MMES

JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. H.C.V. 1268/2003

BETWEEN	**EUREKA MEDICAL LIMITED**	**CLAIMANT**
AND	**LIFE OF JAMAICA LIMITED**	**DEFENDANT**
	AND BETWEEN	
	LIFE OF JAMAICA LIMITED	**ANCILLARY CLAIMANT**
AND	**EUREKA MEDICAL LIMITED**	**ANCILLARY DEFENDANT**

Lord Anthony Gifford Q.C. and Andrew Irving instructed by Gifford Thompson & Bright for the Claimant/Ancillary Defendant.

Georgia Gibson-Henlin and Catherine Minto instructed by Nunes Scholefield Deleon & Co. for The Defendant/Ancillary Claimant.

Heard: 28th October 2004, 15th April 2005 and 12th October 2005.

Mangatal J :

1. I apologize for the delay in delivering this judgment. I also must at the outset thank Counsel for both sides for the clear and thorough submissions which greatly assisted me in arriving at my decision.

Eureka Medical Limited "Eureka" was at a particular point in time formerly the tenant of Life of Jamaica Limited "L.O.J" at premises 1 Eureka Road, Kingston 5. On or about the 13th of March, 2003 L.O.J. re-took possession of the premises. The substantive claim in this case is concerned with, on the one hand, Eureka's claim that it was wrongfully evicted in breach of a revocable contractual license without reasonable

notice, and on the other hand, L.O.J.'s counterclaim for arrears of rental, water rates, and insurance premiums.

2. On the 26th of January 2004, a case management conference was adjourned to the 31st of March 2004 for determination of the issue of whether L.O.J. can obtain Judgment on admissions made by Eureka to L.O.J.'s Counterclaim notwithstanding Eureka's Defence claiming to set off against L.O.J.'s Counterclaim so much of Eureka's claim as will wholly extinguish the Counterclaim.

3. On the 31st of March 2004 L.O.J. made a new application, which was filed on the 29th March 2004, seeking the following orders on behalf of L.O.J.:

- The Statements of Case of Eureka be struck out on the basis that there are no reasonable grounds for bringing the Claim or defending the Counterclaim pursuant to Part 26. 3(1) (c) of the Civil Procedure Rules 2002.
- Summary Judgment be entered in favour of L.O.J against Eureka on the grounds that Eureka has no real prospect of succeeding on the Claim or issue or of successfully defending the claim or issue.

It is these combined applications that were heard and determined by me at an adjourned hearing and in respect of which I reserved judgment.

4. The starting point for considering whether Summary Judgment should be granted is Part 15 of the Civil Procedure Rules 2002(C.P.R.). Part 15.2 states that:

The court may give summary judgment on the claim or on a particular issue if it considers that-

i. the claimant has no real prospect of succeeding on the claim or the issue; or

ii. the defendant has no real prospect of successfully defending the claim or issue.

5. Part 15.5 requires that the parties file affidavit evidence in support of their arguments for or against summary judgment. Eureka filed two Affidavits sworn to by Neville Hume, Eureka's Managing Director, filed March 23 and August 23 2004. L.O.J. filed the Affidavit of Janice Taffe, Vice President and Legal Counsel of L.O.J., filed June 28 2004.

6. Rule 26.3 (1)(c) states:

26.3(1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court-

....(c) that the statement of case or part to be struck out discloses no reasonable grounds for bringing or defending a claim...

7. The test for real prospect of success as referred to in the English rules(Rule 24.2) was discussed in **Swain v. Hillman** [2001] 1 All E.R. 91, a decision of the English Court of Appeal. In our jurisdiction, my brother Anderson J. in **Caribbean Outlets Limited v. Beverley Barakat** C.L. 2002 C145 delivered May 19 2004, adopted the English Court of Appeal's test. Lord Woolf MR in elucidating the test in **Swain,** page 92 j, indicated that in order to dispose summarily of a case, the judge has to be satisfied that there was no realistic chance of the case succeeding. The word "real" is in contra-distinction to a fanciful prospect of success. For the proper disposal of an issue under our summary judgment rules, like the English rules, the judge ought not to conduct a mini-trial. Summary judgment is really designed to deal with cases that do not merit trial at all. In **Swain**

page 92 g-h, Lord Woolf discussed the English rule 3.4 , which is essentially in the same terms as our Rule 26.3(1) (c) and deals with striking out a statement of case or part of it. He states:

> *Clearly, there is a relationship between r.3.4 and r. 24.2. However, the power of the court under Pt. 24, the grounds are set out in r. 24.2, are wider than those contained in r. 3.4. The reason for the contrast in language between r. 3.4 and r. 24.2 is because under r. 3.4, unlike r. 24.2, the court generally is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing or defending the claim.*

It would seem to me that in relation to Rule 26.3 (1) (c), unlike Rule 15.2, the court is not permitted to have regard to anything but the statement of case and is to make its decision strictly on the terms and contents of the statement of case.

8. In **Three Rivers DC v. Bank of England [2001] 2 All ER 513,** a majority decision of the House of Lords, at paragraphs 94 and 92 541 j and 542 g, Lord Hope, who delivered one of the majority judgments, stated that the question whether a claim has no real prospect of succeeding at trial is a question that has to be answered having regard to the overriding objective of dealing with the case justly. Like the English Rules, the overriding objective of our Rules (Rule 1.1 of the C.P.R.) is to enable the court to deal with cases justly. Lord Hope expressed the view that in more difficult and complex cases attention to the overriding objective of dealing with the case justly is likely to be more important than a search for the precise meaning of the summary judgment rule. At paragraphs 94 and 95 542g,h and 543 a and b Lord Hope gives what I consider to be useful guidance for interpreting how our own rules should be operated:

But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is- what is to be the scope of that inquiry? I would approach that further question this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf MR said in Swain's case [2001] 1 All ER 91 at 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.

8A. The broad issues are:

(a) Whether Eureka has a real prospect of succeeding in establishing that Eureka was, at the time of the eviction exercise, a contractual licensee entitled to reasonable notice of three months.

(b) In the alternative, whether Eureka has any real prospect of succeeding in establishing that L.O.J. made certain representations by its letters and conduct upon which Eureka relied to its detriment. The question here is whether L.O.J. was estopped from exercising its strict rights without giving reasonable notice of three months.

(c) Whether Eureka has any reasonable prospect of succeeding in its defence against the ancillary claim.

(d) Whether Eureka's statements of case show any reasonable grounds for bringing the claim or defending the ancillary/ counterclaim.

9. The facts agreed by the parties are as follows:

(a) Eureka was until on or about the 13th of March 2003 in occupation of 1 Eureka Road, Kingston 5 in the Parish of Saint Andrew. These premises are owned by L.O.J.

(b) There had been a ten year lease between Eureka and L.O.J's predecessor in title which commenced in 1988 and which lease required payment of rental on a monthly basis. Eureka remained on the premises after the expiration of the lease term in 1998 and was required to pay rental monthly in advance.

(c) The premises are exempt from the Rent Restriction Act.

(d) Eureka received notices to quit dated July 30 2002 and August 30 2002. The notice to quit dated 30th August 2002 determined the tenancy on 30th September 2002.

(e) Eureka ceased to occupy the premises on or about the 13th of March 2003 or a few weeks thereafter when L.O.J. re-took possession of the premises.

10. L.O.J. contends that it re-took possession in keeping with the Notice to Quit dated the 30th of August 2002, served on the same date, and pursuant to its exemption certificate. L.O.J. maintains that subsequent to the termination of the tenancy by notice, it did not enter into any new arrangement, whether expressly, impliedly, or by conduct or representations with Eureka giving rise to a contractual licence.

11. Eureka on the other hand contends that by L.O.J's conduct, which is set out in the Particulars of Claim, and in particular by letters dated 11th September and 3rd October 2002, and by L.O.J.'s demands for and receipt of rent, L.O.J. granted to Eureka a contractual licence to occupy the premises. The argument runs that Eureka as consideration agreed to pay the current rent. Eureka maintains that this licence was revocable by reasonable notice, but not otherwise, and that in all the circumstances reasonable notice would have been three months.

12. Eureka contends that on the 13th March 2003 L.O.J. wrongfully, and in breach of contract and without giving Eureka any notice whatsoever, trespassed upon the premises, entered into possession, and excluded Eureka from the premises.

13. Further or in the alternative Eureka states that by its conduct and letters L.O.J. represented to Eureka that Eureka could continue to occupy the premises on terms of paying the current rent, while it continued to seek the financing for purchase of the premises and to negotiate with the U.S. embassy. Eureka goes on to allege that it relied on these representations to its detriment, by continuing to occupy the premises, by continuing to seek financing for the said purchase, by continuing to negotiate with the U.S. embassy, and by not seeking relocation in other

premises. Eureka claims that L.O.J. was estopped by these representations from exercising its strict rights without giving reasonable notice of its intention to do so. Such reasonable notice would have been three months.

14. By reason of L.O.J.'s wrongful acts Eureka claims to have suffered loss and damage and the claim exceeds ninety-three million dollars. This claim includes the amounts that Eureka had to pay out to its staff as a result of having to give notice to all staff members consequent on the alleged wrongful eviction. Eureka also makes a claim for the loss of revenue that Eureka anticipates that it would have received from the contract with the U.S. embassy. The loss of the contract with the U.S. embassy, Eureka alleges, is a loss that was foreseeable by L.O.J as a natural consequence of its wrongful eviction of Eureka.

(a) Whether Eureka has a real prospect of succeeding in establishing that it was at the time of the eviction exercise, a contractual licensee entitled to reasonable notice of three months

15. The fundamental and crucial question in this case is whether the facts disclose a contractual licence. The law is clear that there must be a contract in terms of the basic principles of contract law. There must be offer, acceptance, consideration and an intention to create legal relations- Chitty on Contracts Volume 1 28th ed2-145 to 2-148.

16. In this case the court is being asked to infer a contract from the letters and conduct of the parties. All of the factual material relevant to the finding of a contractual licence is contained in documents or is deponed to in the Affidavits of Neville Hume. There is no allegation of any oral representations. Indeed, Lord Gifford Q.C., in the course of making his submissions on behalf of Eureka, indicated that most of the material upon which the court's decision would be based is contained in the documents exhibited and that the case would not be much affected by oral evidence.

He further submitted, that Eureka would at this stage be entitled to judgment for damages to be assessed had Eureka chosen that route.

17. The burden of proof of the existence of a contract lies on the proponent of the contract, in this case Eureka. At paragraph 248 of Chitty it is stated:

> *In deciding issues of contractual intention, the courts normally apply an objective test..... The objective test, in other words, merely prevents a party from relying upon his uncommunicated belief as to the binding force of the agreement. Where such a belief is expressed in the documents, it must be a question of construction of the documents as a whole what effect is to be given to such a statement. In the absence of such an expression of intention, however, the legal effects of an agreement which is clearly intended to give rise to some legal relations is similarly not determined by the subjective intentions of the parties or of one of them: for example an agreement may take effect as a lease even though it is intended by the lessor to take effect only as a licence*

18. At **paragraph 10 of Halsbury's Laws of England, Volume 27 (1) 4th edition reissue** it is stated:

> *In order to establish a contractual licence there must be a promise which is intended to be binding and is either supported by consideration, or is intended to be acted upon and is in fact acted upon.*
>
> *.....If the licensee under a revocable licence has brought property onto the land, he is entitled to notice of revocation and to a reasonable time for removing his*

property and in which to make arrangements to carry on his business elsewhere.

19. In **London Borough Council of Hounslow v. Twickenham Gardens Developments Limited** [1970] 3 A.LL. E.R., 326, it was held that there must be terms since the licence is a part of the contract. At page 336-b and 343-d Megarry J. stated :

(336-b)

Whereas in equity, at all events, a contract may be regarded as bringing into being some estate or interest in the land, separate from the contract that creates it, a licence is no separate entity but merely one of the manifestations of the contract.

(343-d)

I would summarise the position relating to contractual licences as follows:

(1) A licence to enter land is a contractual licence if it is conferred by a contract; it is immaterial whether the right to enter the land is the primary purpose of the contract or is merely secondary.

(2) A contractual licence is not an entity distinct from the contract which brings it into being, but merely one of the provisions of that contract.....

20. In this case there is no indication from Eureka when the licence commenced. It is accepted by both parties that the tenancy determined on the 30th of September, 2002, the date of expiry of the Notice to Quit dated 30th August 2002.Eureka's case does appear to be premised on the assumption that a licence is the only interest that could result from the termination of the tenancy on the 30th day of September 2002. The relevant period in which Eureka must demonstrate that the licence was created would be from the determination of the tenancy on the 30th of

September 2002 to the date of eviction on or about the 13th of March 2003.

21. My understanding of the law is that where a lease for a fixed term of years requiring a tenant to pay rental monthly expires, and the tenant continues in occupation with the landlord's consent, the tenant is a tenant at will until some other interest is created, either by express grant or by implication. The terms of a tenancy at will which arises in this way will be those of the expired lease unless inconsistent with the nature of a tenancy at will and unless there is evidence of a contrary intention – paragraphs 171 and 182 of Halbury's Laws, Volume 27(1) 4th Edition. It is at least interesting to note that at paragraph 4 (w) of the lease agreement between L.O.J's predecessor and Eureka , the lessee, Eureka covenanted:

> *At the expiration of this lease or any extension thereof or sooner determination thereof as herein provided to peaceably and quietly yield up and deliver vacant possession of the leased premises .... To the Lessor or to whom it may appoint in such state of repair and condition as shall be in strict compliance with the terms, covenants, conditions and agreements herein contained. In the event that the Lessee shall fail to yield up the leased premises such occupation by the Lessee shall not be deemed to be a continuation or extension of this Lease and the Lessee shall be construed to be a Tenant at Will from month to month and in addition to all other remedies available to it hereunder, the Lessor shall have the right to receive and recover from the Lessee such amount as is fixed by law for the time the Lessee shall withhold possession of the leased premises or any part thereof.* (my emphasis).

22. One of the matters relied upon by Eureka as pointing to the existence of the contractual licence (in combination with other factors) is L.O.J's demand for, and Eureka's payment of, current rent. In **Javid v. Aqil** [1991] 1 All E.R. 243, the English Court of Appeal held(as per the headnote) that where a prospective tenant was allowed into possession and thereafter paid periodic payments of rent while negotiations proceeded on the terms of a lease to be granted to him, it was to be inferred in the absence of any other material factors that the parties intended to create a tenancy at will rather than a periodic tenancy pending the outcome of the negotiations, since the parties could not be taken to have intended that the periodic payments of rent would create a periodic tenancy when they were not agreed on the terms on which the prospective tenant would occupy.

> Nicholls LJ at pages 247 h to 248 c and 248f to 249 a stated:
>
> *As with other consensually-based arrangements, parties frequently proceed with an arrangement whereby one person takes possession of another's land for payment without having agreed or directed their minds to one or more fundamental aspects of their transaction. In such cases the law, where appropriate, has to step in and fill the gaps in a way which is sensible and reasonable. The law will imply, from what was agreed and all the surrounding circumstances, the terms the parties are to be taken to have intended to apply. Thus if one party permits another to go into possession of his land on payment of a rent of so much per week or month, failing more the inference sensibly and reasonably to be drawn is that the parties intended that there should be a weekly or monthly tenancy. Likewise, if one party permits another to remain in possession after the expiration of his*

tenancy. But I emphasize the qualification: "failing more". Frequently there will be more. Indeed, nowadays there normally will be other material surrounding circumstances. The simple situation is unlikely to arise often, not least because of the extent to which statute has intervened in landlord-tenant relationships. Where there is more than the simple situation, the inference sensibly and reasonably to be drawn will depend on a fair consideration of all the circumstances, of which the payment of rent on a periodic basis is only one, albeit a very important one (my emphasis).....

Of course, when one party permits another to enter or remain on his land on payment of a sum of money, and that other has no statutory entitlement to be there, almost inevitably there will be some consensual relationship between them. It may be no more than a licence determinable at any time, or a tenancy at will. But when and so long as such parties are in the throes of negotiating larger terms, caution must be exercised before inferring or imputing to the parties an intention to give the occupant more than a very limited interest, be it licence or tenancy. Otherwise the court would be in danger of inferring or imputing from conduct, such as payment of rent and the carrying out of repairs, whose explanation lies in the parties' expectation that they will be able to reach agreement on the larger terms, an intention to grant a lesser interest, such as a periodic tenancy, which the parties never had in contemplation at all.

> *....I refer... to the decision of the Court of King's Bench in* ***Doe d Cheny v. Batten*** *(1775) 1 Coup 243 at 245, [1775-1802] All ER Rep 594 at 595 for a much- quoted observation of Lord Mansfield CJ. There a tenancy at will of some warehouses was determined. After proceedings had been brought to recover possession, and while they were still pending, the landlord accepted payment of a quarter's rent. Lord Mansfield CJ said:*
>
> *The question therefore is, que animo the rent was received, and what the real intention of both parties was? If the truth of the case is, that both parties intended the tenancy should continue, there is an end of the plaintiff's title: if not, the landlord is not barred of his remedy by ejectment.....(Lord Mansfield C.J.'s emphasis).*

23. In **Cardiothoracic Institute Ltd. v. Shrewdcrest Ltd.,** [1986] 3 All E.R. 633, it was held that a tenant holding over after the expiry of a business tenancy excluded from statutory protection was a tenant-at-will, notwithstanding the payment of a monthly rental.

24. As Knox, J. said at 642a of the Cardiothoracic decision, the test enshrined in Lord Mansfield, C.J.'s que animo test is applicable whenever one finds rent being paid and accepted without there being a clear lease or tenancy agreement in force to explain the payment. The inference sensibly and reasonably to be drawn will depend on a fair consideration of all the circumstances.

25. Eureka does not contest the fact that the tenancy came to an end at the date of expiry of the notice to quit. It is for Eureka to establish that a new contractual arrangement was entered into or that some other

circumstances exist that would render it inequitable for L.O.J. to recover possession.

26. At paragraph 4 of Eureka's written submissions, it is stated that it is common ground that there was no tenancy relationship between the parties after the 30th of September 2002 when the latest notice to quit expired. It was further conceded, correctly in my view, that the last paragraph of letter dated 3rd October 2002 from L.O.J. to Eureka makes it clear that there was no intention to create a new tenancy. However, the fact that there was clearly no new or continued periodic tenancy arrangement does not mean, and there is no principle of law that will support a finding that, Eureka's continued occupation then became automatically or without more, one of a contractual licensee; one has to find the usual requirements for the existence of a contract made out. Neither the fact of calling the payment rent, nor the acceptance of rent would automatically create a new tenancy, much less a contractual licence.

27. Eureka's Attorneys-at Law made a written submission that L.O.J's averment in its amended Counterclaim that Eureka " was a tenant/lessee of the said premises until March 13, 2003" contradicts L.O.J's argument that Eureka was a trespasser who could be lawfully evicted. Eureka's Attorneys also argued that the fact that the rental invoice dated March 1st 2003 referred to "Mar/ 2003 Base Rent" and to "GCT on rent" confirms that the intention of L.O.J. was to allow Eureka to remain at least through March 2003, on payment of the "rent" for that month. They further argue that the demand for "March rent" clearly negatives any suggestion that Eureka was a trespasser. There is a fallacy in this argument; there is nothing in L.O.J's case suggesting that Eureka was a trespasser. As I understand L.O.J's case, they are saying that Eureka was after the expiry of the notice to quit, a tenant –at-will. A tenancy at will at

common law entitles the landlord to immediate possession on termination of the tenancy, which he may terminate at his will. If Eureka was a licensee, L.O.J. argues, then it was a licence that was determinable at any time, or , on the happening of an event, i.e. the breakdown in the negotiations for sale of the premises or concluded sale of the premises. As regards the argument made about the invoices, it seems to me that, although the Invoice says March rent, the sum due for rent under the tenancy arrangement was due monthly and was payable in advance and thus, a sum would remain due for occupation of the premises by Eureka at the commencement of March. In any event, termination of a tenancy at will does not require that termination take place at any particular time. At paragraph 172 of Halsbury Volume 27(1), it is stated:

> *"where rent is payable under a tenancy at will and the tenancy is determined between the rent days, the rent is apportioned."*

I therefore reject the argument that the wording of the invoice supports a position that L.O.J intended to allow Eureka to remain through March or that it negatives any suggestion that Eureka was a trespasser(since L.O.J. was not making that suggestion in any event).

28. In **Clarke v. Grant** [1949] 1 All E.R. 768, a yearly tenant of premises where rent was payable in advance, received a valid notice to quit. The tenant after the expiry of the notice to quit paid one month's rent in advance to the landlord's agent, who accepted it in the belief that it was rent payable in arrears. In holding that the landlord was entitled to possession, Lord Goddard C.J. stated:

> *...the tenancy having been brought to an end by a notice to quit, a payment of rent after the termination of the tenancy would only operate in favour of the tenant if it could be shown that the parties intended that there should be a new tenancy. That has been the law ever since it was laid down by the Court of King's Bench in*

> ***Doe d. Chen v. Batten*** *where Lord Mansfield said (1 Coup. 245):*
>
> *"The real question therefore is, que animo the rent was received, and what the real intention of both parties was?"*
>
> *It is impossible to say that the parties in this case intended that there should be a new tenancy. The landlord always desired to get possession of the premises. That is why he gave his notice to quit. The mere mistake of his agent in accepting the money as rent which had accrued is no evidence that the landlord was agreeing to a new tenancy.*

29. Eureka is relying upon the fact that it claims to have been in negotiations with L.O.J. to purchase the premises. Reliance is placed upon a number of the letters issuing between the two parties. In particular, Eureka in its written submissions relies upon the following words of the letter dated 3rd October 2002, written by Janet Taffe to Eureka's then Attorneys-at-Law, exhibit JT8 attached to the Affidavit of Janet Taffe:

> *It is our objective to not only have Eureka Medical Limited maintain current rent, but also to clear the arrears in the shortest possible time, more particularly through the sale of the property.*

30. The submission advanced by Lord Gifford Q.C. on behalf of Eureka in respect of those words is that by these words L.O.J. indicated its willingness to wait for a further period, during which 'current rent' would be paid, in the hope that the sale would materialize.

31. Eureka also relies on the words :

We would require that the amounts for escrow be a sum equivalent to one (1)year's rent and service fees plus the monthly amount of $500,000.00

The submission is that by these words L.O.J. indicated its willingness to wait for the anticipated revenues to be earned, which revenues according to Eureka it was anticipated would be earned from a contract with the U.S. embassy, and paid into the escrow account.

32. However, it seems to me that in order to properly assess the highlighted terms of the letter of October 3rd 2002, one has to look at the whole series of correspondence, and indeed, at the entire contents of the letter itself. All of this must be considered against the unchallenged backdrop that L.O.J. had served notice to Eureka to quit the premises for the reason that rental was outstanding, L.O.J. did not want to grant Eureka a new lease or tenancy, and that L.O.J. was negotiating to sell the premises. When the Affidavits and letters are carefully considered, i.e. the letters comprising exhibit NH1 attached to the First Affidavit of Neville Hume, and the letters comprising exhibits 6 through10(inclusive) of the Affidavit of Janice Taffe, the following circumstances clearly emerge:

(a) Eureka and L.O.J. had been negotiating about the sale of the premises for a fairly protracted period of time. There were proposals and counter-proposals.

(b) L.O.J served a notice to quit dated July 30th 2002 because of arrears of rental. L.O.J. and Eureka had discussions and L.O.J. indicated its intention to re-take possession of the premises. Eureka asked for time to carry out purchase of the premises.

(c) There had been delay on Eureka's part in completing purchase of the premises. Eureka sought to have

certain terms agreed by L.O.J.,(letter dated August 8 2002-J.T. 9). L.O.J. rejected those terms(letter of August 19, 2002-J.T.10).

(d) Discussions regarding the purchase continued up to August 30th 2002 and, in the spirit of those discussions, L.O.J. abandoned the notice to quit dated July 30 2002.

(e) At a meeting on 30th August 2002, confirmed in letter dated August 30 2002, (J,T,6) L.O.J. laid down certain conditions that had to be met by Eureka if the sale was to be concluded. The last paragraph of that letter reads:

> *Please bear in mind however that should the parties fail to arrive(at) an agreement in respect of the above, LOJ will be left with no option but to proceed with the termination of the tenancy*

(f) On the same day of the meeting LO.J. started the ball-a-rolling in the termination process by serving Eureka with a Notice to Quit.

(g) Eureka then responded by letter of 11th September 2002(J.T.7), and in that letter asked that , amongst other things, a lease for a year be entered into as rental and other payments would be guaranteed from the monthly escrow account. The letter went on to state that in addition, the current rent would be paid.

(h) Interestingly, in the letter of 11th September 2002 Eureka's Attorneys indicate Eureka's awareness that L.O.J. intended to proceed to eviction by requesting

that L.O.J. dispel the rumour that it had an imminent intention to padlock the premises.

(i) It is to that letter that L.O.J. then responded by way of letter dated 3rd October 2002 (J.T.8) speaking about current rent and requirements for the escrow account. The last two(2) paragraphs of the letter of October 3rd 2002 are telling:

> *We note that to date, we have not received the signed Agreement for Sale from your client nor an appropriate letter of undertaking for the balance purchase monies from a financial institution or firm of Attorneys acceptable to L.O.J.*
>
> *We wish to point out that we are not prepared to consider granting a new lease agreement to your clients as it is our firm position that there has been a total breakdown of the relationship of landlord and tenant.*
>
> *We wish therefore to hear from you with regard to the conclusion of the sale of the property as a matter of urgency.*

(k) There is no evidence of any further communication between the parties after October 3,2002 save for the payment of rent and what I would term "administrative invoices" sent by L.O.J to Eureka.

33. In my view, having reviewed the law and the statements of case, and Affidavits and exhibits, Eureka has no real prospect of succeeding in establishing that there was a contractual licence in its favour. The inference sensibly and reasonably to be drawn upon a fair consideration of the circumstances does not support the existence of a contractual licence. I bear in mind that the inference to be drawn cannot be determined by the

subjective intentions of the parties, or of Eureka alone. As discussed above, the payment of current rent (which would really appear to be mesne profits in the circumstances of this case), cannot by itself be construed as creating a contractual licence. I also cannot see how, in light of the nature of the discussions that took place, and the correspondence which was exchanged, the negotiations with the U.S. embassy or the negotiations to purchase the premises would convert the occupancy of Eureka from that of a tenant at will into, or create, a contractual licence. In addition, it would appear that the negotiations for the purchase really were taking place between L.O.J. and a related company of Eureka's, i.e. Eureka Medical Cancer Treatment (Jamaica) Limited which, whilst it may share directors, principals and shareholders, is nevertheless, a separate legal entity from Eureka . However, even if Eureka were to succeed in making out a licence, such a licence would be short-lived and would be terminable on the happening of a certain event,i.e. the breakdown in negotiations or the successful negotiation and completion of the sale. The breakdown in negotiations occurred.

34. In **Sandhu v. Farooqui** [2003] EWCA Civ 531, referred to at paragraph281 of **Parker v. Parker, The Beechwood Estates Company v. Fentville Limited** 2003 WL 21917443 as extracted from Westlaw, Chadwick L.J said:

> *A licence to occupy premises may be granted for a term certain—so that it comes to an end on a fixed date limited by the term—or it may be granted until some event happens—in which case it comes to an end when the event occurs—or it may be granted until it is determined on notice—in which case it will be necessary to ask whether the occasion for giving notice has arisen and, if so, what period of notice(if any) is required.*

35. As Lord Nicholls stated in **Javad v. Aqil**, the court must in circumstances such as the present exercise caution before inferring or imputing to the parties an intention to give to the occupant more than a very limited interest, be it licence or tenancy. Eureka has sought to fix itself with a contractual licence. However that is not the only kind of licence that could arise. Certainly, it would be extremely difficult for a court to find that under any licence Eureka would be entitled to three months' notice as being reasonable when there was no such requirement under the expired lease or under the monthly tenancy which existed after the expiry of the lease. In addition, the lease expressly indicates that a holding over position simpliciter must be construed as a tenancy at will from month to month.

36. I also refer to paragraph 7 of Halsbury's Laws, Volume 27(1) headed " general principles for determining whether agreement creates lease or licence". It is there stated:

> *Save in exceptional circumstances, an agreement creates the relationship of landlord and tenant and not that of licensor and licensee where there is the grant of exclusive possession for a fixed or periodic term at a stated rent.*

> Paragraph 9 , headed "Creation of licence" states:
> *A licence is normally created where a person is granted the right to use premises without becoming entitled to exclusive possession of them, or where exceptional circumstances exist which negative the presumption of the grant of a tenancy.*

> Paragraph 8 discusses circumstances which negative the presumption of a tenancy. It is there stated:
> *The surrounding circumstances may show that the right to exclusive possession is referable to a legal relationship*

other than a tenancy, such as occupancy under a contract or an intended contract for the sale of land.

37. Paragraph 170 of Hals. Volume 27(1) states:

"A person who enters on land with the owner's consent under a contract which does not immediately give him a definite interest in the land enters as a tenant at will. For example, a purchaser who enters into possession of land pending the completion of the purchase is generally a tenant-at-will."

However, footnote 1 to paragraph 170 states that contracts for sale of land often expressly provide that, if the purchaser is allowed into possession in advance of completion, he takes possession as the vendor's licensee and not as tenant.

38. In this case Eureka continued to have exclusive possession of the premises after the expiry of the notice to quit. This exclusive possession is normally an incident of tenancy and not of a licence. There is no fact, circumstance, representation, agreement or conduct, express or implied which can be said to have converted Eureka's occupancy from that of a tenant –at-will to that created by occupancy under an intended agreement for sale of land. The parties in any event did not reach the stage of an intended agreement; the negotiations never chrystallised to that point. Indeed, it is interesting to note that under the expired lease(Clause 6 g) Eureka was given an option to purchase the premises. In the event that Eureka had exercised the option the terms and conditions of the Third Schedule would come into effect. The Third Schedule is set out in the format of an agreement for sale . It states:

<u>POSSESSION:</u> The purchaser is already in possession of the property as a tenant of the vendor.

39. The observation I make here is that under the expired lease, had Eureka even been in occupancy when an agreement for sale was in place or intended to be put in place, its possession and occupation of the premises would be in its capacity as a tenant, not a licensee. The basis of the occupant's initial entry into the premises is crucial in analyzing the basis of its continued occupation in conjunction with any new dealings between the parties, if any.

40. In any event, I am of the view that even if Eureka were able to successfully argue that a licence in its favour existed, Eureka would have no reasonable prospect of arguing that it did not receive reasonable and sufficient notice of L.O.J's intention to re-take possession of the premises. After receiving several notices to quit, and after the termination of the tenancy, Eureka was allowed considerable time to wind down its business and remove from the premises. Several months elapsed between the expiry of the tenancy and the date of re-possession. Further, according to Eureka in paragraph 8 of the Reply and Defence to Counterclaim, by letter dated 13th March 2003, L.O.J gave Eureka two days to vacate the premises. Eureka states that this was later extended for a further period of ten days to allow doctors to remove their files from the premises.

(b) The alternative claim-whether Eureka has any real prospect of succeeding in raising an estoppel

41. I turn now to consider the alternative claim. In this regard Eureka appears to be relying upon the equitable doctrine of estoppel. It is not clear to me whether the claim has been mounted on the basis of proprietary estoppel or promissory estoppel or both. I have therefore dealt with both areas of the law. In any event, both doctrines have common features and are manifestations of the depth and flexibility of the principles of equity.

42. The doctrine of proprietary estoppel is discussed in a very interesting English first instance decision involving the 9th Earl of Macclesfield's claim in respect of Shirburn Castle, England, a castle described by one expert witness as " a sleeping beauty of a castle", complete with moat and all- **Parker v. Parker; The Beechwood Estates Company v. Fentville Limited** 2003 WL 21917443 -extracted from Westlaw.

43. At paragraphs 22 and 23 of that judgment reference is made to **Megarry & Wade on Real Property**(6th Edition) paragraph 13-001 where the principles are summarized as follows:

(i) An equity arises where

(a) the owner of land(O) induces, encourages or allows the claimant(C) to believe that he has or will enjoy some right or benefit over O's property;

(b) in reliance on this belief, C acts to his detriment to the knowledge of (O); and

(c) O then seeks to take unconscionable advantage of C by denying him the right or benefit which he expected to receive.

(ii) This equity gives C the right to go to court to seek relief. C's claim is an equitable one and subject to the normal principles governing equitable remedies.

(iii) The court has a wide discretion as to the manner in which it will give effect to the equity, having regard to all the circumstances of the case, and in particular to both the expectations and conduct of the parties.

(iv) *The relief which the court may give may be either negative, in the form of an order restraining O from asserting his legal rights, or positive, by ordering O either to grant or convey some estate, right or interest in or over his land, to pay C appropriate compensation, or to act in some other way.*

44. At paragraph 207 of **Parker** Lewison J. states:

The three principal elements necessary to raise the equity are: expectation, encouragement and detrimental reliance Although it is convenient to consider them separately, they are ultimately interconnected, and the facts must be viewed in the round.

Lewinson J. quoted from **Gillett v. Holt**[2001] Ch 10 where Walker L.J. stated:

Moreover the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine.

45. When one examines the evidence in this case, there is no sound basis for saying that Eureka had an expectation that it could remain in possession of the premises on the basis of a contractual license revocable by three months notice. There is no clear evidence as to when this contractual licence was supposed to have commenced and I agree with Mrs. Gibson-Henlin, Counsel for L.O.J. that such an expectation cannot be one-sided, it would have to be communicated to L.O.J. or there would have to be evidence pointing to knowledge of this expectation on Eureka's part resting in L.O.J. There is no such evidence here. Even if Eureka could establish that it had an expectation of a contractual licence determinable by three months notice, there is in my view, no evidence that L.O.J. encouraged that belief. There is no allegation that there was any

communication between the parties after October 3 , 2002, save for the rental invoices, and these do not add any substance to Eureka's claim.

46. I also find that there is no evidence that Eureka relied to its detriment upon this expectation, whether or not with L.O.J.'s knowledge. Eureka's pursuit of a contract with the U.S. embassy seems more akin to being part of its own business plan and does not manifest detrimental reliance. There is no evidence to support a contention that Eureka gave up or expended anything that was not in the ordinary course of its business. I am therefore of the view that Eureka has no real prospect of succeeding in reliance on proprietary estoppel.

47. The question remains whether there is any fact or law that disentitles L.O.J from relying on the Notice to Quit which admittedly determined the tenancy. Paragraph 200 of Halsbury's Laws of England, Volume 27(1), headed " Withdrawal and Waiver of Notice" states:

> *Once a valid notice to quit has been served, it automatically brings the tenancy to an end on the expiration of the notice and strictly, may not be withdrawn or waived. After a valid notice to quit has been served, the landlord and the tenant may, however, agree expressly or by implication for the grant of a new tenancy to take effect on the expiry of the notice. If such an agreement is effected during the currency of the notice to quit, the notice is, inaccurately, said to be "withdrawn". If such an agreement is effected after the expiry of the notice to quit, the notice is, inaccurately said to be "withdrawn". By reason of the fact that a new agreement is necessary, the person who gives the notice to quit, whether landlord or tenant, may not "withdraw" or "waive" the notice without the consent of the person to whom the notice is given.*

While a person who serves a notice to quit may not unilaterally withdraw it, he may, even in the absence of an agreement for a new lease, so conduct himself as to be estopped from relying on the notice under the principles of equitable or promissory estoppel.

48. At paragraph 201 of Halsbury's, " acts by which the effect of a notice to quit may be lost", it is stated:

.....An agreement by the landlord to suspend the exercise of his rights under a notice to quit, as for example, where he promises that the tenant is not to be turned out until the premises are sold, is not a waiver of the notice, and the landlord retains all his rights under it, subject only to the agreement. A statement by the landlord that he will not enforce his right to possession upon the expiration of the notice to quit may bind the landlord under the principles of promissory estoppel.(my emphasis)

49. In this case there is clearly no allegation by Eureka that any agreement was reached as to a new tenancy; indeed, it was conceded that there was no such agreement. There is therefore no allegation that the notice to quit was "withdrawn" or " waived". So prima facie L.O.J. is entitled to rely upon its notice to quit.

50. However, is there a sound case for saying that the landlord's conduct estops him from relying on the notice to quit or enforcing his strict legal rights?

51. In the English Court of Appeal decision **Joseph Taylor v. Lancashire County Council and anor,** [2001] EWCA Civ 174, extracted from Westlaw, the doctrine of promissory estoppel is discussed with clarity in a case involving landlord and tenant. At paragraph 37 of the judgment

Dyson L.J. quotes from the leading case of **Hughes v. Metropolitan Railway Company** [1887] 2 App. Cas. 439, where Lord Cairns at page 448 stated:

> *It is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.*

Dyson L.J, then commented :

> *It is to be noted that the conduct must be such as to lead one of the parties to suppose that the strict legal rights arising under the contract will not be enforced, or will be kept in suspense or abeyance. It is clear that the principle does not apply if the conduct is merely such as to lead one party to suppose that the other party's strict rights may not be enforced, or may be suspended.*

52. In **Taylor** and in **Dun and Bradstreet Software Services v. Provident Mutual** [1998] 2 EGLR 175, the English Court of Appeal emphasized that an estoppel falling within the ambits of the doctrine of promissory estoppel must be founded on a clear and unequivocal representation(my emphasis).

53. L.O.J. served a notice to quit dated 30th July 2002 because Eureka was in arrears of rent and had been for sometime. After service of

the notice to quit L.O.J and Eureka had discussions in which it was made clear to Eureka that L.O.J. would be taking steps to terminate the tenancy and re-take possession of the premises. Eureka asked for some time to make proper arrangements to purchase the premises By letter dated August 8th 2002 Eureka asked L.O.J to agree to certain terms. By letter dated August 19 2002 L.O.J rejected those terms.. The discussions continued and culminated with the meeting on August 30, 2002. Two days before the expiration of the notice of July 30th 2002, in the spirit of the discussion and while not resiling from its intention to terminate the tenancy, L.O.J abandoned the Notice to Quit dated July 30th 2002(paragraphs 16-21 of the Affidavit of Janice Taffe, with which no issue has been taken by Eureka).Eureka and L.O.J. met on the 30th August 2002 and the outcome of those discussions is set out in letter of August 30 2002. Notice to Quit dated 30th August 2002 was served on the same date of the meeting, i.e. 30th August 2002. The letter of August 30 2002 required the sale to be completed within 2 weeks. The letter of August 30 2002 ended with the ominous reminder to Eureka that if the negotiations fell through, L.O.J would be proceeding with termination of the tenancy. By letter of September 11 2002 Eureka made a counter-proposal. In that letter Eureka admitted that it was not in a position to indicate definitively when the funds to purchase the property would be available. Eureka also requested a lease for a year. L.O.J responded and made clear that it was not prepared to grant a new lease. It was also noted that the conditions set out in the letter of August 30 2002 and in the meeting held on that date with regard to a signed Agreement for Sale and appropriate letters of undertaking for the balance purchase monies had not been met. When one reads the last paragraph of the letter, it is clear that the juxtaposition of the two sentences is no accident. The first sentence clearly states L.O.J.'s refusal to consider a new lease agreement as there had been a total breakdown of the landlord and tenant relationship. In the second sentence, L.O.J in the circumstances indicated that they therefore wished

to hear from Eureka with regard to the sale of the property, the conditions for which sale had not been met, " as a matter of urgency". It is to be noted that L.O.J in this letter did nothing to comply with Eureka's previous request that it dispel rumours about padlocking the gates. There is no evidence that L.O.J received any further communication from Eureka after the letter of October 3rd 2002, and significantly, L.O.J. heard nothing further from Eureka about the sale of the property as a matter of urgency or at all.

54. There is absolutely no proper basis for saying that there was a clear and unequivocal representation by L.O.J to Eureka that Eureka could continue to occupy the premises, on terms of paying the current rent, while it continued to seek financing for the said purchase and to negotiate with the U.S. embassy- paragraph 21 of the Particulars of Claim. There was not in my view even any indication that L.O.J. might not enforce its strict legal rights, far less that it would not. The evidence is overwhelming to the contrary.

55. I am of the view that there is no substance to Eureka's claim in so far as reliance is placed on the principles of promissory estoppel. There is generally no conduct on the part of L.O.J. which equity would regard as unconscionable or unfair, disentitling L.O.J from enforcing its strict legal rights, relying upon the notice to quit and re-taking possession.

56. In my view the factual basis of both alternative claims is fanciful and far-fetched. The more accurately etched picture that refuses to disappear is this:

> Eureka was the tenant of very desirable premises. Indeed, Eureka had previously been the owner of those premises. Eureka had carried out business on the property for years and clearly would have placed all sorts of attachment and

> unique value on the premises. Eureka was strapped for cash, and continuously in default with its rental obligations to L.O.J. L.O.J. wanted to recover possession of the premises and served Notice to Quit. Eureka (or its related company) desperately offered, but unsuccessfully tried, to purchase the premises, or, at the very least, prolong the dreaded day when it would have to leave and part with possession. There were no concluded negotiations or sale. L.O.J took possession of the premises.

In those circumstances a contractual licence or estoppel can have but an imaginary or fantasy existence.

57. Before leaving this aspect of the case, I wish to say something about the exemption certificate obtained by L.O.J. This point has not been raised or dealt with in the case so it really does not impact on my decision as to whether to grant L.O.J's application for summary judgment. However, I think it deserves comment. Eureka and L.O.J. had been dealing with each other as landlord and tenant without the existence of an exemption certificate from the Rent Assessment Board. Indeed, Eureka in its Reply and Defence to Counterclaim (paragraph 8) states that it only learnt of the exemption on 17th March 2003. It is only after the existing contract of tenancy had been terminated by a valid notice to quit, after the expiry of the notice to quit (on 30th September 2002), that L.O.J. obtained an exemption certificate(dated 17th October 2002). Public or commercial buildings, such as the premises at 1 Eureka Road, are considered controlled premises subject to the Rent Restriction Act and the protection that Act affords tenants. However, the proviso to section 3 of the Rent Restriction Act provides that the Act does not apply to a public or commercial building which, pursuant to an application by a landlord for a certificate of exemption, an assessment officer certifies is constructed after the 31st August 1980, or , having been in construction before that date, is

completed thereafter(my emphasis). I propound no views as to whether the timing of the certification of exemption resulted in breach of any rights that had already enured to Eureka 's benefit. Suffice it to say that, such rights, if indeed they exist, and if indeed they have been infringed, would be of a very different order than those claimed in the case as formulated before me and in respect of which I make my decision.

(d) Striking Out- Whether Reasonable Grounds for Bringing the Claim

58. I am therefore of the view that the factual basis of the claim by Eureka lacks substance and has only a fanciful prospect of success. I am of the view that the appropriate rule to be applied is the summary judgment rule rather than the striking out rule since I have had regard to the wider factors involved in assessing the suitability of summary judgment, as opposed to being limited to Eureka's statement of case.

(c) Whether Eureka has any real prospect of succeeding in its Defence against the Ancillary Claim

59. I now turn to consider the following issues in relation to L.O.J's ancillary claim or counterclaim:

(a) Does the mere raising of a defence of set-off prevent the Court ordering summary judgment or judgment on admissions;

(b) Is the set-off claimed by Eureka truly in the nature of a set-off;

(c)The over-all issue -does Eureka have a real prospect of successfully defending the ancillary claim or issues;

(d) Does Eureka have any reasonable ground for defending the claim.

60. In its ancillary claim L.O.J claims the sums of $4, 567,420.63 as arrears of rental, $23,728.07 on account of outstanding utility bills, and U.S. $ 26, 771.24 in respect of Eureka's alleged obligation to reimburse annual insurance premiums pursuant to clause 4 (c) of the lease. There is a further claim for interest at a commercial rate. In its reply and defence to the counterclaim, Eureka admits that rent was in arrears but states that the rental in arrears as at August 2002 was $3,864,000.00 , that rental was paid monthly from September 2002 to March 2003, and accordingly the arrears of rental as at March 2003 would remain at $3,864,000.00. Eureka also admits that sums were outstanding for water rates, but states that the amount was $17,882.15 as at March 31, 2003. As regards the claim for insurance premiums, Eureka states that no demand for payment of any insurance premium was ever made by L.O.J of Eureka, including the period when negotiations for the purchase of the premises was taking place and L.O.J. are estopped from making any such claim. Eureka also contends that all claims for insurance premiums before August 1997 are statute-barred. Eureka claims that this is not a commercial action and on that basis denies that L.O.J. is entitled to interest at commercial rates. Eureka has sought to set off any amounts due against the damages that it alleges is due to it on its claim.

(a) Does the mere raising of a Defence of Set-off Prevent the Court from Entering Summary Judgment or Judgment on Admissions

61. L.O.J. filed a request for judgment on admissions in respect of the admissions made regarding outstanding rent and utilities pursuant to Part 14.7 of the C.P.R. 2002. L.O.J also filed an application for judgment on what it claims are implied admissions in relation to the insurance premium refund claim. I had stayed the request for judgment and the application for judgment on admissions pending a determination of

whether Judgment can be entered under Part 14.7(1)(b) and 14.7(4) where a set-off is claimed. Where L.O.J. has applied for judgment on admissions for sums less than the sums being claimed, this means that L.O.J. is accepting the lesser sums admitted in satisfaction of the full claim, otherwise they would have to indicate and continue with the proceedings(see for example Rule 14.7(2)). I note that the request for judgment filed by L.O.J. is a hybrid of Form 8 (Default Judgment) and Form 9. (Judgment on Admissions). It should really be as set out in form 9. No question of assessment of damages as referred to in Form 8 arises once one elects to enter judgment on admission for a sum less than the sum claimed, where the claim is for a specified sum of money.

62. Rule 15.6 of the C.P.R. gives the court wide powers when dealing with an application for summary judgment, including the power (Rule 15.6(2):

> *Where summary judgment is given on a claim, the court may stay execution on that judgment until after the trial of any ancillary claim made by the defendant against whom summary judgment is given.*

63. Part 14 does not address the situation of what the court should do in respect of a judgment granted on admissions where there is a defence claiming to set off an ancillary claim. However, it is clear that the court has under its general case management powers and inherent jurisdiction power to stay execution of its judgments of any kind when appropriate.

64. In the English Civil Procedure Rules 1999, 2nd Edition, Paragraphs 24.2.5 and 24.6.3, the authors make the point that under previous English rules, counter-claims amounting to set-offs would often prevent the entry of summary judgment in the first place. There were,

however, even then, cases where the court would grant summary judgment subject to a stay on enforcement pending trial of a counterclaim.

65. At paragraph 24.2.5 the learned authors declare the possibility that under the new English rules,(which are similar to our own rules on these matters), the court may grant summary judgment more frequently than hitherto. They state:

> *Such an approach would appear to be in harmony with the overriding objective to ensure that cases are dealt with " expeditiously and fairly"..... and with the court's duty to actively manage cases by " deciding promptly which issues need full investigation and trial and accordingly disposing summarily of others"*

66. Those views make eminent good sense to me and I adopt them. I therefore hold that a Defendant cannot under our C.P.R. defeat a summary judgment application simply by relying on a counterclaim or claim amounting to a set-off. I also agree with the submissions of Mrs. Gibson-Henlin that under Part 14.7 (5) the registry must as an administrative matter enter judgment in accordance with the request for judgment. In relation to that aspect of the matter I therefore lift the stay on the request for judgment which I had granted on 26th January 2004. The question that would remain is whether a stay on <u>execution</u> of the judgment, as opposed to a stay on the <u>entry</u> of judgment should be granted in light of the set-off claimed. This issue can be dealt with alongside the application to enter judgment on admissions with regard to L.O.J's claim for a refund of insurance premiums, as well as the application for summary judgment.

<u>(b) Is the set-off claimed by Eureka truly in the nature of a set off</u>

67. I will start with a consideration of the nature of a set-off. As Mrs. Gibson-Henlin has argued on behalf of L.O.J., the right to claim a set-off as a defence is a substantive right retained in our Judicature Supreme Court Act, although the C.P.R. does not address the concept of set-off. The authorities demonstrate that a set-off may be legal or equitable in nature. A legal set-off is possible where there is a claim for a liquidated sum of money. This is subject to the condition that the Defendant's cross-claim can be determined with certainty at the time of filing the defence- Blackstone's Civil Practice, 2002editor-in-chief Charles Plant paragraph 5.4 and the cases there cited.

68. An equitable set-off is permissible where the Defendant's cross-claim and the claimant's claim arise out of the same transaction or the Defendant's cross-claim is so closely connected with the Claimant's demands that it would be manifestly unjust to allow the Claimant to enforce payment without taking the Defendant's claim into account- see **Federal Commerce v. Molena Alpha Inc.** [1978] 3 All. E.R. 1066 at 1077-1078 per Lord Denning M.R. and **Dole Dried Fruit & Nut Co. v. Trustin Kerrwood Ltd.** [1990] 2 Ll. Rep. 309, at 311 Column 1 per Lloyd J. and **Hanak v. Green** [1958] 2 Q.B.,9 Morris L.J.

69. In the present case, the set-off alleged is really in the nature of an equitable set-off. It must therefore be demonstrated that Eureka's cross-claim arises out of the same transaction as L.O.J.'s claim or is so closely connected with L.O.J's demands that it would be manifestly unjust to allow L.O.J. to enforce payment without taking Eureka's claim into account.

70. I found the facts and analysis of the law in the **Dole Dried Fruit** case helpful. The plaintiffs were a company incorporated in California and the Defendants contended that in July 1984 they were appointed by the

plaintiffs as sole and exclusive agents for the importation and distribution in England of the plaintiffs' prunes and raisins. On May 1, 1989 the plaintiffs purported to terminate the contract without notice. On August 3, 1989 the defendants commenced proceedings claiming damages for repudiation of the distribution agreement. On August 21 1989 the defendants commenced separate proceedings in which they claimed $375,000 as the price of goods sold and delivered under a series of sale contracts. On Sep. 6 the plaintiffs issued a summons for summary judgment. The defendants did not dispute the plaintiffs' claim but they claimed that they were entitled to set off their counterclaim for unliquidated damages. Lloyd L.J. held that:

> *The whole purpose and intent of the agency agreement was that the parties should enter into contracts for the purchase and sale of the plaintiffs' goods. The sale contracts were thus concluded in fulfillment of the agency agreement. In those circumstances the claim and the counterclaim are sufficiently closely connected to make it unjust to allow the plaintiffs to claim the price of goods sold and delivered without taking account of the defendants' counterclaim for damages for breach of the agency agreement.*

The Court then dismissed the Appeal holding that the defendants were entitled to rely on their counter-claim as a set-off. It therefore followed that the Defendants had an arguable defence and summary judgment was therefore inappropriate.

71. In **British Anzani(Felixstowe) Ltd v. International Marine Management (UK) Ltd.** [1980] QB 137 it was held that where a landlord brings a claim for arrears of rent, the tenant is allowed to set off a counterclaim for damages against the landlord for a breach of a covenant in the lease in respect of which the landlord is claiming.

72. In **Hanak v. Green**[1958] 2 Q.B. 9, the claimant sued her builder for breach of contract for failing to complete certain building works at her home. The defendant was allowed to set off counterclaims for a *quantum meruit* for extra work done outside the original contract, for damages for loss sustained through the claimant's refusal to admit his workmen, and for damages for trespass to his tools. The court held that all three cross-claims were equitable set-offs, because the courts of equity before the Judicature Acts would have required the claimant to take the cross-claims into account before insisting on her own claim.

73. In the circumstances of this case, where it was clear and agreed on both sides that there was no continuation of the tenancy after September 30 2002, the contractual licence which Eureka is claiming is a quite separate and distinct entity from a tenancy, giving rise to differing rights and duties. Indeed, in this case, the success of Eureka's claim to occupation on the whole new basis of a licensee, depends heavily on Eureka distancing itself from the original tenancy under which L.O.J.'s claims arise. In essence I find that there is no sufficient degree of connection between the two transactions such that L.O.J.'s counterclaim should not be enforced without taking Eureka's claim into account. There is no equity in Eureka's claim to warrant a reprieve in the circumstances.

(c) Does Eureka have a real prospect of successfully defending the ancillary claim or issues

74. However, even if I am wrong on the question of whether Eureka's cross-claim is properly the subject of an equitable set-off, I have already indicated that I find the claim to have only a fanciful prospect of success. The defence, in so far as it relies on set-off, has no real prospect of succeeding, given that the set-off hinges on a claim which I consider fanciful. In those circumstances, subject to my resolution of the other

issues raised by way of defence to the Counter-claim, there would not without more be anything standing in the way of L.O.J'S application for summary judgment.

75. There would be no proper basis for ordering summary judgment and then granting a stay pending resolution of the claim. There would be no necessity for further resolution since the upshot of my decision with regard to the prospects of success of Eureka's claim is that trial would be a waste of time and expense and therefore unnecessary.

76. The Defence of limitation is raised in relation to the insurance premiums. However, the claim by L.O.J appears to be for the period April 1 2000 to May 1 2003. It is not clear to me why the claim is being made up to May 2003 as opposed to the 13th March or the end of March 2003. In any event, the plea of limitation is not apposite as there is no claim being made for a period outside the statutory period for bringing contractual claims, or for claims in debt, which period is six years.

77. Eureka also argues that no demand had hitherto been made for the insurance premiums and that L.O.J is estopped from making the claim now. However, a perusal of the relevant clause of the lease, Clause 4 (c) does not indicate a requirement for demand to be made for the refund of premium in order to render Eureka liable to repay.

78. The basis of L.O.J's application in relation to this aspect of the counterclaim is that there are implied admissions by Eureka. Admissions may be express or implied but they must be clear- See paragraph 14.1.4 of the English Civil Procedure Rules, 1999 and the cases there cited.

79. L O.J. has pleaded in paragraph 4 of its counterclaim that it paid insurance premiums. The Counterclaim bears the required Certificate of

truth. Whilst Eureka has raised several defences to this claim, they have not denied payment by L.O.J. Nor did Eureka require L.O.J to prove payment. Payment by L.O.J would be a prerequisite in order to demand a refund. The schedule from Allied Insurance Brokers dated November 5 2003 indicates the annual premium charges but is not proof of payment by L.O.J. However, although Lord Gifford Q.C. argued that the schedule did not prove payment by L.O.J, this point was not raised in the Reply and Defence to Counterclaim.

80. Now it is clear that where a party admits a fact, costs may be saved by obviating the need for the other party to call or produce evidence to prove a fact. One of the aims of the new rules, in addition to saving time and expense, is to identify with clarity which issues are really in contest between the parties and which issues therefore require proof. Rule 10.5 of the C.P.R speaks to the Defendant's duty to set out its case. The relevant sections of the Rule state:

> *10.5 (1) The defence must set out all the facts on which the defendant relies to dispute the claim...*
> *(3) In the defence the defendant must say-*
> *(a) which (if any) of the allegations in the claim form or particulars of claim are admitted;*
> *(b) which (if any) are denied; and*
> *(c) which (if any) are neither admitted nor denied; because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove....*
> *(5) Where, in relation to any allegation in the claim form or particulars of claim, the defendant does not-*
> *(a) admit it; or*
> *(b) deny it and put forward a different version of events,*

the defendant must state the reasons for resisting the allegation.

81. When one looks at the wording of the Rules closely it is clear that the authors wanted to do away with undesirable guessing games or hide-and seek. It seems to me that the new Rules have rendered otiose, or useless, that "seriatim clause" which all civil practioners under the old rules were fond of inserting in a defence as a "catch-all" clause. Indeed, Eureka in paragraph 14 of its Reply and Defence to Counterclaim did plead such a clause. Paragraph 14 states:

14. Save as is hereinbefore expressly admitted or not admitted the claimant denies each and every allegation contained in the Defence and Counterclaim as if same were herein set out and traversed seriatim.

82. Based on my reading of the rules, and of the overriding objective, I am of the view that in making this application for summary judgment L.O.J. is not required to prove that it paid the premiums as this is not in issue in this case. In my view L.O.J is entitled to judgment for the insurance premiums in the sum of U.S.$25,797.96 (up to March 31 2003) or the Jamaican equivalent thereof at the date of payment or enforcement, whichever shall be sooner.

83. As regards the claims for rental and water rates, Eureka has admitted certain sums to be outstanding. Part 14 deals with Judgment on Admissions. As I have already indicated, Eureka's claim is not a true equitable set-off and in addition it has no real prospect of success. L.O.J. is therefore entitled to have its Request for Judgment in the sum of

$3,919,882.15 entered, (including fees and Attorney's costs) in respect of the admissions of outstanding rent and utilities.

84. As regards the claim for commercial interest, the relevant factor is whether this is a commercial transaction as opposed to a commercial action. The transaction here is clearly of a commercial nature and L.O.J was at liberty to recover a commercial rate of interest. However, although interest at a commercial rate has been claimed, no proof with regard to that rate has been provided and therefore interest should be entered at the rate on judgment debts, i.e. 12 percent per annum on the claim for outstanding rent and utilities. As to the interest rate on foreign currency, I have not been furnished with any proof as to an appropriate rate and I am not prepared to make an award in relation to interest on the insurance premium claim.

(d)Does Eureka have any reasonable ground for defending the claim

85. I am of the view that L.O.J is entitled to succeed on the wider provisions of the summary judgment rules rather than the striking out rules since I have had regard to matters other than those referred to in Eureka's Statements of Case.

86. My ORDERS are as follows:

(a) Summary Judgment is entered in favour of L.O.J. on the Claim.

(b) Summary Judgment is entered in favour of L.O.J on its Counterclaim, being (a) the sum of $3,919,882.15 entered pursuant to the Request for Judgment on admissions, with interest thereon at the rate of 12% per annum from the 31st March, 2003 to the 12th October, 2005. and (b) being U.S. $25,797.96 in respect of the application for judgment on

admissions, or the Jamaican equivalent thereof on the date of payment or enforcement, whichever shall be sooner.

(c) Costs to L.O.J. on the Claim and on the Counterclaim to be taxed if not agreed or other wise ascertained.

(d) The dates fixed for pre-trial review and trial are to be vacated.