand, Six Hundred and Fifty Dollars Fifty Cents ($101,650.50) previously paid and Forty Five Thousand and Seventy Three Dollars Forty Eight Cents ($45,073.48) when received) refundable with interest at the rate of 9.875% (Scotia Bank Pass Book rate) at the end of the tenancy date providing rent and maintenance are current."*

[80] Mr. Mais accepted that "there was a dispute as to maintenance and once that was settled the deposit should be paid". He seemed to have accepted in cross examination that the claim for deposit refund was premature as the outstanding maintenance charges were not yet settled. The defendant is entitled to the return of deposit with interest as soon as the arrears are settled. The money had been placed in an account and is still there. The claimant failed to indicate what the balance in the account is to date or what the interest rate is on the balance as it stands now. The

defendant is entitled to the sum paid as deposit together with whatever interest as accrued on the sum over the period as it stands in the account identified by the claimant.

REFUND OF THE INSURANCE CHARGES

[81] The defendant sought a refund of all monies it claimed was wrongly charged for the insurance component of maintenance since 1999. It claimed a total of One Million, Five Hundred and Forty Eight Thousand, Three Hundred and Thirty Seven Dollars and Eighty One Cents ($1,548,337.81) as refund. The claimant submitted that the defendant should not be allowed to unilaterally alter the terms of the lease on the basis that it no longer found them favourable and that it was not entitled to any refund.

[82] The claimant asked the court not to interfere in a contract freely entered into by the parties who were two commercial entities of equal bargaining power. They pointed out also that, in any event, the claim for recovery for the periods 1996-2006 would be statute barred, the claim having been filed in 2012, after the six year limitation period had elapsed.

[83] There had been no initial dispute over the insurance component in the maintenance charges, however after the fire when it became clear that the defendant's chattels were not covered by the insurance the defendants sought to object to the sums charged. The defendant therefore sought a set off and refund of those sums already paid in the total of One Million, Five Hundred and Forty Eight Thousand, Three Hundred and Thirty Seven Dollars and Eighty One Cents ($1,548,337.81).

FINDINGS

[84] The insurance provision in the lease required the lessor to insure the premises and fixtures and in the case of a fire to restore the premises as soon as reasonable possible using the insurance proceeds. This is what the claimant did. The defendant accepted that this is what the claimant did.

[85] The authority to charge insurance as part of the maintenance arose from the third schedule to the lease. This was not a term of the lease agreement initially objected to by the defendant and was therefore acted on by both sides. Mr. Mais agreed that nowhere in the lease did he read any provision requiring the claimant to insure the contents of the rented unit. Although he claimed in cross examination that the expected coverage was based on dialogue with City Properties, no evidence of that dialogue was given or of who were the parties to this discussion. I do not accept that any such discussion took place. For these and the reasons already expressed in paragraphs 27-42 of this judgment I find that the defendant is not entitled to a refund of the sums already paid.

THE CLAIM FOR DAMAGES

[86] In its defence and counterclaim the defendant claimed damages for losses occasioned by the fire of 2009 to its chattels. It claimed that as a result of the fire it had to replace renovate and refurbish furnishings and fittings to the tune of over three million dollars. It also claimed that it received no compensation from the claimant for those losses and that the claimant had assured it that the insurance component of the maintenance it had been paying would cover insurance on its chattels. It was only after the fire and the losses that it discovered the policy of insurance on the building did not cover the contents of the unit it occupied.

[87] The amended defence and counter claim however, did not specifically state the basis for this claim. Notwithstanding that, the witness statement of Mr. Mais contained what may be viewed as evidence in support of a statement of case. In it he stated that:

> *"Notwithstanding that there was no signed lease agreement, the landlord still has a common law duty to maintain and keep the building in good repair.*
>
> *The claimant failed to discharge its duty of care by failing to carry out sound maintenance/repairing obligation as landlord.*

There is no evidence that the claimant carried out any maintenance work in relation to the said contents of the cavity atop the Defendant's office.

The Defendant did not, nor was it able to access that area for the purpose of carrying out any repairs or maintenance work in that area.

The Claimant knew or ought to have known that wiring would have needed repairs and therefore should have taken steps to repair same.

This failure on the part of the landlord is the cause of loss and damage to the Defendant's property.

On the 23rd Day of January 2009, sometime after the agents of the Defendant left the building, the aforementioned suite was severely damaged by a fire.

There is no evidence that the fire commenced as a result of the actions of the Defendants or its agents and the fire report presented by Trench Town Fire Department which responded to fire shows no evidence of this."

[88] At the end of the trial and in his written submissions counsel for the defendant stated that the defendant was no longer pursuing that claim as they were not able to prove it. Counsel for the claimant made extensive written submissions in opposition to the claim for damages. In light of counsel for the defendant's admission the matter could end there. However, I think it is necessary to say a few words on the issue for future reference in light of the form this aspect of the counter claim took and in deference to the claimant's submissions on this issue

[89] Based on the form of the defendant's pleadings, this court had had to grapple with the question of whether the defendant was attempting to frame a cause of action in negligence and/ or occupiers liability and if so whether the defendant has indeed established that the claimant was so negligent or liable. Firstly, negligence was not pleaded in the amended defence and counter claim and there were no particulars of negligence. There is no prayer with regard to negligence or claim for damages for loss

as a result of negligence. What was claimed by the defendant was a declaration that the parties were joint occupiers of the premises and a statement that it had been assured that the insurance covered them but that it subsequently found out that it did not and that it had not been compensated for the loss. I had a great difficulty in ascertaining the reason the defendant was seeking this declaration of joint occupancy. What I do know is that the failure to plead negligence or occupiers liability and to set out the statement of case with regard to it is fatal.

[90] As regards any statement of case on the defendant's counter claim, all that existed were the assertions contained in Mr. Mais' witness statement. However, a defendant cannot rely on the averments in a witness statement to ground a claim in negligence or any other cause of action for that matter.

[91] A claimant is required to set out his statement of case at the start of litigation. Rule 8.9 (1) of the Civil Procedure Rules 2002 states that;

> *"The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies."*

The term statement of case is defined by the CPR as a Claim Form, Particulars of Claim, Defence, Counter Claim, Ancillary Claim, or Defence and Reply and any further information given in relation to any statement of case under Part 34 either voluntary or by order of the court. Part 34 deals with requests for information.

[92] The outline of a case in a witness statement cannot serve as a substitute for a failure to plead facts relied on. This issue was considered by the Privy Council in the case of **Charmaine Bernard v Ramesh Seabalack** [2010] UKPC 15. In that case the statement of case did not contain details of a claim for damages. Witness statements were filed which disclosed receipts in support of allegations of damages and loss which had not been pleaded. The claimant applied for what amounted to a second amendment. In paragraphs 15 and 16 the Board examined the issue of the requirement for pleadings. It said;

> *"In the view of the Board, an amendment of the statement of case was required. Part 8.6, which is headed "Claimant's duty to set out his case", provides that the claimant must include on the claim form or in his statement of case short statement of all the facts on which he relies. This provision is similar to Part 16.4 (1) of the England and Wales Civil Procedure Rules, which provides that Particulars of claim must include-(a) a concise statement of the facts on which the claimant relies". In* ***McPhilemy v Times Newspapers Ltd*** *[199] 3 ALL ER 775 at p792J, Lord Woolf MR said: "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old and the new rules……But a detailed witness statement or a list of documents cannot be used as a substitute for a short statement of all the facts relied on by the claimant. The statement must be as short as the nature of the claim reasonably allows. Where general damages are claimed, the statement of case should identify all the heads of loss that are being claimed. Under the pre-CPR regime in England and Wales, RSC Ord 18 r 7 required that every pleading contained a summary of the material facts and by r 12(1) that "every pleading must contain the necessary particulars of any claim."*

[93] In **Alexander Okuonghae v University of Technology, Jamaica** [2014] JMSC Civ. 138, in addressing the issue of failure to plead facts to be relied on the court said;

> *"I must, however, state categorically that the claimant is not allowed to rely on any factual contention raised in the written submissions that were not pleaded in his statement of case to build a case against the defendant."*

[94] Even if the short averments in the counter claim were to be taken into account with the evidence of Mr Mais, it falls woefully short in establishing fault in the claimant for the fire. To establish the threefold test for negligence there has to be shown the existence of a duty of care, a breach of that duty and the resulting damage. See the judgment of Lord Atkin in **Donoghue v Stevenson** [1932] A.C. 562 at 580 and the case of **Flickenger v Preble** decided November 10, 2010, unreported. In the case of negligent misstatement, there must not only be proof the statement was made but also proof the statement was relied on and that such reliance resulted in loss.

[95] In this particular case the unexecuted lease agreement provided that the defendant had the obligation to repair. Paragraph 4 of the second schedule of the draft lease stated in clear terms the defendant's obligations to carry out the necessary repairs on the leased premises. The defendant's obligation was;

> "*To repair, keep up and maintain all doors, windows, locks and fasteners and the interior of the leased premises other than the load bearing walls, roof and floor beam but including floor ceilings and plaster and other surface material applied to the internal or external of the leased premises and of all additions thereto and the sanitary water and electrical apparatus and the Lessor's fixtures (damage by accidental fire or other inevitable accident excepted) throughout the said term and to yield up the same or any extension thereof and also make good any stoppage or damage to the drains caused by the negligence of the Lessee, its servants or licensees. The Lessee Shall at its sole costs maintain all lighting fixtures within the leased premises including the replacement of fluorescent lamps, starters and ballasts, PROVIDED ALWAYS that any repairs or maintenance to be effected by the Lessee under the provisions of this clause shall only be carried out by contractors nominated by the Lessor for that purpose."*

[96] The agreement also exculpated the claimant from liability for negligence of third parties. The provisions of paragraph 4 (h) provided;

> *"The Lessor shall not be responsible or liable in any manner whatsoever for any loss or damage that may be occasioned by or through the acts omission or negligence of any person*

> *in on or occupying the leased premises or any part or parts thereof for any loss or damage resulting to the Lessee or the Lessee's property from burst taps or leaking water, sewer, sprinkler or steam pipes plumbing fixtures or electrical wiring or fittings".*

[97] The claim for negligence is also factually unsupported as the evidence from the fire department is that the cause of the fire which begun in the section of the premises occupied by the defendant was unknown. The defendant's assumption that it was an electrical fault is a mere assertion and unsupported by one iota of evidence. The defendant, through its witness Mr. Mais relied on the claimant's common law duty of care to maintain, since he asserted there was no signed agreement. He asserted also that the claimant failed in its duty by failing to conduct repairs or maintenance in the cavity atop the defendant's unit and that the defendant did not and was not able to access the area to conduct repairs or maintenance. The statement also claimed that the claimant knew or ought to have known that wiring would need repairs and should have taken steps to repair. Mr. Mais also asserted that there was no evidence the fire was as a result of the actions of the defendant and the fire report shows no evidence of this.

[98] To those assertions I say, the fire report stated the cause as unknown and therefore, there is equally no evidence that the fire resulted from the claimant's failure to repair or maintain the cavity atop the defendant's unit. The claimant on the other hand, asserted in its evidence from Mr. Chung, that the building was regularly maintained and certified by electricians hired by the claimant; and that the defendant would sometime hire electricians to do work on the property whose skill and competence the claimant could not speak to.

[99] The claimant relied on the case of **Dudzinski v Cole** [1988] O.J. N.O. 1582 on the standard of proof required to recover damages for negligence in fire cases. In that case the court reiterated that the onus was on the claimant to establish negligence. The learned judge Mr. Justice McTurk went on to state that:

> *"It is common knowledge that fires do occur frequently from accidental and unascertained causes without negligence as*

stated by Justice Goodman in Paquette v Labelle, supra. In my opinion the plaintiffs have failed to prove by way of specifici evidence that the defendant or the other occupants were negligent in any respect."

[100] Having considered the evidence of the fire officer the judge went on to state that there was no evidence of what caused the fire, nor was there any evidence to show negligence on the part of the defendant or occupant for which he was responsible. He also stated that res ipsa loquitor was not applicable. He concluded by stating that the court could not draw any inference from the circumstances stated in the evidence to find negligence in the defendant or its occupant.

[101] In **McAuliffe v Hubbell** [1931] DLR 835, also cited by the claimant, it was made clear that the onus was on the claimant to support the charges made. In **Collingwood v Home and Colonial Stores Ltd** [1936] 3 All E R 200 a claim was made that fire was caused by the negligence of the defendant and that it was as a result of electrical wiring in the basement being left in a dangerous and defective state. The Court of Appeal upheld the judge's decision that the fire was an accidental fire as it was unclear on the evidence whether there was faulty wiring, or short circuit caused by rats or by water escaping into the basement or other ways.

[102] In this case there is no assertion or evidence even of faulty wiring. To merely state the cause was electrical is insufficient for even if it was electrical it was not necessarily due to the negligence of the claimant but may have resulted from other circumstances as stated in **Collingwood.**

[103] As I have said, the claim in negligence was never explicitly pleaded or particularized in the amended defence and counterclaim, in any event. It is difficult to determine the basis of the claim for damages in the first place. The defendant had the obligation to repair including electrical repairs, so the claim could not be on the basis of a failure to repair, the agreement excluded liability for negligence of persons in or occupying the premises, so even if there was a fault caused by other occupants of the

so called common areas or any third party, then the claimant would have been excluded from liability by virtue of the agreement.

[104] The claimant claimed damages in the amount of Three Million, Five Hundred and Twenty Eight Thousand, Seven Hundred and Seventy Five Dollars ($3,528,775.00) for damages to its property as a result of the fire of January 23, 2009. Again it is difficult to fathom on which cause of action the defendant had based this claim. Based on the assertion in the amended statement of claim that "the claimant assured the defendant and the Defendant was made to believe that the building insurance extended to the Defendant's property as the Defendant was required to pay as part of maintenance charge a sum for insurance coverage" it may have been alleging misrepresentation or negligent mis-statement. But there is no such evidence led, so the court was left to speculate on the basis of this claim for damages for the fire.

[105] Finally on this issue, the amount claimed was the amount the defendant alleged it cost to replace, renovate and repair its damaged property. To claim for damages the defendant must prove loss. The defendant failed to provide any evidence of its loss from the fire except merely to state a figure. It has been said time and time again in these courts that a claimant is not entitled to just throw figures at the court and expect to succeed. The loss must be proved and this the defendant has failed to do.

DECLARATION OF JOINT OCCUPANCY

[106] I see no reason for this declaration to be made and none have been shown to the court, the defendant having abandoned its claim for damages.

DISPOSITION

[107] For the reasons given and the claimant having applied for and been granted permission to amend the claim to increase the sum originally claimed as arrears, the court makes the following orders;

1. Judgment for the claimant on the claim in the sum of Five Million, Nine Hundred and Two Thousand, Nine Hundred and Seventy Two Dollars and Fifty Four cents ($5,902,972.54) with interest at 6% from date of judgment.

2. The defendant to pay 80% of the claimant's costs in the claim and counterclaim to be agreed or taxed.

3. Judgment for the defendant on the counterclaim for restitution for fixtures and fittings. The claimant to pay the sum of Two Million, Six Hundred Thousand Dollars ($2,600.000.00) to the defendant without interest.

4. The court orders that the defendant is entitled to the return of deposits in the sum of One Hundred and Forty Six Thousand, Seven Hundred and Twenty Three Dollars, and Ninety cents ($146,723.90) together with the interest accrued thereon within 24 hours of the receipt by the claimant of the arrears of rent and maintenance as ordered by the court.

5. The defendant is permitted to set off the sum due to it for the fixtures and fittings against the payment of outstanding rent and maintenance.

6. The claimant to pay 20% of the defendant's costs in the claim and counterclaim to be agreed or taxed.