[2022] JMCC Comm 6

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2021CD00065

BETWEEN	**BYRON PARCHMENT**	**CLAIMANT**
AND	**SCJ HOLDINGS LIMITED**	**DEFENDANT**

Assessment of damages- Fixed term lease terminated – Land owned by the state – Land Acquisition Act – Improvements – Fixed assets – Crops – Measure of damages – Other occupants – Whether cost to evict should be borne by tenant – Whether issues related to liability relevant when assessing damages.

Suzann Campbell instructed by Harricamp Law for the Claimant

Danielle Archer for Defendant

Matthew Gabbidon instructed by Myers Fletcher and Gordon for the Rural Agricultural Development Authority

In Open Court

Heard: 14th, 16th, 17th February and, 4th March, 2022.

Cor: Batts J

[1] If there ever was a case, which demonstrates the insensitivity of governmental bureaucracy, this is perhaps the one. The Claimant is a farmer who, leased land from the Commissioner of Lands and, invested in that land. He grew mainly long term crops such as, ackee, sour-sop, banana, plantain, coconut, mango and bread fruit. He also raised chickens, pigs and goats. He built walls and pens for his animals. He installed plumbing and irrigation systems. With 15 years left to go, of his fixed term lease of 25 years, the Jamaican Government decided that the land

would be better used for housing solutions. Pursuant to that decision the Defendant was instructed to terminate the Claimant's lease and sell the land to a housing developer. The Defendant therefore served a Notice to Quit on the Claimant.

[2] The Claimant alleges that he was never informed of a change in his landlord from the "Commissioner of Lands" to "SCJ Holdings Ltd." (the Defendant). He says that when he received the Notice to Quit it was from a legal stranger. The parties nevertheless embarked upon a series of negotiations to determine the appropriate compensation, for the unexpired portion of the Claimant's fixed term lease and, for the investments he had made. It is upon the breakdown of those negotiations, and the Defendant's stated intent to evict the Claimant, that this litigation commenced. The Defendant consented to a judgment on liability and for damages to be assessed. Having heard evidence, and considered the parties' respective submissions, I delivered my decision on the 4th March 2022. I promised then to provide my reasons at a later date. This judgment fulfils that promise.

[3] It is important, for reasons which will be apparent later in this judgment, that I set out in detail the rather torturous progress of this litigation.

a) On the 2nd March, 2021 a Fixed Date Claim was filed against the SCJ Holdings Limited, as 1st Defendant and, the Commissioner of Lands as 2nd Defendant. The Claimant alleged that he had a lease for the period 1st November, 2007 to 31st October 2032. The further allegation is that the lease was not registered and "is *not valid to pass interest and/or estate"* and therefore,

> *"The Second Defendant having failed to register an instrument of assignment of the lease has not assigned any rights, if any to re-enter to the First Defendant."*

b) The Fixed Date Claim in subsequent paragraphs asserted that the property was part of land being acquired under

section 25 of the Housing Act for a "*public purpose."* Compensation was therefore being claimed. The Fixed Date Claim was supported by an affidavit and a supplemental affidavit from the Claimant filed on the 2nd March 2021 and 16th April, 2021 respectively.

c) The Director of State Proceedings entered an Acknowledgement of Service on behalf of the 2nd Defendant (Commissioner of Lands) on the 9th April, 2021.

d) Danielle S. Archer, on the 19th April, 2021, entered an Acknowledgement of Service on behalf of the 1st Defendant (SCJ Holdings Limited).

e) On the first day of hearing of the Fixed Date Claim the following occurred:

   i. The first date hearing was adjourned to 8th June, 2021.

   ii. The 1st Defendant, through its counsel, undertook *"not to interfere with the Claimant's possession or peaceful enjoyment of the property in issue until June 8th or further order of the Court"*

   iii. The undertaking was conditional on the Claimant paying into court $569,312.50 being rent for the property

   iv. The Defendants were given permission to file affidavits in answer.

f) The condition was met and that undertaking has been extended from day to day until the 4th March 2022 when my decision was delivered.

g) I will set out in exact terms orders made, by consent, on the 8th June 2021:

"By Consent, .

1) *The Claim against the 2nd Defendant is withdrawn with no order as to costs.*

2) *The 1st Defendant shall compensate the Claimant for the unexpired portion of the lease, his crops, buildings, walls, pipes, and any other infrastructure he installed in the period November 2007 to January 2017, if any.*

3) *Compensation shall be assessed by Judge alone in open court at an Assessment of Damages.*

4) *Assessment of Damages is fixed for the 2nd December 2021 at 10:00 a.m. for one day.*

5) *Standard Disclosure of documents on or before the 30th July 2021.*

6) *Inspection of documents on or before the 20th August 2021.*

7) *Witnesses limited to one ordinary and 2 expert witnesses for each party.*

8) *Witness statements and the expert reports (if available) are to be filed and exchanged on or before the 30th September, 2021.*

9) *Parties are if possible to agree a bundle of documents to be admitted in evidence at trial.*

10) *The bundle of agreed documents if any is to be filed and served by the Claimant's attorney on or before the 14th October 2021.*

11) *With respect to documents, not agreed but, on which a party intends to rely all Notices to Produce and/or Notices under the Evidence Act are to be filed and served on or before the 18th day of October, 2021.*

12) *Counter-Notices if any are to be filed and served on or before the 20th October, 2021.*

13) *Time under the Evidence Act is abridged accordingly.*

14) *Listing Questionnaires are to be filed and served on or before the 20th October, 2021.*

15) *Pre-trial review fixed for the 21 October 2021 at 12 noon for 1 hour.*

16) *Costs in the Claim."*

h) At the pre-trial review (PTR), of 21st October, 2021, time had to be extended for the parties to file witness statements, lists of documents and for the agreement on a bundle of documents. The hearing date of the assessment was vacated and reset for 14th February, 2022. The PTR was further adjourned to the 2nd December 2021.

i) On the 2nd December the PTR was again adjourned to the 17th January 2021. This primarily because the Claimant said that a report from the Rural Agricultural Development Authority (RADA) was awaited.

j) On the 14th December 2021 the Claimant filed an Amended Fixed Date Claim. This document added the (RADA) as a 2nd Defendant. It repeated the allegation that the land was compulsorily acquired for a public purpose under section 25 of the Housing Act and, asked that the Second Defendant produce any one of three reports/lists/records, they were alleged to have, in relation to the said land. A further supplemental affidavit of Byron Parchment in support of Fixed Date Claim was also filed.

k) On the 17th January, 2022, the court was advised, as per an affidavit of service filed on the 14th January, 2022, that the 2nd Defendant had been served with the Amended Fixed Date Claim on the 15th December 2021.

The 2nd Defendant, having been made a party for the purpose of discovery orders only, the PTR continued. An order appointing Mr. Cornel Steer an expert witness, and for his report under cover of letter dated 31st October 2019 to be admitted without need for cross-examination, was made. Mr. George Henry a quantity surveyor was also appointed an expert witness. The 1st Defendant was permitted to pose questions to him and a date set for his response to be filed. Time was extended for filing and service of witness statements and for a bundle of documents to be agreed. The PTR was again further adjourned to the 10th February, 2022.

l) On the 1st February, 2022 the Claimant filed a Notice of Application for issue of a witness summons against the 2nd Defendant (RADA). This was ordered on the 3rd February, 2022. The witness summons was sealed on the 7th February, 2022 but apparently not served.

m) At the PTR, of the 10th February 2022, RADA (the 2nd Defendant) attended with counsel Shaneil Hunter of the Director of State Proceedings. The orders made were:

> *"1. Cecilia Miles is to attend court on February, 14th 2022 at 11:00 a.m. and produce amended report for the Rural Agricultural Development Authority based on site visit which was done in September 2021 in the alternative the original records of the list of crops which was used to prepare the report dated February 25, 2019 or, in the further alternative, the original records of the list of crops which was collected in September 2021 by Locksley Waites valuator employed by Rural Agricultural Development Authority.*
>
> *2. Time extended to the 27th January, 2022 for 1st Defendant to file witness statement and the witness statement filed will stand."*

n) When the assessment of damages came on for hearing on the 14th February, 2022 the Claimant's counsel

> complained that the document produced by RADA was not that which was expected. The complaint was it had no valuation figures attached. Cecilia Miles, the person from RADA to whom the witness summons had been directed, was only its custodian. I explained to counsel that this court could not order a party or an expert to give a report or an opinion. Counsel indicated a desire to cross-examine the maker of the document, a Mr Ney Smith, an employee of RADA. RADA's legal representative, Mr. Matthew Gabbidon indicated that that person could be made available on the next hearing date. With that assurance the assessment of damages was adjourned to the 16th February, 2021.

[4] The assessment of damages commenced on the 16th February, 2022. A bundle of documents entitled: "Amended Notice of Intention to Tender" was by consent admitted in evidence as exhibit 1 (a) to (e). Claimant's counsel then raised a concern about the Defendant being allowed to call a witness asserting that, pursuant to rule 16.3(6), a Defendant not having filed a defence was not entitled to call evidence. I agreed with Miss Archer's rebuttal as this court had, by and with the parties' consent on the 8th June, 2021, ordered witness statements to be filed. The time for the Claimant to have taken objection was then.

[5] There was another interesting development on this first day of hearing. This was that RADA's counsel objected when the person from RADA, Mr. Winston Ney Smith, was called. Mr Gabbidon submitted that, as the witnesses' name was not on the witness summons, he could not be asked to give evidence. I then asked Mr. Ney Smith whether he was present willing and able to give evidence. He answered in the affirmative. I ruled that the witness could be called by the Claimant. He was giving evidence voluntarily, as do the vast majority of witnesses and, without the need of summons or subpoena. Furthermore, the adjournment to today, had been on the expressed promise of RADA to have the maker of the document subpoened present. This made the objection of RADA's counsel, to the witness giving evidence, rather odd to say the least.

[6] The witness was then sworn. He indicated that he was the maker of exhibit 1(e) but that exhibit 1 (f) was prepared by a joint team. He then gave evidence which explained the unit value of the ackee trees. Shortly thereafter, there was a consultation between counsel and, the court was advised that the parties were agreed that the value of crops was $19,785,666.67. Both sides indicated that neither RADA nor this witness would any longer be required in these proceedings. I therefore excused Mr. Ney Smith from the witness box and ordered that RADA be removed as the 2nd Defendant to this action.

[7] Counsel for the Defendant attempted to argue as a preliminary point that an assessment of damages was inappropriate, or prohibited by law, because the lease was terminated for a public purpose. The Land Acquisition Act she asserted provides a mechanism for such assessments. I did not allow the submission because it is too late in the day, given the history of this litigation, as outlined above. The Claimant had always pleaded that the Defendant's act of termination/repossession was not pursuant to a lease but for a public purpose. The order, to have damages assessed by the court, was by consent. The Defendant cannot blow hot and cold and it would be unfair to the Claimant to further postpone the assessment of his compensation.

[8] The Claimant was the first witness to give evidence. His witness statement, dated the 28th September 2021, stood as his evidence in chief. He said that one of his businesses is farming. On the 1st November 2007 he entered a lease agreement with the Commissioner of Lands. It applied to "*Block 7 Bernard Lodge*" St. Catherine. It was a 25-year lease. The document went into evidence as Exhibit 2 by consent on the Defendants undertaking to have it stamped by the 17th February 2022. It is undated. It is also internally inconsistent as the word "*term*" is defined as 10 years in Clause 1 but in the schedule it is noted as 25 years. There is however no dispute by the Defendant that, the term is 25 years and that, its commencement date is the 8th day of January 2009. (See Para 1 of Defendant's written submission dated 17th February 2022). The Claimant's pleadings and

witness statement suggested a commencement date in 2007 but the document proves otherwise.

[9] The Claimant in his witness statement details the investments he made. He built walls to protect his animals. He installed pipes and pumps for irrigation and for his workers and animals. He planted ackee, mango, coconut and, many other crops. The buildings erected included a cooking shed, farm cottage, and three poultry houses. He indicates (in paragraph 9 of his witness statement) that most of his crops were long term and the only crop he has so far harvested, for its full potential, was the ackee. He says he usually made a minimum of $500,000 from ackee each season.

[10] The Claimant says that on the 27th April, 2019, he received a notice to quit from the Defendant. The notice to quit was not put in evidence. He says he planted no more crops but,

> *"5…… I did not move however, because at no point I leased any property from SCJ Holding neither was I given a notice that my landlord had changed. I have never paid any lease to SCJ Holdings Ltd, as they are not my landlord. However, at the commencement of this matter I paid the sum of five hundred and sixty-nine thousand three hundred and seventeen dollars and fifty cents ($569,317.50). This money was paid to the Accountant General on account of rental of Block 7."*

[11] He states that he received threats of demolition from the Defendant (see paragraph 6 of his witness statement). In paragraph 7 he says that the Defendant valued his crops and buildings but have not compensated him. They commissioned Allison Pitter & Company to value his buildings. He indicates that the Rural Agricultural Development Authority (RADA) did a valuation of his crops. He took issue with the RADA valuation for what he called discrepancies. He outlines them in a table at paragraph 8. He computes the total value of his crops at $53,176,666.00. The crops are: June plum, red plum, sweet sop, pomegranate, ackee, orange, naseberry, coconut, lime, guava, orange and moringa, escallion, yellow plum, breadfruit, jackfruit, guinep, custard apple, and lemon. The cost of irrigation infrastructure ($5,000,000.00) is included in his calculation of the value of crops.

Put in evidence by consent were reports by: Allison Pitter & Co. Exhibit 1 (a), Geecho Consultants & Construction Ltd, quantity surveyors, Exhibit 1(b) and, from RADA Exhibit 1 (e). Letters passing between the quantity surveyors and the Defendant's attorney were also admitted as Exhibits 1 (c) and (d).

[12] The Claimant states, at paragraphs 11 and 12 of his witness statement, that the Defendant agreed to compensate him but wants to deduct, from the amount due to him, the amounts they had paid other farmers who had occupied a portion of the leased land. He says:

> *"12. I have never collected any lease or any money from these farmers. I occupy more than twenty-five acres of the land. Commissioner of Lands informed me that I could farm the land along with others. Commissioner of Lands was also aware of the presence of the other farmers as the representative from Commissioner of Lands would visit the farm to collect the lease from me. Most of these farmers have built structures on the property that are very obvious to the naked eyes. This was never voiced to be a concern until I asked for compensation upon being served a Notice to Quit and receiving various demolition threats.*
>
> *13. I have been advised and do verily believe SCJ Holdings Limited started compensating all the other farmers who occupy the land that I leased from Commissioner of Lands."*

[13] The Claimant was extensively cross-examined. The following relevant evidence was elicited. The permission to build on the land was given to the Claimant orally. He was unaware that the lease required permission to be in writing. He was also unaware the lease required him to fence the property. He maintained that building approval was not required for the pig pen. The witness farmed the land for 12 years. He has planted nothing since 2019. He kept no records which the witness explained thus.

> *"Q. you have a record of how much producing*
> *A: Long term crops so did not produce*
> *Q: In 12 years.*
> *A: Try tumeric and lost. Try pepper and pigs and chicken. I kept no records.*

Q: you say you hired persons to work on the farm. Any records of what you paid them
A: No, just in my head
Q: Correct to say you had no written record of your earnings from the farm
A: Correct."

[14] It was also revealed that he shared one chicken house with someone named Trevor Lee. Trevor Lee was one of 10 persons he gave permission to occupy the land. It was suggested that he had no permission to allow others to farm on the land and he disagreed. He also disagreed with a suggestion that there was no permission to erect any structure "*permanent or otherwise*" on the land. He was asked about receipts related to the construction and said that after 7 years he no longer had them. The following exchange occurred:

"Q: Did you try to get information from people who built it for proof
A: 12 years ago. Where would I find that person. Wall is up 9 – 10 years ago."

[15] The witness was challenged on his evidence of earnings and he gave answers which, impressed me as being truthful and, suggest the witness is an honest person.

"Q: suggest to you having no record of your production and no proof of income from the farm, not true to say minimum you earned is $500,000.00 from each active season.
A: it is in my statement
Q: your Para 9
A: (Reads it carefully) well it would not happen like every season. It is up and down."

[16] He was further challenged about earnings from crops. The following revealing answers were given:

"Q: Can you say what are at peak of production
A: Nothing from 2019. Mr. Shoucair say I should stop so I stop.
Q: what was at peak
A: breadfruit, soursop, ackee was up
Q: people come "tief"
A: yes irrigation, everything, gone. For my safety I don't go over there. Everybody gone

Q: the figures are ones at 2019
A: What figures
Q: the RADA, these are at 2019
A: Yes
Q: Suggest, are you aware lease requires you to remove persons without written permission and cost is to be borne by you
A: no explanation from me
Q: you have a lawyer
A: on my expense, I am not aware of that."

[17] In re-examination the witness explained the basis of Mr. Trevor Lee sharing his chicken house

"Q: You indicated that one chicken house shared with Mr. Trevor Lee. Can you explain on what basis?
A: He asked me if he can raise some chicken and I asked Mr. Henry at land agency and he said yes but no sub-lease.
Q: You refer to Mr. Henry who is he
A: The agent. He and his supervisor over time I was there. Agent of Land Agency."

In answer to the court he gave a further response on that issue:

"J. When Mr. Henry and his supervisor come there
A: 2011 about 4 - 5 years until; don't fully recall exact date, until about 2015, now recall 2009-2012."

In questions arising from my question:

"Q: are you saying he stopped [coming]
A: 2009 – 2012.

[18] The only witness for the Defence was Mr Joseph Shoucair. His witness statement dated the 26th January 2022 stood as his evidence in chief. He is an attorney at law and managing director of the Defendant. At paragraph 4 of his statement he said:

"By virtue of Cabinet Decision No.35/07 dated 1st October 2007 the Defendant is fully authorised to act as agent for the registered proprietor of the leased land and to exercise all the rights and and functions as set out in the Lease Agreement. That mandate was communicated to the chairman of the board of the 1st Defendant dated August 23, 2011 That was official communication to the 1st Defendant, and should I see it again I will be able to identify it"

[19] Mr. Shoucair states that he gave instructions for a notice to quit which stated several reasons, including non-payment of rent, for termination of the lease. The sum paid into court by the Claimant was a fulfilment of his obligation to pay rent. At paragraph 8 of his witness statement he referenced clause 5(3) of the lease and says the Claimant is only entitled to compensation for structures for which permission was sought and granted and none for permanent structures. At paragraph 11 Mr Shoucair accepts an obligation to compensate for crops. He states:

> *"11. The 1st Defendant however does accept and has offered to compensate the Claimant for the crops on the property and sought to obtain an objective assessment of the crops on the land from the Rural Agricultural and Development Agency. This report stated a value of $14,102,000. The 1st Defendant takes no issue with this valuation for the crops on the property. As the 1st Defendant commissioned this report, I can identify it should it be shown to me."*

[20] The witness also referenced clause 3 (3) of the lease which prohibits the subletting assignment or parting with possession of the land or any part of it without the previous written consent of the *"Lessor and the Minister responsible for Lands first had and obtained."* The Claimant, he asserts, allowed ten farmers to occupy part of the land. He continued in paragraph 13,

> *"In defiance of this clause, the Claimant allowed ten (10) farmers to occupy sections of the leased land. Our records and those inherited from the Commissioner of Lands do not indicate that permission was granted to the Claimant to underlet or part with possession of part of the leased land."*

He explains in paragraph 14 that in order to recover possession of the land the Defendant had to:

> *"… compensate the said farmers so that they would yield possession. Given that the 1st Defendant had entered into an agreement to divest the property time was of the essence. Accordingly, to expedite their removal, the 1st Defendant expended the sum of $66,454,800.00 as outlined below…"*

[21] The relevant settlement agreements were admitted into evidence as exhibits 3 to 11. Except for Mr Clayton Wilson's the settlement agreements, for all the persons listed at paragraph 14 of his witness statement, were exhibited. Among them is that of Mr. Trevor Lee. At paragraph 15 of his statement Mr. Shoucair further explains,

> *"15. The 1st Defendant on account of the exigent circumstances could not avail itself of taking the matter through court given that time was important to the Agreement for sale and as such the said costs were expended as the cost to remove them. It was I who gave the instructions to pay the sums to recover possession and I caused agreements noted as Instruments of Release and Discharge to be prepared for each of the individuals who improperly occupied the property leased by the Claimant…."*

[22] Mr. Shoucair states that the sums paid were guided by valuations from RADA and Allison Pitter and Company. The witness then references Clause 5(9) of the Lease which exempts the Lessor from responsibility for any claim in relation to the leased property by anyone claiming any right under the lease or anyone using the property and *"the Lessee agrees to hold the Lessor harmless from all claims in respect of any and all such matters.*" He asserts that the compensation paid to the ten farmers should be deducted from any amount due to the Claimant.

[23] Mr. Shoucair, at paragraph 19 of his witness statement, said that although the property was designated for a public purpose it was *"not in fact done in law until the property was declared as such in the gazette dated the 2nd day of December 2021."* He then made three statements (at paragraphs 19, 20 and 21 of his witness statement) which appear to be submissions in law rather than statements of fact. I summarise them thus:

a) As the property has now been designated for a public purpose then clause eleven of the lease, which speaks to termination for a public purpose, should be applied. Therefore, only a sum set by the Commissioner of valuations and filed in the office of the Lessor is

relevant and that is "*final and conclusive evidence between the Lessee and the Lessor.".*

b) Alternatively, if the court has jurisdiction to determine compensation, all terms and conditions of the lease apply and therefore the Claimant is only entitled to the crops so planted less the cost of removal of the ten persons.

c) The Claimant is entitled to reasonable compensation but the terms and conditions of the lease should be applied.

[24] When cross-examined Mr. Shoucair gave the following relevant evidence. He admitted there was no document before the court proving the Defendant ever became a party to the lease. He admitted the lease was never registered on the title. He was unaware whether, before the notice to quit was served, anything in writing was sent to the Claimant advising that the Defendant was the new landlord. He admitted the Claimant had never paid any rent to the the Defendant but asserted that, before notice was served, substantial arrears had accumulated. He said that he could not recall seeing any notice of objection, to the structures erected, on the files related to the lease to the Claimant. He was further cross-examined on the state of the landlord's knowledge about the existence of structures:

"Q. Can you say whether or not these structures were obvious to the naked eye?
A: Can't say
Q: suggest they were built from 2009 to 2015
A: not in a position to contradict you
Q: in that time agents from Commissioner of Lands. Mr. Henry visited property and observed them being built or already built
A: I don't know Mr. Henry. Can't say. Don't see relevance
Q: Though structures built there has been no objection in writing or otherwise to claimant building them until he asked for compensation

A: I can't answer
Q: you perused the files. Having done so you noticed there is no copy of an objection to building being erected
A: Can't say. Don't recall seeing any written objection.
Q: suggest structures claimant built with verbal permission of Mr. Henry an agent of the Commissioner of Lands
A: do not know."

[25] The witness was also unable to say whether or not the Commissioner of Lands had given verbal permission for the ten other farmers to occupy part of the leased land. He admitted that these ten farmers built structures prior to 2019. Also that the structures were large enough to be visible. He stated that the staff of the Defendant thought these 10 farmers were staff of the Claimant. It was the valuators who informed him the structures were owned by persons other than the Claimant. The following very revealing exchange then occurred:

"Q: suggest that you decided on your own to negotiate with the ten farmers to exclusion of Claimant
A: I, you know very well that is inaccurate. The eleven farmers were represented by you Miss Campbell.
Q: suggest Claimant was not aware of your discussions with the ten farmers.
A: disagree
Q: you agree that before making payments to the ten farmers you had no agreement that these funds would be deducted from his compensation.
A: I met personally with Claimant before knowledge of these persons came to me. He told me that all assets were his. He never disclosed that the ten separate individuals.
J: repeats question
A: no had no such agreements because not aware there were ten .
Q: but even when you became aware you did not have an agreement with Claimant to deduct the payments
A: No, because I was not obliged to do so."

[26] Mr. Shoucair stated that the land was sold for housing development *"2 or 3 years ago."* He could not recall whether the notice to quit was served after the land was sold or before. There followed the following exchange.:

"Q: when sold needed to give vacant possession

A: in any event decision made by Cabinet that all those lands be cleared of farmers and be relocated. That was before notice to quit. Master development plan approved by cabinet in 2018.

Q: though gazette published in December 2021 in effect property was being acquired for a public purpose.

A: no, the gazette enables compulsory acquisition if he so desired. No compulsory acquisition then or now."

[27] When re-examined the witness stated that Cabinet documents were confidential but that he had received written communication from the Minister. An effort to make reference to the content of that letter was prohibited by me unless the document was tendered. Counsel declined to do so. The Defendant thereafter closed its case.

[28] The parties made submissions on the 17th February, 2022. The Claimant's counsel commenced by submitting that the lease was not registered and therefore the Commissioner of Lands was unable to pass an interest. I enquired what was the relevance of that submission at this stage, now that the Sugar Company of Jamaica was the only Defendant and had accepted liability , and received no response. I then heard submissions on damages.

[29] The Claimant and the 1st Defendant each tendered written submissions. The Claimant's submission affirmed that,

> *"2… by consent the 1st Defendant agreed to compensate the Claimant for the unexpired portion of the lease, his crops, buildings, walls, pipes and any other infrastructure he installed in the period November 2007 to January 2017 if any. The Claimant as a result of this admission of liability, withdrew the claim against the Commissioner of Lands and the matter was set for assessment of damages against the First Defendant."*

The Claimant's attorney identified the only issue as being whether the Defendant can avail itself of all the terms and conditions of the lease. (Paragraph 5 of submissions). The submissions then proceed to urge that the Defendant cannot avail itself of these terms because it was never recognised by the Claimant as its landlord. Further, as the lease was not registered, no interest in the land could be

passed, ***Tewani Ltd. v Tikal Limited (t/a Super Plus Food Stores) [2016] JMCC Comm 8*** was cited. The submissions allege that the landlord had given oral permission for the erection of the structures. Further, as they were obvious to the naked eye, the landlord's consent should be implied. In any event by reason of the consent order the Defendant agreed to compensate the Claimant for them. The issue is one of quantum. As regards the ten farmers the valuations show they erected large structures. No objection had been taken to them by the landlord. It was unreasonable to expect any one person to have so many pig pens placed so far apart. Therefore, the landlord's knowledge is to be presumed. With regard to the allegation that rent was due it was submitted the Defendant could not avail itself of the terms of the lease as the lease was not registered. There is no document of assignment and no evidence the Claimant was ever notified of the Defendant's agency or assignment. There was no agreement that the Defendant would reimburse the Claimant for compensation paid to the ten farmers. Had the Claimant been acting as a landlord he would have called on the Claimant to remove the ten farmers not enter direct negotiations with them to the exclusion of the Claimant. The Claimant asks for $89,193,355.67 for crops, structures, walls and pipes.

[30] In written submissions on behalf of the Defendant counsel wrote,

> *"In the case at bar, making a presumption that the 1st Defendant would compensate the Claimant for the unexpired portion of a lease, pipes, structures, crops, if any does not make it a fact that the Claimant is entitled to damages. Hence, it is trite law that at an assessment of damages the Claimant must prove he is entitled to damages by providing proof of the nature and extent of the damage."*

The Claimant, she contends, is only entitled to compensation for crops and not for the structures or pipes affixed to the land. Compensation should be as allowed by the terms and conditions of the lease which commenced in January 2009. It is submitted that the Claimant cannot take the benefit without the burden of the lease. The lease gives him standing to make the claim hence the following applies: (a) the requirement for written permission to erect the structures (b) the erection of a

fence was an obligation under the lease (c) the reversion of structures to the landlord at the end of the lease (d) the lease says no forbearance, or neglect to enforce any remedy, is deemed to be a general waiver of such covenant or condition or the right to enforce it (e) the cost of removing squatters is to be borne by the tenant and, (f) the tenant has an obligation to yield up the lease upon its termination. The submission further indicated that section 31 of the Housing Act exempted the Minister from payment of stamp duties. Release from the undertaking to stamp was requested. This was granted. It was also submitted that the notice to quit lawfully brought the lease to an end. At paragraph 8 of the written submissions the Defence asserts that the Claimant is entitled to $19,755,666.67 for the crops as at the date of issue of the Notice to Quit. The areas of dispute are:

1. *"Whether the claimant is entitled to compensation for the permanent structures*

2. *Whether the cost to remove the squatters is to be deducted."*

[31] It was submitted, as regards the permanent structures, that whatever is attached to the land belongs to the owner of the land. (Paragraph 9 to 15 of written submissions). The degree of and purpose of annexation of the walls and structures support the fact they are fixtures. The terms of the lease will determine if compensation is permissible. The lease allows removal of temporary structures. As the premises are not controlled under the Rent Restriction Act and it is not building land there is no legal obligation to compensate for them ***Lewis v Mclean (1982) 19JLR 56***. There is no evidence of a promise of compensation such as would trigger liability as was the case *in* ***McCollin v Carter 26 WIR 1*****.** Further the lease clearly said that, even if consent was granted to improvements being done, they go to the owner on termination. There was therefore no need for the landlord to object.

[32] The lease it was further submitted, at paragraphs 16 to 22 of written submissions, required the Claimant to not allow anyone else on the land. Any such oral

permission would be a material change to the written agreement. The words of Evan Brown J (as he then was) in **Claim No. 2014 HCV03290 Maria Grey Grant v Christopher Wood & Anor at para 37 – 42** were cited. As the lease was clear the Claimant is bound by the terms. The ten persons were therefore squatters. The cost to remove them should therefore be borne by the Claimant. Clause 21 of the lease required the Claimant to remove any squatters at his expense. Clause 3 prevented him sharing possession with anyone. The cost of removing them was $65,436,800.00, and the lease provided that forbearance does not amount to a waiver. The failure of the landlord to object to the presence of the ten "squatters" does not preclude the Defendant holding the Claimant to account.

[33] In oral submissions the Claimant's counsel indicated that the following was agreed between the parties:

		$
	Buildings	56,890,000.00
	Walls and pipes	12,547,689.00
	Crops	19,755,666.67
Total		**89,192,355.67**

She said the only evidence before the Court of lost profits was $500,000 annually from ackees. None of the other crops had as yet matured. The livestock will be removed by the Claimant when he gives up possession so no claim was made in that regard. She sought judgment accordingly.

[34] Miss Archer in her oral submissions argued the following:

i. The lease is and was valid

ii. There was a Notice to Quit

iii. The structures erected by the Claimant are fixtures which go with the land.

iv. The walls also form part of the land

v. The Claimant is not entitled to compensation for these fixtures

vi. The lease was terminated for non-payment of rent but she conceded, there was no proof of that as the notice was not in evidence.

vii. The Defendant took no issue with the value of the crops.

viii. The Defendant is not saying there should be no compensation for the fixtures.

ix. The issue is what is the value of the lost period of the lease.

x. Lost earnings would have been the usual measure however there is no data to work with. The replacement value approach is not appropriate as there was a breach of the lease

xi. The breach also included allowing others to farm the land. The sums paid to have them removed should therefore be deducted.

xii. The Land Acquisition Act does not apply to this matter as the relevant declaration was only made in December 2021.

xiii. The walls were erected because the lease required it.

xiv. The Defendant wished to be released from its undertaking to the court not to take steps to evict the Claimant.

[35] I have detailed the evidence and respective submissions in order to demonstrate that the parties seem unclear about the issues before me. The history of this litigation to my mind does not, at this stage, give rise to some of the matters urged by counsel. I will endeavour to say why and thereafter, in the event I am wrong on that, briefly address the questions in any event.

[36] The consent judgment, as outlined in paragraph 3(g) (2) above, provides that the Defendant "*shall compensate*" the Claimant for:

> *"the unexpired portion of the lease, his crops, buildings, walls, pipes and any other infrastructure he installed, in the period November 2007 to January 2017, if any."*

That order delimits the terms of reference of this assessment of damages. Therefore assertions that the Claimant because he is in breach of his lease, is barred from recovering for the improvements made and/or that the amount awarded ought to be reduced by sums paid to others, cannot be entertained. The question, and the only question, is how is the compensation for his crops and improvements (as delineated) to be assessed. The alleged breaches of the lease go not to the assessment of compensation but rather to the Defendant's liability. The court at an assessment of damages considers issues related to quantum such as the approach to measurement or quantification, mitigation, causation of injury and such the like. Having consented to a judgment on liability and to the court assessing the amount of compensation payable, the Defendant cannot raise issues, which go to liability and which are properly the subject of counterclaim or set-off.

[37] In the event I am wrong on that let me say that I rather doubt the Defendant could either reduce, or avoid paying compensation, on the bases advanced. In the first place reliance on the clause of the lease, prohibiting improvement or construction without consent, is misplaced. The uncontradicted evidence of the Claimant, which I accept, is that he obtained oral permission and, that the landlord's agents' attended, observed and, took no objection either, to the things he erected or, to the other farmers. The matter is not one of variation of contract. It is one of estoppel. Equity will prevent the landlord, whose conduct encouraged or induced the Claimant to act to his detriment in the belief that the strict terms of the lease would not be relied upon, from thereafter enforcing such terms. Having in fact permitted the structures to be erected will a court of equity allow such a landlord to rely on the absence of written permission, as a basis to terminate the lease? I think not. Similarly, should it be a reason to deny compensation at this assessment of damages? The answer is of course self-evident.

[38] Secondly the other occupants, whom the Defendant's attorney calls squatters, were compensated by the Defendant for their crops and infrastructure. The Defendant now seeks to have the amount paid deducted from any amount

due to the Claimant. The "settlement agreements" entered into with these individuals are in two categories see, exhibits 3 – 11. The person paid is described, in all but two of the agreements, as *"the claimant"*. In the other two, exhibits 10 and 11, the payee is called the "*lessee."* The Defendant is described as the "*defendant* "or the *"lessor"* respectively in the agreements. The documents all recite that the land is required for "*public purposes*" and that the payment is "*in recognition of the crops and structures which were cultivated and utilised" by* the lessee or claimant. The agreements also reference an intent to enter into another lease for another property. The *"lessee*" or "*claimant"* in each agreement acknowledged they had received independent legal advice. The person witnessing the signature of each was the same attorney who represents the Claimant in this matter.

[39] Manifestly therefore the Defendant did not treat with two of these persons as strangers to whom they had no obligation. Furthermore, it would have been incumbent on the Defendant, if it intended to hold the Claimant to account for any amounts paid, to have made that clear to the Claimant prior to the entry into those agreements. The Claimant indeed ought to have had an opportunity to participate in any such negotiations. More importantly if, as the Defendant contends, the lease precluded construction of permanent structures the Defendant has paid these persons unnecessarily. If they have made extra-legal or gratuitous payments it is difficult to see how the Claimant can be held liable for that. Certainly that was not the intent of Clause 5(9) of the lease. That section is intended to immunise the landlord from liability to the lessee for any claim by someone claiming an interest in the land. Further, if the matter had been tried, and the Claimant found liable for breach of the covenant against subletting, the likely damages would have been the legal cost to remove the persons and perhaps the cost to demolish the structures. The Claimant ought not to be asked to indemnify the Defendant, for compensation paid to persons in possession, when there is no evidence that possessory titles were or could reasonably be claimed. The Defendant's decision, to make payments, resulted from the entry into an

agreement for sale which promised vacant possession before it was in a positon to deliver vacant possession.

[40] I now address the issue of whether this assessment is premised on the lease or on the land being acquired for a public purpose. Both attorneys spent much time on the question. I fail to see its relevance. The judgment entered by consent stated, categorically, the court's terms of reference. If damages were being awarded pursuant to statutory provisions the court, or any entity considering damages, would be obliged to consider the nature of the Claimant's interest in the land and the value of that interest. Compensation for acquisition of land reflects payment for the interest in land the person to be compensated holds. An assessment of that, if he is a tenant, would necessarily involve any liabilities and/or deficiencies in that status. In short, any right in his landlord to set off, and/or terminate, and/or claim from the tenant as tenant, would impact a valuation of the tenancy for the purpose of statutory compensation. As indicated above the uncontested evidence suggests waiver and/or estoppel against the landlord in respect of the alleged breaches. Furthermore, liability having been conceded, those latter issues no longer arise. Therefore, whether it is the lease which is being valued or it is a valuation for purposes of compulsory acquisition, the same approach is applicable. The Defendant voluntarily settled with the other occupants and has not demonstrated any legal basis for those payments. It would be unjust and inequitable to impose those payments on the Claimant whether he is being compensated as lessee or under the Land Acquisition Act.

[41] The pleadings, on the basis of which the consent judgment was entered, suffice to support an assessment on either basis. Be that as it may I will assess damages as provided for in the consent order. The claim was originally filed against both the Commissioner of Lands, (as landlord) and the Defendant (as a stranger). The election to withdraw against the Commissioner of Lands occurred at the same time as the Defendant consented to the judgment and for damages to be assessed. Therefore, had it been necessary to so decide, I would have determined compensation against the Defendant on the basis that the state was taking

possession of its own land and not in the capacity of a landlord terminating a tenancy. This is consistent with the pleadings which formed the basis of the judgment entered by consent.

[42] I will now proceed to consider the quantum of damages to be awarded for the crops, buildings, walls, pipes and other infrastructure installed by the Claimant. The value of the crops is agreed and therefore I need make no assessment. The award is $19,755,666.67. With respect to the buildings and walls and other infrastructure there are two reports. The quantity surveyor states that replacement cost of the walls and irrigation infrastructure, is $12,547,689.00, see exhibit 1 (b). Messrs. Allison Pitter gives us the depreciated replacement cost of the buildings and other structures and improvements being $ 56,890,000.00, see exhibit 1 (a). This Allison Pitter report also values the items for which compensation was paid to some of the other individuals.

[43] I am not satisfied that either, the quantity surveyor's or, Allison Pitter's measure is appropriate to determine compensation due to the Claimant. This is because these items constitute fixtures. They belong and, at the end of the lease, would have reverted to the landlord as a reversioner. The loss to the Claimant is the loss of use of these structures for the remaining portion of the lease. This is normally measured by reference to the loss of profit, that may have been earned using these structures, in that period, see **McGregor On Damages 16th edition paragraph 1025 page 676 et seq.** There is before me absolutely no evidence to assist with that type of analysis. It was not the basis used or contemplated when treating either with the Claimant or the other persons. There is no doubt that the structures were used productively. The Claimant raised chickens and pigs in them. I can take judicial note that chicken and pig meat are in great demand. One need only visit the supermarket to see that the price of each is not insubstantial. I cannot close my eyes to that fact. The remaining years of the lease are therefore more likely than not, that is on a balance of probabilities, to have been profitability used. The value or replacement value of these structures is not however an appropriate measure of that profitability.

[44] I will therefore adopt the approach used in a somewhat unrelated context. The court when making an award for loss of use of a non-profit earning chattel, will compute interest on its capital value, see discussion in **Macgregor On Damages** (cited above) at paragraphs 1356,1359 and 1362. I will adopt that approach. I have decided to apply interest to the values stated and apply a multipler (being the unexpired portion of the lease). There is, as I have indicated, no warrant for the reduction of the award to the Claimant either, to take account of compensation paid to other persons or, alleged breaches of the lease.

[45] In the final analysis therefore the question is how are the crops, fixtures and, infrastructure to be valued. The value of the crops is not in issue. As regards the fixtures and infrastructure it is relevant that the reversion did not belong to the Claimant. He would have had use of the fixtures for another 15 years (2019 to 2034) see exhibit 2. In the absence of evidence of annual value (either the rental that might be earned or the expected profits) the court must do its best. In this regard it is significant that the depreciated replacement cost and/or the replacement value was used, and agreed by the parties, for pipes and infrastructure on one hand and building and fixtures on the other. These totalled $69,437,689 ($56,890,000 for buildings and $12,547,689 for pipes and infrastructure). I therefore assess the loss to the Claimant by giving a percent of that capital value for the years remaining in the lease. However, I will use 12 years purchase instead of 15, to take into account contingencies as the Claimant is receiving a lump sum payment for future loss. The authorities in **McGregor on Damages (**referenced above) utilise a 5% rate of interest. Interest on judgments in Jamaica range between 3 and 6 percent. Commercial rates vary and no evidence of that is before me but it is judicially noted that they are now modest. The onus of proof is on the Claimant. I will therefore adopt a rate at the lower end of the spectrum. My award, for buildings, fixtures, pipes and, infrastructure is therefore $69,437,689x 3%x12 = $24,997,568.04. The award for crops lost is the value agreed being $19,755,666.67. There is no award for anticipated profits from the sale of such crops because the Claimant is being given their value. In any

event the evidence of earnings and anticipated earnings was quite unreliable and inadequate.

[46] The award to the Claimant is however to be reduced by reasonable costs to remove the other persons who were there. This is because even if, as I have found, permission was given to the Claimant by the landlord to allow other persons on the land, the responsibility to have them removed at the end of the lease remained with the Claimant. They were either his licensees or his tenants at will. There is no evidence as to what is the cost of removing them. However, the cost of litigation is something within the experience of the court as an institution. An action for possession might have been commenced in the Parish Court. I therefore assume a moderate cost of $250,000 for such an action in which all ten persons might have been made defendants.

[47] In the premises there will be judgment entered for the Claimant against the Defendant as follows:

Buildings Walls Pipes & Fixtures	$24,997,568.04
Crops	$19,755,666.67
Less (reasonable cost to recover possession)	$250,000.00
TOTAL	**$44,503,234.71**

Costs will go to the Claimant to be taxed if not agreed. Interest will run on the award at 3% from the date of this assessment until payment.

David Batts
Puisne Judge.