IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011HCV 00013

BETWEEN UNIVERSAL CHURCH OF THE KINGDOM OF GOD CLAIMANT

AND TEWANI LIMITED DEFENDANT

Miss R. Harper and Miss K. Tracey instructed by John Bassie & Co. for the Claimant

Ms. Carol Davis for the Defendant

Claim for breach of lease agreement for failure to refund security deposit – Counter claim for entitlement to deduct costs of repairs – whether claimant in breach of covenants to repair - whether security deposit should be refunded.

IN OPEN COURT

Heard: November 25, 26, 27, 2014; January 21 and 28, 2015 and June 26, 2015

LINDO J. (Ag.)

[1] On January 4, 2011, the claimant, (hereinafter referred to as "UCKG") filed a claim form and particulars of claim claiming against the defendant, damages for breach of a lease agreement dated March 15, 2007, "in that the defendant refuses and or neglects to return security deposit in the sum of US$17,000.00 and such other reliefs as this honourable court deems just in the circumstances".

[2] The Defendant filed a Defence on February 15, 2011 joining issue with the claimant on the allegations contained in the Particulars of Claim. The defendant also filed a counterclaim claiming that it was entitled pursuant to the lease, to deduct the cost of the repairs to the premises, that the cost of the repairs are in excess of the amount of the security deposit "...and as such there is no sum due to the claimant for the return of its said security deposit". Particulars of the costs of the repairs were stated to be in the amount of Ja$3,156,335.00.

[3] By way of the counterclaim, the defendant states *inter alia*, as follows: "...In breach of the lease the claimant damaged and/or failed to maintain and/or repair the leased premises and on the termination of the lease the defendant was required to spend $3,156,335 on repairs to the leased premises... The sum of US$17,000 being Ja$1,150,900 at the exchange rate of US$1=J$67.7 in 2007, was deducted from the security deposit, such that the sum of $2,005,435 remains due and owing to the defendant..."

[4] The sole witness for the claimant, Andrea Campbell, by her witness statement filed October 31, 2013 states that the property located at 24-26 Trinidad Terrace was rented by UCKG from the defendant and was handed over in March 2007. When taken over it was not freshly painted by the defendant, the roof was leaking and was repaired by the defendant and even after the repairs it was still leaking and on more than three occasions the defendant had to send their roof technician to repair leaks and that they changed some ceiling tiles. She indicates that the defendant changed some floor tiles from the second floor and additional repairs, including the removal and replacement of ceiling tiles, were done at the expense of UCKG.

[5] Additionally, she indicates that when the UCKG took occupation of the property there was no electricity, the air conditioning units (a/c units) were serviced by UCKG and they were making a rumbling sound and she communicated with the defendant and permission was given to have split units installed. She further states that UCKG did not use the units which were part of the building as they were not working.

[6] After the decision was taken to terminate the lease agreement, Ms. Campbell states that the building was inspected by a representative of the defendant and as requested the claimant re painted the building, replaced some ceiling tiles and diffusers and after the keys were handed over "he signed off that everything was okay except... diffusers and... the air conditioners needed to be serviced."

[7] In cross examination, Ms. Campbell agreed that the claimant was responsible for maintenance of the property pursuant to the lease and insisted that there was no meter on the premises and that the claimant had to make arrangements with the Jamaica

Public Service Company for a meter to be installed. She also agreed that Tewani Limited sent Harper's Air Conditioning Company to service the air conditioning units.

[8] When asked whether UCKG entered into a maintenance contract to service or maintain the a/c units, Ms. Campbell indicated that they installed their own, did not use those provided and stated that the church got "verbal" permission to install a/c units. She however agreed that on the day the keys were handed over, they were told to service the a/c units and later admitted that under the agreement UCKG needed written permission to install a/c units and to make any structural alterations.

[9] Ms Campbell agreed that all repairs requested by the claimant to be done before moving in, were done by the defendant and also agreed that with regard to clause 2 vii) of the lease, the claimant was responsible to do all that was set out there.

[10] With regard to the issue relating to floor tiles, Ms Campbell stated that the claimant fixed all the floor tiles. When it was suggested to her that on both floors the tiles were mismatched, she agreed and stated that as they could not find the exact tiles, Mr Tewani chose tiles that were closest.

[11] In relation to the electrical wires, the witness indicated that she was not aware of them not being in proper condition and with regard to windows and bathroom to be fixed, Ms Campbell indicated that the church hired someone to fix them and insisted that the church did repairs for which they were responsible.

[12] Ms Campbell agreed that after the claimant left the premises, there was discussion with the defendant in relation to things to be fixed and that based on the lease, Tewani Limited was entitled to deduct expenses for repairs and painting, but that the church did repairs for which they were responsible and it was not true to say the sum of $2,005,435 remains due to Tewani Limited.

[13] The defendant called two witnesses, Kamlesh Menghani and Dwayne Baker.

[14] Mr Kamlesh Menghani's evidence is that he was assistant manager at Tewani Limited and that one of his duties was to inspect properties owned by the defendant when they are made available for rental and that he monitored the properties during the

course of the rental and collected rentals from time to time. He indicates that before the claimant moved in, the defendant inspected the premises and he recalls that the claimant complained that the air conditioner was making too much noise and they had to have it fixed before the claimant moved in.

[15] He further states that in February 2010, the claimant indicated that it did not wish to renew the lease and the defendant by letter dated February 16, 2010 wrote to them setting out repairs to be done and that he visited the premises and identified the items set out in the letter. He indicates that the letter is incomplete as at the time he was unable to inspect the air conditioning units but that the premises were inspected by Dwayne Baker and Andre Neil a few days after the claimants moved out and he sent a fax to the claimants with respect to the floor tiles, diffusers and air conditioning units which were all in a state of disrepair.

[16] He indicates that in or about 2011 he got quotations from Active Traders in relation to the cost of tiles which was $1,285,232.(Ex. 4) He states that he got an invoice for the cost of labour for removing and laying tiles, which was $637,000.00, (Ex.5) His evidence further is that Tewani Limited employed Mr Bygrave to fix the bathrooms and he provided invoices for $9,000.00 and $13,500.00 (Ex. 6a and b) which were paid, that he employed Windell Jonas to do repairs to electrical wiring and he presented an invoice for labour in the sum of $250,000.00 (Ex. 7) and additional invoices from ABC Electrical Sales for material in the sums of $38,493.00, $60,717.47and, $106,262.87 (Ex. 8a,b and c) which were all paid by Tewani Limited. He states further that RD Fabricators Ltd did work in relation to locks and window hinges that were damaged and had to be replaced and their invoices dated 28th January 2011 and 2nd February 2011(Ex.9a and b) total $97,055.00. In relation to the air conditioning, Mr Menghani indicates that it was fixed by Andre Neil and Dwayne Baker and they presented invoices totalling $639,800.00 (Ex. 10a,b and c)

[17] Mr. Menghani gave further evidence that the building was locked up for two to two and a half years and repairs were done before the building was handed over to UCKG. This he said was in relation to the roof and tiles that were lifted, servicing of a/c units and removal of some paintings. He noted that servicing of the a/c units is “normal

procedure before we hand over building. Units were not new". He also indicated that when UCKG left, he went to inspect the premises and that he contacted UCKG to fix

the a/c units and was told that they did not use them so he had one serviced on November 23, 2010 and the second which needed parts was repaired in January 2011 and serviced in February 2011

[18] In cross examination by Miss Harper, Mr Menghani stated that every 3 – 4 months the a/c units would be serviced and that repairs were in relation to "leaking roof, tiles lifting up or any cleaning of the property". He indicated that the facilities referred to as being in good working order when the claimants moved in were "a/c, bath room fixtures, floor in good condition, walls were painted".

[19] He agreed that when the claimant occupied the building they (the defendant) had to repair ceiling tiles and that the claimant reported once that floor tiles had lifted and Mr Jones was sent to fix them, but he denied that before the claimant moved in, the defendant had to repair tiles. He stated that he was not aware that tiles had lifted again as they were not informed and when he went to inspect the premises he saw the replacement tiles. He also agreed that the defendant was informed by the claimant that they were unable to get similar tiles but denied having knowledge if Mr Tewani selected the tiles to be used.

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[20] Mr Menghani stated that when the claimant's representative handed over the keys to him he indicated that the a/c units needed to be fixed, and he agreed that it was not listed in the February letter. He denied that he took the keys because he accepted that the premises were in proper condition and stated that with regard to the floor tiles, he had attempted to get tiles and after going to a number of places was unable to find similar tiles.

[21] Mr Menghani denied that the work carried out by the defendant in November 2010, January and February 2011 were the company's usual maintenance of premises

and preparation for new tenants and in relation to electrical wiring, admitted that work was done by the defendant November 29, 2010 and January 10 and 24, 2011 and that work done to replace locks and windows were done January 28, 2011.

[22] Mr Dwayne Baker's evidence is that he is a technician and that he inspected the a/c units at the premises after the claimant had left. He states that based on his observation the units were not maintained so required parts which "we installed and repaired". He indicated in cross examination that a/c units have to be maintained every three to four months and that based on his observation one of the units was newer than the other and "the one serviced was a little newer than the second one"

[23] Miss Harper, Counsel for the claimant submitted that there was an express covenant to "repair, maintain, clean and upkeep the leased premises" and in order to make a fair assessment of what is reasonably required under a covenant to repair, the ambit of the covenant needs to be determined. Counsel found guidance in the case of **Ravensheft Properties Limited v Davystone (Holdings) Limited** [1980] QB 12 on the issue of whether the claimant was required to give back a different thing from that which it took when it entered into the covenant. In that case it was held that a tenant was liable not only for the cost of reinstating stone cladding to a building but also for the increase in the cost of the work.

[24] "Repair" she submitted, as defined by Atkin LJ in **Anstruther –Gough–Calthorpe v McOscar** [1924] 1 KB 716 at 734 "connotes the idea of making good damage so as to leave the subject so far as possible as though it had not been damaged." In reference to the considerations to be borne in mind in determining the true construction of a covenant to repair as outlined in **Anstruther**, counsel submitted that the state of the property when the covenant was entered into is "the key determinant in assessing the claimant's obligation".

[25] She indicated that when the claimant took possession of the property it had been locked up for some time and the claimant realized that the air conditioning units were not working properly, the roof was leaking and the property was not properly wired to receive electricity and took the necessary steps to "bring the property up to its

standard". She indicated that the covenant to repair places a burden on the tenant only when the subject matter of the covenant is damaged or defective and does not import an obligation on the tenant to provide something new to the landlord.

[26] Counsel noted that shortly after the claimant moved into the premises some tiles had lifted resulting in repairs being carried out by the defendant and shortly thereafter tiles lifted again in the same section. Counsel also submitted that the defendant is seeking to be reimbursed for the replacement of floor tiles, but the damaged tiles were replaced with tiles of "similar description, quality and value" and there can be no obligation on the tenant to pay for the extravagance of the landlord.

[27] She expressed the view that replacing all the floor tiles is disproportionate to what is required under the covenant, as the damaged tiles were replaced and the covenant to repair does not import such an onerous obligation on the claimant to remove and replace all the existing floor tiles. This position Counsel said is "buttressed" by Lord Esher MR in **Proudfoot v Hart** [1890] 25 QB 42 where he states:

> *If the landlord puts down a new floor of a different kind, he cannot charge the tenant with the cost of it. He is entitled to charge the cost of doing what the tenant had to do under his covenant; but he is not entitled to charge according to what he himself has in fact done"*.

[28] Counsel also submitted that the obligation to repair the defective a/c units was discharged when the units were serviced at the expense of the claimant and that there would not have been a need for the claimant to install 25 new split units if those already on the premises were in good working order and able to fulfil the purpose for which they were intended. She noted that the claimant agreed that they did not maintain the a/c unit because they were not using them and from the beginning of their occupation the a/c units were not working, they complained to the defendant and the defendant was required to fix it before they moved in.

[29] Counsel pointed to the inconsistency in the testimony of Kamlesh Menghani in relation to the a/c units whether he advised the claimant that one a/c needed fixing and one needed servicing and expressed the view that the defendant's request for

reimbursement for the a/c unit is essentially a request for a new a/c unit. She noted that work on the a/c units was carried out eight months and eleven months after the claimant gave up the premises and after such time, the defendant would have been carrying out such work as part of their maintenance routine for the premises while it was empty.

[30] Counsel submitted that based on the evidence, there was nothing wrong with the electrical wiring as Andrea Campbell gave evidence that an inspector had to "pass the premises" before JPS Co could install the meter, while Kamlesh Menghani was unable to say what was wrong with the wiring. Counsel noted that Exhibit 11 only depicts an electrical socket not being attached to the wall but does not show damaged wiring. Further, counsel noted that repairs purportedly done to wiring by virtue of Exhibits 8a,b and c would have been done on February 12, 2011, and this was eleven months after the claimant left the property. Counsel added that the defendant has not presented any evidence to confirm whether the wiring was not in working condition after the claimant left the premises and therefore asked the court to refuse to accept the defendant's testimony that the wiring needed repairs as a result of an omission by the claimant especially in circumstances where the building remained empty for over a year after the claimant gave up possession. She opined that if the defendant had an issue with the wiring, such concern would have been raised with the claimant at the time of inspection and the keys may not have been accepted from the claimant in such circumstances.

[31] Counsel for the claimant submitted that doors were not listed as items for which repair was required and as such the court should refuse to accept Exhibits 9a &b as costs incurred as a result of any omission by the claimant. In relation to repair to the windows, counsel noted that such work was done by the defendant eleven months after they left the property and shortly before new tenants took possession. She noted that the defendant did not provide evidence to suggest that the doors or windows had been damaged at the time the claimant left the premises but that, as requested by the defendant, the claimant's evidence is that the church hired someone to put the windows in proper condition.

[32] On the issue of whether the defendant should return the security deposit, counsel submitted that the return of the deposit hinges on a finding that the claimant fulfilled all

its obligations under the agreement. She therefore submitted that the reimbursement requested is disproportionate and outside the ambit of the repairing covenant and as such the defendant is obliged as a matter of law, to return the security deposit to the claimant as they had no right in fact or in law to retain it.

[33] Ms. Davis, Counsel for the defendant submitted that the standard of repair required of the respective parties can only be determined pursuant to a proper construction of the lease. She noted that this proposition is confirmed in the case of **International Hotels Limited v Cornwall Holdings Limited** Suit No CL 136 of 1994, unreported, delivered October 24, 1996. She also submitted that the obligations of the parties with regard to the security deposit also have to be determined by a proper construction of the lease agreement.

[34] With regard to the security deposit, Counsel submitted that it is clear that the defendant was entitled to deduct the cost of any repairs as this was agreed at Clause 2(ii) of the lease agreement. She added that the right to deduct sums from the security deposit arises on the lessee vacating the leased premises and at the termination of the term, so once the claimant has vacated the premises, the defendant could deduct from the deposit any cost related to the claimant's previous occupation, including the cost of repairs or reinstatement. She expressed the view that the defendant would not even have to show any breach on the part of the claimant before it is authorized to deduct its costs, as it is clear from the wording used in the lease that this is what the parties agreed to when they signed it.

[35] Counsel submitted that five sets of costs have been identified for which the defendant would be authorized to deduct. These are costs of replacement of tiles, repair of face basin and toilet, electrical wiring, doors and air conditioning unit which totals $3,114,560.00. She added that all the repairs relate to the premises, all were done save for the repairs to the tiles, which were an estimate, and that notice that the repairs were required was given to the claimant.

[36] Counsel further submitted that although the claimant's witness states that repairs were done by the claimant, she has produced no documentary evidence for any of the

repairs they allegedly did. She further indicated that in relation to the air conditioning unit, the undisputed evidence is that they refused to have this serviced since they said they never used it.

[37] Ms Davis also submitted that it is a question of degree whether work carried out is repair or whether it so changed the character of the building as to involve giving back to the landlord "a wholly different building to that demised". She added that on the evidence presented to the court, the claimant had breached the lease agreement and the defendant was entitled to deduct the amounts as set out for costs for breaches of the lease. She suggested that in the absence of documentary proof that Mr Menghani had "signed off" that everything was okay, Mr Menghani's evidence that he signed no document should be preferred.

[38] Counsel also submitted that the replacement tiles were clearly a breach of clauses 2(ix), 2(vii) and 2(viii) as the claimant had covenanted to keep the premises in the same condition as at the commencement of the lease, they had agreed that the tenant would wherever necessary substitute "any of the fixtures or fittings with fixtures or fittings of a similar description, quality and value to the complete satisfaction of the lessor" and the parties had agreed that the claimant would not make alterations to the structure of the premises without the written consent of the landlord.

[39] The issues that fall to be determined are whether the claimant is entitled to damages for breach of the lease agreement due to the defendant's failure to return the security deposit; whether the claimant is in breach of its obligations under the lease to repair, maintain, clean and upkeep the leased premises and if so whether the defendant is entitled to damages as a result of the claimant's breach and was entitled to deduct the cost of repairs to the premises from the security deposit.

[40] In addressing these issues the court has to take into consideration whether at the time of entering the lease agreement the property was well maintained, whether the claimant did all that was reasonable in the maintenance of the property, whether there was any breach of covenant by the claimant and whether the repairs executed by the defendant went beyond the scope of the covenant to repair.

[41] The extent of the parties' obligations in relation to repairs and maintenance are set out in the lease agreement and in an effort to determine the intention of the parties to this lease agreement, the agreement as a whole has to be examined.

[42] The lease agreement dated March 15, 2007 sets out the obligations of the parties under it and the document therefore has to be construed as a whole to determine the extent of such obligations. The relevant parts of the agreement are stated hereunder:

Clause 2 of the agreement sets out *inter alia*, the Lessee's covenants with regard to the paying of rent and the security deposit and the maintenance and repair of the property.

Clause 2 ii) states in part, as follows: *" on the signing hereof to pay a security deposit of (2) two months' rental being UNITED STATES SEVENTEEN THOUSAND DOLLARS (US$17,000.00) in two equal instalments, one of the said sum of US$8,500.00 on the execution if the Lease herein and the remaining amount of US$8,500.00 within six months of the date of execution of the lease. The said deposit is to be applied at the determination of the term hereby created for satisfaction of all the breaches herein, in particular, the repainting of the said premises or sums due and owing by this instrument together with outstanding charges payable by the lessee herein such as electricity and obligations..."*

[43] Clause 2 iii) of the lease agreement is concerned with "maintenance" and states in part, *"it is understood that the premises is being leased AS IS and the Lessee is hereby responsible for the maintenance of the property throughout the term of the Lease. The Lessee shall be solely responsible for all the recurrent expenditure incurred regarding their use and occupation of the leased premises, including the proportionate share of janitorial services, as well as the proportionate charges for water and electricity on the outside of the building*"

[44] Clause 2 iv), relates to the payment of interest on arrears of rent or other monies payable under the lease.

[45] Clause 2 v) states as follows*: "The lessee undertakes at its own expense to timely enter into a maintenance contract with any reputable air-conditioning company to service and maintain on a regular basis the air conditioning system in the leased premises. The lessee shall indemnify the lessor against any claims for loss or damage to the lessee's equipment, fixtures and fittings and any of the contents in the leased premises, provided however that the lessee shall not be obliged to indemnify the lessor against any loss which may arise from the negligence of the lessor.*

Clause 2 vi) concerns the payment for utilities and service contracted by the lessee

Clause 2 vii) states: *"To maintain and repair interior structure The lessee hereby accepts the leased premises in the condition that they are in at the beginning of this lease and agrees at all times during the term of this lease to repair, maintain, clean and upkeep the leased premises..., together with all floors, ceilings, interior finishes...therein in good, substantial and decorative repair, order and condition and to keep...doors and windows, ...toilets, basins, plumbing and sanitary fixtures...clean and in good and substantial state of repair... and whenever it becomes necessary, substitute any of the fixtures or fittings with fixtures or fittings of a similar description, quality and value to the complete satisfaction of the Lessor.*

Clause 2 viii) states: *Not to alter Not to make any structural alterations...or cut any of the walls... without the previous written consent of the Lessor...*

Clause 2 ix) states in part: "*The lessee hereby accepts the leased premises in the condition that they are in at the beginning of this lease and agrees to maintain the said leased premises in the same condition, order and repair as they are at the commencement of the said term excepting only reasonable wear and tear arising from the use thereof...and ... in the event that any of the lessors fixtures and fittings... is in a substantial state of disrepair due to default, negligence or wilful act of the lessee...the lessee shall replace or repair such fixtures and fittings with items of a similar quality*, *description and value to the satisfaction of the lessor at the sole expense of the lessee..."*

[46] Clause 3 ii) states as follows: *"To maintain and repair structure*

The lessor covenants to maintain and repair during the term of the lease ... the structure of the building Provided However that the Lessee covenants to indemnify the Lessor for any damage to the structure which are occasioned by the neglect of the Lessee...The Lessor will be obliged to keep the leased premises wind and water tight and shall be responsible for all roof and structural repairs"

[47] I note also that there was a clause, 4 x) which states, "*if any differences shall arise between the parties hereto, such differences shall be referred to a single arbitrator ...otherwise to two arbitrators... and such reference shall be a condition precedent to litigation in the courts".* There is no indication that the parties have referred the matter to arbitration. I am therefore of the view that the claim having been brought by UCKG and issues joined by the defendant, they having filed a counter claim, the parties have waived that provision of the agreement.

[48] The law with respect to repairs is stated in the text **Drafting and Negotiating Commercial Leases, Murray J Ross, 2nd Edition** Chapter 8 at pages 142-3 as follows: "However large the words of the covenant may be, a covenant to repair... is not a covenant to give a different thing from that which the tenant took when he entered into the covenant: **Lister v Lane** [1893] 2 QB 212 per Lord Esher MR at 216.

[49] In relation to the construction of covenants to repair, the learned authors of Halsbury's Laws of England 4th Ed. Reissue, Vol. 27(1) stated at paragraph 350: "*Every covenant to repair must be construed primarily according to the words used..."*

[50] *Repair is restoration by renewal or replacement of subsidiary parts of a whole. Renewal, as distinguished from repair, is reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole:* ***Lurcott v Wakely and Wheeler*** *[1911] 1 KB 905 per Buckley LJ at 924*

[51] The principle in the case of **Ravenseft Properties Ltd v Daystone (Holdings) Ltd** [1980] QB 12– referred to by both Counsel, is useful***.*** At page 21of the judgment, Forbes J, said

"…The true test is, as the cases show, that it is always a question of degree whether that which the tenant is being asked to do can properly be described as repair, or whether on the contrary it would involve giving back to the landlord a wholly different thing from that which he demised".

[52] The authorities show that the covenant to repair is distinguishable from a covenant to renew. The extent of repair required is a question of fact depending on various factors including the type of building and the state the building was in at the time the agreement was entered into. A covenant to keep a building in repair and to hand over that building in good repair imports upon the lessee an obligation to bring that building into repair, even if the building is handed over to him in the state of disrepair. In order to avoid disputes concerning the extent of repair necessary under a covenant to repair one mechanism employed is for the lessor and the lessee to agree a schedule setting out the state of repair of a property before the entry into possession of a lease. This was not done in this case

[53] I am of the view that the correct approach is to look at the building and the state it was in as at the date of the lease, look at the precise terms of the lease agreement and conclude whether on a fair interpretation of the terms relating to the state of the building, the requisite work can be fairly called repairs.

[54] Applying the above principles to the instant covenant to repair and the facts of this matter, I find that the covenant to repair in the case at bar is not in the same terms as a covenant to keep and deliver premises in repair. However, in effect it is similar as to keep premises in repair implies that the premises are to be kept in repair, and if they are not already in repair, that they will be put into a state of repair, and thereafter kept in repair. I am fortified in this conclusion and construction by the fact that in this case the claimant, UCKG was aware the premises needed work to be done to it prior to taking possession. This is clear from the fact that the premises were said to be leased "as is" and the claimant and defendant had to carry out maintenance work on the a/c units prior to the claimant taking possession and the defendant had to do repair work to the ceiling and floor tiles.

[55] I do not readily accept the evidence of Mr Menghani that all the repairs identified by the defendant as being required were as a result of the breach of the lease agreement by the claimant. I am therefore left in some doubt as to whether the defendant has satisfied this court that the sums said to be expended or are expected to be expended on this property for the ultimate account of the claimant would be for services rendered or to be rendered for repairs that the claimant should have undertaken.

[56] I accept on a balance of probabilities, that the sum of $639,800.00 paid by the defendant in respect of servicing and repairs for the a/c units were a direct result of the breach of the covenants by the claimant. The claimant had covenanted to enter into agreement (s) for the maintenance of the air conditioning units and failed to do so. The claimant indicated that the a/c units were not in proper working condition and that they had not used them so did not service them.

[57] Mr Baker gave evidence that he inspected the units and found that one needed servicing and the other needed parts. I accept the assessment made by Messrs Baker and Neil. On cross examination it became clear that Mr Baker opted for replacement of parts in one a/c unit as opposed to servicing, based on the nature of the damage, and on servicing of the other, as he had noted that one was newer than the other. As such, I am prepared to use the values he has placed on the items he has referred to in respect of the repairs and servicing done to the a/c units. I find that this became necessary as the evidence is clear that the claimant was in breach of the covenant to service the two central a/c units providing the excuse that they did not use them but installed their own.

[58] The ambit of work defined as necessary in the evidence of Mr Menghani in relation to the tiling of the floors in my view appears to be disproportionate to what may reasonably be required under the covenant to repair. I have little doubt that the effect is to provide a complete replacement of all the floor tiles on both floors, when the claimant has in fact replaced the damaged tiles with similar tiles. I therefore agree with Counsel

for the claimant that the covenant to repair does not import such an onerous obligation on the claimant to remove and replace all the existing floor tiles.

[59] The necessity for such extensive work on this area has not been demonstrated, notwithstanding the evidence that they lease properties to persons who expect a certain high standard. Further, I am mindful that at the commencement of the lease tiles had lifted and the claimant reported this to the defendant and they carried out repairs.

[60] The court also is unsure as to exactly when the defendant became aware that the "mismatched" tiles had been placed on the floor as the photograph taken by Mr Menghani (Marked for identity) was taken in July 2011. I agree with counsel for the claimant that it would be disproportionate for the claimant to be required to re-tile the entire flooring as that would amount to a renewal as opposed to repair. Further, I do not find on the evidence that there has been damage to the tiles caused by the claimant.

[61] The claimant and defendant are agreed that the exact tiles were not available. The defendant expressed the view that for the reasonable repair of the premises the two floors would require to be retiled and this would be a repair and not an improvement. I do not agree. I find on a balance of probabilities that the claimant found the closest matching tiles and I accept that the solution was the best economical one. Further, as at the date of trial, the tiles replaced by the claimant remained in the premises and according to the evidence of Mr Menghani, the premises were rented in March 2011 with the tiles described as "misfit". The defendant has therefore not proved on a balance of probabilities that the claimant has breached the covenant in relation to the replacement of tiles.

[62] The repairs to electrical wiring, itemized as "all electrical wires...", suggests that a renewal rather than a repair occurred in relation to this item. However, the necessity for such extensive work in this area has been demonstrated as it has been shown that it was required as a result of the breach by the claimant which the court can also infer as having taken place due to the installation and subsequent removal of twenty five split air conditioning units. The burden of proving that work done falls within the covenant to

repair lies on he who relies on that covenant and alleges it does. I find that on a balance of probabilities the defendant has shown that it was necessary.

[63] The repairs were done in February 2011 by Windell Jonas at a cost of $250,000.00. Exhibits 8a, b and c indicate that it was in November 2010 and January 2011 that materials for this repair were purchased from ABC Electrical Sales. There is evidence to show that these were directly related to the claimant's occupation of the premises and include the fact that the diffusers which the claimant admitted were missing, had to be replaced.

[64] On the evidence, I find that such repairs were necessary and did not go beyond the scope of the covenant to repair and neither was this done as part of the defendant's preparation for new tenants. As it relates to the replacement of the diffusers there is uncontroverted evidence that the diffusers were not maintained and the claimant's witness indicated that six were missing. It is therefore clear that the claimant was in breach of its obligation in that regard and must therefore bear the costs of the subsequent repairs and replacement. The defendant is therefore entitled to deduct the costs of $250,000.00 plus the costs of $233,748.00 for material from the security deposit in keeping with the terms of the agreement.

[65] The replacement of locks and door hinges as well as repairs to windows and bathrooms were done almost a year after claimant vacated the premises. However, there is evidence that the claimant was notified of this aspect of their obligations under the lease before they vacated the premises. The claimant has not satisfied me that they maintained and or repaired these parts of the premises as they have not provided any proof of such repairs. I therefore find on a balance of probabilities that in failing to maintain and repair the premises in that regard they have breached the agreement and the defendant having shown that they did the necessary repairs were entitled to deduct the costs of these repairs from the security deposit.

[66] In terms of the breaches particularized by the defendant in the Counter Claim, I find that apart from the issue relating to tiles, these were substantiated by the evidence

of the defendant's witnesses and substantially admitted by the claimant. The court can reasonably conclude therefore that the claimant is guilty of breaching some of the covenants alleged by the defendant to have been breached. On the evidence, it does not appear that the lessees have lived up to their side of the bargain as it relates to the air conditioning units as they failed to enter into a contract for them to be maintained, failed to maintain and replace the diffusers and neither has it been shown that they repaired and maintained the premises in relation to toilets and doors. I also find that part of the repairs required to be done by the claimant on vacating the premises which related to the wiring, included “making good” any “structural alterations” that became necessary and having installed a/c units, no written consent having been obtained, this was also a breach of the lease agreement.

[67] I find that the defendant has established by credible evidence that the claimant is in breach of some of the clauses of the lease agreement as some of the issues joined between the parties became virtual non- issues as the case progressed, as the witness for the claimant essentially admitted some of the breaches although endeavouring to offer explanations or excuses for them. I therefore find that the defendant is entitled to that part of the expenditure relating to repair and servicing of the air conditioning units, maintenance and replacement of diffusers, repairing of wiring and repairs to bathrooms, windows and doors.

[68] The defendant has pleaded $3,156,335.00 as the sum to which it is entitled and counterclaimed for $2,005,435.00 as the balance outstanding when that sum is deducted from the security deposit. However, based on my assessment, I find it has only proved that it has paid the sum of $1,214,828.34 to carry out repairs and replacements as a result of the claimant’s breach of the lease agreement. The defendant is therefore entitled to reimbursement of that expenditure and pursuant to clause 2 ii) of the lease agreement is entitled to deduct that sum from the security deposit of US$17,000.00 which was equivalent to Ja$1,150,900.00 in 2007. I find that on deducting the sum assessed, there is a balance of $63,928.40 still outstanding to the defendant.

[69] The defendant claimed interest at a commercial rate. There was no evidence adduced to show the factual basis for the entitlement to interest at the commercial rate.

[70] There shall therefore be judgment for the defendant on its counterclaim in the sum of $63,928.40 with interest at 3% per annum from March 14, 2010 to the date hereof.

[71] The Claimant has been unsuccessful on the majority of the issues raised. The defendant has succeeded on its counterclaim in part. Rather than awarding each party its respective costs on the claim and the counterclaim, in the exercise of my discretion I order that each party bears its own costs