[2022] **JMSC Civ 114**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016 HCV 00007

BETWEEN	**ADS GLOBAL LIMITED**	**CLAIMANT**
AND	**McLEAN HOLDING LIMITED**	**DEFENDANT**

IN OPEN COURT

Mr. Kent Gammon instructed by Kent Gammon & Associates for the Claimant

Mr. Patrick Thompson with Ms. Abigail Lettman instructed by Clark, Robb & Co for the Defendant

Heard: JUNE 20, 21, 23, 2022 and July 8, 2022

Landlord & Tenant – Breach of Agreement for Quiet Enjoyment – Establishing Breach of Quiet Enjoyment - Whether Claimant has shown any facts that show a breach of the Agreement for Quiet Enjoyment.

Contract – Breach of Contract – Whether Claimant has established breach of contract – whether the right of re-entry was properly exercised under the contract.

Pleadings – Failure to Plead Particulars of Breach of Contract or Breach of Covenant for Quiet Enjoyment – Whether Court can make findings of breach of contract or breach of covenant for quiet enjoyment when no allegations of facts of either breach of contract or breach of covenant for quiet enjoyment pleaded.

D. STAPLE J (Ag)

BACKGROUND

[1] There was a foul stench that rose up from an as yet undetermined source on or about the 2nd June 2015. The stench permeated and penetrated the two properties leased by the Claimant company from the Defendant company at Units 21 and 22, Block C3, Fairview II Office Park in the parish of St. James. These leases began on the 14th March and the 14th June 2011 respectively. These units were owned by the Defendant company.

[2] The Claimants contend that the scent was coming from a source external to the buildings. There is no pleading that the source of the scent was found.

[3] For the Claimant, the claim that the scent became so unbearable that the workers at their establishment, which they used as a call centre facility, were badly affected and could not perform as productively and there were frequent absentees. They alleged that the scents came and went periodically throughout 2015. As a result, they claim that they have lost revenue due to both the performance shortfall as well as the absenteeism.

[4] However, during the period, on the 2nd October 2015, the Claimant was served a letter from the Defendant's Attorneys-at-Law demanding outstanding rent and maintenance payments due from the Claimant.

[5] The Claimant has now sued the Defendant for Damages for Breach of Contract as well as for loss caused by substantial interference with the Claimant's use and enjoyment of the property. They claimed interest at 12% (no reason for this figure was pleaded) and costs.

[6] The Defendants denied liability for any of the losses claimed by the Claimant. They contend that the property managers went and investigated the two units and could see nothing out of the ordinary or anything for which they (the Defendants) would be responsible. Their claim is that the Claimant owed them monies for rent and outstanding maintenance which had not been paid. To this end, the Defendant

took out an Ancillary Claim against the Claimant for outstanding rent and maintenance and service charges due to them under the lease agreement.

[7] There was an Order by Bertram-Linton J (Ag) on the 14th April 2016 that the Defendant was restrained from taking any step to re-enter or re-take possession of the units and that the injunction was granted on terms that included the payment by the Claimant of all outstanding rent and maintenance fees due and owing to the Defendant up to that point.

[8] The Order of Bertram-Linton J(Ag) also expressly left in place the ability of the Defendant to establish that the lease agreement had been lawfully terminated as well as making it clear that there was no monthly tenancy created and that the Order she made should not be interpreted as creating or contemplating or declaring that the lease agreement has or has not been terminated lawfully.

[9] The Claimant must therefore satisfy the Court that the Defendants have breached the agreement and that the Defendant has substantially interfered with the use and enjoyment of the properties by the Claimant. They must satisfy the Court on the balance of probabilities.

FACTS

[10] The Claimant and the Defendant entered into two lease agreements for two units owned by the Defendant as stated above. The leases for the two units are exactly the same except for the unit numbers. The units were leased to house the Claimant's call centre operations. There is no pleading that the Defendants knew that this was the purpose for the lease.

[11] The units contained specific covenants for tenants and covenants for the landlords. Among the covenants was 5A which reads as follows:

"Quiet Enjoyment That the Tenant paying the rent, the Service and Maintenance Charge and outgoings hereby reserved and observing and performing the covenants and conditions and agreements on its part herein contained shall quietly enjoy the Leased

Premises during the Term without any interruption by the Landlord or persons lawfully claiming under the Landlord." (underline and bold as in original)

[12] The Defendant undertook to hire a reputable company to deal with the maintenance of the premises and to that end hired the former 2nd Defendant the Claimant against whom was struck out by Sykes J.

[13] The leases for the two units started in 2011. The Claimant contends that on the 2nd June 2015, what they contend was an unreasonable smell began emanating from **a source external to the subject premises** (emphasis mine) that substantially interfered with the Claimant's use of the property in breach of Clause 5A.

[14] Now, there is no pleading of any facts at all that leads to this position. The Claimant has not averred in their pleading any act or omission on the part of the Defendant that would have caused or contributed to the alleged scent emerging or the alleged continuation of the alleged scent. The Court is therefore unable to say on what basis the Claimant asserted that the Defendant has breached the covenant 5A.

[15] The Claimant has pleaded no particulars of breach of contract despite pleading breach of contract. So this Court cannot say exactly how the contract was breached, if at all.

[16] In their evidence, two workers gave testimony about the terrible nature of the smell. They were Neil Chisholm and Diedre Rose. Ms. Rose did not testify and Mr. Chisholm did not give any evidence as to the source of the odour.

[17] The Court does accept, as it was not disputed by the Defendant, that there was a terrible odour detected in the units. There was also no denying the evidence of Mr. Chisholm that the scent had a serious impact on the workers and the clients of the Claimant. The Court accepts these assertions and find that they are established on a balance of probabilities.

[18] Concerning the evidence of Mr. McKay, paragraph 9 of his witness statement presented an issue. The second sentence is hearsay and was struck out. Firstly, we do not know who was in attendance from this entity known as the Environmental Health Foundation. There is no evidence that the Defendant was invited to participate in this inspection. There is no evidence from anyone that can speak to this inspection and there is no evidence from Mr. McKay that he was in attendance on the 13th October 2015 when this inspection was carried out. The Claimant is clearly relying on the statement as proof of the truth of it's content. Hence, any assertion as to the observation made must be hearsay and inadmissible. In any event this factual assertion **was not pleaded** (emphasis mine) and so the Claimant cannot raise it now for the first time in evidence[1].

[19] Interestingly, the Claimant did not deny that they had not paid the Claimant the rent and maintenance and service charges for the two units. They contended, through Mr. McKay, that the money was being kept *in escrow* (emphasis mine) as the Defendant, "…was not taking the problem that was being experienced at the leased premises seriously.[2]"

[20] As to the monies being claimed by the Claimant, there is no evidence of who prepared the document containing the figures outlining the Claimant's claim for the losses occasioned by the alleged breach of the covenant for quiet enjoyment. Therefore, this statement is not admissible. Mr. Gammon in his written submissions at paragraph 9 prayed in aid CPR Rule 29 which he claimed said that unless the list of documents is challenged when it is put in, it is deemed admitted. Firstly, Rule 29 concerns witness statements and not the List of Documents and so this is an incorrect reference.

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[1] See rule 8.9A **Civil Procedure Rules 2002** (As Amended)

[2] Paragraph 8, Witness Statement of Ronald McKay filed June 29, 2018.

[21] The rule to which Mr. Gammon might (I emphasise might as I cannot go into Mr. Gammon's mind) be referencing is Rule 28.19 which says that a party is deemed to **admit the authenticity** (emphasis mine) of a document disclosed under part 28 unless the party files a notice to prove document. This has nothing to do with the admissibility of the document into evidence. It concerns whether the document is an authentic document. A document may be authentic but inadmissible.

[22] The Court cannot verify the basis upon which the figures in the document were arrived or derived. The expertise of the person who created these figures was not established in any way and so the Court cannot place any reliance on them as being of any evidential value. It is trite that losses must be proven and losses of this nature should be proven by properly established experts in the field. In this case, we do not even know who prepared the documents, let alone their expertise in establishing such financial losses. The document is therefore rejected as being of no evidential value.

[23] So what we have from the Claimant is no facts pleaded as to the nature of the breach of contract and no evidence that the Defendant has breached their contract with the Claimant.

[24] There is no pleading or evidence from the Claimant as to how it is that the Defendant has breached the covenant for quiet enjoyment in 5A of the lease agreements for the two units. There is no report or evidence from the inspection carried out on the 13th October 2015 which the Court can lawfully accept.

[25] The Defendant, for their part, says that the Claimant owed them rent and maintenance and service charges for both units. They also insisted that having received complaints from the Claimant about the scent, they requested that the former 2nd Defendant carry out an investigation of the Units to determine if there was such a scent and to find out the possible source. According to the evidence from Mr. Dwayne Barnett, an Estate Officer employed to La Maison Property Services Limited, he visited the units on the 26th July 2015 and detected an odour.

They checked the manholes and interior of the premises and detected no sewage back up.

[26] Mr. Barnett again visited the units on the 25th September 2015. This time he was present along with Mr. Desmond Wignall, the facilities manager for the Claimant as well as a Mr. O'Neil Brown, a Public Health Inspector from the St. James Health Department.

[27] According to Mr. Barnett, the investigation revealed that the odour and smell of sewage was the result of internal defects and that the issue should have been addressed by the Claimant as La Maison was only responsible for the maintenance of communal facilities and areas. The findings were related to issues having to do with the toilets, carpets and extractor vents.

[28] He further testified that during a follow up inspection, which date was not stated, none of the recommendations made were done and the Claimant continued to maintain that the source of the odour was an external source. Curiously, Mr. Gammon did not make any challenge to any of these assertions by way of suggestions to Mr. Barnett.

[29] In their Ancillary Particulars of Claim, the Defendants counterclaimed against the Claimant for total rent for the two units of US$33,000.00 and total maintenance and service charges of J$1,799,488.98 as well as interest.

[30] By Order of Bertram-Linton J (Ag), the Claimant would have paid up all the outstanding maintenance and service charges as well as the rental due to the Defendant from the Claimant as at the date of the Order. There is no evidence from the Defendant that any further monies are due and owing to them from the Claimant. So all that remains is the question of whether or not the lease was lawfully terminated.

[31] However, it appears as though the Claimant has vacated the units and so this does not appear to be a factual issue any longer.

ISSUES

[32] The Court has determined that these are the issues for determination:

(i) Has the Claimant established that the Defendant breached the contract? Were the leases for Units 1 and 2 properly terminated by the Defendant?

(ii) Have the Claimant's established that the Defendants have done or failed to do anything that resulted in a breach of the covenant for quiet enjoyment as set out in Clause 5A of the Leases?

(iii) If the answer to (ii) above is yes, have the Claimant's proven their losses?

[33] Before I go into the above issues, Mr. Gammon raised a point for the first time in his submissions concerning the pleadings of the Defendant in their defence and ancillary Claim. He asserts that the pleadings were not signed by the Defendant's director nor sealed with the company seal and so neither are valid.

[34] It is true that the documents were not signed by the Defendant's director, but by counsel. This is perfectly permissible under CPR Rule 3.12(3). The certificates, I find, are compliant with rules 3.12(3) and 3.12(4). In the circumstances therefore, there would not be the need for the company seal as the certificate is being given by the party's Attorney-at-Law. So this point regarding the Defendants' statements of case is not made out.

Has the Claimant Established that the Defendant Breached the Contract? Were the Leases Properly Terminated?

[35] There are no express particulars of breach of contract pleaded in the Claimant's Particulars of Claim despite the efforts by Mr. Gammon to argue otherwise. He sought to argue that the breaches could be implied from the pleadings, but the Court was left to guess at what these might be. This is an unfortunate state of

affairs. Mr. Gammon pointed to paragraphs 14 and 15 of the Particulars of Claim as containing the elements of the breach of contract.

[36] Paragraph 14 says, "On the 10th day of December 2015 the Claimant was served a Notice to Quit stating that the Claimant is to quit, vacate and deliver up possession of the subject premises on or before the 13th January 2016." There is nothing in that statement which suggests a breach of contract as there is no averment that the issuing of the notice was unlawful or otherwise in breach of the contract.

[37] Paragraph 15 merely points to a statement of an opinion by the Claimant. This does not assist the Claimant.

[38] The Court finds that the leases were properly terminated. There is no evidence from the Claimant that the Defendant had received the rent and maintenance payments as due under the lease prior to the notice to quit being served. Accordingly, I find that the Defendant would have the right and did properly exercise the right to demand the rent and outstanding payments due and then to terminate the lease.

[39] The Lease Agreements mandate that rental and service and maintenance charges were payable by the Claimant. Clause 2(a) and item 3, Schedule 2 together speak to the rental to be paid, when it is to be paid and how it is to be paid. The Clauses are set out in full below:

2(a) The rent in the amount set forth at Item 3 of the Second Schedule hereto (hereinafter referred to as "the Rent" (bold as in original), payable in United States Dollars only (such rent to be payable monthly in advance on the first day (excluding Saturdays, Sundays and public holidays in Jamaica) of each calendar month during the Term. Such Payments shall be made to such payee as the Landlord may in writing notify the tenant;

Item 3, Second Schedule – No rent shall be payable during the Rent Moratorium Period. Rent shall initially be fixed at US$30,000.00 per annum and be payable in equal monthly instalments [sic] of US$2,500.00 monthly in advance, payable in United States Dollars on the 1st day of each month.

[40] Clauses 2(b) and 3A as well as Item 4, Schedule 2 speak to the Maintenance and Service Charge. It is also defined in the Definition of Terms under Clause 1 under 1(iii) and (iv). These are set out below.

Clause 1(iii) "The service and maintenance Charge" shall be the bona fide estimate of the Expenses incurred by the Management Company in the provision of the services in the Third Schedule hereto prior to the commencement of each calendar year and thereafter from time to time during such year as often as the Management Company may determine and shall be the sum obtained by dividing the Expenses by the square footage of total rentable space in Fairview II Office Park as set forth at the Second Schedule (or as same may be varied from time to time) and multiplying the amount so obtained by the square footage of the leases premises as set forth in the First Schedule. The certificate of the Management Company's auditors that the Monthly Service and Maintenance Charge has been computed in accordance with this Lease and is correct shall be binding upon the parties.

Clause 1(iv) "The monthly Service and Maintenance Charge" means such monthly amount for the services provided in the Third Schedule hereto as in the opinion of the Management Company fairly represents one-twelfth of the service and maintenance charge for the current accounting year as hereinafter mentioned.

Clause 2(b) The Monthly Service and Maintenance Charge payable in Jamaican Dollars only as described in Clause 1(iv) hereof in the amount set forth at Item 4 of the Second Schedule hereto (such Monthly Service and Maintenance Charge to be payable monthly in advance on the first day (excluding, Saturdays, Sundays and public holidays in Jamaica) of each calendar month during the Term. Such payments shall be made to such payee as the Landlord may in writing notify the Tenant.

Clause 3A Monthly Service and Maintenance Charge ***(underline and bold as in original)***

The Tenant shall upon each day fixed for the payment of the Rent pay to the Landlord or the Management Company the Monthly Service and Maintenance Charge payable in Jamaican Dollars only, it being understood and agreed that as soon after the end of that Accounting Year as the Expenses for the said Accounting Year is determined, the Management Company shall be entitled to increase or decrease the amount by which the Expenses for the preceding Accounting Year of the Term exceeded or was less than the Service and Maintenance Charge during that Year. As soon as practicable after the end of each Accounting Year the Landlord shall furnish to the Tenant an audited account of the expenses and the Service and Maintenance Charge payable for that Accounting Year which shall have been prepared by the Management Company and if in any Accounting Year the amount of the Service and Maintenance Charge is found to be less than the sum of the Monthly Service and Maintenance Charge payments made by the Tenant in respect of that Accounting Year the excess shall be refunded by the Landlord or the Management

Company as the case may be to the tenant and if the amount of the Service and Maintenance Charge is found to be greater than the sum of the Monthly Service and Maintenance Charge payments paid by the Tenant in respect of that Accounting Year such excess sum shall be paid by the Tenant on the next date in which the Monthly Service and Maintenance Charge is payable following notification of the account of the Expenses and Service and Maintenance Charge to the Tenant and in the event of any special cess same shall be paid by the Tenant at the time and in the manner prescribed by the Landlord.

Schedule 2, Item 4 – The Monthly Service and Maintenance Charge: (Underline as in original) The monthly maintenance shall be NET payable by the Tenant on a proportionate basis based on the Operating Budget for the Shopping Centre. This amount is payable monthly in advance. This amount shall be payable in Jamaican Dollars. It is understood and agreed that this amount shall be adjusted based on the maintenance budget, as per the provisions of this lease hereunder.

[41] Clause 4A establishes the covenant of the Tenant to pay the rent and service and maintenance charges. It is also set out below.

To Pay Rent and Service and Maintenance Charges (underline and bold as in original).

> *"To pay the Landlord the Rent in United States Dollars or in Jamaican dollars (converted at the Bank of Jamaica weighted average selling rate of exchange for United States Currency prevailing on the date of payment), together with the increases as hereinafter provided and the Service and Maintenance Charge payable in Jamaican Dollars hereinbefore reserved regularly and promptly and as and when due together with the General Consumption Tax payable thereon at the prevailing rate at the time the Rent and Service and Maintenance Charge are payable hereunder and to pay interest to the Landlord at 10 percent (10%) interest per annum on the due date and charged on any part of such Rent and Service and Maintenance Charge (both before and after any Judgment) accruing as from the due date and charged on any part of such Rent and Service and Maintenance Charge as remains due and unpaid."*

[42] The Court finds that the Claimant has not challenged the assertion of the Defendant/Ancillary Claimant that the rent and service charges were not paid as and when due. It was not until ordered so to do by both Sykes J (as he then was)

and then Bertram-Linton J (Ag) (as she then was) that the payments for both sets of monies were paid over to the Defendant. This was not until April of 2016, well past the due dates.

[43] The Court accepts the evidence from the Defendant that they had sent a letter to the Claimant demanding the outstanding rental. This was not denied by the Claimant. They agreed they received this letter in October of 2015.

[44] The right to terminate the lease is found under clause 6D. In particular, the termination for non-payment of rent or other monies due under the Lease Agreement is found under Clause 6D(a)(ii).

[45] There is no evidence that the Claimant had been compliant with its payment obligations. Therefore, the Defendant would have the right to issue a notice of termination. There is no pleading that the notice to quit served on the Claimant on the 10th December 2015, which the Claimant said they received, to expire on the 13th January 2016, was invalid or otherwise inoperative.

[46] Clause 6D(c) of the Lease gives the Defendant the right to re-enter the premises in the event the Claimant failed to vacate the premises on service of the termination notice. There is no pleading that the Defendant wrongly exercised its right of re-entry under the Lease Agreement or that they were otherwise not lawfully entitled to re-enter the property.

[47] As a consequence, the Court is unable to say on what basis the Claimant is claiming breach of contract. If they are saying that the lease was wrongly terminated and the right of re-entry wrongly exercised, then I do not find that this has been established on the evidence. Mr. Gammon in paragraph 12 of the submissions alluded to the evidence of the chaining of the door by the Claimant. Now, this fact was never pleaded and so cannot be relied upon. But let us assume it was. There is no evidence that it was even unlawful in any way. As stated, there is no averment or evidence that the exercise of the right of re-entry was done unlawfully or in breach of the Agreement.

[48] Further, we have no clear evidence as to how long the door was locked. But it was unlocked the same day. Again, the Claimant has not properly established its loss from this action so I could not find any loss as established even if I had accepted that the act of locking the door was unlawful.

[49] So I find that this claim for breach of contract was not established and must fail.

Have the Claimant's established that the Defendants have done or failed to do anything that resulted in a breach of the covenant for quiet enjoyment as set out in Clause 5A of the Leases?

The Law on the Breach of Covenant for Quiet Enjoyment

[50] The covenant for quiet enjoyment is as old as the estate of the leasehold. The covenant can be either absolute or qualified. In the case before the Court, it is a qualified covenant. However, the effect is still the same[3].

[51] The covenant extends to all acts or omissions of the lessor whether they are lawful or not. In the case of the omission, it is normally actionable in circumstances where the omission involves a breach of duty on the part of the landlord. But in such a case, the omission must be of such a character as would itself amount to an unlawful act on the part of the landlord.

[52] Persons claiming through the lessor or acting under the authority of the lessor can also breach the covenant. But these actions on the part of this category of persons

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[3] See Hill & Redman's Law of Landlord & Tenant (Lexis Nexis edition accessed 17 June 2022), Chapter 9 paragraph 2949. If it is qualified it is none the less a covenant that the lessee shall peaceably hold and enjoy the demised premises without interruption by the lessor or persons claiming through or under him during the term which is granted. The parties may frame an express covenant as they wish, but the form of the qualified covenant commonly adopted provides for quiet enjoyment 'without lawful interruption by the lessor or by persons rightfully claiming from under or in trust for him'. The covenant frequently also provides that the lessee, paying the rent and performing the covenants, shall quietly hold and enjoy the demised premises; but these words have been held not to make the payment of rent a condition precedent to the performance of the covenant (*Edge v Boileau (1885) 16 QBD 117*).

must be acts that they can lawfully do. Otherwise, the lessee would have an action against that person in tort or other civil remedy.

[53] So it is clear therefore that there must be some factual basis for saying that the covenant has been breached. There must be an act or omission of the landlord, or some lawful act by a person claiming through or under the landlord that causes the breach. It is not enough to assert the breach, the acts or omissions leading to the breach must be clearly set out.

[54] An important decision in this area comes from the landmark case of ***Southwark London Borough Council v Mills and others; Baxter v Camden London Borough Council[4].*** This was a decision from the House of Lords emanating from two cases concerning essentially the same issue – whether or not the Landlord Councils (The Respondents) could be held to be in breach of the covenant for quiet enjoyment where one set of tenants (the Appellants) were claiming that they were being disturbed by noise from the ordinary living of their neighbouring tenants. As it turned out, the construction of the council homes was done with material that did not have any sound proofing between the units resulting in there being an unreasonable amount of noise being experienced by the tenants.

[55] The two cases were eventually consolidated before the House of Lords and their Lordships ruled that the Councils could not be held liable for breach of the covenant for quiet enjoyment following a comprehensive review of the principles and authorities on the subject.

[56] Concerning the issue relating to breach of the covenant for quiet enjoyment, the holding of the case said as follows[5]:

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[4] [1999] 4 All ER 449.

[5] Id at pages 449-450

> *"Although a breach of the covenant for quiet enjoyment required a substantial interference with the tenant's lawful possession of the land, that interference need not be direct or physical, and a regular excessive noise could constitute such substantial interference. However, the covenant for quiet enjoyment was prospective in nature, and did not apply to things done before the grant of the tenancy, even though they might have continuing consequences for the tenant. Moreover, a tenant took the demised property not only in the physical condition in which he found it, but also subject to the uses which the parties contemplated would be made of the parts retained by the landlord. In the instant cases, the appellants must reasonably have contemplated that there would be other tenants living normally in neighbouring flats, and they were complaining solely about a structural defect which was present when they took their tenancies and for which the landlord assumed no responsibility, namely the lack of soundproofing. Accordingly, the landlords had not breached the covenant for quiet enjoyment, and the appeals would therefore be dismissed."*

[57] What the case emphasises is that tenants really take the premises as they find them. Even if there is a substantial interference with the use and enjoyment of a premises, the landlord can only be held liable for breach of the covenant where the acts or omissions of himself or persons claiming through him or under his authority are substantial. According to Lord Hoffman in the *Southwark London Borough Council* case, it is always a question of **fact and degree** (emphasis mine) in determining whether there was a breach of the covenant[6].

[58] There is also the principle that the law does not imply a warranty from a landlord that the premises are fit for the purpose for which they are let. Such a warranty must be expressly stated.

[59] In the case of ***Edler v Auerbach***[7] Devlin J said:

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[6] N4 at page 455.

[7] [1949] 2 All ER 692 at 699, [1950] 1 KB 359 at 374

> *'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 wants to use them, whether such fitness depends on the state of their structure or the state of the law or on any other relevant circumstances.'*

[60] The question of the breach of the covenant is highly fact sensitive. If the facts giving rise to the breach are not set out plainly and established from the evidence, then the claim cannot be sustained.

Were the Acts or Omissions Set Out? Who Did them?

[61] I find on a balance of probabilities that there is no evidence from the Claimant as to how the Defendant breached Clause 5A of the Lease. In the circumstances therefore, this claim must also fail.

[62] One of the biggest hurdles the Claimant faces is that the source and cause of the smell has yet to be identified in its pleadings. What further complicates this issue is that the evidence is, I find, in parts at variance with the pleaded case. The pleaded case was that the smell was from a source external to the building. This was the testimony of Mr. McKay. Quite frankly, this could mean anything. And that is where the problem lies. It does not point to the Defendant or anyone claiming through or under the Defendant as lessor as being the cause of the initial problem or its continuation.

[63] Contrast with the evidence of the Claimant's second witness, Mr. Chisholm who said that the scent was from inside the building. This inconsistency was not resolved at the end of the case for the Claimant. There is no evidence from the Claimant that the internal source was identified.

[64] Mr. McKay in his evidence under cross-examination said that they checked internal sources such as the carpets, toilets and found nothing. Indeed, this was an exchange between himself and Mr. Thompson:

Sugg: This foul odour of which you spoke, you personally knew that the odour came from within ADS Global? I disagree then and I disagree now.

[65] From a pleading point of view, the Claimant has not set out any factual averment of exactly how the Defendant itself has breached Clause 5A. Mr. Gammon argued that the averments could be found in the Claim Form under clauses (i) and (ii). These clauses merely identify the cause of action and relief claimed. They did not set out the factual basis for the claims.

[66] Mr. Gammon sought to point the Court to paragraphs 6, 13, 14, 15, 16, and 18 of the Particulars of Claim as being the paragraphs that highlighted the factual bases for the claim for breach of Clause 5A. With respect to Mr. Gammon, I am unable to agree with him. Those paragraphs do not set out in any way, whether expressly or implicitly, the thing(s) that the Claimant said the Defendant did or failed to do to give rise to the smell or its persistence which would be a breach of clause 5A.

[67] It was for the Claimant to set out in its pleadings, the factual bases upon which he mounts its claim so that the Defendant could reply. Mr. Gammon sought to argue that it could be implied that the Defendant was told of the smell and did nothing. However, such a factual averment cannot be left to implication. It must be set out, if not precisely, sufficiently to allow the Defendant to know what are the facts they are to meet. There is nothing in the pleadings that said that the Defendant knew of the smell and did nothing to resolve same.

[68] In any event, the Defendant did have the place inspected by the property managers and this inspection involved the Claimant's own facilities manager as well as persons from the St. James Health Department and a Public Health Inspector O'Neil Brown. I accept this evidence and I so find. It was not contradicted by the Claimant. I find that this inspection took place after the complaint from the Claimant. So I reject as false that the Defendant knew about the complaint and did nothing. I am satisfied that they did all they could do at the time; have the place inspected to determine the source of the smell.

[69] I find that there is nothing in the evidence to say that the smell or its source was something about which the Defendant could have done something, but did not do same or that the smell was somehow the fault of the Defendant or a person claiming through them or under their authority.

[70] I do not accept the evidence from Mr. McKay. I find as established that the odour came from inside of the units. I preferred the evidence of the Defendant's witness Mr. Barnett on this point. He actually carried out an investigation and he identified the sources. His evidence in this regard was not challenged. These sources, I found were not due to any fault on the part of the Defendant or its agents. There was evidence from him, which I accept and so find, that there was no sewage back up seen in the communal area of the property either.

[71] The unchallenged evidence of Mr. Barnett was that there was a follow up visit done and the Claimant had not implemented the recommendations. I find that this was the case.

[72] In those circumstances therefore, the Claim for breach of Clause 5A must fail as being not substantiated in the pleadings or evidence.

CONCLUSION

[73] The Claimant has not satisfied me on the balance of probabilities that the lease agreements were breached in any way. There was no evidence of any breach of the covenant for quiet enjoyment by the Defendant. To date the Court is uncertain of what those actions or omissions were.

[74] The Claimant has also not satisfied me, on the balance of probabilities that the Defendant has otherwise breached their contract with the Claimant.

[75] As such, there should be judgment for the Defendant on the Claim with costs to the Defendant on the Claim. The Defendant has abandoned the Ancillary Claim.

DISPOSITION

[76] Judgment for the Defendant on the Claim;

[77] Costs to the Defendant on the Claim to be taxed if not agreed.

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Dale Staple
Puisne Judge (Ag)