



JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 CD 00032

COMMERCIAL DIVISION

BETWEEN	NICO DISTRIBUTORS LIMITED	CLAIMANT
AND	BILLY CRAIG INVESTMENTS LIMITED (IN RECEIVERSHIP)	1ST DEFENDANT
AND	SCOTIA INVESTMENTS JAMAICA LIMITED	2ND DEFENDANT

IN OPEN COURT

Ms. Carol Davis, Attorney-at –Law for the Claimant.

Mr. Sundiata Gibbs and Ms. Melissa McLeod, instructed by Michael Hylton & Associates, Attorneys-at-Law for the Defendants.

HEARD: 22, 23 October, 18 December 2012, and March 22 2013.

PROPERTY LAW-WHETHER REFRIGERATION ROOMS FIXTURES OR CHATTELS-TWO-PRONGED TEST - DEGREE OF ANNEXATION AND PURPOSE OF ANNEXATION - PARAMOUNTCY OF PURPOSE- PLEADING - CONVERSION - REVERSIONARY INJURY - WHETHER COVERED BY PLEA OF “WRONGFUL INTERFERENCE WITH GOODS”

Mangatal J:

- [1] The Claimant Nico Distributors Limited (“Nico”) is a limited liability company duly incorporated under the laws of Jamaica. On May 3rd 2011, Nico filed this claim for wrongful interference with and/or conversion/ detention of its goods, i.e. an Isowall Chill Room, Isowall Freezer Room, and an additional Freezer Room.

[2] The First Defendant Billy Craig Investments Limited (In Receivership) (“Billy Craig”), and the Second Defendant Scotia Investments Jamaica Limited “Scotia Investments”, deny that they have converted any goods belonging to Nico. They say that these items were equipment affixed to the property upon which they are located and cannot be removed without causing material damage to the property. In the circumstances, the Defendants plead that if Nico had owned or been entitled to possession of this equipment, which is not admitted, that ownership and entitlement to possession passed to the registered owner of the property.

THE CLAIM

[3] Nico states that the Isowall Chill Room and Isowall Freezer Room were imported from Trinidad in July 1998. The additional room was imported, the Particulars of Claim state, in or about 1995 from the United States. Mr. Robert Joseph is a shareholder and Managing Director of Nico.

[4] The Cold Rooms were installed at premises at Pimento Way, Montego Freeport in the Parish of Saint James, which property was at the material time owned by Fletcher and Company Limited (“Fletcher”). This property is comprised of the parcels of land contained in Certificates of Title registered at Volume 1070 Folios 141 and 142 of the Register Book of Titles. Fletcher is a limited liability company. Mr. Joseph’s evidence is that he became a shareholder and Managing Director of Fletcher in or about 1995.

[5] In his Witness Statement which was ordered to stand as examination in chief, Mr. Joseph stated that Nico was given a licence by Fletcher and was permitted to install the Cold Rooms at the Fletcher property. He stated that at the time Nico did not have its own property and it was convenient to install the Cold Rooms in the building owned by Fletcher.

[6] Fletcher had granted a mortgage over the property to Billy Craig. According to the Particulars of Claim, Billy Craig had a dispute with Fletcher, and purported to be entitled to take possession of the Fletcher property in July 2006. Scotia Investments, then known as Scotia Dehring Bunting & Golding Limited (“Scotia

DB&G”), acted as agent of Billy Craig, and in that role, took possession of the premises at Pimento Way, and of Nico’s equipment and Cold Rooms.

- [7] By letter dated 8th October 2007, Nico through its then Attorneys-at-Law, sought the return of its goods from Scotia DB & G. However, by letter dated 7th January 2008 Scotia DB&G refused to permit Nico to remove its equipment and Cold Rooms from the building at Pimento Way.
- [8] Nico claims that to its knowledge, Scotia Investments has converted the equipment to its own use and has been renting it for commercial use.
- [9] Nico avers that prior to the detention and/or conversion of the Cold Rooms by the Defendants, they were being rented to Coldfield Manufacturing Limited (“Coldfield”) for a monthly rental of US \$3,166 per month, to be increased by 7 1/2 % per annum.
- [10] As a result, Nico claims that it has suffered loss and damage consisting of the value of the Cold Rooms detained/converted by the Defendants (US\$36,666.00) and loss of rental income of US\$161,538 and continuing. Interest is claimed at a commercial rate of 16% per annum or such other interest as ordered by the Court.

THE DEFENCE

- [11] The Defendants say that the Cold Rooms were affixed to the property owned by Fletcher and in respect of which Billy Craig had a mortgage.
- [12] Fletcher defaulted under the terms of the mortgage and Billy Craig took possession of the property pursuant to an order of the Supreme Court in Claim No. 2005 HCV 05018 dated July 12, 2006.
- [13] The Defendants admit that Scotia Investments was known as Scotia DB&G at the relevant time. They deny that Scotia Investments was an agent of Billy Craig, as alleged or at all. Alternatively, they say that if, which is denied, Scotia

Investments acted as the agent of Billy Craig, Billy Craig was a disclosed principal and at all material times Nico was aware of this.

[14] Scotia Investments denies that it converted or rented the Cold Rooms as alleged or at all. Billy Craig also along with Scotia Investments denies that it detained or converted the Cold Rooms.

THE PROCEEDINGS

[15] The evidence in this case was completed in December 2012. The parties submitted written submissions and copies of authorities, the last such submissions having been filed on the 23rd of January 2013. I take the opportunity to thank Counsel on both sides for their assistance in what has been a most interesting matter. The case involves a number of intricacies, including the often-times difficult question of what is a fixture and what is a chattel.

THE ISSUES

[16] The following are the issues in this case:

1. Were the Cold Rooms originally the property of Nico?
2. Are the Cold Rooms fixtures or chattels?
3. In the alternative, are the Cold Rooms trade fixtures rather than chattels? If they are trade fixtures, is/was Nico entitled to remove them?
4. Is Nico entitled to the loss of rental income?
5. Can Nico recover for reversionary injury when it brought a claim for “wrongful interference with goods”, detention and/or conversion?

Issue No. 1-Were the Cold Rooms originally the property of Nico?

[17] Exhibits 1 and 2 are the Invoice and Bill of Lading respectively which show that Nico imported the Isowall Chill Room and the Isowall Freezer Room from Trinidad, having purchased these items from Mecalfab Ltd. This was in 1998. It was Mr. Joseph’s evidence that he imported the other Freezer Room in 1995 from the United States but he was unable to locate the documents in respect of

that transaction. The Defendants made no challenge to that evidence. I accept and find as a fact that these Cold Rooms did originally belong to Nico.

The main issue-Issue No. 2- Are the Cold Rooms fixtures or chattels?

[18] This is really the main issue in the case and much of the evidence and the submissions were directed at clarifying this matter.

[19] One of the claims by Nico is that the Defendants have converted the Cold Rooms for their own use. The learned authors of the well-known text **Winfield & Jolowicz on Tort**, 16th Edition, at pages 595- 596, paragraph 17.6, cited by Mr. Gibbs on behalf of the Defendants, state that conversion “**is committed by dealing with the goods of a person which deprives him of the use or possession of them. Thus, it may be committed by wrongfully taking possession of goods, by wrongfully disposing of them, by wrongfully destroying them or simply by wrongfully refusing to give them up when demanded.**”

[20] Any corporeal, movable property may be converted. At footnote 44 on page 596 of **Winfield & Jolowicz**, it is pointed out that a person cannot be liable for conversion of land. Since fixtures become part of the land to which they are affixed, it follows that there can be no conversion of fixtures.

[21] Therefore, in order to succeed, (subject to any argument about whether the Cold Rooms are trade fixtures which Nico were, or are entitled to remove), Nico will have to demonstrate that the Cold Rooms were chattels at the time when the property was sold.

THE LAW

[22] In the old English case of **Holland v. Hodgson** (1872) L.R.7 C.P. 328, Blackburn J. sagely provided guidance that has withstood the tests of time. At page 334, it is stated:

“There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land; but

it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question that must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz. the degree of annexation and the object of the annexation.

[23] The more modern trend has been to attach greater importance to the purpose of the annexation rather than the degree of annexation. The learning provided by the authors of **Woodfall Landlord and Tenant**, Sweet & Maxwell, Release 43, paragraph 13.133, 13/84, cited by Mr. Gibbs on behalf of the Defendants, is instructive. It is there stated, under the heading “Distinction between chattel and fixtures”:

“.... in considering the degree of annexation, the question is whether the article ‘can easily be removed, integre, salve et commode, or not, without injury to itself or the fabric of the building.’ In considering the purpose of the annexation, all the circumstances are to be considered, the question being whether the article was affixed ‘for the permanent and substantial improvement of the dwelling’ or ‘merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel.’

The early law attached great importance to the first test, namely the degree of annexation. It proved harsh and unjust both to limited owners who had affixed valuable chattels of their own to settled land and to tenants for years. The second test was evolved to take care primarily of the limited owner, for example, a tenant for life..... .. Indeed it has been held that the degree of annexation is irrelevant save in so far as it throws light on the object and purpose of the annexation.”

[24] The case of **Berkley v. Poulett** [1977] 1 EGLR 86, is a most fascinating case of some complexity. Counsel for the Claimant had optimistically summarized the basic issue as being simply whether some pictures, some prints, a statue and a sundial were fixtures or chattels. At page 88, Scarman L.J. stated:

“...a degree of annexation which in earlier times the law would have treated as conclusive may now prove nothing. If the purpose of the annexation be for the better enjoyment of the object itself, it may remain a chattel, notwithstanding a high degree of physical annexation. Clearly, however, it remains significant to discover the extent of physical disturbance of the building or the land involved in the removal of the object. If an object cannot be removed without serious damage to, or destruction of, some part of the realty, the case for its having become a fixture is a strong one. The relationship of the two tests to each other requires consideration. If there is no physical annexation there is no fixture....Nevertheless an object, resting on the ground by its weight alone, can be a fixture, if it be so heavy that there is no need to tie it into a foundation, and if it were put in place to improve the realty. Prima facie, however, an object resting on the ground by its own weight alone is not a fixture; see Megarry and Wade, p.716. Conversely, an object affixed to realty but capable of being removed without much difficulty may yet be a fixture, if, for example, the purpose of its affixing be that “of creating a beautiful room as a whole”.....Today so great are the technical skills of affixing and removing objects to land or buildings that the second test is more likely than the first to be decisive. Perhaps the enduring significance of the first test is a reminder that there must be some degree of physical annexation before a chattel can be treated as part of the realty.”

[25] An object affixed to the realty, will on its face be deemed a fixture. In such circumstances, the onus would be on the person asserting that such an object is a chattel. The converse is that an object not affixed to the land but resting on its weight alone will on its face be deemed a chattel, the onus then would be on the person contending that it is a fixture. Support for both of these propositions can be found in **Holland v. Hodgson** at page 335.

EVIDENCE AS TO THE FIRST ISSUE/TEST-THE DEGREE OF ANNEXATION

Nico's evidence

- [26] Mr. Joseph gave evidence that he has been involved in the distribution business for many years and that he personally assisted with (in cross-examination he said that he oversaw) the installation of all the equipment.
- [27] Nico also called as a witness Mr. Michael Lee, who in his Witness Statement, ordered to stand as examination in chief, stated that he was a refrigeration specialist. Originally, Mr. Gibbs on the 23rd of October 2012 had objected to a number of paragraphs of Mr. Lee's Witness Statement on the basis that Nico had not sought or obtained permission to call Mr. Lee as an expert pursuant to Part 32 of the Civil Procedure Rules ("the CPR").
- [28] Ms. Davis had sought in response, to draw a distinction between experience and expertise. However, ultimately, Mr. Gibbs withdrew his objection, and I therefore think the court will simply have to decide what weight to put on Mr. Lee's evidence. What is clear, is that Mr. Lee's evidence is more material to the question as to the degree of annexation, rather than the purpose of the annexation.
- [29] Mr. Lee gave evidence on the 18th of December 2012 and there was no cross-examination of him. Mr. Lee states that he is the Managing Director of M.H.L. Refrigeration Service Limited ("Mr. Lee's company"). Mr. Lee's company is in the business of installing, servicing, maintaining and removing refrigeration equipment. It also provides professional advice on the pricing, costing and suitability of refrigeration equipment in accordance with the need of customers. Mr. Lee has been involved in the refrigeration business such as is done by his company for in excess of thirty five years.
- [30] On or about March 2012, Mr. Lee was contacted by Mr. Joseph with regard to certain refrigeration equipment. On the 29th March 2012 he along with Mr. Joseph visited premises at Pimento Way, Montego Bay. He saw and examined

there an Isowall Chill Room, Isowall Freezer Room, and another Freezer Room with no discernible brand, identified to him by Mr. Josephs as belonging to Nico.

[31] Both witnesses gave evidence about the Cold Rooms. They stated that they are made up of panels that fit together with an interlocking mechanism. For purposes of dismantling, the panels can be separated by inserting an Allen key(Mr. Joseph) or a wrench(Mr. Lee) which loosens the interlocking mechanism. Mr. Lee indicated that the Rooms are provided by the manufacturer in panels. It should be noted that the Invoice and Bill of Lading both describe the Isowall Chill Room and the Isowall Freezer Room as consisting of 129 packages. The Invoice states that the Isowall Chill Room is 38' x 27' x 11', and the Isowall Freezer Room as being 50' x 38 x 14' 6". In my view, the fact that the Rooms came in this number of packages is consistent with the two witnesses' evidence that the Cold Rooms are made up of panels that fit together in order to constitute the whole.

[32] The 2 Freezer Rooms and Chill Room are described as all having a roof and the panels are fitted to the roof. For the Isowall Rooms, the roofs are suspended from the rafters of the building by cables, according to Mr. Joseph. Mr. Joseph states that this is so as to prevent the roof of the Isowall Freezer Room and Chill Room from falling in.

[33] Mr. Lee states that the roofs of the Isowall Rooms are suspended by hangars from the roof support of the building. The roof itself consists of panels. With respect to the non-Isowall Freezer Room, Mr. Lee states that approximately 50% of the roof has caved in and done damage to some of the wall panels.

[34] The Isowall Chill Room has no floor. The panels sit on the building floor, which is used as a floor for the Chill Room. It is not attached to the building in any way.

[35] The two Freezer Rooms are said to have sides that are fitted on to their roof, so that all the panels form a refrigerated box. The panels which make up the roof and sides stand on their own. Insulation is placed onto the floor of the building, for a thickness of about four inches. Approximately two to three inches of concrete is then placed on top of the insulating foam to form a floor for the

Freezer Rooms. The building floor is unharmed because of the insulation which protects it. The Freezer Rooms are not at all attached to the building floor. Further, all three Rooms rest on the existing building floor

- [36] There are evaporators in the Freezer and Chill Rooms which blow air into the Rooms for the purpose of cooling them. Compressors/ Condensing units to the evaporators are located outside of the building and there is a hole in the wall through which copper tubing is passed. This is part of the refrigeration system. Freon runs through the copper tubing to cool the Cold Rooms. The evaporators are hung from the roof panels of the Freezer and Chill Rooms. The tubing connecting the condensing units can be removed and the small hole in the building wall that would remain after the removal of the tubing can be filled with a filler.
- [37] According to Mr. Joseph and Mr. Lee, the Cold Rooms can be easily removed by dismantling the panels. The panels can then be taken out singly. For purposes of removing the Freezer Rooms, the 2" to 3" of concrete can be broken up and removed. Once dismantled, the Cold Rooms can be removed from the building with no damage to it. The cables by which the roof is suspended just need to be untied, states Mr. Joseph. Mr. Lee states that for the purpose of removal of the Rooms, the hangars would have to be cut down. This would not damage the roof of the building. Once all of the panels are removed, the hole in the wall through which the copper tubing passed would need to be refilled by using a filler.
- [38] According to Mr. Lee, both the Isowall Rooms and the Freezer Room are free-standing pieces of equipment which can be easily dismantled and re-erected elsewhere.
- [39] Mr. Lee provided a diagram which was admitted as an exhibit in which he depicts the relationship between the Isowall Rooms and the building. With respect to the other Freezer Room, this is not attached to the roof at all.

- [40] During cross-examination of Mr. Joseph, photographs were admitted as exhibits as representing what the Isowall Freezer and Chill Room and the non-Isowall Freezer Room looked like before July 2007.
- [42] Mr. Joseph agreed with Counsel that in order to dismantle the Cold Rooms, a professional would have to loosen the interlocking panels with a tool, would have to detach from the roof, and remove the copper tubing. This person would need to break up the concrete that makes up the floor of the Freezer Rooms and also have to take up the insulation, and fill up the small hole in the wall that would remain. In relation to the Isowall Chill Room, the process would be the same, except that there would be no need to break up any concrete floor, and there would be no insulation to remove.

THE DEFENDANTS' EVIDENCE

- [43] Ms. Violet Wade, who is the Senior Manager, Special Accounts Risk Management at the Bank of Nova Scotia Jamaica Limited gave evidence on behalf of the Defendants. In her capacity as Senior Manager, Special Accounts, Ms. Wade is responsible for the review of Special Accounts within the Scotia Group, including those of Scotia Investments.
- [44] In her Witness Statement, Ms. Wade gives evidence that on or about March 2010, she inspected the property owned by Fletcher. She noticed that there were three Cold Rooms. They were according to her fully enclosed in the buildings on the property and attached to the walls and floor. Ms. Wade stated that they could not be removed without causing significant damage to the walls and floor, and could not be taken out of the building without being dismantled.
- [45] Ms Wade was cross-examined quite effectively. In my view, Ms. Wade was refreshingly candid with the court and conceded that she was not able to assist in a number of relevant areas. It became clear early in the cross-examination that her experience with Cold Rooms was quite limited, and that she was not able to recall or observe a number of important physical details about the Cold Rooms that she inspected in March 2010.

- [46] The witness indicated that she had some amount of experience with Cold Rooms, but this was in her capacity as a Banker, having managed the manufacturing accounts of companies such as Cremo and Spike Limited. She has never installed a cold room and has never removed one. She admitted that technically, she did not know the difference between a Cold Room and a Chill Room.
- [47] She further stated that she walked into one room. She stood just inside another room and looked around, because there were things stacked in that room. The third room, she indicated that the roof had collapsed, so she did not go into that room at all.
- [48] In relation to the room that she entered, Ms. Wade indicated that it was very cold, and she assumed it was the Freezer Room, but she is not sure. She could not really see the walls because there were crates full of drinks stacked up against the walls. She could not say whether there was space between the walls of the Cold Room and the wall of the building. She saw the floor of both Rooms that she went into and the one she just stepped inside, but could not say what they were made of. There were also crates stacked up in the room that she stepped just inside.
- [49] Ms. Wade indicated that she was not able or in a position to see the join between the wall and the floor of either of the two Rooms that she went into.
- [50] Ms. Wade did not know whether the Rooms or the roof of the Freezer Room were made up of panels. Further, that she did not know whether the panels can be removed without causing damage to the building. She said that the reason that she stated in her Witness Statement that the Cold Rooms could not be removed without causing significant damage to the walls and floor of the building, was because from her observation, they were part of the building, and because of the fact that she had just walked into them. Based on that she would have thought that to remove them would cause some damage.

[51] Ms. Wade also could not recall if the Freezer Room was suspended from the roof by hangars. She stated that there was something there at the roof, from outside of the Freezer Room there was some suspension, but she could not recall what it was.

[52] Ms. Wade was shown the diagram done by Mr. Lee. When it was suggested to her by Counsel Ms. Davis that the diagram represents the relationship between the Isowall Rooms and the building, Ms. Wade said that she was not in a position to agree, because the diagram seems to suggest that there are building walls to the side, and that the freezer room is boxed in, and she could not agree that it looked like that.

RESOLUTION OF THE ISSUE OF DEGREE OF ANNEXATION

[53] In my judgment, the evidence of Mr. Joseph and Mr. Lee as to the physical description of the Cold Rooms is to be preferred to that of Ms. Wade. In so finding, I bear in mind that Mr. Lee was not appointed as an expert by the court. However, I think that considerable weight can be attached to what he has to say and his evidence mirrors that of Mr. Joseph on the issue of the degree of annexation. It is clear to me that both men have had considerable experience in dealing with Cold Rooms. The diagram provided by Mr. Lee is also very instructive, and so too are the photographs.

[54] However, I do not accept their characterization of the Cold Rooms as not being attached to the building in any way. I find that there is some attachment of the Cold Rooms to the building, albeit minor. I find that there is attachment in that the roofs of the Isowall Rooms, i.e. the Isowall Freezer Room and the Isowall Chill Room are suspended by cables attached to the rafters of the building (as Mr. Joseph put it), or, the roofs of the Isowall Rooms are suspended by hangars from the roof support of the building (as stated by Mr. Lee). Further, there is copper tubing running from evaporators in all the Cold Rooms, through a hole in the wall of the building, to condensing units located outside of the building.

- [55] I accept that the Chill Room consists of panels that form a refrigerated box when assembled, and that the panels rest directly on the floor of the building. In other words, that the Chill Room is floorless.
- [56] I find as a fact that both the Isowall Rooms and the non-Isowall Freezer Room are capable of being easily dismantled and re-erected elsewhere with no permanent damage to the building.
- [57] Whilst the two Freezer Rooms, i.e. Isowall and Non-Isowall, have concrete insulated floors, I accept that this two to three inches of concrete can be broken up and removed and that the equipment can then be dismantled with no damage to the floor of the building.
- [58] I further find that the non-Isowall Freezer Room is not attached to the roof of the building at all. In relation to the Isowall Freezer Room, and the Isowall Chill Room I am satisfied that the roofs of these Rooms are suspended by hangars or cables from the roof support or rafters of the building. It is my finding that these hangars are not permanent, and can be cut down, for the purpose of removing the rooms, without damage to the roof of the building. I am of the view that the diagram prepared by Mr. Lee accurately depicts the relationship of the Isowall Rooms with the building.
- [59] It is also my finding that the tubing connecting the condensing units to the evaporators can be removed and that the small hole remaining in the building wall after the removing of the tubing can be filled.
- [60] The Australian decision of Kaye J. in **Belgrave Nominees Pty. Ltd. v. Barlin-Scott Airconditioning (Aust) Pty Ltd.** [1984] Vic. Rp. 75, cited by Mr. Gibbs, applied the learning in **Holland v. Hodgson** and held that even slight fixing to the land is sufficient to raise a presumption that the chattel is a fixture. The facts of that case are interesting for present purposes. The Claimants owned two buildings and in 1981 they decided to renovate the buildings. The main contractor hired the Defendant Barlin-Scott as the sub-contractor responsible for installing the air-conditioning system. Barlin-Scott began working on the project

but stopped because of delays in receiving payments. At the time of the work stoppage, Barlin-Scott had not yet set up the electric power supply to the air-conditioning plants, but had completed much of the other work. Each air-conditioning unit included a chiller positioned on a platform built on the roof of each building. The chillers rested on the building by their own weight but were connected to the buildings' water supply system by way of pipes. Barlin-Scott ultimately restarted the work. However, when the project resumed, it removed the air-conditioning plant that it had previously installed and this was done without the consent or knowledge of the Claimants.

[61] The Claimants commenced an action in conversion and trespass. Counsel for Barlin-Scott had argued that the chillers were chattels because there was insufficient annexation to cause them to be fixtures.

[62] Kaye J. disagreed, holding that although the chiller's connection to the building was slight and indirect, it was nevertheless sufficient to raise a presumption that it was a fixture, the onus of proving otherwise being on the Defendant Barlin-Scott, which onus they failed to discharge. At page 6 of the copy of the report provided by the Defendants, Kaye J stated:

“It was also contended on behalf of the defendant that there was insufficient annexation of the chillers to cause the same to be fixtures. The chillers were connected to water pipes by means of four bolts and nuts so that there was a connection, perhaps indirect, with the building. In any event, such connection may be described as slight only. Nevertheless even slight fixing to the land is sufficient to raise the presumption that a chattel is a fixture. In those circumstances, the onus of proving otherwise rests upon the party so contending; he must do so by showing from the relevant circumstances that it was intended that the article should remain a chattel.”

[63] The fact that the fixing is very slight, or that the Cold Rooms can be detached with minimal damage to the building, or to themselves, may help to support an inference that they were not intended to be permanent. However, these are but some of the circumstances to be put into the equation. In **Botham v. TSB Bank**

PLC (1996) [1995] EGCS 3, cited by Ms. Davis, the bank took possession of the Claimant's flat pursuant to its powers under a mortgage. A question arose as to which items were fixtures and which were chattels. If the items were fixtures, the bank would have the right to exercise its power of sale to sell the flat as well as these fixtures.

[64] There were 109 items that were the subject of the claim in **Botham**. They were dealt with by the judge at first instance in groups of classes, those classes having been agreed by counsel prior to the hearing.

[65] Those items which I find most useful to consider in detail, as submitted by Ms. Davis, were the items in Class 9. These were white goods in the kitchen, namely the oven, the dishwasher, the extractor, the hob, the fridge and the freezer.

The judge at first instance had held these to be fixtures because (page 4 of 9 of the copy of the report provided to me):

“They were there as part of the overall kitchen. If one were taking a flat on a lease one would expect them to be there. They were put in as part of the kitchen as it stood. They were all physically fixed in, not only resting on their own weight, but being plumbed in, wired in and in most cases aligned with and perhaps to some extent abutted to, so that they could not be too easily removed, the remaining parts of the fitted kitchen. A fitted kitchen is a whole.”

[66] In allowing the appeal in respect of this aspect of the judge's decision, Roth L.J. in the English Court of Appeal, holding the items to be chattels, stated:

“I differ from the judge on this group of items on the slender facts in this case. What one might expect to be in a flat would depend on the type of letting one was seeking. That is not, in my view, a test of whether an item is or is not a fixture. Clearly all of these items are items that one would not be surprised to find in a kitchen, but then so is an electric kettle, a food mixer and a microwave oven, which are all normally “plugged in”. No one, I venture to suggest would look on these as fixtures. Here the judge should have reminded himself that the degree of annexation was slight; no more than that which was need(ed) for those items to be used for their normal purposes. In fact these

items remain in position by their own weight and not by virtue of the links between them and the building. The degree of annexation is therefore slight. Disconnection can be done without damage to the fabric of the building and normally without difficulty. The purpose of such links as there were to the building was to enable these machines to be used to wash clothes or dishes or preserve or cook food. Absent any evidence other than the photographs , it was not open to the judge, in my opinion, to infer that these items were installed with the intention that they were to be a permanent or lasting improvement to the building. This is not a case where the intent to effect a permanent improvement in the building by installing these machines so that they became part of the realty was incontrovertible, as the judge's doubts illustrated."

(My emphasis)

- [67] In the **Botham** case it seems to me that the judge was criticized for inferring that the items in Group 9 were fixtures on the basis solely of evidence consisting of photographs. In an appropriate case, drawing an inference that the items were intended to be permanently or indefinitely affixed is plainly permissible, provided that there is a proper evidential basis and circumstances upon which to do so.
- [68] In **Vauderville Electric Cinema, Ltd v. Muriset** [1923] 2 Ch. 74, the Claimant owned a building which it used as a movie cinema. In 1920 the defendants loaned the Claimant £2000 and to secure the loan the Claimant granted the defendants a mortgage over the building and its fixtures. In 1922 the Claimant initiated winding up proceedings and the defendants sold the property to enforce their security. The Claimant brought an action to recover the value of the chattels that it alleged the defendants had sold along with the building. One of the issues the court had to consider was whether the seats affixed to the floor of the cinema hall were fixtures or chattels.
- [69] Counsel for the Claimant argued that the chairs could have been easily removed without doing any damage to the building. The judge accepted that this was so. However, in the circumstances the Court was of the view that the chairs were

intended to be used as part of the permanent equipment of the building. Sargant J. stated, at page 87:

“ There can be no doubt that in the present case, when the seats were placed in the cinema hall they were placed there for the purposes of the permanent use of the cinema, as a cinema : they were intended to be used as part of the permanent equipment of the building. There was no question of a mere temporary user; and in my judgment no inference could be drawn from anything that was done by the parties that there was an intention to prevent the annexation of the chairs to the flooring and the freehold of the property as a permanent item in the equipment of the property.”

[70] I also take into account that, even if the Cold Rooms are not attached to the land, or only slightly attached, if they sat on the building floor (particularly in the case of the non-Isowall Freezer Room), by their own weight, as submitted by Mr. Gibbs, they could still be considered fixtures, if they were put in place to improve the value of the realty-see per Scarman L.J. in **Berkley v. Poulett**, at page 88. Also, in **Holland v. Hodgson** Lord Blackburn opined that whether an article is a fixture depends on whether it was intended to be part of the land. He gave the interesting example of a stack of blocks, which he stated could be considered a chattel in one set of circumstances, and a fixture in another. He stated, at pages 334-335:

“When the article in question is no further attached to the land, then by its own weight it is generally to be considered a mere chattel... But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land... Thus blocks of stone placed one on top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones, if deposited in a builder’s yard and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels.”

THE PURPOSE OF THE ANNEXATION

[71] Having therefore found that there is some slight degree of annexation, and that the Cold Rooms can be removed fairly easily without injury to themselves or the

fabric of the building, I now turn to consider the more pivotal issue i.e., the purpose of the annexation. All the circumstances are to be considered, the central question being whether the article was affixed for the permanent and substantial improvement of the Fletcher building or merely for a temporary purpose, or for the more complete enjoyment and use of the Rooms as chattels. Albeit the degree of annexation is slight, I think that the onus does lie on Nico to demonstrate from the circumstances that the Cold Rooms were intended to remain chattels, or that they were not intended to be fixtures.

[72] I found the analysis carried out by Kaye J. in the Australian case **Belgrave** instructive. Kaye J. at pages 3-4, quoted from another Australian decision and went on to look at the circumstances from which the intention can be inferred. He stated:

“In Australian Provincial Assurance Co Ltd. v. Coroneo (1938) 38 SR (NSW) 700, at pp. 712-13, Jordan CJ, with whom Davidson and Nicholas JJ. concurred, expressed the principles and test to be applied as follows: “.....The test of whether a chattel which has been to some extent fixed to land is a fixture is whether it has been fixed with the intention that it shall remain in position permanently or for an indefinite or substantial period: Holland v. Hodgson, or whether it has been fixed with the intent that it shall remain in position only for some temporary purpose: Vaudeville Electric Cinema Ltd v. Muriset [1923] 2 Ch 74, at p. 87]. In the former case, it is a fixture, whether it has been fixed for the better enjoyment of the land or building, or fixed merely to steady the thing itself, for the better use or enjoyment of the thing fixed; Holland v. Hodgson; Reynolds v. Ashby and Son [1904] AC 466; Colledge v. H.C.Curlett Construction Co. Ltd. [1932] NZLR 1060; Bengier v. Quartermain [1934] NZLR s 13. If it is proved to have been fixed merely for a temporary purpose it is not a fixture; Holland v. Hodgson; Vaudeville Electric Cinema Ltd. v. Muriset. The intention of the person fixing it must be gathered from the purpose for which and the time during which user in the fixed position is contemplated: Hobson v. Gorringe [1897] ; Pukuweka Sawmills Ltd. v. Winger [1917] NZLR 81.....”

Whether the intention of the party fixing the chattel was to make it a permanent accession to the freehold is to be

inferred from the matters and circumstances including the following: the nature of the chattel; the relation and situation of the party making the annexation vis-a-vis the owner of the freehold or the person in possession; the mode of annexation; and the purpose for which the chattel was fixed; Reid v. Shaw [1905] HCA 54; (1906) 3 CLR 656, at p.667, per Griffiths CJ.”

(My emphasis).

THE SECOND AND CENTRAL ISSUE-THE PURPOSE OF THE ANNEXATION

[73] Applying the analysis from the authorities to the facts of the present case, I must ascertain what is the evidence as to the purpose for which these Cold Rooms were affixed? What was the relationship and interaction between Nico, as the party making the annexation and Fletcher, the owner of the building at the time of installation?

NICO’S EVIDENCE

[74] In his Witness Statement, Mr. Joseph stated that Nico commenced (I assume business) in the early 1990’s. It supplied food stuffs to hotels and restaurants on the north coast of the island. Nico required the equipment, i.e. the Cold Rooms, because it needed cold storage facilities for the distribution business. Initially, Nico managed on only one freezer room(this is the Freezer Room imported in 1995) but in 1998 it was decided to increase its cold storage capacity.

[75] According to paragraph 7 of Mr. Joseph’s Witness Statement, in 1995 himself, Clive Lazarus and Constantine Nicholas had purchased shares in Fletcher. Mr. Joseph became the Managing Director of Fletcher. Mr. Joseph indicates that his company “was given a licence by Fletcher & Co. and we were permitted to install our equipment at the Fletcher property. This is because at the material time Nico did not have its own property, and it was convenient to install Nico’s equipment in the building owned by Fletcher & Company.”

[76] The Cold Rooms were, according to Mr. Joseph, originally intended for use by Nico as part of its distribution trade. However, on or about 2001 Nico was sued

by the Revenue Protection Division (“the RPD”) for breach of the Customs Act. This suit Mr. Joseph continues, severely disrupted Nico’s distribution business and he anticipated that Nico would not be able to continue its distribution business for some time. At paragraph 19 of his Witness Statement Mr. Joseph states “...It was in these circumstances that I decided on behalf of Nico to rent the cold storage to Coldfield Manufacturers Limited. However it was always the intention that once the law suit with the RPD was concluded Nico would continue its distribution business and that the freezer rooms and the chill room would be utilized by Nico for the purposes of that business.”

[77] Mr. Joseph indicates that the law suit with RPD continued until on or about 2007 at which time the complaint against Nico was dismissed by the Court. However by this time Nico was unable to get access to the equipment. Mr. Joseph testified that it is still Nico’s intention to go back into business as soon as it is able to replace the equipment.

[78] According to Mr. Joseph, at the time that Fletcher was evicted on or about July 2006, the Cold Rooms were located in three physical rooms of the Fletcher building. Nico had no opportunity to remove its Cold Rooms.

[79] At paragraph 17 of his Witness Statement Mr. Joseph stated that from the commencement of the association with Coldfield, it was known that the building was owned by Fletcher and the equipment by Nico. Reference was made by Mr. Joseph to letter dated 23rd August 2002 which he describes as being from Coldfield to Nico. However, this letter, under the signature of Coldfield’s Managing Director, Mr. Ian Wong, in which Fletcher is referred to as owner and Nico as occupiers of the Cold Rooms, although written to Mr. Joseph, is in fact directed to Fletcher and not to Nico.

[80] Mr. Joseph at paragraph 18 of his Witness Statement also makes the following assertion:

“18. For convenience Fletcher & Company collected all of the rent, but by arrangement it was agreed with Coldfield

Manufacturing Ltd. that 42 % of the rental was accorded to the building, and 58 % was accorded to the cold room.”

- [81] Nico relies upon a letter dated 22nd February, 2006 from Coldfield addressed to Robert Douglas, which was seemingly a typographical error, and what was intended was a letter addressed to Robert Joseph as Managing Director of Fletcher.
- [82] Mr. Ian Wong was summoned as a witness by Nico and he gave oral evidence-in-chief and was cross-examined.
- [83] In cross-examination Mr. Wong indicated that Mr. Joseph and Coldfield discussed the possibility of apportioning rent between the Cold Storage Rooms and the building and that it was pursuant to that discussion that he, Mr. Wong, wrote the letter dated February 22 2006. Mr. Wong also indicated that it is true that no apportionment ever did take place. He further indicated that if the Fletcher property had not had cold storage facilities installed, Coldfield would not have rented it.
- [84] In his letter to Coldfield dated October 5 2006, Mr. Joseph, writing on the letter head of Fletcher requested Coldfield to pay all amounts outstanding for rent over to Scotia DB&G. In cross-examination, Mr. Joseph conceded that this letter did not mention any apportionment, and does not tell Coldfield to pay only the alleged 42 % portion due to Fletcher in respect of the building to Scotia DB&G. Mr. Joseph claimed that the reason why Coldfield was asked to pay over all of the money was because Fletcher was trying to negotiate certain terms with Scotia DB&G in good faith. Mr. Joseph also admitted that the proposals in Coldfield's letter of February 22 2006 were made after Scotia DB&G had already made demands of Coldfield to pay the rent over to them and at that time Coldfield had stopped paying rental to Fletcher and the sums were being paid by Coldfield into escrow upon advice of its Attorneys-at-Law.
- [85] Mr. Joseph said that Panache Trading Limited was a company that operated the business that had been carried on by Nico only while it had the case with the

RPD. A letter written by Mr. Joseph on the letterhead of Panache dated March 15 2006 and addressed to Coldfield was admitted into evidence during cross-examination. That letter referred to a proposed rental split of 66.87% to 33.33% for the Cold Storage and building respectively. However, Mr. Joseph insisted that this was a typographical mistake on behalf of his secretary and he inadvertently signed the letter with the wrong figures. He insisted that the letter was supposed to have in it the correct figures which were agreed with Coldfield i.e. 58% to 42%.

[86] Mr. Joseph agreed that Nico was not a party to the Lease between Fletcher and Coldfield. He also admitted that there is no written correspondence between Nico and Coldfield that mentions the Cold Rooms at all, and that in fact he could not recall any written correspondence whatsoever between Nico and Coldfield in relation to anything relevant to these proceedings.

The Defendants' Evidence

[87] In his Witness Statement filed March 14 2012, Mr. Lissant Mitchell, the Chief Executive Officer of Scotia Investments, states that in 1996 Fletcher issued a guarantee supported by a mortgage over the property to a company named Sportula for repayment of a loan. The debt and the mortgage were transferred to Billy Craig in February 1997 and Billy Craig became the registered mortgagee.

[88] In 2002 Fletcher leased part of the property to Coldfield. The part of the property leased included the Cold Rooms which are the subject of these proceedings.

[89] Billy Craig subsequently appointed a Receiver over Fletcher and Coldfield started paying rent to the Receiver. (In point of fact it would appear that a Receiver Ms. Grant was appointed in respect of Billy Craig and it is not clear that a receiver was appointed by Billy Craig in respect of Fletcher.-see the Certificates of Title. However, I do not think that this affects the issues in this case in any significant way).

[90] On October 7, 2007, Billy Craig gave Fletcher notice of its intention to exercise its power of sale.

[91] In response, Mr. Mitchell states, Fletcher filed Claim No. 2009 HCV 02459 and obtained an injunction to prevent the sale of the property by Billy Craig. Billy Craig appealed the decision and the Court of Appeal set aside the injunction on November 17, 2010 in SCCA 15 of 2010.

[92] On June 1, 2011 the Receiver sold the property “as same shall stand” including the three cold rooms to Indies Pharma Jamaica Limited (“Pharma”), which is now the registered proprietor.

RESOLUTION OF ISSUE AS TO PURPOSE OF ANNEXATION

[93] In my judgment, the Cold Rooms were fixtures because they were intended to remain attached to the building for an indefinite and substantial period of time and for the Building to be used for cold storage-see **Belgrave**, and also **Vaudeville Electric Cinema v. Muriset** [1923] 2 Ch 74.

[94] In **Vaudeville**, it was held that the chairs were affixed in the building for the convenient use of the building for a particular purpose, i.e. as a cinema. I accept Mr. Gibbs submission that the evidence demonstrates that Mr. Joseph installed the Cold Rooms in the warehouse space so that the building could be used indefinitely for cold storage. Without the Cold Rooms the Fletcher building would not have been able to serve as a cold storage facility. The Cold Rooms therefore transformed and improved the building in the sense that it was no longer simply a storage facility; it could now serve as a cold storage facility. Further, the evidence is that Nico did not at any time own a warehouse building in which the Cold Rooms could have been installed. The purpose of the Cold Rooms themselves is to provide refrigeration. They are designed to be installed in a building in order to provide refrigeration. When assembled, they are relatively large and substantial objects. The relationship of Mr. Joseph, Managing Director and shareholder for both companies, with Fletcher,(he being the only witness who has a connection with Nico who has given evidence), continued. I will assume that Nico had intended that after the dispute with RPD had resolved itself, it could continue to utilize cold storage facilities. Even if that was so, I draw the reasonable inference

that it was the same Fletcher building in which the Cold Rooms were installed and which had been leased to Coldfield for a substantial period, that Nico had intended to reoccupy. This supports the finding that the Cold Rooms were intended to be attached to the Fletcher building for an indefinite and substantial period of time. The only thing that changed is that Billy Craig exercised its rights under the security granted to it by Fletcher. That cannot change, affect or alter what the true intention as regards the installation of the Cold Rooms was.

[95] In particular, the evidence shows that, as described in the written submissions by Mr. Gibbs and Ms. McLeod on behalf of the Defendants:

- (a) Mr. Joseph and his business partners bought the shares in Fletcher (and thereby acquired the property) in 1995.
- (b) It was in the same year that the property was acquired that Mr. Joseph had the non-Isowall Freezer Room installed, i.e. 1995. In 1998 the Isowall Rooms were installed.
- (c) From 1995 to 2002 Nico used the Warehouse Space where the Rooms were located for Cold Storage.
- (d) In 2002, Coldfield took possession of the Warehouse Space where the Cold Rooms were and was required by the terms of the lease to continue to use the leased Space for Cold Storage- See Clause (4) Permitted Use, and Second Schedule, "Storage and refrigeration of goods".
- (e) The duration of the lease was five years, with an option to renew for a further five years.

[96] In my view, this evidence does show that the annexation was intended to last for a substantially long period, at least twelve years, and potentially seventeen.

[97] There is no reliable evidence from which I could draw an inference that there was an intention on the part of Nico to prevent the Cold Rooms being affixed to the building for a substantial period.

- [98] Nico, in order to rebut the presumption that the Cold Rooms were fixtures has sought to allege that it was always intended for the Cold Rooms to be treated separately from the building. Reliance was placed upon correspondence between Coldfield and Mr. Joseph. However, I reject that assertion for reasons that follow.
- [99] Firstly, the lease itself does not say anything about apportionment of rent. It does not mention Nico whether as a party or at all. Secondly, the first mention of apportionment is in a letter dated February 22 2006, some four years after the signing of the lease. Thirdly, this was taking place at a time when Coldfield had stopped paying rent to Fletcher because of the steps taken by Billy Craig to enforce its security.
- [100] Coldfield's letter does not mention paying rent to Nico. However, more fundamentally, Mr. Wong in his evidence is clear that the apportionment discussion only came up before he wrote the letter, that was why he wrote the letter, and that the apportionment never in fact took place.
- [101] On a balance of probabilities I therefore reject Mr. Joseph's statement in paragraph 18 of his Witness Statement that there was an agreement with Coldfield to divide the rent payable under the lease as being 42% allocated to the building and 58% allocated to the Cold Rooms.
- [102] Indeed, inconsistently with the position there asserted, in cross-examination Mr. Joseph then said there was no need for Coldfield to know of the alleged agreement between Nico and Fletcher for apportionment of rent. I do not find on a balance of probabilities that there was any such agreement between Nico and Fletcher. Indeed, it seems to me that Mr. Joseph operated the businesses of Fletcher and Nico without placing much attention on the fact that the two companies are separate legal entities. Indeed, if Nico really was entitled to a portion of the rent, why would Mr. Joseph in the letter dated October 5 2006, direct Coldfield to pay all of the rent, not just some portion allegedly due to Fletcher, to Dehring Bunting & Golding? In my view, the explanation as to good

faith negotiations strains credibility and it seems far more likely that there was some blurring of the operations, assets and liabilities of Nico and Fletcher, which had shareholder and managing director in common in the person of Mr. Joseph.

[103] The **Belgrave** decision is also useful on another important score. This claim by Nico is against Billy Craig as mortgagee and its alleged agent Scotia Investments. One of the matters that Nico relies upon is that it claims that there was an agreement between Nico and Fletcher, unknown to Mr. Wong and Coldfield, that the rental of the Fletcher Building would be apportioned. However, it is not contested that this was not an arrangement to which Billy Craig or its successors would have been privy. As I have already stated, I do not accept Nico's evidence that there was in place such an agreement. The evidence does not support this, and such as there is, has only surfaced after it was already clear that Billy Craig was seeking possession of the property based upon the default by Fletcher, and to ultimately exercise its power of sale. However, I will assume as Kaye J. in **Belgrave** did (see page 4) for the purposes of argument, that there was an agreement between parties not involving the Defendants that suggested or from which it could be inferred that the items remained chattels. In the instant case Nico asserts that such an agreement existed between itself and Nico, thereby suggesting that the Cold Rooms remained the property of Nico and only were affixed there temporarily. The reasoning in **Belgrave** suggests that such an agreement, not being one between the Claimant and the Defendant, unknown to the Defendants, cannot be used to infer the purpose of annexation. Counsel for Barlin-Scott had sought to rely upon certain provisions in the sub-contract between itself and the main contractor to suggest that the chillers did not become fixtures. However, Kaye J., in rejecting that argument, quoted from the judgment in the English Court of Appeal's decision in **Hobson v. Gorringe** [1897] 1 Ch. 182, at page 193 where it was stated:

"It is said that the intention that the gas engine was not to become a fixture might be got out of the hire and purchase agreement, and, if so, it never became a fixture and part of the soil, and it was said that the case of Holland v. Hodgson had so decided. For this point it must be assumed that

such intention is manifested by the hiring and purchase agreement, though, as before stated, we think it is not. Now, in Holland v. Hodgson, Lord Blackburn, when dealing with the “circumstances to shew intention” was contemplating and referring to circumstances which shewed the degree of annexation and the object of annexation which were patent for all to see, and not to the circumstances of a chance agreement that might or might not exist between an owner of a chattel and a hirer thereof. This is made clear by the examples that Lord Blackburn alludes to shew his meaning. He takes as instances (a) blocks of stone placed in position as a dry stone wall or stacked in a builder’s yard; (b) a ship’s anchor affixed to the soil, whether to hold a ship riding thereto or to hold a suspension bridge. In each of these instances it will be seen that the circumstance to shew intention is the degree and object of the annexation which is in itself apparent, and thus manifested the intention. Lord Blackburn in his proposed rule was not contemplating a hire and purchase agreement between the owner of a chattel and a hirer or any other agreement unknown to either a vendee or mortgagee in fee of land, and the argument that such a consideration was to be entertained, in our judgment, is not well founded.’ ”

(My emphasis)

[104] The same point is made in the case of Melluish (Inspector of Taxes) v. BMI (No. 3) Ltd. [1995] All E.R., cited by the Defendants.

ISSUE NO. 3 - ARE THE COLD ROOMS

TENANT’S FIXTURES AND IS NICO ENTITLED TO REMOVE THEM?

[105] Nico argues in the alternative that the Cold Rooms are trade fixtures rather than chattels. Generally, a tenant may remove fixtures if they have been affixed for the purposes of trade or manufacture, so long as they are capable of being severed from the land without any irreparable injury to it. The rule is said to represent a relaxation of the rule that fixtures may not ordinarily be removed in order to encourage industry-see **Halsbury’s Laws of England –Volume 27(1)** paragraph 149, cited by Ms. Davis.

[106] However, as stated in the **Halsbury's Laws of England, Volume 27(1)(2006-Re-issue)**, paragraph 182, cited by Mr. Gibbs, **"where fixtures are removable by a tenant, the general rule is that he is entitled to exercise this right only during the term and, if he omits to do so, the fixtures become the reversioner's absolute property. If, however, the tenant remains in possession after the term in such circumstances that he is entitled to consider himself as a tenant, his right to remove fixtures continues as long as this state of things lasts."**

[107] In his letter to Scotia Investments dated October 8, 2007, Mr. Joseph states that Nico was a tenant of Fletcher for many years. In this letter he sought permission to remove, amongst other items, the Cold Rooms. However, in his Witness Statement, Mr. Joseph stated that Billy Craig took over possession of the Fletcher property on or about July 2006. In the letter of October 8 2007, Mr. Joseph states that Fletcher was evicted in February 2007. One wonders why Nico did not seek to claim possession of the Cold Rooms immediately that it says they were wrongly detained. Mr. Mitchell gave evidence that on October 7, 2007, Billy Craig gave Fletcher Notice of its intention to exercise its power of sale. This Notice was given to Fletcher only a day before Nico's letter to Scotia Investments which now claimed that Nico was entitled to the Cold Rooms. In her letter in response, Ms. Schnoor, then CEO of Dehring, Bunting & Golding, stated that one of the reasons why Nico would not be permitted to remove any items from the building was that Scotia Investments' predecessor did "not hold any documentation which proves that the items to which (you) refer belong to Nico Distributors Limited".

[108] I note that in his Witness Statement, Mr. Joseph at paragraph 7, indicated that Nico "was given a license by Fletcher" and permitted to install the Cold Rooms. In cross-examination Mr. Joseph stated that Nico was a tenant of Fletcher and that Nico's occupation of the Cold Rooms lasted until 2002. However, in re-examination, Mr. Joseph claimed that after 2002, Nico's relationship to the building was as a tenant, since they had a vested interest in the refrigeration, and

Mr. Joseph claimed they “had a small office there”. He avers that Nico was a tenant of Fletcher. In her written closing submissions, Ms. Davis argues that for the purposes of housing its equipment/the Cold Rooms, Nico “remained a tenant (sub tenant) of Fletcher after 2002. Fletcher then on leased the equipment to Coldfield”. The submission further refers to Mr. Joseph’s evidence in re-examination that “Nico was a tenant and to maintain the tenancy it was in their interest to instruct Coldfield to pay over (the whole rent)..”.

[109] Ms. Davis went on to submit that the Defendants taking of possession of the Fletcher building would not in law have ended the lease between Fletcher and Coldfield, and similarly, it was submitted, that the lease between Fletcher and Nico would have similarly continued, until the letter from Nico to the Defendants of October 8, 2007.

[110] Ms. Davis also refers to the allegation by Mr. Joseph that one Ms. Grant “called him as Managing Director of Nico” to tell him that the roof of the freezer had caved in. Mr. Joseph claims to have confirmed this conversation in a letter dated January 16th 2009. This letter was written on a Nico Distributors Limited letterhead.

[111] Coldfield was granted exclusive possession of the Cold Rooms. I have a hard time accepting that there was any on-leasing of the Cold Rooms by Fletcher. This is because there is nothing in the Lease that speaks to this, there is no correspondence to that effect, prior to Billy Craig exercising its rights under the security. In the context of the claim it is self-serving for Nico to claim that it continued to be a tenant. This is because Mr. Joseph is both shareholder and Managing Director of both Fletcher and Nico. Though I accept that a tenancy agreement between Fletcher and Nico need not have been in writing, it is a fact that there is no documentary evidence of this alleged tenancy between these two connected parties. Further, the independent parties who could have spoken to such an arrangement had there been one, Coldfield and its Managing Director Mr. Ian Wong, do not support this position. Having regard to all of the circumstances, I am not satisfied on a balance of probabilities that Nico remained

(if it ever was), a tenant (as opposed to licensee), of the Cold Rooms after 1st November 2002, the date when the Lease between Fletcher and Coldfield commenced.

[112] In my judgment, such tenancy as Nico had with Fletcher, did not continue after 2002. If, therefore, the Cold Rooms were tenant's fixtures, Nico lost any right to remove them from the Fletcher property long ago. Thus Nico's claim also fails under this head.

ISSUE NO. 4 - ENTITLEMENT TO RENT

[113] In my view, Nico's claim to be entitled to rental of the Cold Rooms was made in the context of its claim that the items remained chattels and not fixtures. As indicated above, I find that the Cold Rooms are fixtures. However, I also reject Nico's claim that it had any agreement with Fletcher which entitled it to a portion of the rent from Coldfield per se or that Fletcher was collecting any rent on behalf of Nico. There is therefore no basis upon which Nico could properly recover the claims made for loss of rental income against the Defendants, whether on the basis of the Cold Rooms being chattels, or on the basis of agreement between itself and Fletcher simpliciter.

ISSUE NO. 5 - TORT OF REVERSIONARY INJURY

[114] This matter arose in Ms. Davis' submissions, learned Counsel having made the reasonable concession that the tort of conversion requires that the Claimant had a right to immediate possession, which Nico did not have in 2007. At paragraph 5.1 of her written submissions, Ms. Davis states that where a claimant has no right to immediate possession, he sues in wrongful interference for reversionary injury. Mr. Gibbs has argued that the claim by Nico for "wrongful interference with goods" is somewhat of a misnomer because it is a term utilized in an English Statute, the equivalent of which we do not have in Jamaica. Further, that there is no single wrong or tort of "wrongful interference with goods"- see the extract from **Clerk and Lindsell on Torts**, 19th Edition, paragraph 17-01 cited by Ms. Davis. Mr. Gibbs submits in response to Ms. Davis' submissions, that even if this is so,

Nico did not in fact sue for “reversionary injury”. In the extract, reversionary injury is referred to as a separate tort from the torts of trespass or conversion. It is also a separate tort from detinue, which still exists in Jamaica, but not in England. In the 17th Edition of the same Text, at paragraph 13.01, cited by Mr. Gibbs, the authors state “Although by this Statute many existing liabilities are grouped together under the rubric “wrongful interference”, this is a matter of nomenclature only: as regards substantive law, one still has, in order to see whether the defendant is liable, to look at the underlying torts.” I have indicated that the Cold Rooms are fixtures and therefore even if pleaded, a claim for reversionary injury could not have succeeded in this case. Therefore I have resolved this claim against Nico on the application of the substantive law to the evidence and facts as found by me. However, in any event, I do think that Mr. Gibbs is strictly speaking correct on this pleading point (though I must confess that I cannot presently recall ever seeing a claim for “reversionary injury”, or for, as **Clerk and Lindsell** put it, this loss which “was often known as ‘damage to the reversion’, hence the name ‘reversionary injury’, which is used in this book.”)

[115] There is another related point that Mr. Gibbs has raised. He argues that even if Nico’s claim for “wrongful interference with goods” was sufficient to ground a claim for reversionary injury, he submits that the claim could not succeed in relation to the Cold Rooms. Paragraph 139 of the extract from **Clerk and Lindsell**, 19th Edition, states that the action for reversionary injury lies where the claimant is deprived either temporarily or permanently of the benefit of his reversionary interest, either “because the goods are destroyed or seriously damaged, or because they are wrongfully disposed of by a transaction whereby the disponent acquires a good title, so preventing recovery of them”. The paragraph points out that actual damage is necessary, so where there is a wrongful sale, except in so far as the claimant can prove it has destroyed his title or at the very least reduced his chances of recovering his goods, no damages are available.

[116] Mr. Gibbs further submits that In this case, Billy Craig sold registered land to Pharma under the impression that the Cold Rooms were part of the land. If the Cold Rooms were not part of the land (as Nico claims) the sale of land did not extinguish Nico's title to any chattels that were located on it. Therefore, the argument continues, Nico, as the entity with good title, would therefore still be able to seek recovery of the Cold Rooms.

[117] I find the submission interesting. Complicated questions can arise where there are wrongful sales involving questions whether items are chattels or fixtures and the claimant has to sue a third party-see the dicta of Scarman L.J. in **Berkley v. Poulet**, at page 88, where he commented:

“I have recited enough of the history to show that, if the pictures, statue or sundial or any of them, be fixtures, difficult questions arise as to the entitlement of the plaintiff to sue the head-vendor, Lord Poulett. But if none of them was a fixture, the plaintiff is non-suited at the outset...”

[118] On the evidence of Mr. Lee, the Cold Rooms were still there up to when he saw them in March 2012. Mr. Mitchell in his evidence stated that the sale by Billy Craig of the Fletcher property to Pharma included the three Cold Rooms. The consideration money for the transfer of the two Titles to Pharma in exercise of Billy Craig's power of sale is stated on the relevant Certificates of Title to be J\$50 Million dollars. The curious thing about this case is that, it seems to me, that if either:

- (a) Nico had succeeded in its claim against the Defendants for the value of the Cold Rooms, which Ms. Davis submits is US\$36,666.00 on the basis of Mr. Lee's evidence , or
- (b) As Mr. Gibbs submits could have been the case if the Cold Rooms were chattels, Nico had sought to reclaim them against whoever is wrongfully in possession of them now.

The Defendants would have been entitled to deduct whatever value they had received from Pharma in respect of the Cold Rooms from the amount collected and applied against the indebtedness of Fletcher. In the demand loan statement of account from Scotia Investments in respect of Fletcher dated December 24 2008, the indebtedness was then stated to be nearly J\$60 Million, with per diem interest of over \$49,000.00. These matters could not have affected my decision. Rather, they would be more in the nature of possible consequences. However, I wonder whether Mr. Joseph, the Managing Director of both companies Nico and Fletcher had contemplated such a possible outcome. This particularly arises in my mind, given the manner in which the two companies appear to have been operated. The evidence was that at one point Nico was prepared to have paid over to Dehring Bunting & Golding, sums to which it was allegedly entitled in respect of and in reduction of Fletcher's indebtedness. Indeed, Mr. Joseph stated that he was instructed so to do in the interests of good faith so that Fletcher could better negotiate with the Defendants predecessor. In other words, if Nico succeeded in its claim, Fletcher's liability to the Defendants in respect of its indebtedness would very likely have to undergo a directly corresponding upward adjustment.

[119] In summary, the Claimant Nico has failed to establish its claim against the Defendants or either of them. There will therefore be judgment for the Defendants against the Claimant, with costs to be taxed if not agreed.