IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. I 036 of 1994

BETWEEN	INTERNATIONAL HOTELS LIMITED	PLAINTIFF
A N D	CORNWALL HOLDINGS LIMITED	DEFENDANT

B. St. Michael Hylton, Mrs. Sandra Minott Phillips and Nicole Lambert instructed by Myers, Fletcher & Gordon, Manton and Hart for Plaintiff.

Dr. Lloyd Barnett, Q.C. and Christopher Honeywell instructed by Clinton Hart and Company for the defendant.

HEARD: June 10,11,12,13,14,17,18,19,20,21, October 24 ,1996

HARRIS J.

The plaintiff's claim against the defendant is for breaches of a written lease agreement dated November 16,1981, with respect to premises known as the Trelawny Beach Hotel. As a consequence, the plaintiff seeks the following:

(i) An order that the defendant remedies breaches of clauses 7(3) (b) and 7(4) of the lease by carrying out maintenance and/or repairs and/or replacement of items particularised in the Statement of Claim.

(ii) An indemnity in favour of the plaintiff in respect of expenses and costs incurred by the plaintiff remedying the breaches.

(iii) An order restraining the defendant from incurring and charging against the income of the hotel any expenses not related to or reasonably required for the hotel's operation.

(iv) An order that the defendant complies with the terms of the lease and in particular clauses 7(3) (b) and 7(4).

(v) The sum of $4,850,965.12, or

(vi) In the alternative, damages for breach of contract.

(vii) Interest pursuant to the Law Reform (Miscellaneous Provisions) Act.

The reliefs claimed under items(iii) and (iv) above were not pursued by the plaintiff.

The defendant counter claims against the plaintiff for breach of covenant of quiet enjoyment and for a sum representing any appreciation in the value of the

of the hotel as a consequence of improvements carried out by them.

The plaintiff is the registered proprietor of property known as Trelawny Beach Hotel situated in Falmouth in the parish of Trelawny. The hotel was leased by the defendant from its previous owner, Trelawny Resorts Limited, a subsidiary of National Hotels and Properties, for a period of 15 years commencing on the 1st January,1982. On 14th March,1990 the hotel was purchased by the plaintiff subject to the lease. It was a requirement of the lease that the defendant, among other things expends certain amounts during the first three years of the lease in respect of the refurbishment of the hotel, its plants, furniture, fixtures and equipment and then to execute repairs and replace certain of these items. A controversy developed as to whether, on the interpretation of certain clauses in the lease, a burden is imposed on the defendant to repair or replace several items of furniture, fixture and equipment in the hotel and whether it is under a duty to account to the plaintiff for certain uncollected debts and account for funds utilised by the defendant to pay office rental overseas on behalf of the hotel.

Agreed bundles of documents contained in 6 volumes included:-

The documents [illegible]:

1. Lease of the Trelawny Beach Hotel between Trelawny Resorts Limited and Cornwall Holdings Limited dated January 1,1982.

2. Agreement for Amendment of Lease between Trelawny Resorts Limited and Cornwall Holdings Limited dated March 20,1989.

3. Release between Trelawny Resorts Limited and Cornwall Holdings Corporation dated March 20,1989.

4. Release by Trelawny Resorts Limited dated December 19,1990.

5. Certificate of Title registered at Volume 1066 Folio 927, in respect of lands on which Trelawny Beach Hotel is built.

6. Booket in respect of Uniform System of accounts for Hotel.

7. Financial statements in respect of Cornwall Holdings Corporation Operations of Trelawny Beach Hotel.

8. Survey and evaluation Inspection reports of the elevators, kitchen, laundry and air conditioning equipment boilers and genarators

9. Miscellaneous Correspondence passing between plaintiff and defendant.

10. Miscellaneous Correspondence passing between various servants or agents of Cornwall Holdings Limited and Trelawny Beach Hotel.

11. Rental Agreement for office in Brussell dated December 30,1991.

12. Statistical digest prepared by Bank of Jamaica.

13. Trelawny Beach Hotel Bad Debts account analysis at April 1992.

The principal witness for the plaintiff, Mr. Burnett Cameron, a Director and senior Vice President of the plaintiff Company, testified that in April 1991 he visited the hotel and inspected the plant machinery, equipment and furniture and fixtures and a number of rooms. Based on his observations, he prepared a list of defects of various items and then proceeded to give instructions to a firm for the preparation of a report on the condition of the equipment at the hotel.

He further declared that the defendant was required to furnish monthly statements of accounts inclusive of a balance sheet. Balance sheets were remitted with monthly statements up to the end of 1992, none had been submitted since January 1993. He stated a balance sheet was necessary in order to assess the gross operating profit of the hotel and as result would enable the plaintiff to compute additional rental due. The absence of balance sheets created difficulty in the determination of the profit and loss accounts

In 1992 a new account entitled 'Office rental Europe' made its advent in the Sales and Marketing expenses of the hotel. This item related to rental of 203 square meters by the defendant of office space in Belgium between 1992, and 1995, at a cost of $4,023,320 in 1992, $2,307,306.00 in 1993, $34,061,133 in 1994 and $4,102,421 in 1995.

It was also reported by him that in 1991, the hotel's financial statement reflected a "write off" of bad debts amounting to $1,840,710.00 and $400,294.00 in 1992. The records showed that some of the debtors were tour operators who were still in business. The debts were unsubstantiated and uncovered by invoices from debtors. HH inquiry revealed that the defendant's record keeping was inadequate.

Various experts who inspected the kitchen and laundry equipments, air-conditioning units, elevators and boilers also gave evidence as to the conditions of these items at time of inspection.

The main witness for the defendant was Mr. Freddy Prud'homme, Vice President for Warwick International Hotels of which Cornwall Holdings a subsidary. His evidence was that the defendant had implemented a systematic preventative maintenance programme at the hotel since the commencement of the lease. In 1991, 1992 and 1993 refurbishing programmes were carried out. The current maintenance cost averages 6.2% of revenue in addition to capital expenditure. In the course of his administration, reports were received from the plaintiff with reference to the maintenance and refurbishing requirements. In compliance with these reports, refurbishing work was undertaken by the defendant. The defendant had expended substantial sums annually to maintain, refurbish and upgrade the furniture, fixtures and equipment and the hotel is now in better condition than at the commencement of lease.

In 1991 the impact of the Gulf War and recession in North America led to a lack of confidence by the travelling public which indirectly caused a decrease in hotel occupancies. Trelawny Beach suffered a decline. The European economy was at that time progressing and a decision was made to intensify marketing efforts in Europe, as of mid 1991. By end of 1993 after 2½ years, of effort, Trelawny Beach's revenue and gross operating profits were tripled, from which additional rent was paid to the plaintiff and in particular additional rent of US$7,000,000 was paid in the year 199

He further asserted that based on the decision to penetrate the European tourist market 200 square meters of office space was rented from the Warwick Group at its hotel in Brussels. The Warwick Group owns hotels in Europe, North America and the Far East. Their hotel in Brussels and one in New York have regional sales offices for purpose of marketing hotels inclusive of Trelawny Beach. Hotels are promoted by marketing exposure, trade shows, exhibitions and meetings with tour operators, airline personnel and travel agents.

He also declared that profit and loss accounts certified by auditors were submitted to the plaintiff annually and various accounting records were available for the plaintiff's inspection subject to reasonable notice being given. He also stated that there was in existence certain bad debts at the hotel. They were investigated, reconciled and written off as they were unrecoverable for a number of reasons. Written off debts were attributable to bankruptcy of debtor, accounts being reduced by discounts, or by default of payment through loss of identify of the debtor, or as a result of change of address of debtors rendering it impossible to locate them.

Various experts tendered evidence on behalf of the defendant as to the condition of the furniture, fixture and equipment of the hotel and to the accounting procedure and state of the accounts.

The plaintiff contended that, by virtue of the provisions of Clauses 7(3) (b) and 7(4) of the lease agreement, the defendant was under an obligation to keep the plant, machinery, furniture, fixture and equipment of the hotel (referred to in the lease as the "FF&E") in good and substantial repair and condition and to replace those that were worn out or unfit for use. It is necessary to mention at this stage, that although plaintiff's claim is with reference to FF&E only and 1 although Clause 7(3)(b) of the Contract principally refers to the building or structure, the Clause does in part incorporate refurbishing of items FF&E. Clause 7(4) is therefore not the only relevant clause for this purpose, as counsel for the defendant has asserted.

The question now to be answered, is what is the extent of the defendant's obligation under these two clauses of the lease? To do so, it is essential to outline Clauses 7(3)(b) and 7(4) which are couched in the following terms:-

> "7(3)(b) To repair, maintain, cleanse and keep the leased premises including all floors, ceilings, exterior and interior finishes, additions and improvements in good and substantial repair and condition as at the commencement of this Lease, subject to and inclusive of the refurbishment provided for in Sub-clause (a) of this Sub-clause, fair wear and tear expected, and to keep the windows, entrances and doors of the leased premises and the glass glazed surfaces and pilasters therein clean and in good condition, and promptly to replace all broken or cracked glass, and when it becomes necessary to replace or substitute fixtures, materials, structures or otherwise of a similar description of the Landlord, all of which shall be done in a manner in accordance with the equivalent standards which apply in respect of hotels of an equivalent standard offering like amenities and facilities PROVIDED HOWEVER, THAT:-
>
> (1) The Tenant's obligations and liability under this Sub-clause shall be subject to provisions of Clause 8 (2) hereof and limited by the following sub-paragraph of this Sub-clause (3);
>
> (2) In the event that during the Term the leased premises are damaged by events which the Landlord is obliged to insure against, in accordance with Clause 8(2) hereof, thereof is collected following the insured's pursuing all their rights and remedies, the total such insurance proceeds as appropriately relate to such damage shall be utilised towards the cost of repair and replacement which the Tenant is obliged to effect under the provisions of this Sub-clause"

"7(4) To repair, maintain and keep the FF&E (which is defined in the lease to mean and include all items of plant, machinery, equipment, furniture and fixtures used in or about at the leased premises and specified for clarification on the inventory of same in the Second Schedule attached to the lease) in good and substantial repair and operating condition as at the commencement of this lease subject to and inclusive of the refurbishment provided for in sub-clause 3(a) of this Clause 7, fair wear and tear expected, and to replace such items of the FF&E as may become worn out or unfit for use by substituting others of a like nature and equal quality as at the commencement of the Term.

Provided however, that

(1) The Tenant's obligations and liability under this Sub-clause shall be subject to prvisions of Clause 8(2) hereof and limited by following sub-paragraphs of this Sub-clause (4);

(ii) Upon expiration of the first two (2) years of the Term, the Tenant shall establish and maintain a furniture, fixture and equipment replacement reserve therein called "FF&E Reserve") in the amount of three percent (3%) of Gross Room Revenue earned by the Tenant from the hotel in each subsequent year of Term of this Lease, which reserve shall be sued to fund the repair, maintenance and replacement of the leased premises, FF&E and operating equipment, which the Tenant is obliged to carry out under the provisions of the preceding sub-clause (3), this sub-clause and sub-clause (5) of this Clause 7. All sums due to be credited to the FF&E Reserve pursuant this sub-clause shall be paid into an interest-bearing escrow account in the name of the Landlord and the Tenant on a monthly basis within thirty (30) days after the end of each calendar month. All repairs, maintenance and replacement to be carried out by the Tenant hereunder, shall initially be funded from such escrow account and all withdrawals on such escrow account for such purposes shall be reported to the Landlord on a semi-annual basis. No withdrawals may be made from such escrow account other for the purposes of this sub-clause. All interest earndd on the escrow account shall belong to the Tenant, but upon the termination of this Lease, for whatever cause, the amount at credit of such escrow account if, any, shall belong to the Landlord.

(iii) In the event that during the Term, FF&E is damaged by the events which the Landlord is obliged to insure against, in accordance with clause 8(2) hereof, and the clause 8(2) hereof, and the claim on such insurance in respect thereof is collected following the Insured's pursing all their rights and remedies, the total of such insurance proceeds as shall appropriately relate to such damage, shall be paid into the FF&E Reserve escrow account towards the cost or repair and replacement, which the Tenant is obliged to effect under the provisions of this Sub-clause."

In order to evaluate the scope of the defendant's liability with regard to the refurbishment of the FF&E it will first be necessary to determine whether the standard of repair and maintenance to which the defendant should adhere after refurbishing ought to exceed that which was in existence in January 1982, the date of the commencement of the lease. What was the intention of the parties? It is a cardinal rule of construction, that in an effort to glean the intention of parties to a contract, the terms and objects of the document must be interpreted by reference to the instrument as a whole, even if the immediate purpose of an investigation is to establish the meaning of a particular clause only. The learned author of Chitty on Contracts 26th Edition at page 520 paragraph 820 in the context of the law relating to construction of contracts recognises this proposition as follows:-

> "Every contract is to be constructed with reference to its object and the whole of its terms, and accordingly, the whole content must be considered in endeavouring to collect the intentions of the meaning of an isolated clause." It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected ex antecedentibus every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done." And so Lord Davey said in N.E. Railway & Hastings, quoting Lord Watson, "the deed must be read as a whole in order to ascertain the true meaning of its several clauses, and the words of each clause should be interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible."

It is convenient at this juncture to make reference to the submissions of counsel for the defendant that the items of FF&E only related to those which were specifically enumerated in the inventory to the second schedule annexed to the lease.

Clause 1 of the lease states:

> "FF&E means and includes all items of plants machinery, equipment, furniture and fixture used in, or, about the leased premises and specified for the purpose of clarification in the inventory of plant machinery, equipment, furniture and fixtures set out in th esecond schedule hereto."

The parties agreed that FF&E is inclusive of plant, machinery, equipment, furniture and fixtures used in the hotel. Those items were particularised in the inventory of the second schedule to make clear what items were in existence at the time of the lease. The word 'clarification' in clause 1 is in my view synonymous with identification. It must be that the object of the specific referenee to the items in the inventory

to the second schedule was for the purpose of identification of all items which existed at the commencement of the lease. It could not be that this clause restricts items of FF&E only to those to which reference is made in the second schedule. To place such an interpretation on it, would be an absurdity in light of other provisions in the lease. It would surely be rediculous for the parties to have incorporated certain other terms in the lease, the tenor of which are demonstrative of an intention to include other articles which should be acquired during the life of the lease, yet limit FF&E only to those which were mentioned in the Inventory. Clause 7(4) of lease requires the defendant to replace items which become worn out or unfit for use, by substituting others which are of equivalent nature and quality. Clearly, the parties anticipated that some items would have become useless and would have to be replaced. Logic dictates that they must have intended that FF&E should not only include items which were existing at date of commencement of the lease but also those which were subsequently procured. Further, there is evidence from the defendant which shows that items of FF&E have been replaced since the defendant had taken possession of the property.

Having considered that FF&E encompassed articles which existed at date of the lease and these acquired thereafter, I will now proceed to consider the measure of defendant's liability to repair and replace these items. Clause 7(4) clearly directs the defendant to keep and maintain the FF&E in good and substantial repair and condition as at the commencement of the lease subject to and inclusive of the refurbishment devised. The evidence disclosed that the FF&E were in a state of disrepair at the date of the commencement of the lease. This being so, it would be deemed by the lease that the FF&E were in good condition at the commencement of the lease. Consequently, it must have been the intention of the parties that the defendant would be under a duty to keep the FF&E in good and substantial repair, which would have been the same condition in which it could have been placed at the end of the preliminary period of refurbishment and not the state in which they had existed in January 1982.

By clause 7(20) of the lease the defendant covenanted "to use the leased premises and every part thereof and the FF&E only for the purpose of operationg a first class hotel." It had been acknowledged by the plaintiff and defendant that the hotel was in very poor condition in 1981, a situation of which the original lessor had been aware. There is no room for debate in pronouncing that the parties being aware of that condition,

intended that it remained in that state, in light of the requirements under the lease that the defendant operate the hotel as a first class one, and that the property inclusive of the FF&E be kept and maintained in good and substantial repair and condition. It must have been designed by the parties that the defendant improve the condition of the FF&E, not exclusively by continous refurbishment but also by acquisition of items to replace those which were rendered incapable of performing their functions efficiently, during the currency of the term.

Additionally, the lease demands that the FF&E be kept in good and substantial repair and condition. By presumption of law, the defendant would be under a duty to place them in proper state of repair and condition and keep them in such condition. It is obligatory on the part of a tenant who is under liability to substantially repair demised premises and to keep them in state of good repair to do so, even if they were not in state of tenantable repair at inception of the tenancy.

Halsbury's Laws of England 4th Edition Volume 27 paragraph 286 lends support to the foregoing pronouncement as follows:-

> "If he has expressly covenanted to put a house into tenantable repair and to keep it in such repair, and it is not in tenantable repair at the commencement of the tenancy, the tenant must do the necessary repairs not withstanding that the building is thereby put in a better condition than when the Landlord let it. The effect is the same if, without expressly covenanting to put into repair, the tenant only covenants to keep the house in tenantable repair. Such a covenant presupposes putting the house in such repair, and keeping it in repair during the term. The construction of the covenant is the same whether the covenant specifies "tenantable" or habitable" or "good repair." A general covenant is repair without any such words is satisfied if the premises are kept in a substantial state of repair.
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> "The repairs which must be done in order to keep a house in tenantable repair vary according to the circumstances of the building. Good tenantable repair is such a repair, as, having regard to the age, character and locality of the house, would make it reasonably fit for the occupation of a reasonably minded tenant who would be likely to take it; Accordingly the tenant must do such repairs as are necessary to preserve the premises and to make them suitable for a new tenant ....Covenants of this nature must be reasonably construed."

In keeping with this view, Lord Esher in Proudfoot v. Hart (1890) 25 QBD at page 50 declare:-

> "What is the true construction of a tenant's contract to keep and deliver up premises "in tenantable repair"? Now, it is not an express term of that contract that the premises should be put into tenahtable repair, and it may therefore be argued that where it is conceded, as it is this case, that the premises were out of tenantable repair when the tenancy began, the tenant is not bound to put them into tenantable repair but is only bound to keep them in the same repair as they were in when be became the tenant of them. But it has been decided and, I think, rightly decided that, where the premises are not in repair when the tenant takes them he must put them into repair in order to discharge his obligation under a contract to keep and deliver them up in repair. If the premises are out of repair at any time during the tenancy the Landlord is entitled to say to the tenant, "you have now broken your contract to deliver them up in repair." I am of the opinion that under a contract to keep the premises in tenantable repair and leave them in tenantable repair, the obligation of the tenant, if the premises are not in tenantable repair when the tenancy begins, is to put them into, keep them in, and deliver them up in tenantable repair."

There is no question that the defendant is bound to carry out substantial repairs to the FF&E. The lease enjoins it to do so. This requirement, coupled with the injunction to keep the FF&E in good repair and condition mandates the defendant to keep them in good condition notwithstanding they were in a state of disrepair when the defendant took possession of the property under the lease. It is the duty of the defendant not only to repair and keep the FF&E in tenantable state and condition but deliver them up in such state.

It is now necessary to determine whether the requirement for the defendant to replace worn or useless items of FF&E is affected by the exemption of fair wear and tear and to examine the extent of the defendant's liability to repair FF&E with reference to the exception. Clause 7(4) of the lease stipulates that where the state of the FF&E is a consequence of fair wear and tear, the defendant is not required to repair, maintain and keep them in good and substantial repair and operating condition. That Clause however directs the defendant to replace items of FF&E which becomes worn or unfit for use. The qualification of fair wear and tear expressly covers items to be repaired. It does not however cover those to be replaced. The exception of fair wear and tear is therefore inapplicable to those items which are found to be worn out or unfit for use and are in need of replacement.

I will now proceed to examine the true import of fair wear and tear within the context of the exemption imposed by the leased. What is fair wear and tear? "Wear

and tear" designates impairment to an article by ordinary usage, or depreciation in the condition of that article by continuous use or service. "Fair" within the meaning of wear and tear implies reasonable care in user of an item. Where reasonable wear and tear is excepted, a tenant is not obliged to make good defects originating from exposure to the elements or resulting from ordinary use. He is however, under a duty to ensure that the property does not deteriorate more than the operation of time and nature would cause. "He is bound by seasonal applications of labour to keep the house as nearly as possible in the same condition as when it was devised" per Tindal CJ in Gutt Gutteridge & Munyerd (3) 1934 1 Mood a R334 at page 336.

The question as to whether wear and tear is fair is not measured by the quantum of defect or deterioration on the property but by taking into account all surrounding circumstances relating to the property which is subject to the exception. In Taylor v. Webb (1937) 2KB 283 CA; (1937) 1 ALL ER 590 the exception of fair wear and tear was annexed to a Landlord's covenant in an underlease to keep outside walls and roof of devised premises in tenantable repair. The roof and skylight became damaged causing rain and wind to affect interior of premises in respect of which landlord had not covenanted to repair. It was held that the effect of an exception clause of fair wear and tear relieved the landlord from liability for damage occurring consequential on his failure to repair. In Regis Property Co. Ltd. v. Dudley 1975 LR 370 it was held that exemption of fair wear and tear in a repairing covenant of lease extended so far as rectifying things which wear out in ordinary course of reasonable use and did not embrace other damage resulting from wear and tear.

The defendant in case under consideration, covenanted "to repair maintain, and keep the FF&E in good condition and substantial repair and operating condition as at the commencement of the lease." Fair wear and tear excepted. This imposes on it a general obligation to repair subject to the exemption of fair wear and tear. The exception does not reduce the defendant's obligation to a practically negligible extent, nor does it effectually remove the burden imposed on it to repair, nor does it release the defendant from liability resulting from, unfair or unreasonable user of the property by itself servants, agents or other licensees. The assumption is that a reasonable and careful tenant will keep and maintain demised property in good condition and substantial repair. The defendant must therefore show that the condition of the FF&E

as set out in the plaintiff's claim arose from reasonable wear and tear. The matter of whether the defendant has so established will be determined later.

Leading counsel for the defendant, Dr. Barnett emphasised that there was no obligation on the defendant to replace obsolete items if they are capable of performing efficiently. This is undeniable. The issue however, is whether the defendant is under liability to replace items which are not merely obsolete but have become useless and worn out. The requirement to replace items is not subject to the qualification of fair wear and tear. Consequently, if items are deemed to be worn out and unfit for use, the lease compels their replacement and the question whether their condition was due to fair wear and tear is irrelevant.

The defendant has no duty in upgrading or improving the quality of the items to be replaced. The lease clearly stipulates that items which require replacement should be substituted by others similar in nature and quality. Evidence has been advanced by the plaintiff to show that it would be more economical to replace than repair some items and that by virtue of techonological advancement items have been upgraded by manufacturers. This proposition was also supported by Mr. McIntyre one of the defendant's witness. This I accept. It would be illogical and preposterous to repair an item if the cost of repair would be in excess of the replacement cost, even if, the replaced item is a upgraded and modernised version of the one for which it was substituted.

A further matter which falls for consideration is whether the defendant's liability for repair and replacement of FF&E is restricted to funds in an escrow account by use of the word 'initially' in the context of Clause 7(4) of the lease. Clause 7(4) (ii) of the lease makes provision for the establishment and maintenance of a reserve fund to be utilised for the purpose of repair and replacement of FF&E, after the expiration of the first 2 years of the lease. Such fund must be derived from 3% of the gross room revenue earned by the defendant in each subsequent year of the lease. It also directed that all repairs, maintenance and replacement should be funded initially from such escrow account.

The plaintiff's evidence disclosed that the lease did not require the plaintiff, who is the landlord, to carry out any repairs, or replacement. The defendant was charged with the /responsibility to do so. There is uncontroverted evidence that in all National Hotel and Properties leases either there was no ceiling on the tenant's liability to repair, or, it was landlord's liability to do so. Memoranda dated September 11

and September 13,1993 passing between the defendant's main witness Mr. Freddy Prud'homme and the Managing Director of the Hotel Mr. Richard Chiu lend credence to an assumption that the defendant was not of the opinion that there was an upper limit on the expenditure of funds to meet cost of repair and replacement. Futher, Mr. Prud'homme admitted that 3% of the gross room revenue was inadequate to keep the hotel and FF&E in good condition. Bearing in mind that the defendant was obliged to keep the FF&E in good and substantial repair and condition and to maintain a first class hotel, in order to do so, it must have been envisaged by parties that the defendant would have to expend such amounts as necessary to keep FF&E in good and substantial condition. For the parties to have intended otherwise would be to defeat the purpose for which they had covenanted. It follows therefore, that it must have been the intention of the parties that where the 3% gross room revenue in the escrow account was insufficient to meet the defendant's obligation the defendant would be under a duty to meet any amount in excess of the 3% necessary to carry out repairs and replacement.

Consequently, the use of the word 'initially' in the context of clause 7 (4) (ii) could only be interpreted as portraying that the escrow account should be utilised as a primary source of funding. To find that it placed limitation on the amount that ought to be expended on repairs and replacement of FF&E, in that, expenditure for these purposes should not exceed the amount at credit in the escrow account, would not only be an aburdity but would also be in conflict with certain requirements under the lease, for example, the obligation to keep FF&E in substantial repair and satisfactory condition and to operate a first class hotel.

I must now allude to the plaintiff's claim with regard to the defendant's breach of covenant to repair specific items of FF&E. The defendant was obliged under clause 7 (3) (ii) of the lease, among other things, to perform certain specified acts of refurbishment of the FF&E. These items were prioritized and enumerated in the 7th Schedule of the lease. The refurbishment was required to be done within the first year of the commencement of the lease. The items requiring repair or replacement included elevators, hot water boilers and pumps, laundry, kitchen and airconditioning equipment.

It must be borne in mind that the defendant was constrained to maintain and keep the FF&E in good and substantial repair and operating condition, fair wear and tear excepted and to replace such items which become valueless. Proceeding on the premise

that the defendant had in fact carried out refurbishing of FF&E within the first year of lease, they would have been deemed to be in good condition as at the commencement of the lease and the burden imposed on the defendant to repair or replace items remained throughout the term.

I will examine each item of FF&E to determine whether there had been a breach of repairing or replacement as the case may be. I will first direct my attention to the elevators.

It is a sore complaint of the plaintiff that the elevators had not been properly maintained or serviced, they have surpassed their normal life span and ought to be replaced or upgraded. The defendant confirmed that the elevators have exceeded their usual life span but contended that they had been properly maintained and serviced over the years, they are still operable and their condition is due to fair wear and tear.

Mr. Arnold Beckford one of the defendant's witnesses continuously recommended upgrading of the elevators or replacement of certain parts. The defendant neglected to adhere to recommendations. In fact he had recommended upgrading of the passenger elevators from as far back as 1981. On review of certain job sheets, prepared by Mr. Beckford in respect of work done on the elevators, certain defects in the elevators had been outlined in the remarks column. Mr. Beckford confirmed that no work had been carried out in respect of those defects, There are also indications from the job sheets that he mademade extremely frequent visits (almost monthly) to the hotel to repair the same type of problem on the elevators over an extended period. Clearly, if the elevators were subject to a proper maintenance programme, the regularity of Mr. Beckford's visits would have been dramatically reduced. Dr. Barnett urged that the replacement of the elevator must be viewed as improvement of FF&E, which is not required by the lease. The lease stipulates that items that are worn out should be replaced by ones similar in nature equal in quality. However, the evidence discloses that parts available are superior in quality to those that are to be replaced. This being the case, if it is essential that in order to comply with the covenant the defendant should substantially replace the whole elevators or parts thereof by substituting modernised version it is obligatory on its part so to do.

In Lurcott v. Wakely and Wheeler (1911) 1KL 905 a tenant covenanted under a

lease to substantially repair premises which was very old at time of the commencement of lease and to keep it in good condition. An external wall in premises was in very poor condition and could not be repaired unless it had been rebuilt. During the existence of the lease the London County Council served a Notice on the owners and occupiers of the premises to remove the wall. The landlord requested the tenant to comply with the Notice. The tenant refused to do so. On the expiration of the lease, the landlord demolished and rebuilt the wall to modern specifications. The Court of Appeal held the tenant liable for the cost of demolishing and rebuilding the wall.

In Ravenseft Properties Ltd. v. Davestone Holdings Ltd 1980 QB 12, (1979) 1 ALL ER 929., it was held that a tenant was liable not only for the cost of reinstating stone cladding to a building but also for the increase in cost of the work as a result of the installation of expansion joints in the cladding in order to prevent recurrence of dilapidation, not withstanding the expansion joints did not form part of the original design, or specification of the building.

Is the plaintiff requesting th of the defendant to give back to it a wholly different thing from that which it took when it entered into the covenant? In Ravenseft Properties v. Daveston (Holdings) (supra) Forbes J states:-

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

In the case under consideration the defendant covenanted to replace and repair and to keep the leased FF&E in tenantable order and repair and to keep it in good and substantial order and condition. The premises must be kept by the defendant in state of good repair and good condition during the entire term. The parts of equipment to be replaced constitutes upgraded versions of those which were in existence at commencement of lease. These are what are available on the market today. This being the case, the installation of the upgraded equipment, in my view cannot be regarded as the defendant giving back to the landlord, a wholly different thing from that for which it had covenanted at the commencement of the lease.

Dr. Barnett further urged that the plaintiff's evidence must be restricted to the condition of the equipment in 1994 when they carried out their inspection. Even if this submission were to be accepted, the defendant's own witness confirmed that their

condition of the elevators had deteriorated since 1992. It is obvious that the defendant has been in breach of its obligation to maintain the elevators and keep in proper condition and therefore must bear the cost of replacing them.

The cost of installation of the service elevator was placed at US$171,510.00 and installation J$1,1000,000.00, and cost of the passenger elevators US$231,960.00 and installation cost at $1,400,000.00.

I will now refer to the plaintiff's claim in respect of the boilers and laundry equipment. Mr. Trevor Bernard testified on behalf of the plaintiff that he inspected the boiler, plant room and laundry equipment at the hotel. I will first refer to the boiler. So far as the boiler equipment is concerned, he found that a steam boiler, two water pumps and a calorifier, were in need of descaling, the body of the boiler required repairs, the pipe leaked and an alarm bell which is a necessary requirement was absent. He opined that there ought not to be any appreciable scaling on a boiler which is properly maintained nor should there be leaks in one properly serviced, nor leaks in calorifier which is routinely maintained. Mr. MyIntyre, the defendant's expert witness, stated that the boiler has been completely refurbished and is operating satisfactorily. This I accept and find that the defendants are not in breach of covenant to repair the boiler and its attachements.

I will now turn to the laundry equipment. The plaintiff contended that a Chicago Flatwork Ironer, a Rheem Steam heated garment press are in need of repairs, while an Electrolux Wascator, two Michaelis Washers and Michaelis Dryer, a Dynowash Water Extractor needed to be replaced.

Mr. Bernard stated that on his examination of the Flatwork Ironer, he discovered that 15 of its 40 belts were missing. the other 25 were fairly new. The steam traps on the Ironer were decayed and there was much corrosion in the area where the belts were connected to the trap. The defendant's witness Mr. McIntyre, confirmed that a number of belts were missing. In fact he stated that almost one third of belts were missing. This particular piece of machinery carries forty belts. The absence of as many as nearly one third of those belts clearly demonstrates that there has been inadequacy in the system of maintenance. So too, the presence of corrosion on the equipment shows a lack of proper care in keeping equipment in good condition. These defects could not be ascribable to fair wear and tear.

He also found the Rheem Steem heated garment press to be out of service for want of repairs as it requires valves and a pnuematic cylinder. This equipment has

cylinder which have resulted in the temporary dissue of the equipment, could have arisen from fair wear and tear. In any event, the defendant in an updated report shows that this item had been refurbished. The defendant's updated report also shows that as of June 1996 the Wascator Washer, the 2 Michaelis Washers, the Dyna Washer and the Michaelis Dryer have been refurbished. This I accept. The defendant is however liable for repair of Chicago Flatwork Ironer which cost has been placed at US$1,580.00.

I will now advert to the airconditioning system. It is the plaintiff's evidence throught their witness Mr. Rowan Small, that he carried out inspection and survey of nine airconditioning units at the hotel in June 1994. They all showed signs of not having been regularly maintained. Four units had the majority of coil fins missing and the fins which remained were covered with algae. The algae reduced the significance of the heat transfer and the cooling. This affects the efficient performance of the equipment. Eight of the units were approximately 22 years old and one 12 years old at time of inspection. The estimated life expectancy of each unit was 20-25 years. Assuming the/ 22 year old units had been refurbished at the commencement of the lease, when they would have been approximately 9 years old, and assuming a regular schedule of maintenance had been observed, the units ought not to have been in the condition in which they were found by the plaintiff in 1994. The coils are significant component parts of the air handling system, if the defendant had carried out a regular system of maintenance and /servicing of the units, as they were required to do, it could not have been possible for Mr. Small to have found missing fins and growth of algae on the coils of the three units in the staff canteen, the units in the great hall foyer and those in the ballroom. It was asserted by the defendant that condition of the units was due to fair wear and tear. This is unacceptable. It is obvious their state is a result of improper servicing and poor system of maintenance.

The defendant reported that few coils had been replaced in 2 units and the cooling tower of one unit had been cleaned. It had not however, given any evidence as to the condition of the rest. I find, that the defendant is liable to the plaintiff for the repair of the eight defective units. Mr. Small stated it was substantially more expensive to repair than to replace the units. In the interest of economy, it would be prudent to replace these items. From Mr. Small's computation, the cost of replacing the items, would be $5,979,533.06 made up as follows:-

Material and labour cost plus G.C.T.	-	$4,424,162.70
C.I.F. and F.O.B & S plus C Costs	-	$ 81,579.10
Installation Costs	-	$1,473,691.26

I will now turn to the plaintiff's claim in respect of the kitchen equipment. It is necessary to state at this stage, that the plaintiff accepted that the Mister Winter 14ft. x 8ft. W.I. Combination Chiller/Freezer, a 10ft. S/S table with wooden shelves and a universal 2 section glass door refrigerator listed in their claim, had been repaired. Mr. Richard Vaz gave evidence on behalf of the plaintiff concerning the kitchen equipment. Evidence was led to items which required replacement, those in need of repairs and those requiring general service. He stated that certain pieces of kitchen equipment as listed in the statement of claim have surpassed their useful life, should be condemned and discarded. Some of these items are still in use but in poor condition, others were not in use. He was a pains to describe the condition of the chill rooms. He spoke of chill room in old pantry which was in good condition but the others were in a deplorable state, and unable to maintain the desired temperatures. He further narrated that some areas inspected by him were used as chill rooms but were in fact airconditioned insulated rooms, most of which were in poor condition, as the insulated areas were exposed and had become porous, leaving the refrigeration material in poor state.

He was offered accomodation and meals at hotel but after inspection and observing the condition of the kitchen equipment he declined to dine there. To a large extent, he was able to give an opinion as to age of equipment. He said "I would be flabbergasted if some of the equipment I listed and condemned are still in use today."

The defendant's witness Mr. Michael McIntyre reported the following items missing - Vulcan H30 Stove and Oven Blodgett convection oven FA100, Anlikner Food Processor, Silver King Refrigerator Milk Dispenser SK2 1NB, MKE Sandwich Refrigerator, Dayor Frozen Slush Machine, 2 Ice Chest C/W Cold Plate. He described the Vulcan Stove and Oven and Vulcan Griddle Top Oven H60 H72 and H45 respectively as in need of refurbishing yet in good condition. He also stated Vulcan Heavy Duty Range #HS6 was replaced by heavy duty Vulcan Range but could not give a description of the replaced equipment, when asked to do so. All other items to which Mr. Vaz referred, he reported that they were in need of refurbishing but in good condition.

I find Mr. Vaz's evidence is to be preferred to that of Mr. McIntyre. It was suggested however by Counsel for defendant, that Mr. Vaz is a supplier of equipment and likely to be prejudicial in his report, leaning towards replacement of items. It must be noted that he did not condemn all items. His recommendations included, repairs,

servicing as well as replacement. His report in my opinion, was unbiased. He condemned items, but recommended repairs and refurbishing of more items than those which he condemned. Im my opinion he submitted a far more reliable report than that of Mr. McIntyre.

It is also obvious from the internal memorandum dated September 19, 1990 passing between the Chief Engineer Mr. Joel Daley and the General Manager Mr. P. Pellegrino that there had been lack of maintenance of kitchen equipment and some had even been rendered useless. In the 6th paragraph of memorandum Mr. Daley stated:-

> "The kitchen equipment were obviously not properly maintained over a period which results in frequent breakdown and in some case totally useless."

Referring to the kitchen equipment Mr. McIntyre observed, "as general comment all equipment needed heavy cleaning." His report materially corroborates Mr. Vaz's evidence in part, in his updated report he listed the items as in need of repair. Mr. Vaz's evidence demonstrates that the kitchen equipment was not properly maintained. Additionally, the internal communication between the Chief Engineer and General Manager, the servants of the defendant, clearly demonstrates that the equipment had not been maintained over the years and therefore it could not be said that want of repair was due to fair wear and tear. The state of the equipment could only be due to neglect and lack of care on the part of the defendant.

It also follows that the items stated by Mr. Vaz as being in need of repairs or servicing had been in that condition due to absence of ongoing maintenance by the defendant and not as a result of fair wear and tear and the defendant is liable to repair. All items listed in the statement of claim as needed to be replace were worn out and must be replaced. At the time of his report in 1994, Mr. Vaz stated the total cost of replacement to be US$146,688.00 and was variable in accordance with the rate of exchange and would in June 1996 have increased by at least 7.5%. He also gave the estimate cost of each item, which was outlined in his exhibited report. He placed installation cost at J$586,672.00 with an increased of 12.5% of the capital outlay by June 1996. The cost of repairs he placed at J$339.500.00 and said that it could have increased by 15% since he prepared his report and maintenance cost he estimated to be J$66,000.00.

I will now refer to the claim for replacement of standby generators. Mr. Vincent Commock gave evidence on behalf of plaintiff in respect of two generators. His inspection of the first equipment revealed that it was in poor condition and needed

to be dismantled fitted with new parts and reassembled. The other was not functioning, as it was in a state of disrepair and need to be replaced.

So far as the generator which needed repairs is concerned, he stated that the engine was grey in colour on examination, which indicated that there was entry of water in lubricating oil,contaminating the oil and damaging the engine if regularly serviced, this condition would not have prevailed. The smoke from exhaust system of equipment was also grey in colour which indicated that the injectors were in need of servicing. If proper maintenance had been conducted this condition would not have occured. The defendant even failed to maintain a log book, recording servicing, which is necessary. The defendant's statement that the condition of the generator is due to to fair wear and tear is unacceptable. Its condition as described by Mr. Commock, whose evidence I find reliable, clearly shows that the generator had not been maintained over the years. This being so, the state in which it was found was a consequence of poor maintenance by reason of neglect on the part of the defendant to adhere to proper maintenance programme and not as a result of fair wear and tear.

In relation to the second generator, it is the defendant's admission that it needed replacement but its condition was due to fair wear and tear. So far as the defendant's liability for replacement is concerned the question of fair wear and tear does not arise. The defendant is under an obligation to replace the generator.

The defendant is liable to repair one generator the cost of which has been placed at $113,052.00 and to replace the other genarator at a cost of US$42,000.00 with cost of installation at J$232,733.50.

I will now address the issue as to whether the defendant is obliged to furnish the plaintiff with balance sheets together with monthly statements. In an effort to do so, it is vital to scrutinize Clause 7(30) of the lease which is expressed in the following terms:-

> "On or before the fifteenth (15th) day following the end of each calender month, commencing with the fourth (4th) month of the term, to funish the landlord with a monthly statement of the operations of the Hotel prepared in accordance with the Uniform Systmen of Accounts, referred to in Clause 9 (22) hereof, and containing the additional operating and financial information in respect of the Hotel, for the proceding calender month set out in the SIXTH SCHEDULE hereto. The Landlord shall have the right to require the monthly statements provided for herein to be certified by the Lessee's auditors, provided that the costs of such certification shall be borned by the Landlord, except in any instance where such monthly statements are found to be materially inaccurate in relation to the computation of any amount due to the Landlord

> under this Lease. On or before the one hundred and twentieth (120th) day following the end of each of its fiscal years, the Tenant shall also furnish the Landlord with an annual Statement certified by a Chartered Accountant licensed to practice in Jamaica, showing the usual expanded form such operating and financial information in respect of the operation of the Hotel and any other business carried on by the Tenant during the previous annual period."

This Clause provides for the preparation by the defendant of monthly statements of the operation of hotel in conformity with Uniform System of Accounts. These statements to be submitted to the plaintiff on the first day after the end of each calendar month. The first paragraph of page 1 of the Uniform System of Account provided as follows:-

> "A complete set of financial statements of income, includes a balance sheet, a statement of income a statement of owners equity, a statement of changes in financial position and disclosure necessary to comply with generally accounting principles."

The foregoing clearly prescribes that a balance sheet ranks an integral part of financial statements.

The uniform system of accounts which forms a part of the covenant which the defendants is under a duty to obey, designates balance sheets as part of financial statements. The lease requires remittance of monthly statements by the defendant to the plaintiff. The evidence discloses that the defendant had customarily supplied balance sheets to the plaintiff from the commencement of the laase until mid 1991. It is unmistakenly evident that the defendant had, prior to 1991, always interpreted the provision in the lease as one which required submission of balance sheets with monthly statements of accounts. The financial statement is a medium through which the plaintiff can check the accuracy of the additional rent payable. Although Mr. Prud'homme stated that the balance sheet was not the only available source from which the plaintiff could obtain the information and that they could have access to it by requesting the figures from him nonetheless proceeded to state that he would refuse to supply the information on the ground of confidentially. Notwithstanding the additional rent is paid biannually, the plaintiff is entitled to know whether the rental had been accurately calculated by the defendant.

In my opinion the defendant is under a duty to furnish balance sheets with monthly statements, such statements being part of the financial statements. Failure to do so, is clearly a breach of its obligation to the plaintiff.

A further issue to be addressed is whether it is an implied term of the lease that the defendant would not incur and charge against the hotel any expenditure not reasonably required for its operation. The question here is whether the expenses incurred by the defendant in leasing office space in Brussels reasonably related to the operation of the hotel and was reasonably required for that purpose.

It was plaintiff's evidence that in 1992 a new account entitled 'Office Rental' - Europe' was presented in the sales and marketing expenses of the hotel. This expenditure was significant. The charges stood at $4,023,320.00 for the year 1992, $2,397,006.00 for year 1993 and $3,406,133.00 for 1994 and $4,102,421.00 for 1995. These related to rental of office space in Belgium charged to the hotel.

It was also contended that the effect of this expenditure would be to reduce the additional rent payable and in calculating additional rent only expenses which related to and were reasonably required for the hotel's operation should be charge against the income of the hotel. The defendant maintained that rental of office space in Brussels was permissible under the lease and was necessary to engender promotional activities for the benefit of the Trelawny Beach Hotel and therefore reasonable. To this end, office space comprising of 203.3 square meters (2000 sq. ft.) was used as an exhibition centre exclusively for the exposure of the hotel.

An amendment to the lease restricts the sale and marketing expenses to 10% of the gross revenue. The lease provides for the deduction by the tenant of operating expenses of the hotel except management fees and similar payments. This notwithstanding, it cannot be inferred that the parties intended that the tenant was at liberty to charge any item it desired against the income of the hotel. The test of reasonableness as to the Sales and Market expenses must be imported. Consequently only expenses which were reasonable ought to have been charged against the income of the hotel.

To satisfy the test of reasonableness, it must be shown that the expenses incurred were not only reasonably required for the operation of the hotel, but also necessary. Mr. Prud'Homme declared that the impact of the Gulf War in 1991 led to worldwide insecurity and lack of confidence which adversely affected tourism causing a decline in hotel occupancy. He also asserted that the post Gulf War period saw a recession in North America from which majority of the hotel's patrons originated. The European economy was vibrant. He took a decision to intensify marketing efforts from mid 1991 in European

market to recoup the possible loss of the hotel's market share. This he did, by renting office space in Brussels to expose Trelawny Beach by the means of trade shows, travel exhibitions, meetings with airlines personnel, tour operators and travel agents. In my opinion a project designed to promote hotel by activities described by Mr. Prud'Homme at a time when there was a decline in the local tourist industry is reasonable and necessary. However, his lack of candour in material aspects of his evidence as well as blatant discrepancies therein, render the reasons advanced by him unconvincing. It is difficult to comprehend why he elected to rent office space of 203.3 meters to promote Trelawny Beach only, in light of the evidence that there were other hotels within the Warwick Group of hotels managed by him, the promotion of which were launched from Denver, or New York offices. It could not be regarded necessary or reasonable for the operation of the hotel for him to have rented space of this magnitude which is three times as large as the area used by the New York office to promote several other hotels within the Warwick Group.

The enigma surrounding the rental of the Brussel's office space has further manisfestation in paragraph 1 of Rental Agreement between Royal Warwick S A and Cornwall Holdings Ltd. Which is expressed as under:-

> "Due to the disposing of an office space that is available at the time of the signature of the present agreement and until he decides about the future use of this space for his own needs he puts the space at Lessee's disposal."

Royal Warwick S.A. is a company related to the Warwick Group, the company had space which was not being used, and the space was being made available until a decision about the "future use of the space for his own needs," could be made. Clearly, this does not conform with ordinary commercial standards in a lease. Mr. Prud'Homme is a signatory to the lease. He is vice-president of Warwick International Hotels which are owned or leased and operated by the Warwick Group. Cornwall Holdings Ltd. is a subsidiary of Warwick International Hotel. It is patent that the object of this exercise was one of convenience for the defendant and not for the benefit of the hotel.

It follows therefore that the defendant is liable to the plaintiff for sums expended on rental of office space in Brussels. Its liability to the plaintiff for the year 1992 is 30% of $4,023,320.00 which amounts to $1,206,996.00. In 1993 the defendant deducted $2,397.006.00 for Marketing and Sales expenses and added back the sum of

$83,000.00 to the gross income of the hotel. The liability of the defendant for the year 1993 stands at $694,201.80 which is 30% of $2,314,006.00 i.e. $2,397,006.00 less $183,000.00. In 1994 the defendant returned the complete sum of $3.5 million of marketing expenses to the gross income. The plaintiff consequently withdrew claim for that year. For the year 1995 the defendant's liability amounted to 30% of $4,102,421.00 which is $1,230,726.30.

An additional matter which falls for consideration is whether the defendants is in breach of covenant 9(22) of the lease. This section states inter alia that "the tenant shall keep full and adequate books of account and other record reflecting the results of the operation of the hotel."

The question which emerges, is whether the tenant, by implication, is under a duty to maintain records and accounts in keeping with prescribed accounting practices. In my opinion the criteron by which the defendant should be judged is whether, in its accounting practices and procedures it has conformed to the standard practices dictated by ordinary accounting norms.

In December 1992 the defendant's auditors Messrs. Deloitte & Touche found that between December 1991 and April 1992, the state of bad debts written off by the defendants was as follows:-

	December 1991 J$	April 1992 J$
Write offs	1,870,043.00	400,294.00
Provisions	68,200.00	65,000.00
	1,938,243.00	465,294.00

The following were listed as significant written off debts:

		December 1991	April 1992
Sunburst Holidays	-	385,174.00	103,131.00
Apple East	-	74,152.00	
Apple West	-	226,853.00	
Funway Holiday	-	64,945.00	
Hayes & Jervis	-	164,269.00	
Interworld Travel	-	41,593.00	
Jamaica Air Tours	-	35,835.00	
Key Tours	-	565,230.00	
		233,022.00	272,380.00
		1,791,073.00	375,511.00

The defendant did not provide auditors with details of any invoices or dates of various transaction, but stated bad debts that were written off dating to 1990. The defendant's documentary evidence showed a deplorable accounting situation. They attributed the circumstances of bad debts to the absence of material to support the amounts written off, error and discrepancies resulting from improper monitoring of application of payments received against outstanding balances receipts not credited to accounts - and dishonoured cheques.

Although there was detailed reconciliations of amounts written off, the balances in reconciliation in some instances could not be related to the travel agents ledgers. There is no evidence of any efforts made by defendant to collect outstanding amounts notwithstanding Mr. Prud'homme stating that there was. It is logical that the defendant ought to have written to the debtors demanding amounts and to have taken whatever steps that were necessary to recover outstanding indebtedness as ordinary accounting principles dictate that this be done.

Further, by its internal accounting documents the defendant listed potential bad debts as of November 1991 in the amount of US$116,009.62 less US$17,471.28, advanced no reason for the deduction of this amount from the total but proceeded to give similar reason as those already cited for failure to collect outstanding sums and for the state of the bad debts.

Mr. Markham an auditor and the defendant's own witness confirmed that the auditor's report showed that there were problems with defendant's record keeping and accounts and that there were deficiencies with defendant's book-keeping accounts. Mr. Prud'homme admitted that auditors report showed that accounts department did not keep proper books and records.

Mr. Prud'homme made reference to existence of an'outrageous CAMPAIGN' conducted between 1991-1993 at the hotel where guests were offered a second stay, of a week, free of cost, if they decided to stay for a period beyond their appointed stay. The tour operators would be charged the full amount and the concession of free stay would be discounted in favour of the tour operator. This scheme seems mystifying, as no mention of it was communicated to auditors, by the accounting department in their internal memoranda, notwithstanding Mr. Prud'homme's statement that the old accounts staff had been aware of this. Obviously, if such a campaign did exist reference would have been made to it by the accounts department and the auditors.

The defendant must be regarded as negligent in failing to secure invoices to support credit offered by them. It is under an obligation to apply payment received for

particular debt towards that debt and cannot apply same to old balance. The pattern of evidence exhibited by the defendant shows improper accounting practice and it is therefore liable to the plaintiff for failure to collect outstanding amounts. The defendant is obliged to account to plaintiff for the sum of $672,301.12, representing 30% of debts written off in 1991 and January to April 1992, which is computed as follows:- 1991 - 30% of $180, 043.00 less $29,332.65 for dishonoured cheques - $552,213.12; 1992 - 30% of $400,294.00 - $120,088.20.

Having found that the defendant is in breach of Clause 7(3) (b) and 7 (4) of the lease it is apt to consider the remedies available to the plaintiff. Leading Counsel for the defendant argued that the plaintiff cannot avail itself of damages or specific performance. In relation to damages, it was submitted that damages for breaches of covenant to repair can only be pursued at the termination of the lease and if action is commenced during the terms of the lease, damages can only be obtained in respect of the diminution of the value of the reversion and must be specifically pleaded, and this the plaintiff had not done. He made reference to a few cases which I do not think necessary to state, though it is desirable that I should recite the principle established by those cases, which is, the appropriate measure of damages available to a lessee in an action commenced during the term of the demise, for a breach of covenant to repair, is the diminution of the value of the reversion. It is necessary to point out, that the relief sought by the plaintiff under S 7 (3) (b) and S. 7 (4) of the lease is specific performance and not damages.

Can the plaintiff obtain specific performance? Dr. Barnett cited a number of cases of some vintage, the gravamen of which is that the Court will not decree specific performance of a contract to build or repair. It is correct to say that the Court does not usually order specific performance of contracts which involve continuous acts or which require its supervision. The modern approach however, indicates that the Courts are willing to enforce contracts requiring continuing acts or supervision provided certain conditions are satisfied. To this end, Lord Eldon R.C. In Shiloh Spinners Ltd. v. Harding (1973) 1 All ER at page 102 asserted:-

> "Where it is necessary, and in my opinion right, to move away from some 19th century authorities, is to reject as a reason against granting relief, the impossibility for the Courts to supervise the doing of the work. The fact is a reality, no doubt, and explains why specific performance cannot be granted of agreements to this effect but in the present context it can now be seen (as it was seen (as it was seen by Lord Erskine L.C. in Sanders v Pope) to be an irrelevance: for what the Court has to do is to satisfy itself, ex post fact, that the covenanted work was been done, and it has ample machinery, through certificates or by enquiry to do precisely this."

A number of recent cases have shown that Courts will decree specific performance of a contract to build or repair where the work to be done is defined by contract between the parties. In Honnslow LBC v Twickenham Garden Development Ltd (1971) 1 Ch 233, it was held that a building contract for execution of specified works on a site during a specified period was specifically enforceable.

The authorities also demonstrate that the specific performance will be ordered in case of building contract if the work is specified in the contract between the parties, the plaintiff has substantial interest in performance of contract, the contract is such that compensation in damages would be inadequate and the defendant is in possession of the land on which the contracted work is to be performed. The same by analogy must apply to contracts to repair.

In Tito v. Waddel No (2) 1 Ch. 106 at pg. 322 Megarry V.C. declared:

> "The real question is whether there is sufficient definition of what has to be done in order to comply with the order of the Courts. That definition may be provided by the contract itself or it may be supplied by the terms of the order, in which case there is a further question of whether the Court consider that the terms of the contract sufficiently supports, by implication or otherwise, the terms of the proposed order."

The guiding principle therefore, is whether the work to be done is sufficiently defined by the parties to the contract, expressly or impliedly, to allow the Court to make an order permitting the defendant to know what he has to do to comply with the order and whether damages would be an adequate remedy.

The work to be done by the defendant had been specifically stated in the lease agreement, that is to repair and, or replace items of FF&E. The agreement has precisely stated the extent of the work to be done. The defendant was aware of what was to be done. There is no uncertainty or ambiguity as to scope and extent of what the defendant was required to do. The area of its responsibility had been clearly defined. This being so, the defendant should carry out the work required by replacing or repairing as the case maybe, those items of FF&E which have been found to be in need of repair or replacement.

The defendant convenanted to keep the FF&E in good and substantial repair and condition by maintaining, repairing and replacing where necessary the FF&E. The defendant has failed to observe the requisition under the covenant in relation to certain

items of FF&E and is therefore under obligation to repair or replace them.

I will now direct my attention to the plaintiff's claim for interest pursuant to the Law Reform (Miscellaneous Provisions) Act S.3 which provides:-

> "In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which Judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole sum or any part of the period between the date when the cause of action arose and date of the Judgment."

The present case is one in which the defendant is found liable in debt to the plaintiff and therefore falls within the parameter of cases which may attract interest at commercial rates under the foregoing provision of the Act.

In dealing with the basis on which interest ought to be awarded in commercial cases Forbes J, in Tate and Lyle Food Distribution Ltd. v. Greater London Counsel and Aver (1981) 2 All E.R. 716 at page 722 declared:-

> "I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the plaintiff would have had to borrow money to supply the place of that which was wrongly withheld. I am also satisfied that on should not look at any special portion in which the plaintiff may have been; one should disregard for instance, the fact that a particular plaintiff because of his personal situation could only borrow money at a very high rate or, on the other hand, was able to borrow at specially favourable rates. The correct thing to do is to take the rate at which the plaintiffs in general could borrow."

This statement I adopt.

In S.C.C.A. 114/94 British Caribbean Insurance Ltd. v. Delbert Perier our Local Court of Appeal held that in award for payment of interest by a defendant in commercial cases, the rate should be that at which the plaintiff would have had to borrow money in lieu of the money wrongfully withheld by the defendant and the plaintiff is at liberty to proffer evidence/demonstrating the rate of interest at which such money could have been borrowed.

The plaintiff is entitled to receive payment of interest on the debt due and owing by the defendant. Such interest should be paid, at the commercial rates prevailing between 1992 and 1996 as those would have been the rates at which the plaintiff would have been required to borrow money, if the necessity had arisen, in place of that which had been wrongly withheld by the defendant.

There is evidence contained in statistical statements exhibited relating to domestic interest rates. These statements outline the rates of interest paid on deposits by commercial banks between September 1988 and February 1996. Although these are rates paid on deposits, the plaintiff could have borrowed at these rates. The rates of interest paid between January 1992 and February 1996 were as follows:-

1992	-	35.53
1993	-	28.20
1994	-	31.82
1995	-	21.85
1996	-	29.44

If the plaintiff had to borrow the sum found due and owing to it by the defendant from a commercial financial institution between 1992 and 1996, it would have to pay an average minimum rate of interest as follows:-

March 1, 1992 to October 1996	30.09 per annum
March 1, 1993 to October 1996	28.73 per annum
March 1, 1994 to October 1996	28.91 per annum
March 1, 1996 to October 1996	29.36 per annum

The defendant, having deprived the plaintiff of money which it would have had if the defendant had not retained it, is liable for interest as follows:-

30.09% on the sum of $552,213.00 from March 1, 1992 to the date of Judgment.

28.73% on the sum of $1,206.996 from the 1st March, 1993 to date of judgment.

28.91% on the sum of $694,201.80 from the 1st March, 1994 to date of Judgment.

29.36 from March 1, 1996 on the sum of $1,230.760.00 to the date of Judgment

28.73 on the sum of $120,088.20 from March 1, 1993 to the date of Judgment.

Finally, I must make reference to the defendant's counterclaim, the first of which is for damages for breach of quiet enjoyment whereby it alleges that the plaintiff subjected the defendant to harrasment through missives which were repugnant in tone and it embarked on a course of baseless attacks on the defendant and on several occasions the plaintiff's agents presented themselves at the hotel without giving due notice as required by the lease. A covenant for quiet enjoyment of demised premises secures for the tenant a right to enjoy the property free of interference or interruptions from his landlord. Where the ordinary and lawful enjoyment of premises is interfered with by the landlord, the covenant is broken. It is however a question of fact whether interference has taken place.

The authorities have shown that to constitute a breach there must be some physical interference. No evidence has been adduced by the defendant to show that there has been any physical interference by the plaintiff to prevent it from lawfully enjoying the property. Mr. Prud'homme narrated that he objected in principle to a wall which was built by the plaintiff adjacent to the tennis court but went on to say "I had no objection in keeping it, as it was already built." He said many months after wall was built he complained about it as he had not received formal notice before the wall was constructed. The defendant made reference to the plaintiff's agent attending on one occasion to carry out inspection without first giving the forty-eight hours notice required. The isolated occasion cannot be regarded a breach, of quiet enjoyment. The defendant's claim under this head cannot be sustained.

The second claim of the defendant is for damages as a consequence of improvements carried out by it, resulting in appreciation of the value of the property. The defendant is by virtue of the lease bound to refurbish the property. There is no evidence adduced to establish that the defendant had done more than it was required to do to keep the property in good and substantial repair and condition. The defendant's claim under this limb also fails.

IT IS HEREBY DECLARED THAT :

1. The Defendant is in breach of Clause 7(4) of lease dated November 26, 1981;

2. The Defendant is in breach of Clause 7(30) of the said lease;

3. The Defendant is in breach of Clause 9(22) of the said lease;

4. **IT IS ORDERED THAT THE DEFENDANT:**

A. (i) Replace the following Air Handling units with new ones:-

(a) Model 39BA050 serving Staff Canteen and located in General Store.

(b) Model 39BA050 serving Staff Canteen and located in Stationary Room.

(c) Model 39BA060 serving Staff Canteen and located in General Store.

(d) Model 39BA070 serving Accounts and located in Accounts.

(e) Model 39BA080 serving Greater Hall Foyer and located in Ladies Bathroom.

(f) Model 39BA080 serving Rum Keg Disco and located in Plant Room

(g) Model 39BA090 serving Ball Room and located in Ladies Bathroom.

(h) Model 39BA090 serving Ball Room and located in Old Pantry.

Estimated cost: J$5,979,532.06

B. (i) Replace the Stanby Generating Plant-AC Alternator AEG

Rotauct TypeDKbl a 284/04-DEA 226 - 3Ph. No. 72-463092

Y416/208 Volt. with a new generating plant of equal capacity.

Estimated cost: US$42,000 (Equipment) + J$232,733,50 installation)

(ii) Repair and put in good operating condition the 92KW All Power Generating Plant Serial No. 2025-1

Estimated cost:JS113,052.00

C. (i) Repair and put in good operating order the following items of laundry equipment:

(a) The Chicago Flatwork Ironer Model No. SA 30-120-R Serial No. 28017;

Estimated cost: US$1,769

D. (i) Replace the following items of kitchen equipment:

1 Vulcan H 30 Radial Fin Hot

Top W/Oven

1 Vulcan H72 Heat Top W/Oven

1 Vulcan H45 4 Burner Range W/Oven

1 Vulcan H60 Griddle Top W/Oven

1 Blodgett Single Section Convection Oven

1 Vulcan 36L77R 6 Burner

Ranger W/Oven

1 S/S Urn Stand W/Galvanized Base 8'

2 Vulcan 40 Gallon Stationary Steam

1 Tabco 12'S/S Table W/Gal. Undershelf

1 Custom Fabricated Painted Pot Rack

1 Single Comp Pot Sink

16' Baine Marie Fabricated Shelving Units

16' S/S Table

1 Hobart CRS103 Conveyor Type

Diswasher W/Dish table

1 Anlinker Food Processor

1 Single Comp. Sink

1 12' Urn Stand S/S

2 Toast Master 2 Drawer Hot

Food Servers

1 Silver King SK21NP Refrigerated

Milk Dispenser

1 Cecilware FE200 6 gallon

Coffee Urn

1 Hobart 5212 Meat Saw

1 Biro Meat Saw

1 Custom Configured and Built

Cold and Chilled Rooms in Old Pantry

2 Custom 6' Maple Top Bakers

Tables

1 Custom Wooden Work Table

1 Hobart C44A Conveyor Type

Dishwasher W/Dishtables

1 2 Section Refrigerator

1 Cecilware 2 Burner Hotplate LPG

1 36" Griddle LPG

1 4 Burner Hotplate LPG

1 MKE Sandwich Refrigerator

1 Custom Wooden Top Table W/Base

1 3 Comp. Under Sink

1 Taylor Frozen Slush Machine

1 Ice Chest W/Cold Plate

2 Ice Chest W/Cold Plate

Estimated cost of equipment: US$157,000.00

Estimated cost of installation: J$749,075.00

(ii) Repair the following items of kitchen equipment:

1 Aquatem 3 Burner Oven

1 Hobart 512 Meat Slicer

1 4' Baine Marie

1 10' x 14' Walk-in Combi Chiller/Freezer

1 Custom 20' Exhaust Canopy - Painted

Galvanized Sheet Metal

1 Hatco Conveyor Toaster

1 18' S/S Base W/Double Overhead

Shelves-Overhead Heat Lamps

1 Griddle W/2 Burner Hotplate

1 Vulcan TK35 Deep Fat Fryer

1 Bev.Air DW49D Bottle Cooler

2 3 Comp Bar Sink

1 Bev. Air DW49 Bottle Cooler

1 6'x 10' Diary Cooler

Estimated Cost of repairs: J$390,425.00

E. Replace the existing passenger and service elevators with new elevators.

Passenger Elevators

Extimated cost: US$231,960 (Equipment) + J$1,400,000 (Installation)

Service Elevators

Estimated cost: US$171,510 (Equipment) + J$1,100,000 (Installation)

5. In the event that the Defendant fails to comply with paragraph 4 of this order or any part thereof within thirty days of the date of this Order, or within such extended period as the court may order the Plaintiff shall be at liberty to effect the relevant repairs and replacements and to recover from the Defendant the costs of doing so, not exceeding the estimated sums indicated in paragraph 4 hereof.

6. There be judgment for the Plaintiff in the sum of $3,804,225.30 with interest:

a) On $1,206,996.00 at 28.73% from March 1, 1993 to the date of judgment;

b) On $694,201.80 at 28.91% from March 1, 1994 to the date of judgment;

c) On $1,230,726.30 at 33.06% from March 1, 1996 to the date of judgment;

d) On $552,213.00 at 30.09% from March 1, 1992 to the date of judgment;

e) On $120,088.20 at 28.73% from March 1, 1993 to the date of judgment.

7. The counterclaim is dismissed.

8. Costs to the Plaintiff to be agreed or taxed.