IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L. 2002/I-12

BETWEEN	IMPLEMENTATION LIMITED	CLAIMANT
AND	SOCIAL DEVELOPMENT COMMISSION	DEFENDANT

Mr. Braham and Ms. Kathryn Cousins, instructed by Livingston, Alexander and Levy for the Claimant.

Ms. Lisa Whyte and Ms. Gail Mitchell, instructed by Director of State Proceedings for the Defendant.

Heard: 26th, 27th and 28th July 2010; 3rd August 2010 and 10th January 2013

Campbell, Q.C., J.

Background

[1] The Claimant is a company registered under the Companies Act 1967 and provides real estate consulting services and undertakes project and construction management. It is a lessee under a Lease made in 1994, between itself and the Commissioner of Lands (COL), for premises at Stonehole and Cumberland Pen, in the parish of St. Catherine, containing over eighty-four acres. The Lease is for a term of 25 years with an option to renew for another 25 years (Head Lease). The Claimant had, along with Jamworld Ltd., developed a part of the leased premises into an entertainment complex known as Jamworld Entertainment Centre (the Centre) in accordance with the terms of the Head Lease.

[2] The Defendant is incorporated pursuant to the Jamaica Social Welfare Commission Act, 1958, with powers to purchase, hold and dispose of land, and to sue and be sued in its corporate name. A name change was effected by a legislative amendment in 1995, which provided at section 4, that the Commission

shall be known as the Social Development Commission (SDC). The Commission consists of a chairman and not less than two nor more than nine other members appointed by the Minister who is empowered, after consulting with the chairman to give directions of a general character as to the policy to be followed in the exercise and performance of SDC's functions.

[3] Following negotiations and an exchange of written correspondence between the parties, SDC entered into possession of the Centre, on or about the 1st October 1998. Monthly invoices for a rental sum of $140,000 were sent to SDC, who vacated the premises on or about the 30th November 2001.

[4] Consequent on SDC's departure from the Centre, the Claimant filed an action on the 1st March 2002, alleging that the Defendant in breach of contract, has failed and or neglected to pay rent and utilities, particularly electricity bills. Judgment in default of defence was entered on the 15th April 2003 for $6,750,555.96 and interest. On the 23rd March 2004, the Defendant had its application to set aside the default judgment granted along with leave to file its Defence. The affidavit in support of its application stated that the Defendant had vacated the Centre after giving the requisite notice and further that the sums owing for rental and electricity were $3,440,000.00 and $208,405.96, respectively.

[5] Approximately seven months later, the Claimant filed an application for Summary Judgment, alleging at paragraph 4 of the affidavit of Jeremy Brown, in support of the application, that the Claimant's representative, Jamworld Ltd., by letter dated 14th May 1998, to the Defendant, had confirmed the Claimant's willingness to enter into a long-term lease with the Defendant for the Centre and proposed the terms and conditions to be contained in the lease, inter alia;

> "The initial lease term of ten years with an option to renew for a further period of five years. We will also grant a right of first refusal to lease the premises on the expiration of the fifteen year term if the option to renew after 10 years is exercised".

[6] On the 1st February 2005, with the consent of the Defendant, Mr. Justice Reid entered judgment for the Claimant in the sum of $3,648,406.00. The balance of the claim, including interest, was adjourned for determination on the 18th February 2005, on which date, Mr. Justice Reid further adjourned the matter to the 18th July 2005, allowing three hours for the determination of the outstanding matters.

[7] On the 14th July 2005, the Defendant filed an Amended Defence and Counterclaim, admitting paragraphs 1 and 2 of the Amended Statement of Claim and admitted owing the sums of *$3,*440,000.00 for rental and the sum of $208,405.96 for utilities. The counterclaim was for the sum of $17,409,882.07, alleging unjust enrichment of the Claimant from certain improvements the Defendant had carried out on the Centre. The Claimant's answer to the counter-claim was that the purported improvements were not carried out with the permission of the Claimant, and had adversely affected the property. On the 22nd February 2007, Rattray J, granted permission for Mr. Errol Spence, Quantity Surveyor, to be called as an expert witness.

The Claimant's Case

[8] It was the Claimant's contention that there was a fixed term lease agreement between the Claimant and the Defendant under the lease agreement. There was no provision permitting the Defendant to terminate the lease agreement by giving one month's notice or by giving any notice. Accordingly, the Defendant breached the lease agreement by abandoning the premises on the 30th November 2001. The Claimant submits that all the essential terms of the lease had been agreed, as evidenced by the correspondence between the parties. The fact that these terms were not formalized in a document is not necessary, because the normal rules governing the formation of contracts apply to tenancy agreements.

[9] The Claimants submitted that the Defendant, in its Further Amended Defence, had made several important admissions, i.e.;

(1) That the Claimant is Lessee of the premises pursuant to a Head Lease with the Commissioner of Lands.

(2) That by an agreement for lease made in or about 1998, the Defendant acquired a sublease of the lands on certain terms and conditions, including;

(a) The sublease was to be for a fixed term of ten years with an option to renew for a further five (5) years.

(b) Rent was to be $140,000.00 per month.

(c) The Defendant was to be responsible for all utility payments, including water, electricity, and telephone.

(d) During the first five-year term, the lease payment for each succeeding anniversary of the lease term would be increased by the per cent difference in the Consumer Price Index (CPI) over and above an increase of 8% per annum for the current year.

(e) The sub-lease would commence on October 1, 1998.

(3) That the Defendant entered into possession and paid rent to the Claimant.

(4) That the Defendant vacated the premises on or about the 30th November 2001.

(5) That the Defendant failed to pay utilities and a portion of the rent.

(6) That the Defendant demolished the VIP stand, vendors stall and placed top soil and irrigation piping on the grounds of the amphitheatre.

(7) That the Defendant owes $3,648,405 for rent and $208,405.96 for utilities.

Defendant's Pleaded Case

[10] It was submitted on behalf of the Claimant that SDC's argument at trial was different from the defence they pleaded and they should not be permitted to raise an argument that did not appear in their Further Amended Defence and was

inconsistent with it. The Defendant had not, prior to trial, disputed the Claimant's contention that the parties had agreed a sublease of a fixed term of ten years with an option to renew for a further five years. However, at trial, Counsel for the Defendant sought to argue that there was no formation of a lease for a fixed term between the parties. It was clear, from March 2002, when the Claimants pleadings were served, that the Claimant was alleging that the parties had entered into a fixed-term lease agreement for a period of ten years, with an option to renew for a further five years. The draft Defence in support of the application to file defence out of time, admitted paragraphs 1, 2 and 3 of the Amended Statement of Claim.

[11] The affidavit of Jermey Brown, CEO in support of the Claimant's application for Summary Judgment, referred to the Head Lease. Mr. Brown, in paragraphs 3 - 6 of his affidavit, traced the history of the negotiations between the parties and asserted that the terms of the lease that were alleged in the Claimant's Statement of Claim, were proposed by the Claimants in a letter dated 14th May 1998. The Defendant, in its letter dated 27th August 1998, confirmed its intention to lease the land, effective the 1st October 1998, and agreed the terms proposed in the Claimant's letter, except a new proposal was submitted for the determination of the rent. The Claimant's proposal on that issue was eventually accepted by SDC in their letter of the 12th September 1998. These allegations were not traversed.

[12] On the 1st February 2005, the Court ordered;

(1) By consent, judgment for the Claimant in the sum of three million, six hundred and forty eight thousand four hundred and five dollars and ninety-six cents.

(2) The balance of the claim including interest on the 18th February 2005.

[13] In its Amended Defence filed on the 14th July 2005, the Defendant admitted the existence of a sub-lease of a fixed term of ten years with an option to renew. As also, the rental sum and the date of commencement of the lease, and the

formula for determination of the increase in rental. The parties both filed pre-trial memoranda. The Defendant admitted that he had entered into a sub-lease with the Claimant. 0ne of the Defendant's legal contentions was whether the sub-lease was for a monthly tenancy or a tenancy of a fixed term of ten (10) years. It has however been contended by Counsel for the Claimant, that the Defendant had maintained the stance throughout that the lease was for a fixed term. None of the issues, admissions or contentions raised by the Defendant is inconsistent with its earlier admission that the lease was for a fixed term of ten years with an option to renew. The Defendant had, for the first time, raised the issue of a term other than a fixed term of ten years.

[14] I have traced the matter in some detail to demonstrate that the Claimant is on firm ground to mount a challenge against the Defendant being allowed to raise a defence other than that which they pleaded. A good defence should assist the court and the parties in identifying the issues in dispute. The Claimant's pre-trial memorandum clearly demonstrates that the case the Claimant had prepared itself to meet, as was pleaded by the defence, was based on the Defendant's admission that a fixed term lease was agreed between the parties. There were several case management conferences and pre-trial review hearings that proceeded on the basis of the issues joined. That there was a lease for a fixed term of ten years.

[15] In **Three Rivers District Council v Governor of the Bank of England (2001q) UKHL 16**, Lord Hope of Craigehead emphasized the basic purpose of pleading and the question of the adequacy of the pleadings, and quoted with approval. ***British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd*** **(1994) 72 BLR 26, 33-34**, where Saville LJ said:

> "The basic purpose of **pleadings** is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it. To my mind it seems that in recent years there has been a tendency to forget this basic purpose and to seek particularisation even when it is not really required."

Lord Justice Saville's observations were made under the old rules. But the same general approach to **pleadings** under the CPR was indicated by Lord Woolf MR in ***McPhilemy v Times Newspapers Ltd*** [1999] 3 All ER 775, 792J-793A:

> "The need for extensive **pleadings** including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statement, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. **This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules."**(Emphasis mine)

[16] The Defendant should not be permitted at this late stage, to raise a case that did not appear in its Further Amended Defence. To allow the Defendant's case to proceed in disregard to its own pleadings is to permit the Claimant to be ambushed and surprised. The general nature of the case that had been known to the Claimant all throughout the pre-trial process is not the case the Claimant has to meet here. New issues have been thrust upon the Claimant. As pleaded, the main issue remaining on the claim between the parties would be whether one month's notice given by the Defendants would be valid notice. Although Justice Reid did not have the Defendant's counter-claim before him, he was of the view that the outstanding matters could be resolved in three hours. The fact that the hearing of the case took place over four days is indicative of the difference in complexity of the case as pleaded and the case that was argued before this court. The Defendant had conceded in its written submission that the fixed term lease can only be terminated by the effluxion of time (See paragraph 29). On its pleaded case, the Defendant has no real prospect of success. However, in the event I am wrong, I intend to deal with the new challenge raised by the

Defendant, to the Claimant's claim to an agreement between the parties for a fixed term lease for a period of ten years.

Was there an Agreement for a Lease?

[17] The Claimant submitted that, "a contract (agreement) for a lease does not operate as a conveyance at law but is a contract that binds the parties the one to grant and the other to accept it. That the relationship of landlord and tenant will thus be created in equity and as between the parties, the rights and duties of that relationship will be the same as if the lease had been granted. (See **Cheshires Modern Law of Real Property (12th Ed.)** page 388-339.) If the essential terms of the lease are offered and accepted, an agreement for the lease would have come into existence. These essential terms include, (a) identification of parties (b) the premises to be leased (c) commencement of the lease (d) rent. Halsbury Laws of England Volume 27 (4th ed) at paragraph 57. The Claimant further submitted that an agreement for a lease is evidenced in the correspondence between the parties for the period from April to September 1998.

[18] The Defendant submitted that, (a) there is no indication that the parties ever arrived at a final agreement, (b) the exchange of correspondence provides insufficient note or memorandum of the agreement for the purposes of the Statute of Frauds (c) that occupation and paying of rent for that period to Implementation Limited do not constitute acts of part performance in respect of a sub-lease for ten years. These acts also do not indicate that there was an agreement/contract in existence.

Subject to Contract

[19] The Defendant agrees that an agreement for a lease is enforceable, but submitted that there was no agreement arrived at between the parties for the following reasons, (1) there is no indication that the parties ever arrived at a final agreement. (2) All the terms of the contract could not have been settled and approved by the parties if the Commissioner of Lands had not given any written

consent or approval for the premises to be sublet. Furthermore, there were outstanding issues that needed resolution, inter alia, granting of an option to purchase to SDC, or the assignment of the Claimant's interest in the Lease with the Commissioner of Lands. The Defendant further urged that the Claimant cannot rely upon the correspondence between the parties, because the letters themselves express that they were subject to a letter of intent being signed by both parties in the absence of a formal lease agreement being available. The fact that the letters were "subject to contract" is clear indication that they could not constitute a sufficient memorandum.

[20] The Defendant relied on **Tiverton Estates Ltd. v Wearwell Ltd. (1974) 2 W.L.R 176,** and **Winn v Bull (1877) 7 Ch D. 29.** It was submitted that **Tiverton Estates Ltd**. was authority for the Defendants' submission that the correspondence being "subject to contract," was proof of an insufficient memorandum. In **Tiverton**, the Defendants had entered into an oral contract with the Plaintiffs under which the Plaintiffs agreed to sell their leasehold interest in the property for $190. At the trial, the Plaintiffs submitted; inter alia, (1) that on the evidence, there was no firm oral contract, particularly in regard to a letter of July 4, which was written "subject to contract." (2) and there was no written memorandum to satisfy S40 of the Law of Property 1925; The trial judge held,(1) there was a triable issue as to whether there is a contract, (2) there was no memorandum to satisfy S40. On appeal, the court found that there were two conflicting lines of authority on the first point, i.e. (a) to satisfy the statute, the writing must contain, not only the terms of the contract, but also an express or implied recognition that a contract was actually entered into. According to the other line, it is not necessary that the writing should acknowledge the existence of a contract. It is sufficient if the contract is by word of mouth and that the terms can be found set out in writing without any recognition whatsoever that any contract was ever made.

[21] Lord Denning wrote the leading judgment, dismissing the appeal:

> "The writing here, being expressly "subject to contract", was not sufficient to satisfy the statute. There is no enforceable contract

> between the parties. In respect of the sufficiency of the note or memorandum, "The draft does not contain all the terms of the oral contract … it omits the term ... the Tiverton company would move out, giving vacant possession ... adds a term that 'the prescribed rate of interest will be 12 percent per annum'".

Stamp LJ. Said;

> "Apart from authority, I would have thought that a memorandum signed by the party to be charged, stating terms which the other party asserted were the terms of an oral agreement, would not, in the absence of something in the memorandum at least pointing to the existence of a contract made upon the stated terms, satisfy the requirements of the section. It would not be a note or memorandum of the contract sued upon but merely the terms which the parties charged is alleged to have agreed. It would leave the contract to be determined by verbal evidence."

[22] In respect of **Winn v Bull** (supra), where the Defendant agreed to take a lease of a house for a certain time at a certain rent, "subject to preparation and approval of a formal contract," it was held that there was no enforceable contract and Jessel M.R. said at page 32 that;

> "It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared."

[23] Mr. Braham responded that **Tiverton Estates**, was irrelevant, and sought to distinguish it for the following reasons; that Tiverton is a case that deals with an oral agreement, whereas, in the instant case, neither party has alleged an oral agreement, the issue being whether the correspondence between the parties constitute an agreement for a lease for a fixed term. Secondly, **Tiverton** was an offer case, whether the Defendant had made an offer, which also acknowledged the existence of a contract. In this case, terms and conditions were proposed in details in writing and accepted in writing. In the present case, the lease had a commencement date, and therefore 'subject to contract' did not apply. Mr. Braham relied on **FBO (Antigua) Ltd. v Bird (2009) 2 P.CR. 14**, **w**here, at page 247, the Privy Council held that;

> "To be enforceable an agreement for a lease must contain at least the essential terms of the transaction, the parties, the land to be leased, the term and the rent."

and at page 2249, their Lordships Board considered terms not agreed.

> "It is undoubtedly true that when the terms and conditions of the lease were being settled such matters would have come into consideration and would very probably have formed the subject of more or less detailed provision in the final lease document. It does not necessarily follow, however, that a sufficiently binding agreement for a lease could not be reached without encompassing such terms."

[24] In respect of **Winn v Bull**, Mr Braham submitted, the barebones agreement in that case had intervening factors, which distinguished it from the instant case.

[25] I accept that in this case, the terms of the contract on which the Claimant relies are in the written correspondence from April to November 1998, between the parties. The contention between the parties, unlike in **Tiverton**, is whether there is an agreement for a fixed term. The essential terms were here agreed, the Defendant's letter of 27th August 1998, confirmed the Defendant's intention to commence the lease on the 1st October 1998, and agreed the terms in the Claimant's letter of the 14th May 1998. The concern of Stamp J that the note in **Tiverton** case would lead to a determination of the contract by verbal evidence, would not be a relevant consideration in this case. I accept that the Defendant, having gone into occupation, meant that all that was required was the formalization of the terms that the parties had agreed. There were no essential terms outstanding. I find a sufficiently binding contract was agreed between the parties. There were no outstanding matters brought to the attention of the court that could not be detailed in the final document. I find support for so finding in the Privy Council decision in **FBO (Antigua) Ltd. v Bird** (supra).

Frustration

[26] The Defendant submitted that, if there was any contract, it was frustrated because of the "unanticipated and unexpected failure" to secure the written consent and approval of the Commissioner of Lands by the Claimant. The Claimant's attorneys-at-law, in its letter of the 23rd September 1999, points out that COL was acting unreasonably in refusing consent to SDC. The Defendant further submitted that any arrangement between Implementation Ltd. and the SDC would be determined at the end of the Lease between Implementation Ltd. and the Commissioner of Lands. The Claimant contends that the consent of the Commissioner of Lands was not a condition precedent for the commencement of the fixed term tenancy, the tenancy having subsisted from the date of occupation.

[27] The decision of the Court of Queens Bench in the matter of **Taylor v Caldwell** (1863) 3 B & S 826, the Court took the view that there will be an implied condition that the contract will be automatically terminated by the occurrence of an unexpected and intervening event which results in the physical destruction of the subject-matter in the contract. *The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it, and it must be some outside event or extraneous change of situation.* See **Chitty on Contract**, Vol. 1, 28th Edition, at page 1170. A court examining the formation of the contract with a view of explaining *"whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist*." See **F. A. Tamlin SS. Co. Ltd. v Anglo-Mexican Petroleum Products Co. Ltd. (1916) 2A.C. 397. P 403-404**. Would an enforcement in the circumstances, as exist, render it a thing radically different from that which was undertaken by the contract?

[28] I find that the consent of the Commissioner of Lands was not a condition precedent to the commencement of a fixed term tenancy. The Defendant's argument rests on the base that the failure of Implementation to secure the consent of COL rendered the agreement frustrated. This ignores the fact that the Claimant had entered into occupation. It cannot be claimed, therefore, there was

a complete failure of the fundamental obligation. The fact that COL consent was not forthcoming, in circumstances where it could not reasonably be withheld where the tenant was responsible and reliable, is a factor for consideration. COL had in a letter dated 5th November 1999 advised that, "We are currently looking at the issues with a view of resolving the matter amicably." SDC cannot claim that, the termination of the agreement was not due to their act or election. The SDC had, in a letter dated the 12th October 1998, blamed a change in government's policy for the SDC'S inability to continue with the project. SDC's attorney-at-law, in a letter dated the 26th October 2001, gave the reason for her client quitting the Centre to be that SDC "no longer requires use and occupation of the premises." The admissions contained in these letters are inconsistent with the Defendant's submission that the contract was frustrated due to the unanticipated and unexpected failure to secure the written consent and approval of the Commissioner of Lands.

[29] There is no evidence before this court as to COL's reason for the withholding of his consent. It is enough to say that the Defendant was a statutory body which fell under the policy direction of a Minister of government who was empowered, "to give directions of a general character as to policy to be followed in the exercise and performance of its functions." SDC has urged that its intention was to transform the Centre into a national cultural centre providing creative services to the parish of St. Catherine and the wider Jamaican community, and in pursuance had spent $17,000,000. SDC's Board Chairman, the Rev. Garnet Roper, testified that he was not aware of the need for COL's consent, although Mr. Bryan had testified that COL's consent was a Board requirement. The consent of COL was not a term of the agreement between the parties. SDC, in its further amended defence, admitted that there was an agreement for a lease between SDC and the Claimant, an admission, which was inconsistent with a reliance on frustration. SDC's submission that the establishment of a sublease was contingent on COL's consent is unsustainable.

[30] I find that the parties were in agreement as to the essentials of a lease ahead of SDC's letter of the 30th September 1998. The Claimant's response of the 14th May 1998 to an earlier communication proposes twelve terms on which the Claimant was prepared to sublease the premises. SDC, in its letter of the 27th August 1998, accepted all the terms proposed in the Claimant's letter, except the commencement date and the increase in rental after the first five years. The letter states: "In reference to your letter dated 1998 May 14 outlining the terms and conditions for lease of the above captioned property, I now write to confirm the following;

1. Agreement with Lease Payment of $140,000.00 per month.

2. Agreement with all other terms and conditions except the Annual Increase and the commencement of the lease.

   I am confirming intention to lease the property, effective 1998 October 1, and proposing that the Annual Increase to lease payment be fixed at 20% after five years.

   I trust you will find my counter proposal agreeable and will proceed with the preparation of the necessary documents for signing."

[31] The Claimants, in their written submission, contended that there were two outstanding issues at that stage. (a) That commencement date of the tenancy should be the 1st October 1998 instead of the 1st July 1998. (b) That there be an increase in rent by 20% after 5 years. In letters dated the 5th September 1998 and the 30th September 1998, respectively, those outstanding issues were resolved.

[32] I find that the negotiation stage between the parties had passed; that all the essential terms were agreed, and clearly and distinctly stated in the correspondence between April and September 1998. The fact that the parties had indicated an intention to execute a formal lease did not prevent the creation of a lease. I find that the expressions in Robert Bryan's letter of the 30th September 2010, requesting Implementation to advise "your attorneys to prepare the formal lease document for our signatures," was not a term of the agreement

between the parties. It was to facilitate a more formal and professional document and made unnecessary the letter of intent that had earlier been proposed. It would not be expected that the attorneys would be able to change the agreed terms. See **Rossiter v Miller (1877- 78) L.R. 3 App. Cas. 1124**, Lord Heatherley at 1143, Lord Blackburn at 1151.

[33] The Defendant conceded in its written submission that, if the court finds that the lease was for a fixed term of ten years, as this court did, it cannot be terminated by one month's notice. It can only be terminated by effluxion of time. See Woodfall Landlord and Tenant paragraphs 1-1983 page 894.

[34] I find that the agreement between the parties would have expired on the 30th September 2008; the Defendant left the premises on the 1st November 2001. I accept that the rent due up to the Defendant vacating the premises in October 2001 was $4,280,000.00 SDC has paid $3,440,000, which is the amount due up to May 2001. The rent due for the remainder of ten years term would be calculated for the period November 2001 to September 2008 is $15,985,348.27.

[35] A sum was claimed for breach of maintenance clause of the contract, which would include the cost of reconnection of the electricity, repair of external lighting, repair of the fencing and amphitheatre, and the cost of securing the property for a period of 144 weeks. SDC was obliged to be responsible for the regular maintenance of building plant and equipment and replacement of items that are lost or destroyed. The cost of reconnection of the electricity is recoverable under this head. I make an award of $159,815.94. The cost of repair of external lighting is $71,000.00. An award of $18,500.00 to repair the chain link fence. I find it was necessary to have security, in light of theft of vital infrastructure not being uncommon. The Claimant's evidence as to the cost of securing the premises and the duration has not been challenged.

Defendant's counterclaim

[36] The Defendant has admitted to the demolition of the VIP stand, vendors stall and covered the amphitheatre with soil. Mr. Errol Spence, Quantity Surveyor, and joint expert, notes that, his observations of the Claimant's contentions were pointed out to the representatives of the Attorney General's Chambers, who had requested a site visit. The Report notes that, "The observations were confirmed and agreed by all." The covering of the grounds of the amphitheatre with topsoil, caused damage to the hard standing surface, which previously existed for patrons to stand on and caused damage to the storm water flow. The Expert Witness Report estimates the cost of repairs or replacement based on costs of labour material and construction inputs, at the costs prevailing at the time of preparation of the Report at $13,369,672.62. I made an award of $12,826,128.68 for the rehabilitation of the demolition.

[37] The Defendant contended that the modifications constituted an improvement, which was acknowledged by the Claimant. The Joint Expert, on the instructions of Counsel for the Defendant, made an assessment of the named improvements to the property whilst the Defendant was in occupation. These improvements included renovation to the Administrative Block, construction of Arena Road, irrigation works, modification of front fence and entrance, Civil Works extension of Artiste building and landscaping. Mr. Spence indicated that the individual amounts on the counter-claim all varied from the amounts in the bills submitted to support them. Of the plans submitted in relation to the improvement undertaken, Mr. Spence said at page 7 of his report:

> "Whereas these bills total the amounts claimed, my observations are that the plans provided offer very little assistance in my assessments. A total of forty-five (45) plans were provided, but they contain several duplications, many are sketches and perspectives with little detail, while others are for work, which does not appear to have been done and which are not the subject of the defendant's contention. In fact, the plans have been of little or no help in assessing the defendant's contention."

The SDC claimed that there was an outlay of $16,692,734.69 in making these "improvements," the Quantity Surveyor assessed the cost of constructing and

extending the facilities at the time of construction in 1999, at $4,488,611.12. If Mr. Spence is correct, and I find as a matter of fact, that he is, the SDC claim could not be said to reflect the true cost of construction, and nowhere is this more clearly demonstrated, than in the claim for professional services, where it was noted that 2/3 of the items refer to fees "which do not appear to be done" or items under consideration.

[38] Mr. Spence, in commenting on the state of these "improved" facilities in or around 22nd May 2009 (the occasion of his visit with representatives of the AG's Chambers), said the administrative building was in a state of disrepair, having been poorly maintained. The Arena Road was overgrown and had ponds on its surface and is in need of patching, cleaning and regarding the artiste building, the front gate and facing were in good repair. The irrigation works were not in place. The landscaping was not discernible. Based on Mr. Spence's report, the only benefit or improvement to the Centre would be work done on the Artiste Building along with the front gate and fencing, assessed by Mr. Spence at a cost of $1,610,935.50 and $859,656.06 respectively, for a total of $2,470,591.56.

[39] Unjust enrichment is not concerned with the value of the benefit of which SDC has been deprived, but the extent of the Claimant's enrichment at SDC's expense. There is divergence on the evidence in respect of this point. Mr. Jeremy Brown in his affidavit dated September 4, 2009 states on the matter of benefit, at paragraph 27, *inter alia:*

> *The JamWorld Entertainment Centre, as the name implies, was developed as an entertainment centre and the building construction allegedly carried out by the Defendant adds no benefit or value to JamWorld as an entertainment centre. The other "improvements' relate to the placing of top soil and the installation of irrigation piping in the amphitheatre which is a definite detriment to the operations of the entertainment centre as the hard standing previously in place was destroyed."*

Was the claimant enriched by the works carried out on the Centre? It was submitted on behalf of the Defendant that, 'it was not credible that, given the difference between the Claimant's use of the property for shows and the proposed Rio Cobre Park, that Jermey Brown would not have known of the proposed improvement. It was further contended on behalf of the Defendant, that Implementation cannot raise the issue of absence of written permission when that was not a part of the negotiations, as demonstrated by Jermey Brown's letter of the 14th May 1998. However, paragraph xi of that letter requires SDC to seek the approval of Jamworld Ltd. for capital improvements to the property individually costing in excess of J$500,000. The Defendant is unable to point to any such approval being sought or given. I accept the evidence of Mr. Jeremy Brown that there is no benefit derived by the claimant in respect of the "improvements" done by the defendant.

[40] The Defendant relied on the cases of **Chalmers v Pardoe (1963) All E.R. 552** and **Blue Haven Enterprises v Dulcie Tully and Eric Robinson** (unreported), decision dated the 21st February 2006 to support its submission that "SDC is not liable for any alleged waste committed and ought to be compensated for the improvements made to the property." In **Chalmers**, the Defendant told the Claimant that he could build on the land, with a promise of a sublease or surrender of that portion on which the building was located. There were prior approvals necessary, the Claimant proceeded to build without the acquisition of those approvals. The Claimant could have rectified the lack of approvals with the cooperation of the Defendant, which was not forthcoming, because of a deterioration in the relationship of the parties. The court had to make a determination as to whether the Defendant would be able to take the building for nothing. The court was of the view that the Claimant having erected the structures on the basis of the arrangements with the Defendants, equity would intervene to prevent the Defendant from benefitting. The SDC, in this case, was not ejected from the land by Implementation Ltd., it was the SDC themselves who made the decision to terminate their lease thus leaving the structure. Based on the evidence before me, I find that no such consent or approval was given.

The Defendant counterclaim fails. Judgment for the Claimant on the Claim and counterclaim.

[41] The Court makes the following award:

Rent due when SDC vacated	$840,000.00
Rent due for remainder of term	$15,985,348.27
Maintenance (reconnection of electricity)	$159,815.94
External lighting	$71,000.00
Security to secure the premises	$1,526,400.00
Demolition rehabilitation	$12,826,128.68

Interest at 6% from the 1st December 2001 to the 21st June 2006.

Interest at 3% from the 22nd June 2006 to the 10th January 2013.

Cost to the Claimant to be agreed or taxed.