[2025] JMCC COMM. 33

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU 2020 CD 00402

CONSOLIDATED WITH CLAIM NO. SU 2023 CD 00589

BETWEEN	**NEW HORIZON CHRISTIAN OUTREACH MINISTRIES**	**CLAIMANT**
AND	**SHAVUOT INTERNATIONAL HOLDINGS COMPANY LIMITED**	**DEFENDANT**

Mr. Matthew Royal and Ms. Nicole Taylor instructed by Myers, Fletcher & Gordon, Attorneys-at-law for the Claimant

Mr. Emile Leiba and Ms. Chantal Bennett instructed by DunnCox Attorneys-at-law for the Defendant

Civil procedure– Breach of contract- Whether the oral arrangement entered into between the Claimant and Defendant amounts to a lease or a licence- Elements of a lease and a licence- Exclusive possession- Certainty of rent- Certainty of duration- unjust enrichment- Damages for breach of contract and loss of business opportunity

IN OPEN COURT

Heard on: 9th - 12th June, 25th July, 2025 and 26th September, 2025

STEPHANE JACKSON-HAISLEY J.

INTRODUCTION

[1] The Claimant New Horizon Christian Outreach Ministries (NHCOM) is a Christian based charitable organization in the business of providing social enterprise services to at-risk youth in the parish of St. Catherine through skills training, job placement and mentorship. It is the owner of premises situated at Wynter's Pen, Spanish Town in the Parish of Saint Catherine registered at Volume 1036 Folio 32 of the Register Book of Titles.

[2] The Defendant Shavuot International Holdings Company Limited (Shavuot) is a company involved in the business of agro-processing of products including spices, herbal teas and castor oil.

[3] The executive director of NHCOM Mr. Michael Barnett and the Chief Executive Officer and part-owner of Shavuot, Mr. Richard Harris were well acquainted with each other through their membership at the same church. After engaging in a series of discussions and correspondence, they arrived at certain agreements.

[4] In or about August 2014, NHCOM and Shavuot entered into an agreement for Shavuot to occupy its Wynter's Pen premises to carry out its business. The other agreements alleged will be discussed during the course of this judgment but the main agreement relates to the occupation of NHCOM's premises by Shavuot. The relationship which commenced in August 2014 continued for years and after a series of events, by letter dated April 20, 2020, NHCOM issued a notice of termination of Shavuot's occupancy of the premises. To date Shavuot has failed, neglected and refused to deliver up possession of the premises.

[5] This claim is for recovery of possession of the Claimant's premises and for damages for trespass to property and damages for breach of contract. Shavuot denies that NHCOM is entitled to the reliefs claim and has counterclaimed for damages for breach of contract and for loss of business opportunity.

The Claim

[6] The Claimant claims:

a. Recovery of possession of its premises situated at Wynter's Pen, Spanish Town, in the parish of St Catherine;
b. Damages for trespass to property;
c. Damages for breach of contract;
d. Alternatively, damages for unjust enrichment; and
e. Interest at the commercial rate pursuant to the Law Reform (Miscellaneous Provisions) Act and Costs.

[7] In the Particulars of Claim NHCOM avers that Shavuot breached several oral agreements between the parties which included the following:

a. Failing/neglecting and or refusing to make payments due pursuant to the agreement and inclusive of the payment for its occupation of the Claimant's premises and the use of the Claimant's furniture, equipment, machinery, and utility costs;
b. Failing to pay the Claimant's fee for administrative services rendered and to compensate the Claimant for providing trained personnel;

[8] As a result of these breaches the Claimant asserts that it has incurred and continues to incur financial losses as a result of the Defendant's continued and unlawful trespass to its property.

The Counter-Claim

[9] In its Particulars of breach of contract, Shavuot avers that NHCOM:

i. failed to provide persons who were adequately trained to use the equipment;
ii. failed to supply an effective working dryer;

iii. failed to re-pay the sum of $100,000.00 in May to June 2018 for water rates;

iv. failed to honour the terms of the expansion agreement to complete its expansion exercise; and

v. failed to complete the electrical upgrade to the premises.

[10] As a result of this failure, Shavuot incurred loss as follows:

i. Damage to its equipment incurred during the period April 2016 to March 2018;

ii. Loss of products and sales in the sum of One Million Dollars ($1,000,000.00) incurred during the period April 2016 to March 2018;

iii. Damages in the sum of approximately Two Million Eight Hundred and Eighty Thousand Dollars ($2,880,000.00) as a result of an inefficient dryer;

iv. Loss of raw material in the sum of approximately One Million Two Hundred Thousand Dollars ($1,200,000.00) as a result of the ineffective dryer;

v. Damages in the sum of One Million Four Hundred Thousand Dollars ($1,400,000.00) incurred around April 2016 to March 2018 in drying raw material at a third party;

vi. Costs and interest incurred on or about December 7, 2015 to December 6, 2017 for repaying the loan for the dryer to EXIM Bank;

vii. Expenses in the sum of approximately Seven Hundred Thousand Dollars ($700,000.00) to complete the electric gate;

viii. Losses in the sum of approximately Fifteen Million Two Hundred Thousand Dollars ($15,200,000.00) expended for the conversion of the school to a factory;

ix. Loss of business opportunity from January 2019 to January 30, 2021 in the sum of Fifty Million Dollars ($50,000,000.00) as a result of breach of Expansion Agreement; and

x. Loss in the sum of One Hundred Thousand Dollars ($100,000.00) which was paid as a loan to the Claimant towards the bill for National Water Commission.

[11] Shavuot is also claiming interest at the commercial rate for damages arising from the loss of business opportunity from the date of filing of the claim until the date of judgment or alternatively, interest at a rate of 3% from the date of service to the date of Judgment.

EVIDENCE ON BEHALF OF THE CLAIMANT

Evidence of Michael Barnett

[12] Mr. Michael Barnett, gave evidence that in August 2014, he engaged in a series of discussion with Mr. Richard Harris, whom he had been familiar with for several years, regarding a commercial arrangement between NHCOM and Shavuot for the benefit of the social enterprise activities.

[13] This arrangement provided that Shavuot would occupy a room at the premises for a fee which was not agreed upon at the time of the discussions, however, there was an understanding that the particular figure or method of calculating the figure based on square footage would be agreed upon at a later date. It was also agreed that NHCOM would train and equip at-risk youth to perform job functions at Shavuot after their training. Further that NHCOM would build or acquire certain machines, furniture and equipment for use in Shavuot's manufacturing business. Mr. Barnett stated that it was also the understanding that Shavuot would compensate them for the use of the machines and pay the utility bills associated with its operations. During cross-examination, Mr. Barnett disputed the suggestion that a term of the arrangement is that persons would be trained for employment in Shavuot. He instead asserted that persons are not trained for Shavuot only, as it runs a national training programme. He also denied that the individuals were inadequately trained.

[14] Mr. Barnett asserted that, despite their acquaintance, the discussions with Mr. Richard Harris was not for any private arrangement but it concerned a commercial agreement between NHCOM and Shavuot. He stated that at the initial stage in

2014, Shavuot was allowed to occupy a room for storage of raw material and that there was never an arrangement for exclusive occupation of the building. He asserted that the first few months' fees were waived as a show of goodwill and warm welcome to Shavuot and that during 2015 to 2016, the main building was outfitted with facilities such as the Entrepreneurial Training Room which Shavuot was allowed to access along with a storage room, the pantry and the kitchen. He spoke to issues that arose in the commercial relationship when he became insistent that fees are to be paid for the occupation of the premises as well as for the business in accordance with invoices that were supplied to Shavuot.

[15] Mr. Barnett asserted that on or about July 12, 2014, there were discussions regarding the build-out of an industrial dryer for a projected cost of Three Million One Hundred Thousand Dollars ($3,100,000.00), however, Shavuot did not have the full funds and obtained a loan in the sum of One Million Two Hundred Thousand Dollars ($1,200,000.00) to offset the cost. This initial payment was insufficient, therefore NHCOM funded critical aspects of the build-out on the understanding of being reimbursed, however Shavuot failed to provide the additional funding. During cross-examination Mr. Barnett accepted Counsel's suggestion that the invoice which forms part of the exhibits, makes no reference to the costs of the dryer being Three Million, One Hundred Thousand Dollars ($3,100,000.00) and there is no indication that the One Million Two Hundred Thousand Dollars ($1,200,000.00) stated on the invoice is a part payment. He however, denied the assertion that the dryer was defective or that Shavuot made extensive losses and incurred expenses to engage a third party to assist in drying raw material.

[16] He asserted that the parties had a discussion in April 2019 where it was agreed that Shavuot would pay an interim amount of Eighty Thousand Dollars ($80,000.00) and it was understood that the sum was not reflective of the full value of the portion of the premises being occupied. It was also agreed that Shavuot would pay sixty percent (60%) of the utility bills as well the water charges isolated

by a meter which measured the water that was pumped to the building occupied by Shavuot.

[17] Shavuot sought permission to acquire additional rooms which included the main offices, a large classroom space, another storage area and a welding training room for which NHCOM had free access. Further that, in December 2019, Shavuot changed the locks on the building without notifying NHCOM or seeking permission and failed to provide NHCOM with a copy of the keys. Mr. Barnett asserted that he later received communication from Shavuot's attorneys indicating that it had exclusive possession of the building. During cross-examination, Mr. Barnett accepted Counsel's suggestion that as at April 2020, the arrangement between NHCOM and Shavuot was that Shavuot would exclusively occupy one (1) building and a portion of another building on the premises for the sum of Eighty Thousand Dollars ($80,000.00) per month. However, in re-examination he reverted to his previous position that there was no exclusive occupation by Shavuot.

[18] Mr. Barnett stated that Shavuot carried out unilateral expansion and made substantial alteration to the premises without permission. By letter dated April 20, 2020, NHCOM's attorneys made a formal demand for Shavuot to terminate the licence and hand over possession of the premises however, Shavuot failed, neglected and/or refused to honour the demand.

Evidence of Sophia Barnett

[19] Mrs. Sophia Barnett is a Director of NHCOM. She asserted that in early 2015, when NHCOM provided employees to Shavuot, she was in charge of recruiting and training new employees, maintaining the records, ensuring data and health protocols and she was in charge of dismissing employees upon the instructions of Shavuot. Mrs. Barnett contended that when bills were submitted for use of equipment and employment of staff, Mr. Richard Harris complained that it was too much and that he was unable to pay. During cross-examination, she accepted

Counsel's suggestion that no fixed sums were set out for payment of administrative services but asserted that there was an understanding that NHCOM would be paid Eighteen Thousand Dollars ($18,000.00) as a flat fee and Two Hundred Dollars ($200.00) per person for each employee who carried out duties. Mrs. Barnett asserted that the fees were to be recovered from payroll, which was prepared by her on Shavuot's behalf however, she became unwell during the period January to March 2018 and was unable to continue the services for Shavuot.

[20] Mrs. Barnett averred that in July, 2019, NHCOM installed a separate water meter which pumped water to Shavuot on the understanding that they would be compensated for the water it consumed, and this arrangement continued until early 2020 when Shavuot begun to truck its own water. She further averred that as at April 23, 2025, there was arears of approximately Nine Hundred Thousand Dollars ($900,000.00) for unpaid water that Shavuot used from NHCOM's connection, which NHCOM cleared and continues to pay the current monthly charges.

[21] She asserted that NHCOM has had to pay all JPS bills in full which was in the region of up to One Hundred Thousand Dollars ($100,000.00) until in or about 2016. However, it became intolerable to carry such a significant portion of the operating costs and they insisted that Shavuot should immediately make payments towards the bills. She further asserted that Shavuot began to pay the full JPS bills for the premises despite only asking for a contribution of a fixed sum of One Hundred Thousand Dollars ($100,000.00) and that in April 2019, it was agreed that Shavuot would pay sixty percent (60%) of the JPS bills which it did until it obtained its own power supply.

[22] Mrs. Barnett accepted Counsel's suggestion that as at April, 2020, Shavuot was paying the sum of Eighty Thousand Dollars ($80,000.00) per month for occupation of a building and a portion of another building, however she indicated that this was an interim payment. She accepted the assertion that Mr. Richard Harris had been asking for a lease agreement for at least three (3) years and pointed out the reason

why a lease agreement had not been provided. Mrs. Barnett also accepted Counsel's suggestion that the invoice for the dryer does not reflect that the sum of One Million Two Hundred Thousand Dollars ($1,200,000.00) is a down payment. She however pointed out that the invoice says that that sum is valid only for fourteen (14) days.

EVIDENCE ON BEHALF OF DEFENDANT

Evidence of Richard Harris

[23] Mr. Richard Harris asserted that in or about 2013, Mr. Barnett approached him with a request for assistance to start a joint venture and he agreed to a social partnership as Mr. Barnett was a trained Swiss engineer who could build machines and equipment. He averred that an oral agreement was entered into for NHCOM to provide one room for Shavuot's operations and in exchange, Shavuot would engage the students trained in its business. He asserted that the initial agreement did not include the payment of rent or for payment of utilities. During cross-examination, Mr. Richard Harris accepted Counsel's assertion that it was Shavuot, in an email dated November 29, 2014, who requested rental of a space at a reasonable fee. He however, denied the suggestion that Shavuot was required to pay compensation for occupation of the new building and that the parties agreed to negotiate reasonable compensation using the market rate as a guide.

[24] Mr. Richard Harris contended that the terms of the agreement changed in late 2014 when Mr. Barnett sent an email attaching an invoice dated November 30, 2014 for labour costs for projects and related costs per month with production related utilities and rental space costs being waived. He also contended that this was inconsistent with the terms previously agreed and averred that the agreement was that Shavuot would occupy the entire building after the school operated by NHCOM closed in 2016. The terms of the agreement were further amended in 2016 to include the payment of electricity and water for the entire compound

inclusive of the building occupied by NHCOM and this was in lieu of rent. During cross-examination, Mr. Harris accepted the suggestion that the discussion which led to the interim payment of Eighty Thousand Dollars ($80,000.00) commenced in February 2019 and he agreed that it was an interim payment whilst negotiations continued to determine what the final amount would be.

[25] He asserted that Shavuot's business continued to grow and between 2018 and 2019, an Expansion Agreement was entered into with NHCOM which was to be done in phases. Drawings were provided and Shavuot invested approximately Fifteen Million, Two Hundred Thousand Dollars ($15,200,000.00) in material, equipment and labour to renovate and complete phase 1 of the building on the premises. He denied Counsel's suggestion that there was no agreement for Shavuot to do such improvements and averred that Shavuot was unable to complete phase 2 of the expansion project contrary to the expansion agreement which resulted in loss of business opportunity of approximately Fifty Million Dollars ($50,000,000.00) between January 2019 to January 30, 2021.

[26] He asserted that the relationship between NHCOM and Shavuot started to deteriorate and a board meeting was held in 2019 where it was agreed that the terms of the agreement would be reduced to writing and Shavuot would begin to pay rent, its own electricity and a portion of the water for the property. He contended that the relationship further deteriorated and Shavuot did not allow Mr. Barnett access to the factory when requests were made on short notice or when the factory was preparing for inspection by the health authorities. During cross-examination, he denied Counsel's assertion that NHCOM had full access to the building until 2019 when the locks were changed and he indicated that currently, there is no partnership as Shavuot operates as a tenant.

[27] He instructed his attorneys to inform NHCOM that it had a right to quiet enjoyment and requested that the written lease agreement stipulate the terms on which the premises is occupied. Mr. Richard Harris stated that he received a letter from

NHCOM's attorney dated April 20, 2020 which alleged that Shavuot is in breach of the agreement to provide compensation for services provided, that the agreement between the parties was not a lease and that Shavuot should cease its occupation of the premises within three (3) months.

[28] He asserted that when Shavuot received the letter in April 2020, the terms on which it occupied the premises were:

a. Rent of Eighty Thousand Dollars ($80,000.00) per month commencing 2019
b. Shavuot had exclusive possession from 2018 and continuing
c. NHCOM required Shavuot's permission to enter the premises
d. Shavuot generally enjoys quiet enjoyment of the premises save for instances when NHCOM breached the covenant
e. Shavuot has its own electricity and trucks its own water to the premises

[29] He expressed that Shavuot has continued to pay all sums due for rent and utilities and has not trespassed on any area that it is not entitled to traverse. He indicated that Shavuot has returned all equipment provided by NHCOM as the equipment did not work and Shavuot was unable to operate its business efficiently and had to resort to using external sources to dry its products.

Evidence of Joel Harris

[30] Mr. Joel Harris is the Marketing Director and part owner of Shavuot since 2014. He asserted that over the years, there were discussions between Shavuot and NHCOM regarding the occupation and expansion of the premises and on one (1) occasion in 2019, he attended a board meeting along with Mr. Richard Harris where it was agreed that the terms of the agreement for occupation would be reduced to writing and Shavuot would begin paying rent in the sum of Eighty Thousand Dollars ($80,000.00). He however, accepted Counsel's suggestion during cross-examination, that the sum of Eighty Thousand Dollars ($80,000.00)

was negotiated to be an interim payment until the actual rent could be determined and that Shavuot continued to make interim payment as the actual rent has not yet been determined.

[31] He stated that over the years, the actions of NHCOM have resulted in financial loss to Shavuot due to the breach of the terms of the agreement between the companies including the failure to build a hybrid/solar biomass dryer oven at the requisite standard. He stated that this adversely affected Shavuot as it did not have the proper drying facility for its products between April 2016 and March 2018 and incurred loss and damage, increased employment and further costs as it had to re-pay the loan it obtained from EXIM Bank to assist with purchasing the dryer. He denied Counsel's assertion that the loss occurred as a result of Shavuot's failure to follow NHCOM's instructions on the use of the dryer as Shavuot's employees did follow instructions in terms of capacity.

[32] He stated that NHCOM is in breach of the Expansion Agreement which resulted in a loss of business opportunity of a business deal of Thirty Million Dollars ($30,000,000.00) per year which it could no longer acquire as they did not have the washing and drying capacity. This amount is however inconsistent with Mr. Richard Harris' statement regarding loss of business opportunity.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[33] Counsel for the Claimant, Mr. Matthew Royal contended that the relationship between the Claimant and Defendant amounts to that of a licence, not a lease and that the Claimant was entitled to terminate the licence by giving reasonable notice as it is not required to comply with the formalities of the Rent Restriction Act (the Act). Counsel discussed the essential elements of a lease and quoted the principles in the seminal case of **Street v Mountford** [1985] 2 All ER 289, p 291b-d, where Lord Templeman noted that:

> *"To constitute a tenancy the occupier must be granted exclusive possession for a fixed periodic term certain in consideration of a premium or periodic payment."*

[34] Counsel contended that Lord Templeman went further and noted that:

> *"Unless these three hallmarks are decisive, it really becomes impossible to distinguish a contractual tenancy from a contractual licensee save by reference to the professed intention of the parties or by the Judge awarding marks for drafting."*

[35] Mr. Royal submitted that even where the features are present, the Court should consider whether the parties intended to create legal relations. He quoted Lord Justice Denning's observation in **Facchini v Brydson** [1952] 1 TLR 1386 as follows:

> *"…in all the cases where an occupier has been held to be a licensee there has been something in the circumstances, such as a family arrangement, an act of friendship, generosity, or such like to negative any intentions to create a tenancy…"*

[36] Counsel submitted that though the principles laid down in **Street v Mountford** surrounds residential properties, it has been held that they relate to business properties as well. To support his position Mr. Royal relied on **London & Associated Investment Trust plc v Calow** (1986) 53 P. & C.R 340 at 352 as well as **Mann Aviation Group (Engineering) Ltd (in administration) v Longmint Aviation Ltd.** [2011] EWHC 2238 Ch. He contended that the Court should also consider the circumstances surrounding the arrangement entered into between the parties and relied on **A.G. Securities & Vaughn v Villiers and Anor** [1990] 1 A.C. 417 where the court made the observation that:

> *"In considering one or more documents for the purpose of deciding whether a tenancy has been created, the court must consider the circumstances including any relationship between the prospective occupiers, the course of negotiations and the nature and extent of the accommodation and the intended and actual mode of occupation of the accommodation."*

[37] Counsel submitted that it should be evident that the parties intended to create legal relations, remained in negotiations regarding the essential terms of an intended lease while periodic payments are being made and the tenant had been put into possession of the property. He relied extensively on **Javad v Aquil** [1991] 1 All ER 243 and submitted that the authorities demonstrate that (i) sharing space with the owner (or someone standing in the position of the owner); and (ii) provision of services by the owner to the occupier, are both inconsistent with the existence of a lease. Mr. Royal cited **National Car Parks Limited v Trinity Development co. (Banbury) Ltd** [2001] 2 EGLR 43 where the court considered that a licence was created and not a lease in circumstances where arrangements were entered into for the management of a car park.

[38] Mr. Royal contended that the evidence as presented is clear that Shavuot was not given exclusive possession of the premises. He asserted that it is not in dispute that the Defendant, as at April 2020, occupied the building to the exclusion of the Claimant on the basis that Shavuot changed the locks denying the Claimant access to the premises. Counsel contended that there is no evidence on behalf of the Defendant that it was given exclusive possession of the building. He submitted that the Claimant and Defendant continued to use the space in the building contemporaneously to conduct the joint social enterprise activities.

[39] On the issue of rent, Counsel quoted from the authors of Halsbury's Laws of England 5th Edition 2022) Vol 62 (2022) paragraph 257 as well as Hill and Redman 16th ed., Butterworth, 1976 and submitted that rent must be certain. He stressed that in circumstances where there is no certainty in rent, the agreement could not amount to a lease. He relied on **Regnart v Porter** (1831) ER 174 where the court found that the sum for rent had not been settled with precision as well as **Renford Toomer v Herbert Hamilton & Ronald Sullivan** Claim No. 2006 HCV00955 where the Court found that the Claimant occupied the land as a tenant at will due to his failure to agree rent.

[40] Counsel contended that no sum for rent had been agreed between the parties, neither had there been any agreement concerning a method by which rent would be calculated, however there was always the understanding that the Claimant would be compensated. He asserted that the sum of Eighty Thousand Dollars ($80,000.00) as discussed between the parties was an interim payment as a monetary contribution towards the rental of the building and these interim payments were being received with the expectation that the full sum for past payments would be made to complete the balance of interim payments. He submitted that the case at bar is strikingly similar to **Renford Toomer** where the Court concluded that there was no *consensus ad idem* concerning the final rent. He further pointed the Court to the reasoning in **Javad v Aqil** where the putative tenant was put into possession of the property while negotiations were ongoing and the court counselled against finding that a lease exists.

[41] Mr. Royal articulated that as there being no certainty of rent and no duration for which the Defendant was permitted to occupy the premises, it cannot be said that a lease of certain duration exists.

[42] In supporting his position that the nature of the contractual license was properly determined, Counsel pointed the Court to the dicta in **Winter Garden Theatre (London) Limited v Millennium Productions Limited** (1947) 2 All ER 331 where the court found that a contractual licence may be determined with reasonable period of notice being given which the Claimant has complied with by giving three (3) months' notice to vacate the premises.

[43] Mr. Royal contended that the Claimant is entitled to recover damages as compensation for the fee which the Defendant was obligated to pay for occupation and use of the premises. He asserted that the Defendant was also required to pay fees for the building of machines and equipment and also for the provision of furniture. He submitted that the Claimant is entitled to quasi-contractual relief as

it has incurred a detriment and is also entitled to restitution to avoid unjust enrichment of the Defendant. To support his position, Counsel relied on **Carlton Williams v Veda Miller** [2016] JMCA Civ 58, **British Steel Corp. v Cleveland Bridge and Engineering Co. Limited** [1984] 1 All ER 504 as well as **Susan Williams et al v JTC-32 LLC et al** [2024] JMCC Comm 16 where the court considered the existence of a valid contract and the principles relating to unjust enrichment in circumstances where the detriment suffered is the provision of a service rather than expending money.

[44] On the Defendant's Counterclaim, Counsel submitted that the Court should reject entirely the counterclaim as being wholly without merit and contrived as a reaction to the claim. He asserted that there was never an agreement permitting the Defendant to expand or do any type of alterations to the premises as the Defendant did not comply with the clearly communicated stipulations by the Claimant.

[45] Mr. Royal asserted that it is incredible that the Defendant is making a claim for a refund of water having not made any payment for utilities during the period 2014 to 2019. He submitted that the Defendant had an obligation to pay for the water it consumed and is not entitled to a refund in the sum of One Hundred Thousand Dollars ($100,000.00).

[46] As it relates to the alleged loss of Seven Hundred Thousand Dollars ($700,000.00) as grant money from the Sofi Tucker Foundation for completion of electrical update, Counsel submitted that the evidence is clear that the grant funding was to be used to the benefit of Claimant, not for the Defendant's benefit.

[47] Mr. Royal submitted that there is no evidence to support the allegation that the Claimant's agents fell below any required standard in building machine or delivering skills training and that the Defendant's counterclaim is unmeritorious. He contended that an allegation as such should have the support of an expert qualified in the same profession to establish the claim. Counsel relied on

Caribbean Steel Company Limited v Price Waterhouse (a firm) [2013] 4 All ER 338 to support his position.

[48] Mr. Royal concluded his submission by urging the Court to find that the Defendant's witnesses are incredible and cannot be relied on. He instead encouraged the Court to accept the version of events advanced by Mr. Barnett a witness whose credit worthiness has not been impeached.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[49] Counsel for the Defendant, Mr. Emile Leiba disputes that the relationship between the Claimant and Defendant amounts to a licence and instead posited that a lease exists. He asserted that if a tenancy exists between the parties as alleged, it follows that the Claimant is not entitled to recovery of possession and the Claimant would have to show that it met the requirements under the Rent Restriction Act. Counsel contended that it is uncontroverted that the Defendant occupied a building and a portion of another building exclusive of the Claimant. He referred the Court to **Easton Bowen v Judith Myers** [2023] JMCA Civ 21 in support of his position on the creating a of valid lease.

[50] Counsel submitted that the Claimant accepted during cross-examination that the Defendant occupied one (1) building solely and a portion of another and also participated in the removal of its belonging from the building which the Defendant solely occupied. Counsel contended that a copy of the key was given to the Claimant however, that was only for emergency purposes and the Claimant did not have liberal access to the building.

[51] Mr. Leiba submitted that it is clear that there is payment of a sum related to the Defendant's occupation of the premises and that this is a sum that is agreed between the parties at a meeting. He contended that even if a future sum was to

be agreed, that sum does not invalidate the payment of rent. He referred the Court to **United Scientific Holdings Ltd. v Burnley Borough Council** [1978] AC 904 on the determination of rent.

[52] As it relates to certainty of duration, Counsel referred the Court to **Prudential Assurance Co. Ltd. v London Residuary Body** [1992] 2 AC 386 and submitted that the Defendant paid a monthly sum which created certainty regarding the sum and the term of the tenancy. He submitted that the Defendant has established all the essential elements of a valid lease. Counsel relied on the seminal case of **Walsh v Lonsdale** (1882) 21 Ch D 9 for the principle that an agreement for a lease is as good as a lease and submitted that the other reliefs would fall away once the Court finds that the Defendant's occupation of the premises is pursuant to a valid agreement. He contended that damages for trespass cannot be found if the Defendant is in occupation in agreement with the owner of the land.

[53] As it relates to damages for breach of contract, the Defendant denied that it is obligated to compensate the Claimant for its occupation of the premises as well as for the building of machine, equipment and furniture. It is argued that the Clamant adduced no evidence to support the unpaid amounts being claimed and it is submitted that the Court should not make an order for assessment of damages as the burden was on the Claimant to provide evidence of any alleged damages at trial. The Defendant contended that the Claimant is not entitled to damages for breach of contract nor unjust enrichment. Counsel submitted that the issue of unjust enrichment does not arise as there is no evidence that the Defendant made a benefit at a quantifiable value that the Court could utilize to define such figure and it is asserted that it is clear on the written and oral evidence that the cause of action and reliefs sought are not established as a matter of fact and law.

[54] With respect to the Counterclaim, it was submitted that the witnesses for the Claimant were not credible. Counsel pointed out that the Claimant's evidence that the sum stated for the dryer did not entail the entire agreed purchase price, is not

credible and should not be accepted. He asserted that the Claimant did not dispute the authentication of the invoice nor produce another invoice to reflect the balance due or the abated price. He contended that the Court should accept that there was an agreement to provide a working dryer and the failure to do so led to the inevitable.

[55] In the Reply to the Claimant's submissions, Counsel accepted that the elements of exclusive possession, consideration in the form of rent and a fixed periodic term are essential in determining the essence of a lease. He argued that Lord Templeman in **Street v Mountford** opined that the only intention which is relevant is the demonstration by the agreement to grant exclusive possession for a term at rent. He stated that consideration of the surrounding circumstances is also relevant and submitted that:

a. The relationship between the Claimant and Defendant reveals that a commercial relationship in which the Defendant occupied the Claimant's premises to operate its factory for the payment of a monthly sum;

b. The course of negotiations between the parties started in 2014 and evolved as the Defendant's business expanded and eventually occupied an entire building in exchange for a payment of a monthly sum;

c. The nature and extent of the accommodation given to the Defendant started with one (1) room in 2014 and expanded to a building and the part of another building in 2019;

d. The intended and actual mode of occupation of accommodation provided to the Defendant is in dispute and needs to be resolved by the Court. It is submitted that the actual mode of accommodation was for the Defendant to operate its factory in the building on the premises.

[56] It was submitted that the authority of **Javid v Aqil** relied on by the Claimant is distinguishable as in that case, the prospective tenant was let into possession as a tenant at will pending the outcome of negotiations and the trial was conducted on that basis. He contended that NHCOM did not assert that Shavuot was a tenant at will and should be estopped from now seeking to make a claim of a tenancy at will. Counsel further submitted that the most relevant terms of the agreement between the parties were settled however, in **Javid v Aqil**, the parties still needed to resolve several terms of the lease which included the sub-letting of the premises, the deposit and the execution of the lease which had been negotiated. He submitted that based on the evidence, a lease was already in place even though a formal agreement had not been signed due to lack of feedback from the Claimant.

[57] Counsel contended that the authority of **National Car Parks Limited v Trinity Development Co. (Banbury) Ltd**. relied on by the Claimant has no bearing on the present case as the facts are completely distinguishable since the Defendant operated a factory in a building for which it was granted exclusive possession.

[58] Counsel accepted that **Greater London Council v Connolly** [1970] 1 All ER 870 can be relied on to determine whether the Defendant paid rent and submitted that the interim payment of Eighty Thousand Dollars ($80,000.00) was certain and could be calculated with certainty each month. He however, argued that the other authorities relied on in support of the Claimant's position on rent are distinguishable and do not apply to the present case.

[59] Counsel articulated that there is no evidence to support the Claimant's contention that its officers would have liberal access to the building especially as the Defendant operated a factory which required operation at certain health standards. He highlighted that the evidence on cross-examination revealed that the building was converted for the sole use of the Defendant, that Mr. Barnett admitted that the Claimant removed its belonging from the filing room prior to December 2019 and

this amounted to an intention to grant exclusive possession of the building. Counsel submitted that the presentation of the diagram for the re-purposing of the building for a factory as admitted by Mr. Barnett supports the contention of complete usage by the Defendant. Counsel also contended that there was no correspondence objecting to the Defendant's sole occupation of the building until April 2020 when its Attorneys received a letter in response which claimed a breach of its rights under the lease.

[60] Counsel argued that the Defendant's evidence did not indicate that it changed the locks to exclude the Claimant from the building without its consent. Rather, its evidence is that it started to occupy the entire building for which it procured a key and gave the Claimant a copy. Further, that in the event the Court finds that the Claimant did not consent to full occupation and acquiesced to it, he relied on **Zephaniah Blake & Anor v Almando Hunt & Ors**. 2008 HCV 01773 for the definition of acquiescence.

[61] Counsel submitted that the lease was a monthly tenancy with certainty of duration. It is argued that where a lease has been determined, the Rent Restriction Act is applicable and termination of the lease would be required to follow the provision of the Act.

ISSUES

[62] The issues can be summarised as follows:

a. Whether the oral arrangement entered into between the Claimant and Defendant amounts to a lease or a licence;

b. Whether the Claimant is entitled to recovery of possession, damages for trespass and damages for breach of contract or unjust enrichment;

c. Whether the Defendant should be compensated for sums being counterclaimed for damages for breach of contract and loss of business opportunity

LAW & DISCUSSION

Whether the oral arrangement entered into between the Claimant and Defendant amounts to a lease or a licence

[63] The main issue to be determined is whether the arrangement between the parties amounted to a lease or a licence. This is important because the rights enjoyed by a lessee are different from those enjoyed by a licensee. A lessee enjoys the protection of the Rent Restriction Act and if the Rent Restriction Act is applicable then the Notice to Quit given to the Defendant would be invalid.

[64] A lease is defined by the authors of Woodfall, Landlord and Tenant, at paragraph 4.001 as follows:

> "*An agreement for lease is a legally enforceable agreement by which one person agrees to grant, and another agrees to take a lease. The agreement may be immediately enforceable or may be enforceable only on the occurrence of some event, or the fulfilment of some conclusion. The phrases 'contract for a lease' and 'agreement for lease' are usually interchangeable, but in modern practice it is more common to speak of an agreement for lease...*
>
> *[T]he creation of an agreement for lease is itself the creation of an equitable interest in land, because the present right to call for a future grant is such an interest."*

[65] A licence is simply the permission to use property without conferring an interest in the property. The definition of a licence has been discussed in a number of judicial authorities such as the authority of **A.G. Securities & Vaughn** cited on behalf of the Claimant where Lord Templeman examined the difference between a licence

and a lease. In that case a company entered into separate agreements with four (4) different persons, therefore none of them had exclusive possession of the flat and so what was created was a licence and not a lease. Lord Templeman in coming to his decision placed reliance on his previous House of Lords decision of **Street v Mountford** relied on by both parties which had set out in clear terms the distinction between a lease and a licence as follows:

> *The test whether an occupancy of residential accommodation was a tenancy or a licence was whether, on the true construction of the agreement, the occupier had been granted exclusive possession of the accommodation for a fixed or periodic term at a stated rent, and unless special circumstances existed which negatived the presumption of a tenancy (eg. where from the outset there was no intention to create legal relations or where the possession was granted pursuant to a contract of employment) a tenancy arose whenever there was a grant of exclusive possession for a fixed or periodic term at a stated rent.*

[66] Lord Templeman emphasized that in the absence of the essentials, what exists between the parties amounts to a licence. Some authorities have referred to an added element to the creation of a licence which is the lack of an intention to create legal relations. This was discussed by Lord Denning in **Facchini v Brydson** where he observed that "*in all cases where an occupier has been held to be a licensee there has been something in the circumstances such as a family arrangement, an act of friendship, generosity, or such like to negative any intention to create a tenancy*."

[67] Lord Templeman in **Street v Mountford** commented on this observation by Lord Denning referring to the special circumstances which are capable of negativing an intention to create a tenancy but reaffirmed the principle that the professed intention of the parties is irrelevant.

[68] Kodilyne in Commonwealth Caribbean Property Law also cautioned that under the test in **Street v Mountford**, the intentions of the parties as to whether a lease or licence was to be created are irrelevant and the only intention that is to be regarded

as relevant is the intention to give exclusive possession of the premises. Kodilyne went on to identify the circumstances in which a licence and not a lease was created which included where a person is given exclusive possession of premises as an act of friendship or generosity or by way of a family arrangement.

[69] The authorities have signalled that consideration should also be made of the surrounding circumstances to determine the relationship between the prospective occupiers, the course of negotiations and the nature and extent of the accommodation (see **A.G. Securities v Vaughn & Antoniades & Villers**). The starting point here must be firstly to examine the circumstances surrounding the arrangement between the parties.

[70] It is accepted that the parties were part of the same church and that in early discussions they both seemed interested in providing social enterprise services, in particular to at-risk youth from Spanish Town. When they embarked on the arrangement there were little formalities in place and the Defendant was given a space on the compound which was a shared space. The relationship seemed to be one based on trust and mutual interest. In determining whether a lease or license was created the starting point must be to consider whether or not exclusive possession was given to the Defendant.

Whether the Defendant had exclusive possession of the premises

[71] The Claimant's position is that the Defendant was never given exclusive possession of the portions of the building it was allowed to occupy. The Claimant operated its business on the same premises. It is accepted that the premises consisted of some seven (7) buildings. Initially the Defendant was allowed to use a room for storage however, as the Defendant's business expanded, it was given access to a building and a portion of another building on the Claimant's premises. Representatives of the Claimant always had access to the premises until the Defendant unilaterally changed the locks preventing the Claimant from entering

the building. The Defendant contends that it had sole occupancy of one (1) building and partial occupancy of another and in furtherance of that, the Claimant had willingly cooperated in removing its belongings from the building that the Defendant solely occupies. They contend that despite the fact that the Claimant retained a key for the premises, this was only for emergency purposes. Moreover, the Defendant operated a factory and the nature of the business was such that external persons including the Claimant's representatives could not have liberal access to the factory.

[72] On a review of the first set of communication between the parties, it would appear that there may have been an intention to have a landlord and tenant relationship but as has been cautioned by Lord Denning in **Street v Mountford** it is not the intention of the parties that is the deciding factor but rather what actually happened. The intention is only relevant to the issue of exclusive possession.

[73] By email dated November 29, 2014 from Mr. Richard Harris to Mr. Michael Barnett, the subject of which stated '*FCJ – Lease'*, Shavuot made a formal request for rental of a storage space from an effective date of December 2014 at a reasonable rate. In response to this email, Mr. Michael Barnett welcomed the request to be partners in a social entrepreneurship model assisting in expanding the Youth Training experience at its experimental stage. The email also stated that a consideration of the rental amount for the storage space as well as a review of the draft document attached, taking into consideration market price and discussion with the Board for approval, would take place. In the meantime, however, Shavuot was allowed the use of the Resource Room until favourable terms of the rental were agreed.

[74] Though the earliest set of communication revealed that there was an intention to enter into an agreement, the parties did not seem to have followed through with this and what seemed to have ensued was a social partnership. This can be gleaned from email correspondence from Mr. Richard Harris dated May 27, 2015 where he introduced himself as Mike's friend and partner in a social enterprise

project. It is also apparent that both companies shared the use and access of the building. This is evident from email dated June 2, 2015 from Mr. Michael Barnett to Mr. Richard Harris indicating that NHCOM's stock of items has been depleted as they were used by Shavuot's employees. The Defendant sought to rely on a letter from NHCOM to Shavuot dated January 1, 2017 enclosing a Rental Agreement for review however, there is no evidence that the terms of the agreement were agreed.

[75] It is not sufficient for one party to be interested in securing a lease and the other party to be resisting this. There must be consensus between the parties on the essential terms which include consensus on exclusive possession. The case of **Implementation Limited v Social Development Commission** [2019] JMCA Civ 46 underscores this point. At paragraph 75 Phillips JA quoted the authors of Halsbury's Law on the essentials of a lease:

> *The authors also stated that, if those "matters are ascertained to be offered and accepted, it is sufficient". If these essential terms are not mentioned by one side and accepted by the other, the matter rests in incomplete negotiation, and there is no concluded contact."*

[76] It appears from the correspondence that although the Defendant had expressed its interest in securing a lease, and the Claimant promised to finalize this, the Claimant had not followed through with this. Mr. Richard Harris indicated that in 2018 when the Company started occupying the entire building for the operation of the factory, it procured a key for the building and only gave the principals of NHCOM a copy of the key for emergency. He also stated that NHCOM was provided with a master lock key for the main gate.

[77] The authorities have indicated that the basis on which the keys are retained by the Landlord should be considered. The authority of **Aslan v Murphy** [1990] 1 WLR 773, opined that:

> *"Provisions as to keys are often relied upon in support of the contention that an occupier is a lodger rather than a tenant. Thus in Duke v. Wynne, to which we turn next, the agreement required the occupier "not to interfere with or change the locks on any part of the premises, [or] give the key to any other than an authorised occupier of the premises." Provisions as to keys, if not a pretence which they often are, do not have any magic in themselves. It is not a requirement of a tenancy that the occupier shall have exclusive possession of the keys to the property. What matters is what underlies the provisions as to keys. Why does the owner want a key, want to prevent keys being issued to the friends of the occupier or want to prevent the lock being changed?"*
>
> *"A landlord may well need a key in order that he may be able to enter quickly in the event of emergency: fire, burst pipes or whatever. He may need a key to enable him or those authorised by him to read meters or to do repairs which are his responsibility. None of these underlying reasons would of themselves indicate that the true bargain between the parties was such that the occupier was in law a lodger. On the other hand, if the true bargain is that the owner will provide genuine services which can only be provided by having keys, such as frequent cleaning, daily bed-making, the provision of clean linen at regular intervals and the like, there are materials from which it is possible to infer that the occupier is a lodger rather than a tenant. But the inference arises not from the provisions as to keys, but from the reason why those provisions formed part of the bargain*."

[78] In **Aslan v Murphy,** the Lords considered the basis on which the key was retained. Although the facts of the case are different, the principle on the purpose of the landlord's use of the keys is applicable. It does not appear that the Claimant retained the keys simply for emergency reason. I find that it is more likely that they retained the keys because they felt they had a right to access the property as they chose and when they desired to. It is suggestive of the fact that they never intended to give the Defendant exclusive possession of the section of the premises which they occupied.

[79] When all the circumstances are examined, taking into account the evidence given by the parties, I found the evidence presented by the Claimant to be more credible. I accept that Shavuot was allowed use of a room and when their business

expanded, they were allowed access to a building and a portion of another. There were no requirements for NHCOM to be excluded from the premises and it would appear that each company operated to the benefit of the other. The Claimant's evidence is that it continued to use the building for training. Further that some parts used in the Claimant's operation were kept in a storage room at the back of the facility and specific areas used as sickbay, bathroom, kitchen and pantry space were accessible to the Claimant and its students.

[80] The parties shared a cordial relationship until sometime in February 2019 when the board of NHCOM met to discuss the lease agreement. The parties agreed that Shavuot would pay an interim amount of Eighty Thousand Dollars ($80,000.00) until an appropriate sum was determined and agreed to. Shavuot also agreed to pay towards the utility bills. A water meter was installed to measure the water being pumped into the building occupied by Shavuot. It was also agreed that Shavuot would have its own electricity meter. Even after this meeting there remained issues that needed to ironed out as indicated in an email dated February 20, 2019 from Mr. Michael Barnett to Mr. Richard Harris. Up until this point, it would appear that NHCOM had full access to the building occupied by Shavuot and retained the keys thereto.

[81] It was in December 2019 that Shavuot changed the locks on the building without notifying NHCOM and did not provide them with a copy of the keys. Mr. Richard Harris accepted in cross-examination that the locks were changed but that this was in order to prevent health hazards based on the nature of the business they operated. Mr Barnett pointed out that he protested about this as it was never agreed that Shavuot would have sole occupation of the premises. He made several demands to them for the keys and access to the properties.

[82] The relationship between the parties continued to deteriorate and Shavuot's attorneys-at-law sent a letter to NHCOM insisting that they had a right to exclusive possession and NHCOM's Attorneys-at-law responded with a letter dated April 20,

2020 terminating what they referred to as the licence and making a formal demand for Shavuot to quit possession of the premises. This letter also explained that Shavuot had changed the locks and did not provide NHCOM with a key to the premises. The Claimant has insisted that this Notice was sufficient to terminate the arrangement, it being a mere licence and that they never gave the Defendant exclusive possession.

[83] In order to establish that there was exclusive possession on a balance of probabilities, there should be evidence that the Claimant intended to grant exclusive possession and did in fact do so. There must also be an agreement by the grantee to this exclusive possession. The parties must be *ad idem* on this. The Claimant has asserted that it never expressly gave exclusive possession to the Defendant. The Defendant is asking the Court to find that by the conduct of the parties, exclusive possession was agreed and did in fact take place. In this regard the Defendant has been inconsistent. Mr Harris' evidence was that it was agreed that Shavuot would occupy the entire building which it occupies presently after the school operated by NHCOM closed in about 2016, however he also gave evidence that Shavuot has exclusive possession of the premises from 2018 and continuing.

[84] According to Mr. Barnett, from 2015 to December 2019 NHCOM maintained free access to all rooms on the building. According to Mr. Harris, it was in 2018 that the company started occupying the entire building for the operation of the factory and it gave NHCOM a copy of the key for emergency purposes. Mr. Harris spoke about his own actions of the company and the efforts they made to secure exclusive possession but there is no evidence coming from him that NHCOM ever consented to them having exclusive possession. Although Mr. Harris spoke to Shavuot's attorneys-at-law who wrote to the Claimant requesting a written lease agreement there was no response agreeing to this and no formal lease agreement was even given to them.

[85] Although the Defendant has insisted that it had exclusive possession they have not pointed to the circumstances under which this agreement for exclusive possession was made. In addition to that they have not denied that at all times save and except when they changed the lock, that the Claimant maintained its access to the premises. Mr. Harris spoke about NHCOM constantly allowing its occupants to roam freely. He even spoke about Shavuot not allowing Mr. Barnett to access its factory when he made a request on short notice for external persons to tour the factory. Shavuot has not pointed to any conduct on the part of NHCOM that shows an intention to grant them exclusive possession. The Defendant has suggested that the fact that they had their own electricity and water meters is suggestive of exclusive possession but that without more does not support exclusive possession as that was done for the purpose of apportioning the cost of the utilities. Based on the circumstances painted, it is evident that both parties used the space in the building contemporaneously.

[86] The fact that Shavuot had to secure exclusive possession by changing the locks supports the Claimant's account that they never gave them exclusive possession. In all other circumstances, when the locks were changed, a copy of the keys were provided to NHCOM but on this occasion Shavuot changed the locks and did not hand over a copy of the key to NHCOM which prevented their access.

[87] During the cross-examination of Mr Barnett, he agreed with Counsel's suggestion that as at April 2020 the arrangement and understanding was that Shavuot was exclusively occupying a building and a portion of another building exclusively on the Claimant's premises for the sum of Eighty Thousand ($80,000.00) per month. He clarified this in re-examination when he reiterated that in his witness statement he said that up until December 2019 it was never agreed that Shavuot would have sole occupation of any building. This has to viewed in the context in which that answer was given which was following questions to do with him being locked out of the premises from December of the previous year and the undisputed evidence that the Claimant unilaterally changed the locks to the premises so as to exclude

the Claimant and its agents from entering the premises. Any exclusive possession obtained in these circumstances could not have been by way of an agreement between the parties. I am satisfied on a balance of probabilities that there was no intention on the part of the Claimant to give exclusive possession and similarly no consensus idem on the giving of exclusive possession to the Defendant.

[88] I will now consider the issue of rent.

Whether there was an agreement for the payment of rent

[89] The parties are agreed that at the time Shavuot commenced the occupation of a room at the premises owned by NHCOM in 2014 there was no agreement as to a fixed amount to be paid by Shavuot to NHCOM. According to NHCOM although no fixed sum was agreed, it was the understanding that the parties would try to agree a particular figure at a later time. According to Shavuot, the initial terms of the agreement did not include the payment of rent, nor the payment of water and electricity, however this changed later in 2014 when NHCOM sought to introduce a rental fee and related costs.

[90] Interim payments were made by Shavuot as shown on some of the invoices exhibited to include, labour cost for projects, production related utilities and in some instances, rental of space for storage rooms but these figures varied. The Claimant's evidence is that these payments were a *symbolic monetary contribution towards the rental of the building and property*", a portion of a yet to be determined sum and not the full sum. On a review of the evidence, the invoice dated December 20, 2014 is the first invoice that disclosed a payment for rent in the sum of Ten Thousand Dollars ($10,000.00). The description on this invoice stated 'Rental Space Costs for Resource Room – New Building'. The payment amount and description is not consistent throughout all the invoices. In fact, in the initial stage, only the invoices dated November, 2014, December 2014, January 2015, April

2015, May 2015 and June 2015 disclosed a description for a rental sum and the sums for rent fluctuated.

[91] It was not until April 2019 that the parties had a discussion leading to an agreement that Shavuot would pay the sum of Eighty Thousand Dollars ($80,000.00) per month. According to Mr. Barnett, this sum was merely an interim amount and was not reflective of the full value for the portion of the premises being occupied. It is the Claimant's contention that there was no *consensus ad idem* between the parties concerning the full rent as discussions were ensuing regarding the final sum. However, Mr. Richard Harris in his evidence said there was an agreement for Eighty Thousand Dollars ($80,000.00) for rent plus sixty percent (60%) of the utility bills as well the water charges isolated by a meter which measured water pumped to the building occupied by Shavuot. It is accepted that NHCOM promised to reduce the terms of the agreement to writing which did not materialize. However, there is no contest to the fact that Shavuot started paying this sum on a monthly basis.

[92] An invoice was prepared dated May 2019 for the sum of One Hundred and Thirty-Three Thousand, One Hundred and Thirty-Two Dollars and Seventeen Cents ($133,132.17) representing interim monthly lease payment in the sum of Eighty Thousand Dollars ($80,000.00) and the balance represented a sum for National Water Commission and Jamaica Public service bill. Another invoice exhibited, although dated June 1, 2019 refers to the interim lease payment for May in the sum of Eighty Thousand Dollars ($80,000.00). This payment of Eighty Thousand Dollars ($80,000.00) for interim monthly lease payment remained consistent for the remaining invoices exhibited.

[93] In order for a valid tenancy to exist there must be certainty of rent. This position can be gleaned from a number of authorities to include **Greater London Council v Connolly** where Lord Denning expressed that "it is clear law that rent must be certain. But that does not mean that it must be certain at the date of the lease.

Rent is sufficiently certain if it can be calculated with certainty at the time when payment becomes due". In **Regnart v Porter** (1831) ER 174, the court found that no lease existed where the sum was not settled with precision. The Claimant has relied on the case **Renford Toomer v Herbert Hamilton anor** to say that there was no agreement for the rental sum therefore no *consensus ad idem*. In that case the court emphasized the need for *consensus ad idem* pointing out that "Rent must be certain or capable of being calculated with certainty at the date when payment becomes due. An uncertain agreement cannot be enforced."

[94] I recognise that the question of whether there was certainty of rent could only have arisen post April 2019 when the parties met and the sum of Eighty Thousand Dollars ($80,000.00) was discussed. I accept that there was *consensus as idem* as this was the figure set by Mr. Barnett and thereafter Shavuot started making this payment on a monthly basis. Mr. Barnett insists that this was an interim sum, however even if this were so, it was still a certain sum required to be paid monthly. My understanding of this interim sum is that it was a certain sum to be paid until Mr. Barnett had worked out a sum that would be commensurate to the value of the premises occupied by Shavuot and so he was seeking to retain the right to increase it. The fact that it was paid monthly without demur suggests that it was accepted that until there was another agreed figure this was the amount that was to be paid by the Defendant.

[95] A similar position obtained in the case **Re Knight, ex p Voisey** (1882) 21 Ch D442 where the Court held that a rent, the amount of which may fluctuate according to the happening of certain events is not an uncertain rent. A distinction was drawn between a rent which may fluctuate and one which is uncertain. In this case there was no fluctuation of the payment sum. It was set at Eighty Thousand Dollars ($80,000.00). Therefore, what this means is that even if it is for the interim, until the parties arrived at some other agreement as to another sum to be paid, this remains as the amount to be paid on a monthly basis. I am therefore satisfied on a balance of probabilities that there was certainty of rent.

Whether there was certainty of duration

[96] Counsel for the Claimant asserts that since there is no agreement setting out the duration for which the Defendant was permitted to occupy the premises, it cannot be said that a lease of a certain duration exists. The case **Prudential Assurance Co Ltd v London Residuary Body** relied on by the Defendant made the point that it was a requirement of all leases and tenancy agreements that the term created was of certain duration.

[97] This payment amount was required to be made monthly and in fact the Defendant made the payments as per the agreement so this created certainty regarding the sum and the term. So if this were found to be a tenancy it would constitute a monthly tenancy regardless of whether it was an interim sum or not.

Conclusion on the issue of whether a lease or licence was created

[98] I have accepted that there was certainty of the sum to be paid and certainty of the term. However, in order for there to be a lease, all three elements must be present, and they must be present at the same time. I had earlier found that there was no exclusive possession and therefore what existed between the parties was a licence. Since there was payment being made, it would be more aptly described as a licence for value or a contractual licence.

Whether the Claimant is entitled to recovery of possession, damages for trespass and damages for breach of contract or unjust enrichment

[99] A licence having been created, the **Winter Garden Theatre** case supports the position that a contractual licence for the occupation of premises may be determined at any time by the licensor, provided that reasonable notice is given. The Claimant has maintained that the letter dated April 20, 2020 written by Myers

Fletcher & Gordon terminated the agreement and provided the Defendant a reasonable period of three (3) months to vacate the premises. In that letter the attorneys for the Claimant wrote inter alia:

> *"This letter serves as a formal demand for Shavuot to turn over possession of the captioned premises and return all equipment built and supplied New Horizon within three months of the date hereof."*

[100] In the **Winter Garden Theatre** case, it was agreed between the parties that what they had was a pure license for value. Although no rights were stipulated concerning termination, Viscount Simmons at page 337 of the judgment on the question of termination commented on the fact that the license was not perpetual and so "upon the appellants indicating their decision that the permission given by the licence would be withdrawn, the respondents were to have a reasonable time to withdraw after which they would become trespassers". The only answer that a licensee can have is that sufficient time was not given. In the instant case, I have found that what existed was a monthly arrangement and so one (1) months' notice to vacate would have been sufficient.

[101] The Claimant gave the Defendant three (3) months' notice. The Defendant could not have expected to remain in perpetuity. When this is considered in the context of the Defendant having occupied the premises for in excess of five years and having done some expansion work on the premises, three months would be sufficient time to re-arrange their affairs and quit the premises. This was sufficient time and so I find that the contractual licence was therefore validly terminated, and the Claimant is entitled to an order for recovery of possession.

Whether the Claimant is entitled to Damages for Trespass

[102] The Defendant should have vacated the premises by July 20, 2019. The Defendant's authority to remain on the property has expired and so the Defendant is now in the position of a trespasser. The Claimant would therefore be entitled to

damages for trespass. In the Particulars of Claim, the Claimant averred that as a result of the Defendant's continued occupation of the premises following the termination of the contractual license agreement and the expiration of the notice period, the Claimant has incurred and continues to incur financial losses as a result of the Defendant's continued and unlawful trespass to its property.

[103] The Claimant has not put forward any evidence to substantiate their claim for financial loss. They have however asked for an order appointing an assessment of damages hearing. They say this is necessary because the true extent of the losses incurred by the Claimant cannot be determined until the property is vacated by the Claimant and a qualified real estate agent makes an assessment of the market value of the property.

[104] The Defendant's response in their skeleton arguments was that the Defendant continues to pay rent to the Claimant and as such its occupation cannot amount to trespass. Further in submissions before me the Defendant contended that the Claimant has brought forward no evidence to show the damages to which it would be entitled. There is merit in this submission.

[105] It is important at this juncture for me to point out that this was a full trial on liability and quantum. It was not until the Claimant filed its skeleton submissions on May 30, 2025, a few days before the commencement of the trial that they asked for an order appointing an assessment of damages hearing so that damages may be enquired into and assessed by the Court.

[106] In seeking to show their loss, it would have been open to the Claimant to rely on an expert to prove the kind of income a property of a similar value to what the Defendant occupies would be worth on a monthly basis in rental income. It was always open to the Claimant to ask the Court for an order permitting a real estate agent to enter the premises to conduct a valuation which they could have relied on at trial.

[107] If the trespass has caused actual damage the Claimant is entitled to receive such amount as will compensate him for his loss. If the Claimant was concerned about how the Defendant's occupation of the premises would impact them financially in the sense that they may have done acts to cause a diminution in the value of their premises, it would certainly have been open to them to ask the Court for an order permitting an inspection of the premises.

[108] The Defendant is still in occupation of the premises. Even if the Court makes an order for them to vacate by a particular date there is no certainty as to what date they would vacate. If the Court were to wait until they vacate to do an assessment there is no guarantee as to when this would even be possible. Although there may very well be damage incurred up to the point to fully vacating the premises, this did not relieve the Claimant of the obligation to put before the court the best evidence that they had up to the time of trial to enable the Court to come to a decision at this point. If there is any damage done to the property up to the point of vacating the premises or that is discovered after the Defendant vacates the premises, this may very well be the subject of a different claim. I do not find that it would be appropriate to send the matter for an assessment of damages.

[109] The tort of trespass is actionable per se. Therefore, even if the Claimant fails to place evidence of loss or damage before the Court, he is entitled to recover nominal damages. Taking all the circumstances into account, I am of the view that a reasonable sum for nominal damages would be Five Hundred Thousand Dollars ($500,000.00).

Whether the Claimant is entitled to damages for breach of contract or alternatively unjust enrichment

[110] The Claimant claims damages for breach of contract by the Defendant. From the Particulars of Claim, the nature of the contract separate and apart from the

contractual license is set out in the Particulars of Oral Agreement. This included that the Claimant was to train and equip at risk youth to perform job functions in the Defendant's business; that the Claimant in its administrative capacity was to manage the Defendant's payroll and the Defendant was to pay a fee in consideration of the services offered. The Claimant was also to build or acquire certain machines, furniture and equipment for use in the Defendant's business with the ownership remaining vested in the Claimant and transferred to the Defendant after compensation for them provided to the Claimant. The Claimant alleges that the Defendant breached these agreements resulting in the Claimant suffering loss and incurring expenses.

[111] The first question to be determined is whether any of these agreements constituted a contract between the parties. The Claimant had alluded to an oral agreement between the parties. The court has to decipher the terms of this alleged contract and whether the elements of a contract were in fact present. The decision of **Equilibrio Solutions (Jamaica) Limited v Peter Jervis & Associates** [2021] JMCC COMM 28 is instructive where Laing J (as he then was) held that in order to create a valid contract there must be an intention to create legal relations along with the other elements. It is accepted by both parties that there was an arrangement for the parties to operate a social enterprise service. In these circumstances, the issue as to whether there was an intention to create legal relations has to be carefully considered.

[112] The Court of Appeal decision of **Carlton Williams v Veda Miller** relied on by the Claimant is also of assistance. It reiterated the principle that "where the contract is alleged to be oral, the court must look for the intention of the parties in the words said at the time the contract was alleged to have been made, the conduct of the parties to the contract and any evidence of the negotiations at the time of the contract". What the court cannot do is create a contract where none existed.

[113] The Claimant has suggested that this being a commercial arrangement there is a presumption in favour of there being an intention to create legal relations. However, the relationship that existed between the parties was not akin to a normal commercial relationship where the parties are solely in the business of making money. This was a social enterprise, the parties were in the same church, the Claimant's representative referred to themselves as missionaries. The fact that when the arrangement commenced there was no agreement for the Defendant to pay any money to use the space supports the Claimant's contention that the relationship started out as being a social enterprise. The Claimant agreed to train young persons who would be employed by the Defendant to work in its business. During the currency of the arrangements with the assistance of the Defendant, the Claimant benefited from a grant from an organisation known as Sofi Tucker. Therefore, the usual presumption of commercial arrangements having an intention to create legal relations would not be applicable in this case.

[114] Mr. Barnett gave evidence of an agreement for Shavuot to compensate NHCOM for its provision of skilled labours but does not indicate what was the agreed sum if there was one and on which date or occasion this agreement was entered into. Mr. Barnett also said that Shavuot agreed to pay a fee for administrative and human resource management support services without indicating what this fee was and when it was payable. Mr. Barnett said that Shavuot agreed to compensate NHCOM for use of the machines and equipment without any indication as to what sum if any was agreed.

[115] Mrs. Barnett also gave evidence in support of these contractual arrangements indicating that for the first few months she generated bills for Shavuot which included the amount for employment of the staff, utilities, use of equipment and a surcharge for the services NHCOM provided through her. She said she performed administrative services for Eighteen Thousand Dollars ($18,000.00) per month but there was no remuneration to NHCOM from January 2015 to December 2018. Despite these allegations of services being provided, there is no firm evidence as

to the Mrs Barnett could not point to when or where there was this agreement for the Defendant to pay this sum or any other sums for services rendered. In cross-examination she agreed that there was no fixed or specific sum set for Shavuot to pay NHCOM for administrative services.

[116] With the kind of lose arrangement the parties shared, on a balance of probabilities it would be difficult to accept that there was an intention to create legal relations. It is clear that there was a relationship between the parties and there was some sort of social enterprise going on between them where each party benefited in some way. In terms of the elements of a contract, there is no evidence to substantiate that and no intention to create legal relations. The Claimant has also failed to provide evidence of the sums owed to it for services and equipment provided. There would also have been some consideration to the fact that at the time the claim was filed some of the sums being claimed, in particular those from 2015 and 2016 may have been statute barred.

[117] The Claimant has alternatively sought damages on the basis of unjust enrichment. They have asked the court to make an award for unjust enrichment in keeping with the principles in **Susan Williams et al v JTC-32 LLC et al** where Wint-Blair J at paragraph 242 of the judgment extrapolated the principles of unjust enrichment to be as follows:

> *"The principle of unjust enrichment requires: 1) That the defendant has been "enriched by the receipt of a "benefit" 2) That this enrichment is at the expense of the claimant 3) that the retention of the enrichment is unjust.*

[118] The starting point would be proof that the Defendant received a benefit and was enriched at the Claimant's expense and that it was unjust. The Defendant has not denied that it was placed into occupation of the premises and that for some time no rent was paid. However, this was through no fault of the Defendant as it was the Claimant who promised to set a certain figure for rent and for years failed to do

so. During this period there were in fact some haphazard payments made in different sums. In addition to that the Claimant who was engaged in this social enterprise of training at-risk youth benefited from the employment of these youths in the Defendant's business. The ability to do that would have enured to the Claimant's benefit in succeeding the objectives of its mission and enterprise. The Claimant was accustomed to receiving grants from organisations and in fact received a grant from the Sofi Tucker during the time the Defendant occupied its premises and with the assistance of the Defendant's input. The Claimant cannot therefore say that it derived no benefit from this arrangement it had with the Defendant.

[119] Since May 2019 the Defendant started making a set payment each month. It could be argued that the payment made did not justify the nature of the premises enjoyed by the Defendant however, it was the Claimant whose duty it was to set a sum that reflected the true value of the interest that was enjoyed by the Defendant. It would also have been open to the Claimant to lead expert evidence to show what would be the actual value of the premises occupied by the Defendant. The Claimant also failed to do this. I find there is merit in the Defendant's submission that there is also no evidence of any benefit of a quantifiable value accrued by the Defendant. The Claimant has failed to establish a case of unjust enrichment by the Defendant.

Whether the Defendant is entitled to the sums being claimed on the Counterclaim for damages for breach of contract and loss of business opportunity

[120] The Defendant has counterclaimed for damages for breach of contract asserting breaches by the Claimant of several agreements. The breaches encompass the following: failing to provide young persons who were adequately trained to use the equipment; failing to supply an effective and working dryer pursuant to the terms of the Dryer Agreement; failing to repay the sum of One Hundred Thousand Dollars ($100,000.00) for the cost of water pursuant to the Water Bill agreement; failing to

complete the electrical upgrade to the premises at the requisite standard; and failing to honour the terms of the Expansion Agreement.

[121] The Claimant has contended that none of the counterclaims is supported by evidence of the fundamental basis of a contract or any agreement or meeting of the minds between the parties nor is there any evidence of conduct of the Claimant which would make it bound to compensate the Defendant. The determination of these issues will depend on the nature of the evidence relied on including the documentary evidence and credibility of the witnesses.

Inadequately Trained Workers

[122] The first alleged breach is the failure to provide young persons who were adequately trained. The evidence in support of this came from Mr. Richard Harris who indicated that Shavuot suffered loss as a result of damage to equipment by inadequately trained students resulting in loss of products amounting to approximately Seven Hundred and Fifty Thousand Dollars ($750,000.00) and One Million Dollars ($1,000,000.00), respectively. This is alleged to have occurred during the period April 2016 to March 2018. In response Mr. Barnett stated that the trainees received Heart National Vocational Qualifications at Levels 1 and 2 after which Mr. Harris was involved in the vetting and interviewing of the students and it was he who made the decision as to which students to employ. He also indicated that they received no complaints from Shavuot about the inadequacy of the training provided.

[123] The evidence in this regard is vague and lacking in specificity as to on what occasion or occasions this took place and which student/s were responsible for damaging the equipment and what equipment was damaged and how it was damaged and what would be the cost to repair said equipment. All this would have been necessary for the Claimant to properly respond to this especially since the Claimant is saying this was not brought to their attention before. Even questions

concerning the limitation period for some of those claims could not be addressed without some specificity. Such an allegation would have to be made with some specificity for it to generate credibility.

[124] The fact that equipment is damaged by students does not mean that it must be because of a lack of proper training. There could be other reasons. I agree with the Claimant that in order to prove this, the Defendant should have provided supporting evidence either by way of expert evidence or otherwise to support the allegation that the damage to the equipment was due to inadequate training and not any other factor.

[125] The Defendant would have to prove that in delivering skills training courses to these persons the Claimant and/or its agents were professionally negligent and that they fell below the required standards of care for professional men engaged in such tasks. The fact that the young persons did not do their jobs properly does not mean that they were not properly trained. In any event the decision to employ these persons resided with the Defendant. There is no evidence to substantiate the assertion that there was inadequate training and that the damage to the equipment was a direct result of any improper training. This aspect of the Claim is entirely without merit.

The Dryer Agreement

[126] The Defendant's case is that the Claimant agreed to build a hybrid solar/biomass dryer for the sum of One Million Two Hundred Thousand Dollars ($1,200,000.00). Mr. Richard Harris testified that Mr. Barnett provided them with a proforma invoice dated November 23, 2015 prepared by NHCOM and addressed to Mr. Richard Harris for the provision of a hybrid solar/biomass dryer for the sum of One Million Two Hundred Thousand Dollars ($1,200,000.00). Mr. Harris also testified that this money was paid to NHCOM in 2016 and provided documentation from EXIM-Bank showing payments of Nine Hundred Thousand Dollars ($900,000.00) and Three Hundred Thousand Dollars ($300,000.00), respectively to the Claimant.

[127] No issue has been taken with the fact of this payment being made however, according to Mr. Barnett, the payment made by Shavuot was insufficient to build the dryer to the required specifications. Mr. Barnett stated that the projected cost to design and build the dryer was Three Million, One Hundred Thousand Dollars ($3,100,000.0) but Shavuot indicated that it did not have the full amount to fund this and that it intended to fund same through the proceeds of a loan from EXIM Bank in the sum of One Million, Two Hundred Thousand Dollars ($1,200,000.00). According to Mr. Barnett they thereafter agreed that the build out of the dryer would be done in phases to accommodate Shavuot's ability to fund the project.

[128] However, the proforma invoice provided by NHCOM did not reflect this. Taken at face value the invoice provided for the supplying of a hybrid solar/biomass dryer of a certain specification for the sum of One Million Two Hundred Thousand Dollars ($1,200,000.00). In cross-examination Mr. Barnett accepted that there is no evidence to support his assertion regarding the cost of the dryer exceeding what is set out in the invoice. I therefore accept that the invoice reflected the agreement of the parties and that the sum set out was the full sum agreed. Mr. Richard Harris testified that up to one (1) year after discussion, NHCOM was unable to complete the dryer as agreed though Shavuot provided the invoiced sum.

[129] There is no evidence to support Mr. Barnett's assertion that the invoiced sum is a part payment of a further sum. He accepted that the dryer was not built to specification and both parties accepted that it was deficient and did not adequately provide the required service. Mr. Barnett accepted in his evidence that since the dryer was not built to specification, clear instructions and guidance were given to prevent material loss. He indicated that he repeatedly stressed that Shavuot should limit the amount of raw material being put in the dryer at any given time or after Wednesdays, and their failure to abide by these instructions caused the material not to dry properly which caused condensation. Based on the above, Mr.

Barnett was aware of the defects of the dryer and that the dryer was not built to the requisite standard.

[130] Shavuot asserted that they incurred financial loss as a result of NHCOM's failure to build a hybrid/solar biomass dryer to its requisite standard and as a result of this failure, Shavuot did not have the proper drying facility which adversely affected its products and still had to repay the loan it obtained from the bank to assist with purchasing the dryer. I accept that it was the Claimant who breached the contract to provide a functioning dryer that was fit for the purpose for which it was built. Shavuot has contended that as a result of the defective dryer, it incurred a series of losses to include:

i. Two Million, Eight Hundred and Eighty Thousand Dollars ($2,880,000.00) between April 2016 to March 2018 as a result of the inefficient dryer;
ii. One Million, Two Hundred Thousand Dollars ($1,200,000.00) for loss of raw material used for pepper; and
iii. One Million, Four Hundred Thousand Dollars ($1,400,000.00) to engage RADA for drying facility.

[131] The sums claimed here are akin to special damages. Special damages are required to be specifically proven. The sum of Two Million, Eight Hundred Thousand Dollars ($2,800,000.00) was said to be incurred during the period April 2016 to March 2018. Mr. Joel Harris the marketing director of Shavuot gave evidence that damages were calculated based on the extended time it took to dry products. He also spoke to damages arising as a result of the increase in the energy cost to the company as it had to migrate the propane system and begin purchasing gas from PETCOM because of the absence of a proper functioning dryer. The payments made to PETCOM are reflected in the financial records of the company. There is no indication as to how he arrived at this figure of Two Million, Eight Hundred Thousand Dollars ($2,800,000.00) or that he has any expertise in this area to be able to give this kind of evidence. It would have been necessary to secure the services of an expert who would speak to the loss incurred as a result

of the malfunctioning dryer. There is no evidence to show the amount the Defendant would have earned for any specific period that could then be used as a guide to make an award.

[132] Mr. Joel Harris also spoke about increased employment but did not indicate what that cost the company. He also gave evidence that in order to dry products and mitigate their losses Shavuot had to engage the services of RADA and that the cost to dry products on each occasion was One Hundred Thousand Dollars ($100,000.00) for fourteen (14) months resulting in a total cost of One Million, Four Hundred Thousand ($1,400,000.00). This cost would be recoverable even without any expert evidence. There are however no receipts to support this expenditure of One Million, Four Hundred Thousand Dollars ($1,400,000.00). The only receipts presented by the Defendant as coming from RADA are dated 2015 which would have been prior to April 2016 which is the period from which the alleged dryer losses were incurred. When the evidence is scrutinized, there is no evidence to support these sums being claimed.

[133] Counsel for the Defendant has asked me to consider making an award of nominal damages for this breach of contract. I take into account that unlike trespass a breach of contract is not actionable per se. However, there are authorities that support a nominal award being made where there has been loss but there is no evidence as to the amount. This question of damages in a case where there is a failure to prove loss was considered in the case of **Dixon v Deveridge** (1825) 2 C & P 109, where the Defendant accepted that he owed a debt but there was no evidence as to the amount and the court found that the Plaintiff was only entitled to a nominal amount of damages. This case demonstrates that nominal damages are not confined to trespass cases but can extend to cases where there is a breach of contract. The Defendant has proven that there was damage incurred but has failed to prove sums pleaded. In these circumstances, I find it appropriate to make an award of nominal damages to signal that a wrong was committed being a

breach of contract. I find the sum of Two Hundred Thousand Dollars ($200,000.00) to be appropriate.

The Water Bill Payment

[134] The parties are agreed that the sum of One Hundred Thousand Dollars ($100,000.00) was given to the Claimant by the Defendant. According to the Defendant this was a loan. According to the Claimant, the Defendant was merely paying towards the water bill. I found the Claimant's witness to be more credible on this point. I accept the evidence of Mr. Barnett that this payment was made to them following a disconnection of the water supply to the premises on account of sums being outstanding. I accept that Mr. Barnett spoke to Mr. Harris about the disconnection and Shavuot paid the sum of One Hundred Thousand Dollars ($100,000.00) towards water charges which had accumulated to in excess of Seven Hundred Thousand Dollars ($700.000.00). I find as a fact that this sum was not a loan and that it was paid by Shavuot as their payment towards the water charges.

The Electrical Upgrade

[135] The witnesses for the Defendant did not give evidence to substantiate any agreement for an electrical upgrade. However, Mr. Barnett was questioned during cross-examination about whether he recalled NHCOM being engaged by Shavuot to upgrade the electrical wiring of the building occupied by Shavuot and he answered no. However, when asked about the grant received from the Sofi-Tucker foundation in the sum of United States Fifty Thousand Dollars (USD$50,000.00) he accepted that he received the grant for the purpose of upgrading the electrical supply to the premises and he said this was done. He was asked if he agreed that after this Shavuot has to expend additional sums and he agreed that he was aware of one additional cost to change a pothead, an electrical meter and connected wires. Shavout has not supplied any evidence of what the actual agreement was in relation to the electrical work and whether there was an agreement in place to

compensate them for any electrical upgrade. There is insufficient evidence to prove a breach of any agreement by the Claimant.

The Expansion Agreement

[136] The Defendant avers that the Claimant breached the Expansion Agreement and has claimed damages for loss of business opportunity. It is contended that Fifteen Million, Two Hundred Thousand Dollars ($15,200,000.00) was expended for the conversion of the school to a factory pursuant to an Expansion Agreement and though Phase 1 was completed, the Claimant took steps to hinder the completion of Phase 2 contrary to the Agreement. In its Amended Defence and Counterclaim filed February 12, 2024, the loss of business opportunity is stated at approximately Fifty Million Dollars ($50,000,000.00). However, this is inconsistent with the evidence of Mr. Joel Harris who alleged that loss of business opportunity is Thirty Million Dollars ($30,000,000.00) per year. It is contended that the Claimant facilitated the expansion by providing drawings for the work to be done.

[137] The Claimant on the other hand, asserted that there was never any agreement between the parties to expand or carry out any type of alterations to the premises without prior approval. Further, it was made clear that certain alterations should be specifically placed on drawings supplied for the Board's approval prior to them being made and there is no evidence that the Defendant complied, therefore any work done outside of approval from the Claimant would be in breach of the express instructions.

[138] The Claimant insists that the expansion was carried out without its knowledge. Mr. Barnett in his evidence pointed out that NHCOM did not enter into any agreement with Shavuot concerning any expansion of or making any substantial alterations to the premises and that Shavuot unilaterally expanded its operations without permission from NHCOM. Further, that Shavuot always represented that it would not be making any permanent alterations to the building and that it would remove any changes made following the end of its period of operation. During cross-

examination of Mr. Barnett he contradicted himself on this issue when he was confronted with a diagram setting out the “re-purposing of the factory space”. He agreed that it was the Claimant who sent it to the Defendant and that the diagram reflects a complete usage of the building by the Defendant. However, he sought to explain that it was only a draft.

[139] When Mr Barnett was asked if he was familiar with an expansion agreement proposed by the Claimant to the Defendant between 2018 to 2019 he said he was familiar with plans for expansion but said he would not term it an expansion agreement. Similarly, although Mrs. Barnett at first sought to say that the expansion took place without their knowledge, the evidence elicited under cross-examination showed otherwise. She agreed that there were discussions about this and that it took place over time. The Claimant’s case on this issue was inconsistent so I found the Defendant’s witnesses more credible here. I therefore accept that the Claimant was aware of the expansion that was taking place and that there was some agreement in place however the terms of that agreement will have to be determined.

[140] There is no written expansion agreement so the terms of the agreement will have to be extracted from emails sent and the discussions between the parties. It is agreed that sometime after March 2019 Shavuot made infrastructural changes, which included renovations, relocations and additions. The only document in writing seems to be the diagram and the emails exchanged between Mr. Michael Barnett and Mr. Richard Harris. In an email dated February 20, 2019 which has as its heading “Moving ahead with Lease Documentation-Update and Request for Proposal”, Mr. Barnett writes:

> *“We are totally open to reasonable approaches and are also taking into our lease draft, the ability to offset Shavuot’s “improvement costs” that have been previously agreed with NHCOM, generally those made in lieu of developments that we want to see for the overall “Project” such as the upgrading of the power lines to the Leased Building, as lease payments. In the lease, such Tenant Improvement and Tenant*

Additions are thoroughly addressed and can with mutual understanding be addressed and acknowledged as explained above as part or full lease payments".

[141] On March 3, 2019, Mr. Harris sends an email titled Pro Forma Invoice for Repair and Restoration of Fence in which he makes certain request for work to be done. Mr. Barnett responded:

> *"With respect to the request for expanded metal, ¼ inch be cut to size and tacked onto beam to keep out rodents he responded: "Ok, generally not a challenge as of now each time a request for alteration such as this is to be done, please print on the attached drawing, any (Shavuot) Tenant Improvements; or Shavuot (Tenant Alterations (showing previous and currently requested changes) and submit such updated sketches for review by the Landlord, New Horizons. This modification is one that will leave our building in a more marketable state than previously, and as such I give you herewith New Horizon's agreement, that the cost of this particular improvement, upon presentation to us of all original bills and expenses, is one such cost as will be allowed to be deducted in lieu of rent payments for that period.*

[142] NHCOM has relied on an email from Mr. Barnett to Mr. Richard Harris dated April 4, 2019, which expressed:

> *"We have not yet seen a diagram of all your proposed and implemented changes and have had to convey them verbally to the Board as you propose them. It has been explained to you that we are operating with new levels of accountability and transparency and as such we would prefer receiving a diagram first of all proposed changes before any changes are done."*

[143] From this it was made clear that Shavuot is not authorised to make physical changes to the premises without diagrams being submitted to NHCOM and approved by them. Mr. Harris accepted in cross-examination that in March 2019, NHCOM made it clear that any alterations were to be depicted and shared with NHCOM prior to making them. When he was asked about the NHCOM Board approving the alterations he says were made and whether they were done with

permission, his response was that he was not sure although he went on to say that he submitted diagrams. Although the evidence supports the fact that the Barnetts were aware that this expansion was to take place, the full extent of the agreement in relation to these diagrams is unclear.

[144] Mr Harris has not pointed to any agreement regarding compensation for the upgrades made, nor has it been shown that there was any agreement about the Claimant compensating the Defendant for the alterations that they made. There is no evidence to support the assertion that the Claimant agreed to pay the Defendant sums amounting to the tune of Fifteen Million, Two Hundred Thousand Dollars ($15,200,00.00). The Defendant has also averred that the Claimant hindered them from proceeding to Phase 2 of the Expansion however there is no evidence that the Claimant agreed to any such expansion. The Defendant has also failed to substantiate its claim for loss of business opportunity.

CONCLUSION

[145] Judgment is for the Claimant in respect of the claim for recovery of possession and for trespass. The Claimant has sought interest but as there is no sum awarded apart from the nominal sum, there is no entitlement to interest. Judgment for the Defendant on the Counterclaim for breach of contract in relation to the dryer agreement. All other orders sought on the Counterclaim are refused. With respect to the question of cost, I note that usually the successful party is entitled to their cost however the award of cost resides within the discretion of the court. The substantive claim was for recovery of possession. It was the issue in relation to recovery of possession that consumed most of the time to address this matter and the Claimant has succeeded in that. The majority of orders sought in respect of the Counterclaim have been refused. The award for nominal damages was made as the Defendant failed to place adequate evidence before me regarding the loss incurred in relation to the dryer agreement. In those circumstances, I am not

prepared to make an award of costs in their favour. I think it is more appropriate to award cost in favour of the Claimant. My orders are as follows.

1. The Claimant is entitled to recovery of possession of its premises situated at Wynter's Pen, Spanish Town in the parish of St. Catherine on or before November 30, 2025.
2. Nominal Damages for the Claimant for trespass in the sum of Five Hundred Thousand Dollars ($500,000.00).
3. Judgment on the Counterclaim to the Defendant for breach of contract in relation to the dryer agreement. All other orders sought in the Defendant's Counterclaim are refused.
4. Nominal Damages for the Defendant for breach of contract in the sum of Two Hundred Thousand Dollars ($200,000.00).
5. Costs to the Claimant to be agreed or taxed.

……
Stephane Jackson-Haisley J.
Puisne Judge