[2015]JMSC Civ. 260

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010 HCV 00041

BETWEEN	**IAN LUNAN**	**CLAIMANT**
AND	**ROHAN SUDINE**	**DEFENDANT**

Michael G. Howell, instructed by Knight, Junor and Samuels, for the Claimant

Kent Gammon instructed by Kent Gammon and Company for the Defendant

Heard: June 19 and 21, 2013, and October 23, 2015

TENANCY AGREEMENT – PERIODIC TENANCY – NOTICE TO QUIT – RE – ENTRY BY LANDLORD ONTO LEASED PREMISES – FAILURE OF TENANT TO END OCCUPATION OF LEASED PREMISES – CLAIM FOR DAMAGES FOR BREACH OF CONTRACT AND DAMAGES FOR LOST OPPORTUNITY – WHETHER THERE WAS A BREACH OF CONTRACT BY THE PARTIES – FAILURE BY CLAIMANT TO COMPLY WITH TERMS OF LEASE – FAILURE BY DEFENDANT TO COMPLY WITH TERMS OF LEASE – PROOF OF SPECIAL DAMAGES

ANDERSON, K. J

[1] This matter concerns a claim for breach of contract and loss of an opportunity and a counterclaim for damage to and loss of, equipment, in the context of a lease agreement which was entered into, between the parties. The lease in question, dated October 31, 2013, should have and could have been much more particular as to the terms agreed between the claimant and the defendant, so as to clearly state the parties' intentions. Furthermore, special arrangements had

been made for the renovation of the leased premises and this was not mentioned in the lease. In addition, the parties should have reduced a subsequent lease which they had entered into writing, having regard to the fact that the premises leased was a commercial premises leased with fixtures.

[2] During the course of the trial, both parties, in support of their respective cases, gave evidence through their witness statements, which stood as their examination-in-chief and through viva voce evidence adduced primarily upon cross-examination. The defendant's witness statement was amplified, where necessary. Only the claimant and the defendant testified respectively, in support of their statements of case.

The Background

[3] This matter came before the court by claim form and particulars of claim both filed January 8, 2010. The acknowledgment of service of claim form filed January 14, 2010 disclosed that service was effected on the defendant on January 13, 2010. A defence and counterclaim was filed by the defendant on February 26, 2010. There was an order of this court, which was made at pre-trial review, permitting the defendant to rely on an amended defence and counterclaim, which was to have been filed and served by or before April 11, 2013. Same was so filed and served.

[4] The following remedies are being sought by the claimant:

1) *Damages for breach of contract;*

2) *Damages for lost opportunity;*

3) *Interest at the commercial rate or pursuant to the Law Reform (Miscellaneous Provisions) Act or at such rate as this Honourable Court shall think fit;*

4) *Costs;*

5) *Attorneys costs;*

6) *Any other such order as the court sees fit.*

[5] The particulars of claim indicate as follows: The claimant and the defendant entered into a three (3) year agreement for the lease of part of 41 Dunrobin Avenue, Kingston 10 (hereinafter described 'as the premises'). The date of commencement of the lease was October 31, 2003 for a section of a building at the front of the premises and a machine shop, together with certain equipment and machinery therein, for the purpose of conducting business. Prior to the lease agreement (which is hereinafter referred to as 'the 2003 agreement') there was a fire at the premises, which became the subject of the lease, and the premises had not been fully repaired. It was therefore agreed between the parties that the claimant - being the tenant, would renovate the front section of the premises and that the defendant being the landlord, would compensate the claimant for those renovations by monthly deductions of fifteen thousand dollars ($15,000.00) from the sum due for rent. The claimant contends that he was to receive additional space and to date the defendant has not provided to the claimant, the additional space that was promised.

[6] The defendant, by means of his defence and counterclaim, has claimed compensation for damage to and loss of equipment and material in the sum of $578,000.00 along with interest at 20% of the sum claimed. The defendant put forth in his defence that there was a written agreement subsequent to the 2003 lease and that additional space was afforded to the claimant for no further rent. On September 22, 2009, the claimant served the defendant with a notice to quit the premises.

[7] In the defendant's statement of case, it was alleged that the defendant took out a civil suit against the claimant, in an effort to remove the claimant from the additional space behind the workshop and to recover monies owing in early 2008. No allegation was made in the defendant's statement of case, as to what the outcome of that civil suit was and also, there was no allegation as to any

criminal complaint having been made by the defendant against the claimant in respect of any matter pertaining to the lease and/or usage of the relevant premises, by the claimant.

[8] The claimant filed neither a reply, nor a defence to counter-claim. What this court has done though, is to treat with the claimant's particulars of claim, as though it is the equivalent of the claimant's defence to counter-claim. If this court had done otherwise, it would have had to have required the defendant to seek, through the registrar, entry of default judgment, against the claimant, in respect of the ancillary claim. Even if that were to be granted, in the defendant's favour, it could thereafter have been set aside, based on the claimant's allegations as set out in the claimant's particulars of claim, since essentially, those allegations could not, to my mind, properly be deemed by a court as having no realistic prospect of success, in response to the defendant's counter-claim. The days of this court being more concerned with form than substance, are over, as also, are this court's engaging in permitting its proceedings to be used in a manner which wastes either time or costs, much less, both time and costs.

[9] What this court has found itself wholly unable to do though, is to treat in any way whatsoever, with the allegation in the defendant's statement of case, that a civil suit was instituted by the defendant against the claimant, in the magistrate's court, in an effort to remove the claimant from an additional space behind the workshop and to recover monies allegedly then owed by the claimant, to the defendant – that being in early 2008. Equally, this court has also been unable to treat with the evidence given at trial, of the claimant having been convicted in the magistrate's court, of the criminal offence of malicious destruction of property. That evidence was given at trial, by the defendant.

[10] The former allegation takes this matter no further, as far as rendering of judgment is concerned, because the mere filing of a civil suit in court, as the defendant has alleged that he did, cannot enable this court to conclude, one way or the other, that said suit was justifiably pursued, or successfully pursued.

Parties must set out their statement of case with sufficient detail and clarity, so as to properly enable an opposing party to know the case which he has to meet. See **rules 8.9, 8.9A, 10.5 and 10.7**, of the Civil Procedure Rules (CPR), in that regard.

[11] Those rules of court, referred to immediately above, considered collectively, require the parties to set out in their claim, particulars of claim, or defence (as the case may be) a statement of all the facts being relied on and expressly preclude a party from relying on any allegation or factual argument which is not so set out, but which could have been set out there, unless the court gives permission. No such permission was ever sought by the defendant and thus, none such was ever granted. In the circumstances, this court has paid no attention to the evidence of the claimant having been criminally convicted in the magistrate's court, for the purpose of rendering its judgment herein, other than to the very limited extent as has been referred to in paras. 9 -11 hereof.

[12] The parties agreed a bundle of documents as set out below and accordingly, all of these documents were entered as exhibits:

a) Letter from defendant to the claimant, dated October 2, 2005;

b) Letter from defendant to the claimant, dated July 31, 2006;

c) Letter from defendant to the claimant, dated October 31, 2008;

d) Letter from defendant to the claimant dated June 24, 2009;

e) Notice to Quit dated September 22, 2009 and served on the claimant;

f) Lease dated October 31, 2003, between the defendant and the claimant;

g) Letter from claimant to the defendant, dated July 1, 2009;

h) Letter from defendant to the claimant, dated July 7, 2009;

i) Machinery, equipment and accessories listing owned by the defendant and rented by the claimant;

j) Photographs of the state of the extended office and of work being done on the building in 2003; and

k) Expert report from quantity surveyor prepared by Ryon Edwards dated June 18, 2013.

[13] Essential to the issues in this case, is the credibility of the parties. The court is not obliged to accept all of the evidence of any witness, or of any part thereof, but has the discretion to accept a part of the evidence if it deems same to be credible. The court does not wholly accept the evidence of either the claimant or the defendant. This court accepts however, that parts of their evidence are credible and truthful.

[14] The ordinary civil standard of proof is on a balance of probabilities and the claimant has the burden of proof, to prove his claim, while the defendant has the burden of proof, to prove what he claims, by means of his counterclaim.

[15] For his part though, in his amended defence and counter-claim, the defendant asserted that the claimant was initially informed that, in respect of the eight (8) parking spaces which were available at the front of the building in which the leased premises was located, those spaces were to be shared by all of the offices on the premises (para. 3b). He has also asserted that in October, 2003, 'three (3) of the (4) four parking spaces' were being used by the claimant and/or the claimant's customers and/or the claimant's employees (para. 3b). According to the claimant, there was road expansion undertaken by the National Works Agency along the road that runs in front of the premises, in late 2008, which resulted in a reduction of parking spaces at the front of the building in which the leased premises was located. Prior to the road expansion, the defendant alleges that he informed the claimant that the remaining three (3) parking spaces (including two (2) spaces under the garage shed, that would be left at the front of

the building), were for the claimant's use and that the claimant could use two (2) of the newly created parking spaces at the side of the building as a temporary parking area totalling five (5) parking spaces (para. 3c).

Parking Spaces

[16] The claimant filed no reply or defence to the defendant's defence and counter-claim respectively. Accordingly, all that this court has been left with, as far as the parties' respective statements of case are concerned, are their respective allegations as set out above.

[17] As things evolved at trial though, on the issue of the parking spaces, the claimant gave no evidence whatsoever, as regards same. On the other hand, the defendant did give such evidence. Whilst the claimant's failure to provide any evidence at trial, as regards this particular issue, does not at all, oblige this court to accept the evidence which the defendant provided at trial, as regards same, this court has nonetheless, accepted as being credible and true, the defendant's version of events, on this particular issue.

[18] In any event though, the claimant never contended in his particulars of claim, that the defendant failed to provide for his use, the four (4) parking spaces which he has alleged, was part and parcel of the 2003 lease agreement, or that the defendant breached said agreement, by failing to provide sufficient access to parking spaces.

[19] The claimant would have been entitled to such access by virtue of the covenant of 'quiet enjoyment' which is contained in that agreement, since that covenant entitles the tenant to be able to, without undue interference or restriction by the landlord, use and enjoy the leased premises with reasonable comfort and convenience. That covenant does not only, as it is sometime thought, protect the tenant against physical interference with the leased premises, during the term of the lease. That used to be the legal understanding of the term – 'quiet enjoyment' (See: **Browne v Flower** – [1911] 1 Ch 219, at 228, per Parker J).

That is though, no longer the legal understanding of same. The covenant of quiet enjoyment is now regarded by courts, as being much wider in scope. See: **McCall v Abelesz** – [1976] 1 ALL ER 727.

[20] The claimant having failed to provide any evidence as to what transpired between the parties, as regards the parking spaces and also, having failed to allege in his particulars of claim that there was any failure on the defendant's part to provide him with access to and/or use of parking spaces and with this court having accepted the defendant's version of events as regards the parking spaces, this court has concluded that the defendant did not breach the lease agreement, in so far as the provision of parking spaces is concerned.

Space Rented – Additional Space – Equipment

[21] The claimant has alleged, at para. 5 of his particulars of claim, that upon having taken possession of the leased portion of the premises, he and the defendant entered into a further agreement in addition to the 2003 lease agreement, that the claimant would renovate portions of the landlord's property and the claimant would obtain additional office space. By virtue of that additional agreement, which will hereafter be termed as, 'the collateral contract,' the claimant was to have had the sum of $15,000.00 per month, deducted from the rental sum which he was then paying, pursuant to the 2003 agreement, until the renovation expense had 'expired.' This court has taken that quoted words 'expired,' used by the claimant in his particulars of claim, to mean that such expense would have been completely paid for by the defendant, as a consequence of the $15,000.00 a month rent deduction and that until same had been completely paid for, by means of the $15,000.00 a month, rent deduction, said deduction would continue.

[22] The claimant has made no allegation in his statement of case, as to any particular sum having been agreed on, as to what the total cost of renovation was expected to be, at the time when the collateral contract was entered into. It

should be noted that it has not been alleged by the defendant, that the collateral contract was a written one.

[23] For his part, the defendant alleged, in his statement of case, that at the time of the commencement of the 2003 agreement, the claimant occupied more space than he was rented and that he was allowed by the defendant, to do so, at no increase in rent. According to the defendant, this was done to off-set the cost of any infrastructural repairs or rebuilding done by the claimant to the said space. The defendant has made no allegation, in his statement of case, as to what said infrastructural repairs and/or rebuilding was expected to entail, or as to what the cost thereof, was expected to have been. Furthermore, the defendant has not alleged, in his statement of case, that said collateral contract was written.

[24] The defendant has further alleged, in his statement of case, that the claimant was using the general parking area to carry out work related to the claimant's business. After several discussions about that unacceptable practice, the defendant then made arrangements in early 2006, for the claimant to occupy more space behind the workshop. That section of the property was rented separately from the original workshop and office space, at a rate of $15,000.00 per month. (para. 5b)

[25] The defendant has gone on to allege that on or about October 2, 2005, the terms and conditions of leasing the 'aforementioned space' – that quoted term being one which this court understands as meaning – the space leased pursuant to the 2003 agreement, were varied and reduced to writing.

[26] If that is correct, then why is it that the defendant has also alleged that it was in early 2006, that he made arrangements for the claimant to occupy more space behind the workshop? Why wasn't the precise extent of space which was to be rented to and utilized by the claimant, not agreed to and reduced into writing, on or about October 2, 2005? This court will next have to go on to consider the

evidence given at trial, by the parties, on this particular issue, in an effort to determine the answers to these questions.

[27] The variation of the collateral contract which the defendant alleges, was agreed on and reduced into writing, was as follows:

(i) The claimant would occupy the space whilst allowing the defendant and his employees to perform work in the workshop as and when required by the defendant.

(ii) The parties would reconstruct the office space at the front of the building located at 41 Dunrobin Avenue, Kingston 10.

(iii) The claimant would pay a subsidized rental, which represented about 25% of the total value of the space and increasing incrementally over time, as an incentive to rebuild the office space.

(iv) The reconstruction work of the office space would have been completed within the first three (3) years of the claimant's occupancy and on completion, agreed monthly deductions would be set off against the rental, so as to reimburse the claimant's outlay for this reconstruction.

(v) Since the defendant's equipment, materials and tools were too cumbersome to be relocated, the parties agreed that the claimant would be allowed to use the equipment, on the understanding that the same were not being leased to him, but instead, they could be used by him, in accordance with the terms and conditions as aforementioned. Additionally, the claimant was expected to use same in a professional manner and to properly maintain them.

[28] Those are the respective allegations made in the parties' statements of case, as regards the collateral contract. The alleged variation of that contract, which was allegedly reduced into writing, was not produced into evidence at trial, by either party. Indeed, while the claimant was being cross-examined by defence counsel, it was never suggested to him that there existed such a written variation of the collateral contract, or what the precise terms of the collateral contract, were. With no such suggestion having been made to the claimant, it is not legally appropriate for the defendant to contend at this stage – with evidence closed,

that such a written collateral contract even existed, much less, what the precise terms of same, are.

[29] In any event though, the collateral contract, if reduced into writing, should have been signed by the parties and produced to the court and then entered as an exhibit. That was not done. Instead, what the defendant brought before this court in that respect, which was entered as an exhibit, was an unsigned letter dated October 31, 2008, purportedly sent by him to the claimant. Even if same was so sent, that is not evidence of an agreement between the parties, as to any of the terms set out therein.

[30] The defendant, while giving evidence at trial, under cross-examination, testified that the 2003 agreement was the only signed agreement between the parties, because the claimant had refused to sign the subsequently prepared lease, since the parties could not agree on the terms thereof.

[31] Considered in that overall context, it is clear that this court cannot accept that there existed any variation of the 2003 agreement that was agreed upon by the parties.

[32] That there was a collateral contract between the parties though, as to the usage of the additional space and usage of the defendant's machinery and equipment as to the renovation of the overall premises, there can be no doubt. Additionally, it is equally clear that the parties were engaged in a landlord and lessee relationship, as of November 1, 2006 and continuing unit March 14, 2010. That must be so, since the claimant remained in occupation of the leased portion of the premises until that latter – mentioned date and the 2003 agreement expired as at October 31, 2006.

[33] What is equally clear is that the claimant's evidence as given at trial, that he owns the machinery and equipment which the defendant has, instead, not only

claimed ownership of, but also, in his counter-claim, claimed for damage to and loss of same, is entirely untrue.

[34] According to the claimant, the agreement of 2003 specified that he owned the machinery and equipment which the defendant has alleged, was his. He gave that evidence while undergoing cross-examination. The 2003 agreement though, patently belies that contention as made by the claimant, as that agreement has made no reference whatsoever, to said machinery and equipment, as being owned by the claimant.

[35] The defendant's evidence-in-chief as to the usage by the claimant of more office and storage space, at no increase in rent, was consistent with that which he set out in his statement of case. On the other hand, the claimant's evidence-in-chief as to the usage by him of additional office space, was inconsistent in material respects, with that which he had set out in his statement of case. Whilst the claimant has accepted that he was permitted by the defendant to obtain additional office space, as a consequence of the renovation work which he was then to have carried and did in fact, carry out and that such additional office space was obtained for usage by him, 'at no additional cost,' according to him, the defendant agreed that he should withdraw $5,000.00 per month from the rent, for reimbursement of the restoring the building. That though, is inconsistent with what the claimant alleged in that respect, in his statement of case. It is to be recalled, that in same, he had alleged that the sum of $15,000.00 per month, was agreed on between the parties, as the sum which was to have been deducted from the rental sum, pursuant to the 2003 agreement, so as to pay for the renovation work.

[36] The claimant further contradicted himself, in his evidence-in-chief, when he stated that the collateral agreement permitted him to deduct $15,000.00 from the rent for the second office, until the expense for the renovation of the additional office space was paid off.

[37] Was it thus, $5,000.00, $15,000.00 or $20,000.00 ($15,000.00 + $5,000.00) to be deducted from the rent, so as to compensate the claimant for the cost which he incurred in renovating the premises? The claimant's statement of case, considered along with his evidence-in-chief, rather than having provided any credible answer to that question, are what have led to that question. In any event, how could the sum of $5,000.00 per month, or even $20,000.00 a month, have been expected to have been sufficient to pay for the $1,000,000.00 worth of renovation work, which the parties have agreed, was carried out by the claimant, on the defendant's property, bearing in mind that, also according to the claimant's evidence-in-chief, it had been agreed on, that the time for completion of the renovation work, would have been, three (3) years? Within three (3) years even at $20,000.00 per month ($15,000.00 + $5,000.00), the amount which would have thereby been deducted, would have been $720,000.00.

[38] This court does not accept the claimant's evidence on this issue. The more credible version of events, is that the claimant was permitted, pursuant to the renovation work which he was carrying out, to rent additional space, at no extra cost.

[39] In the circumstances, this court does not accept the claimant's evidence-in-chief that the defendant failed to make available to him, the additional office space as contemplated by the collateral agreement and/or to refund the expense which he had incurred for renovation of the property.

[40] This court instead accepts that in respect of the $1,000,000.00 renovation work, done to the property by the claimant – that sum, no doubt, being inclusive of labour and materials, said sum was duly 'repaid,' insofar as the claimant was permitted to use extra space at no extra cost and in fact did use that extra space until he left the premises in March of 2010.

The extension of the lease agreement from November 1, 2007 until March 14, 2010

[41] As earlier stated in these reasons, the claimant remained as the lessee of portions of the entire premises, beyond October 31, 2006. What though, would have been the nature of that tenancy and the terms and conditions thereof?

[42] That question is succinctly answered by means of reference to **sections 3(1) and 28(1) of Rent Restriction Act**. **Section 3(1)** provides that the said **Act** shall apply, subject to the provisions of **section 8**, to all dwelling houses and public or commercial buildings, whether in existence or let at the commencement of that Act, or erected or let thereafter. **Section 8 of the Act**, has no relevance for present purposes. Accordingly, the 2003 agreement was subject to the **Rent Restriction Act**.

[43] **In section 28(1) of that Act**, it is provided, so far as is relevant for present purposes, that – '*A tenant who, under the provisions of this Act, retains possession of any premises, shall, so long as he retains possession, observe and be entitled whether against the landlord or otherwise, to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act...'*

[44] In the circumstances, there having been no new lease agreement entered into between the parties, either as of November 1, 2006, or beyond, the provisions of the 2003 agreement, coupled with the collateral contract which had been entered into between the parties, would have collectively constituted the terms of the lease agreement between the parties, from as of November 1, 2007 until March 14, 2010, when the claimant left the leased premises.

Was there either a breach of the 2003 agreement or the collateral contract, by the defendant?

[45] That is a central question to be answered, since the claimant is claiming damages for breach of contract. This court has, firstly, concluded that there was no breach by the defendant, of the collateral contract. The defendant permitted

the claimant to use the extra space which he required and allowed the claimant to do so, at no additional rental cost.

[46] With respect to the 2003 agreement, this court has concluded that, in order to determine whether the said agreement was breached by the defendant, careful consideration must be given to the allegation that at one stage, the defendant pulled out the electrical breakers from the wall of a portion of the premises that had been rented to the claimant – this having resulted in there no longer having been any electricity to the rented premises. In addition, it is the claimant's allegation that the defendant also removed the electrical wiring and small equipment from the rented premises. These particular allegations were supported by evidence from the claimant personally.

[47] In response, the defendant gave evidence that because he did not trust the claimant, based on his past experience with him, he was of the view that his machinery and equipment were not safe and therefore, in order to protect same, he removed 'certain accessories from some of the machinery tools and the electrical breakers that could have been easily removed and/or destroyed.' (Para. 20 of the defendant's witness statement – which was accepted as part of his evidence-in-chief)

[48] The parties are therefore, in agreement that the defendant removed the electrical breakers. As to what else was, or was not removed though, the parties are in disagreement. The precise nature of that disagreement was though, not explored or challenged, in cross-examination of either party. The omission of same, is regrettable.

[49] As there was though, evidence given on that particular issue, it is for this court, to decide on which evidence on that particular issue, it believes. This court accepts the defendant's evidence as to what it was that he did upon his having entered the leased portion of the premises, so as to, as he has claimed, safeguard his machinery and equipment there. This court does not though, accept the

defendant‘s evidence as to why it was that he did what he did, upon his having then entered the leased premises.

[50] This court is of the view that the defendant did what he then did, so as to frustrate the claimant and cause him to have to leave the premises. Surely, the removal of electric supply from the leased portion of the premises, would not and could not have been sufficient to protect the machinery and/or equipment that was then stored on the premises. Certainly though, it would have been sufficient to have made the claimant unable to carry out his work as a machinist, at the leased premises, since undoubtedly, most, if not all of the machines that he utilized for that purpose, would have required the use of electricity. That is a reasonable inference derived from proven facts.

[51] This court accepts that the defendant removed the electrical breakers and certain ‘accessories’ from some of the machinery tools. He did so, while the tenancy agreement remained in effect and in having so done, the issue as to whether the defendant breached the covenant of quiet enjoyment becomes a live and central one.

The covenant of quiet enjoyment – whether the defendant breached that covenant

[52] It is helpful at this stage, to address the law as regards the covenant of quiet enjoyment, in some detail. A covenant for quiet enjoyment is one which is for the benefit of a tenant and accordingly, it requires the landlord, during the course of the tenancy, to not do anything that will impede or outrightly prevent the tenant’s quiet and peaceful usage of the premises, for the purpose (s) as contemplated by the tenancy agreement. It also protects the lessee against omissions of the landlord, which detrimentally affect the lessee’s quiet enjoyment of the leased premises, during the term of the lease. See: **Booth v Thomas** – [1926] Ch 397.

[53] The quiet enjoyment covenant, unless it is cast in some unusual form, which varies its normal effect, extends to all acts of and/or omissions the lessor himself, as well as, to the extent as explained below, anyone claiming under the lessor or

having authority from him, to do those acts, or rectify such omissions (s). See: **Harrison, Ainslee and Co. v Muncaster** – [1891] 2 QB 680, at 684.

[54] It is still a breach of such a covenant, even though the lessor has, apart from the covenant, the right to do the act complained of. See: **Andrews v Paradise** – [1724] 8 Mod Rep 318. It also protects the lessee against actions of the landlord, whether those actions are lawful or not. See: **Andrews v Paradise** *(op. cit.).* As regards persons claiming under the lessor, their acts will only constitute a breach of the covenant of quiet enjoyment, if they are lawful acts, the reason being that if they are unlawful acts, the lessee will have remedies in tort, against the person responsible. See: **Matania v National Provincial Bank Ltd.** – [1936] 2 ALL ER 633.

[55] A covenant for quiet enjoyment may either be expressly set out in the lease agreement, or, if not so set out, will always be implied. An express covenant for quiet enjoyment though, excludes an implied covenant to the same effect. See: **Miller v Emcer Products Ltd.** – [1956] ALL ER 237. Although there are usual forms of the covenant, the parties to an express covenant may, of course, choose the precise words and obligation which they wish. See: Hill and Redman's Law of Landlord and Tenant, Volume 1, (17th ed.), 1982. The express covenant typically provides that the lessee, paying the rent and performing the covenants, shall quietly enjoy the demised premises; but under such words, the payment of the rent, is not a condition precedent to the performance of the covenant. See: **Dawson v Dyer** – [1833] 5 B and Ad 584, and **Edge v Boileau** – [1885] 16 QBD 117, and **Taylor v Webb** – [1936] 2 ALL ER 763 – which was reversed, but on other grounds – [1937] 1 ALL ER 590. This latter – mentioned legal point will be of significance, as regards the outcome of the claimant's claim, herein.

[56] A breach of covenant for quiet enjoyment is a breach of contract. In certain circumstances though, the precise circumstances constituting that breach, may themselves constitute a tort. If that is so, then a claim for damages arising from

the conduct which constituted such breach can properly be founded in either the law of contract, or tort. It should not though be founded in both contract and tort, as part and parcel of the same claim, since that could lead a court into error, in terms of doubly compensating the wronged party.

[57] Where the acts which constitute the breach, are limited to annoyance, the claim is in contract and in the absence of special damages being specially claimed for, only nominal damages can be awarded. Damages in contract law though, may however, address the issue of mental upset and distress caused by the breach – See: **Jarvis v Swan Tours Ltd.** – [1973] 1 ALL ER 71 and this can include mental upset and distress, caused to the claimant's family members, by the breach.

[58] In the present case, the claimant has made no claim for special damages, nor has he specified any particular losses incurred or suffered by him, as a consequence of the breach of contract, which he is, by means of this claim, seeking damages for. Additionally he has not alleged any mental distress or anguish which he could have experienced, arising from the alleged breach of contract.

[59] Further to that, this court also wishes it to be noted, particularly for the purposes of other alleged breach of contract cases, that the specifics of each act or omission which allegedly constitutes the breach ought, invariably, to be set out with particularity in the claimant's particulars of claim, in order that the defendant to that claim, can not only know the specifics underlying the claim, but also, can be better enabled to prepare and present to the court, his defence. That was regrettably, not done by the claimant, in respect of this claim.

[60] This court has concluded though, from the evidence given considered along with the respective parties' statements of case, that the defendant did breach the lease agreement which subsisted between the parties, at the time when the breakers and various machinery accessories were removed from the rented

portion of the premises. The defendant breached same at that time, by having thereby, substantially interfered with and prevented the claimant's quiet enjoyment of the leased portion of the premises.

[61] The claimant though, is entitled to nothing other than nominal damages for same. This court will award him the sum of $30,000.00 as nominal damages, in that respect and since it is only nominal damages – this as distinct from general or special damages, no interest on same, will be awarded.

[62] The claimant is awarded nominal damages, because the defendant breached the express covenant for quiet enjoyment which is contained in the 2003 agreement and is worded as follows – *'The lessor observing the lessee's covenants herein shall quietly and peaceably enjoy the said premises for the duration of the lease or any extension thereof agreed from time to time between the parties.'*

[63] The defendant has alleged that the claimant failed to pay rent and did other things, during the course of the tenancy, which were in breach of the lessee's covenants, such as, for example, failure to pay the stipulated rental sum, in full, as and when due. As earlier stated though, even a failure to pay rent, notwithstanding said wording of that express covenant, is not a condition precedent for the performance of that covenant. (see para. 55 above)

Claim for the value of renovation work done to the premises

[64] This court has concluded that $1,000,000.00 was agreed on by the parties, as the sum which was spent by the claimant on the construction and renovation work which he carried out to the premises, in conjunction with the defendant. The claimant renovated two (2) offices, a changing room, two (2) bathrooms and a warehouse, on the premises.

[65] While undergoing cross-examination, the claimant had disagreed with the suggestion which was put to him by the defence counsel, to the effect that he

(the claimant) had spent between $800,000.00 and $1,000,000.00 on renovation of the premises.

[66] The defendant though, had written a letter to the claimant which was dated October 31, 2008 and which was entered into evidence at trial, as an exhibit. That letter stated – '*Since the original agreement, you were allowed to build an office, storeroom and changing room that occupy more space than original intended ... We have agreed that the total expenditure on your part, is $1,000,000.00. Since November 2007 monthly deductions of $5,000.00 have been made from the rental payments, totalling $60,000.00 to October 2008.'*

[67] Based on that documentary evidence, this court accepts that the parties had themselves agreed, that the sum spent by the claimant on the renovation work, was $1,000,000.00. For that sum though, the claimant was permitted to use far more space than he was permitted, according to the terms of the 2003 agreement and he was permitted to do so, at no increase in rental cost.

[68] At one stage, the defendant though, had agreed to reimburse the claimant the sum of $550,000.00 for the renovation work done to the premises. The defendant though, by the time of trial, if not before then, was no longer prepared to make that proposed repayment, on the ground that when the claimant left the premises, pursuant to a court order, it was then discovered that there had been significant damage done to his machinery and equipment, which the claimant had been permitted to use, pursuant to the lease agreement.

[69] If a specific sum is now due to the claimant, arising from his renovation work done to the premises, the claimant should have sought such specific sum, in his particulars of claim, as special damages. The clamant did not do that. The claimant has instead, chosen to rest his case, on his claim for general damages for breach of contract, loss of business opportunity and loss of job opportunity.

[70] This court cannot be expected to simply 'divine' what the claimant's particular losses were, with respect to the renovation of the premises. Some, of that initial monetary loss, would have been offset by his use of the additional space, at no additional rent. This court though, is not in a position to quantify the extent of the claimant's loss.

[71] Special damages must, at least as a general rule, be specially pleaded and specially proven. The claimant has failed in both of those respects, as regards the renovation work done. His evidence on the issue of damages, would not entitle him to the benefit of any exception being applied to that general rule. Furthermore, it is now well settled law, that special damages must not only be specially pleaded, but moreover, that evidence relevant to it, cannot properly be adduced if only general damages have been pleaded. See: **Hayward v Pullinger and Partners Ltd.** – [1950] 1 ALL ER 581, **The Susquehanna** – [1926] AC 655, at 661 **and Anglo – Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd.** – [1951] 1 ALL ER 873.

[72] As such, whilst this court has concluded that some of the money spent by the claimant in renovating the premises, ought to have been reimbursed to him and that the defendant's failure to do so, constitutes a breach of contract, there having been no special damages either claimed for, or specifically proven, with respect to same, the claimant can only and will only, be awarded nominal damages, in the sum of $30,000.00, for same, with no interest thereon. Similar approaches have been adopted by English courts, in other cases. See: **Constantine v Imperial Hotels Ltd.** – [1944] KB 693 **and Erie County Natural Gas and Fuel Co. Ltd. v Carroll** – [1911] AC 105.

[73] In the circumstances, the claimant's claim for damages for breach of contract and loss of business and job opportunities, is partially proven and the claimant is awarded nominal damages in the sum of $60,000.00, with no interest thereon.

The defendant's counterclaim

[74] The defendant has, in his amended defence and counterclaim, stated – '*I claim against the claimant for damage to the equipment and loss of equipment on the following grounds – The claimant has not compensated the defendant for ...'* Thereafter, the defendant has set out those 'grounds,' which appear to be more in the nature of specific losses allegedly suffered by the defendant, as a consequence of the tenancy agreement. Thus, those 'grounds' are respectively specified as being that – 'The claimant has not compensated the defendant for:

(i) Payment of rent in the sum of $495,000.00 for the period July 1, 2009 to March 15, 2010 to November 2009 and continuing.

(ii) Payment of loss of rental foregone at $55,000.00 one (1) year and ten (10) months since April 1, 2012 to date and continuing, i.e. $1,210,000.00.

(iii) Damage to the equipment and for loss of equipment and material in the sum of $578,000.00.

(iv) Damage to repair the extended office space to the claimant in the sum of $1,624,902.46.'

[75] The aforementioned 'grounds' for the defendant's counterclaim for 'damage to the equipment and loss of equipment and material,' can properly be treated with by this court, for the purposes of this judgment, as individual claims for special damages arising from what this court would infer as being, essentially, a claim for damages, in particular, special damages, for breach of contract. The defendant's counterclaim though, is woefully lacking in both clarity and detail.

[76] This court will though, treat with same as aforementioned, by taking into account and applying **rules 8.9 (1) and 26.9 of the CPR**. **Rule 8.7 (1) (a)** requires that a party, must, in a claim form, include a short description of the nature of the claim. This court understands that rule to mean that if, for example, the claimant is claiming for damages for breach of contract, the same should be so specified in

the claimant's claim form. **Rule 18.2 (1) of the CPR** goes on to provide that '*an ancillary claim is to be treated as if it were a claim for the purposes of these Rules, except as provided by this Part*.' Said exception has no applicability to the matter at hand. **Rule 8.7 (1) (b)** requires that a claimant must, in the claim form, specify any remedy that the claimant seeks (though this does not limit the power of the court to grant any other remedy to which the claimant may be entitled).

[77] **Rule 26.9 of the CPR** specified that a failure to comply with a rule of court does not invalidate any step taken in the proceedings, unless the court so orders. This is though, it is to be noted, only so, in circumstances wherein the consequence of failure to comply with a rule, practice direction or court order, has not been specified by any rule, practice direction, or court order. In such a circumstance, if there has been a procedural error, or failure to comply with a rule of court, it is open to this court, to 'make an order to put matters right.' (**Rule 26.9 (4) of the CPR)**. Furthermore, this court may make such an order on or without an application by a party. (r**ule 26.9 (4) of the CPR**)

[78] Accordingly, this court makes the order that the claimant's counterclaim stand as amended, specifically so as to be claiming damages for breach of contract – being the rental agreement which subsisted between the parties, for the period – October 31, 2003, to March 14, 2010 and with such breach consisting of:

(i) Failure to pay rent sums due; and

(ii) Damage caused to extended office space; and

(iii) Damage to and loss of equipment and material.

[79] The claimant's specific sums being claimed for, are respectively treated as claims for special damages, included amongst which, will be what is essentially, a claim for 'loss of mesne profits from April 1, 2012 to date, in terms of loss of rental foregone, at $55,000.00 – being $1,210,000.00.'

[80] The defendant has also claimed for that which is a commercial rate of interest – that being 20%. He has however, led no evidence to justify said commercial rate of interest being awarded to him and on that basis alone, would not be entitled to be awarded a commercial rate of interest on any general or special damages which he may be awarded. See: **Central Soya Jamaica Ltd. v Junior Freeman** – S.C.C.A 18/84.

[81] The defendant has also sought costs and such further and other relief as this court deems just.

[82] The defendant has placed before this court no expert evidence as to the alleged damage to equipment and material, caused by the claimant. Such loss, if it did indeed occur, should have been quantified by a loss adjuster. The defendant did not have such loss so quantified and thus, was unable to and did not present such evidence to the court. The only expert evidence which was provided to this court, was expert evidence of an estimate of the work done to the premises by the claimant. That evidence was provided to this court, as an agreed document.

[83] In the absence of any satisfactory evidence having been provided to this court, as to the alleged damage to equipment and material, it follows that even if such alleged damage had been proven as having occurred, as a consequence of the claimant's unlawful actions in breach of contract, the defendant, having failed to prove the special damages sum, which he has claimed for, would have been entitled by virtue of his counterclaim, to only recover nominal damages.

[84] As things now stand though, the defendant has failed to prove, on a balance of probabilities, that the claimant should be held liable for breach of contract, on the ground of the alleged loss of equipment and/or damage to material, caused by the claimant while there may have been some damage caused, this court is not satisfied that the same was not caused as a consequence of 'fair wear and tear' during the course of the usage thereof, pursuant to the terms of the lease agreement.

[85] The defendant's evidence-in-chief, as set out in para. 21 of his witness statement, makes it clear that when the defendant re-entered the leased premises, he discovered that '*some contents of the workshop have not only not been properly maintained by the claimant but have been damaged and or misplaced as follows ...'*

[86] The defendant's own evidence-in-chief therefore, does not support his claim for loss of equipment and he did not provide any precise evidence to this court, as to the extent of the damage allegedly caused to such machinery and equipment by the claimant. Such precise evidence though, would have had, firstly to have been provided to this court, by him and thereafter the quantification of the value of such damage, would have had to have been provided to this court, by a quantity surveyor. Having not provided evidence of even the first of those two (2) things, this in a context wherein it is to be noted that the evidence suggests that the material and equipment provided for the claimant's usage, as part and parcel of the lease agreement, were not new items, is fatal to the defendant's claim that the claimant breached the lease agreement (breach of contract), by means of the damage caused to and/or loss of, the defendant's equipment and material.

[87] The defendant's claim for loss of rental foregone – which I have herein categorized as the equivalent of a claim for loss of mesne profits, also cannot and does not succeed. This is so because no expert evidence has been provided to this court, in support of that particular claim for loss. In the absence of same having been provided, this court finds itself unable to properly conclude that the defendant has suffered such loss in that respect, as he has claimed for. In any event, this court has found itself wholly unable to understand how it is that the defendant could have lost mesne profits from renting premises which was significantly improved in value during and as a consequence of the tenancy agreement between the parties and specifically due to the joint contribution of the parties.

[88] The defendant has also claimed for rental sums allegedly due to him, in the sum of $495,000.00 up until March 15, 2010 'and continuing.' The defendant is not entitled to claim for any rental sum beyond March 15, 2010, since the claimant was required by court order to vacate the leased portion of the premises and pursuant to that order, that is what he did. Accordingly, the claimant cannot be legally required to pay for rental of the portion of the premises, beyond the time when he was required, by the court order, to vacate the leased portion of the premises.

[89] The defendant gave evidence, during cross-examination that he used to issue rent receipts, to the claimant, in respect of rental sums paid by the claimant to him. Surprisingly though, if that evidence is true, not one such rent receipt copy was provided to this court. Surely, a duplicate copy of each such rental receipt should exist and in any event, if such rental receipts were indeed issued, then the same should have been disclosed in each party's list of documents and copies thereof could have been made and provided to the court as evidence, by either party. That was however, not done by either party. In the absence of such evidence having been so provided and in addition, with there having been absolutely no explanation provided by the defendant to the court, as to why the same either was not, or could not (as the case may be), have been so provided, this court has been forced to conclude that the claimant's claim for special damages has not been specially proven, as the law generally requires. In that regard, see: **Mcgregor on Damages, 12th ed., at paras. 1527 and 1528 and Ratcliffe v Evans** – [1892] 2 QB 524.

[90] This court has though, concluded that the claimant is in breach of contract for having failed to pay rent sums due. The precise extent of the financial loss suffered by the defendant in that respect though, has not been satisfactorily proven. In the circumstances, this court awards to the defendant, nominal damages, in the sum of $30,000.00.

[91] The defendant has also counterclaimed for damages for breach of contract, arising from the alleged – *'Damage to repair the extended office space to the claimant in the sum of $1,624,902.46.'*

[92] In paragraphs 22 to 24 of his witness statement, the defendant stated the following, which was accepted as part and parcel of his evidence-in-chief: '*On March 15, 2010, the date the claimant was ordered to vacate the property, the defendant discovered that the office building and workshop was ransacked and severely damaged. The defendant also discovered that some of his machinery, electrical wiring and fixtures, tools, doors, windows and ceiling were missing or destroyed. (para. 21) The defendant immediately involved the police in the investigation. (para. 22) The office and the workshop the (sic) was occupied and being used by the claimant up to March 14, 2010, was now in a unusable state. The keys to the office and the workshop has still not been handed over by the claimant to the defendant.'* (para. 24)

[93] Paragraph 2(f) of the 2003 agreement, required the claimant to keep the office and workshop in a, 'clean and organized state at all times.' There existed between the parties in that agreement, which, as a matter of law, remained in existence and operational until the claimant quit his occupation of the leased portion of the premises, no express stipulation as to repairs. In the absence of any express stipulation as to repairs, it is the law, that every tenant is subject to an implied obligation to use the property demised, in a tenant – like manner, or in other words, he must take proper care of the premises. See: **Marsden v Edward Heyes Ltd.** – [1927] 2 KB 1; **and Warren v Keen** – [1953] 2 ALL ER 118.

[94] During the trial, the claimant never sought to, nor did respond to the allegation made by the defendant, in his witness statement that he (the claimant) had caused damage to the office and workshop. Furthermore, the claimant's counsel never cross-examined the defendant as to the alleged damage that had been caused by the claimant to the office and workshop, other than to the very limited

extent of cross-examining him as to the claimant having, when he left the property, left the walls and roof of the property intact. The defendant agreed with that, when he was cross-examined about same.

[95] This court finds it proven on a balance of probabilities, that the claimant breached the implied covenant to maintain the demised premises in a tenantable state of repair and also, that he breached the express covenant to keep the office in, 'a clean and organized state at all times.'

[96] What the defendant has been wholly unable to prove though, is the loss in the sum of $1,624,902.46, allegedly incurred by him, to repair the extended office. The defendant should have produced to this court, documentary proof of such expense of repair, having been incurred by him. He did not do so. In the circumstances, this court finds the claimant liable for breach of contract in that respect, but will only award to the defendant, nominal damages in the sum of $30,000.00 for same.

[97] This court's judgment orders are therefore as follows:

(i) The claimant is awarded nominal damages in the sum of $60,000.00, for breach of contract.

(ii) The defendant is awarded nominal damages in the sum of $60,000.00, for breach of contract.

(iii) Each party shall bear their own costs.

(iv) The defendant shall file and serve this order.

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Hon. K. Anderson, J.