THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2009/0014

MARIE MAKHOUL

Appellant/Counter-Respondent

and

[1] CICELY FOSTER
[2] LOUIS LOCKHART

Respondents/Counter-Appellants

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Hugh C. Marshall Jr. for the Appellant
Sir Gerald A. Watt, QC, with him, Dr. David Dorsett and Mr. Jared Hewlett for the Respondents

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2014: November 25;
2015: February 23.

Civil appeal – Landlord and tenant – Subletting by tenant – Whether the learned judge erred in finding that notice to quit was valid – Section 53(h) of the Registered Land Act – Title to building – Chattel – Fixture – Whether building became a fixture – Whether building is a tenant's fixture – Whether tenant entitled to remove building – User principle – Whether learned judge ought to have awarded damages on the user principle

In 1979, the first respondent's father, Stanley Walter, granted the appellant's husband, Elias Makhoul, a five-year lease of land situate at the corner of Market Street and South Street in St. John's, Antigua. Mr. Walter gave Mr. Makhoul permission to erect thereon a chattel building for use by Mr. Makhoul as a store. The parties subsequently entered into a new lease agreement in 1985 for a six-year term.[1] The lease agreement provided that upon determination of the lease, Mr. Makhoul was to deliver up possession and remove

[1] By that time Mr. Walter had died and the second respondent, a partner in a firm of lawyers who acted on behalf of Mr. Walter and after his death, the first respondent, was then the executor of Mr. Walter's estate.

from the land any building constructed thereon. It was also a term of the lease that Mr. Makhoul could not erect a structure of a permanent nature on the land. A building was in fact erected on the land.

After many defaults by Mr. Makhoul and many indulgences by the lessor, the lessor eventually refused to grant any further leases to Mr. Makhoul. However, sometime in 1996 or prior thereto, the first respondent ("Ms. Foster") discovered that the Makhouls had caused an addition to be constructed to the original building and had also entered into in a tenancy agreement with one Habib George whereby the Makhouls acted as Mr. George's landlord and Mr. George, with the agreement of the Makhouls, financed the construction of the addition. When Ms. Foster became aware of this, the Makhouls and Mr. George were advised of the unlawfulness of their action. The result was that in 1996, Ms. Foster, in seeking to clarify the position, entered into two lease agreements: one with the appellant ("Ms. Makhoul") and the other with Mr. George. Ms. Makhoul's lease provided inter alia that the lease of the land was for a period of 2 years at a monthly rental of $700.00 and that at the end of the lease she would have to remove the building on the land. Conversely, Mr. George's lease provided that at the end of the lease the building would become the property of Ms. Foster. At the end of the two-year term no new lease was granted to Ms. Makhoul, thus she remained in possession of the land as a tenant holding over.

Sometime in 2002, Ms. Makhoul approached Ms. Foster about subletting the lot she occupied.[2] Ms. Foster was not amenable to this due to past difficulties she experienced with the Makhouls and proposed instead an arrangement whereby she would have a direct landlord/tenant relationship with the proposed tenant and would pay Ms. Makhoul a monthly commission for referring the proposed tenant. The arrangement never materialised as Ms. Makhoul proceeded to sublet the lot without receiving permission from Ms. Foster.

In February 2003, the second respondent ("Mr. Lockhart") had cause to write Ms. Makhoul concerning an extension to the original building which it was discovered Ms. Makhoul was constructing, requesting that she cease from so doing. Mr. Lockhart also reminded her that she was not permitted to sublet the premises. The letter, dated 26th February 2003, was also accompanied by a notice to quit of even date which fixed the date for delivery up of possession by 31st March 2003.

Ms. Makhoul subsequently commenced legal proceedings against the respondents on 25th March 2003 seeking a declaration of title of the buildings located on the land at the corner of South Street and Market Street and a prohibitory injunction to prevent the respondents from executing the notice to quit. She asserted that she was entitled to all the buildings on the land and therefore to rents being collected by Ms. Foster. Ms. Foster defended the action and counter-claimed for possession of the premises and mesne profits. At the conclusion of proceedings, the learned trial judge found that the notice to quit was validly given and ordered delivery of possession of the premises to Ms. Foster and for payment of mesne profits then found to be due. She also found that when Ms. Foster caused the

[2] Mr. Makhoul had died by this time.

lease to be entered into with Ms. Makhoul, it was only in relation to the portion of land where the original chattel building/store ("the Building") was and that the additional structure was constructed by Mr. George in respect of which he had later entered into his own lease arrangements with Ms. Foster. The learned trial judge further found that the store rests on a foundation that is attached to the ground and that the store had become part of the land and affixed to it and was therefore now owned by Ms. Foster. Ms. Makhoul was aggrieved by the learned trial judge's decision and appealed on several grounds.

Held: allowing the appeal in part, only to the extent that the appellant was entitled to remove the original building erected on the property at the end of the tenancy and otherwise dismissing the appeal; valuing the claim at $50,000.00 under CPR 65.5(2)(a) and awarding prescribed costs to the first respondent on that sum in the lower court and on appeal two-thirds of that sum, discounted by 20%, to reflect the degree of success of the appellant in the appeal; dismissing the counter-appeal by the first respondent with costs to the appellant fixed in the sum of $5,000.00; and awarding prescribed costs in the court below to the second respondent under CPR 65.5(2)(a) in the sum of $7,500.00, that:

1. Section 53(h) of the **Registered Land Act** places an evidential burden on the party who asserts that the other party unreasonably refused to give consent to subletting to prove that the refusal of consent was unreasonable. It is a trite principle of law that he who asserts must prove and this principle in respect of the evidential burden is only displaced where the law places the burden ether expressly or by necessary implication on the other party. In this appeal, the learned judge correctly found that it was for the appellant to place facts and circumstances before the court from which it could infer that consent to sublet had been unreasonably withheld. There was no evidence before the court tending to show any response from the appellant to the first respondent's proposal and the evidence was simply that, without further reference, the appellant proceeded to sublet on at least two occasions. The learned judge correctly found that the appellant had not discharged the evidential burden and accordingly there was no basis for disturbing her finding that the notice to quit was valid.

   Section 53(h) of the **Registered Land Act** applied.

2. In determining whether a structure is or is not a fixture, the decisive factors a court must consider are the degree of annexation to the land and the object of annexation. The answer whether such a structure has become annexed is as much a matter of common sense as precise analysis, but a building which is constructed in such a way that it cannot be removed at all, save by destruction, cannot have been intended to remain as a chattel. In the present case, evidence presented to the learned trial judge showed that any attempt to remove the Building would result in the destruction of the Building. Consequently, based on all the evidence before the learned trial judge, as well as her own observations from her site visit, it was open to her to conclude that the Building had become a fixture.

   Elitestone Ltd v Morris [1997] 1 All ER 513 applied.

3. Although parties may agree to treat a structure as a chattel, the question whether a structure is a chattel is one of law. The terms of a such an agreement will regulate the contractual rights to sever from the land as between the parties to the contract and where an equitable right is conferred by the contract, as against certain third parties. However, such an agreement cannot prevent the chattel once fixed, becoming in law part of the land and owned by the owner of the land so long as it remains fixed.

   Melluish (Inspector of Taxes) v BMI (No 3) Ltd [1996] AC 454 applied; **Elitestone Ltd v Morris** [1997] 1 All ER 513 applied.

4. Notwithstanding that as a general rule a chattel affixed to land is deemed in law to be a fixture, a tenant who has affixed a chattel for the purpose of trade may have a right of severance and removal of the chattel so affixed. It is the purpose and object of the erection of the building that is critical in determining the character which it is to assume. Further, a court in determining the question of removability may consider in particular the various relationships between the interested parties such as landlord and tenant and each case must be decided on its own facts. In this appeal, the lease agreement between the first respondent as lessor and the appellant as lessee, expressly provided that the appellant was required to remove the Building at the end of the term. Further it was not disputed that the Building had been erected for the purpose of carrying on a trade, namely, the operation of a store. Consequently, although the Building became a fixture at the end of the term of the lease, the appellant was entitled to sever and remove the Building from the land. However, so long as the building remained on the land it would retain its character as a fixture and thus form part of the realty owned by the first respondent.

   Webb v Frank Bevis Ltd [1940] 1 All ER 247 applied; **Elitestone Ltd v Morris** [1997] 1 All ER 513 applied.

5. An appellate court will not allow a party to add a claim which was not pleaded in the lower court and section 20 of the **Eastern Caribbean Supreme Court Act** does not assist a party who has failed to do so as it does not entitle a party to a grant of a remedy which was not claimed. In this appeal, there was no pleading by the first respondent in the court below seeking damages on the user principle; accordingly, the first respondent was precluded from doing so on the appeal.

   East Caribbean Flour Mills Limited v Ormiston Ken Boyea SVGHCVAP2006/0012 (delivered 16th July 2007, unreported) applied; section 20 of the **Eastern Caribbean Supreme Court Act** applied.

6. The user principle in relation to a trespasser is distinguishable from a case in relation to a tenant holding over. In this appeal, at the end of the lease the appellant was not a trespasser in the true sense but rather a tenant holding over. Further, the first respondent was seeking damages in relation to the use and occupation of the Building which was understood at all times and treated as being

owned by the appellant. In addition, to make a further award of damages in respect of the building when mense profits for the land was already awarded against the appellant would import an element of double compensation which is not permissible under the principle of *restitutio in integrum*.

Inverugie Investments Ltd. v Hackett [1995] 1 WLR 713 distinguished.

JUDGMENT

[1] **PEREIRA CJ**: The appellant ("Ms. Makhoul") was a tenant holding over under a lease agreement dated 6th December 1996 for a two year term of a portion of land owned by the first respondent ("Ms. Foster") situate at the corner of Market Street and South Street in St. John's, Antigua. That land is recorded on the land register as Registration Section: St. John's South, Block: 66 1692E, Parcel: 597. The second respondent ("Mr. Lockhart") was at all relevant times a partner in a firm of lawyers who acted on behalf of Ms. Foster's father and after his death, Ms. Foster. Ms. Makhoul was served with a notice to quit dated 26th February 2003 requiring her to deliver up possession of the leased premises by 31st March 2003. The appellant has appealed against the decision of the trial judge in her judgment delivered on 28th May 2009 in proceedings at the suit of Ms. Foster in which the learned judge upheld the validity of the notice to quit and ordered delivery of possession of the premises to Ms. Foster.

The Background

[2] Ms. Makhoul's relationship with the respondents in respect of the land at Market Street and South Street commenced in the year 1979 when Ms. Foster's father, who then owned the land, granted in the first instance, a five-year lease of the land to Ms. Makhoul's husband, Elias Makhoul. It is common ground that Ms. Foster's father, Stanley Walter, gave to Mr. Makhoul, permission to erect thereon a chattel building for use by Mr. Makhoul as a store. The parties entered into a fresh lease in 1985, the term of which was for six years commencing on 1st April 1984. By that time Mr. Walter had died and the second respondent was then the executor of Mr. Walter's estate. It was an express term of that lease that on the determination thereof, Mr. Makhoul was to deliver up possession and remove from the land any

building constructed thereon by him. It was also a term of that lease that Mr. Makhoul not erect any structure of a permanent nature on the land.

[3] A building had in fact been constructed on the land by Mr. Makhoul. Due to many defaults on the part of Mr. Makhoul and many indulgences granted by the lessor there came a time when the lessor refused to grant any further leases to Mr. Makhoul.

[4] Sometime in 1996 or prior thereto, Ms. Foster had discovered that the Makhouls had caused an addition to be constructed unto the original building in an arrangement between the Makhouls and one Habib George. The Makhouls had also entered into a tenancy arrangement with Mr. George in respect of the additional structure in which the Makhouls acted as Mr. George's landlord. Mr. George, with the Makhouls' agreement, financed the construction of this addition. When Ms. Foster became aware of this, the Makhouls and Mr. George were advised of the unlawfulness of their action. The result was that Ms. Foster, in clarifying the position, in 1996 entered into two lease agreements - one with Ms. Makhoul dated 6th December 1996 which limited the area of land leased to her as being in respect of the land on which her building was sited and one with Mr. George dated 4th December 1996 limited to the area of land on which his building was sited. Thus, as of 1st December 1996, the land became occupied by two tenants, namely, Ms. Makhoul and Mr. George – each in respect of the portion of the land on which their respective building had been sited.

[5] Ms. Makhoul's lease of 6th December 1996 contained the following pertinent terms:

> "1. Our client will grant you a lease of the parcel of land on which your building is sited for two (2) years from 1st December, 1996 at a monthly rental of $700.00.
>
> 2. The land will have to be resurveyed to cut off the piece occupied by Habib George.
>
> 3. …

> 4. At the end of the lease unless there is a renewal of the same you will have to remove the building presently on the land."

[6] Mr. George's lease contained more or less similar terms to that of Ms. Makhoul in respect of his portion of the land save that his rental amount was different and importantly, unlike Ms. Makhoul's lease, contained the following term:

> "3. At the end of the term the building will become the property of our client [Ms. Foster] …"

[7] It is common ground that at the expiration of the two-year term granted in the lease agreement, no new lease was ever granted to Ms. Makhoul. She thus remained in possession of the land as a tenant holding over.

[8] Sometime in 2002, Ms. Makhoul approached the second respondent seeking permission to sublet the lot she occupied to one Eric Shepherd. By then Mr. Makhoul had died. Ms. Foster was not amenable to subletting the lot due to the past difficulties which had been experienced and proposed terms which in essence amounted to having a direct landlord/tenant relationship with the proposed tenant but was prepared to pay to Ms. Makhoul a monthly commission fee in respect thereof for referring the proposed tenant. This arrangement did not materialise as Ms. Makhoul proceeded without receiving permission from Ms. Foster to sublet the lot.[3]

[9] It appears that sometime in early 2003, Ms. Makhoul had caused a notice to quit to be sent to one Wayel Luwisa to whom Mr. George, with the permission of Ms. Foster, had assigned his lease earlier. Also, in February 2003 the second respondent had cause to write to Ms. Makhoul concerning an extension to the original building which it was discovered Ms. Makhoul was constructing, requesting that she cease from so doing. She was also reminded that she was not permitted to sublet the premises which she had done and the fact that she had caused improperly, a notice to quit to be sent to Mr. Luwisa. This was by letter

[3] See agreement made 10th February 2003, supplemental bundle at pp. 148 - 151

dated 26th February 2003 which also accompanied the notice to quit of even date fixing the date for delivery up of possession by 31st March 2003.

[10] Ms. Makhoul launched legal proceedings on 25th March 2003 seeking:[4]

> "1. A Declaration of title for the buildings located at the corner of South and Market Street on land more particularly described in the Land Registry as **Registration Section: St. John's South Block:66 1692E Parcel 568.**
>
> 2. A Prohibitory Injunction to prevent the Defendants and their servants or Agents from executing the Notice to Quit dated the 26th day of February 2003 … until the determination of this suit."

Ms. Makhoul in her claim asserted that she was entitled to all of the buildings and therefore to the rents being collected by Ms. Foster in respect of the portion of the lot which had been leased to Mr. George. She accordingly claimed damages in the nature of loss of rental income in respect of the entire building which she said was one structure separated only by a wooden partitioning wall. She also sought an account of rents from the respondents. Ms. Makhoul remained on the land, yielding up possession only after the delivery of the judgment.[5]

[11] Ms. Foster defended the action and counterclaimed for possession of the premises. She also counterclaimed for mesne profits at the rate of $700.00 per month until delivery of possession. In answer to Ms. Makhoul's claim, Ms. Foster asserted that the building on the land was attached to and therefore formed part of the land and thus no issue of title to the building independent of title to the land arose.

[12] The second respondent having been joined to the suit by Ms. Makhoul, filed a defence in which he asserted that he had no interest in the subject matter of the claim and was at all material times acting in the capacity as attorney-at-law on behalf of Ms. Foster. The learned judge found at paragraph 86 of her judgment that neither the pleadings nor the evidence adduced at the trial supported any

[4] See claim form (filed 25th March 2003), record of appeal, at p. 293.
[5] She had obtained an interim injunction against the respondents restraining them from acting on the notice to quit.

cause of action against the second respondent. Accordingly she struck out the action[6] as against the second respondent. The second respondent remains as a party to this appeal because, notwithstanding the striking out of the action as against him, the learned judge, at para. 91 of her judgment, granted judgment 'on the counterclaim in favour of Mr. Louis Lockhart against Ms. Marie Makhoul, together with prescribed costs …'.

[13] It is common ground that the second respondent, Mr. Lockhart, made no counter-claim in the action and thus it can only be concluded that this order was one made by the learned trial judge in error. Counsel for the respondents accept this and is content to treat it as a nullity. Mr. Lockhart has taken no active part in this appeal. Mr. Lockhart would no doubt be entitled to costs resulting from the dismissal or striking out of Ms. Makhoul's claim against him. Nothing more need be said in relation to this ground of appeal[7] as nothing further turns on it.

The findings of the trial judge

(a) The Notice to Quit.

[14] The learned judge found that the notice to quit was validly given. She found as a fact[8] that Ms. Makhoul had sublet the leased premises at least on two occasions without the permission of the landlord as required. Additionally, she found that it was as a result of Ms. Makhoul's subletting of the premises to Mr. Shepherd and subsequently to Mr. Wang that caused Ms. Foster to issue the notice to quit. Having considered sections 2 and 12 of the **Rent Restriction Act**[9] which in essence permits the giving of a notice to quit where the tenant has sublet without the permission of the landlord where no express authorization had been given by the landlord allowing subletting, and having further considered section 53(h) of the **Registered Land Act**[10] which implies a covenant on the part of a lessee not to, among other things, sublet the leased premises without the previous written

[6] At para. 89 of the judgment.
[7] Ground L of the grounds of appeal, record of appeal p. 4.
[8] At para. 72 of the judgment.
[9] Cap. 378 of the Laws of Antigua and Barbuda.
[10] Cap. 374 of the Laws of Antigua and Barbuda.

consent of the lessor 'which consent shall not be unreasonably withheld', the learned judge opined at paragraph 74 as follows:

> "In the absence of any evidence of any written consent given by Ms. Foster to Ms. Makhoul, the only issue that remains for the Court to determine is whether the landlord has unreasonably withheld the permission to enable Ms. Makhoul to rent the property. Ms. Makhoul in the Court's considered view has led no evidence which substantiates learned Counsel Mr. Marshall's contention that Ms. Foster has unreasonably refused to grant her permission to lease the property. In fact, to the contrary, the evidence points to Ms. Foster having granted Ms. Makhoul numerous indulgencies [sic]. I see no basis for holding that Ms. Foster has unreasonably refused to give her consent for the subleasing of the land."

At paragraph 76, the learned judge stated further:

> "the evidential burden is on Ms. Makhoul to prove that Ms. Foster has unreasonably withheld consent … There is not a scintilla of evidence on which the Court properly directing its mind can come to that conclusion. In fact, the evidence points the other way namely that after Ms. Foster made a counter-offer in relation to the leasing of the property, Ms. Makhoul simply rejected it and proceeded nonetheless to rent the store to two different sets of persons. Her contention that Ms. Foster has unreasonably withheld her permission does not have any evidential basis."

(b) The interest in the Building:

(i) The additional structure

[15] The learned judge found at paragraph 64 of her judgment that in March 1996, when Ms. Foster caused the lease to be entered into with Ms. Makhoul, it was only in relation to the portion of land where the 'chattel building/store' was; and that Ms. Makhoul was leased only that portion of the land on which the original chattel building rested. She also found that the additional structure was constructed by Mr. George in respect of which he had later entered into his own lease arrangements with Ms. Foster. At paragraph 65 the learned judge stated among other things that Ms. Makhoul had:

> "quite blatantly tried to mislead the Court into thinking that the additional structure was financed by her husband in the face of overwhelming evidence to the contrary. There is not a scintilla of credible evidence to

support her contention as to the ownership of the additional structure. Also, at the visit to the scene, Ms. Makhoul pointed out … the original structure as being the extent of the land her husband had first rented. It is clear that the additional structure is owned by Ms. Foster."

(ii) The original structure

[16] The learned judge found that the original structure has been on the land for some 30 years and that it is annexed to the land by way of a foundation. At paragraph 82 she concluded thus:

> "I am satisfied that the original chattel building rests on foundation that is attached to the ground. It is clear that the structure was not entitled to be a chattel and to be removed. There is no doubt that the chattel building has become annexed to the land and cannot be moved …. where it is evident that the chattel building was constructed in such a way that it could not be removed, save by destruction, it could not have been intended to remain a chattel and must have been intended to form part of the realty."

At paragraph 84, she went to hold that 'the store had become part of the land and affixed to it.' She further stated as follows:

> "The Court is also mindful of Ms. Makhoul's evidence when she stated that the building cannot move and from its own observation of the building, together with the evidence of other witnesses, it is clear that the building has become affixed to the land and is therefore now owned by Ms. Foster."

The orders of the trial judge

[17] The learned judge, among other things:

(a) stated at paragraph 80 of her judgment, under the heading 'mesne profits' as follows:

> "During the course of the trial, the Court was advised that all monies that Mrs. Makhoul had owed to Ms. Foster have been paid. If that is so, it is not necessary to make any order for mesne profits, save and except for the month of May."

At paragraph 93 she ordered payment in the sum of $700.00 to Ms. Foster by way of mesne profits;

(b) dismissed Ms. Makhoul's claim it its entirety against Ms. Foster[11] and struck out her claim against Mr. Lockhart;[12]

(c) gave judgment to Ms. Foster on her counterclaim[13] by ordering delivery of possession of the land, and declared that Ms. Foster was the lawful owner of the entire property and entitled to collect all rents in respect thereof and that Ms. Makhoul was not so entitled;[14] and further ordered the payment by Ms. Makhoul of mesne profits as counterclaimed;[15]

(d) discharged the injunction previously obtained by Ms. Makhoul;[16] and

(e) awarded prescribed costs in favour of the respondents[17] but did not specify which provision of the **Civil Procedure Rules 2000** ("CPR") dealing with prescribed costs was being applied.

The Appeals

[18] The appellant raised some thirteen grounds of appeal. However, they essentially boil down to the following basic issues:

(a) Whether the notice to quit was valid and as a corollary of that, whether the evidential burden of proving the invalidity of the notice to quit rested on the appellant;

(b) Whether the building on the land had become a fixture and if so whether it may be classified as a tenant's fixture as distinct from a landlord's fixture;

[11] At para. 88.
[12] At para. 89.
[13] At para. 90.
[14] At para. 92.
[15] At para. 93.
[16] At para. 94.
[17] At paras. 90 and 91.

(c) If the building may be classified as a tenant's fixture, whether the appellant is entitled to remove it.

[19] The first respondent has counter-appealed and contends that on the finding that the notice to quit was valid, the learned judge ought to have awarded substantial damages to the first respondent on the 'user principle'. The first respondent accordingly seeks a substantial award on this basis in the sum of approximately $493,500.00 and that costs should be on the prescribed basis by reference to this sum.

The Notice to Quit

[20] The notice to quit stated three reasons for the giving of notice, namely:

> "1. The tenant has sublet the whole or part of the premises without obtaining the consent of the landlord or being expressly authorised by the tenancy agreement so to do.
>
> 2. The tenant has been guilty of conduct which is an annoyance to the adjoining occupier, to wit, Wayel Luwisa t/a as Louis Brothers.
>
> 3. The tenant has impugned the title of the Landlord."

The learned judge did not find reason 2 made out,[18] and no reference was made to reason 3. The focus related to reason 1. No issue is taken on appeal with this approach and accordingly on this appeal the focus will be on the question as to whether the learned judge was right in finding that Ms. Foster had not unreasonably withheld her consent to Ms. Makhoul's subletting of the property.

[21] No issue is taken with the application of the **Rent Restriction Act** to the notice to quit or to the application thereto of section 53(h) of the **Registered Land Act** which states that:

> "**53**. Save as otherwise expressly provided it shall be an implied covenant in every lease on the part of the lessee –
>
> …

[18] See para. 79 of judgment.

> *(h)* not to transfer, charge, sublease or otherwise part with the possession of the leased premises or any part thereof without the previous written consent of the lessor, **which consent shall not be unreasonably withheld**." (Emphasis added)

[22] At the hearing of the appeal, the question arose as to the application of the emphasized portion of the lessee's implied covenant to not sublet in circumstances of a lessee holding over. The Court's attention was drawn to section 51 of the **Registered Land Act** which states that:

> "(1) Where a person, having lawfully entered into occupation of any land as lessee, continues to occupy that land with the consent of the lessor after the termination of the lease he shall, in the absence of any evidence to the contrary, be deemed to be a tenant holding the land on a periodic tenancy on the same conditions as those of the lease so far as those conditions are appropriate to a periodic tenancy."

[23] Assuming for the purposes of this appeal that the emphasised provision applies, it is clear that the learned trial judge adequately dealt with the issue from paragraphs 70 to 77 of her judgment. She found as a fact that Ms. Makhoul had sublet the premises and that she had done so 'not once but on two occasions, without obtaining the consent/permission of the landlord.'[19] Specifically, at paragraph 73 she had regard to section 53(h) of the **Registered Land Act** and concluded at paragraph 74 that Ms. Foster had granted Ms. Makhoul numerous indulgences and crucially, at paragraph 76, that Ms. Makhoul had simply rejected the counter-offer made to her by Ms. Foster 'and proceeded nonetheless to rent the store to two different sets of persons'. Accordingly, the criticism levelled at the trial judge suggesting that she failed to take account of the provision dealing with the reasonableness of the refusal to grant permission or consent is not justified.

[24] The appellant contends that the wording of section 53(h) of the **Registered Land Act** places an evidential burden on the appellant of adducing evidence as to the unreasonableness of the refusal to allow subletting. Counsel for the appellant then submits that the issue once raised placed the burden on the respondents to prove that refusal to give consent was reasonable. This, he says, was a matter of

[19] At para. 72 of the judgment.

law based upon the wording of section 53(h) of the **Registered Land Act**. These two contentions appear to my mind to be inconsistent with each other. A trite principle of law is that he who asserts must prove. This principle in respect of the evidential burden is only displaced where the law places the burden either expressly or by necessary implication on the other party. No basis and indeed no authority has been advanced by the appellant which persuades this Court to hold that the evidential burden shifted from the appellant to the respondents to show that refusal of consent was reasonable. Ms. Makhoul sought to impugn the validity of the notice to quit. In my view the learned judge rightly found that the evidential burden lay on Ms. Makhoul to prove that Ms. Foster had unreasonably withheld consent. I agree with the learned judge that it was for Ms. Makhoul to place facts and circumstances before the court from which it could infer that consent had been unreasonably withheld. The learned judge found that Ms. Makhoul had not discharged that burden. To the contrary, the learned judge found that 'after Ms. Foster made the counter offer in relation to the leasing of the property, Ms. Makhoul simply rejected it and proceeded nonetheless to rent the store to two different sets of persons.'[20] It is on this basis that the learned judge found that Ms. Makhoul's contention of unreasonable refusal had no evidential basis.

[25] There was clearly evidence before the learned judge on which she was entitled to so find. There was no evidence tending to show any response by Ms. Makhoul to the proposal made by Ms. Foster. The evidence is simply that Ms. Makhoul without further reference to Ms. Foster, proceeded to sublet not once but at least on two occasions. It is well established on numerous authorities of this Court[21] and others that an appellate court will not easily disturb a trial judge's findings of fact. Fairly recently, the Privy Council in **Mutual Holdings (Bermuda) Ltd and others v Hendricks**[22] Lord Sumption adopted the words of Lord Hoffman in **Biogen Inc v Medeva plc**[23], where he opined as follows:

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[20] At paragraph 76 of judgment.
[21] See for example. Chiverton Construction Limited et al v Scrub Island Development Group Limited BVIHCVAP2009/028 (delivered 19th September 2011, unreported) at paras. 8 to 10.
[22] [2013] UKPC 13 at para. 28
[23] [1997] RPC 1, 45

> "The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, *la vérité est dans une nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

This statement is apt in the present case. There is no reason to disturb the trial judge's finding that Ms. Makhoul had not put forward evidence on which it could reasonably be concluded that refusal of permission was unreasonable based on the trial judge's overall assessment of the evidence in the case. Here it cannot be said that the learned judge made 'a palpable and overriding error'[24] in coming to the conclusion to which she came. Accordingly, there is no basis for disturbing the learned judge's finding that the notice to quit was valid.

The building – a fixture?

[26] At the trial Ms. Makhoul claimed an entitlement to the buildings on the land. This was analyzed at trial as comprising the original structure and the additional structure put up by Mr. George. As alluded to earlier, the learned judge found that Ms. Makhoul had no interest in the additional structure. At the hearing of the appeal the appellant confined its claim to the original structure ("the Building"). Counsel for the appellant also raised arguments which were not run before the trial judge based on the equitable principle of unjust enrichment or restitution on the basis that the Building which was indisputably said to be owned by Ms. Makhoul was an improvement to Ms. Foster's property if it was to be treated as a fixture which had become in law part of the realty. Counsel argued that the appellant was

[24] Expression used in the case of Paul Housen v Rural Municipality of Shellbrook No. 493 [2002] 2 RCS cited by the respondents.

entitled to the beneficial interest of her value to her improvements to the realty and thus entitled to compensation for the Building.

[27] The respondents point out, quite rightly, that this argument was neither pleaded nor formed any part of the appellant's case below. No claim was made on the basis of unjust enrichment or restitution or that the appellant was entitled to the value of her improvements in the land. As this Court pronounced in **George Knowles v Elaine Knowles**,[25] per Barrow JA: 'it cannot be a satisfactory situation that one case is 'pleaded' and the judgment is pronounced on another case.' It is also trite that it is not permissible to argue on appeal a case which was not placed before the court below save in limited circumstances. One such circumstance is where the issue goes to the court's jurisdiction. That is not the case here. It would be unfair to decide the case on the basis of a case being raised for the first time on appeal.

[28] The appellant argues however, that the learned judge was wrong to find that the original structure was a fixture; that it could not be moved without destruction of the Building. Counsel for the appellant refers to the express agreement that at the end of the term the appellant was required to remove the Building and that at no time prior to the proceedings did Ms. Foster claim the Building. Counsel for the appellant further suggests that the learned judge relied on her own observations and disregarded the evidence of Evan Zachariah[26] in concluding the Building was a fixture. He points to certain answers given by Mr. Zachariah in cross-examination where he was asked:[27]

> "Q: And basically you said it is possible to remove it but not financially practical; …Does that accurately summarize your report?
>
> A: Not really. I also said that the size of the streets were such that you would not be able to move it as one building. It would have to be partially dismantled."

[25] ANUHCVAP2005/0017 (delivered 18th September 2006, unreported).
[26] Mr. Zachariah is a civil engineer and was engaged by the first respondent to inspect and evaluate the feasibility of removing the building.
[27] Transcript of trial proceedings, record of appeal at pp. 254 to 255.

[29] The respondents say that this is a challenge to the learned judge's finding of fact; that the learned judge had visited the locus in quo and had seen the Building and was fully satisfied that the Building was attached to the land.

Discussion

[30] The learned judge began a detailed analysis of the question as to whether the Building had become a fixture beginning at paragraph 40 of her judgment. She considered several authorities[28] which analyzed the matters to be addressed in determining whether a structure was (or was not) a fixture, the decisive factors being (1) the degree of annexation to the land and (2) the object of annexation. She relied extensively on the dicta in **Elitestone Ltd v Morris**. At paragraph 82 of her judgment the learned judge recorded that she had regard to the evidence of Ms. Makhoul as well as the evidence of the witnesses called on behalf of Ms. Foster. She also stated that a visit to the scene proved invaluable. On that basis the learned judge concluded as she did that the 'chattel building has become annexed to the land and cannot be moved.'

[31] Based on all the evidence before the learned judge, as well as her own observations, it was open to the learned judge to conclude that the Building had become a fixture. The criticism that the learned judge seemed to have relied on her own observation from her visit to the locus and not the expert evidence is in this instance also unjustified. The learned judge clearly had regard, as she stated,[29] to all the evidence. She was entitled to rely also on her observations at the locus. In this regard her observations were analogous to the observations made by the trial judge at the locus in **Elitestone**. Further, the evidence of Mr. Zachariah in cross-examination cannot be taken out of context in respect of his own witness summary and as well as his report which the learned judge had before her. In his witness summary it was stated that his findings upon inspection

[28] Elitestone Ltd v Morris [1997] 1 All ER 513; Holland and another v Hodgson and another (1872) LR 7 CP 328; Reid v Smith (1905) 3 CLR 656; Mitchell v Cowie (1964) 7 WIR 118.
[29] At para. 84 of the judgment.

of the building are that any attempt at removal of the building will result in destruction of the building. His more detailed report stated in part as follows:[30]

> "The building is a fairly old one, and its structural members are showing signs of deterioration. Considerable shoring and bracing would therefore have to be carried out before any attempt could be made to lift the structure. Notwithstanding the braces which may be placed, lifting the building would likely result in distortion of the structure and possible collapse of the building if the bracing is inadequate, or if the wall structure are unable to withstand the stresses being subjected thereto. Any distortion of the structure is likely to result in damages to the finishes particularly the ceramic floor tiles and windows."

As was made plain in **Elitestone**, when one is considering a structure such as a house (a building), the answer whether such has become annexed is 'as much a matter of common sense as precise analysis.'[31] Lord Lloyd of Berwick opined at page 519 that

> "a house which is constructed in such a way so as to be removable, whether as a unit or in sections, may well remain a chattel, even though it is connected temporarily to mains services such as water and electricity. But a house which is constructed in such a way that it cannot be removed at all, save by destruction, cannot have been intended to remain as a chattel. It must have been intended to form part of the realty."

[32] In respect of what the parties may have themselves agreed, the pronouncements in **Elitestone** relying on the dictum of Lord Browne-Wilkinson, a decision of House of Lords in **Melluish (Inspector of Taxes) v BMI (No 3) Ltd.**[32] is apposite. He opined at page 473 in **Melluish** as follows:

> "The terms expressly or implicitly agreed between the fixer of the chattel and the owner of the land cannot affect the determination of the question whether, in law, the chattel has become a fixture and therefore in law belongs to the owner of the soil. … The terms of such agreement will regulate the contractual rights to sever from the land as between the parties to that contract and, where an equitable right is conferred by the contract, as against certain third parties. But such agreement cannot prevent the chattel once fixed, becoming in law part of the land and as such owned by the owner of the land so long as it remains fixed."

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[30] Letter from R. Everon Zachariah to Lockhart Mendes & Company, record of appeal, pp. 384 to 386.
[31] At p. 519
[32] [1996] AC 454.

[33] From this statement, what becomes clear is that whereas parties may agree to treat a structure as a chattel, the question is one of law. They cannot by agreement deem a structure a chattel or vice versa, if in law it is not. As stated in **Melluish** and approved in **Elitestone**, the parties' intention:

> "is only relevant to the extent that it can be derived from the degree and the object of annexation. The subjective intention of the parties cannot affect the question whether the chattel has, in law, become part of the freehold, any more than the subjective intention of the parties can prevent what they have called a licence from taking effect as a tenancy, if that is what in law it is."[33]

[34] I am satisfied based on the evidence before the trial judge that she was entitled to conclude, based on the facts as she found, that the Building was annexed to the land and was a fixture. No sufficient reason has been advanced by the appellant warranting this Court disturbing this finding.

The right to remove the Building

[35] The class or category of fixture in which the Building fell to be treated was not addressed by the learned judge. It is common ground that the Building was put up for the purpose of operating a trade – for the operation of a store. It has long been established as an exception to the general rule that a tenant may have a right of severance and removal of a fixture which has been affixed by the tenant for the purpose of trade. In **Webb v Frank Bevis Ltd**[34] a large shed some 135 feet long and 50 feet wide, built on a concrete floor and attached to the floor by iron straps was held to be a fixture forming part of the realty. As revealed in **Webb** the "purpose and object" of the erection of a building is critical in determining the character which it is to assume. In that case Scott LJ opined:[35]

> "To my mind, it is inconceivable that the tenant at will should go to the expense of putting up such a structure unless it was for "the purpose and object," first, of himself using it, and, secondly, of taking it away if he ceased to be tenant."

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[33] Elitestone Ltd v Morris [1997] 1 All ER 513 at p. 519; see also Street v Mountford [1985] AC 809.
[34] [1940] 1 All ER 247.
[35] At p. 251.

The court therefore held that the shed was a tenant's fixture having been erected by the tenant for use in his trade and for this reason could be severed from the land and removed by the tenant at the end of his tenancy. To my mind, this sums up the point quite succinctly.

Notwithstanding that the Building is in law part of the realty, consideration must be given to the question of removability. On this issue, Lord Clyde in **Elitestone** opined at page 522, that this may involve particular consideration of the various relationships between the interested parties which may play a part in the matter of removability such as landlord and tenant and that each case must be decided on its own facts.

[36] This brings me back to a consideration of the contractual relationship between the parties and the observations made by Lord Browne-Wilkinson in **Melluish**. **Mellusih** establishes that whereas parties may not decide what is (or is not) a chattel, their contractual arrangements may determine what can be done with it whatever may be its nature in law. The lease agreement between Ms. Foster as lessor and Ms. Makhoul as lessee, expressly provided at paragraph 4 thereof that Ms. Makhoul was required to remove the Building at the end of the term. It is also not disputed that the Building had been erected for the purpose of carrying on a trade namely the operation of a store. It seems to me then that whereas the building has become a fixture, Ms. Makhoul at the end of the term would have been entitled to sever and remove the Building from the land. However, as stated by Lord Browne–Wilkinson in **Melluish**, whose reasoning I adopt, so long as the building remains on the land it retains its character as a fixture and thus forms part of the realty owned by Ms. Foster.

The Counter-Appeal – the Claim to Damages on the User Principle

[37] The first respondent counter-appealed on the basis that the learned trial judge erred when, although finding that the notice to quit was valid, she failed to find that

damages were due under the 'user principle' as found in **Inverugie Investments Ltd. v Hackett**.[36]

[38] The claim made by the first respondent in the court below was for mesne profits in respect of the continued use and occupation of the land based on the monthly rate of $700.00. This was accepted by the learned trial judge and so ordered. The learned trial judge found at paragraph 80 of her judgment:-

> "During the course of the trial, the Court was advised that all monies that Ms. Makhoul had owed to Ms. Foster have been paid. If that is so, it is not necessary to make any order for mesne profits, saved and except for the month of May."

[39] The greatest difficulty with this counter-appeal is that in the court below there was no pleading by the respondent seeking damages on the 'user principle'. The court's approach on a litigant's failure to plead an aspect of their case has been clearly stated in a number of authorities. One such pronouncement was made in **East Caribbean Flour Mills Limited v Ormiston Ken Boyea**[37] by Barrow JA who, adopting the sentiments of Lord Woolf in **McPhilemy v Times Newspapers Ltd.** opined:[38]

> "The "pleadings should make clear the general nature of the case," in Lord Woolf's words, which again I emphasize. To let the other side know the case it has to meet and, therefore, to prevent surprise at the trial, the pleading must contain the particulars necessary to serve that purpose."

It is trite that the Court will not therefore allow the respondent to add a claim which was not pleaded in the lower court. The first respondent lost the opportunity when she failed to raise this issue on the case as pleaded in the lower court and therefore cannot regain it by raising it for the first time in closing submissions following the trial.

[40] The first respondent submits that the court is duty bound to grant litigants the remedies to which they are entitled so as to avoid a multiplicity of legal

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[36] [1995] 1 WLR 713.
[37] SVGHCVAP2006/0012 (delivered 16th July 2007, unreported).
[38] At para. 43.

proceedings being brought before the court. She seeks to rely on section 20 of the **Eastern Caribbean Supreme Court Act**[39] which states:

> "Determination of matters completely and finally
>
> **20**. The High Court and the Court of Appeal respectively in the exercise of the jurisdiction vested in them by this Act shall in every cause or matter pending before the Court grant either absolutely or on such terms and conditions as the court think just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of these matters avoided."

With the greatest of respect to learned counsel, section 20 of the **Eastern Caribbean Supreme Court Act** does not assist as it does not entitle one to the grant of a remedy which was not claimed. The inherent jurisdiction of the court cannot be exercised to allow a litigant to, as we often phrase it, have "a second bite at the cherry".

[41] In putting forth her argument to this Court, the first respondent has equated herself to that of the plaintiff in **Inverugie Investments Ltd.** and submits that she is entitled to substantial damages having been wrongfully dispossessed of her land since 1st April 2003. It must be noted that in **Inverugie Investments Ltd.** the appellant was a trespasser. It is this factor which makes **Inverugie Investments Ltd.** distinguishable from the case at bar as Ms. Makhoul was not a trespasser in the true sense but rather a tenant holding over.

[42] Another critical factor which must be taken into consideration is that the damages sought is not in relation to use and occupation of the land but rather is based on the use and occupation of the Building which was understood and at all times treated as being owned by the lessee, Ms. Makhoul. To make a further award of damages in respect of the building when mesne profits (compensation for use and occupation) for the land (the subject of the lease), was already awarded against

[39] Cap 143 Laws of Antigua and Barbuda.

Ms. Makhoul, would, to my mind, import an element of double compensation. This is not permissible under the basic principle of *restitutio in integrum.*

[43] The arguments advanced by the respondent have not satisfied the Court that an award should be made for damages under the user principle. I would accordingly dismiss this ground of the counter-appeal.

Costs

[44] All that remains is a consideration of the costs orders. I will take each costs award in turn.

Ms. Foster

[45] The learned trial judge at paragraph 90 made an order for prescribed costs in favour of Ms. Foster, unless otherwise agreed. However, the order did not state the exact amount nor the specific rule under which the costs order was made.

[46] I agree that an award for prescribed costs is in order in this case and I would order prescribed costs to the respondent under CPR 65.5(2)(a). I would value the claim as $50,000.00 and award costs on the prescribed basis on that sum in respect of the proceedings below and 2/3 of that sum on appeal, discounted by 20%, to reflect the degree of success by the appellant in the appeal.

Mr. Lockhart

[47] As I stated above, Mr. Lockhart is entitled to prescribed costs in the lower court resulting from the learned judge's dismissal or striking out of Ms. Makhoul's claim against him. I would therefore order that Mr. Lockhart be awarded prescribed costs on the prescribed basis on valuing the claim at $50,000.00 under CPR 65.5(2)(a). Having found that the order for costs on the counter-claim made by the learned trial judge was done in error, no costs order on appeal is warranted.

Counter-appeal

[48] The counter-appeal having been dismissed, costs are awarded to Ms. Makhoul fixed in the sum of $5,000.00.

Disposition

[49] For the reasons outlined above, the order I propose to make is as follows:

(1) The appeal is allowed in part and only to the extent that I have found that the appellant was entitled to remove the original building erected on the property at the end of the tenancy. Otherwise, the appeal is dismissed.

(2) Having valued the claim at $50,000.00 under CPR 65.5(2)(a), prescribed costs are awarded to the first respondent in the lower court and on appeal 2/3 of that sum, discounted by 20%, to reflect the degree of success by the appellant in the appeal.

(3) The counter-appeal made by the first respondent is dismissed, with costs to the appellant fixed in the sum of $5,000.00.

(4) The appellant to pay Mr. Lockhart prescribed costs in the court below under CPR 65.5(2)(a) in the sum of $ 7,500.00.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Gertel Thom
Justice of Appeal

I concur.

Gerard St. C. Farara, QC
Justice of Appeal [Ag.]