[2025] JMCC COMM. 20

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2017CD00625

BETWEEN	**NEW PINEAPPLE SHOPPING CENTRE JA LIMITED**	**CLAIMANT**
AND	**DAWKINS BROWN T/A UHY DAWGEN CHARTERED ACCOUNTANT**	**1ST DEFENDANT**
AND	**UHY DAWGEN LIMITED**	**2ND DEFENDANT**

Ms. Rykel Chong and Ms. Marsha Chambers instructed by Nigel Jones & Co. Attorneys-at-law for the Claimant.

Mr. Roderick Gordon and Ms. Kereene Smith instructed by Gordon/McGrath, Attorneys-at-law for the Defendant.

Civil procedure – Breach of contract - Whether an agreement for a fixed term lease existed between the parties- Whether the Defendants are in breach of the Lease Agreement- Unstamped Lease Agreement- Whether the Claimant is in breach of the covenant for quiet enjoyment- Damages

IN OPEN COURT

Heard on: 16th , 17th December, 2024 and 14th May, 2025

STEPHANE JACKSON-HAISLEY J.

INTRODUCTION

[1] This is a claim to recover outstanding rent and maintenance in relation to premises owned by the Claimant known as New Pineapple Shopping Centre Ja Limited (New Pineapple) located at Lot 13A-16C New Pineapple Shopping Centre, Hermosa Beach, Main Street, Ocho Rios in the parish of Saint Ann (the premises).

[2] The Claimant claims that the Defendants Dawkins Brown t/a UHY Dawgen Chartered Accountants (UHY Dawgen) and UHY Dawgen Limited have failed to pay rent and maintenance due to them for several months. The Claimant asserts that it entered into a written lease agreement on or about February 2012 with the Defendants for a term of five (5) years. The Defendants however deny executing any written agreement but instead assert that the parties had an oral monthly tenancy agreement for the use of the premises.

[3] The Defendants have counter claimed that the Claimant is indebted to them for breach of quiet enjoyment due to their inability to use the upper floor of the space when the tiles became defective and so they were deprived of the full benefit of the premises and therefore ask the court to find that this was a breach of their quiet enjoyment and damages should flow as a result.

EVIDENCE ON BEHALF OF THE CLAIMANT

[4] Mrs. Sandra McFarquhar Gonzalez, the Company Secretary and Manager of New Pineapple asserted that UHY Dawgen went into occupation of the property under a fixed term Lease Agreement for five (5) years commencing March 1, 2012 which began as an oral agreement but was later reduced to writing. Mrs. Gonzalez asserted that at all material times, the terms of the lease were accepted and Mr. Dawkins Brown provided a personal Guarantee in his personal capacity. She further stated that a term of the Lease Agreement required equal monthly payments in accordance with the Schedule which provides as follows:

a. For the first year – US$20,320.00 plus GCT
b. For the second year – US$20,320.00 plus GCT
c. For the third year – US$21,366.00 plus GCT
d. For the fourth year – US$22,402.80 plus GCT; and
e. For the fifth year – US$23,522.94 plus GCT

[5] Mrs. Gonzalez asserted that the Defendants have failed to comply with the terms of the Lease Agreement to pay rent punctually and have refused or neglected to pay the agreed rent for several months since the commencement of the lease. She accepted that the total sum of Sixty Thousand and Eighty United States Dollars and Sixty-One Cents (US$60,080.61) has been paid up to August 31, 2015 however at that time, the sum of Forty-Seven Thousand, Six Hundred and Ninety-Nine United States Dollars and Eighty-Three Cents (US$47,699.83) was outstanding for rent. Mrs. Gonzalez also asserted that a term of the lease agreement provided for repairs and upkeep, which the Defendants have failed to comply with and the Claimant has had to incur additional repair expense in the sum of Seven Hundred and Fifty United States Dollars (US$750.00).

[6] During amplification, Mrs. Gonzalez indicated that Mr. Brown sent an executed Lease with his cover letter dated February 7, 2012, which was sent to the Stamp Office however, the document was misplaced. When pressed by Counsel for the Defendants during cross-examination, she asserted that she had documents at her office to support her contention that the Lease was sent for stamping. Mrs. Gonzalez denied receiving marked up comments on the Lease sent by Mr. Brown by letter dated February 7, 2012. She accepted that the oral discussion regarding the Lease was between Mr. Danni Gonzalez and Mr. Brown, however she indicated that Mr. Gonzalez would usually inform her of the content of his discussions with prospective tenants. She denied Counsel's suggestion that the oral agreement was to make monthly payments of One Hundred and Ninety-Five Thousand Jamaican Dollars (J$195,000.00) for the term of occupation but

countered that payments were to be made in United States Dollars though payments were usually made in Jamaican currency.

[7] Mrs. Gonzalez asserted that the Defendants have not made any payments on the outstanding sum since being served with the claim.

EVIDENCE ON BEHALF OF THE DEFENDANTS

[8] Mr. Dawkins Brown gave evidence in his capacity as the 1st Defendant as well as in his capacity as Managing Director of the 2nd Defendant. He asserted that sometime in March 2012 after a series of negotiations, an oral tenancy agreement was entered into with New Pineapple for the monthly rental sum of One Hundred and Ninety-Five Thousand Jamaican Dollars (J$195,000.00). He stated that it was agreed that the sum would be payable in Jamaican currency and immediately prior to entering into possession, a total sum of Six Hundred and Fifteen Thousand Jamaican Dollars (J$615,000.00) which comprised of a security deposit of one (1) month's rent plus two (2) months' rent was paid. Additionally, the sum of Thirty Thousand Jamaican Dollars (J$30,000.00) was paid representing a payment to cover the Defendants' share of costs incidental to installing a bathroom vent.

[9] Mr. Brown asserted that neither a written Lease Agreement nor a Guarantee was executed and though several drafts of a Lease Agreement were discussed, the terms were not settled between the parties. He asserted that the draft Lease Agreement being relied on by the Claimant is likely one of the many drafts that were presented but not agreed upon. During cross-examination, he denied the suggestion that he sent a copy of the finalized Lease Agreement that was in keeping with the discussion between the parties as he had an objection to paying rent in United States currency. He stated further that he could not have agreed to make payments in United States Dollars as this would have been in breach of the Companies Charter for Accountant firms. He asserted that that was circled in the

draft Lease Agreement sent to the Claimant for perusal. Mr. Brown also denied any agreement to pay maintenance and expressed that as a result of these issues, he did not execute the Lease Agreement.

[10] He averred that in keeping with the oral tenancy, the Defendants made rental payments over the years for the monthly sum of One Hundred and Ninety-Five Thousand Jamaican Dollars (J$195,000.00) which has been accepted by the Claimant without objection save for its allegation that payments ceased after August 2015. This statement is however inconsistent with the Defendants' letter to the Claimant dated August 3, 2015 where he accepted that the sum of Three Million, One Hundred and Two Thousand and Eighty-Nine Jamaican Dollars and Forty Cents (J$3,102,089.40) was outstanding as at that date. In the letter, there was also a proposal to settle the debt by making monthly payment of One Thousand, Seven Hundred and Sixty Dollars and Eighty Cents United States Dollars (US$1,760.8) for fifteen (15) months.

[11] Mr. Brown asserted that the oral tenancy was terminated at the end of August 2015, the monthly rental sum due was paid at the end of August, the premises was vacated on September 1, 2015 and the keys returned to the Claimant who is not entitled to any additional payments after August 2015. He further asserted that the oral tenancy agreement did not provide for a payment of maintenance and the Defendants have been responsible for paying its own electricity charges, water charges as well as cleaning and general maintenance of the tenanted premises.

[12] He averred that the Defendants were forced to abandon the entire upstairs due to defective tiling which created a hazard and caused the premises to be uninhabitable. Despite several complaints, the situation was never remedied which caused the Defendants to occupy a smaller area than contemplated. As a result of this, he contended that the Claimant is in breach of the implied covenant to repair and the right to use and enjoy the tenanted premises with reasonable

comfort and convenience. The Defendants have counterclaimed for damages for the alleged breach as follows:

(1) Damages for breach of covenant for quiet enjoyment in respect of the tenancy agreement between the parties;
(2) Further and/or alternatively that any sums awarded to the Claimant on its claim be set off against any award on the Defendants' counterclaim;
(3) Interest on damages awarded pursuant to the Law Reform (Miscellaneous Provisions) Act from the date of the claim to the date of Judgment, or as assessed by this Honourable Court.

[13] In the Particulars of Breach, the Defendants allege that the Claimant failed to repair the defective floor tiles that rendered the upstairs area uninhabitable, restricted the Defendants' right to use and enjoy the tenanted premises with reasonable comfort and convenience and is claiming damages for breach of the covenant of quiet enjoyment during the term of the tenancy. The Defendants have claimed payment of rent for the uninhabitable section of the tenanted premises for a period of six (6) months from March 2015-August 2015.

CLAIMANT'S SUBMISSIONS

[14] Counsel for the Claimant, Ms. Rykel Chong contended that the issues for the court to consider are:

a. Whether there was a Lease Agreement entered into by the parties and if so, what is the effect of the Defendants' conduct on the Lease Agreement?
b. Whether the Claimant is entitled to the sums owed for outstanding rent and maintenance?
c. Whether the Claimant is liable to the Defendants for any alleged breach of covenant of quiet enjoyment.

[15] Ms. Chong relied on the dicta set out in **Walsh v Lonsdale** [1882] 21 Ch D 9 where Jessel MR at pages 14 and 15 stated that:

> *"There is an agreement for a lease under which possession has been given. Now since the Judicature Act the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same right as the landlord would have had if a lease had been granted. On the other hand, he is protected in the same way as if a lease had been granted, he cannot be turned out by six months' notice as a tenant from year to year. He has a right to say, "I have a lease in equity, and you can only re-enter if I have committed such a breach of covenant as would if a lease had been granted have entitled you to re-entry.' That being so, it appears to me that being a lease in equity he cannot complain of the exercise of the right of distress merely because the actual parchment has not been signed and sealed."*

[16] Counsel also quoted **City Properties Ltd. v New Era Finance Ltd**. [2016] JMCC Comm 1, where a lease was prepared by the Claimant but never signed. In this case, the Defendant paid rent in accordance with the draft lease even though subsequent drafts were done and objected to. The Court found that the Defendant was bound by the draft lease to the extent of the terms for which there was no objection.

[17] Ms. Chong referred to the Court of Appeal case of **Implementation Limited v Social Development Commission** [2019] JMCA 46 where Phillips JA quoted **Rossiter v Miller** at paragraph 80 and submitted that the negotiation stage between the parties had passed and that all essential terms were agreed. Counsel further submitted that the fact that the parties had indicated an intention to execute a lease agreement did not prevent the creation of a lease as expounded in the seminal cases of **Walsh v Lonsdale** and **City Properties**.

[18] Counsel submitted that the expression in Mr. Brown's letter of February 7, 2012 was to facilitate the finalization of the Lease Agreement and is evidence negating an oral agreement as alleged by the Defendants. Counsel further submitted that

by virtue of Mr. Brown's letter of August 3, 2015 the Defendants acquiesced to the debt owed for the outstanding rent and maintenance costs and submitted that the letter demonstrates that the rent was payable not in Jamaican currency but the equivalent of the prevailing United States Dollars at the time it was paid. Counsel contended that the Defendants, having remained in possession, paying rent in accordance with the terms of the Lease Agreement and by its conduct agreed to the Claimant's right to recover the maintenance payment, is bound at the very least to the extent of the terms for which there were no objections.

[19] As it relates to whether the Lease was lawfully terminated, Counsel referred to the dicta of McDonald-Bishop JA (as she then was) at paragraphs 28, 69 and 70 in **Tikal Limited (T/A Super Plus Food Stores v Tewani Limited** [2021] JMCA Civ 38 and submitted that the Defendants are in breach of Clause 4(k) of the Lease Agreement which required them to give the landlord six (6) months' notice. Further that the Defendants unlawfully terminated the lease and are liable to pay the outstanding rent and maintenance costs. Counsel further submitted that even if the agreement created a monthly tenancy, the Defendants would still have been in breach since no valid notice would have been served on the Claimant for termination of the monthly tenancy. Counsel refuted the Defendants' assertion that the Claimant surrendered the property when she received the keys.

[20] As it relates to the issue of breach of quiet enjoyment, Ms. Chong contended that as the Defendants admitted that they were relocated by the Claimant, the Defendants cannot then aver that the Claimant did nothing and so the Court should reject the assertion that the Claimant's inaction in its capacity as landlord restricts its right to use and enjoyment of the tenanted premises. Counsel submitted that subsequent repairs were conducted on the premises to restore it to its original condition and that any claim for special damages with respect to rental payments cannot be sustained as the Defendants were still in occupation of the tenanted premises.

DEFENDANTS' SUBMISSIONS

[21] Counsel for the Defendants, Mr. Roderick Gordon commenced his submissions by asserting that the Claimant has failed to prove its case. He submitted that the burden rests with the Claimant to prove on a balance of probabilities that:

(a) There was a written lease agreement signed by the parties;
(b) The parties' oral agreement included a requirement to pay maintenance;
(c) The sum being claimed as outstanding rent is the amount actually due and owing; and
(d) The Claimant is entitled to six (6) months' rent in lieu of notice.

[22] Counsel asserted that the Claimant failed to show that the parties operated under the terms of the draft Lease Agreement that was presented to the Court, and the Defendants have never complied with the alleged essential terms to pay in United States Dollars nor have they paid maintenance since there was no such agreement. Counsel submitted that the Claimant's evidence does not rise to the level to satisfy the Court that the Defendants owe the sums claimed and for the period claimed. In support of this position, Counsel relied on paragraphs 35 and 36 of **Tharpe v Robinson et ux** [2022] JMSC Civ 66 to support the point that the Claimant has failed to establish its case to a reasonable degree of probability and so the claim should fail.

[23] Mr. Gordon submitted that the draft Lease Agreement cannot be relied on as evidence as it is an unexecuted document which gives no evidence of *"consensus ad idem".* Counsel also submitted that the Claimant's witness admitted that there were discussions regarding the letting of the property which were primarily between her husband, Mr. Danni Gonzalez and the Defendants' representative Mr. Brown, however, the discussions did not come to fruition as the parties were unable to agree on the proposed terms presented in the written agreement. Mr. Gordon urged the Court to consider that Mr. Danni Gonzalez was not present to

give evidence to support the claim. He further submitted that the unsigned and unstamped draft Lease Agreement cannot be relied on by the Claimant to buttress its allegations as to the true terms of the oral tenancy agreement. Counsel pointed out that the law prescribes that an unstamped instrument such as a lease cannot be admitted as valid as section 36 of the Stamp Duty Act specifically instructs that:

> *No instrument, not duly stamped according to law shall be admitted in evidence as valid or effectual in any court or proceeding for the enforcement thereof.*

[24] Counsel relied on the Court of Appeal case of **Mayne v Rothery** [2017] JMCA Civ 8 where Brooks JA (as he then was) declared as follows:

> *There was also raised, in argument before us, the question of whether the document embodying the lease agreement should have been stamped in accordance with the requirements of the Stamp Duty Act. It appears, based on the authority of section 36 of the Stamp Duty Act, and the interpretations given to it by this court in its decision in **Garth Dyche v Juliet Richards and Another** [2014] JMCA Civ 23, that the document ought to have been stamped before it was admitted into evidence. The fact that a judge of the Supreme Court in **Marjorie Brown-Young v Laddy Vernon Anderson** (1984) 21 JLR 348, admitted a document into evidence without requiring it to be stamped, cannot bind future tribunals faced with the issue of the admissibility of an unstamped document.*

[25] Counsel contended that the Defendants' witness has consistently reiterated that the parties entered into an oral tenancy agreement for the monthly payment of One Hundred and Ninety-Five Thousand Jamaican Dollars (J$195,000.00) and there was never an agreement to pay maintenance. Mr. Gordon further contended that the service of the Notice to Quit on the Defendants which gave one (1) months' notice to vacate the premises is sufficient proof that the tenancy was not a fixed term tenancy but a month to month tenancy which required only one (1) months' notice. Counsel referred to Professor Gilbert Kodilinye, Commonwealth Caribbean Property Law, p 17 which states that a periodic tenancy is terminable by a notice for the period equivalent to how rent is paid in order to terminate the tenancy.

[26] In support of the claim for damages on the counterclaim, Counsel submitted that the Defendants paid the monthly rental as agreed and as accepted by the Claimant's representative that the correct monthly payment of One Hundred and

Ninety-Five Thousand Jamaican Dollars (J$195,000.00) was paid and so they are not in arrears. It is being countered that within six (6) months prior to vacating the property, the upstairs became uninhabitable resulting in a reduction of the space and breaching the implied covenant of quiet enjoyment. Counsel referred the Court to paragraphs 19, 53, 54 and 60 of **Ian Lunan v Rohan Sudine** [2015] JMSC Civ 260 where Anderson J addressed the concept of quiet enjoyment and submitted that the Defendants are entitled to damages on their claim for breach of quiet enjoyment.

ISSUES

[27] The issues for the court to discuss are (i) whether the parties are bound by the terms of the written Lease Agreement, (ii) what were the essential terms of the Lease Agreement and did this include a term for rent to be payable in United States Dollars? (iii) what sum is outstanding for rent and (iv) whether the Claimant is liable to the Defendants for breach of quiet enjoyment.

DISCUSSION

Whether the parties are bound by the terms of the written Lease Agreement?

[28] The Claimant's contention is that the document tendered as exhibit 3 entitled Lease Agreement is a fixed term contract and entails all the terms discussed and settled by the parties. The Defendants on the other hand dispute the Claimant's contention and instead countered that the draft Lease Agreement being relied on by the Claimant is likely one of the many documents discussed but did not include all the terms agreed between the parties.

[29] The exhibited Lease Agreement is unsigned. The Defendants have always maintained that the parties never executed a written Lease Agreement and expressed that during the negotiation process there were several drafts exchanged but that the 1st Defendant did not sign it. The Claimant's witness, Mrs. Gonzalez during amplification, gave evidence that the Lease Agreement was signed. Prior to that, neither in the Particulars of Claim nor Mrs. Gonzalez's witness statement was it expressly indicated that the Lease Agreement was signed. This is in contrast to the Claimant's indication in both documents that the 1st Defendant signed the Guarantee. During cross-examination, when it was specifically suggested to her that the 1st Defendant did not sign the Lease Agreement, her response was that she did not agree for the reason that she has a letter on file saying "*please see the lease agreement*". The letter she was referring to was the letter dated February 7, 2012 which was admitted as exhibit I. The letter addressed to Mr. Dani Gonzalez is instructive. It states as follows:

> *February 7, 2012.*
>
> *Mr. Dani Gonzales*
> …….
>
> *Dear Mr. Gonzales,*
>
> *Please find enclosed the following Document for your perusal:*
>
> - *Lease Agreement representing Shop C1.*
>
> *Best regards,*
> *UHY Dawgen Chartered Accountants*
>
> *Dawkins Brown*

[30] When this letter is examined, nowhere in it is there any reference to a signed Lease Agreement. All it does is to enclose the Lease Agreement allegedly for perusal. There is no further letter tendered showing that subsequent to this an executed Lease Agreement was sent. I do not agree with the Claimant's submission that the letter indicated that the terms were agreed and signed, in fact I find the contrary, that if the 1st Defendant had in fact signed the Lease Agreement, I would have expected the letter to make reference to a signed Lease Agreement.

[31] There is the question as to what has become of this executed Lease Agreement if it did in fact exist. When Mrs. Gonzalez was taxed about this, it became clear that she was not personally involved in the exchange of the Lease. Mrs. Gonzalez also accepted that it was Ms. Cooper's responsibility to keep a copy of the Lease Agreement. Ms. Cooper did not give evidence. Mrs. Gonzalez alleged that the Lease Agreement was stamped at the Stamp Office. This also appeared to be hearsay evidence as she did not have first hand knowledge of the Lease being sent to be stamped. There was also no document tendered on behalf of the Claimant to show proof of the Lease Agreement being submitted to the Stamp Office. During cross examination, Mrs. Gonzalez indicated that the original Lease Agreement was submitted to the Stamp Office for the necessary stamp duties to be applied however, the document was misplaced by the stamp office. There is no evidence before the Court that the document was actually stamped at the Stamp Office. The Claimant did not present any receipt from the Stamp Office that the document was sent for assessment nor a letter or any other correspondence from the Stamp Office to support the contention that an executed Lease Agreement was submitted.

[32] It is the Defendants' contention that this document was not executed and not stamped and so, it should not be admitted as a valid enforcement pursuant to section 36 of the Stamp Duty Act. Before considering questions concerning the validity of the Lease Agreement, based on the provisions of the Stamp Duty Act, I would first have to be satisfied that the Lease Agreement was in fact signed by the parties.

[33] This letter of February 7, 2012 lends the inference that the Defendants were in agreement with the terms of the draft Lease Agreement up to February 7, 2012 when the draft document was forwarded to the Clamant for perusal. In fact, Mr. Brown admitted that the draft Lease Agreement disclosed by the Claimant is likely one of the drafts discussed. I have found the 2nd Defendant's account to be more probable. I also accept his evidence that one version of the Lease Agreement had

his handwritten notes of proposed changes. The failure thereafter to take the final step and sign the Lease Agreement suggests that the Defendants did not intend to be bound by the written Lease Agreement in the current form.

[34] When all these circumstances are examined, I find the 2nd Defendant's account to be more consistent and forceful as he was the one integrally involved in the negotiations and has given credible evidence that he did not sign the Lease Agreement. I therefore accept that the 2nd Defendant did not sign the Lease Agreement. I also am not satisfied that any Lease Agreement was submitted to the Stamp Office. There is therefore no need for me to embark on an assessment of the provisions of the Stamp Duty Act.

[35] The next question to be determined is whether in the absence of execution by both parties, the 2nd Defendant is bound by the terms of the unexecuted Lease Agreement. The Claimant's reliance on the **City Properties Limited** case supports the position that reliance can be placed on an unexecuted lease agreement however, in the **City Properties Limited** case, the Court found that the Defendant was only bound by the draft lease to the extent of the terms for which there was no objection and that was the basis on which the parties conducted their affairs. In order to rely on an unexecuted lease agreement, the parties must have accepted all the terms of the lease agreement. In the instant case there is no evidence on which there can be an inference that all the terms of the written Lease Agreement were accepted without demur from the Defendants.

[36] Both parties accepted that they had discussions concerning the Lease following which the Defendants took up occupation of the premises so there were certain terms which were agreed.

What were the essential terms of this Lease Agreement and did this include a term for rent to be payable in United States Dollars?

[37] The parties have accepted that there was an agreement for the Defendants to lease the Claimant's premises commencing March 1, 2012 and that the Defendants took up occupation of the subject premises. Both parties here admit that there were discussions regarding creation of a Lease and so there is no issue that a Lease was in fact created, the issue is what were the agreed terms.

[38] The creation of this Lease Agreement is consistent with what is described as a fixed term agreement by Woodfall in Chapter 4 of Woodfall, Landlord and Tenant, at paragraph 4.001. as follows:

> *"An agreement for lease is a legally enforceable agreement by which one person agrees to grant, and another agrees to take a lease. The agreement may be immediately enforceable or may be enforceable only on the occurrence of some event, or the fulfilment of some conclusion. The phrases 'contract for a lease' and 'agreement for lease' are usually interchangeable, but in modern practice it is more common to speak of an agreement for lease...*
>
> *[T]he creation of an agreement for lease is itself the creation of an equitable interest in land, because the present right to call for a future grant is such an interest."*

[39] This was also consistent with the principle enunciated in the seminal case of **Walsh v Lonsdale** relied on by the Claimant, that it is settled law that an agreement for a lease was as good as a lease. The decision of Campbell J (as he then was) in **Implementation Limited v Social Development Commission** [2013] JMSC Civ 05, considered very similar facts and supported the position of the creation of a valid lease agreement in similar circumstances. The decision was appealed and in 2019 Phillips JA (as she then was) confirmed the lower court's position that rent and maintenance were due and payable by the Defendant. In the Court of Appeal decision of **Implementation Limited v Social Development Commission,** Phillips JA at paragraph 75 quoted the Halsbury's Laws of England, 4th edition, volume 27, paragraph 57, where the learned authors stated the

essential terms of an agreement for a lease, namely: *"(1) the identification of lessor and lessee; (2) the premises to be leased; (3) the commencement and duration of the term; and (4) the rent and other consideration to be paid"*. The authors also stated that, if those *"matters are ascertained to be offered and accepted, it is sufficient"*.

[40] Phillips JA (as she then was) opined that if these essential terms are not mentioned by one side and accepted by the other, the matter rests in incomplete negotiation, and there is no concluded contract. Phillips JA (as she then was) found that the signing of the final lease document was not a necessary pre-condition for a valid lease and that the essential terms of the lease were all agreed. She went on to say *"…in my view, that fact that the "technical formality" of issuing a letter of intent or signing a final lease agreement was not completed, does not mean that no agreement for lease existed between the parties"*. She found that in the circumstances of that case the parties had in fact agreed to a ten (10) year fixed term contract despite the fact that there was no signed lease agreement.

[41] The parties here have accepted that the Lease was for a period of five (5) years and was subject to the payment of a monthly sum. There were certain terms that were however contested, in particular the currency of payments and the payment of monthly maintenance and the method of termination of the lease and what are sums to be paid in lieu of notice.

[42] The Claimant has insisted that the oral agreement arrived at was for rent to be paid in United States Dollars, but the 1st Defendant insisted that rent was payable at a monthly payment of One Hundred and Ninety-Five Thousand Dollars Jamaican Dollars (J$195,000.00).

[43] In his evidence Mr. Brown insisted that there was no agreement to pay in United States Dollars and even said it would have been a *"breach of the Companies Charter where we as an Accountant firm knew that our functional currency is*

Jamaican dollar and for you to prepare any financial notice for USD it has to be approved by TAJ". When the statements of account tendered by the Claimant are examined, they reflect that the payments were all made in Jamaican Dollars. However, this does not mean that there was no agreement that the United States Dollar should guide the monthly sums payment. Although the 2nd Defendant is adamant that the sum agreed was Jamaican One Hundred and Ninety-Five Thousand Dollars (J$195,000.00), the statement of accounts shows that different sums were paid monthly. Mr. Brown accepted that there was a variation in the sums paid monthly. When Mr. Brown was cross-examined about this, he sought to explain that it was due to the water bill but this does not sufficiently explain the variation.

[44] The letter of August 3, 2015 also supports that Claimant's position that the monthly payment was to be calculated based on United States Dollars currency. This letter states as follows:

> *August 3, 2015*
>
> *Sandra McFarquhar Gonzalez (Mrs.)*
> *……*
>
> *Dear Mrs. Gonzalez,*
>
> *Re: Lease of Shop C1 at New Pineapple Shopping Centre Jamaica Limited*
>
> *I refer to our current Lease of C1 at the New Pineapple Shopping Centre Jamaica Limited. Since Leasing this Premises we have seen our Monthly Lease move from Jamaican Equivalent of $165,000 to an Excess of $284,408.69 based on your August 2015 Invoice.*
>
> *While this is no fault of your Company and is due to significant devaluation of the Jamaican Dollar vs. the United States Dollar this cost has now completely erode the monthly Space Benefit.*
>
> *I am also acknowledging the fact that base on the exchange rate conversion we are owing a Balance of Approximately US$26,412 United States Dollars (J$3,102,089.40 @ conversion rate of 117.45:1) base on your August Invoice.*

I am proposing the following payment plan to liquidate this debt as the activity of the branch cannot support this Monthly Charge and we cannot expand the services there.

Payment Plan

- *Monthly payment of US$1,760.8*
- *Number of months: 15 months*

Please find enclosed our First Payment of J$206,810. I am also proposing that I send you the 15 Postdated Cheques for safe keeping and for you lodged them on the due date. I await a favourable response to this proposal.

Regards
Dawkins Brown

[45] In this letter, Mr. Brown acknowledged that the increased rent is not a fault of the Claimant but is as a result of the devaluation of the dollar. If the rent was not discussed and agreed to be in United States currency, then this statement would not have been made. Mr. Brown also stated in the letter that "*I am also acknowledging the fact that base on the exchange rate conversion we are owing a Balance of Approximately US$26,412 United States Dollars (J$3,102,089.40 @ conversion rate of 117.45:1) base on your August Invoice.*" I am therefore satisfied on a balance on probabilities that the agreement was for the rent to be paid in United States Dollars and that the Defendants' conduct demonstrate an acknowledgement of this although they sought instead to pay the equivalent sum in Jamaican Dollars. I therefore reject the Defendants' evidence that the rent was settled at One Hundred and Ninety-Five Thousand Jamaican Dollars (J$195,000.00).

[46] The next issue to be addressed is whether the Defendants were also required to pay an additional sum of maintenance. Even in Ms. Gonzalez' witness statement she alleged that maintenance cost shall be paid at the same time as the rent at a total of United States Two Thousand, Two Hundred and Thirty-Eight Dollars and Thirty-Eight Cents (US$2,238.38). When the Statements of Accounts are examined, they do not reflect any additional sums or heading for maintenance. It

is clear from this that the rental amount was calculated to include the maintenance amounts and no additional sum was to be paid for maintenance.

Whether the Defendants are liable to the Claimant for rent owed

[47] In the letter of August 3, 2015, the Defendants accepted that there were outstanding sums owed for rent. Mr. Brown goes further to make arrangements to liquidate the debt by not only suggesting a monthly payment plan in United States currency but also sending post-dated cheques for the next fifteen (15) months.

[48] When the Claimant's statement of account is examined, there were some months when no rental sum was paid. The Defendants have not provided any evidence demonstrating proof of payment of the outstanding sums and so have not been able to successfully challenge this. The Claimant's contention is that the sum of United Stated Forty-Seven Thousand, Six Hundred and Ninety-Nine Dollars and Eighty-Three Cents (US$47,699.83) is owed for rent and maintenance up to November 2015 and thereafter an additional sum of United States Twenty-Six Thousand, Eight Hundred and Sixty Dollars and Fifty-Six Cents (US$26,860.56). This additional sum is to cover the remainder of months left in the five-year lease.

[49] Although I have accepted that the Lease was intended to last five (5) years, I have not accepted that there was any agreement that where the Lease was terminated before the five (5) years that there was an obligation on the part of the Defendants to pay the remaining sum. Having not accepted all the terms of the written Lease Agreement, including the term to pay the entire sum, the Claimant would not be entitled to this additional sum of United States Twenty-Six Thousand, Eight Hundred and Sixty Dollars and Fifty-Six Cents (US$26,860.56).

[50] There is also the related question as to whether the Claimant is entitled to the sum representing six (6) months' rent in lieu of notice. The Defendants have vigorously challenged the Claimant's contention that they were to pay six (6) months' rent in

lieu of notice. The basis on which the Claimant asserts an entitlement to this is based on Clause 4(k) of the unexecuted Lease Agreement. Having found that the Defendants are not bound by the terms of this Lease Agreement, it follows therefore that they are not required to pay the six (6) months' rent in lieu of Notice. I have accepted that based on how the parties conducted the affairs regarding the Lease, that it operated as a monthly tenancy and all the Claimant would be entitled to is one (1) months' rent in lieu of Notice.

[51] In addition to that it is clear to me that it was the Claimant that initiated the circumstances under which the Lease was terminated. By way of a Notice to Quit dated 20th day of May 2015 addressed to the 2nd Defendant, under the signature of the Claimant's Attorneys-at-law and on behalf of the Claimant, the Defendants were given one (1) months' Notice to Quit and deliver up possession of the property on the 30th day of June 2015 or at the end of the next complete month. Among the reasons given for the Notice was that rent was lawfully due in the sum of United States Twenty-Eight Thousand, One Hundred and Forty-Nine Dollars and Thirty-Eight Cents (US$28,149.38). When Mr. Brown was cross-examined about not having given notice to quit, he accepted this but pointed out that it was the Claimant who served them with a Notice to Quit. In the circumstances of the Claimant serving the Notice to Quit, I do not agree that the Defendants would have been obliged to give Notice to Quit. I accept that it was the Claimant who initiated the termination of the Lease and even though the Defendants took more than a month to vacate the premises, the Defendants would not be required to pay any sums for failure to give one (1) months' Notice.

[52] In those circumstances the Claimant is only entitled to the monthly rental sums that were unpaid. In the Statement of Account dated November 30, 2016, the entire sum claimed is United States Forty-Six Thousand, Seven Hundred and Seventy-Eight Dollars and Thirty-Nine Cents (US$46,778.39). The sum claimed for six-months' rent of United States Fourteen Thousand, Five Hundred and Twenty-Nine Dollars and Eighteen Cents (US$14,529.18) must be deducted from

this sum. The balance owing is United States Thirty-Two Thousand, Two Hundred and Forty-Nine Dollars and Twenty-One Cents (US$32,249.21).

Whether the Claimant is liable to the Defendants for breach of quiet enjoyment.

[53] The Defendants have counterclaimed for damages for breach of quiet enjoyment. It is alleged that the entire upstairs of the leased premises became uninhabitable within six (6) months prior to termination of the oral agreement and that they were forced to occupy a smaller space than agreed. This resulted from the tiles in the upstairs section becoming defective causing them to be forced to operate from a smaller space which impacted their ability to carry on business.

[54] Section 4 of the Rent Restriction Act provides for an implied covenant for quiet enjoyment in a tenancy agreement or lease. This implied position is applicable whether or not the term is expressed in a lease and is also applicable in oral arrangements. The authority of **Ian Lunan v Rohan Sudine** relied on by both the Claimant and the Defendants is instructive. The Court's statement at paragraph 52 is as follows:

> *"A covenant for quiet enjoyment is one which is for the benefit of the tenant and accordingly requires the landlord, during the course of the tenancy to not do anything that will impede or outrightly prevent the tenant's quiet and peaceful usage of the premises, for the purpose (s) as contemplated by the tenancy agreement. It also protects the lessee's quiet enjoyment of the leased premises, during the term of the lease. See Booth v Thomas – [1952] Ch 397*.

[55] The case of **Ads Global Limited v McLean Holding Limited** relied on by the Claimant explained the law on breach of the covenant for quiet enjoyment and at paragraph 53 and 57 of the judgment the Court expressed that:

"53. So it is clear therefore that there must be some factual basis for saying that the covenant has been breached. There must be an act or omission of the landlord, or some lawful act by a person claiming through or under the landlord that causes the breach. It is not enough to assert the breach, the acts of omissions leading to the breach must be clearly set out".

[56] The Court after reviewing the landmark case of **Southwark London Borough Council v Mills and others: Baxter v Camden London Borough Council** [1999] 4 All ER 449 summarized the principles at paragraph 57 of the judgment as follows:

"*57. What the case emphasises is that tenants really take the premises as they find them. Even if there is substantial interference with the use and enjoyment of a premises, the landlord can only be held liable for breach of the covenant where the acts or omissions of himself or persons claiming through him or under his authority are substantial. According to Lord Hoffman in the Southwark London Borough Council case, it is always a question of* ***fact and degree*** *(emphasis mine) in determining whether there was a breach of the covenant".*

[57] In **IBP Outsourcing Limited v Unique Four Limited** [2024] JMSC Civ 99, Wint-Blair J discussed breach of quiet enjoyment in a commercial contract and came to the conclusion at paragraph 94 that:

[94] The covenant for quiet enjoyment is therefore a covenant that the tenant's lawful possession of the land will not be substantially interfered with by the acts of the lessor or those lawfully claiming under him. For present purposes, two points about the covenant should be noted. First, there must be a substantial interference with the tenant's possession. This means his ability to use it in an ordinary lawful way. The covenant cannot be elevated into a warranty that the land is fit to be used for some special purpose (see Dennett v Atherton).

[58] The learned Judge went further at paragraph 95 and opined that:

[95] On the other hand, it is a question of fact and degree whether the claimant's ordinary use of the premises has been substantially interfered with. The claimant was not driven out of the premises, it could be used, however he was not successful in using it as a call centre."

[59] When these cases are examined, it is clear that it is a question of fact as to whether the covenant for quiet enjoyment has been breached. The Claimant should prove that the use of the premises has not only been interfered with but substantially so. If the Defendants were unable to carry on business due to the defective tiling, this would amount to a substantial interference with their possession as they would not be able to use it for the purpose for which it was leased.

[60] The evidence on this issue came from Mr. Brown who asserted that the Defendants were forced to abandon the entire upstairs section of the tenanted premises due to issues related to defective tiles and that notwithstanding several complaints to the Claimant, the situation was never remedied. During cross-examination he admitted that their operation was reduced but not fully. During cross-examination Mrs. Gonzalez denied that they were in receipt of any complaints from the Defendants about defective tiles. She said it was after they moved out that she looked at it properly. When it was suggested that the space became uninhabitable, her response was that he should have stated it to us in writing so that they could make repairs.

[61] During cross-examination of Mr. Brown, it was suggested that there is no evidence with respect to any complaints made to the Claimant about defective tiles and Mr. Brown's response was that they were told but he did not provide any other evidence of this. It is of note that in the letter of August 3, 2015, although he admitted outstanding arrears for fifteen (15) months' rent and proposed a payment plan there was no indication in that letter of any complaints made that the tiles were defective and that it was interfering with their occupation of the premises. There was also no indication that they had to vacate the upstairs section of the building due to it being uninhabitable.

[62] In order to prove a breach of the covenant of quiet enjoyment, the Defendants would have to establish that the Claimant did an act which amounted to interference or omitted to do an act. There is no evidence that the Claimant did

anything to cause the tiles to lift. The Defendants are seeking to establish this breach by virtue of the Claimant's failure or omission to repair the defective tiles. It would therefore have been important that a complaint was made to the Claimant.

[63] It is a question of credibility as to whether there was in fact a complaint made about these tiles. The Claimant has not denied that there was some defect in the tiles which required repairs but indicated that it was after the Defendants moved out that this was observed. I am of the view that Mrs Gonzalez was more credible than Mr. Brown in this regard. I do not accept that the fact of defective tiles and its effect on the Defendants' habitation of the premises was brought to the attention of the Claimant's representatives. I would have expected that if the defective tiles substantially interfered with the Claimant's occupation of the premises to the extent that they had to vacate a part of the premises they would have indicated that in the letter of August 3, 2015. I therefore find that there was no substantial interference with the Claimant's possession of the premises and therefore no breach of the covenant of quiet enjoyment. The Defendants' Counterclaim fails and judgment on the Counterclaim is for the Claimant.

[64] I note that in the Statement of Account the figure of United States Seven Hundred and Fifty Dollars (US$750.00) is being claimed as the cost for repairs. On behalf of the Claimant, it was contended that the Lease made provision for the Defendant to do repairs of a certain nature. Based on my finding that the Defendants are not bound by the written Lease Agreement, there would be no requirement on the part of the Defendants to effect these repairs. I am of the view that the cost for such repairs should be the responsibility of the Claimant and not the Defendants as there is no evidence that the defect in tiles was caused by the Defendants' misuse of the property. That sum should be deducted from the total sum claimed. When the sum of United States Seven Hundred and Fifty Dollars (US$750.00) is deducted from United States Thirty-Two Thousand, Two Hundred and Forty-Nine Dollars and Twenty-One Cents (US$32,249.21) what remains is United States

Thirty-One Thousand, Four Hundred and Ninety-Nine Dollars and Twenty-One Cents (US$31,499.21).

[65] My orders are as follows

1. Judgment for the Claimant in the sum of US$31,499.21.
2. The Defendants' Counterclaim fails and Judgment on the Counterclaim is for the Claimant.
3. Costs to the Claimant to be agreed or taxed.

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Stephane Jackson-Haisley
Puisne Judge