[2024] JMSC Civ 140

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO SU 2016HCV02322

BETWEEN	**IBP OUTSOURCING LIMITED**	**CLAIMANT**
AND	**UNIQUE FOUR LIMITED**	**DEFENDANT**

IN OPEN COURT

Ms Jacqueline Cummings and Dianca Watson instructed by Archer Cummings and Co for the Claimant

Ms Tavia Dunn and Jaavonne Taylor instructed by Nunes, Scholefield, Deleon and Co. for the Defendants

Heard: February 5, 6 & November 12, 2024

Nuisance – Commercial Lease – Noise from Adjoining Nightclub – Landlord liable in Nuisance if Participated Directly – Whether Landlord Liable for Breach of Covenant of Quiet Enjoyment – Whether Doctrine of Frustration applies – Alteration to Premises – Unstamped Lease Agreement Inadmissible for Enforcement of its Terms – Common Law – Privity of Contract – Parties agreed to be bound

The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, section 16(2)

The Stamp Duty Act, section 36

WINT-BLAIR J

[1] The claimant, by way of Claim Form,[1] seeks the following relief:

1. A declaration that the defendant has derogated from and/or frustrated the grant of a lease granted by it to the claimant in the month of March 2015 for property known as B31 Fairview Shopping Centre, Montego Bay, in the Parish of Saint James being one half of the building on the said premises beside movie theatre.
2. A declaration that the claimant was entitled to rescind the said lease.
3. A refund of all sums paid by the claimant to the defendant for the deposit, rental and maintenance and also the repayment of the costs to retrofit the building and one half of the costs to change the entrance of the said premises.
4. Further and/or alternatively, an order that the claimant is entitled to damages for nuisance and/or breach of the covenant of quiet enjoyment against the defendant.
5. The defendant do pay to the claimant damages for the loss and damage it has suffered herein.
6. The defendant do pay to the claimant interest pursuant to the Law Reform (Miscellaneous Provisions) Act.
7. The Defendant do pay the costs of this action herein
8. Such further and/or other relief as this Honourable Court deems just.

The Evidence

Claimant

[2] Mr Norman Horne, is the former chairman of the board of directors of IBP Outsourcing Limited ("IBP") and the representative of the claimant company. IBP is a company with registered offices at 14 Bell Road, Kingston 13, St. Andrew.

[3] The defendant is a company with registered offices at 30-34 Market Street,

[1] Filed on June 06, 2016

Montego Bay, St. James. The defendant at all material times was the owner and lessor of premises at B31 Fairview Shopping Centre, Montego Bay, St James ("the leased premises".)

Undisputed facts

[4] The evidence of Mr Horne is that in March 2015 Global Outsourcing Solutions Limited in March 2015, assigned its lease[2] to the claimant company. The demise was contained in a lease without a date. The evidence is that this lease commenced in March, 2015 and was expressed to run for a term of five-years. The annual rent was US$84,000.00, paid quarterly. The permitted use of the leased premises was as a call center. There was a common wall shared with Taboo nightclub, an adjoining tenant.

Claimant's case

[5] It is the claimant's case that it was an implied and/or express term of the lease that the claimant was entitled to quiet enjoyment of the property and it would not create nor be subject to any nuisance during the lease term.

[6] Prior to taking possession of the leased premises, Mr Horne gave evidence that he spoke with Mr. Anil Chatani, a director of the defendant company, who assured him that the Taboo nightclub, which operated between the hours of 10:00 pm to 3:00 am, would not be a problem and would not interfere with the operations of the claimant company.

[7] IBP invested significantly in retrofitting the property with telephone systems, computers, servers, and electrical components to operate as a turnkey facility for use as a call centre with the full knowledge of the defendant. The claimant spent JA$12,207,184.10 on retrofitting the leased premises for use as a call centre and JA$2,105,705.00 on establishing a separate entrance from the nightclub. The cost of separating the entrances was to be shared with the defendant as agreed with Mr Chatani. The invoice for this work done was supplied by MC Developers

[22] Exhibit 1 agreed

Company Limited.[3] This improvement increased the value of the property for the defendant.

[8] When the claimant occupied the leased premises it was discovered that Taboo would periodically do sound tests during the day and play unbearably loud music which disturbed the claimant.

[9] Between March to October 2015, IBP attempted to secure agreements with five separate entities but was unsuccessful in getting clients to use the space due to the noise created by the nightclub. It was the intention of the claimant to charge US$23.00 per square foot per annum for a 10,000 square foot space, potentially earning US$230,000.00 annually. The rental was US$7,000 and maintenance was US$1,500 monthly. The claimant paid US$10.20 per square foot and intended to earn a mark-up of US$128,000.00 per annum after expenses.

[10] Mr Chatani took a sound test expert to the leased premises and a sound test showed sound levels at 84 decibels, far above the acceptable level of normal sound of 40 decibels, but Mr. Chatani refused to soundproof the building or to address the issue with the night club.

[11] As a result, IBP could not occupy the property as an implied term of the lease had been breached. Alternatively, the claimant contends that the defendant has breached an obligation imposed in law and in doing so has derogated from its grant and further and/or in the alternative, that the lease was frustrated.

[12] In November 12, 2015, IBP rescinded the lease, returned the keys, and demanded a refund of the US$13,500.00 deposit it paid, a refund of rent to the period of October 2015 in the sum of US$63,000.00 and US$9,000.00 in maintenance. The claimant relocated to 30 Market Street, Montego Bay, retrofitted that premises and attracted a client who rented the space for US$23.00 per square foot. That new location was fully occupied.

[13] The defendant has refused to refund any sums and as a consequence, the claimant claims sums of JA$14,312,899.10 and US$85,500.00 for special

[3] Exhibits 2 and 3 agreed

damages and general damages for breach of contract.

[14] In cross examination, Mr Horne gave evidence that as the company chairman he was frequently involved in the day to day operations. He testified that IBP vacated the leased premises by agreement after meeting with the defendant's representatives, contrary to the defendant's position that the claimant moved out without notice.

[15] Regarding property modifications, it was suggested that IBP had the option to take all of its fixtures and fittings upon leaving. The witness responded that it was inconceivable to remove all the fittings and fixtures as that would have been more costly than leaving them. It was further suggested that under the lease it was agreed that IBP was to restore the leased premises to the same condition as at the commencement of the lease at the tenant's expense. There was no direct answer from Mr Horne, who said it would have been rather unwise having improved the building substantially to the benefit of the owners of the building to remove all the improvements. The modifications were executed by MC Development under a contract with Global Outsourcing, another tenant with whom IBP had negotiated and whose contract it inherited.

[16] It was agreed by Mr Horne that before the lease was signed, the claimant viewed and inspected the leased premises and knew that the Taboo night club was an adjoining tenant sharing a wall. He testified that it was warranted by Mr Chatani that the nightclub would operate between 10:00pm and 3:00am and as the claimant intended to operate between 8:00am and 8:00pm there would be no impact to its business.

[17] The claimant's evidence is that Mr Chatani warranted that the leased premises was suitable for operation as a call centre. He explained that IBP inherited a building that was already designed, with space already allocated and a call centre in process. Most of the work of retrofitting was already complete. The claimant was neither architect, nor designer neither did it participate in any agreement between the defendant and Global Outsourcing.

[18] When it was suggested to the witness that the claimant did not begin its operations

as a call centre between March to November 2015, the witness responded that on signing the lease, IBP sought clients for its operations but could not place anyone in that location to work over the period and as a result, no clients worked in the leased premises.

[19] It was further suggested to Mr Horne that the claimant voluntarily left the leased premises in November 2015. The witness said that he was told specifically that he could vacate the space and benefit from a refund of US$13,500 which he rejected. Further, his only other option was to go to court, which would take about ten years.

[20] It was put to Mr Horne that no music was played by Taboo during the daylight hours, with this the witness disagreed. The claimant testified that the defendants breached the covenant of quiet enjoyment as that was the reason for the decibel test which showed clear results. The claimant rejected the suggestion that the defendant did not cause a nuisance to its company between March and November 2015 as the defendant not only accepted the fact that it was impossible to function as a call centre having conducted decibel testing, however the defendant refused to soundproof the building.

[21] The defendant elected to call no evidence.

Submissions

Claimant

[22] The evidence is that IBP took over the lease in March 2015, and at that time, the adjoining premises was being operated by the night club. The evidence is that the defendant's representative assured the claimant that the nightclub operated between the hours of 10:00 pm and 3:00am. The agreement between the claimant and defendant was that the leased premises would be retrofitted to separate the entrances of IBP and the night club.

[23] Counsel submitted that the claimant was never able to occupy nor use the leased premises for its intended purpose. During the period of March to October 2015, the claimant attempted to occupy the leased premises but due to the noise created by

the nightclub they were unable to contract with 5 separate investors on different occasions.

[24] The defendant confirmed the nuisance's existence when it employed an expert to test the normal sound level affecting the claimant. The test revealed that of an acceptable level of sound at 40 decibels, the measured sound level penetrating the leased premises was 84 decibels. Soundproofing and the cost thereof were advised. The defendants failed and/or neglected and/or refused to soundproof the building or address the noise nuisance during the daytime with the nightclub, its tenant.

[25] The claimant claims the deposit, rental and maintenance paid plus the costs of retrofitting the premises as the action or inactions of the defendant caused it to be unable to use the premises. The claim is brought on the basis that it was the defendant's failure to address the problem that caused it to suffer loss as it paid for a building it was unable to occupy.

[26] Counsel submitted that based on the evidence before the court, the claimant is entitled to damages for nuisance and the breach of quiet enjoyment. A nightclub operates at night when most businesses are closed. It could not have been within the contemplation of the claimant that the nightclub would also operate in the day and cause such disturbance which did not operate within the agreed hours.

[27] It was submitted by the claimant that in its defence, the defendant claims that the claimant moved out before they could retrofit or soundproof. There is no evidence that the defendant took steps either to retrofit or soundproof the building for the entire period of nine months. When the claimant approached the landlord to see if the noise complaint could be resolved, the response was to "*leave and take back the deposit, if you want more than that sue me".*

[28] The claim is for renovation costs and the half cost of the construction of a separate entrance. The claimant also seeks a refund of the cost to retrofit the leased premises as the defendant has had the benefit of the improvement to their building. The defendant having inherited these improvements, it is a bit disingenuous for it to now seek to rely on a term in the lease which says the leased premises should

be restored. If you build a mansion on a chattel house, it doesn't make sense to put back the chattel house. Notwithstanding what was in the contract, equity says having received the building with all improvements the defendant is to compensate the claimant, especially in light of the short term that the claimant was in possession of the property and was not able to use it.

[29] The damages for a breach of quiet enjoyment amount to the loss of value of the sums spent retrofitting which amounts to over $14 million as the lease was frustrated by this event. The defendant knew that the leased premises was to be used as a call centre and should have taken the necessary steps to allow its use as such.

[30] The defendant instead derogated from the grant. The defendants' actions frustrated the lease with the claimant who was within his rights to rescind it by vacating the premises since the company could not use the space as a call centre, which was its intended use.

[31] The defendant could have directed its tenant to stop playing music in the daytime or to install soundproofing on its building. The defendant chose to do neither and just simply told the claimant to leave meanwhile it inherited the benefit of the improvement to its property.

[32] The claimant being unable to occupy the space as a call centre lost the income as it would have rented the call centre space at US$23 per square, the location was 10,000 sq. ft. It would have earned US$230,000 per annum and after paying the rent and maintenance would have made a profit of US$120,000 per year. The defendant by refusing to talk to the nightclub and refusing to soundproof the building has caused a loss of US$96,000 in profit in the 9 months the claimant attempted to operate from the leased premises.

[33] The claimant, while in possession of the property from March to November could not utilize the physical space so it is submitted that it was technically not in occupation of the property as a call center was contemplated by the lease agreement. It is submitted that this entitles the claimant to a refund of the rent and maintenance paid over that period in addition to lost profit of $13,500 and special

damages in the sum of JA$14,312,899.10 and US$85,500 and general damages in the sum of US$96,000.

[34] In defining nuisance, counsel relied on the case of **Sedleigh-Denfield v O'Callaghan**[4] and Winfield and Jolowicz on Tort[5] which states that *the essential feature of nuisance liability is that of the protection of private rights in the enjoyment of land, so that the control of injurious activity for the benefit of the whole community is incidental.*

[35] Private nuisance involves the wrongful interference with the claimant's use or enjoyment of their land or some right or interest in it. Typically, these cases involve ongoing interference by property owners or occupiers affecting neighbouring properties. Such conduct is only deemed unlawful if it is unreasonable, requiring a balance between the occupier's and the neighbour's rights. For interference to be considered unreasonable, it must be substantial rather than trifling or inconsequential. Determining unreasonableness is a question of fact, considering factors such as the time, place, manner of commission, and whether the effects are permanent or transitory[6].

[36] Lord Lloyd in **Hunter and Others v Canary Wharf**[7] identified private nuisance as being of three kinds: nuisance by encroachment; nuisance by direct physical injury; and nuisance by interference with a person's quiet enjoyment of the land. Where the first two types are concerned, the measure of damages is the diminution in value, that is, the difference between the money value of the claimant's interest in the property before the damage and the value after the damage. In the case of the third type, there may be no diminution in value as there may not be physical damage, but there will be the loss of amenity value so long as the nuisance continues. It was argued that in the case of **Pamela Davis v McQuiney Card & Others**[8] *damages for this type of nuisance may be said to be at large.*

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[4] [1940] A.C. 880
[5] Thirteenth Edition, 375,
[6] Annette Nelson & Luscelda Brown v Glasspole Murray [2012] JMSC Civ 76
[7] (1997) 2 All ER 426
[8] [2012] JMCA Civ 39

[37] Further, in the case of **Pro-Jam Limited v Gibraltar Trust Limited and Island Hoes Limited,**[9] Chester Orr, J ordered a landlord to pay the tenant for fixtures left at the landlord's premises after their removal. The defendant, is liable in nuisance for unnecessary and unreasonable noise created by the nightclub that affected the claimant. The fact that the defendant was made aware of the nuisance and breach of quiet enjoyment, took an expert to measure the extent of the problem, was advised how to correct the problem and failed to do so for several months is what makes them liable herein.

[38] The claimant is entitled to receive compensation for the injuries, loss and damage it has suffered as a result of the foregoing. The claimant expected to earn an income for the use of the defendant's premises, it did not and it continued to pay the defendant rental and maintenance for the use of the building it was unable to occupy. The loss suffered by the claimant would be the loss of potential income. Therefore, the claimant is entitled to receive the sums claimed.

Defendant

[39] The defendant submitted that it was unable to call witnesses in support of its defence and counterclaim however its statement of case remained for determination. The defendant had the right to cross-examine the claimant in the exercise of a fundamental principle of justice and its constitutional right under section 16(2) of the Charter of Fundamental Rights and Freedoms. In addition, the burden of proof rests on the claimant to prove its case on a balance of probabilities.

[40] It filed a defence and counterclaim disputing the claim in its entirety. Further, neither the defendant nor its servants and/or agents used the land in a manner that would make the leased premises unfit or materially less fit for its intended purpose.

[41] It was agreed that the claimant entered into a five-year lease agreement with the defendant for B31 Fairview Shopping Centre, with a monthly rent of US$7,000. In

[9] CLP 137 of 1986 decided on March 20, 1997

2014, the defendant had rented another part of the property to Taboo, a nightclub that shared a common wall with the claimant's premises. The claimant was informed about the nightclub before signing the lease. The lease agreement allowed the claimant to retrofit the premises to operate a call centre. The claimant and defendant also agreed to construct a separate entrance, with costs shared equally. The defendant paid half of the construction costs amounting to JA$2,105,705.00.

[42] The defendant submitted without any evidence to support it, that this separate entrance was not necessary for the call centre operation but was agreed upon to satisfy the claimant.

[43] It was argued that at all material times, the claimant was aware of the existence of the nightclub adjoining the leased premises and freely entered into the lease with that knowledge. The claimant, of its own volition determined that the leased premises were suitable for its intended purpose and the defendant denies that any representation or warranty was made by it to the claimant regarding the suitability of the premises for the operations of a call centre as the lease was assigned to the claimant by previous tenants.

[44] It was submitted that there were no unforeseen circumstances which made it impossible to perform the contract or radically changed the principal purpose for entering into the contract.

[45] The defendant submitted that the complaint was addressed by having discussions with the operator, as well as the receipt of a complaint from the claimant regarding alleged noise coming from the nightclub was addressed. The defendant sought advice concerning how to address the noise complaint but before it could take any steps, the claimant vacated the premises. Again. These submissions are without any evidential foundation.

[46] The defendant submits that it was under no duty or obligation to abate any alleged nuisance purportedly caused by the nightclub and denies liability. The defendant counterclaims that the claimant failed to restore the demised premises to its original condition, made substantial changes without the defendant's approval and

terminated the lease in breach of the terms thereof. The defendant claims damages in the sum of US $42,000 for the breach of covenant, damages for breach of contract and interest at 1% above the commercial banks' prime lending rate.

[47] Counsel for the defendant submitted that the principle of derogation from grant and/or frustration of the grant of a lease is inapplicable to the case at bar and accordingly the claimant ought not to succeed on this limb.

[48] According to the Stair Memorial Encyclopedia[10]:

> "*On the principle that the landlord may not derogate from their own grant, they are precluded from conducting operations on their own property which may result in structural damage or material, physical and tangible injury to the subjects leased including damage by vandals. To found a claim by the tenant, such damage must affect the premises and not merely the occupants and must be material and not merely be temporarily inconvenient. It must result from some deliberate or voluntary behaviour of the landlord, there being no implied obligation on the landlord that nothing whatever will occur on premises occupied by them to cause injury to property or premises occupied by the tenant. The landlord is not liable for acts carried out by any third party that affect the premises. Furthermore, if the landlord has leased adjoining land to a third party whose actings make it difficult for the tenant's customers to enter the premises, there is no liability on the landlord."*

[49] There is nothing on the claimant's case to suggest that there was any structural damage to its premises as a result of any deliberate behaviour of the defendant. Further, the issues complained of by the claimant were not caused by the landlord, its servants and/or agents but rather by a tenant who is a third party and accordingly liability cannot be attributed to the defendant.

[50] It was further submitted by the defendant that the doctrine of frustration is not

[10] LANDLORD AND TENANT (2nd Reissue) (original date of publication: March 2021) paragraph 155

applicable in this case because the claimant has provided no evidence to this effect. It is trite that this doctrine rarely applies, particularly in landlord and tenant disputes. Therefore, for the doctrine to apply, an event must occur such that no substantial use of the demised premises as would have been permitted by the lease and was in the contemplation of the parties when the lease was made, remained possible to the tenant after the frustrating event.[11] In this instance, the property could still have been used as a call centre, despite the claimant's assertions.

[51] The defendant is not liable to pay damages for nuisance as the claimant's witness provided no evidence besides his say-so. It is undisputed that the nuisance was caused by the nightclub, which is curiously not a party to this claim despite the allegations of nuisance being founded on its actions. It is submitted that the law requires the party responsible for causing a nuisance to be joined as a defendant to answer to the allegations, which has not been done in the instant case.

[52] To succeed in a claim for nuisance the claimant must show that: -

a. *"the injury or interference complained of will not be actionable unless it is*
    i. *sensible (in the case of material damage to land); or*
    ii. *substantial (in the case of interference with enjoyment of land);*
b. *the defendant will not be held liable unless his conduct was unreasonable in the circumstances."*[12]

[53] The landlord is not liable for nuisance caused by a tenant if the landlord did not cause, sanction, or authorize it.[13] Additionally, it was an express term of the lease in clause 3(b) (i) *that the Landlord shall not be liable for any act or omission of any other tenant of the landlord.* If the claimant can prove that the noise from the nightclub amounted to a nuisance during its period of occupation, it cannot be attributed to the defendant.

[54] The covenant for quiet enjoyment operates to ensure that the landlord, its' servants

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[11] National Carriers Ltd v Panalpina (Northern) Ltd [1981] 1 All ER 161
[12] Kodilinye, Gilbert, Commonwealth Caribbean Tort Law, 3rd Edition, page 159
[13] Mowan v Wandsworth London Borough Council and Another [2001] LGR 228

and/or agents do not interfere with the tenant's possession and enjoyment of the premises for all usual purposes. To succeed, the claimant must show substantial interference with their possession of the premises by the landlord or any one authorized to act for, and/or on the landlord's behalf .[14] The nightclub is neither the defendant's servant and/or agent, so any disturbance caused by it cannot be attributed to the defendant.

[55] It was contended that the claimant admits that the nightclub occupied the adjoining premises before the claimant signed the lease with the defendant in March 2015. The claimant was aware and contemplated that the nightclub would operate, including playing music and entertaining patrons, next to its premises. The defendant relies on the statement of the law which says:

> *"It would be entirely inconsistent with this common understanding if the covenant for quiet enjoyment were interpreted to create liability for disturbance or inconvenience or any other damage attributable to the condition of the premises. Secondly, the lease must be construed against the background facts which would reasonably have been known to the parties at the time it was granted".*[15]

[56] The right to rescind the contract did not apply to the claimant, as there was no evidence of mistake, misrepresentation, undue influence, inducement or deception by the defendant in the signing of the lease. At all material times, the claimant was aware of the nightclub's presence and existence as its neighbour occupying the adjoining premises when it freely entered into the lease agreement.

[57] The claimant is not entitled to a refund of monies expended during the lease period. Despite claiming it couldn't occupy the premises, the claimant entered into possession upon signing the lease and received the keys, making it liable for all due payments of rent from March to October 2015, deposit and maintenance.

[58] Further, the claimant cannot reasonably advance the argument that it was unable

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[14] Southwark London Borough Council v Mills and others; Baxter v Camden London Borough Council [1999] 4 All ER 449, HL

[15] ibid

to occupy the premises in circumstances where, on its own case, it claims a refund for money expended to retrofit the space. How would the claimant have gotten the opportunity to retrofit the premises had it not been in occupation of it? Therefore, all the monies paid with respect to the period of occupation by the claimant are non-refundable as the premises were exclusively occupied by the claimant and/or its servants and/or agents.

[59] Counsel submitted that the defendant is entitled to recover damages for breach of the lease agreement, as the claimant breached clause 1(p) of the tenant's covenants to provide the required six months' notice of termination. Also, any structural alterations made by the claimant were made in breach of the express terms of the lease, particularly clauses 1(j) and 4(a).

[60] It is submitted that on a balance of probabilities, the claimant has failed to prove its case against the defendant and accordingly judgment should be entered in favour of the defendant on the claim. The defendant should also be compensated for the breaches by the claimant as set out in its counterclaim and judgment entered on the counterclaim in its favour.

Discussion

[61] The lease agreement relied on by both sides in this case was unstamped. The unstamped agreement is in evidence as an exhibit, however, it has not been received for the purpose of its enforcement and cannot be used for that purpose pursuant to Sections 36 of the Stamp Duty Act which provides as follows:

> *"36. No instrument, not duly stamped according to law, shall be admitted in evidence as valid or effectual in any court or proceeding for the enforcement thereof.…*

[62] In its pleadings, the defendant does not deny the title as successor landlord, nor does the defendant deny the contract with the claimant. The title of the defendant as landlord is not in dispute before this court. There is also no dispute that there was an agreement for a five-year fixed term lease between the claimant and defendant. That lease was signed and executed by both parties for a certain rent

to be paid in accordance with its terms.

[63] From the evidence of the claimant, through its sole witness, Mr Horne, it is clear that both parties to these proceedings acted upon the terms of the fixed-term lease until the claimant vacated the premises. There was a privity of contract between them.

[64] The intention of the parties had been reduced into writing, and the parties' representatives had placed their respective signatures on it. Most importantly, the rental was paid by the claimant and accepted by the defendant. All these facts point to one conclusion, which is the parties had agreed to the terms of the lease agreement.

[65] In the case of **Cuthbertson v Irving**,[16] Martin B stated:

> *"This state of law in reality tends to maintain right and justice, and the enforcement of the contracts which men enter into with each other (one of the great objects of all law); for so long as a lessee enjoys everything which his lease purports to grant, how does it concern him what the title of the lessor, or the heir or assignee of his lessor, really is. All that is required of him is, that having received the full consideration for the contract he has entered into, he should on his part perform it."*

[66] I find that parties agreed to be bound by the terms of the lease entered into between them; the claimant acknowledged the duration of the lease; that the lease term had not expired; and that the claimant paid rent and maintenance to the defendant in accordance with its terms.

[67] The claim is made on the basis that it was the defendant's failure to address the noise caused by the nightclub that led to loss suffered as it paid for premises it was unable to occupy. The defendant counterclaims that the claimant:

a) failed to restore the demised premises to its original condition,

b) made substantial changes without the defendant's approval and

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[16] (1859) 157 ER 1034

c) terminated the lease in breach of the terms thereof.

[68] The defendant also claims damages of US $42,000.00 for breach of covenant, damages for breach of contract and interest at 1% above the commercial banks' prime lending rate.

[69] In cross-examination, it was put to Mr Horne that no music was played by the nightclub during the daylight hours, with this the witness disagreed. This was a curious suggestion given that there was no challenge to the evidence that the claimant had complained about the noise levels from the nightclub and as a result decibel testing was done by the defendant. Further, it is the defendant's contention that it sought to address the noise complaint but the claimant vacated the premises before it could do so.

[70] From the unchallenged evidence of the claimant, I find the following facts proven. First, there was loud music being played by the nightclub during the daytime, which was outside of its hours of operation between 10:00pm and 3:00am. Second, the claimant did not intend to operate during the same hours as the nightclub. Third, there was a complaint from the claimant to the defendant who called in an expert to perform a decibel test. Fourth, this testing was done at the behest of the defendant, not the claimant. Fifth, the test showed levels that were more than double what noise levels ought to have been. Sixth, the defendant was advised to install soundproofing and the cost of so doing was indicated. Seventh, the soundproofing was not installed.

[71] It can be inferred from these primary facts that the ordinary operations of the club which involved the playing of music would not have been the cause of complaint by the claimant during its normal daytime hours of operation. There was no challenge to the evidence that the nightclub should have operated between 10:00 pm and 3:00 am, therefore any daytime music being played would have been outside of the hours of its expected operations. Also, the decibel testing was an attempt by the defendant to take the complaint seriously and to measure the depth of the penetration of sound, to determine the veracity of the complaint made by the claimant.

[72] I find that the evidence discloses that the test for nuisance has been passed and that the noise from the nightclub during the daytime exceeded normal decibel levels. This amounted to a wrongful interference with the claimant's enjoyment of the leased premises. The nuisance established on the evidence was not created during the normal use of the nightclub. The nightclub premises was let for operations between 10:00 pm to 3:00 am.

[73] There is no evidence from either claimant or defendant that either of them addressed the owners/operators of the nightclub directly about this issue. It was a reasonable contemplation that the operations of the claimant would have been disturbed by this development.

[74] The defendant cannot testify through submissions of counsel that the claimant vacated the premises before it could address the nuisance. The claimant, similarly, cannot rely on the proposition that the defendant took no steps to prevent the nuisance as there is no evidence from either side as to the date of decibel testing, what steps were taken if any, after the test by either side, and whether there were any steps taken to address the noise levels directly with the nightclub.

[75] The lease agreement contains no warranty on the part of the landlord that the leased premises has sound insulation nor is in any other way fit to be used as a call centre. Nor was there any law cited to the court which would indicate that such a warranty is to be implied. The claimant before the court had the bargaining power to exact an express warranty as to the condition of the premises as well as the freedom of choice to reject the leased premises if it did not meet its needs

[76] In **Hart v Windsor**[17] Parke B said:

> *"There is no contract, still less a condition, implied by law on the demise of real property only, that it is fit for the purpose for which it is let."*

[77] And in **Edler v Auerbach**[18] Devlin J said:

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[17] (1843) 12 M & W 68, 87-88

[18] [1950] 1 KB 359, 374

> *"It is the business of the tenant, if he does not protect himself by an express warranty, to satisfy himself that the premises are fit for the purpose for which he wants to use them, whether that fitness depends upon the state of their structure, the state of the law, or any other relevant circumstances."*

[78] Caveat lessee.

[79] In the absence of any modern statutory remedy which covers its complaint, the claimant has attempted to fill the gap by pressing into service two ancient common law actions. They are the action of the covenant for quiet enjoyment and the action of nuisance.

Nuisance

[80] The primary defendant is the person who causes the nuisance by doing the acts in question. As Sir John Pennycuick V-C said in **Smith v Scott** [1973] Ch 314, 321:

> *"It is established beyond question that the person to be sued in nuisance is the occupier of the property from which the nuisance emanates. In general, a landlord is not liable for nuisance committed by his tenant, but to this rule there is, so far as now in point, one recognised exception, namely, that the landlord is liable if he has authorised his tenant to commit the nuisance."*

[81] The claimant invokes the tort of nuisance and the covenant for quiet enjoyment to obtain indirectly that which they cannot obtain directly. It complains of the sound emanating from the adjoining property, alleging that it constitutes a legal wrong for which the defendant as landlord is responsible, and seeks orders to restrain its continuance.

[82] The claimant has to prove that the landlord is liable for this nuisance as there was no joinder of the nightclub to this claim, a fact which Ms Taylor correctly identified as curious. There is absolutely no evidence that the claimant complained to anyone concerned with the nightclub about the noise emanating from it as there is not one scintilla of evidence as to who owns or holds the lease for the nightclub or whether anything was done in this regard by the claimant.

The leased premises

[83] In terms of the building that the claimant took possession of, the building was constructed the way that it was. It was said on this point in the case of **Carstairs v Taylor** that:[19]

> *"Now, I think that one who takes a floor in a house must be held to take the premises as they are and cannot complain that the house was not constructed differently." Goddard LJ spoke to the same effect in Kiddle v City Business Properties Ltd [1942] 1 KB 269, 274-275:*
>
> > *"[The plaintiff] takes the property as he finds it and must put up with the consequences. It is not to be supposed that the landlord is going to alter the construction, unless he consents to do so. He would say to his intending tenant: 'You must take it as it is or not at all.'"*

[84] The law accords autonomy to contracting parties. In the absence of statutory intervention, the parties are free to agree and take a lease of the premises constructed as they are and to allocate the cost of putting that building in order between themselves as they see fit. In my view, this does not depend on the ability of the claimant to inspect the property before taking the lease. Rather, this position is a governed by the law of contract and applies to the state and condition of the demised premises or to its location in the part of the building which shared a wall in common with the nightclub.

[85] The evidence disclosed that the state of the demised premises was one in which it adjoined a nightclub, shared an entrance and a wall in common and occupied half of a building. The entrances were separated by mutual agreement and the cost shared. The real complaint in this case is the absence of adequate sound insulation.

[86] The claimant has to show that the landlord participated directly in the nuisance in order to succeed. It is the claimant who bears the burden of proof. The claimant's case is that the landlord did nothing having learnt of the decibel levels when music

[19] (1871) LR 6 Ex 217, 222

was played by the nightclub in the daytime. The inference the claimant wishes drawn from this is because the defendant did not install the insulation for soundproofing and therefore it participated in the nuisance.

[87] In **Coventry and others v Lawrence and another**, [20] a decision of the United Kingdom ("UK") Supreme Court, the issue of liability on the part of a landlord was discussed:

> *11. The law relating to the liability of a landlord for his tenant's nuisance is tolerably clear in terms of principle. Lord Millett explained in Southwark London Borough Council v Mills [2001] 1 AC 1, 22A, that, where activities constitute a nuisance, the general principle is that "the … persons directly responsible for the activities in question are liable; but so too is anyone who authorised them". As he then said, when it comes to the specific issue of landlords' liability for their tenant's nuisance, "[i]t is not enough for them to be aware of the nuisance and take no steps to prevent it". In order to be liable for authorising a nuisance, the landlords "must either participate directly in the commission of the nuisance, or they must be taken to have authorised it by letting the property."*
>
> *12. In Smith v Scott [1973] Ch 314, referred to with approval by Lord Hoffmann in Mills at p 15D-E, Sir John Pennycuick V-C considered at p 321C-D the appropriate test to be applied in order to decide whether landlords had authorised a nuisance by letting a property from which the tenant caused the nuisance. He described "the authorities … [as] not altogether satisfactory" but decided that they suggested that it must be a "virtual certainty", or there must be "a very high degree of probability", that a letting will result in a nuisance before the landlords can be held liable for the nuisance. As Pickford LJ put it in a case cited with approval by Lord Millett in Mills at p 22A, Malzy v Eichholz [1916] 2 KB 308, 319, "[a]uthority to conduct a business is not an authority to conduct it as to create a nuisance, unless the business cannot be conducted without a nuisance", a*

[20] [2014] UKSC 46

view shared by Lord Cozens-Hardy MR at pp 315-316.

13. When it comes to landlords being liable for their tenant's nuisance by participating in the nuisance, as a result of acts or omissions subsequent to the grant of the lease, the law was considered authoritatively in Malzy. Lord Cozens-Hardy at p 316 had no hesitation in rejecting as "an extraordinary proposition" the contention that landlords could be rendered liable by accepting rent and refraining from taking any proceedings against their tenant, once they knew that their tenant was creating a nuisance. As he put it at p 315, by reference to an earlier, unreported case, "there must be such circumstances as to found an inference that the landlord actively participated in the [relevant] use of the [property]", and he referred a little later to the need for "actual participation by [the landlord] or his agents".

[88] The case of **Coventry** discusses three of the cases cited to this court, **Sampson** by the claimant and **Chartered Trust** as well as **Southwark London Borough Council** cited by the defendant. The judgment of the UK Supreme Court continued:

14. It was suggested that two decisions of the Court of Appeal, Sampson v Hodson-Pressinger [1981] 3 All ER 710 and Chartered Trust Plc v Davies [1997] 2 EGLR 83, demonstrated that the law has developed since Malzy, so that it is now less easy for landlords to escape liability for their tenant's nuisance than it was 100 years ago. We were not referred to any social, economic, technological or moral developments over the past century in order to justify a change in the law on this topic; indeed, as already mentioned, Smith (where Sir John Pennycuick relied on 19th century cases) and Malzy (which was decided a century ago) were both cited with approval in the House of Lords less than 15 years ago. Sampson was discussed in Mills at p 16B-D by Lord Hoffmann, whose implied doubts about the decision I share. If, which I would leave open, the defendant landlords in Sampson were rightly held liable for nuisance in that case to the plaintiff tenant, it could only have been on the basis that the ordinary residential

user of the neighbouring flat which they had let would inevitably have involved a nuisance as a result of the use of that flat's balcony. In Chartered, although the nuisance resulted from the tenant's use of the property, the actual nuisance was caused by people assembling in the common parts, impeding access to the plaintiff's property. Since the landlords were in possession and control of the common parts, where the nuisance was occurring, the decision may well have been justified on orthodox grounds, although, again, I would not want to be taken as approving (or indeed disapproving) the decision that there was a valid claim against the landlords in nuisance in that case.

[89] The Supreme Court did not approve of **Sampson** and distinguished **Chartered Trust** on its facts. The court approved of **Malzy** and **Mills** as was set out in paragraph 18.

18. Accordingly, if the claim in nuisance against the Landlords is to succeed, it must be based on their "active" or "direct" participation to use the adjectives employed by Lord Cozens-Hardy in Malzy and by Lord Millett in Mills. The question whether a landlord has directly participated in a nuisance must be largely one of fact for the trial judge, rather than law. It is clear in my view that the issue whether a landlord directly participated in his tenant's nuisance must turn principally on what happened subsequent to the grant of the Leases, although that may take colour from the nature and circumstances of the grant and what preceded it.

… the fact that a landlord does nothing to stop or discourage a tenant from causing a nuisance cannot amount to "participating" in the nuisance (to use the expression employed by Lord Millett and Lord Cozens-Hardy). As a matter of principle, even if a person has the power to prevent the nuisance, inaction or failure to act cannot, on its own, amount to authorising the nuisance. As already discussed, that is strongly supported by the reasoning in Malzy. **(Emphasis mine.)**

[90] In terms of the separate entrance built by both parties, the fact that a landlord takes

steps to mitigate a nuisance is not a fact which gives rise to the inference that he has authorised it. The claimant has argued that the defendant should be liable for the nuisance because it did not take steps to prevent it, while also arguing that the fact that it took steps to reduce the nuisance by building a separate entrance, supports the contention that the defendant is liable for it.

[91] The law does not support the position taken by the claimant and he has not established that the defendant participated in the nuisance. The defendant is not liable for the nuisance caused by the loud music played by the nightclub and I so find.

Breach of the covenant for quiet enjoyment

[92] In **Jenkins v Jackson**,[21] Kekewich J defined the word "quietly" in the covenant to mean:

> *"does not mean undisturbed by noise. When a man is quietly in possession it has nothing whatever to do with noise … 'Peaceably and quietly' means without interference—without interruption of the possession."*

[93] In the case of **Kenny v Preen,**[22] Pearson LJ explained that:

> *"the word 'enjoy' used in this connection is a translation of the Latin word 'fruor' and refers to the exercise and use of the right and having the full benefit of it, rather than to deriving pleasure from it."*

[94] The covenant for quiet enjoyment is therefore a covenant that the tenant's lawful possession of the land will not be substantially interfered with by the acts of the lessor or those lawfully claiming under him. For present purposes, two points about the covenant should be noted. First, there must be a substantial interference with the tenant's possession. This means his ability to use it in an ordinary lawful way. The covenant cannot be elevated into a warranty that the land is fit to be used for some special purpose (see **Dennett v Atherton**[23]).

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[21] (1888) 40 ChD 71, 74
[22][1963] 1 QB 499, 511
[23] (1872) LR 7 QB 316

[95] On the other hand, it is a question of fact and degree whether the claimant's ordinary use of the premises has been substantially interfered with. The claimant was not driven out of the premises, it could be used, however he was not successful in using it as a call centre.

[96] In **Southwark** it was said that in construing the covenant, the location of the demised premises, the use to which adjoining premises are put at the date of the tenancy agreement, or the use to which they may reasonably be expected to be put in future, must be a material consideration.

> *"…the covenant for quiet enjoyment is broken if the landlord or someone claiming under him does anything that substantially interferes with the tenant's title to or possession of the demised premises or with his ordinary and lawful enjoyment of the demised premises. The interference need not be direct or physical."*

[97] The acts alleged to constitute the breach need not support an action in nuisance. While it may be a sufficient condition of liability, there is nothing in the language of the conventional form of the covenant that would justify making such a finding. The covenant before the court may be described as a conventional one.

[98] In discussing the construction of the covenant and the obligation on a grantor not to derogate from the grant, the court in **Southwark** enunciated that:

> *"Once these artificial restrictions on the operation of the covenant for quiet enjoyment are removed, there seems to be little if any difference between the scope of the covenant and that of the obligation which lies upon any grantor not to derogate from his grant. The principle is the same in each case: a man may not give with one hand and take away with the other. Whether a particular matter falls within the scope of the covenant for quiet enjoyment depends upon the proper construction of the covenant. As ordinarily drafted, however, the covenant shares two critical features in common with the implied obligation. The first is that they are both prospective in their operation. The obligation undertaken by the grantor and covenantor alike is not to do anything after the date of the grant which will*

derogate from the grant or substantially interfere with the grantee's enjoyment of the subject matter of the grant: see Anderson v Oppenheimer 5 QBD 602.

The second feature that the implied obligation and the covenant for quiet enjoyment have in common is that the grantor's obligations are confined to the subject matter of the grant. Where the covenant is contained in a lease, its subject matter is usually expressed to be the demised premises. In an oft quoted passage in Leech v Schweder (1874) LR 9 ChApp 463, 474 Mellish LJ said:

> *"It is perfectly true that the lessee is 'to hold and enjoy without any suit, let, or hindrance'. But what is he to hold and enjoy? 'The premises.' What are the premises? The things previously demised and granted. The covenant does not enlarge what is previously granted, but an additional remedy is given, namely, an action for damages if the lessee cannot get, or is deprived of that which has been previously professed to be granted. Nothing, I apprehend, can be plainer than that at law it would not, in the least degree, enlarge what was granted."*

[99] This means that the claimant's right to remain in and to enjoy the quiet occupation of the demised premises must be identified at the date when the tenancy was granted. It consisted of retail space in a building constructed or adapted for multiple use commercial occupation and having inadequate sound insulation.

[100] An undesirable feature of the demised premises was that it admitted the music being played too loud from the adjoining tenant. The landlord covenanted not to interfere with the tenant's use and enjoyment of a space it rented having that feature. It has not done so. It has not derogated from its grant, nor has it interfered with any right of the claimant to make such use and enjoyment of the premises comprised in the tenancy as those premises are capable of providing. To import into the covenant an obligation under the lease on the part of the landlord to install soundproofing, would extend the operation of the grant.

[101] I think with respect that the claimant's reasoning, while appearing attractive and arguable on the facts, omits some essential steps. At the time when the claimant was granted his lease, it must have been contemplated by the parties that the nightclub would be used for the purpose of playing music in a building without insulation for that is the way the building was constructed. It could not therefore have been intended that such use would be a breach of the covenant for quiet enjoyment. It could have amounted to a breach only if the cause of the noise was some act of the defendant or the lessee of the nightclub claiming under the same landlord, which could not fairly have been within the contemplation of the parties when the claimant took his lease.

[102] Had the nightclub not existed at the time the lease was granted, I could see the argument that the parties could not have contemplated that the claimant would ever hear music being played and played too loud. However, the question which remains unanswered is, could it have been contemplated by the parties that music would be played at such a loud volume in the daytime?

[103] As the building then stood in its uninsulated state, that may have been an unreasonable use to make of the space occupied by the nightclub. If it did so regularly, with the authority of the landlord, in such a way as to cause substantial interference with the claimant's enjoyment of the premises, it could have been a breach of the covenant for quiet enjoyment. I also accept that if the defendant did anything to enable his other tenant, the nightclub, to continue operating, after the lease with the claimant had commenced, he would be obliged to do so in a way which protected the claimant from unreasonable noise.

[104] But this argument depends entirely upon any modification of the building owned by the defendant, such as soundproofing, taking place after the grant of the lease. It would seem to have application to the present case if it could have been reasonably contemplated that unbearably loud music would be played in the daytime at the time of taking on the lease. If there was no such contemplation, then the argument has no application to the present case as the leased premises was in its present condition when the claimant took up occupation.

[105] The case was argued in nuisance and the implied obligation not to derogate from the grant, but the reasoning is equally applicable to the covenant for quiet enjoyment. This is why it is important to bear in mind that the subject matter of the lease in the present case was for commercial premises within a multi-use commercial building constructed or adapted for business. The adjoining premises appears to have already been used as a nightclub at the date of the claimant's lease agreements, but it would make no difference if it was not. It must have been within the contemplation of the claimant that the adjoining premises being used as a nightclub would cause a nuisance. The defendant as landlord, has not been shown by the evidence presented to have done anything since the lease agreement was entered into which was not contemplated by everyone concerned.

[106] In the present case, there was evidence that the nightclub operated outside of its stated hours. However, the claimant has not really hinged its case on this, it has instead contended that the condition of the property being uninsulated against sound breached the covenant. I say this because the claimant can point to no evidence that it complained to the nightclub itself based on what was said about its hours of operation, and as I have already indicated, the claimant has chosen not to join Taboo nightclub in this claim.

[107] In the face of evidence that the leased premises needed soundproofing there was no evidence as to the cost of remedying the complaint. To my mind that would require a clear contractual obligation to have been expressed in the lease agreement or expressly agreed between the parties. The covenant for quiet enjoyment is an unsuitable vehicle for such an obligation which is a matter of contract. As a consequence, I find there was no breach of this covenant on the part of the defendant.

Derogation from grant

[108] There has to be evidence that any damage suffered by the claimant affected the premises and not just the occupants, the damage must be material and not merely temporarily inconvenient, it must result from some deliberate or voluntary behaviour of the landlord and must not result from acts of a third party that affect

the premises. The defendant is not liable for acts carried out by a third party that affect the premises. There is no evidence of the premises being affected by the acts of the nightclub. The obligation is not to do anything after the date of the grant which will derogate from the grant or substantially interfere with the grantee's enjoyment of the subject matter of the grant. There is no evidence from the claimant to ground this aspect of the claim.

Frustration

[109] In the case of **Implementation Ltd v Social Development Commission**,[24] Phillips, JA discussed the doctrine as follows:

> *"[107] …the classic statement in respect of frustration was that made by Lord Radcliffe in Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696, at page 729, where he said: "...frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do."*
>
> *[108] Bingham LJ also quoted Lord Reid in Davis Contractors Ltd at page 721 that: "...there is no need to consider what the parties thought or how they or reasonable men in their shoes would have dealt with the new situation if they had foreseen it. The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end."*
>
> *[109] Lord Bingham in The Super Servant Two mentioned certain well settled propositions of law, namely:*
>
> > *"1. The doctrine of frustration was evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises (Hirji Mulji v. Cheong Yue Steamship Co. Ltd. (sub nom.*

[24] [2019] JMCA Civ 46

Dharsi Nanji v. Cheong Yue Steamship Co. Ltd.), (1926) 24 L1.L.Rep. 209 at p. 213, col.

2... The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances...

2[sic]. Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended...

3. Frustration brings the contract to an end forthwith, without more and automatically...

4. The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it...

5. A frustrating event must take place without blame or fault on the side of the party seeking to rely on it..."

[110] In the case of **National Carriers Ltd and Panalpina (Northern) Ltd**,[25] the House of Lords traced the history of the law relating to the doctrine of frustration and this case was cited by the defendant.

[111] The evidence of the claimant is that it sought to enter into five separate arrangements for clients to use the leased premises and was unsuccessful as a result of the noise from the nightclub. This is evidence from which it can be inferred that these clients were to use the space as a call centre and that claimant was not raising this as an issue merely of financial loss, but as an event which meant that he could not comply with the permitted use agreed when he entered into the lease.

[112] The difficulty with the claimant's evidence is that there was no documentary proof

[25] [1981] 2 WLR 45

of the assertion that he had lost these clients. Mr Horne gave no business or prospective client names, dates, or proposed square footage to be taken by any lost prospects. The assertion that the claimant was paying for space it could not use is distinct from saying the claimant was paying for space it could not attract prospective clients to use. It is noted that the same leased premises was being used as a call centre by Global Outsourcing before the claimant was assigned the lease.

[113] The test for frustration as set out in **Davis Contractors Ltd**[26] is: "[*T]he question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end*."

[114] The loud music was an interruption to the claimant's intended operations, however, there is no evidence as to its frequency or duration over the music over the nine months that the claimant occupied the leased premises. The issue of frustration is a question of degree and one of mixed fact and law in this case.

[115] Global Outsourcing was operating a call centre on the same terms as the lease entered into by the claimant. The claimant and defendant constructed separate entrances after the commencement of the lease and the claimant remained in occupation until October 2015. There is no date on which the nuisance commenced such that this issue of frustration could be contemplated by the court.

[116] There is no correspondence or documentary evidence of a date of complaint to the defendant by the claimant on the issue that the contract was incapable of being performed as a result of a change in circumstances. The "radically different" test looks to whether a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it radically different to what the contract provides for and contemplates. Why the claimant remained in occupation for nine months is unknown despite the evidence of its declared inability to use the leased premises.

[117] The defendant, by testing the sound levels, appeared to be willing to address the

[26] page 721

noise level. Another type of use was not explored by the claimant, nor was the impossibility of remaining in the leased premises raised with the defendant. Rather, the claimant raised the defendant's failure to install soundproofing, this means that the claimant could have remained at the demised premises, thereby rendering the doctrine inapplicable.

[118] Further, there were no negotiations involving the nightclub itself on the evidence of the claimant and in my view, any contract which had arisen out of such negotiations could not have been seen as unreasonable given the circumstances. For instance, the claimant and the nightclub could have soundproofed their walls and the cost agreed between them.

[119] Finally, to succeed on this point, in my opinion, it was incumbent on the claimant to prove that the contract was incapable of being performed, and in the circumstances of this case, it has failed to do so. I find there is insufficient evidence from the claimant to make out the application of the doctrine.

The alteration of the leased premises

[120] The transfer of the lease was not registered on the title for the property, which means the Registration of Titles Act did not apply and the contract is governed by the common law. Under the common law, the claimant is only bound by those terms and conditions under the lease agreement which 'touch and concern' the land, those which for instance, affect the nature, quality or value of the land or the mode of using or enjoying the land. Further, the alteration of the leased premises does not form a part of the terms which the defendant can enforce given its reliance on the unstamped instrument to do so.

Notice to quit

[121] In the case of **Brady & Chen Limited v Devon House Development Limited**[27] the Court of Appeal cited a passage from Professor Gilbert Kodilinye in his text, Commonwealth Caribbean Property Law at page 18, which reads:

"A lease for a fixed period terminates automatically when the period expires,

[27] [2010] JMCA Civ 33

there is no need for any notice to quit by the landlord or the tenant. Another basic characteristic of a fixed term lease is that the landlord cannot terminate the lease before the end of the period unless the tenant has been in breach of a condition in the lease, or the lease contains a forfeiture clause and the tenant has committed a breach of covenant which entitled the landlord to forfeit the lease. Nor can the tenant terminate the lease before it has run its course, he may only ask the landlord to accept a surrender of the lease, which offer the landlord may accept or reject as he pleases."

[122] Additionally, in addressing the "form of a notice to quit", the learned authors of Hill and Redman's Law of Landlord and Tenant, Chapter 14 at para. 4447, stated that:

"At common law, subject to the express terms of the tenancy agreement, there is no 'prescribed form' for a notice to quit. The form of notice is immaterial, provided that it indicates, in substance and with reasonable clearness and certainty, an intention on the part of the person giving it to determine the existing tenancy at a certain time."

[123] The learned authors continued at para. 4450-4460:

"A notice to quit must be unequivocal and be such as the recipient can properly act upon it. Such a notice only can be good as, on a reasonable construction of it, denotes an intention to give up the premises at the lawful time. There must be plain, unambiguous words claiming to determine the existing tenancy at a certain time."

[124] The authorities are clear that for a notice to quit to be valid, it must be unequivocal and indicate on a reasonable construction of it, the certain time at which the lease will be determined. The claimant was bound by the terms of the fixed-term lease. On that basis, the lease continued to subsist between the parties for the term it was agreed.

[125] As a result, the claimant was obliged to terminate the contract in accordance with the terms of the lease. The law required that a written notice to quit, indicating, at least, the intended date on which possession would have been delivered up and

the reasons for the notice, should have been served on the defendant, no less than six months before the date fixed for the delivery up of possession. The claimant having failed to serve such a notice on the defendant, is found liable for breach of contract.

The claimant failed to restore the demised premises to its original condition and made substantial changes without the defendant's approval

[126] There is no evidence that the defendant prevented the claimant from removing fixtures installed in the leased premises upon vacating it. It was the claimant who took the decision not to do so. He cited reasons of cost generally but not reasons for the non-removal of all the items placed in the demised premises by way of retrofitting in this particular case. The defendant is not liable to compensate him for these sums. Equity does not assist a volunteer.

Rescission

[127] The right to rescind the contract did not apply to the claimant, as there was no evidence of mistake, misrepresentation, undue influence, inducement or deception by the defendant in the signing of the lease. At all material times the claimant was aware of Taboo nightclub's presence and existence as its neighbour occupying the adjoining premises when it freely entered into the lease agreement.

Refund for rent and maintenance paid

[128] Again, there has been no proof that the defendant breached any of the agreed terms. The claimant did not join the nightclub in this claim and that was at his election. The claimant occupied the premises for nine months and has to pay the obligations due and owing for the period of occupation. The claimant exclusively occupied by the leased premises over the period March to October 2015 and on its own case retrofitted the space. The defendant is not liable to refund these sums.

[129] I do not find however that in the circumstances, given the inherited improvements to the property, that the defendant ought to receive no more than nominal damages for the breach of contract for early termination of the lease. Although the defendant

is entitled to damages, there was no proof of any quantifiable loss. The monetary award will, therefore, be restricted to nominal damages.

[130] The general rule that damages are intended to be compensatory was set out in **Stoke-on-Trent City Council v W & J Wass Ltd**.[28] In that case, Nourse LJ explained the general rule and the basis of exceptions. The following extracts are taken from his judgment at pages 397-8 of the report:

> *"The general rule is that a successful plaintiff in an action in tort recovers damages equivalent to the loss which he has suffered, no more and no less. If he has suffered no loss, the most he can recover are nominal damages. A second general rule is that where the plaintiff has suffered loss to his property or some proprietary right, he recovers damages equivalent to the diminution in value of the property or right. The authorities establish that both these rules are subject to exceptions."*

[131] The Earl of Halsbury LC explained the concept of nominal damages in 1900 in the case of **The Owners of the Steamship 'Mediana" v The Owners, Master and Crew of the Lightship "Comet" - The Mediana.**[29] The learned Lord Chancellor pointed out that:

> *"Nominal damages' is a technical phrase which means that you have negatived anything like real damage but you are affirming by your nominal damages that there is an infraction of a legal right, which, though it gives you no right to any real damages at all yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term "nominal damages" does not mean small damages."*

[132] The learned editors of McGregor on Damages 17th Ed note at paragraph 10-006 that the sum that was usually awarded in such cases was £2.00. After a century at that level, it was, in more recent times, increased to £5.00 (see **Brandeis Goldschmidt & Co v Western Transport [1981] QB 864 at page 874**).

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[28] [1988] 3 All ER 394; [1988] 1 WLR 1406

[29] [1900] AC 113 at Page 116

[133] As a consequence of the foregoing, the court makes the orders set out below.

[134] Orders

1. Judgment to the defendant on the claim.
2. Judgment to the defendant on the counterclaim
3. Nominal damages awarded to the defendant on the counterclaim in the sum of Fifty Thousand Jamaican dollars, (JA$50,000.00.)
4. Costs to the defendant to be agreed or taxed.

……..……..

Wint Blair, J