EASTERN CARIBBEAN SUPREME COURT
ST. CHRISTOPHER CIRCUIT

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2011/0242

BETWEEN:

DELTA PETROLEUM (NEVIS) LIMITED

Claimant

And

[1] OOJJ'S LTD (Doing Business as OOJJ's Service Station)
[2] OTHNEIL HYLIGER

Defendants

Appearances:

Mr John Carrington and Ms Camilla Cato for the Claimant
Ms Sherry Ann Liburd-Charles for the 2nd Defendant

2012: November 20th

2013: May 23rd

JUDGMENT

[1] THOMAS J (AG) On 21st August 2011 the claimant, Delta Petroleum (Nevis) Limited filed a Claim Form in which OOJJ's Ltd and Othneil Hyliger were named as defendants.

[2] The claimant claims the sum of $241,932.89 as being the outstanding amount due from the defendants to the claimant, which the first defendant in breach of its agreement which the claimant made on or about 30th May 2008 and the second defendant in breach of his Promissory Note issued to the claimant on 6th June 2008, have failed and/or refused to pay the said sum together with interest

compounded at the rate of 5% per annum from January 2011, the most recent payment.

[3] In its Statement of Claim the claimant pleads the agreement entered into with the first defendant on or about 1st August 2002 under which the defendant, as dealer, agreed to purchase from the claimant petroleum products for resale at its service station. The claimant agreed to supply such products.

[4] The claimant pleads a material term of the agreement (being clause 7) whereby the claimant would allow a credit limit of $200,000.00 with respect to the payments due to the claimant for the supply of petroleum products which the dealer was to pay off at the end of each month or when the authorized credit limit was reached.

[5] It is pleaded by the claimant that during the course of the agreement the claimant provided credit to the limit and that after the expiration the first defendant acknowledgment in writing on 30th May 2008 its indebtedness to the claimant in the amount of $486,833.84.

[6] It is further pleaded by the claimant that on or about 30th May 2008 the claimant and the defendant agreed that the first defendant's debt would be treated as an advance payment of the rent due from the claimant to the second defendant under the claimant's tenancy agreement of the second defendant's premises at Basseterre. This tenancy was to commence in June 2008 pending full payment of the sum due from the first defendant to the claimant.

[7] At paragraph 9 of the statement of claim this following is pleaded:-

> "9. Further on in the alternative, the second defendant in consideration of the forbearance of the claimant from collecting the debt due from the first defendant and the claimant agreed to treat the sum due from the first defendant as an advance payment of rent issued a promissory note in favour of the claimant on or about 6th June 2008 under which the second defendant agreed to pay the sum of $486,833.84 together with the compound interest calculated at the rate of 5% per annum in instalments of $12,000.00 per month commencing on 6th June 2008".

[8] The claimant avers that it entered upon the premises of the second defendant in or about the beginning of July 2008 and terminated the tenancy and quit the premises on or about 30th September 2008 on the ground that it was unable to conduct its operations on the premises due to the first defendant's failure, in breach of the terms of the lease, to ensure an adequate supply of electricity to the premises occupied by the claimant.

[9] The claimant avers that as a consequence of the foregoing only the sum of $36,000.00 was applied towards the first defendant's debt to the claimant. And further that the second defendant made a lump sum payment in or about the month of January 2011 in the amount of $278,433.84 towards the debt.

[10] It is the contention of the claimant that second defendant in breach of the terms of the Promissory Note did not make the payments of the monthly instalments towards the debt after August 2008 as promised or at all.

[11] At paragraphs 15 and 16 of the said statement of claim the pleadings are in these terms:

> "15. The claimant in its letter of 5th January 2011 demanded payment of the balance of the debt from the second defendant and by its further letter of 22nd June 2011 demanded payment of both defendants of both defendants of the outstanding sum.
>
> 16. Notwithstanding such demand and a breach of the agreement between the claimant and the first defendant and/or the promissory note made by the second defendant, the defendant has failed or refused to pay the balance of the debt to the claimant whereby the claimant has suffered loss and damage of the principal sum of $235,166.43 and interest accruing thereon".

Defence

[12] In his defence the second defendant makes a number of admissions as his to occupation, his relationship with the first defendant, the agreement between the claimant and the first defendant for the sale and purchase of products, and the first defendant's indebtedness to the claimant in the sum of $486,833.84 at the expiration of the said agreement.

[13] In further admissions in relation to clause 7 of the claimant's Statement of Claim the second defendant contends that: pursuant to the agreement of 30th May 2008 the claimant entered into a five year fixed tenancy agreement with respect to premises known as OOJJ's Commercial Complex situate in Basseterre; it was agreed between the claimant and the second defendant that the debt owed to the claimant as of June 2008 was $486,833.84 which would be used as advance payment by the tenant for rent of the demised premises pending full payment of the said sum of $486,833.84. It was further agreed that the sum of $12,000.00 (monthly payment) shall be allocated on the 10th day of each month for the amount due to the claimant until the debt is satisfied; the lease agreement was signed by the second defendant in June 2008 and sent to the claimant for execution but without the knowledge or approval of the second defendant the date of the lease was altered.

[14] At paragraph 8 of his defence the second defendant denies that a term must be implied into the lease agreement in order to give it business efficacy as pleaded by the claimant.

[15] With respect to paragraph 9 of the Statement of Claim the second defendant admits that he signed the Promissory Note on 6th June 2008; but denies that the said Promissory Note was signed in consideration of the forbearance of the claimant collecting the debt as alleged.

[16] With respect to paragraph 10 of the Statement of Claim the second defendant makes certain denials regarding the termination of the tenancy and the sequel to the termination by the claimant; possession of the demised premises during the period in dispute. Issues regarding the adequacy of the electricity supplied to the demised premises are also pleaded and the termination of the tenancy by the second defendant by letter dated 8th December 2009.

[17] Regarding paragraph 12 of the Statement of Claim, the second defendant contends that with the lump sum payment of January 2011, the first defendant was

no longer indebted to the claimant and that its principal account balance with the claimant should have a zero balance.

[18] With respect to paragraph 14 of the Statement of Claim the second defendant contends that he was not in breach of the Promissory Note as alleged and denies that he did not pay any monthly instalments towards the debt after August 2008. It is further contended by the second defendant that he was always willing and able to perform his part under the Lease Agreement and consequently willing to settle the debt owed by the first defendant in the manner agreed to in the lease and under the terms of the Promissory Note.

Counterclaim

[19] The second defendant's counterclaim is based essentially on the Lease Agreement and its terms. Accordingly the claim is as follows:

> "1. A declaration that the Claimant is indebted to the second defendant in the sum of EC$208,400.00 representing rental income due and owing to the second defendant by virtue of a five (5) year fixed term lease agreement for the period June 2008 to May 2013 entered into between the parties in relation to the premises belonging to the second defendant known as OOJJ's Commercial Complex situate at Camps, Island Main Road, Basseterre, St. Kitts containing by admeasurements 1640 square feet, said lease agreement was breached by the Claimant's failure to allocate the monthly rental towards the satisfaction of the debt that was agreed to be due and owing to the claimant by the first defendant in June 2008 in the sum of EC$486,833.84.
>
> 2. The sum of EC$208,400.00 be set off from the principal debt in the sum of EC$486,833.84 that was owed to the claimant by the first defendant in of around June 2008.
>
> 3. Such further and other relief as this Honourable Court thinks just.
>
> 4. Costs".

[20] A number of grounds are pleaded upon which the counterclaim rests, including the following:

> "12. Further, although the claimant principal to terminate the Lease Agreement in or around 30th September 2008. The claimant

remained in possession of the premises. In January and February 2009. The claimant exercised its privileges on the demised premises as tenant. In or around February 2009, Agents of the claimant placed fuel in underground tanks located at the demised premises. Employees of the claimant as well as certain management officials of the claimant were also observed on the demised premises in February 2009.

13. In breach of the said Lease Agreement, this Defendant failed to credit the second Defendant's account on a monthly basis with EC$12,000.00 rent as agreed to reduce the debt of the first defendant.

Reply

[21] At paragraph 1 of the reply the claimant joins issue with this averments set out in the defence.

[22] At paragraph 4 of its reply the claimant avers that the repayment of the debt was to be made by a combination of set off from rentals due under the Lease Agreement and direct payments by the second defendant. And as to paragraph 9(a) the claimant denies the second defendant entered into the obligation under the Promissory Note other than in his personal capacity and further that reliance will be on the terms of their full meaning and effect.

[23] With respect to paragraph 10 of the Defence, the claimant does not dispute that the tenancy commenced in June 2008 but highlights the following averments as pleaded at paragraphs 10(c), 10(e)(i), 10(e)(ii) – (iv): acceptance of the keys from the second Defendant's solicitors; re-entry into the demised premises after September 2008; the placing or removal of fuel in underground tanks after September 200; responsibility for electrical problems at the demised premises; the absence of a legal basis to end the fixed term tenancy on the part of the claimant and the lease was not terminated prior to December 2009; or that the claimant is indebted to the second defendant the sum of $208,400.00 and that the lease was lawfully terminated in September 2008.

[24] At paragraph 10(g) the following is pleaded:

> "Further and in the alternative, if, which is denied, the Claimant wrongfully repudiated the Lease Agreement in September 2008 when it quit the demised premises, the second Defendant had no interest in not accepting such repudiation and failed to mitigate his loss by not doing so and offering the premises for rent otherwise. The Claimant is therefore not liable in the sum of $208,400.00 as averred on at all".

[25] As to paragraph 11 through 14 of the defence the claimant "repeats the averments of paragraph 6(f) and (g) above and avers that there is no basis for the set off of the sum of $208,400.00 from the sums owning to the claimant".

Defence to Counterclaim

[26] In its defence to counterclaim the claimant advances a number of contentions regarding the following: the compounded rate of 5% per annum on the debt of $486,833.84; the undertaking by the second defendant to pay off the said debt within a short period; possession of the demised premises in July 2008; the termination of the lease for cause; an implied term in the agreement as to the fitness of the premises for the purpose for which it was to be used; the failure to discover and or report the real cause of the fluctuations in the electricity; and the second Lease Agreement in 2010.

[27] At paragraph 12, the claimant contends that it did not re-enter the demised premises or conduct any activities thereon after September 2008. It contends further that any activity was on the adjoining premises owned by the second defendant and leased to the claimant under a separate lease for the conduct of its wholesale operations.

[28] At paragraph 13 of its counterclaim the claim is that breach of the Lease Agreement there was a failure to credit the second defendant's account on a monthly basis with the EC$12,000 as agreed to reduce the debt of the first defendant. This is denied by the claimant. The contention being that it was under no obligation to credit the defendant account after the termination of the lease on September 2008.

[29] At paragraph 14 of the counterclaim the matter of the termination of the Lease Agreement by the second defendant with effect from 11th December 2009 is raised; but while the claimant admits receiving the letter of 8th December 2009, it contends that the termination took effect since September 2008. The claimant goes on to deny that it is indebted to the defendant in the amount of $208,400.00 and said further that the Defendant's account was credited with the amount of $36,000.00 being the rent for the months of July 2008 through September 2008.

[30] The claimant further denies that it is indebted to the Defendant as at December 2009 and says that even in the face of the denial, if it is so indebted it is entitled to a set off of:

> "i. The sum of $36,000.00 which had been applied firstly to the outstanding interest due from the second Defendant under the promissory note and then to principal,
>
> ii. The further sum representing interest or the outstanding balance of the principal debt due from the Defendants to the Claimant at the compounded rate of 5% per annum from 6 June 2008 until payment in full".

[31] Finally, at paragraph 17 of its defence to counterclaim the claimant denies that the second defendant suffered any loss as a result of the repudiation of the Lease Agreement in September 2008. According to the claimant, the second defendant "had no legitimate interest in not accepting such repudiation and the performance of the Lease Agreement and Covenants thereunder would have required the active cooperation of the Claimant". It is the further averment of the claimant that the second defendant failed to mitigate his loss by not taking reasonable steps to offer the premises for rent after 30th September 2008.

Reply of the Second Defendant to Defence

[32] In his reply the second defendant denies the following:

> i. An undertaking to pay off the debt within a short period of the commencement of the tenancy,
>
> ii. An implied term in the Lease Agreement that the premises would be fit for the purpose for which it was to be used,

iii. There was an agreement between the parties that a thorough inspection of the premises which revealed that the electricity supply was being used by other businesses on the second defendant's compound,

iv. There was no legitimate interest in not accepting the unlawful reproduction of the Lease Agreement,

v. A failure to mitigate losses in the context of the Lease Agreement after 30 September 2008, or at all.

EVIDENCE

The evidence consists of witness statements, witness summaries and cross examination thereon.

[33] Evidence was given by Bevis Sylvester, Sharon Hobson, Basil Woods; And for the second defendant Othneil Hyliger gave evidence.

[34] In summary Bevis Sylvester testified as to his employment as his employment as Regional General Manager of Delta Petroleum (Caribbean) Limited with oversight of the operations of Delta Petroleum (Nevis) Limited, a subsidiary incorporated in Nevis. Sylvester also gave evidence and in his capacity as Regional General Manager he was involved in the negotiating of the matters leading up to a lease between the claimant and the second defendant. Sylvester also gave evidence of the business dealings between the claimant and the first and second defendant, plus the matter of the supply of electricity to the demised premises.

[35] Sharon Hobson as Financial Comptroller of the claimant gave evidence as to her responsibilities in relation to money owed to the claimant by the second defendant. Basil Woods, Ed Ventura and all concerned at different levels with electricity gave evidence as to their involvement with the electricity supply at the demised premises.

[36] Jasmine Hanley's evidence concentrated on her observations at the demised premises at OOJJ's Commercial Complex at Camps, Basseterre.

[37] Othneil Hyliger, the second defendant gave evidence of his ownership of the OOJJ's Commercial Complex which he built and did the electrical wiring there.

Hyliger gave further testimony of money owed to him by the claimant and also of the lease executed with the claimant.

[38] Details of the evidence of all witnesses will be given in the course of the judgment as appropriate.

ISSUES

[39] The issues for determination are:

1. Whether any additional terms should be implied into the Lease Agreement.

2. Whether the claimant had a legal basis to terminate the Lease Agreement.

3. Whether the second defendant can succeed on the counterclaim.

4. Whether the second defendant had a legal basis to terminate the Lease Agreement.

5. Whether the claimant is entitled to any outstanding principal and accrued interest with respect to the debt of $486,833.84.

6. Whether a duty to mitigate arose.

ISSUE NO. 1

Whether any additional terms should be implied into the Lease Agreement

[40] The genesis of this issue lies in the claimant's pleading that it terminated the tenancy on the ground that it was unable to conduct its agreed operations on the premises due to the second defendant's failure, in breach of the terms of the lease, to ensure an adequate supply of electricity to the premises occupied by the claimant. This is contested by the second defendant who contends, *inter alia*, that it was under no obligation pursuant to the lease or otherwise to supply electricity to the claimant without fluctuations.

[41] In its reply the following is pleaded:

> "(e) As to sub-paragraph 10(e)(i)-(iv):
>
> I. The Claimant denies these averments and asserts that as the demised premises were leased for specific purposes

known to and agreed by the second Defendant; that must be implied into the Lease Agreement that the tenant was entitled to quiet enjoyment of the demised premises and the landlord would not derogate from his grant by doing any act that substantially interfered with the use of the demised premises for the purposes of which he was aware they were to be used.

II. The second defendant breached these terms by wiring the premises demised to the claimant in such a manner that the users of other adjoining premises on the second Defendant's compound shared the electricity supply coming onto the demised premises thereby causing fluctuations in such supply which rendered the claimant unable to continue its business thereon.

III. The said terms were fundamental terms of the Lease Agreement, the breach of which by the second Defendant entitled the claimant to rescind the said Lease Agreement on or about 30th September 2008".

Lease Agreement

[42] The Lease Agreement between Othneil Hyliger and Delta Petroleum (Nevis) Limited, in the usual manner, contains covenants to be observed by the tenant and the landlord. With respect to the tenant the relevant covenants are in clause 9(a) to pay the rent in accordance with the terms set out and in the context of a debt of $486,833.84 owed to Delta Petroleum. Also relevant is clause 2(b) which requires the tenant to pay certain specified charges, including electricity.

[43] On the part of the landlord the covenants include in clause 3(a): "That the tenant paying the rent hereby reserved and observing the several covenants, conditions and stipulations herein contained shall peaceably hold and enjoy the demised premises during the term hereon without any interruptions by the landlord or any person claiming rightfully under the landlord[1]".

Submissions

[44] For the claimant the following are the submissions on the point:

[1] There are no submission on behalf of the second defendant on this point

"33. There is an implied term in every tenancy that the landlord will not derogate from his grant to the tenant or affect the quiet enjoyment by the tenant of the premises by doing or suffering to be done anything on the premises that would interfere with the tenant's contemplated use of them of which he was aware: see Aldin v. Latimer Clark Muirhead & Co [1984] 2 Ch. 437, 442 '*If a grant is made expressly to enable the grantee to build his house on the land granted, then there is an implied warrant to support subjacent, as if the house had already existed*'.

34. This principle can also been seen in the judgments of the Court of Appeal in Robinson v. Kilvert (1889) 41 Ch D 88. At page 96 Lindley LI stated '*Then as to the breach of an implied agreement for quiet enjoyment. We have a here an agreement for a lease with nothing in it to shew that goods requiring any protection were to be kept on the premises. Bandy v Cartwright shews that under demise by patrol there is an implied covenant for quiet enjoyment. These lessor here are not at liberty to do anything which will make the property unfit for the purpose for which it is let'. And at page 87 Lopes LJ stated 'Then as to the contention that the Defendants have broken an implied agreement not to do anything which will make the property unfit for the purpose for which it was let, we must look to what the Defendants at the time of letting knew as to the purpose for which the demised property was to be used*'.

35. The implication of such a term is necessary in the circumstances to give business efficacy to the agreement between the Claimant and the second Defendant for the operation by the Claimant of a gas station using Stirling pumps on the demised premises: Att Gen v Belize, Telecom Ltd [2009] 1 WLR 1988".

The Law

[45] The matter of implied terms is treated extensively in Chitty on Contracts[2] and the following extracts are to the point:

> "The implication of a term is a matter of law for the court, and whether or not a term is implied is usually said to depend upon the intention of the parties as collected from the words of the agreement and the surrounding circumstances. In many classes of contract, however, implied terms have become standardised, and it is somewhat artificial to attribute such terms to the unexpressed intention of the parties. The court is, in fact, laying down a general rule that in all contract of a certain type – for example, sale of goods, landlord and tenant, the carriage of goods by land and sea – certain terms will be implied, unless the implication of such a term would be contrary to the express words of the agreement. Such implications do

[2] Twenty fifth Edition, Chapter 13

not depend on the intentions of the parties, actual or presumed, but on more general considerations.

Efficacy to contract. A term will be implied if it is necessary, in the business sense, to give efficacy to the contract. The general principle of law was thus sated by Bowen L.J. in *The Moorcock*. 'Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded upon the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such failure or consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have'.
The principle laid down in these words has been approved and applied many times".

[46] In the recent Privy Council case of Attorney General of Belize v. Belize Telecom[3] Lord Hoffman in speaking to the issue of implied terms said in part as follows:

> "20. More recently, in Equitable Life Assurance Society v Hyman [2002] I AC408, 459, Lord Steyn said" "If a term is to be implied, it could only be a term implied from the language of [the instrument] read in its commercial setting.
>
> 21. It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonable be understood to mean. It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer – the implied term must 'go without saying', it must be 'necessary to give business efficacy to the contract' and so on – but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"

[3] [2009] 1 WLR 1988, 1994

[47] The clear principle, which has always existed with variations, is that a term will be implied in order to give effect to the intent of the parties in the context of the language 'read in its commercial setting'.

[48] The commercial setting is pellucid in this case as it is a dealer in petroleum products who sought to lease premises for the operation of a service station to sell its products. What is more is the fact that the first defendant operated a service station on the same premises some six years earlier with products supplied by the claimant.

[49] In the narrow sense here the matter is that of the supply of electricity to operate the pumps and office equipment. This is not new.

[50] The circumstances in which a term has been implied are noted in Chitty on Contracts[4] and in the Belize Telecom case Lord Hoffman re-stated the test to be: 'what the instrument, read as a whole against the relevant background, would reasonably be understood to mean'. Much earlier in Liverpool City Council v Irwin[5] Lord Salmond had proposed the test as to implying a term as being whether in the absence of such a term the whole transaction would become "inefficacious futile and absurd".

[51] It may be said that the instrument, being a Lease Agreement, contains covenants to be observed by both parties. That apart, there are certain matters which make the context clear. For example, the letting of part of a commercial complex, and one of the tenant's covenants is: "To keep the service station and mini-mart aforesaid open and operational during the hours of 6:00 a.m. to 1:00 a.m. seven days a week". There is also a covenant to pay the charges for the utilities.

[52] And it has already been noted that the landlord's covenant includes: "the Tenant shall peaceably hold and enjoy the demised premises during the term hereof without any interruption by the landlord or any person claiming rightfully under the Landlord".

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[4] Supra
[5] [1976 2 All E.R 39, 50

[53] In this context it is clear from correspondence between Othneil Hyliger and Delta Petroleum (Caribbean) Limited concerning the opening hours of the proposed service station in the context of the proposed lease that the hours of 24/7 were proposed[6].

[54] Ultimately, under the Lease Agreement the tenant/claimant covenant to keep the service station opened during the hours of 6:00 a.m. to 1:00 a.m. seven days per week[7].

[55] It is noted[8] that in terms of the landlord the court would enforce covenant (a) for quiet enjoyment, (b) not to derogate from grant, (c) that the premises (if furnished) are fit for human habitation.

[56] The covenant of non-derogation from grant is explained by Samuel Owusu, Commonwealth Caribbean Land Law in this way:

> "Where land is granted or demised to be used for a particular purpose the grantor is under an implied covenant or obligation to refrain from doing anything on his neighbouring property which would render the demised or granted premises unfit or substantially less fit for the particular purpose for which the grant or demise was made. The law impose an obligation on the grantor not to do anything that would frustrate the purpose of the grant. He would be restrained by an injunction from derogating from his grant. That is, he would not be allowed to take away with one hand what he has given with the other. According to Younger L.J., this is 'a principle which merely embodies in a legal maxim a rule of common honesty'.
>
> The covenant of non-derogation overlaps with the covenant for quiet enjoyment. The difference in the scope of the two is very little. For the theory underpinning both is the same, a 'rule of common honesty'. Many cases involving a breach of covenant for quiet enjoyment can be assumed under the covenant not to derogate from grant. But the covenants are not the same and therefore there are acts which may constitute a breach of covenant not to derogate but which would not amount as a breach of the covenant for quiet enjoyment.
>
> As stated above, the covenant for quiet enjoyment seeks to secure the title or possession of the tenant. In its extended meaning, it deals with interference with the exercise of rights or property. It is not, as in the case of covenant not to derogate from grant, primarily concerned with the utility

[6] See Bundle 3 at page 22
[7] Op. cit at page 42 – Clause 2(g) of the Lease Agreement
[8] At p. 572

> of the grant. The non-derogation maxim ensures that the utility be the purpose of a grant is not effectively negative by the conduct of the landlord or those deriving title under him. The purpose of the grant is different from the rights of ownership, which the quiet enjoyment covenant seeks to guarantee".

[57] Given the scope of the implied covenants on the landlord, in particular the covenant of non-derogation from grant, the court concludes that an implied term is unnecessary as the context is clear. For example the letting is part of a commercial complex, and one of the tenant's covenants is: "To keep the service station and mini-mart aforesaid open and operational during the hours of 6:00 a.m. and 1:00 a.m. seven days per week". There is also a covenant to pay the charges for the utilities. Stated otherwise, using Lord Salmond's test, the whole Lease Agreement would not become inefficacious, futile and absurd without the implied term proposed by the claimant.

[58] In this context, it is clear from correspondence between Othneil Hyliger and Delta Petroleum (Caribbean) Limited concerning the opening hours of the proposed service station, in the context of the proposed lease, that hours of 24/7 were proposed[9]. Ultimately under the Lease Agreement the tenant/claimant covenanted to keep the service station opened during the hours of 6:00 a.m. to 1:00 a.m. seven days per week[10].

[59] Central to this case is the issue of the electricity supply with which the claimant takes issue. This is not spelt out clearly in the agreement but the implied covenant on the part of the landlord would embrace any interference with the supply of electricity given the purpose of the tenancy would interfere with the use of the premises for purposes known to both parties.

ISSUE NO. 2

Whether the claimant had a legal basis to terminate the Lease Agreement

[9] See Bundle 3 at page 22

[10] Op. cit at page 42 0 clause 2(g) of the Lease Agreement.

[60] The submissions on this issue reveal two different approaches giving rise to a number of sub-issues as determined by the court. They are as follows:

(a) Whether there is an obligation on the second defendant, as landlord, or the claimant, as tenant, to ensure that the premises are fit for the purpose intended by the parties.
(b) If there were fluctuations in the supply of electricity, was the second defendant responsible giving rise to breach of a fundamental term of the agreement.

(c) Whether the claimant, as tenant, has a right to surrender the Lease Agreement.

(d) Whether the second defendant accepted the termination by the claimant, as tenant.

(a) Whether there is an obligation on the second defendant, as landlord, or the claimant, as tenant, to ensure that the premises are fit for the purpose intended by the parties.

[61] The matter of the Lease Agreement is not in doubt as its existence is recognized by both parties. The Agreement is a central pillar of the present issue before the court. As such it is necessary to highlight certain of its provisions.

[62] It is common ground that there were copious correspondence between Othneil Hyliger, as landlord, and Delta Petroleum (Nevis) Limited, as tenant, with respect to the rental of the entire western portion of the ground floor of the landlords commercial building described as OJJs Commercial Complex situate at Camps, Island Main Road for the purpose of the operation of a service station.

[63] Under the Lease Agreement there are covenants on both sides. As a far as the tenant is concerned the following covenants are relevant to the issue:

> "(a) To pay the Landlord the rent hereby reserved which obligation shall be satisfied in the manner now act out …
>
> (g) To keep the service station and mini-mart …open and operational during the hours of 6:00 a.m. and 1:00 a.m. seven days per week".

[64] On the part of the landlord the following covenant is relevant: "(a) That the Tenant paying the rent hereby reserved and observing the several covenants, conditions and stipulations herein contained shall peaceably hold and enjoy the demised

premises during the term hereof without any interruption by the landlord or any person claiming rightfully under the Landlord".

[65] Clauses 10 – 12 of the Agreement also provide this:

> "10. This Lease Agreement shall be governed exclusively by the laws of the Federation of Saint Christopher and Nevis whose Courts shall have exclusive jurisdiction over any dispute arising therefrom or in the interpretation thereof.
>
> 11. At the end of the term or sooner determination thereof the Tenant shall be entitled to remove any structures or tenant's fixtures installed by or paid for by the Tenant making good any damage to the demised premises caused thereby.
>
> 12. This Lease Agreement constitutes the entire agreement between the Parties and may be modified only in writing signed by the parties".

[66] On the sub-issue of an obligation on the landlord to ensure that the premises are fit for the intended purposes, the submission on behalf of the claimant is in these terms:

> "36. The particular knowledge of the second defendant, who had formerly operated a gas station on the Demised Premises and had experienced problems with the pumps, that Stirling pumps were to be used by the Claimant therefore was sufficient to create an obligation on him, as landlord, to ensure that the premises were fit for the use of these pumps so that the Claimant, as tenant, would have quiet enjoyment of the premises. Under cross examination, the second Defendant agreed that it was his responsibility to ensure that the Demised Premises were fit for the known purpose for which it was being rented".

[67] On behalf of the second defendant the following submissions are made:

> "1. The evidence of the main witness for the Claimant is that the agreement was terminated because there were issues with the adequacy of the supply of electricity to the demised premises. In particular there were fluctuations in the supply which caused equipment to malfunction.

2. The law does not imply a covenant that the property is fit for the purpose for which it is let and the landlord is now responsible for the condition of the demised premises[11].

Analysis

[68] The claimant's submission rests on two planks: first, being landlord's knowledge of the premises was sufficient to create an obligation on the landlord to ensure that the premises were fit for the operation of a gas station using sterling pumps. This is coupled with the second defendant's evidence on cross examination that he had such an obligation. This contention is doubted by the second defendant.

The Law

[69] In discussing "implied covenants" Samuel Owusu[12] writes that: "On the part of the landlord, the courts would enforce covenant (a) for quiet enjoyment, (b) not to derogate from the grant (c) that the premises (if furnished are fit for human habitation". It is stated that: "In the absence of express contrary agreement, the relationship of lessor and lessee implies certain implied obligations on the landlord. The obligations may vary in accordance with the legal or equitable nature of the Lease, but generally include a covenant for quiet enjoyment and a covenant against derogation from grant[13].

[70] Against his statement of the law it is contended by the second defendant that the law does not imply a covenant that the property is fit for the purpose for which it is let and the landlord is not responsible for the condition of the demised premises. Reliance is placed on the *dicta* of Delvin J in Elder v. Auberbach where he said that:

> "It is the business of the tenant, if he does not protect himself by an express warranty, to satisfy himself that the premises are fit for the purpose for which he waits to use them, whether such fitness depends on the state of their structure or the state of the law or any other relevant circumstances".

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[11] The authorities cited in support are: Edler v Auberbach [1949] 2 All E.L 692, or Southwach L.B.C. v Wills [1999] 2WLR 409

[12] [Op cit, p.577

[13] Kevin Gray and Susan Francis Gray Elements of Land Law (5th Ed) para. 4.3..10.

[71] Owusu also notes the following at page 577:

> "There is no liability if the property has some inherent defect: The tenant takes the property subject to the physical condition in which it was of the demise and to the uses which in their contemplation would be made to the other parts in possession of the landlord on his other tenants. There is no obligation to make alterations or improvements to the property or to arrangement or to provide better facilities in the premises or make the demised premises more convenient then they were at the time of the grant".

Conclusion

[72] The court agrees with the learned counsel for the second defendant that the second defendant's knowledge of the premises does not place an obligation on him to ensure that the premises are fit for the operation of a service station. However, in so far as the claimant is concerned, contrary to the submission on its behalf, there is an obligation on the tenant to ensure that the demised premises are fit for the intended purpose.

[73] Further, what may have been agreed to in 2010 regarding a resolution of the electrical fluctuation, issue[14] cannot be given retrospective effect so as to place a legal obligation on the landlord as such a proposition is not known to the law.

(b) If there were fluctuation in the supply of electricity, was the second defendant responsible giving rise to breach of a fundamental term of the agreement.

[74] It is clear that the matter of the fluctuations in the electricity supply looms large in this matter and is a accentuated by the fact that the claimant intended to operate a service station 6:00 a.m. to 1:00 a.m., seven days per week.

[75] The submissions on behalf of the claimant are as follows:

> "38. The Claimant's evidence is that there were fluctuations in the supply of electricity to the Demised Premises in July-September 2008 which were not corrected [53, 55, 58-59]. The second Defendant claims that he was not aware of the fluctuations [54] and under cross examination he suddenly recalled that he checked the premises himself but he was unable to give any

[14] See paragraph 37 of the Claimant's Closing Submissions

specifics about what he did or when he did it. It is significant that none of the correspondence from his solicitors ever referred to his claim that he checked and verified that there were no fluctuations of electricity on the premises. His evidence of doing checks on himself should be rejected.

39. The undisputed evidence from Mr Ventura and Mr Baker is that there was no indication that any electrical work was done on the premises after the Claimant left the premises in September 2008 and prior to its return in early 2010. When the Claimant agreed to investigate the cause of the fluctuation was that the panel on the Demised Premises was being used to provide power to other parts of the building [97(E-2)] and also the wiring was inadequate (oral evidence of Junior Baker). As the second Defendant had wired the Demised Premises himself, the Claimant submits that he was personally responsible for the derogation from the grant to the Claimant.

40. Mr Woods gave evidence on behalf of the second Defendant. It was clear, however, that he had a very limited brief for his works and he candidly admitted under cross examination that he did not check if there were cables leading from the panel on the demised premises to the other parts of the building nor did he test the supply of power to the pumps".

[76] There are extensive submissions on behalf of the second defendant which necessitates the following summary: 3. The Ed Ventura report based on checks at the demised premises on 25 July 2008 revealed the electrical problems thereon were either hydro or internal; 4. The claimant admitted in its pleadings that it hired Basil Woods to do checks but Bevis Sylvester in cross examination reneged on his evidence in chief in this connection; 5. Basil Woods testified concerning the fluctuations of the electricity supply on 31st July 2008 and detailed in his report of 11th August 2008 revealed the problem giving rise to the fluctuations they did not constitute a fundamental breach of contract that would justify termination; 12. There was no basis under the lease to termination by the claimant; 13. Even termination if there was insufficient or inadequate wiring of the demised premises which caused fluctuations the law of the Federation is that the claimant took the premises as it found them; 14. Although the claimant contends that the second defendant caused the fluctuations in the electricity there is no single act which the claimant can identify as being attributable to the second defendant; 15. No

representations were made to the claimant by the second defendant when it entered the premises in June 2008 regarding the electricity supply, as such the claimant cannot thereafter impose phantom obligations on the landlord which were never discussed and agreed to; the claimant cannot take issue with the *wiring ex post facto*; 16. The claimant by its own admissions had full knowledge of the conditions of the demised premises based on its prior dealings with the defendants; 17. Under cross examination Bevis Sylvester admitted that the second defendant did not promise a supply of electricity free from fluctuations, nor was there any agreement or arrangement for any changes to be made to the electricity supply.

Analysis

[77] The evidence regarding the presence or absence of fluctuations in the power supply at the demised premises rests almost entirely on those concerned with electronics, electricity and equipment driven by electricity.

[78] The first witness in this connection was Ed Ventura, an electronics engineer who came to St. Kitts in July to "review the situation on the ground"[15] and found "the supply of electricity to the premises was very unsatisfactory with regular fluctuations"[16]. These findings were re-stated in a letter to "Bevis Sylvester" dated September 2008.

[79] In cross examination Ventura said that when he came in July 2008 the Claimant was carrying out operations based on the old equipment.

[80] Junior Baker, licensed electrician, and an employee of Delta Petroleum Caribbean Limited visited St. Kitts in 2008 to investigate complaints about damaged equipment powered by electricity. Based on his investigation he said he found "other circuits running off the same meter to other parts of the building" and that the cutting in and out of equipment… also contributed to the fluctuations".

[15] Witness statement at para. 3
[16] Ibit at para. 5

[81] Basil Woods, an electrician for 40 years, was also hired by the Claimant to do electrical checks at the demised premises. He too spoke of fluctuations and the effect it would have on equipment. However, in his letter/report, dated August 11, 2008, to Delta Petroleum Nevis he indicates what he found at the demised premises and having remedied it he advised that: "This check provided us with the soundness of the electricity for the use of the office equipment.

[82] The electrical engineer, Ed Ventura and the electricians, Basil Woods and Junior Baker all identified the problem of fluctuations in their reports or in evidence. However, Ventura gave a concise statement of the problem in his letter to "Bevis" dated September 18, 2008[17]. This is what he said:

> "My findings at the OOJJ's service station in St. Kitts was a very poor fluctuation of power on a regular basis, while testing the voltage at several outlets my meter would fluctuate anywhere from 90 volts to 135 volts. In normal situations it would be plus or minus 5% for example 120v could read 126 or 114vac, but would stabilize to 126 or 114 not go up and down every few seconds. This is either a Hydro supply problem or a[n] internal building problem that needs to be rectified before any new equipment is installed".

[83] Therefore, based on the checks carried out by the three technical persons in 2008 although the fluctuations were identified the cause remained unknown for certain. As seen above, Ventura said it was either supply problem or an internal problem. And although it was eventually determined in 2010[18] that it was eventually the latter, that determination is not material to the claimant's determination of the lease in September 2008. It is also of some importance to note that Basil Woods, who was hired by the claimant, in his report of August 11, 2008 to the claimant advised the claimant that the problem of the fluctuations was fixed. According to Woods: "this check provided us with the soundness of the electricity for the use of the office equipment".[19]

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[17] Bundle 3 (Documents) at page 94

[18] Bundle 3 (Documents), page 97. Letter from Ed Ventura to Mr Sylvester dated as February 2010

[19] See: Bundle 3 (Document) at page 56

[84] Bevis Sylvester is clear in his mind that the second defendant is responsible for the fluctuations even though he testified that he had sight of Ed Ventura's Report of September 2008 which report was inclusive on the issue – either a power supply problem or an internal problem.

[85] In this regard, there are several factors which go towards negating any responsibility on the part of the second defendant. First, the court has already rejected the notion that the second defendant has a legal responsibility to make the demised premises safe. Second, there was no report in 2008 that was conclusive as to the cause of the fluctuations. Third, both Ventura and Baker gave evidence that there were no changes in the wiring at the demised premises, between 2008 and 2010. Fourth, the claimant by hiring Ventura, Baker and Woods the claimant assumed responsibility to make the premises fit for the intended purpose as required of it as tenant[20].

[86] In sum, the court agrees with the court agrees with the submission on behalf of the second defendant that there was not a single positive act that the second defendant did to cause the fluctuations.

Breach of Fundamental Term

[87] As noted before, it is the claimant's contention that the ability of the claimant to use the demised premises as contemplated by both parties prior to the execution of the lease was a fundamental term of the agreement.

[88] The claimant's submissions on the sub-issue are as follows:

> "42. The Claimant is a supplier of petroleum products. The sole reason for it to take a tenancy over the demised Premises was to operate a gas station using the Stirling pumps for which it has given notice to the second Defendant. The Claimant's ability to use the Demised Premises as contemplated by both parties prior to the execution of the Lease Agreement was therefore a fundamental term of this agreement. Because of the manner in which the second Defendant had wired the premises, there were fluctuations in the supply of electricity which rendered the

[20] See: Owusu,

> premises unfit for the Claimant to use the contemplated dispensers. The second Defendant did not attend to the problem so as to rectify the situation and make the Demised Premises fir for the purpose for which there were to be used. In those circumstances, and his refusal/inability to remedy the situation amounted to a breach of a fundamental term of the agreement, i.e. a term which went to the very root of the agreement between the Claimant and the second Defendant which entitled the Claimant to bring the agreement to an end: see Chitty on Contracts 30th ed Vol 1 para 24-041. The Claimant did so by its letter of 26th September 2008 [58-59]".

[89] On behalf of the second defendant the submission runs thus: "If there were fluctuations they did not constitute a fundamental breach of contract that would justify termination.

Fundamental term – The Law

[90] According to Chitty on Contracts at paragraph 584:

> "[T]here existed a category of terms ('fundamental terms') which were narrower than a condition of the contract. A fundamental term so it is said, underlies the whole contract so that, if it is not complied with, the performance becomes totally different from that which the contract contemplated'. It was part of the core of the contract, and however extensive the exception clause may be, it has no application if there has been a breach of a fundamental term".

[91] It must be common ground that the central purpose of the Lease Agreement was to enable the claimant to operate a service station. It must also be common ground that the pumps were to be used in dispensing gasoline or other fuels making electricity essential.

[92] The court can agree that the supply of electricity went to the root of the agreement so as to constitute a fundamental term; but the other issue is that of the breach as alleged. And the reasoning must be that the evidence has not revealed that the second defendant did anything to cause the fluctuations identified so as to interfere with the supply of the electricity to the demised premises giving rise to breach of a fundamental term. Indeed, Bevis Sylvester, Regional General Manager, Delta Petroleum (Caribbean) Ltd testified that prior to the termination of

the lease he had sight of Ed Ventura's Report which represented that there were two possible causes of the fluctuations. In other words, the report was inconclusive. As such there was no factual or legal basis for the termination on the basis for the termination on the ground of breach of a fundamental term.

(c) Whether the claimant, as tenant, has a right to surrender the Lease Agreement

[93] It is submitted[21] that the tenant has a common law right to surrender a tenancy for a fixed term independent of the second defendant's breach[22]. The further submission is as follows:

> "45. The Claimant therefore submits that it surrendered the tenancy by the end of September 2008 and this brought its tenancy from the second Defendant to an end. As a result the second Defendant could not claim any further entitlement to rent from the Claimant with the consequence that the debt could no longer be discharged by payment of rent by the first Defendant on behalf of the Claimant. This debt had to be discharged by direct payment of the outstanding amount to the Claimant directly".

The Law

[94] In Hill and Redman's Law on Landlord and Tenant under the rubric "Determination of Tenancy" twelve circumstances are listed by virtue of which a tenancy may be determined. It includes 'by surrender'.

[95] The learning goes on to say the following:

> "Determination of a tenancy may be effected by surrender which consists of yielding up the term to the immediate reversion. The parties to the surrender must be the owner of the term and the owner of the immediate reversion.

[21] At paragraphs 43 and 44 of the closing submissions. There are no submission on behalf of the second defendant on this issue.
[22] Hill & Redman 18th ed. Vol 4, 2057, 2085 and 2099

> An express surrender may be subject to a condition, either precedent or subsequent. If the condition is a condition precedent and is not performed, the surrender will not take effect. Is it is a condition subsequent and is not performed, the estate of the leaser will revert and he will remain liable under the stipulation in the lease".

[96] The following learning in Elements of Land Law is, under the caption "Surrender", is relevant to the issue:

> "A lease may be terminated prematurely by a surrender of the tenant's interest to his immediate landlord. Surrender involves a yielding up of a tenant's estate to a landlord and cannot force upon the latter. Being a premature mode of termination unsanctioned by any prior agreement between the parties, surrender is ineffective without the landlord's consent. If, however, the landlord accepts the surrender, the tenant's term of years is 'aborted by' and merges forthwith in the landlord's reversion being extinguished by operation of law. Such surrender operates, however, only as between landlord and tenant and cannot, for example, terminate the interest of any subtenant in the land, even if the rights of the subtenant were unknown to the landlord and the grant of the sub tenancy would have entitled the landlord to forfeit the lease.
> A surrender of the tenant's term may be made either expressly of impliedly by operation of law. Despite as to whether surrender has occurred may be generated by any of a number of causes.
> The landlord may be anxious to recover rent either from a tenant who has done a moonlight flit, or more realistically, from the tenants surety. Alternatively, a tenant's resistance to this suggestion that surrender has intervened may be attributable to his wish to avail himself of right which depend upon the subsistence of the lease".

[97] Additionally, learned counsel for the claimant referred the court to the case of Thompson and Leach[23]. The head note reads in this way:

> "The Court held that a surrender immediately divest the estate out of the surrenderor, and vests in the surrenderee; for this is a conveyance at common law, and to the perfection of which no other act is requisite, but the bare grant; and though it be true that every grant is a contract, there must be an *actus contra actum*, or a mutual consent is implied; a gift *assumpsit* to take a benefit may well be presumed; and there is the same reason why a surrender should vest the estate as why a grant of goods should vest a property or sealing of a bond in his absence should be ther obligee's bond immediately without notice".

Analysis

[23] 83 ER 691

[98] This must begin with Bevis Sylvester's letter to Othneil N. Hyliger, OOJJs dated September 26, 2008.

[99] This letter raises a number of issues, including branding, which had not been addressed. And the letter goes on to say the following:

> "Because these matters are still to be addressed and we are occupying space at your premises, the company has decided to vacate the premises before the ending of September 2008"

[100] The learning is clear that in the context of a surrender it is not unilateral and the landlord's consents is a condition precedent which is not forthcoming in this case. Put otherwise, there must be mutual consent. In any event, the second defendant pleadings and in particular the counterclaim contradicts the notion of the landlord's consent to the proposition of surrender.

[101] At the level of pleadings the court notes that in the claimant's reply[24] the language of the lease being 'rescinde[d]' and "terminated" is used rather than the language of 'surrender' in the closing submissions[25].

[102] Therefore, while the claimant; as tenant, has a right to surrender no surrender arises in this instance because of the language of the letter of 26th September 2008 and there is, on the evidence there no involvement of the second defendant, as landlord, to give consent. And for the avoidance of doubt the court again notes that Thompson and Leach speaks expressly to '*actus contra actum'* or mutual consent.

(d) Whether the second defendant accepted the termination of the Lease Agreement by the claimant

[103] As noted before, by letter dated September 26, 2008, Bevis Sylvester, on behalf of the claimant sought to terminate the Lease Agreement. A host of correspondence followed between the parties pertaining to the claimant's action. On this basis the

[24] See Bundle 1 (Statement of Case) paras. 6(e) and (f)
[25] Claimant's closing submissions at paras. 43-45

question then becomes whether the correspondence as a whole went in the direction of acceptance or rejection by the second defendant.

[104] In submissions on behalf of the claimant, it is contended that the defendant pleaded in his counterclaim that the second defendant did not accept the termination and that the claimant exercised its privileges as tenant during January to February 2009 are mentioned in and of its contention that the defendant accepted the termination.

[105] On the other hand, in submissions on behalf of the defendant, the contention is that the second defendant, faced with a tenant who unlawfully repudiated the lease and abandoned the premises could have accepted the termination and relate the premises or affirm the contract and treat it as being in force. It is submitted that he chose the latter and as such cannot do anything that is inconsistent with a continued right to possession.

Submissions

[106] The essence of the submissions on behalf of the claimant are in these terms:

> "47. The second Defendant relies on correspondence from his solicitors as evidence that he did not accept the termination of the tenancy [61-62, 66, 70, 73]. This could only be relevant if the Claimant had wrongfully renounced the tenancy. If the tenancy was lawfully surrendered, then his failure to accept the surrender is irrelevant as there is no requirement at common law that the landlord should consent to the surrender of a tenancy: see Thompson v Leach 83 ER 691.
>
> 48. The trail of correspondence from July to September 2008 shows the concerns of the Claimant in relation to its operations on the Demised Premises. When this is considered against the background of the negotiations of the tenancy which took place between February and June 2008 and the willingness of the Claimant to return to the premises from December 2009 [82], the clear inference must be that the Claimant did not have any desire to break the terms of the Lease Agreement but was placed in a position where it was unable to conduct the agreed operations on the Demised Premises.
>
> 49. The Claimant returned the keys to the Demised Premises to the second Defendant on 30 September 2008 [60, 61-62]. There is

no evidence that the second Defendant responded protesting the termination of the tenancy. The evidence of Mr Sylvester and Ms Hobson for the Claimant is that the second Defendant had informed them of negotiations with a third party concerning the takeover of the station and made inquiries about the price at which the Claimant would be willing to sell its equipment on the Demised Premises. The second Defendant denied this but could not explain satisfactorily the letter sent by Mr. Esdaille on 7 October 2008[95(BS-2)] inquiring whether the second Defendant had started negotiations with a third party. The second Defendant also could not explain his silence for five weeks until 5th November 2008 before there was a reaction to the surrender of the tenancy by the Claimant.

50. The Court is therefore asked to find that the second Defendant did initially accept the termination of the lease by the Claimant. This is consistent with his insistence [52, 57] that the gas station should be opened and the other businesses as his complex were being affected. It would not have been unreasonable in the circumstances for him to seek other persons to operate the gas station that was crucial to the success of his building. However, by doing so, he acted inconsistently with the continued existence of the Lease Agreement with the Claimant and so even if the Claimant were in breach he accepted the Claimant's renunciation of the agreement and brought the agreement to an end: see Norwest Holt Group Administration Ltd v. Harrison [1985] ICR 668, 679E-F.

51. The second Defendant's plea that the Claimant exercised it privileges as a tenant simply does not hold up on the evidence. The letter from the second Defendant's solicitor [70] shows that as late as June 2009, the keys for the premises were still held by them.

52. The second Defendant's witness, Ms Hanley, under cross examination, admitted that she did not see the Claimant's personnel conducting the operations of a gas station or minimart on the premises, which was the purpose for which the tenancy has been granted, at the relevant time. Under cross examination she maintained that the Claimant took fuel from tanks in the front of the building but the second Defendant's evidence was that this fuel belonged to the Claimant in any event and there was no evidence that fuel was being sold under the operation of a gas station. Ms Hanley also conceded that her evidence that there was equipment left by the Claimant on the premises was not supported by any of the correspondence from the second Defendant's solicitors during the relevant period [61-62, 63, 66, 70, 73, 76, 79-80]. Mr Sylvester's evidence was that he had been on the site but at a difference time and in connection with an audit

of the petroleum product that had been purchased from the first Defendant and left on the premises".

[107] For the second defendant the submissions read thus:

> "30. The evidence of the Second Defendant is that he affirmed the contract and treated it as being in force. Although, the Claimant's termination letter was dated September 2008, the evidence is that the keys were returned to the Second Defendant in October 2008 accompanied by a letter dated 30th September 2008 (Page 60 of Bundle 3). The letter is stamped October 7th 2008. The Second Defendant's evidence is that upon receipt of keys he took them to his Solicitors and gave them instructions. The evidence is that letters were written on behalf of the Second Defendant by its Solicitors and sent to the Claimant in early November 2008. The letters dated 5th November 2008 and 6th November 2008 are exhibited in Bundle 3 at pages 61 and 63. The veracity of the Second Defendant's evidence is confirmed when one looks at the first paragraph of the letter dated 5th November 2008 on page 61. It reads '*Our client has provided [us] with a copy of your letter dated September 30th 2008 in which your client purported to terminate the lease agreement between Delta and Mr. Othniel Hyliger by returning the keys to the demised premises to our client*'. The letter of 5th November is in direct response to the Claimant's termination and return of keys. Mr. Sylvester's evidence in relation to the return of the keys is that the keys were returned for the first time at the end of September 2008. This evidence is not accurate because the documentary evidence shows that keys were signed for by the Second Defendant's office on 7th October 2008.
>
> 31. What is interesting to note is that throughout the pleadings filed by the Claimant and the witness statements filed by the Claimant in this matter the Claimant has never denied that the Second Defendant always maintained that the lease was not at an end. However, for the very first time during oral evidence both Mr Sylvester and Ms Sharon Hobson gave evidence that after 7th October 2008 when keys were returned to Second Defendant, the Second Defendant had discussions with them to sell the claimant's pumps to a another company. This is denied by the Second Defendant. With respect, our submission is that, that portion of evidence was fabricated by the Claimant's witnesses for a number of reasons. Apart from the fact that it was raised for the very first time at trial, the evidence itself is not credible. The pumps were owned by the Claimant, yet the Claimant's evidence is that the Second Defendant was trying to sell its old pumps to its competitors. Also, Mr. Sylvester's evidence is evidence is that in

these purported conversations the Second Defendant did not specify the names of persons he was allegedly having discussions with. This alleged conversation is denied by the Second Defendant. The letters from the Second Defendant's Solicitor's confirm that Second Defendant evidence is credible and should be believed.

32. The position outlined by the Second Defendant as continuing the lease continued up to 11th December 2009 when the lease agreement was terminated. There are numerous letters between the parties during the period immediately prior to termination (found on pages 64 to 78 of Bundle 3) in which the Second Defendant affirmed the existence of lease and Claimant denied same. Nowhere in these letters is there a mention by the Claimant of the Second Defendant accepting lease and trying to sell Claimant's pumps or equipment to any third party".

Analysis

[108] The submissions fall to be considered under the following heads: initial acceptance of the termination, termination correspondence between the parties, return of the keys to the demised premises, exercise of tenant privileges by the claimant and negotiations by the second defendant.

Initial acceptance of termination

[109] This is entirely a submission on behalf of the claimant based, *inter alia,* on the second defendant's insistence that the gas station should be opened as other businesses were being affected which goes towards initial acceptance of the termination. The further contention is that such insistence is inconsistent with the continued existence of the Lease Agreement and even if the claimant were in breach, the action of the claimant's renunciation, the second defendant accepted it and brought the agreement to an end. Reliance is placed on the case of Norwest Holt Group Administration Ltd v Harrison[26] to say that the initial acceptance (or in that case termination of employment) always prevails.

[110] But from the court's understanding of the authority, (which turns on specific English legislation), it does not support the claimant's contention. To the contrary

[26] [1985] I.C.R. 668

the case established that even if an employer had initially terminated an employee's employment and the employee accepted it, the employer was free to withdraw the threatened termination.

[111] The case can be distinguished by the fact that the employer had sent a letter to the employee dated 14th June 1982 and sought to withdraw the letter seven months later. In this case there are no comparable facts as the court has found as a fact that the second defendant did nothing, prior to 5th November 2008, which could be construed as acceptance of the termination. And even so it was free about four weeks later (as distinct from seven months in the Norwest Holt case) later otherwise in writing.

Correspondence

[112] Beginning with the letter dated September 26, 2008 written on behalf of Bevis Sylvester to Othneil Hyliger indicating the intention to vacate the demised premise with effect from September 30, 2008, the claimant has never wavered from this path. In like manner, beginning with a letter from the second defendant's attorneys dated 5th November, 2009, the second defendant has maintained his non-acceptance of the tenant's termination.

[113] The submission on behalf of the claimant posits that the letters indicating non-acceptance are only relevant if the renunciation was wrongful. But with that said, the court has already determined that the claimant's renunciation was not justified in law.

[114] The claimant also points to the gap of five weeks between the letter of September 26, 2008 and the response on behalf of the second defendant dated 5th November, 2008. However, it is pointed by the counsel for the defendant that the said letter of September 26, 2008 is stamped "Received Oct.7.2008". This the court accepts as being pellucid which would reduce the gap to about four weeks before the response of November 5 2008. In this period there is nothing in the

evidence which shows that the second defendant did or said anything which would be construed as his acceptance of the termination.

Keys

[115] The first mention of the keys to the demised premises is to be found in the claimant's letter to Othneil Hyliger dated September 30, 2008[27]. The letter makes mention of the "entire amount of the keys which you gave to a member of Delta Petroleum staff". This is acknowledged by the Second Defendant's attorney in a letter dated November 5, 2008 and at the same time the keys are returned. This according to the second defendant's evidence is after he had taken the said keys to his attorney's office and given them instructions in this regard.

[116] The other mention of the keys is in the defendant's attorney's letter to the Island Manager of Delta Petroleum (Nevis) Limited dated June 10, 2009. The penultimate sentence states that: "The keys to the demised premises which were returned to our Chambers on 6th November 2008 remained at our Chambers and can be collected at your earliest convenience".

Exercise of tenant's privileges

[117] There is some evidence that agents of the claimant were on the demised premises for various reasons after its determination of the Lease Agreement. This is denied by the second defendant.

[118] The court finds that there is no compelling evidence either way on the balance of probabilities. This is compounded by the fact that is common ground that the claimant held a separate lease for its wholesale business in respect to an area measuring 1640 square feet coupled with the usual right to pass and repass.

Negotiations by Second Defendant

[119] There is evidence from Bevis Sylvester and Sharon Hobson concerning negotiations by the second defendant with respect to the demised premises and the sale of the pumps. This was all denied by the second defendant.

[27] See Bundle 3 (Documents) P. 60. As noted above there is stamped received Oct 2008

[120] The court takes the view that unless there is further evidence as to the period and a party involved, the evidence can only, at best, go to an intention. And as regards the pumps, these, as noted by learned counsel for the second defendant, are actually owned by the claimant.

Conclusion

[121] The second defendant from November 05, 2008 up to December 8, 2009[28] was consistent in telling the claimant that he did not accept the repudiation of the Lease Agreement. At the same time, the keys to the demised premises were returned to the claimant through his attorneys after they were delivered to the second defendant on October 7, 2008. Further, the court has determined that in the absence of a new lease respect to the demised premises any negotiations go merely to intent.

[122] The court therefore concludes that despite the delay of about four weeks which elapsed between the letter of September 26, 2008 and the initial response thereto, the second defendant was consistent in his non-acceptance of the claimant's purported termination of the Lease Agreement.

Summary and conclusions on ISSUE NO. 2

[123] The claimant had no legal basis to termination the Lease Agreement because:

(a) There was no obligation on the landlord to ensure that the demised premises are fit for the purpose intended.

(b) There were fluctuations in the electricity supply but it was not shown that such fluctuations were caused by the second defendant.

(c) The fluctuations in the electricity supply did not give rise to a breach of a fundamental term.

(d) The claimant had a right to surrender the Lease Agreement but there is no evidence that the landlord consented to such surrender.

(e) It was not shown that the second defendant accepted the termination of the Lease Agreement by the claimant.

[28] See Bundle 3 (Documents) pages 61, 63, 66, 70 and 79

ISSUE NO. 3

Whether the second defendant can succeed on the counterclaim

[124] It will be recalled that the second defendant pleaded a counterclaim; and in view of the determination made by the court it is necessary to set out what is sought in the counterclaim:

1. A declaration that the Claimant is indebted to the Second Defendant in the sum of EC$208,400.00 representing rental income due and owing to the Second Defendant by virtue of a five (5) year fixed term lease agreement for the period June 2008 to May 2013 entered into between the parties, in relation to premises belonging to the Second Defendant known as OOJJ's Commercial Complex situate at Camps, Island Main Road, Basseterre, St. Kitts containing by admeasurements 1640 square feet, said lease agreement was breached by the Claimant's failure to allocate the monthly rental towards the satisfaction of the debt that was agreed to be due and owing to the Claimant by the First Defendant in June 2008 in the sum of EC$486,833.84 that was owed to the Claimant by the first Defendant in or around June 2008.
2. The sum of EC$208,400.00 be set off from the principal debt in the sum of EC$486,833.84 that was owed to the Claimant by the First Defendant in or around June 2008.
3. Such further and other relief as this Honourable Court thinks just.
4. Cost.

[125] The court has already determined that the claimant had no legal basis to terminate the lease and that the second defendant consistently refused to accept the purported termination.

[126] The consequence of these determinations is that the claimant cannot succeed on his claim and the second defendant is entitled to succeed on his counterclaim. In the result the claimant who on the evidence, is indebted to the second defendant in the sum of EC$208,400.00, being 17 months' rent due under the five year lease in relation to the demised premises. This the court accepts as being proven.

[127] Further, the second defendant is entitled to set off the said sum of EC$208,400.00 against the debt owed to the claimant in the amount of $486,833.84, as pleaded

and evidenced by the Promissory Note[29]. This is subject to any outstanding principal and accrued interest accrued owed to the claimant.

ISSUE NO.4

Whether the second defendant could lawfully terminate the Lease Agreement when he did.

[128] The answer on this issue is to be derived from the following conclusions of the court:

1. The claimant was not entitled to terminate the Lease Agreement when it did for the reasons stated with respect to issue No.2
2. The second defendant succeeds on his counterclaim that the claimant is indebted to the second defendant in the amount of $208,400.00 representing 17 months of unpaid rent. And a further declaration that the second defendant can set off the $208,400.00 against the $486,833.84 which the second defendant owed the claimant under a Promissory Note subject to any outstanding principal and accrual interest.

ISSUE NO. 5

Whether the claimant is entitled to any outstanding principal and accrued interest with respect to the debt of $486,833.84

[129] The Promissory Note reflects the debt of $486,833.84 with a compound interest rate of 5%. It is against this debt that the lump sum payment of $278,433.84 and the rent of $208,400.00 that the second defendant sought to satisfy the debt owed to the claimant.

[130] Learned counsel for the claimant in submission on the defence/counterclaim raises the following issues:

1. The total debt of $486,833.84 is not in doubt.
2. $36,000.00 was applied towards the debt.
3. There was a lump sum payment of $278,433.84 in January 2011.

[29] See Bundle 3 (Documents) page 37

4. The lump sum was calculated the basis that the payments of 3 months rents ($36,000.00) was undisputed.

5. The second defendant cannot double count in his counterclaim as the amount by which the claimant was indebted to him.

6. The incidence of 5% interest on the Promissory Note[30] [dated 6th June 2008] was not brought into the equation which was admitted by the second defendant in cross-examination.

[131] The court agrees with these submissions.

[132] Bevis Sylvester on his witness statement says that the sum of $278,433.84 paid by the second defendant in January as well as three instalments of rent credited to his account in 2008 were applied firstly towards the outstanding interest under the Promissory Note and then to outstanding principal.

[133] Similar testimony was given by Sharon Hobson, the Financial Comptroller of the claimant, who said that as of January, 2011 when the lump sum was paid the principal would have been reduced to $234,216.81.

Conclusion

[134] The foregoing suggests that the amount of $208,400.00 would have been inadequate to settle the $234,216.81 claimed by the claimant given the application of the payment plus the incidence of the 5% compound interest.

[135] The unchallenged evidence of Sharon Hobson is that as of the date of the trial (being 20th November, 2012) the amount of $29,815.83, principal, and $2882.92 as interest were due to the claimant.

ISSUE NO. 6

Whether a duty to mitigate arises

[136] The evidence which the court accepted is that in breach of this 5 year lease agreement the claimant terminated the said lease and vacated the demised

[30] See page 37 of Bundle 3 (Documents)

premises on September 30, 2008 and the second defendant, the landlord terminated the lease by way of letter dated 8th December, 2013.

[137] In turn, the second defendant, having never accepted the claimant's termination, terminated the said Lease Agreement on 8th December 2009 with effect from 11th December 2009.

[138] It is common ground that the second defendant claimed EC$208,400.00 as rent due, being 17 months' rent. This is the context of the issue of mitigation.

Submissions

[139] There are no submissions on behalf of the claimant on the issue but learned counsel for the second defendant submits that there is no duty to mitigate. This is her submission:

> "The principle of mitigation of damages will apply to a situation where a party to a lease seeks to recover damages from the other party for breach of a covenant under a lease. The principle would not apply to a case where the landlord is suing for arrears of rent. The leading decision on the issue is Richman and another v Beveridge [2006] EWCA Civ. 1659. The landlord's claim for rent is in debt and the rule of mitigation of damages does not apply to a claim in debt was also stated in Jervis v Harris [1996] Ch 195".

[140] The law is similarly stated by Gray and Gray at page 515[31] as follows:

> "In English Law it has generally been said that the contractual principle of mitigation does not apply either strictly of by analogy, where a landlord, faced with a breach of his tenant's covenant to pay rent simply sues for each instalment of rent as it falls due/ the landlord has, supposedly, no duty to mitigate loss by taking steps to relet premises which have been abandoned by the tenant during the term even though the tenant had committed breaches which entitle the landlord to terminate the lease. This view is premised essentially on the theory that a lease confers a proprietary estate on the tenant for a term and that accordingly the landlord need neither concern himself to the tenant election to under-

[31] Op cit

utilise his own property during this term nor trouble himself to re-enter where appropriate on the ground of breach. On this basis the tenant is entirely free, if he wishes to enjoy his property in absentia and the landlord remains perfectly entitled, notwithstanding the tenant's premature departure, to sue for rent as it continues to accrue".

[141] Given the clear statement of the law the court agrees with learned counsel for the second defendant that the second defendant being owed rent by the claimant, there is no duty on his to mitigate.

Costs

[142] The court awards prescribed costs to the claimant on the quantum of the award of interest. And the second defendant is awarded costs on the value of his counterclaim.

[143] IT IS HEREBY ORDERED AND DECLARED as follows:

1. In the legal context of the implied covenants on the landlord there is no need to imply a term to give business efficiency to the Lease Agreement between the claimant and the second defendant.

2. The claimant had no legal basis to terminate the Lease Agreement because
    (a) There is no obligation on the landlord to ensure that the demised premises are fit for the purpose intended.
    (b) There were fluctuations in the electricity supply but it was not shown that such fluctuations were caused by the second defendant.
    (c) The fluctuations in the electricity supply did not give rise to breach of a fundamental term.
    (d) The language in the letter of 26th September 2008 is not that of surrender, in any event the claimant, as tenant has no right to surrender the lease without the consent of the landlord.
    (e) It was not shown that the second defendant accepted the termination by the claimant

3. The second defendant never accepted the termination of the Lease Agreement by the Claimant.

4. The second defendant succeeds on his counterclaim in the result that the second defendant is entitled to set off the EC$208,400.00 owed by the claimant for rent, against the EC$486,833.84 under the Promissory Note, which debt is satisfied when the lump sum payment

of EC$278,433.84 is added subject to any outstanding amounts owed by way of principal and interest.

5. The second defendant is entitled to terminate the Lease Agreement on account of the conclusions reached by the court in relation to the actions of the claimant (as stated in relation to Issue No 2.

6. The claimant is awarded the sum of $32,698.75 consisting of $29,815.82 as outstanding principal and $2,882.92 as accrued interest.

7. The second defendant has no duty to mitigate since the mitigation principle does not apply to a situation of recovery of arrears of rent.

8. The claimant is entitled to prescribed costs on the quantum awarded and the second defendant is entitled to prescribed costs on the value of his counterclaim.

Errol L Thomas
High Court Judge (Ag)