IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2015 CD 00133

BETWEEN	**ISOLYN WALTERS**	**CLAIMANT**
AND	**JAMAICA BAUXITE MINING LIMITED**	**DEFENDANT**

CONTRACT – Lease – Representations- Whether oral collateral agreement that lease would be renewed – Whether oral collateral agreement that tenant would be compensated – Estoppel – Whether landlord estopped from exercising legal rights under terms of the Lease – Expert Evidence – Whether replacement cost at date of claim relevant.

Kadian Dixon instructed by Dixon & Associates for Claimant

Saverna Chambers and Kimona Thompson for the Defendant

HEARD: 21st, 22nd, 23rd February, 21st March and 29th June 2018.

IN OPEN COURT

COR: BATTS, J.

[1] This Claim was filed on the 30th November 2015. On the 17th October 2017 the Claim Form and Particulars were substantially amended.

The Claim now reads:

"(1) That under the doctrine of proprietary and promissory estoppel the Defendant be estopped from denying the Claimant's right in subject property as she has incurred costs in that property to her detriment due to

her reliance on the Defendant's encouragement of her efforts to significantly renovate the subject property.

(2) That the Claimant be awarded damages in the amount of $14,273,086 to reflect the value of the work and investment in the property undertaken by the Claimant in accordance with the principle of promissory and proprietary estoppel.

(3) Alternatively a declaration that by virtue of the doctrine of constructive trust and/or equitable estoppel the Claimant is entitled to an equitable interest in the property and an order as to the extent of such an interest.

(4) That the Claimant be awarded damages for redundancy payment for 12 staff members in the amount of $1,137,000.00 who were employed with the Claimant at the time the Defendant terminated the lease between themselves and the Claimant. "

The Claimant seeks a Declaration and Damages. She particularizes her claim in the Amended Particulars of Claim filed on the 17th October 2017. She alleges that the lease was for a five year term but granted her a right to renew "subject to the Defendant's discretion." The Claimant asserts that she carried out considerable upgrading work which increased the value of the property. These initiatives, she alleges, were encouraged by the Defendant who assured her that her tenure was secure. The lease was renewed in the year 2010 at the Defendant's prompting. In 2015, the Claimant says, the renewal was denied in part because of her consistent late payment of rent. The Claimant says that there was an informal oral agreement that rent was paid in accordance with the seasonal nature of the business. The Defendant acquiesced in these late payments over the years. The Claimant further alleges that Mr. Coy Roache assured her, that notwithstanding the non-renewal of the lease, she was not to worry as her position was secure and the Defendant was working out how to absorb her on the property. The property was advertised in July 2015 and the

Claimant entered a bid. The bid of Mr. Kenny Benjamin was accepted instead. The Claimant was told to vacate by 20th November 2015. The Claimant also particularises her work and improvements done and valued the same at $14,273,086.00.

[2] In its Amended Defence filed on the 14th November 2017, the Defendant admits that the Claimant was a lessee with a lease for a five year duration. It is alleged that the repairs and improvements done by the Claimant were with a view to attracting more visitors and so enhance her revenue. The Defendant denies giving the Claimant assurances as to her tenure. The Defendant admits to not renewing the lease and that the property was put to tender. The preferred bidder was superior and more beneficial and so by letter dated 6th October 2015, the Claimant was so advised. As regards the alleged construction and repairs the Claimant, they say, was advised to submit bills/invoices for work done by her and that she was reimbursed. The Defendant alleges further that pursuant to the terms of the lease they were not obliged to refund the Claimant for any work done. They also deny liability for any redundancy payments. They say the lease expired by effluxion of time and was not renewed.

[3] By way of an Amended Counterclaim filed with the Amended Defence, the Defendant claims as follows:

Cost to Labour and material for work to property between 2010 -2015		$4,933,139.00
Cost to preparing Engineering Report by Taylor Construction Ltd. dated 8th January 2016		50,000.00
Rent outstanding for 2014 (b/f)	363,184.49	
Rent at $145,625.00 per month for January 2015 – November 2015	1,601,875.00	

Total	1,965,059.49	
Less sums paid in 2015	1,690,000.00	
Rent now owed		275,059.49
Amount for outstanding water bill		365,681.47
Total Due		$5,623,879.96

[4] The property in question is popularly known as the "Puerto Seco Beach". It is located in Discovery Bay, St. Ann. I take judicial note of the fact that it is a well known recreational facility that has been enjoyed by many generations of Jamaicans. This is particularly so for residents of the north coast of Jamaica, from Trelawny to St. Mary. In evidence, the Claimant expressed her love for the facility, she having worked there for much of her adult life. The Claimant therefore grasped the opportunity to lease and operate the facility with great hope and anticipation. There is no dispute as to the written terms of the lease. The first five year lease was entered into on or about the 5th June 2005. Prior to becoming a tenant the Claimant operated a small food stall or outlet at the beach. The material terms of the lease were as follows:

> **"2. <u>Lease</u>**
>
> **In consideration of the Rent hereby reserved and the covenants hereinafter contained the lessor HEREBY LEASES unto the Lessee all the leased Premises to hold the same for the Term from the Effective Date YIELDING AND PAYING therefor during the Term such Rent to be paid in advance on the fifteenth day of each month by twelve (12) monthly instalments commencing on the Effective Date."**
>
> **"3. LESSEES COVENANTS**
>
> **The lessee HEREBY COVENANTS with the lessor as follows:**

(1) To pay the Rent herein before reserved at the times and in the manner aforesaid.

.....

(9) The Lessee shall within fourteen (14) days of the date of receipt of notice from the Lessor, commence to repair and make good and proceed diligently with all work in respect of breaches of covenant and defects for which the Lessee may be liable under these presents to the reasonable satisfaction of the Lessor.

(10) That if the Lessee at any time defaults in the performance of any covenants contained herein relating to the maintenance and cleaning or condition of the Leased Premises or any part thereof, provided that notice has been given as aforesaid, and a period of fourteen (14) days has expired, it shall be lawful for the lessor and its agents and workmen to enter the Leased Premises and at the expense of the Lessee to carry out such works as may be necessary in accordance with the covenants contained herein, and the cost and expenses of such works shall be paid by the Lessee to the Lessor on demand."

.....

"5. PROVIDED ALWAYS AND IT IS HEREBY MUTUALLLY AGREED AND DECLARED as follows:

.....

(8) The failure of the Lessor to insist upon strict performance of any terms or provisions of the Lease, or to exercise any option, right or remedy herein contained shall not be

construed as a waiver or as a relinquishment for the future of such term, provisions, option, right or remedy, but the same shall continue and remain in full force and effect.

.....

(11) The Lessee hereby covenants with the Lessor that at the end or sooner termination of the Lease hereby created, the Leased Premises and all buildings thereon and all improvements and additions thereto shall revert to the Lessor free of all encumbrances and charges of whatsoever nature and kind."

[5] Insofar as the written terms of the lease are concerned it is apparent that improvements or additions became the landlord's property. There is no provision for compensation. Indeed it reverts "free of all encumbrances and charges of whatsoever nature." Similarly, the Landlord is expected to give a notice to the tenant before embarking upon any works of repair for which he intends to claim a refund. It is apparent also from the words of the lease that no failure by the landlord to enforce a right should amount to a waiver.

[6] It is perhaps convenient therefore to treat firstly with the Defendant's counterclaim. As regards the works claimed for, the Defendant conceded that there was no notice given to the Claimant pursuant to Clause 3 (9) and (10) of the lease. I therefore hold the Defendant is not entitled to recover any amounts allegedly spent in that regard. As regard the counterclaim for rent owed however, I hold that the fact, as was alleged and confirmed, that rent was repeatedly and regularly collected late due to the seasonal nature of the Claimant's business did not amount to a waiver.

[7] The Claimant endeavours to avoid the consequence of the clear terms of the lease by asserting that representations were made to her by the Defendant. The Claimant, in effect says that there was an oral collateral agreement that she pay rent late and would be compensated for all the improvements and works effected

on the property. It is alleged that she acted to her detriment in reliance on the oral representations and therefore the Defendant should be estopped from relying on the strict contractual terms.

[8] The evidence however, falls short of establishing the allegations. A witness statement dated 29th December 2017 stood as her evidence in chief. At paragraph 4 she stated;

> **"4. I had an informal arrangement with the Defendant whereby rent was paid in a manner dependant on the frequency of visitors to the premises and the seasonal nature of the fluctuation of visitor patronage. The Defendant consented to this for several years by accepting rent based on the terms of this agreement. We operated on this basis for ten years and at no point in time did the Defendant express any kind of disagreement with our payment arrangement. In fact they often praised me for keeping up with payment. This agreement was separate and apart from the express terms of the lease and we conducted ourselves in a manner which indicated acceptance of these payment terms for several years.**
>
> **5. Based on this payment arrangement and the Defendant's acquiescence thereto, the rent was customarily paid late during the year with full settlement being made after the summer when the patronage of the beach is at its highest and the bulk of the income is made"**

[9] The difficulty the Claimant has however is that the terms of the lease were renewed for a second five year period in 2010. So that the following exchange occurred in cross-examination,

"Q: You expect to make $10 million in 2016 if lease had been renewed.

A: I hope so.

Q: Were you comfortable with that?

A: No, out of that I pay $150,000 per month to JBM

Q: 15 million a year?

A: Yes

Q: But you wanted lease to be renewed?

A: I love Porto Seco.

Q: In both lease agreements the legal periods were for a minimum of five years renewable at lessor's discretion?

A: Yes.

Q: Is it true the terms of the lease dated November 2010 were acceptable that is why you signed it?

A: Yes.

[10] I find it difficult to accept that parties to a commercial transaction, who had agreed that rent would be paid based on the season rather than monthly, would after five years renew the agreement without inserting the variation. Indeed the renewed lease reaffirms that a failure to enforce the strict terms of the lease is not a waiver of it.

[11] The Claimant ultimately admitted owing rent, in an emotionally charged exchange,

"Q: If .... why owe rent?

A: Because slow period. Don't have it at the time.

Q: So how you work 10 months?

A: Not one day. Easter, Summer, Boxing Day.

Q: You left there owing rent?

A: Yes, I beg Mr. Roache to allow me to stay for Boxing Day because I know I would make the money. He say no. On Boxing Day they lock up the beach. Police in Discovery Day call me and ask me (witness breaks down crying). They say beach full of buses. Tell me I can't come. They take away the beach"

I had to take a 20 minute break so the witness could compose herself.

[12] The unchallenged evidence is that the lease had expired by effuxion of time. The Defendant had put it to tender and invited the Claimant's participation. They had prior to that informed the Claimant that the lease would not be renewed, see letter dated 12th June 2015, exhibit 7 page D. The Claimant submitted a tender. It was not accepted. By Boxing Day of 2015 therefore the Claimant's lease had come to an end. The emotion of the Claimant notwithstanding, it is clear that by her own admission rent was owed when her second five year lease came to an end. It is clear also that the Defendant was not obliged to allow her access to the beach on Boxing Day as she requested. The Defendant's conduct may have been less than charitable but it was not unlawful. I therefore find rent was due and owing.

[13] In the course of cross-examination the Claimant admitted that she left owing a water bill. She could not say how much but disputed the amount of $365,681.47 suggested to her by the cross examiner.

[14] I preferred the evidence of Mr. Coy. Roache that there was no informal agreement with the Claimant that rent would be paid in a particular manner outside the lease agreement (paragraph 58 of his Witness Statement). I accept that as at 15th November 2015 the Claimant owed $275,059.49 for rent. I do however accept that she was not in possession on Boxing Day. I do not accept Mr. Coy Roache's evidence that she vacated on the 1st January 2016. I find that her possession ended in or about the 30th November 2015. That is the date on which this court, and this Judge, refused the Claimant's application for an injunction to restrain the Defendant from evicting her. On that date also the Defendant through its counsel undertook to take no steps to evict until the 8th December 2015. It is improbable that the Claimant would not have opened the beach for the Christmas season had she been in possession. The water bill due to the National Water Commission, and which the Defendant paid, was $365,681.47.

[15] The Claimant's claim to a refund of money spent to improve the property also fails for want of credible evidence. In the first place, at paragraph 7 of her Witness Statement the Claimant says,

> **"7. Notwithstanding the denial of the application I spoke with Mr. Coy Roache, the Managing Director of the Defendant company, in June 2015. He assured me that I had no reason to worry or lose sleep over the matter. He told me that my position was secure and that the Defendant valued the work I had done over the last decade and they were working at how to compensate me for the monies I have invested into the property."**

This representation be it noted occurs many years after the alleged works of improvement and therefore could not have induced such work. There is no basis for an estoppel.

[16] At paragraph 14 of her Witness Statement the Claimant says,

> **"14. Mr. Roache would periodically visit the property and would praise me for my hard work in renovating the property and increasing patronage. He watched me put all this time, effort and money into the property, knowing that the Defendant company had no intention of renewing the lease. He assured me that my tenure was secure. He led me to believe that the lease would be renewed and so I continued to put my all into the property in hopes of getting a return on my investment."**

[17] When cross-examined an inconsistent, and perhaps more confusing, account is given. So the Claimant said;

> **"Q: Is it true that if Jamaica Bauxite Mining had granted another five year lease you would not have been seeking compensation?**
>
> **A: I would be seeking for them to pay me back money I spent there.**
>
> **Q: Why not seek it before?**
>
> **A: They were paying me. One Mr. Harrison when I went there he said send me all the bills when he see me spend the money. Mr. Harrison used to work with JBM was my boss, to me he was general manager before Mr. Roache"**

Later this exchange occurs,

> **"Q: You wrote [Exhibit 2] seeking an extension of lease?**
>
> **A: Yes.**

Q: You ask for lease of 10 years?

A: Yes.

Q: You said that would be enough to realize a return on investment?

A: That is what I said then.

Q: Was it true?

A: Yes.

Q: Do you agree there is nothing in this letter about compensation from JBM to you?

A: How would I.

Q: Question repeated.

A: Not in this letter"

The evidence, unchallenged, is that the Claimant received two five year leases. That is the 10 years she originally requested and stated to be enough to allow recovery on her investments.

[18] The inconsistencies as related to the alleged promises of compensation continued. The Claimant admitted that most of the spending was done in the first five years of the lease period. The following exchange occurred,

"Q: Pursuant to the lease agreement you did not expect to be refunded?

A: I was expecting to be refunded. I was told by Mr. Harrison my boss.

Q: When he told you that?

A: Within my first five years. He say whatever work I do I must present the bills and I would be compensated"

There was, be it noted, no mention of Mr. Harrison making representations or promises in her witness statement. Furthermore the Claimant goes on to admit that she was compensated, by way of set off for rent, in respect of those bills for work done which she submitted.

[19] It is convenient to note at this juncture that the Defendant has in its Defence offered to pay for those items supported by bills. Their Amended Defence reads;

"19. Further Mrs. Walters was advised by the Defendant to submit bills/invoices for work done by her, she was reimbursed on the invoices submitted. At the trial the Defendant will be relying on those conditions of the Lease Agreement relevant to Mrs. Walters doing work on the property."

At paragraph 21 the Defendant particularises the terms of the lease on which they rely to deny liability to reimburse the Claimant.

[20] It is therefore apparent that the Claimant's evidence as to the promise of reimbursement varies as to who made the representation and when it was made. It does seem in any event that the representation or promise by the Defendant was to reimburse for bills submitted. Further, and this is common ground, the Claimant was compensated in respect of all bills submitted.

[21] The Claimant has not provided bills submitted but not paid. Rather, she has orally explained that her bills and receipts were destroyed when her house burned down. She says the fire was in the year 2008. This would be three years into the first five year lease. There is no adequate explanation for her failure to submit those bills prior to the fire, save to say that she was not in a rush. There was, however, the following exchange during cross-examination:

"Q: **Mr Harrison was the manager at the time**?

A: **Yes**

Q: **You did not give him receipts or invoices**

A: **No because I believe over the years I would have made the money back**. **He saw it**."

[22] The Claimant seeks to establish the value of the work done by the expert evidence of a Quantity Surveyor. This evidence I will comment on later. It seems to me however that this aspect of the claim fails because, if there was a promise from the Defendant, it was to reimburse for bills submitted. I cannot impose on the Defendant an obligation to compensate for work assessed. It seems to me, and I so find, the Defendant at no time agreed expressly or impliedly to compensate the Claimant for the value of work done. Furthermore the promise was not an inducement for her to do improvements, coming as it did after the improvements had been done. The Claimant effected these works to increase her patronage. She, as she admitted, expected to recoup it in increased visitors to the beach. I accept that the Defendant in the course of the lease agreement, and having seen the work done, promised to reimburse her based upon bills submitted and vouched. The effort ten years later to claim the value of work done on the car park, and other things done in the first term of the lease, fails. If the Claimant elected not to submit those bills, she did so at her own peril. The explanation that there was a fire is less than convincing. Surely, she could at that time have obtained duplicates from the contractors who did the work and the suppliers who provided the material. Be that as it may the Defendant's promise was to refund for vouched expenses. I will not impose unvouched expenses on the Defendant.

[23] The third element to the claim relates to the alleged promise of security of tenure. That is, that the second lease would be renewed. The evidence in support falls woefully short for several reasons. In the first place even if there was such a promise there is no evidence that the Claimant acted to her detriment in reliance

on it. On the contrary, she entered the bidding process. The complaint really is that her bid was not preferred. The Defendant clearly had no, and could in law have no, obligation to accept her bid. Otherwise, it would not be a bidding process.

[24] Secondly, it is incredible to expect that Mr. Roache could, at the same time, write to say the lease would not be renewed and tell the Claimant her tenure was secure. It is far more probable, and I so find, that he consoled her by saying efforts would be made to absorb her in the new operation. As this was a new lessee the Claimant must have known that this absorption could only be done if the new tenant agreed. Mr. Roache's account I accept as truthful,

> **"Q: You told her her tenure was secure?**
>
> **A: I could not after the Board directed me to serve her notice. How could I tell her her position was secure?"**

and later;

> **"Q: How do you know?**
>
> **A: The passion when she spoke. I saw it. I was sympathetic to her. I said to her it will be going to tender. We don't know who will win. She did not indicate her interest to tender. I say to her whoever wins, I will see if they will absorb her. She dismissed it. Human pride. She had become boss and I was suggesting she return to Jumpsy."**

I accept on a balance of probabilities this account by Mr. Roache of the conversation. There was no representation or warranty that the second five year lease would be renewed.

[25] The Claimant has therefore failed to prove her case on a balance of probabilities.

[26] I wish however, in the interest of completeness and in the event another court takes a different view, to comment on the expert evidence as to the value of the improvements. The Claimant relied on the report and evidence of Mr. Damion Morgan a Quantity Surveyor. His expert opinion was admitted as Exhibit 6.The report is dated the 14th October 2015, In the second paragraph of the covering letter he states:

> **"The quantities contained herein were deduced from measurements taken on-site at the captioned as outlined in the scope presented by Mrs. Icolyn Walters on September 27, 2015. The rates and prices contained herein are indicative of current obtainable rates and prices. The timeframe for the renovations, as provided by Mrs. Walters, spanned a period between 2006 and 2015."**

I accept as truthful the Claimant's evidence as to the work and improvements she effected in the course of her time as tenant. I however do not accept that the current replacement cost could, even had I found the Defendant liable, be a basis to assess damages. The cost to do the work in 2015 could not be a fair basis to assess the Claimant's expenditure in 2005, and the years following, when most of that work was done.

[27] I did however prefer the evidence of the Claimant's expert to that called by the Defendant who was Mr. H. Taylor, a registered Engineer. He gave a report dated 6th January 2016. He too did an assessment of costs as at 2015. He said "**it is replacement costs we are dealing with**'. His assessment was approximately 50% of Mr. Morgan's. His evidence was discredited because of his unsuccessful attempt to deny that he had seen Mr. Morgan's report prior to doing his own. In a telling bit of cross-examination it became clear to me that not only had he seen Mr. Morgan's report but that he utilised the same categorisations, language and order of listing in his own report. Mr. Taylor's want of candour, on a relatively insignificant matter, would have been a basis to reject his opinion had I found it necessary to consider this aspect of the matter.

[28] In the result however the Claim is dismissed. There is Judgment for the Defendant on the Counterclaim as follows:

Rent	$275,059.49
Outstanding water Bill	$365,681.47
Total	$640,740.96

Interest will run at 3% from the 30th November 2015 to the date of payment. Costs to the Defendant to be taxed or agreed. When regard is had to the unsatisfactory nature of the expert evidence I direct the taxing master to take no account of the cost of the Defendant's expert report, or of his attending to give evidence, when taxing the costs of this action.

DAVID BATTS
PUISNE JUDGE