[2024] JMSC CIV 47

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU 2021 CV 01289

BETWEEN	**KARISHMA KHEMLANI**	**CLAIMANT**
AND	**EYELAND EYEWEAR**	**DEFENDANT**

IN CHAMBERS

Miss Timera Mason instructed by Hylton Powell for the claimant

Mr. Emile Leiba, Ms. Samantha Grant and Ms. Kimberly Hanniford instructed by DunnCox for the defendant

Heard: 29 FEBRUARY & 19 APRIL 2024

Civil Procedure Rules - Rule 15.2 - application for summary judgment - whether the defendant has real prospect of defending the claim; Real property – defences of frustration, surrender of lease, set off, misrepresentation - whether there is a good prospect of succeeding in these defences

MASTER C. THOMAS

Introduction

[1] The claimant has sought summary judgment on her claim filed on 24 March 2021 in which she is seeking the following substantive reliefs:

1. The sum of US$43,608.78;

2. Interest at the rate of 13% per annum from April 1, 2021 to the date of payment or judgment.

BACKGROUND

[2] At the heart of the claim is a lease agreement entered into between the claimant and the defendant for a term of three (3) years initially, commencing on 1 October 2017. The annual rent was US$24,000.00 monthly for the first two years and US$25,000.00 monthly for the final year.

[3] It is pleaded at paragraphs 5 and 6 of the particulars of claim that the defendant defaulted on the terms of the lease by failing to pay the rent as and when it was due and in further breach vacated the premises in 2019 before the expiry of the lease and without giving notice to the claimant, this being done in circumstances where the lease did not provide for early termination.

[4] By an amended defence and counterclaim filed on 9 May 2023, the defendant has rested its defence on the following planks: (i) The premises were flood-prone and this was not disclosed to the representatives of the defendant during negotiations or at the time of entering the lease agreement with the claimant and it was the duty of the claimant to disclose that the premises were flood-prone. The failure to disclose the flood-prone nature of the premises was a material non-disclosure which induced the defendant to enter into the lease and this rendered the lease void or voidable. (ii) The lease was frustrated because the property was no longer in tenantable repair without structural repairs being done to prevent repetitive flooding; and in the alternative, the lease was rendered void ab initio or voidable as a result of fraudulent/negligent misrepresentation on the part of the claimant in failing to disclose the flood-prone nature of the premises (iii) The lease was surrendered to the claimant, which voided the lease and therefore no further rent was due to the claimant. (iv) If the court finds that any sums are owed to the claimant, the damages suffered by the defendant due to the destruction of its

property by the flooding of the premises should be set off against the sum that is found to be due.

[5] By way of counterclaim, the defendant has pleaded that it suffered damages and it set out the "details of its consequential loss" being the "estimated cost of damage to the furnishing" in the amount of $1,800,000.00. The defendant seeks a declaration that the lease agreement between it and the claimant was void from the date of the flood or the date of the surrender as well as damages.

[6] In its reply the claimant has denied the assertions that there was a surrender, asserting instead that: (i) the premises were not flood-prone; as the flooding was a "one-off" situation due to heavy rains which affected all the shops in the complex; (ii) after the flooding event, the leased premises was capable of being used (iii) at the time the parties entered into the lease, they were aware that as is the case with all similar complexes in Jamaica, there was a risk of flooding and as a consequence, the defendant was required to insure the leased premises against natural disasters including flooding; thus, the lease was not frustrated; (iv) at no time did the defendant return the keys of the leased premises to the claimant; and (v) the defendant stopped paying rent months before it vacated the premises.

THE APPLICATION

[7] The claimant in her summary judgment application, which was filed prior to the filing of the amended defence, identified the following issues to be dealt with by the court:

1. Whether the lease was frustrated;

2. Whether the defendant surrendered the premises to the claimant and thereby terminated its obligations under the lease;

3. Whether the defendant can successfully make a claim to set off damages against the claimant for damage allegedly suffered to its property due to flooding;

4. Whether the defendant has a real prospect of successfully defending the claim.

As a result of the amended defence, the claimant identified two additional issues in her supplemental submissions as follows:

5. Whether the claimant is guilty of fraudulent and/or negligent misrepresentation for an alleged failure to disclose flood-prone nature of the leased premises; and

6. Whether the lease can be rendered void or voidable.

The application was supported by two affidavits sworn to by the claimant. An "amended affidavit" in opposition to the application was sworn to by Yhordanka Akwanza, the chief operations officer of the defendant. I will not set out the contents of the affidavits here but will consider them in course of my analysis, where necessary.

[8] I am of the view that the issues identified by the claimant accurately represent the issues raised by the application, save that issue (4) is a general issue to be determined in the course of considering the other issues. I will therefore adopt the claimant's formulation of the issues save for issue (4), which will be subsumed in the analysis of the other issues.

DISCUSSION AND ANALYSIS

[9] Before considering the issues, it is necessary to consider the principles relevant to the grant of summary judgment. While the provisions of rule 15.2 of the Civil Procedure Rules set out the threshold test to be applied, the courts have over time identified various principles to be applied. In **Demetrius Seixas v Tricia Maddix-Blair** [2022] JMSC Civ 103, in relation to those principles, I stated:

> *In determining whether to grant the application summary judgment, I am guided by **Swain v Hillman**, which is authority for the test applicable to*

applications of this nature, that is, the prospect of success must be realistic as opposed to fanciful. I also take into consideration the following principles, which are not exhaustive, that have emanated from various authorities:

*(i) The case must be more than just arguable; however, it does not require a party to convince the court that his case must succeed (**International Finance Corporation v Utexafrica SPRL** [2001] EWHC 508, relied on by Simmons J (as she was then) in Cecelia Laird).*

*(ii) The burden of proof is on the applicant to prove that the other party's case has no real prospect of success (**Island Car Rentals v Lindo** [2015] JMCA App 2; [**Cecilia Laird v Ayana Critchlow & anor** [2012] JMSC Civil 15]).*

(iii) Where the applicant establishes a prima facie case against the respondent, there is an evidential burden on the respondent to show a case answering that which has been advanced by the applicant. A respondent who shows a prima facie case in answer should ordinarily be allowed to take the matter to trial (Blackstone's Civil Commentary 2015, para 34.11).

*(iv) The court will be guided by the pleadings as well as the evidence filed in support of the application (**Sagicor Bank v Taylor Wright**).*

(v) The court must exercise caution in granting summary judgment in certain cases, particularly where there are conflicts of facts on relevant issues which have to be resolved before a judgment can be given (Bolton Pharmaceutical Co 100 Ltd Doncaster [2006] EWCA Civ 1661; Cecilia Laird)

[10] In **Albert Richie v Rosemary McLeod** [2023] JMSC Civ 153, I also stated:

*In **Easyair Ltd (t/a Openair) v Opal Telecom Ltd** [2009] EWHC 339 (Ch), Lewison J in adumbrating the principles applicable to summary judgment*

applications, referred to ***ED & F Man Liquid Products v Patel*** *for the principle that the court was not bound to take at face value and without analysis everything that a claimant says in his statements before the court. Laddie J in* ***Microsoft Corporation v Electro-Wide Ltd and another*** *(1997) IP & T Digest in considering an application to enter summary judgment against a defendant stated:*

So here the court has to ask whether there is a fair or reasonable probability of the defendants having a real or bona fide defence in relation to these issues. In answering that question it is not sufficient just to look at each factual issue one by one and to consider whether it is possible that the defendant's story in relation to that issue is credible. The court must look at the complete account of events put forward by both the plaintiff and the defendant and to use Ackner LJ's words, look at the whole situation. The mere fact that the defendants support their defence by sworn evidence does not mean that the court is obliged to suspend its critical faculties and accept that evidence as if it was probably accurate. If having regard to inconsistency with contemporaneous documents, inherent implausibility and other compelling evidence the defence is not credible, the court must say so. It should not let the filing of evidence which surpasses belief deprive a plaintiff of its entitlement to relief. But the court must also be careful before it deprives defendants of the opportunity to have their evidence tested at trial. It is a strong thing to say, simply on the documents before the court and in the absence of discovery and cross-examination that a party's evidence is not to be believed, it is an even stronger thing for the court to come to that conclusion when it involves finding that a number of the witnesses for the defence have given evidence which is not credible.

[11] I also consider the following dictum of Lord Bridge in **Sagicor Bank v Taylor-Wright** [2018] 3 All ER 1039, which was relied on by the claimant:

There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and the cross-examination of witnesses and

> *oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense.*

ISSUES

Whether the lease was frustrated

[12] The claimant's arguments on this issue mirror the assertions made in her reply. In addition, it was submitted that by the defendant's own evidence, the substantial use of the premises was not affected by the flooding as the contemplated use of the premises remained wholly possible after the flooding. It was submitted on behalf of the defendant that the issue is to be determined based on the terms of the lease on the one hand and the existing circumstances and events which have occurred on the other and that these could not be examined without carrying out a mini-trial of the documents and that the court must carry out the normal processes of discovery and interrogation of the parties to determine this matter. Therefore, summary judgment is not appropriate.

[13] It is by now well-established that the doctrine of frustration may be applied to a lease. In **National Carriers Ltd v Panalpina (Northern) Limited** [1981] 1 All ER 161, a case relied on by both parties, the House of Lords held that:

> *The doctrine of frustration was capable of applying to an executed lease of land so as to bring the lease to an end if a frustrating event (i.e. an event such that no substantial use, permitted by the lease and in the contemplation of the parties, remained possible to the lessee) occurred during the currency of the term. Furthermore, there was no class of lease to which the doctrine was inherently inapplicable. However, the circumstances in which the doctrine of frustration could apply to a lease of land were exceedingly rare.*

National Carriers has been applied in **Liguanea Club Limited v Sunshine Pump and Amusement Company Ltd** [2017] JMCC Comm 8, a case relied on by the defendant.

[14] In determining this issue, I consider clause 20 of the lease to be instructive. By sub clause 20(b), the lessee covenanted that it would maintain or cause to be maintained during the term of the lease "insurance against loss of damage to the buildings' structures, Lessee's fixtures, contents and equipment under standard fire or comparable policy **including but not limited to flood**, earthquake, tornado, hurricane, windstorm and fire following any of the insured perils" (emphasis supplied). I agree with Ms Mason that the lease foresaw the possibility of damage to the claimant's property by flood and expressly provided for it.

[15] In addition, in determining whether no substantial use of the premises as permitted by the lease and in contemplation of the parties still remained after the flooding, I am guided by the dictum of Lord Hailsham of Marylebone in **National Carriers** that "in a wide variety of cases, [it] is a question of degree and therefore to some extent at least one of fact". However, I also consider that merely because a case involves an issue of fact does not mean that it is not appropriate for the grant of summary judgment. I am required to embark on a critical assessment of the evidence to determine whether the defence is more than arguable and whether the processes of disclosure and cross-examination at trial would likely impact the outcome of the issue.

[16] In the instant case, certain facts are, in my view, indisputable. These are:

(i) The lease was for a period of three years commencing on October 2017;

(ii) In May 2019, there was a flooding of the premises;

(iii) At the time of the flooding, about one year and five (5) months of the lease remained;

(iv) In a letter dated 6 June 2019 to the claimant by Mrs. Akwanza about the flooding of the premises, a letter which was exhibited to the affidavit of Mrs. Akwanza, Mrs. Akwanza stated that the need for refurbishing the store was estimated at $1,800,000.00 which included “two weeks of closure days for renovations”.

It seems to me that from these undisputed facts, it could not be said that no substantial use of the premises as contemplated by the parties remained after the flooding in May. The defendant did not put any evidence before the court to suggest that more than two weeks as asserted in its letter would be needed for refurbishing the premises.

[17] In her affidavit, Mrs. Akwanza stated that “due to the refusal to make changes to the design of the building, even if [the defendant] were to take on the financial responsibility of remodelling the premises as well as the financial loss of having to close for renovations, we would still have the issue of this happening, again and again, every time there was significant rain”. It is significant that she did not any point suggest that no substantial period of the lease or use of the premises would remain even if the premises were remodelled. It seems to me that while the flooding and possible repetitive rains may have caused inconvenience and hardship, **National Carriers** as well as **Davis Contractors Ltd v Fareham Urban District Council** [1956] AC 696, which was referred to with approval in **National Carriers**, make it clear that these, without more, are not sufficient bases on which to conclude that the lease has been frustrated.

[18] In light of the contents of the letter of 6 June 2019, which was not modified by the evidence contained in Mrs. Akwanza’s affidavit, I do not agree with counsel for the defendant that the court must “carry out the normal processes of discovery and interrogation of the parties to determine this matter”. It seems to me that the letter, which was contemporaneous to the flooding event, renders the defence of frustration unbelievable. In addition, it seems to me that the lease having made provision for the very event that occurred, it cannot be said that it was frustrated.

[19] I am of the view that on this issue, the defendant has not shown that its defence is more than arguable.

Whether the defendant surrendered the premises to the claimant and thereby terminated its obligations under the lease;

[20] It has been submitted on behalf of the claimant that a lease can only be surrendered where there is mutual agreement between the landlord and tenant to terminate the lease before it ends and that surrender of a lease cannot be implied or assumed. Reliance was placed on **Tewani Limited v Tikal Limited t/a Super Plus Food Stores** [2016] JMCC Comm 8. The claimant, it was submitted, had never received any formal letter or notice and there is no evidence that she agreed to a surrender of the premises. Additionally, the defendant by its own actions confirmed that it had not surrendered the premises.

[21] On behalf of the defendant, reliance was placed on the case of **Banks v Arch** [2004 -05] CILR 441, in which the court referred to a passage from the learned authors of *Halsbury's Laws of England* that "there is a delivery of possession sufficient to effect a surrender where the tenant returns the keys of the premises and the landlord accepts them with the intention of changing possession". Counsel also relied on *Gray, Elements of Land Law*, 2nd edn and **White v Brown** (1969) 13 WIR 523 and submitted that the defendant provided evidence that the keys to the premises were handed over and accepted by the claimant, which evidence was not denied. There was evidence that there was effective change of possession from the defendant to the claimant. It was submitted that the issue of surrender cannot be determined without the careful scrutiny of the facts and the testimony of the parties and therefore the application should be denied.

[22] In **Tewani Limited v Tikal Limited**, Batts J referred to the judgment of Smith JA in **Brady Chen Limited v Devon House Development Limited** [2010] JMCA Civ 33 in which Smith JA had stated that where the lease is for a fixed period, it terminates automatically when the period expires without the need for a notice to

quit. Smith JA also stated that the tenant cannot *"terminate the lease before it has run its course, he may only ask the landlord to accept a surrender of the lease, which offer the landlord may accept or reject as he pleases".*

[23] In **Banks v Arch** [2004 -05] CILR 441, Sanderson J, in addition to accepting the principle stated in *Halsbury's Laws of England* that there is a surrender of the lease where the tenant returns the keys of the premises and the landlord accepts them with the intention of changing possession, referred to Gray's Elements of Land Law (2nd edn) in which it was stated that "the return of a tenant's key, accompanied by the tenant's going out of occupation represents a classic instance of surrender by operation of law". In **Banks v Arch**, the lessee's evidence was that he delivered to the landlord a letter in which he stated that he had no other choice except to close the restaurant and to hold a public auction to sell the contents of the building which he had leased from the lessor in which he operated his restaurant. He later threw the keys to the building on the table in the presence of the landlord. The court found that the lessee surrendered the lease by voluntarily handing over the keys to the lessor when the lessor had levied distress on the lessee's chattels.

[24] In **White v Brown** (1969) 13 WIR 524, the plaintiff tenant had rented a room from the defendant on a monthly tenancy with rent being due on the 28th day of each month. The defendant served the plaintiff notice to quit "on July 28, 1965 next or at the end of the month of your tenancy which will expire next after the end of August 28, 1965 – month from the date of service of this notice on you". The plaintiff continued to occupy the room and the defendant filed ejectment proceedings against him. The plaintiff having been served with the summons, moved to new premises on either 24 or 25 September and handed the defendant the keys for the room that afternoon. The defendant distrained on the plaintiff's goods for arrears of rent to 28 September 1965. The plaintiff commenced proceedings for trespass. It was held that the tenancy was determined when the defendant accepted the key from the plaintiff.

[25] Shelley JA in his judgment stated that the plaintiff in that case may have removed his goods, but nevertheless have retained possession of the room. He stated that it was at the moment that the landlord accepted the key to the premises from the plaintiff that the plaintiff surrendered his possession to the landlord and determined the tenancy. Fox JA, for his part, stated that acceptance of the keys to premises by the landlord is not necessarily an unequivocal act evidencing an intention to surrender and outlined the circumstances in that case, which, in his view amounted to a surrender of the lease.

[26] It seems to me that the cases demonstrate that the question of whether there has been a surrender of a lease depends on the circumstances and that the handing over of keys does not necessarily amount to surrender.

[27] In the instant case, the claimant in her affidavit stated that the defendant never surrendered the premises to her. The only notification that she received was a sign on the store door stating that the premises were closed for renovation. While the claimant did not expressly state that she did not receive the key to the premises, it seems to me that the statement that the only notification she received was the sign on the door amounts to a denial of receiving the key. This is consistent with the position in her reply that the keys were not returned to her. I therefore do not agree with the defendant that it was not denied by the claimant that the keys were handed over to and accepted by the claimant.

[28] Mrs. Akwanza at paragraphs 10 and 11 of her affidavit stated that the defendant was left with no choice but to leave the premises and that “they” instructed the defendant’s employee and verily believe that the employee complied to deliver the key with the closure letter to the claimant’s administrative office. She stated at paragraph 12 that she understood acceptance of the letter and the key to the premises to be an acceptance of early termination of the lease so that the claimant could carry out the much-needed repairs and avoid paying for the defendant’s damages. Later in her affidavit, she stated that the claimant accepted early termination of the lease by requesting the key and the termination letter.

[29] In light of the cases such **White v Brown** which demonstrate that the question of whether there is surrender of a lease depends on the circumstances, it is my view that the resolution of whether there was a surrender of the lease in the instant case is an issue of fact to be considered after hearing evidence concerning whether the keys were in fact handed over, and if so, whether the circumstances in which this occurred amounted to a surrender of the lease. Given that there are two contending accounts as to the circumstances, it will be a matter of credibility for the court to decide after cross-examination as to which party is to be believed.

[30] I note that there appears to be a conflict in Mrs. Akwanza's evidence in relation to whether the keys were sent to the claimant in response to the claimant's request, or whether the keys were handed over on the defendant's own initiative, but it is my view that this is also to be resolved after cross-examination at a trial. I take note of Ms. Mason's contention that the evidence in relation to the handing over the keys is hearsay that does not comply with the dictates of Part 30 of the Civil Procedure Rules. However, while it is that the employee's name is not mentioned, it seems to me that the evidence of the handing over of the keys to the employee for onward delivery to the claimant and there being no return of the keys are within the personal knowledge of Mrs. Akwanza. I also bear in mind Ms. Mason's contention that the letter of closure was not produced and I also note that there was no explanation for this, but it seems to me that the question of whether there was a letter of closure may be affected by the process of disclosure and in any event, it is open to the court at trial to find that the keys were handed over and the lease surrendered to the claimant in the absence of the letter of closure as there is no legal requirement for a letter of closure.

[31] I, therefore, agree with the defendant that this is an issue of fact to be determined at trial, the outcome of which may be affected by the evidence at the trial.

Whether the defendant can successfully make claim to set off damages against the claimant for damage allegedly suffered to its property due to flooding;

[32] The claimant's submission on this issue is that the claimant would only be liable for the losses if she caused the flooding and that there is no evidence that the claimant had anything to do with the construction of the premises and the defendant has not offered any evidence in support of its assertion that the premises had structural defects. It was also submitted that in any event, the lease required the defendant to insure against eventualities such as flooding and therefore it was also intended that the claimant would be liable for this type of damage. Counsel for the claimant also submitted that the defence of set-off is inconsistent with the defence of frustration in that in the case of the former the reason for the breach is usually the fault of the claimant whereas in the latter, the reason for the frustration is the fault of neither party.

[33] The defendant's position is that the claimant being the proprietor of the premises is responsible for inherent defects that led to the significant flooding and that the defence of set-off is sufficiently closely related to the debt the claimant is claiming and should therefore be considered by the court. A deeper scrutiny of the facts and circumstances is necessary, it was argued, and therefore summary judgment should not be granted. Reliance was placed on **Hanak v Green** [1958] 2 WLR 755.

[34] I agree with Ms. Mason that the defence of set-off presupposes that the fault lies with the claimant and that the defence of frustration would be inconsistent with it. It seems to me then that both defences must be treated as alternative defences.

[35] In this case, the defendant's claim to set-off is in relation to the expenses incurred as a result of the flood, on the basis that the claimant is responsible for the inherent defects in the construction of the building. The case of **Ravenseft Properties v Davstone** [1979] 1 All ER 929, which was relied on by Ms Mason, indicates that it is a question of degree whether the remedying of damage as a result of an inherent defect amounts to repair so as to be covered under a tenant's obligation to repair.

It is clear then that there is no doctrine that all damage caused by an inherent defect must be remedied by the landlord. In the instant case, it seems to me that subclause 20(b) of the lease, which I outlined at paragraph [14] of this judgment, in requiring the lessee to obtain insurance coverage in respect of damage caused by flooding, among other eventualities, contemplated how damage by flooding was to be dealt with. I therefore agree with Ms Mason that the lease did not contemplate that the landlord would be responsible for damage caused by flooding, regardless of whether it was caused as a result of inherent defects. I am of the view that in light of this very specific provision of the lease, the issue of whether the defendant would be entitled to a set-off would not be affected by evidence given at trial including whether the damage by flooding was as a result of an inherent defect in the design. Therefore, the defendant has not shown that in this respect it has a defence that is more than arguable.

Whether the claimant is guilty of fraudulent and/or negligent misrepresentation for an alleged failure to disclose flood-prone nature of the leased premises

[36] Counsel for the claimant has argued that the defendant has not identified the alleged false representation of fact that the claimant made. It was submitted that there is no evidence to support the conclusion that the claimant failed to disclose any material fact and that there was fraudulent and/or negligent misrepresentation on her part. Where fraudulent misrepresentation is concerned, relying on the case of **Andrea Green & Ors v Christine Findlay** [2015] JMSC Civ 157, it was argued that the pleadings to prove fraud should be unequivocal and that was not the case here. In addition, there was nothing to disclose as there was no evidence that the premises was actually flood-prone.

[37] With respect to the allegation that the claimant failed to keep the premises in a tenantable state of repair, this obligation imposed by the First Schedule of the Rent Restriction Act would not have been implied because pursuant to section 4 of that Act, clause 5 of the lease agreement imposed an obligation on the defendant to effect repairs where necessary. Given that there was this express obligation on the

defendant, the failure to do so resulted in the defendant breaching the covenant making it liable for defects and/or damage flowing from it. With respect to negligent misrepresentation, relying on Atkins Court Forms for the principle that it is necessary to plead and prove facts relied on in support of the allegation that the claimant was a person or one of a class of persons to whom the defendant owed a duty, Ms. Mason contended that there is no evidence that the claimant owed any duty of care to the defendant for the purposes of the lease.

[38] Counsel for the defendant argued that the material non-disclosure by the claimant that the premises were flood-prone is the misrepresentation. Where negligent misrepresentation is concerned, it was argued that by the terms of the lease, the claimant knew that the premises were being rented for commercial purposes and that if the said premises were flood-prone, this fact ought to have been communicated to the defendant. The defendant also argued that the claimant's failing to disclose the property was prone to flooding would have created an "implied representation from the claimant's conduct that this flooding problem did not exist". This implied representation in the very least would have been made recklessly by the claimant and amounted to a fraudulent misrepresentation. Reliance was placed on **Clinicare Limited (formerly known as Strasbourgeoise UK Private Health Insurance Services Limited) v Orchard Homes and Developments Limited** [2004] All ER (D). It was also submitted that the pleadings were sufficient to raise misrepresentation and that there are two main issues of fact to be dealt with by the court at trial, that is, (i) whether the premises are flood-prone due to structural issues and whether this was within the knowledge of the claimant at the time of the signing of the lease, and (ii) whether the non-disclosure to the defendant amounts to a representation that the court must interpret as alleged by the defendant.

[39] It was also submitted by Mr. Leiba in oral submissions that the summary judgment did not make any reference to the counterclaim before the court. The application predated the amended defence and was focused on the defence and not the counterclaim. It would therefore survive any decision that is made on the claim.

[40] Both parties are agreed as to the elements necessary to establish fraudulent misrepresentation as established by **Derry v Peek** [1886-90] All ER 1, which was applied by our Court of Appeal in **Bevad Limited v Oman Limited** SCCA No 133/05 (delivered 18 July 2008). However, as rightly pointed out by the claimant, there is no pleading of any statement made by the claimant that amounts to a misrepresentation. The defendant places sole reliance on the alleged silence of the claimant in failing to disclose the flood-prone nature of the premises. In light of the fact that there is no dispute that there was no statement made by the claimant, it is first necessary to determine whether silence or conduct can amount to a misrepresentation in these circumstances because if this is not so, then the resolution of the issues identified by the defendant as outlined at paragraph [33] of this judgment would not affect whether the defendant can succeed in its defence. In other words, using the Privy Council's approach in **Sagicor Bank**, if silence may not amount to misrepresentation in the circumstances contended for on the defendant's case, even if the court were to find in favour of the defendant on the issue of whether the premises were flood-prone and the claimant knew of this, the defendant would still not be entitled to judgment in its favour on this aspect of the defence, and therefore it would be a waste of time to allow the claim to go to trial to determine these issues.

[41] The claimant relied on the following extract from Atkin's Court Forms Vol 27(2) as to the circumstances in which silence may amount to a misrepresentation:

> *Mere silence or inaction will not generally constitute a misrepresentation and the general rule is that there is no duty upon the parties to a transaction to disclose material facts. However, there are exceptions to this rule:*
>
> 1. *Where the transaction is a contract ubberimae fidei; for example, a family arrangement, a contract between partners or between those negotiating with a view to becoming partners; and also in some circumstances where the contract is one of guarantee;*

2. *Where there is a fiduciary relationship between the parties. This is not limited to relationships such as between parent and child, solicitor and client or trustee and beneficiary which give rise to the equitable doctrine of undue influence but includes other relationships such as between principal and agent;*

3. *Where that which is not stated renders false that which is or has been previously stated. This may occur in a number of ways. First, the effect of what is said (and, if relevant, of conduct) over a period of negotiations must be considered as a whole and a representation which was correct when made but which has become incorrect before a contract is made must be corrected. Secondly, a statement may amount to a misrepresentation if facts are omitted which render what was actually stated false or misleading in the context in which it was stated. Thirdly, where a false statement is made in the presence of A (the representor for this purpose), whether by B (the representee) or by C (a third party), and A fails to correct it, he may (on the facts of the case) be held to have adopted it. This is likely to be so if A knew of the falsity of the statement, and he will be guilty of misrepresentation as if he had made the statement.*

[42] The defendant has relied on the following extract from Halsbury's Laws of England:

> ***When silence constitutes falsity***
>
> *There are two main classes of cases in which reticence may contribute to establish a misrepresentation (1) where known material qualification of an absolute statement are omitted; and (2) where the circumstances raise a duty on the representor to state certain matters, if they exist, and where, therefore, the representee is entitled to infer their non-existence from the representor's silence as to them*.

[43] The law is therefore clear that silence can amount to a misrepresentation. With respect to the instant case, in my view, the defendant would have to show that

there was a statement made by the claimant, which omitted to include the alleged flood-prone nature of the premises and that as a result of this omission or silence on the part of the claimant, the statement made by the claimant was rendered untrue or false; or that in the circumstances surrounding the parties entering into the lease agreement for the use by the defendant of the premises for the carrying on of its business, there was a duty on the claimant to state that the premises were flood-prone and the failure to state this fact led the defendant to believe that this was not the case.

[44] The defence has not pleaded any statements that were made by the claimant in relation to the premises that would have been rendered untrue by the claimant allegedly failing to state that the premises were flood-prone, nor did the affidavit in opposition filed on behalf of the defendant make any assertion about any such statement. It is significant that in the letter dated 6 June 2019, in speaking of the flood and its consequences including what it regarded as the flood-prone nature of the premises, and asking for a payment holiday in respect of the rent to be paid, the defendant did not once make mention of any statement made by the claimant which had been rendered untrue by the defendant's discovery of the alleged flood-prone of the premises. Given that the defendant was seeking to be relieved from the burden of paying the rent, one would have expected such a critical fact to be stated by the defendant to strengthen its position that it should be relieved of paying rent for a period.

[45] With respect to the defendant's contention that the failure to disclose amounted to an implied representation that the premises were not flood-prone, it seems to me that there ought to be a representation from which an implied representation is inferred. Indeed, in **Clinicare Limited (formerly known as Strasbourgeoise UK Private Health Insurance Services Limited) v Orchard Homes** there was a clear representation on behalf of the vendor that it was not aware of any dry rot from which the court found that there was an implied representation that the vendor made such investigations as could reasonably be expected of them. No clear representation from which there was an implied representation about the flood-

prone nature of the premises has been pleaded in the defence. I am of the view that on the state of the pleadings and on the evidence presented, the defence in relation to fraudulent misrepresentation has no reasonable prospect of succeeding. Here, I am of the view that the defendant ought to have deployed in full all the aspects of fraudulent misrepresentation it intended to rely on by putting all its cards on the table in its defence because proper pleadings are still necessary to mark out the parameters of a party's case.

[46] Where negligent misrepresentation is concerned, given that included in the contemplation of the parties as revealed by the terms of the lease, were the fact that the building was zoned for commercial use and that the permitted use of the premises was to operate primarily as an optical and cosmetic store, I agree with the defendant that the claimant knew that the premises were being rented for commercial purposes and that if the claimant knew that the said premises were flood-prone, this fact ought to have been communicated to the defendant. I am of the view, therefore, that the claimant had a duty, as pleaded by the defendant, to disclose that the premises were flood-prone if in fact, the claimant was aware.

[47] The question of whether the premises were flood-prone, in my view, is one of the fact that requires further examination at a trial. Ms. Mason has argued that the evidence relied on by the defendant is one of a singular flooding event. This has not been denied by the defendant. Considered in light of what would have been about 17 months into the term of the lease, there may be merit to the claimant's contention that the premises may not have been flood-prone. This, notwithstanding, it is my view that the defendant's letter of 6 June 2019 in asserting that "after consulting a contractor, it was determined that one of the main reasons for the flood was the store's location at the bottom of what is a fishbowl like design" suggests that the assertion was not based on mere conjecture but appears to have had support from a professional skilled in that area. I cannot say upon this state of the evidence that the outcome of this issue may not be affected by the processes of disclosure or cross-examination. I think the dictum of Mummery LJ in **Bolton** is apposite in that I cannot say that a "fuller investigation of the facts of the case

would not alter the evidence available to a trial judge and so affect the outcome of the case".

[48] In addition, it seems to me that if it is proven that the premises were flood-prone based on the design, then the issue of whether the claimant knew of this fact, is one of fact for the court at trial to determine after evidence at trial which may include an assessment of the credibility of the parties.

Whether the lease was rendered void as a result of material non-disclosure

[49] Relying on the submissions made in respect of misrepresentation, it was submitted on behalf of the claimant that barring proof of misrepresentation, the lease cannot be void or voidable and there had been no misrepresentation as there was nothing to disclose.

[50] Counsel for the defendant relied on the case **of Redgrave v Hurd [1881 – 85] All ER Rep** 77 in submitting that in order for a contract which has been obtained by misrepresentation to be set aside, it is not necessary that it should be proved that the person who made the representation knew that it was false when he made it. It was submitted that even if the defendant was not aware that the premises were flood-prone at the time of making the representation as to the premises, it is not a necessary element for the contract to be deemed void or voidable.

[51] I am of the view that given that this issue is so closely tied with the issue of whether there was a misrepresentation by the claimant and the factual issues that are involved in that determination, the outcome of this issue may be affected by evidence adduced at trial.

[52] The claimant has also argued that the defendant was well in arrears of rent before the flooding in May of 2019. The evidence of Mrs. Akwanza in that regard is that the defendant is "unable to say without a doubt that these months (December 2017 and January 2018) were in fact paid and that where they were not, it would have been an administrative oversight and not an intentional act". Despite this evidence

of the defendant, given the effect on the lease that a finding that the contract was surrendered or that the lease was void or voidable by virtue of misrepresentation would have on the defendant's obligation to pay rent, summary judgment could not be granted on the claim.

[53] Having regard to the above findings, it is unnecessary for me to address submissions made by Mr. Leiba in relation to whether the court can grant summary judgment for the liquidated amount claimed; whether there was sufficient proof of this sum or whether the reentry on to the premises would have brought the obligation to pay rent to an end in light of the terms of the lease; and whether there was sufficient evidence of the rate of interest claimed.

CONCLUSION

[54] It is my view that the defendant does not have a real prospect of succeeding on the defences of frustration, set-off, and fraudulent misrepresentation. This notwithstanding, given the implications of a finding in favour of the defendant on the defences of the lease being surrendered or rendered void by misrepresentation and given that the facts giving rise to these issues are interwoven and that these issues are best left to be determined at trial, it would not be appropriate to enter summary judgment in favour of the claimant.

[55] In the light of the foregoing, I order as follows:

(i) The application for summary judgment is refused;
(ii) Leave to apply is refused;
(iii) Costs to the defendant to be taxed, if not agreed.