SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim No. SLUHCV 2005/0072

BETWEEN:

PHILMORE DAVIS

Claimant

AND

MARTINUS JN PHILLIP
JOAN JN PHILLIP

Defendants

Appearances:

Mr. Horace Fraser for Claimant
Mrs. Lydia Faisal for Defendants

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2007 : March 25
April 16
May 2
June 26

……..

JUDGMENT

Mason J

[1] In this action, the Claimant claims against the Defendant for the sum of $135,307.94 for the loss incurred and damage sustained by the Claimant due to the Defendants breach

and/a repudiation of contract. The Defendants deny this claim and counterclaim for special damages in the sum of $9,000.00 which represents outstanding rent for two (2) months.

Facts

[2] The Claimant is the Managing Director of Kentucky Fried Chicken Barbados Limited (KFC) and La Marie Food Group St. Lucia Inc. operating twelve (12) and six (6) restaurants in Barbados and St. Lucia respectively. He agreed to take over the franchaise for the St. Lucia market for KFC when Mr. Frank Keller, the Franchaisee, expressed his interest in selling. The Claimant avers that he agreed to retain Mr. Keller as his consultant.

[3] The Defendants are the owners of a two storey building called The Old Court House (OCH) situated in the town of Soufriere. This building housed a restaurant on the ground floor.

[4] Through Mr. Henry Alexander who eventually assumed duties as the Claimant's manager, an approach was made by the Claimant to the first Defendant to rent this property. Discussions ensued about middle May 2004 and almost immediately the Claimant entered into possession, began carrying out alterations and commenced operation of the restaurant at the beginning of June 2004.

[5] The first Defendant was given by the Claimant the responsibility of preparing a draft lease for the consideration of the Claimant's attorney. Included in that lease were the following terms:

(1) *THE LESSORS hereby unto THE LESSEE thereof accepting the premises described in the schedule hereto (hereinafter called THE LEASED PREMISES)*

TO HOLD the same unto THE LESSEE for a term of six (6) years from 1st day of June, 2004 but determinable nevertheless as hereinafter provided

PAYING THEREFOR the sum of FOUR THOUSAND FIVE HUNDRED DOLLARS ($4,500.00) per month for the first year and the sum of FIVE THOUSAND DOLLARS ($5,000.00) for the second to fifth year inclusive

The rental mentioned shall be payable in equal monthly installments commencing on the date upon which THE LESSEE begins operating the restaurant

(2) *THE LESSEE HEREBY COVENANTS WITH THE LESSORS AS FOLLOWS:*

(1) To pay the rent reserved on the days and in the manner aforesaid

(2) To pay all charges for water, electricity and telephones levied in respect of THE LEASED PREMISES

(3) To use THE LEASED PREMISES for the purpose of carrying on a Bar, Restaurant, Retail Outlet, and Concert Room and

not otherwise without the permission in writing of THE LESSORS

[6] The lease was however never signed by the parties but they agreed and accepted that it formed their intentions.

{7] Initially the Claimant paid to the first Defendant the sum of $9,000.00 representing one (1) month's rent and one (1) month's security deposit. Subsequently two (2) further sums of $4,500.00 were paid.

[8] On 17th September 2004 the Claimant and Mr. Keller went to the residence of the Defendants where they had discussions with the first Defendant, which discussion resulted in the termination of the agreement and for which each of the parties, i.e. the Claimant and the first Defendant, blamed the other. The following day the Claimant began to vacate the premises.

[9] On 20th September 2004 the solicitor for the Defendants sent to the Claimant a letter as follows:

Dear Mr. Davis,

I act herein on behalf of and represent my clients MARTINUS AND JOAN JN. PHILLIP of Bay Street, in the town of Soufriere.

I am instructed by my clients that you are a month by month tenant in respect of a building known as Old Court House situated on Bay Street Soufriere at the rental rate of EC $4,500.00 payable monthly, on the first day of every month.

I am further instructed that your rents are in arrears in the sum of EC $4,500.00, this amount represents lack of payment for one month. You are hereby given "Notice to Quit" the aforesaid property no later that 31st October, 2004.

This letter serves as a notice to quit as a result of your failure to pay the arrears of rent due and payable and that my client requires the property for his own use. You are hereby required to pay the said sum of $4,500.00 rent arrears for the month of September, 2004 and $4,500.00 for the month of October 2004, totaling $9,000.00 and to evacuate the said building no later than the 31st day of October, 2004.

Failure to do so will result in legal action being taken against you without further notice.

Be guided accordingly.

[10] The solicitor also on behalf of the Defendants forwarded another letter to the Claimant, obviously mistakenly dated 20th August, 2004 which read:

I act herein on behalf of and represent my clients MARTINUS & JOAN JN. PHILLIP of Bay Street in the town of Soufriere.

My instructions are that, my clients issued you with a Notice To Quit their property dated 20th September, 2004 which you adhered to. Further to that, my clients had promised to pay you the cost of 'improvements, made to their property.

I am informed that my clients have requested a valuation from you, but you have failed to comply. Consequently, with a view of bringing this matter to a finale my clients have undertaken the task of employing a valuer to value the improvements made. The said valuation reflects a cost of THIRTY THOUSAND SIX HUNDRED AND NINETY SIX DOLLARS AND SIXTY CENTS ($30,696.60) (copy attached).

That my client is prepared to pay to you the said sum of THIRTY THOUSAND SIX HUNDRED AND NINETY SIX DOLLARS AND SIXTY CENTS $30,696.60 as soon as you are prepared to collect it.

You may collect the said sum of THIRTY THOUSAND SIX HUNDRED AND NINETY SIX DOLLARS ($30,696.60) from my office as per above at your convenience.

Be guided accordingly.

Issue to be Determined

[11] I accept the Claimant's contention that the sole issue for determination is which of the parties reneged on the agreement from which would flow certain consequential legal circumstances. However since the question of breach of the agreement is fundamentally a question of fact, it is maintained that there are other peripheral factual issues to which regard must be had before coming to a decision as to who defaulted. These issues will be highlighted by reference to the relevant parts of the evidence in order to determine:

(a) whether there was any agreement between the Claimant and the first Defendant for the operation of a KFC outlet;

(b) whether there was any agreement with respect to payment for the alterations/renovations/improvement to the premises;

(c) whether there remains any rent due and payable by the Claimant to the Defendants

Evidence

[12] For the Claimant there were three (3) witnesses, - the Claimant himself, Mr. Frank Keller and Mr. Henry Alexander and for the Defendants two (2) – the first Defendant on behalf of himself and his wife the second Defendant, and Mr. Augustus Alexander, a carpenter.

- the KFC Outlet

[13] It is the Claimant's evidence that it was understood that a restaurant would be operated at the location until they were ready to start the KFC operation at which time the restaurant would be relocated to the first floor. Under cross examination he conceded that there was no mention of KFC in the draft lease but stated that there had been discussions of plans for utilization of the upper floor for a concert room but that nothing had been finalized, that it was decided that the upstairs floor would eventually become the restaurant.

[14] The first Defendant's version of this aspect as reflected first in his Defence was to deny that he and the Claimant had any discussions on the operation of a KFC outlet on any floor. He averred that the Claimant categorically stated to the Defendants that the place was too small for a KFC and he would use the upstairs for social gatherings or a conference room. He also stated that the Claimant was seeking another place for his KFC. Next in his Witness Statement he stated that the Claimant mentioned that he was interested in using the upper floor of the building for the operation of a KFC outlet but that he, the first Defendant, told the Claimant that the section was too small for such an operation and that the Claimant had agreed with him and nothing further was said about the issue.

[15] Under cross examination the first Defendant stated that the Claimant agreed to rent the entire building, that he would start a KFC but that upstairs was too small and that he would do something else with it.

[16] The Claimant's witness, Manager Mr. Henry Alexander, stated that the Claimant discussed with the first Defendant the possibility of leasing the building to operate a KFC outlet. Under cross examination he admitted that he did not remember seeing in the draft lease that there was to be a KFC in the building. In reexamination Mr. Henry Alexander stated that the Claimant indicated to the first Defendant that he liked the building and he would like to lease it because his plan was to operate a KFC in Soufriere and that he would continue to run the place as a restaurant and later convert it into a KFC outlet.

- the Renovations

[17] In his Statement of Claim the Claimant averred that the parties agreed that:

> *4. ii The Claimant would cause certain building and refurbishment works to be done to the property for which the Claimant would be reimbursed by monthly deductions from the rental until the entire amount is paid.*
>
> *iii. The Claimant would commence those works immediately*
>
> *5. In pursuance of the above oral agreement, the Claimant duly commenced the building and refurbishment work on the property and amidst the ongoing works, the Claimant began operating the Restaurant on June 7th 2004*

6. *At all relevant times, the Defendants knew that the Claimant was incurring expenses in making improvements to the property, which were necessary for the operation of the business. The Claimant financed the improvements purchased equipment and incurred operation expenses. The First named Defendant even assisted the Claimant, through the Manager, Mr. Alexander, in purchasing building items*

[18] Under cross examination the Claimant admitted taking possession of the premises on 24th May, that there were some renovations that had to be done. He stated that there was no evidence that the place had been recently renovated. He said that the major work that was done was to the floor of the restaurant because there had been a wooden plywood floor and there was no way that KFC would allow him to have a restaurant with that floor and so it was replaced by a floating concrete floor. A contractor was employed to carry out certain renovations which were supervised by the first Defendant. The Claimant was of the opinion that the changes that he made were absolutely necessary and denied that he had wanted a "personalized touch".

[19] The Claimant admitted that the improvements were made for the purpose of carrying on the business. He stated however that it was not his understanding that the Defendants were not going to pay him for the renovations because the premises had been recently renovated. He agreed that the lease did not make any reference to the improvements/renovations.

[20] Mr. Henry Alexander in support of the Claimant stated in his Witness Statement that the parties agreed that a sum of money would be deducted from the monthly rent to compensate the cost of all renovations incurred by the Claimant and that on behalf of the Claimants and at his expense, the first Defendant and he commenced purchasing building materials and equipment for the improvement of the building.

[21] Under cross examination he stated that the restaurant at that time was in fairly poor shape, the kitchen was fairly small. Then he catalogued the areas improved by the Claimant. He was of the opinion that:

> *Mr. Davis wanted a personalized look and that is why he made those changes in agreement with the landlord*

[22] The Defence was that the Claimant agreed to make improvements at his own cost and expense. It was denied that the Defendants agreed to reimburse the Claimant for any expenses. The Defendant stated that the first Defendant informed the Claimant that he had recently repaired the property two (2) years ago and was not desirous of making any further reposes (sic), but no agreement was made as to deductions for rent.

[23] In his Witness Statement at paragraph 4, the first Defendant said:

> *Mr. Davis informed me that he was interested in renting the property but that he would need to make some alterations to it. I told him at once that I was not minded to spend any more money on the building as I had only recently completed renovation and improvement work to it. Further the building was*

in good condition and did not require and (sic) further renovation. It was my position that I was only prepared to rent the building as it stood then.

And at paragraph 5:

When I had stated my position to him, Mr. Davis assured me that I should not worry about any changes that he wanted to make and that the changes were for his own purposes. He assured me further that he would bear all costs of any changes that he would make. It was only on the basis that I entered into agreement. I would not have rented the property to Mr. Davis if it was the case that I had to spend further money on the building.

He also stated:

With respect to the alterations made to the balcony of the building, I know that I was never legally obligated to make any offer of compensation to the Claimant, but did so only on moral grounds. Further, it is impossible for a balcony of such simple structure to have cost the amount that Mr. Davis is claiming.

I also caused a valuation of the works done to the Old Court House to be made by a qualified quantity surveyor.

[24] Under cross examination the first Defendant accepted that alterations were done on his

property but stated that it was the lawyer who had advised him to refund the Claimant for what he had spent, that he never agreed to pay. He admitted however that he had agreed with the lawyer at the time and the reason why he had not paid the Claimant was because the Claimant took him to court.

- The Rent

[25] By paragraph 7 of the Statement of Claim, the Claimant avers:

> *On 11th June 2004, the Claimant paid the Defendant the sum of $9,000.00 which represented rental for the month of June and one (1) month security deposit. The Claimant also paid the monthly rental of $4,500.00 for the months of July and August without making any deductions since the work was still ongoing.*

[26] Under cross examination the Claimant maintained that he paid rent to the first Defendant for four (4) months: June to September.

[27] The Defendants on the other hand in their Defence state that the Claimant was handed the property in the third week of May 2004 and received $9,000.00 on the 31st May 2004, representing rental for the month of June and July 2004 and

"That a further payment of FOUR THOUSAND FIVE HUNDRED DOLLARS ($4,500), was received by the Defendants from Mr. Henry Alexander on the 10th September, 2004 for the month of August 2004"

[28] The Defence continues:

Save that it is agreed that rent for August was paid on 10th September paragraph eleven (11) of the Claimant's Statement of Claim is denied, rent remains outstanding for September and October 2004. That there was never any security deposit given or received, and none is in the hands of the Defendants. The NINE THOUSAND DOLLARS ($9,000.00) was for rental payment of June and July 2004

[29] However in his Witness Statement, the first Defendant states:

The Claimant took possession of the property in or about the third week of May 2004, and paid me the first payment of rent in the sum of $9,000.00 on the 31st day of May 2004 with a cheque dated 11th June 2004. I applied $4,500.00 as security deposit and the other $4,500.00 was applied for rent for the month of June 2004. The Claimant made a further payment of $4,500.00 by a cheque dated the 13th of July 2004 which was applied to the month of July 2004. The final payment received from the Claimant was by cheque dated 19th day of September 2004 for payment of rent of August 2004

[30] Under cross examination the first Defendant denied telling his lawyer "That there was never any security deposit given or received, and none is in the hands of the Defendants". He however was not prepared to say that the lawyer had "made it up".

[31] He stated:

> *I agree that the first sum for rent was received on 11th June. Since they took over the building on 14th May, I would say that the money was for May and June. Mr. Davis started doing business the same week that he spoke to me, 14th, 15th May…*
>
> *"The agreement was to start in May, immediately, right away. I would say that he started after 15th May. He spent not a full month in May, but at least three (3) weeks. It is my testimony that Mr. Davis paid rent for three (3) weeks"*

[32] When it was put to him that he had stated in his Defence that he had received $9,000.00 on 31st May 2004, representing rental for the months of June and July 2004, he recanted and conceded that he had in fact told that to his lawyer. He then agreed that he and the Claimant did not have an agreement for rent for the month of May. He admitted receiving $9,000.00 on 11th June as rent for June $4,500.00 on 14th July as payment for July and $4,500.00 on 10th September and payment for August, that the rent was being paid after the month had started and that he had never written to the Claimant to ask why rent was not being paid on time.

[33] After being shown the draft lease, he accepted that he had never had an agreement with the Claimant to pay rent on the first day of every month.

[34] It was the evidence of Mr. Henry Alexander that on 30th September he delivered the keys to the building to the first Defendant at his home. He reiterated this under cross examination but added that he had to take the keys to the first Defendant because he had refused to accept them from one of the female employees. The first Defendant for his part claimed that the Claimant and his agents began to remove their belongings from the property the same Saturday afternoon (17th September) but did not return the keys to the premises until 1st November 2004, at which time they were delivered by one of the Claimant's employees. He denied that Mr. Alexander had brought the keys to him because he refused to accept them when one of the female employees brought them to him on 30th September.

Events of 17th September, 2004

[35] The account given by the Claimant and his witnesses is totally divergent from that of the first Defendant.

[36] According to the Claimant, he went to the Defendants' residence together with Mr. Keller and informed the first Defendant that they were ready to start the relocation of the restaurant to the first floor so that the KFC restaurant could be housed on the ground floor but that the Defendant in turn told him that following instructions from his family, he was no longer interested in renting him the property because he wanted to operate the restaurant

himself and he would refund the Claimant all of the money spent based on figures which he had received from Mr. Alexander.

[37] The Claimant said that he advised the first Defendant that he was in breach of the agreement and that there were other expenses of which Mr. Alexander would not have direct knowledge. Mr. Alexander was then brought to the Defendants' home and the first Defendant was asked to repeat what he had told the Claimant. This was done and the Claimant and his party left and on the following day ceased operations in the OCH.

[38] Under cross examination the Claimant stated that the purpose of the meeting was to bring parties up to date with what was happening. This meant that they were ready to go forward with the KFC. He admitted that there was a "blow up" between Mr. Keller and the first Defendant but denied that Mr. Keller had used insulting language to the first Defendant. He said that when the first Defendant reported that he was going to refund all of the expenses, Mr. Keller asked "when" and that was when the conversation got a little "untidy'.

[39] The Claimant stated that Mr. Keller was not part of the lease between the first Defendant and the Claimant and denied that he had tried to impose Mr. Keller on the first Defendant as the person taking over the KFC and that was the reason for the "blow up".

[40] The Claimant was supported by Mr. Keller in his account of the events of the day. Under cross examination, Mr. Keller stated that he was aware that the lease agreement was between the first Defendant and the Claimant, that they were the ones making the deal but

that he was only assisting at the request of the Claimant. He denied that the Claimant tried to impose upon the first Defendant that he (Mr. Keller) was going to operate the KFC. He said that he was aware of the draft lease and although he had not been in on the discussions, he was privy to the information because he was the consultant. He had only accompanied the Claimant to the Defendants' home in order to assist the Claimant to discuss the plans, plans which were known to the first Defendant. He denied that it was when they came with new plans that the first Defendant rejected it and that a "blow up" ensued.

[41] Mr. Alexander's input taken from his Witness Statement related to the first Defendant being asked to repeat in his presence what he (the first Defendant) had said to the Claimant and Mr. Keller. Mr. Alexander recounts:

> *"Mr. Jn Phillip replied by saying "sure I just told Mr. Davis that my wife and family told me its about time I get off my big black ass and operate the restaurant for myself". I also told Mr. Davis that I will refund him all the money he has spent to renovate my building and that's it".*

{42] He was not challenged on this aspect of his evidence.

[43] In the Defence to the Statement of Claim, the Defendants denied everything which the Claimant had pleaded about the events of 17th September and said instead:

"The Claimant merely informed the Defendants that the Claimant will pass on the business to Mr. Keller and that from then on, it is Mr. Keller who would be renting from the Defendants. That the Defendants had never seen Mr. Keller before. That the Defendants informed the Claimant that they were not desirous of renting their property to Mr. Keller and if that was the csse they would run the place themselves"

[44] In his Witness Statement the first Defendant stated that the Claimant introduced Mr. Keller as the person who would be taking over the business and he asked the Claimant what he meant, that he had rented the property to the Claimant and no one else, and the Claimant did not have authority to hand it down to anybody else without his (the first Defendant's) knowledge and agreement. According to the first Defendant Mr. Keller then began to act boisterously and aggressively, using rude and insulting language to him. He said that the Claimant took Mr. Keller away from the house. When the Claimant returned he told him that Mr. Keller was his business partner and would be taking over the business. The first Defendant said that he insisted that he wanted nothing to do with Mr. Keller and that he had absolutely no intention to agree for him to take over the business.

[45] Under cross examination the Defendant agreed that after he changed his mind about renting the property to the Claimant that he went to his lawyer and asked him to give the Claimant a Notice to Quit. He also agreed that when on 17th September he told the Claimant that he was no longer continuing with the agreement and had changed his mind that he did not tell him that it was because he had not paid the rent for September. He stated that he did not remember telling the Claimant that it was his wife and family who

convinced him that he should run the restaurant himself. He admitted that the Claimant had left and come back with Mr. Alexander and he was asked to repeat what he had said but that he could not recall saying that he wanted to run the business himself.

[46] The first Defendant also stated that when the Claimant spoke to him in May about renting the premises to start a KFC he never said that he had a partner called Frank Keller and agreed that if he had told him that, that he would have put it in the draft lease. He was adamant that when the Claimant came to him on 17th September that he told him Mr. Keller would be taking over. He admitted that when the Claimant operated the restaurant that he went there frequently but he never saw Mr. Keller there.

[47] On reexamination the first Defendant stated that he had changed his mind about the agreement because of the way that Mr. Keller had come to his house and started abusing him.

Findings

[48] Having had the benefit of observing the witnesses, I found the evidence as adduced by the Claimant and his witness to be decidedly more credible than that of the first Defendant. The Claimant was forthright as was Mr. Alexander and while from his antics on the witness stand it was easy to discern that Mr. Keller was boisterous and rude as described by the first Defendant, I was able to look beyond his shortcomings to gauge that he also was telling the truth.

[49] On the other hand, the evidence of the first Defendant was replete with inconsistencies. I was not at all impressed by the number of times he had, under cross examination, to retract his Defence or his Witness Statement. Neither was I impressed by his willingness to blame his lawyer for the contradictions. Because of his constant vacillation, I had serious doubts about the veracity of his statements. He appeared to be fabricating his story as he went along in an attempt to bolster his case and in order to make it fit the evidence at any given moment. In fact I found him at times to be downright disingenuous.

[50] By his own admission and on more than one occasion, the first Defendant made it clear that he and the Claimant discussed the Claimant's intention to establish a KFC outlet. This has been evidenced by the first Defendant's ditherings where first (in his Defence) he claimed that the Claimant stated that the upper floor was too small to accommodate a KFC outlet, then (in his Witness Statement) that it was he who told the Claimant that the upper floor was too small for the KFC outlet, then yet again (in cross examination) it was the Claimant who stated that the upstairs was too small for the KFC outlet.

[51] I am satisfied that by dint of discussions at the outset of the negotiations between the parties it was understood that one of the reasons for leasing the premises was to operate a KFC outlet. Although it had not been specifically written into the lease agreement - the reference there is only to a retail outlet – it has been made apparent that such was the intention of the parties.

[52] The law is that in construing an agreement, the intention of the parties taken from an objective stance must be considered. In such instances, the court can look at surrounding circumstances, what the parties had in mind and what was going on around them at the time when they were making the agreement: per Staughton LJ in Scottish Power plc v Brittoil Exploration Ltd. The Times December 2, 1997.

[53] See also the following statement of Earl Loreburn in F. A. Tamplin S. S. Co. Ltd v Anglo Mexican Petroleum Products Co. Ltd (1916) 2 AC 403 where at 404 he opined

> *"A court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would come to exist.*
>
> *And if they must have done so, then a term to that effect will be implied though it be not expressed in the contract. No court has an absolving power but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted".*

[54] I therefore find that there was an agreement between the Claimant and the Defendant for the operation of a KFC outlet.

[55] I accept the contention of the first Defendant that the Claimant wanted a "personalized" touch to the premises, that for example he needed to replace the floor because in the Claimant's own words "there is no way that KFC would allow me to have a restaurant with that floor". The replacement floor was only one aspect of the works undertaken. There was the construction of a balcony and lattice work done to the front of the building. All of these works were supervised by the first Defendant, and manager Mr. Henry Alexander. The equipment and materials were purchased in part from the first Defendant.

[56] However because the first Defendant assisted in the supervision of the work, cannot of itself lead to the conclusion that he agreed to reimburse the cost of the renovations. He strongly insists that he had renovated his property only two (2) years earlier, that there was no need for further improvements and that he had indicated to the Claimant that if he (the Claimant) undertook the work it would be at his (the Claimant's) expense.

[57] The Court accepts that there was some discussion between the parties on this score but holds the view that it is the first Defendant's actions subsequent to the termination of the agreement which is the deciding factor: I am convinced that on 17th September – the date of the termination of the agreement – the first Defendant did offer to reimburse the Claimant for the work done, that he did consider himself indebted – and not through moral suasion - to the Claimant and to this end he engaged the services of a quantity surveyor to evaluate the improvements carried out to his building, which valuation he caused his solicitor to convey to the Claimant and for which he declared himself prepared to pay in the amount of $30,696.60 (see 2nd and 3rd paragraph of letter above at paragraph 9).

[58] Counsel for the Defendants contends that the court ought not to rely on the report of an expert who was not called as a witness whether by the Claimant or the Defendants, thereby supposedly suggesting that the Court should reject or ignore that aspect of the defence which makes reference to the valuation by the quantity surveyor. This presupposes that the court should also ignore the letter from the Defendants' lawyer in which the offer to pay to the Claimant the sum of $30,696.60 was made.

[59] I cannot agree.

[60] This offer was voluntarily made to the Claimant in recognition of what the Defendants considered their liability to the Claimant, an offer which the Defendants now wish to retract on the grounds that the Claimant did not produce any invoices or independent valuation to substantiate the costs of the work.

[61] Article 372 of the Civil Code declares:

> *When improvements have been made by a possessor with his own materials, the right of the owner to such improvements depends on their nature and the good or bad faith of such possessor*
>
> *If they were necessary, the owner of the land cannot have them taken away. He must, in all cases, pay what they cost, even when they no longer exist; except, in the case of bad faith, the compensation of rents issues and profits*

If they were not necessary, and were made by a possessor in good faith, the owner is obliged to keep them, if they still exist, and to pay either the amount they cost or that to the extent of which the value of the land has been augmented

[62] There is no contention by the first Defendant that the improvements were carried out in bad faith. I therefore hold that the Defendants are liable to the Claimant in the sum of $30,696.60.

[63] The first Defendant initially stated that the agreement was that rent was due to him from the month of May but when his various statements were put to him he was made to admit that there had been no such agreement made but that the rent became due from the month of June. He also conceded that the rent was always paid after the start of the month. He avers in his Witness Statement:

The Claimant took possession of the property in or about the 3rd week of May 2004, and paid me the first payment of rent in the sum of $9,000.00 on the 31st day of May 2004 with a cheque dated 11th June 2004. I applied $4,500.00 as security deposit and the other $4,500.00 was applied for rent for the month of June 2004. The Claimant made a further payment of $4,500.00 by a cheque dated the 13th of July 2004 which was applied to the month of July 2004. The final payment received from the Claimant was by cheque dated 10th day of September 2004 for payment of rent for August 2004.

[64] In his counter claim he claimed for $9,000.00 for outstanding rent for the months of September and October 2004 and in contradiction in his Witness Statement for an order that

> *"The Claimant pays me rent of $9,000.00 due and owing to me, for the months of September and October 2004. After the security deposit is applied for one of the months, the Claimant will still owe me rent for October 2004 in the sum of $4,500.00"*

[65] The uncontroverted evidence is that a total of $18,000.00 was paid by the Claimant to the Defendants. It is the Claimant's evidence that he was in occupation of the Defendants' premises for four (4) months – June to September – therefore by a strict arithmetical calculation, the rent being $4,500.00 per month, all payments would have been made.

[66] However the first Defendant asserts that the Claimant declined to deliver up the keys to the premises until 1st November 2004. This would in effect make the Claimant liable for one month's rent but based on the court's previous observations with respect to the first Defendant's propensity to instantly weave a tale in order to fit the moment, I do not accept his account of what transpired on this occasion but rather the account given by Mr. Henry Alexander i..e. that when on 30th September a female employee of the Claimant's took the keys to the first Defendant's residence just yards away from the building, he refused to accept them causing Mr. Alexander himself to deliver them to the first Defendant on the same day. Witness also the solicitor's letter (Notice to Quit) in which it

was stated that the Claimant had already adhered to the request to "evacuate" the building.

[67] The first Defendant in his Witness Statement declared:

> *By the 20th day of September 2004, after the Claimant started to carry their belongings, it appeared to me that the Claimant was leaving without paying me rent for September. I therefore asked my lawyer to send him a letter demanding the payment of rent for September 2004*

[68] That "letter" which his lawyer wrote was captioned "Notice to Quit".

[69] Counsel for the Defendants submitted that the Notice to Quit having been penned after 17th September was of no legal effect. My view is however, that even if it were so, that the Notice to Quit having been brought into contention by the first Defendant himself (though he has to prove nothing) some consideration ought to be given to it for it serves to reinforce the first Defendant's acknowledgement that the agreement had been terminated as of 17th September.

[70] Thus in light of the foregoing, the court accepts the evidence of the Claimant and finds that there is no rent due to the Defendants. The counterclaim of the Defendants accordingly fails.

Breach of the Agreement

[71] The Claimant's version of the events of 17th September were simply and concisely put: when he went with Mr. Keller to the Defendants' residence, it was to update the first Defendant on the developments planned for the premises i.e. that he was ready to start the relocation of the restaurant to the first floor so that the KFC restaurant could be housed on the ground floor,, that the first Defendant informed him that following instructions from his family he was no longer interested in renting the property but that he wanted to operate the restaurant himself.

[72] Conversely the first Defendant proffered to the court three (3) disparate reasons for the termination. At one moment – in the Defence – it was that :

> *The Claimant merely informed the Defendants that the Claimant will pass on the business to Mr. Keller and that from then on, it is Mr. Keller who would be renting from the Defendants. That the Defendants had never seen Mr. Keller before. That the Defendants informed the Claimant that they were not desirous of renting their property to Mr. Keller and if that was the case they would run the place themselves.*

[73] Then at another moment – in the first Defendant's Witness Statement – it was "the Claimant who brought the contact (sic) to an end by virtue of his "walking out" of the contract and by his refusal to pay rent".

[74] The third reason was given in re examination "I did change my mind about the agreement because about the way Mr. Frank Keller came to my house and started abusing me".

[75] It has already been noted that under cross examination the first Defendant conceded that when he changed his mind about renting the property to the Claimant that he gave his lawyer instructions to send a Notice to Quit to the Claimant and he never stated that it was because of non payment of rent. He also accepted that he never had an agreement with the Claimant to pay rent from the first day of every month and that payments for rent were always made after the start of the month.

[76] Counsel for the Claimant argued, citing the cases of Lombard North Central plc v Butterworth (1987) QB 527 and Ramdass Bidaisse v Dorinda Sampath et al [1996] 46 WIR 461, that where prompt payment (of rent) is not made the essence of the contract, late payments will not constitute a breach of a primary term or a term that goes to the root of the contract entitling the Defendants to terminate the lease.

[77] I reject the first Defendant's assertion that the Claimant introduced Mr. Keller to him "as the person who would be taking over the business" on the basis that I consider it a mere after thought on the part of the first Defendant to cover his blunder. I find that, judging from the almost reflex action he took in instructing his lawyer to send the Claimant a letter (see

Notice to Quit), that he did indicate to the Claimant that he was prepared to "run the place" himself and that he "required the property for his own use".

[78] In the premises, the Court finds itself in agreement with the submission of Court for the Claimant that according to Article 1565 of the Civil Code:

> The lessor cannot put an end to the lease, for the purpose of occupying himself the premises leased, unless the right to do so has been expressly stipulated, and in such case the lessor must give notice to the lessee……

[79] There having been no such express agreement between the parties, the Defendants' termination of the agreement on that ground was itself a breach of the agreement.

[80] Counsel for the Claimant also contended that where , as in this case, the parties have agreed to a five (5) year lease but not on the length of notice for its termination, reasonable notice is acceptable and that one (1) month's notice to terminate such a lease is not adequate and therefore not reasonable.

[81] It is from these legal submissions as well as the first Defendant's blatant contradictions that the court finds no difficulty in determining that the first Defendant was the cause for and author of the termination of the agreement between the parties.

Damages

[82] Having thus decided, it stands now to be determined what measure of damages the Claimant is entitled to recover. The Claimant is claiming for loss and damage. Under the head "of Particulars of Loss" he is claiming for improvements to the leasehold and under "Particulars of Special Damages" for operating loss.

Improvements to the Leasehold

[83] Counsel for the Claimant contends that the Claimant is entitled to claim for wasted expenditure or the renovation works because the Defendants' repudiation denied him the benefit of their enjoyment. For this contention he cites the case of C.C.C. Films (London) Ltd. V Import Quadrant Films Ltd. (1985) 1 Q. B. 16. The Claimant has provided a statement for $40,000.00 but no bills or receipts. The Defendants have calculated the cost at $30,696.60 through an estimate by a quantity surveyor.

[84] Counsel for the Defendants argues that in addition to having no invoices or independent valuation to confirm the costs of or any item of work, the Claimant has failed to address same in his witness statement or that of any of his witnesses and on account of the insufficiency of the pleadings, the Claimant has failed to prove his claim.

[85] In the case of Anglia Television v Reed (1972) 1 Q.B 60 where the claim was for expenses incurred before and subsequent to the considered breach of contract, Denning LJ had this to say on the question of wasted expenditure as against loss of profits.

A plaintiff in such a case as this has an election: he can either claim for loss of profits or for his wasted expenditure, but he must elect between them. He cannot claim both. If he has not suffered any loss of profits or if he cannot prove what his profits would have been he can claim in the alternative the expenditure which has been thrown away, that is wasted by reason of the breach …….If the plaintiff claims wasted expenditure he is not limited to the expenditure incurred after the contract was concluded. He can also claim the expenditure incurred before the contract, provided that it was such as would be reasonably be in the contemplation of the parties is likely to be wasted if the contract was broken. (emphasis supplied)

[86] The argument by Counsel for the Claimant regarding the issue of wasted expenditure cannot be entertained since this has not been pleaded in the main or in the alternative.

[87] It will also be seen from paragraph 60 to 62 above that the Court is of the view that the Defendants are bound by the first Defendant's evinced obligation - whether by virtue of his conversation with the Claimant and his witnesses on 17th September or by his solicitor's letter with respect to the improvements – to repay to the Claimant the sum of $30,696.60.

Claim for Operating Loss

[88] On the day of the trial, the Court was reminded of the Order of the Court made on 7th February, 2007 in which it was ordered in part that

2. Leave be granted to the Claimant to rely on the document disclosed and dated 30th September 2007 (sic) at the trial.

[89] Counsel for the Claimant requested that under Part 29.9 (b) the Claimant be permitted to explain that document. It should be noted that there had been no appeal of that Order nor any objection to it at the trial by Counsel for the Defendants.

[90] The Claimant then referred to a copy of an Income Statement dated 30th September 2004 which represented the performance of the restaurant from inception in June 2004 to closure in September 2004. That statement disclosed the figure from sales and revenue as $57,785.56, the cost of goods sold as $36,745.41 and a gross profit of $21,040.15. Expenses totalled $116,098.87 which when set off against the gross profit resulted in a negative balance or operating loss of $95.058.72, the sum which is being claimed as special damages. The Claimant then identified, defined and explained each item on the Income Statement.

[91] Under cross examination the Claimant stated that the accounting fees listed under expenses in the Income Statement included fees listed for both the Barbados and the local businesses. He later countered this statement by saying that the audit fees, the accounting fees and the management fees were all specific and related exclusively to the local restaurant. The Claimant explained that the statement had been generated by his computer in the office in Barbados.

[92] Counsel for the Claimant argued that operational expenses are to be treated in the same way as loss of profit. He contended, following the case of Simpson v The London Northwestern Railway Co., that since the profit making purpose of the lease was established as being in the contemplation of the parties the Claimant is entitled to damages on the ground that loss of profit (operating losses) was a natural and probable result of the repudiation by the Defendants. The Claimant would then be entitled to recover working expenses: wages, stock and related expenses incurred in setting up and operating the business: Valeria (No. 2) (1922) 2 AC 242. In that case Lord Buckmaster said:

> *……what has to be considered is what would this vessel have earned for the period of the seven days that she was incapacitated owing to the accident; and that amount is the true measure of the damage which the vessel who was to be blamed is called upon to pay and it can only be ascertained by considering what she had earned under similar conditions*

and Lord Dunedin:

> *... in calculating damages you are to consider what is the pecuniary sum which will make good to the loss suffered as a result of the wrong done to him*

and further in the words of Cockburn CJ in the Simpson case (supra)

As to the supposed impossibility of ascertaining the damages, I think there is no such impossibility; to some extent, no doubt, they must be matter of speculation, but that is no reason for not awarding any damages at all.

[93] Counsel for the Claimant is thus of the view that the matter of operational expenses falls into the category of general damages which involves some degree of speculation on the part of the Court.

[94] It is the argument for the Defendants that the evidence given by the Claimant through the Income Statement is a belated attempt to incorporate into the Claimant's witness statement, some reference to the claim for operating loss which had not been mentioned in any of the Claimant's evidence. Counsel also contended that the Claimant failed to show how the figure claimed had been arrived at and how and why he was entitled to this sum claimed. This required strict proof and so the receipts and invoices were necessary for the Claimant to prove his case, otherwise the court is left to perform a guessing exercise. Further, having admitted that some of the costs referred to in the document included operations in Barbados, the question is how was this to be quantified and reconciled against the lump sum being claimed. The court cannot make out a case for the Claimant where he has failed to prove his own case. The award of damages cannot be at large. Special damages must be specifically pleaded and strictly proven. For this Counsel quoted Lord MacNaghten in the case of Stroms Bruks Aktie Bolag v Hutchison [1905] AC 515:

"General damages" ....are such as the law will presume to be the direct natural consequence of the action complained of "Special damages" on the other hand are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character and, therefore, they must be claimed specially and proved strictly.

Findings

[95] The general principle regarding damages is that the injured party is entitled as far as money can do it to be placed in the same position as if the contract had been performed: Victoria Laundry v Newman [1949] 2 KB 528. Sometimes however, the Claimant may be compelled by circumstances to frame his suit on a different basis as to damages, not on the basis of the loss of his bargain but on the basis of his out-of-pocket loss. In other words, he is claiming not to be put into the position he would have been in had the contract been performed, but to be put into the position he would have been in had it never been made: Mc Gregor on Damages 17th edition paragraph 2. 020.

[96] In South Austrailia Asset Management Corp v York Montague Ltd [1996] 3 WLR 80, Lord Hoffman opined:

Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation....

Normally the law limits liability to those consequences which are attributable to that which made the act wrongful.

{97] The question which therefore needs be asked is what is the loss for which the Defendants in the present case should justly be held liable. In the celebrated case of Hadley v Baxendale (1854) 9 Ex 341 the oft cited rule as enunciated by Alderson B is that:

where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. [emphasis supplied]

[98] That rule was restated in the case of Victoria Laundry v Newman (supra) which restated rule was qualified in Czarnikow v Koufos (1969) 1 AC 350 where in Lord Reid's opinion, the proper test is whether the loss in question is:

of a kind which the defendant, when he made the contract, ought to have realized was not unlikely to result from the breach …… the words "not unlikely" …….denoting a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable.

[99] It is not unreasonable therefore, as argued by Counsel for the Claimant, to expect the first Defendant to have foreseen that the lease of the building being for profit making purposes would result in a loss to the Claimant if there be a breach of it and in consequence to be held liable for such loss. Having said that, it is nevertheless incumbent upon the Claimant to establish what loss he suffered. His claim is for operating loss. It is the means by which he attempts to establish the loss that the Defendants take issue.

[100] Counsel for the Defendants argues that it being a claim for special damages, it must be "specially pleaded and strictly proved" and this ought to have been achieved by the production of receipts and invoices and an independent witness to verify the figures since the Income Statement had been computer generated by the Claimant's office. The response to this by Counsel for the Claimant was that in order to challenge the accuracy of the Income Statement, the Defendants should have provided alternative figures.

[102] I am not convinced that this was the correct response, for the onus is on the Claimant to show by satisfactory evidence that the sum being claimed is justified.

[103] It is accepted that the function of pleadings is for the parties to make clear to each other the case which has to be met. In the case of pleadings for special damages, on a strict view, the Claimant will be debarred from proving special damage not only where he fails to plead it at all but where he fails to plead it with sufficiently particularlity: sufficient particularlity normally requires that specific instances should be pleaded: McGregor on Damages op. cit paragraph 43-016.

The authors of that work go on to say at paragraph 43-018:

The remedy available to a defendant presented with insufficient particularity in the claimant's statement of case, a remedy the importance of which will grow as the courts become less strict in their refusal to allow proof of insufficiently particularised damage, is to raise requests for Further Information of the damage alleged pursuant to CPR, Pt 18. Under the old procedural rules, it was well established that the defendant was entitled to demand such particulars of special damage, although he could not get particulars of general damage. If the claimant then supplied the particulars he would be bound by them; if he failed to deliver then the defendant might ask for the allegation of special damage to be struck out. In general the defendant was not entitled to the delivery of further and better particulars before he had filed his defence. Now under CPR, r. 18. 1 (1), the court may at any time order a party to clarify any matter which is in dispute or give additional information in relation to any such matter. Such an order could be made before defence if it was thought that the defendant needed the clarification or information at that stage.

Part 34.1 of our CPR provides:

(1) This Part enables a party to obtain from any other party information about any matter which is in dispute in the proceedings.

(2) To obtain the information referred to in paragraph (1), the party must serve on the other party a request identifying the information sought.

Then Part 34.2 states:

> *(1) If a party does not, within a reasonable time, give information which another party has requested under rule 34.1, the party who served the request may apply for an order compelling the other party to do so.*
>
> *(2) An order may not be made under this rule unless it is necessary in order to dispose fairly of the claim or to save costs*
>
> *(3) When considering whether to make an order, the court must have regard to –*
>
> *(a) the likely benefit which will result if the information is given;*
>
> *(b) the likely cost of giving it; and*
>
> *(c) whether the financial resources of the party against whom the order is sought are likely to be sufficient to enable that party to comply with the order.*

[104] What I have determined therefore is that the point at which the Income Statement ought to have been challenged was 7th February 2007 when the Court made its order permitting the Claimant to rely on the statement at trial. No challenge or request for information having been made then, the Statement must be accepted as satisfactory evidence but subject to those items – audit fees, accounting fees and management fees – which were shown to be incorrectly included, no other items having been disputed.

[105] If I am wrong to have so decided, it should be noted that the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages: Vaughn Williams LJ in Chaplin v Hicks (1911) 2 KB 786 and once a reasonable opinion that liability exists is found, there must necessarily be guess work at times as to the quantum of liability: Argosy Co Ltd v Commissioner of Inland Revenue (1911) 15 W1R 502 per Lord Donovan and in the circumstances the loss is a reasonable valuation of what the plaintiff ought to have had but did not get: per Lord Hobouse of Woodborough in Attorney General v Blake (2001) 1 AC 268.

[106] I am in addition of the view that this is not an instance where only nominal damages are justified for the Claimant is deserving of more than a pyrrhic victory. In the words of Jacob J in Hyde Park Residence Ltd v Yelland [1999] RPC 655:

> *A plaintiff who recovers only nominal damages has effectively lost and in reality the defendant has established a complete defence.*

[107] This was not the case in the present action.

[108] In the circumstances I am prepared to award to the Claimant the sum of $46,660.72 as damages which is represented by his claim for $95,058.72 discounted by audit fees of $12,000.00, accounting fees of $14,660.00 and management fees of $20,000.00.

ORDER

Judgment for the Claimant in the sum of $36,096.60 as damages for improvements and $46,660.72 for operating loss.

Interest on these sums at the rate of 6% per annum from the date of judgment until payment.

Counterclaim of the Defendant is dismissed.

Costs to be prescribed costs.

SANDRA MASON Q.C.

High Court Judge