[2019] JMCA Civ 46

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 24/2013

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**IMPLEMENTATION LIMITED**	**APPELLANT**
AND	**SOCIAL DEVELOPMENT COMMISSION**	**RESPONDENT**

SUPREME COURT CIVIL APPEAL NO 32/2013

BETWEEN	**SOCIAL DEVELOPMENT COMMISSION**	**APPELLANT**
AND	**IMPLEMENTATION LIMITED**	**RESPONDENT**

Ransford Braham QC and Mikhail Jackson instructed by Livingston, Alexander & Levy for Implementation Ltd

Miss Carla Thomas instructed by the Director of State Proceedings for the Social Development Commission

7, 8, 12 April 2016 and 20 December 2019

PHILLIPS JA

[1] These appeals stem from a claim filed by Implementation Limited (IL) against the Social Development Commission (SDC) to recover, *inter alia*, rent and other expenses incurred for premises that it had leased to SDC, comprising 84 acres, located at Stonehole and Cumberland Pen in the parish of Saint Catherine (the premises). In

response, SDC filed a counterclaim against IL to recover sums for unjust enrichment from the said premises. On 31 January 2013, Campbell J entered judgment for IL on the claim and counterclaim, with interest and costs to IL to be taxed if not agreed.

[2] Both parties were dissatisfied with certain aspects of this judgment. IL was the first to file its notice and grounds of appeal on 14 March 2013, which was later amended. IL's challenge was essentially:

(a) to interest being awarded only with respect to the cost for security to the premises;

(b) that the learned judge failed to appreciate the commercial nature of the transaction between the parties, and therefore erred in not utilising a commercial rate of interest in making his award;

(c) that the learned judge erred by failing to rely on the evidence before him of the commercial rate of interest; and

(d) had failed to give reasons why he had not awarded the commercial rate of interest on the sums awarded by him.

IL therefore sought orders with interest calculated at the commercial rate on all the sums awarded to it by Campbell J.

[3] SDC filed its notice and grounds of appeal on 5 April 2013, which was also later amended. It stated that the learned judge had erred:

(a) in his treatment and/or interpretation of SDC's pleaded case, and its effect on the case advanced at trial;

(b) his finding that a fixed term tenancy was in force at the time that SDC vacated the premises in question; and

(c) in not treating the arrangement between the parties as a monthly tenancy.

SDC sought orders that the appeal be allowed; that the judgment of Campbell J be set aside; and that judgment be awarded to SDC; or alternatively, that the appeal be allowed; and the damages awarded to IL be reduced.

[4] At the hearing of these appeals, IL raised a preliminary point that SDC was attempting to argue matters that were not argued in the court below, and findings not appealed against, such as the finding that SDC should not have been permitted at trial to raise a case that had not been set out in its pleaded further amended defence. SDC acknowledged that it had not included a specific ground of appeal challenging the court's finding that SDC's case at trial was different from its pleading, but counsel for IL agreed to withdraw its objection once SDC filed an amended notice of appeal including that specific ground. That was done.

Background

[5] In order to properly analyse the grounds raised in both appeals, a detailed and thorough assessment of the background facts and chronology of events is necessary.

The facts are captured from the judgment of Campbell J and a series of correspondence between the parties.

[6] IL is a company registered under the Companies Act 1967 which provides "real estate consulting services and undertakes project and construction management". SDC was "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 own name. It is made up of the chairman and other members appointed by the Minister who are empowered to give directions as to the policy to be followed by SDC in the exercise of its functions.

[7] In or about 1994, IL had entered into a lease with the Commissioner of Lands (COL) in respect of the premises described at paragraph [1] herein. The lease was for a term of 25 years with an option to renew for another 24 years (the head-lease). By letter dated 12 July 1993, the COL gave IL permission to share occupation and possession of the premises with JamWorld Limited (JamWorld). Between 1994 and 1997, IL and JamWorld developed a part of the leased premises into an entertainment complex known as JamWorld Entertainment Centre (JamWorld Centre) in accordance with the terms of the head-lease.

[8] In a letter dated 27 April 1998, SDC wrote to JamWorld and IL expressing its desire to either lease the said premises, or to enter into a joint venture with JamWorld with the objective of:

> "i) creating sustainable income generating projects within the sector based on community participation

ii) [developing] vocational training programmes that will strengthen the capacity of the sector to be more professional and productive

iii) contributing to the development of the infrastructure of the industry."

[9] In response to that letter, IL, in a letter dated 14 May 1998, referred to a meeting held on 13 May 1998 which had been attended by representatives from both IL and SDC. That letter confirmed JamWorld's willingness to enter into a long term lease with SDC in respect of JamWorld Centre, and proposed the following terms and conditions:

"i. 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 15 year term if the option to renew after 10 years is exercised.

ii. Lease payment commencing at Ja$140,000.00 per month. Please note that in addition to the payment of Ja$130,000.00 which we discussed at our meeting, we have a lease agreement with the Commissioner of Lands requiring a payment equivalent to Ja$10,000 per month.

iii. The above payment to be fixed for a term of five years conditional upon the amount being fixed at the Ja$ equivalent of US$3,835.62 per month, i.e. Ja$140,000 converted to US$ at a rate of exchange of Ja$36.50.

iv. The lease to commence on July 1, 1998 subject to both parties signing a letter of intent if a final lease document is not available for signing.

v. After five years the lease payment (fixed in US$ but converted at the Ja$ equivalent) to be increased by a

formula reflecting one or a combination of the following:

a. An increase of 25%

b. An increase equivalent to the percentage increase in the Consumer Price Index as published by Statin between July 1, 1998 to June 30, 2003

c. The average of two independent market appraisals, one appointed by the SDC and the other by JamWorld Ltd

vi. After ten years the lease payments to be increased similar to the formula at v. above.

vii. If the lease is renewed by the SDC after the 15 year term has expired, the lease payment is to be determined by the average of two independent market appraisals, one appointed by the SDC and the other by JamWorld Ltd.

viii. The SDC to be responsible for all utility payments including electricity, water and telephone.

ix. The [premises] has not been assessed for [premises] taxes but should they become payable the lease payment to be increased by the actual amount of taxes assessed.

x. The SDC to be responsible for the regular maintenance of buildings, plant and equipment and replacement of items lost or destroyed.

xi. The SDC to seek the approval of JamWorld Ltd for capital improvements to the [premises] individually costing in excess of J$500,000. Such approval will not be unreasonably withheld by JamWorld Ltd and a failure by JamWorld Ltd to respond within 14 days to any request by the SDC will constitute automatic approval.

xii. The SDC agreeing to the participation by JamWorld Ltd in the organisation and promotion of the annual Caribbean Heritagefest festival held during the National Heroes Day celebrations."

IL ended the letter by expressing its hope that the parties would be able to conclude an early agreement in respect of the leasing of the facility.

[10] By letter of 27 August 1998, SDC wrote to IL referring to the letter of 14 May 1998, and the terms and conditions for the lease outlined therein, and confirmed SDC's agreement with: (i) the lease payment of $140,000.00 per month; and (ii) all other terms and conditions except the annual increase and the commencement of the lease. Instead, SDC proposed 1 October 1998 as the commencement date of the lease, and further proposed an annual increase of the lease payment fixed at 20% after five years. The letter ended saying "I trust you will find my counter proposals agreeable and will proceed with the preparation of the necessary documents for signing".

[11] On 5 September 1998, IL wrote to SDC referring to the letter of 27 August 1998, and in response to IL's proposals contained in the letter dated 14 May 1998. IL indicated that it had accepted the terms and conditions of the proposal set out in the letter of 14 May 1998, other than, the formulae of the increases in lease rental payments, and the commencement date of 1 July 1998. IL then indicated its acceptance of the revised commencement date of 1 October 1998, and proposed a means of computing an increase in the lease rental payment to take account the impact of inflation. The letter ended with the following:

> "When we have received your response to this letter we will instruct our attorneys to prepare a formal lease document but will accept its commencement as October 1, 1998 by issuing a letter of intent with possession being granted.
>
> We look forward to your early response."

[12] By letter dated 30 September 1998, SDC accepted the proposals set out in the letter of 5 September 1998, in respect of the lease arrangements. In fact, it stated that it accepted the "new terms specified in [IL's] proposal for increase in lease payments for each succeeding anniversary of the first five years of the lease term". The letter ended with this instruction: "Kindly advise your attorneys to prepare the formal lease document for our signatures".

[13] SDC therefore went into possession on or about 1 October 1998.

[14] IL wrote a letter to SDC dated 4 December 1998 enclosing two copies of the lease agreement. The lease had already been executed by IL, and therefore IL requested that SDC execute the same. IL explained that the lease was in the name of IL, as lessee (and presumably not in the name of Jamworld), as IL was the lessee in the head-lease with the COL. The letter ended in this way:

> "Please note that the terms of the lease are in conformance with [IL's] letter to the [SDC] dated September 5, 1998 which [the SDC] in turn accepted by their letter dated September 30, 1998.
>
> We look forward to your response."

That concludes the series of correspondence between the parties concerning the essential terms of the lease.

[15] On 26 February 1999, IL wrote to SDC referring to SDC's request to obtain an option to purchase IL's interest in its lease with the COL including the value of improvements. IL agreed to that request and had proposed various terms and conditions.

[16] IL again wrote to SDC on 22 March 1999, asking SDC to execute the copies of lease agreement. IL also sought a response to that letter in order to incorporate the option to purchase clause into an amended lease agreement, and IL also referred to outstanding lease payments and other reimbursable costs that had been due to IL since 1 January 1999.

[17] On 4 May 1999, IL wrote to SDC enclosing, *inter alia*, a copy of the lease agreement with specific reference to the proposed terms of SDC's option to purchase; and a statement of outstanding arrears.

[18] SDC responded to IL in a letter dated 6 May 1999, indicating its agreement with the terms and conditions of the option set out in the letter of 26 February 1999, and confirmed that the option to purchase related to IL's interest in the premises including the value of the improvements. SDC also invited IL to instruct its attorneys to amend the lease agreement to reflect that option.

[19] On 10 June 1999, IL sent the follow-up to the letter of 6 May 1999 to SDC. It recognised SDC's confirmation of the option terms, and enclosed two copies of the amended lease, duly executed by IL, which SDC was also invited to execute.

[20] In correspondence dated 29 June 1999, SDC suggested to IL that rather than entering into a sublease, it should consider assigning the original lease to SDC, or surrendering the lease in its favour.

[21] Counsel for IL, Mr Malcolm McDonald, responded in a letter dated 23 July 1999, agreeing to SDC's suggestion on the terms stated in the option to purchase outlined in the lease.

[22] In its response dated 29 July 1999, SDC wrote to counsel for IL stating its acceptance of the relevant terms in the option to purchase.

[23] In a letter to the COL dated 23 September 1999, counsel for IL acknowledged receipt of a letter from the COL dated 23 August 1999, in response to a letter from counsel for IL dated 4 June 1999, and a notice of breach from the COL to IL dated 24 August 1999. Counsel, on IL's behalf, denied breaching clause 1(e) of the lease which required IL to develop and construct an entertainment centre within two years of the date of the lease subject to required laws. He indicated that IL had made improvements to the premises which had generated substantial revenue, and that it had received the requisite governmental approval for all such improvements.

[24] In that same letter, counsel for IL also denied breaching clauses 1(d) and (i) of the head-lease which speak to covenants not to assign, underlet, grant licence or otherwise part with possession of the premises without first obtaining the COL's prior written consent, which was not to be unreasonably withheld, particularly if granted to a reliable responsible person. He indicated that it was SDC who had approached IL about leasing the premises, and that the lease "gives IL the right to assign its interest to a sub-lessee in the case of a reliable and responsible person and that [the COL] is prevented from unreasonably withholding [its] consent". Counsel apologised for not

seeking the COL's prior written consent, and asked that the COL withdraw the letter of 23 August 1999 and the notice of 24 August 1999, failing which, IL would withdraw the permission IL had given to SDC to use the premises.

[25] Counsel for IL also wrote to SDC on 23 September 1999, indicating that SDC was put into possession of the premises "pending finalisation of arrangements to assign the lease" in order to accommodate plans that SDC had for the Portmore community. He stated that the COL, in its letter dated 23 August 1999, indicated that she would not consent to its arrangements with SDC, and further indicated that it wished to deal with SDC directly. Counsel wrote that such a position had serious legal implications and so he was placing SDC on notice of IL's intent to terminate its possession of the premises, unless the COL withdraws her letter and notice of breach, and consents to IL assigning its interest in the premises to SDC.

[26] By letter dated 30 September 1999, counsel for IL indicated to SDC that no response had been forthcoming from the COL, and so it was issuing one month's notice with effect from 1 October 1999 to quit and deliver up possession of the premises on or before 31 October 1999.

[27] On 5 November 1999, counsel for the COL wrote in response to counsel for IL's letter dated 23 September 1999, indicating that she was reviewing the contents of the letter with a view to arriving at an amicable solution.

[28] The COL wrote to SDC in a letter dated 14 December 1999, indicating that after perusing the matter, she had concerns about the rent paid to IL by SDC, and the

potential purchase price, and she therefore recommended that a valuation be conducted.

[29] By letter dated 16 March 2000, SDC wrote to counsel for IL indicating that the COL was now a party to the negotiations with regard to SDC's proposed acquisition of the premises, and that a valuation report was commissioned pursuant to a request by the COL.

[30] On 20 March 2000, IL wrote to SDC enclosing an invoice dated 18 March 2000 "for the use and occupancy" of the premises for the six month period between October to March 2000 in the sum of $840,000.00. It claimed that monies were outstanding in respect of the monthly payment for the lease, which had been submitted to SDC for its signature, although it had not been signed by SDC. IL recited the history of the matter to include the negotiations, and referred to the fact that SDC had remained in possession despite the issuance of the notice to quit. IL indicated that it disagreed with the method of valuation and the value being ascribed to SDC's interest in the premises. It was concerned that capital investment in the unexpired term of the leasehold interest was not being properly assessed. The letter ended with the statement that IL was prepared "to honour" its agreement with SDC, but if SDC was unable to perform the agreement, it would resume possession of the premises.

[31] By letter dated 2 June 2000 from IL to SDC, IL pointed out that $1,400,000.00 was outstanding for the "use and occupancy" of the premises, and although SDC had promised to make a substantial payment towards that debt, no payments had been

received. IL therefore urged SDC to finalise "its intention to either lease the facility, with or without an option to purchase, or proceed to purchase [IL's] interests outright". The documentation, IL said, had been prepared and was awaiting SDC's intention.

[32] In a letter dated 28 August 2000, IL informed SDC that as at September 2000, SDC owed IL $1,680,000.00 for "the use and occupancy" of the premises, amounting to 12 months of lease payments, and that if a full settlement was not received by 15 September 2000, a suit would surely follow.

[33] SDC in its response dated 12 October 2000, indicated that: (a) a change in policy direction regarding SDC's involvement in the development of the community has resulted in SDC's inability to continue funding projects at the Rio Cobre Park; and (b) SDC acknowledged its debt obligations to IL regarding the lease, and were awaiting direction from its Board and the Ministry as to how to proceed to discharge its obligations.

[34] On 26 October 2001, counsel for SDC wrote to IL stating that it had been put into possession of the premises "pending an assignment to it of the Lease Agreement" between IL and itself. SDC therefore issued one month's notice with effect from 1 November 2001 to quit and deliver up possession of the premises, "as it no longer requires use and occupation of the said premises".

[35] SDC owed rent when it eventually vacated the premises on 30 November 2001.

Proceedings in the court below

[36] Thereafter, on 1 March 2002, IL filed a suit against SDC, which was last amended on 9 February 2006, wherein it sought the following:

> "i. $9,412,101.70 [for rent owed]
>
> ii. $191,210.10 per month from 1st September 2004 to Judgment as mesne profit and/or compensation for use and occupation and/or damages;
>
> iii. Damages for breach of contract;
>
> iv. $596,124.01 for utilities owed;
>
> v. Costs of security guards - $1,526,400.00;
>
> vi. Replacement of VIP stand - $4,600,000.00 and vendors' stalls - $431,250.00;
>
> vii. Removal of top soil and irrigation piping etc. - $4,050,000.00;
>
> viii. Temporary repairs to surface of amphitheatre - $111,720.00;
>
> ix. Electrical work and inspection re Government's Electrical Inspector - $159,815.94
>
> x. Revenue earned since SDC vacated the premises;
>
> xi. Interest at a commercial rate pursuant to the Law Reform Miscellaneous Provision Act [sic];
>
> xii. Costs."

[37] On 15 April 2003, judgment in default of defence was entered in the sum of $6,750,555.96 with interest. On 23 March 2004, the court granted SDC's application to set aside the judgment and gave permission for SDC to file its defence. SDC in its amended defence stated that it had given the required one month's notice to IL to

vacate the premises, and admitted that it owed IL $3,440,000.00 for rent and $208,405.96 for electricity. SDC also filed a counterclaim in the sum of $17,409,882.07 for alleged unjust enrichment to IL in respect of certain improvements carried out by SDC on the premises. IL, in its defence to the counterclaim, contended that improvements had been done without its prior approval, were not required by IL, and in any event, had adversely affected the premises.

[38] On 1 February 2005, judgment in respect of part of the claim was entered by Reid J on a summary judgment application, in favour of IL, with SDC's consent, in the sum of $3,648,405.96. The balance of the claim was adjourned and eventually fixed for hearing on 18 February 2005, and further adjourned by Reid J to 18 July 2005.

[39] Both SDC and IL continued to amend their respective pleadings between 2005 and 2006. On 22 February 2007, Rattray J granted permission for Mr Errol Spence, quantity surveyor, to be appointed as an expert witness. The parties also filed several affidavits setting out their competing positions.

[40] The claim was eventually heard in 2010 and 2013 by Campbell J. Viva voce evidence was taken on behalf of SDC from Mr Robert Bryan, the then executive director of SDC; and on IL's behalf, from Mr Jeremy Brown, founding shareholder and director of IL, and Mrs Brenda Skeffrey, director of JamWorld.

Campbell J's reasons for judgment

[41] Campbell J identified the case for both parties. He noted that it was IL's contention that the parties had entered into a fixed term lease agreement. All the terms

had been agreed although not formalised in a specific document. The agreement did not permit terminating the same by giving one month's notice or by giving any notice. The learned judge indicated that it was also IL's contention that SDC had entered into possession of the said premises and paid rent to IL; and had vacated the premises on or about 30 November 2001. However, prior to quitting the premises, SDC had failed to pay utilities and a portion of the rent; had demolished the VIP stand and vendors' stalls, and had placed top soil and irrigation piping on the grounds of the amphitheatre.

[42] In referring to SDC's pleaded case, Campbell J noted that SDC, in its further amended defence, had made certain admissions to IL's amended statement of case. These admissions included the fact that IL was the lessee of the said premises pursuant to a head-lease with the COL; and that by the agreement for a lease between IL and SDC, made in or about 1998, SDC had acquired a sublease of the said premises on the following terms and conditions:

> "(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 [SDC] would 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 percent 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."

SDC also admitted that it owed it $3,440,000.00 for rent and $208,405.96 for utilities which formed the basis of a consent order.

[43] During the trial before Campbell J, IL had raised the issue that the position advanced by SDC before him was different from that stated in its pleaded case. IL had stated that SDC, in its defence filed 30 March 2004, had admitted paragraphs 1, 2 and 3 of IL's amended statement of claim filed 17 January 2003, which pleaded the existence of a fixed term lease for 10 years with an option to renew for a further five years. However, at trial, counsel for SDC sought to argue against the existence of such a lease.

[44] In deciding this issue, Campbell J cited with approval dicta from Lord Hope of Craighead in **Three Rivers District Council v Governor and Company of the Bank of England** [2001] UKHL 16, who quoted Saville LJ in **British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd and Others** (1994) 45 ConLR 1; (1994) 72 Build LR 26, and indicated that pleadings should always delineate the issues between the parties, so that each party is aware of the case that they have to meet with sufficient detail, and can properly prepare to answer it. Campbell J also reminded himself of Lord Woolf MR's statement in **McPhilemy v Times Newspapers Ltd and Others** [1999] 3 All ER 775, where he had made it clear that although witness statements will be provided under the new civil procedure regime, and extensive pleadings may no longer be necessary, nonetheless, pleadings are not superfluous, and are still required to mark the parameters of the case that is being advanced by each party.

[45] In applying those principles to the instant case, Campbell J found that IL was on firm ground in its contention that its case had proceeded on the basis of the existence of a sub-lease, since SDC had admitted to the same in its amended defence. The learned judge also referred to certain items of correspondence, on which IL relied, that passed between IL and SDC, which indicated the terms of the agreement to which SDC had agreed. He also noted that there had been several case management conferences and pre-trial review hearings that had proceeded on the basis of an acceptance of a fixed term tenancy, and yet, SDC, for the first time at trial, had attempted to raise an issue as to whether the sub-lease between itself and IL was a monthly tenancy or a tenancy for a fixed term of 10 years. As a consequence, Campbell J did not allow SDC to raise, at that "late stage", a case which differed from that which they had pleaded, as it would amount to an ambush.

[46] Campbell J stated that the main issue on IL's pleadings was whether one month's notice would have been valid in circumstances where a fixed term lease could only be terminated by effluxion of time. He found that SDC had conceded that there was a fixed term tenancy, and that it can only be terminated by the effluxion of time, and therefore SDC had no real prospect of success in the action.

[47] The learned trial judge, however, proceeded to explore other issues in controversy between the parties in the event, he said, that he was wrong in his finding that SDC's claim had no real prospect of success.

[48] The first issue he identified was whether there was an agreement for a lease. He set out the parties' competing contentions, and examined various items of correspondence that had passed between the parties, set out in paragraphs [8]-[34] herein, and at paragraphs [19]-[25] of his reasons for judgment, found that "the parties were in agreement as to the essentials of a lease prior to SDC's letter of 30 September 1998". Since all the essential terms were agreed, he found that there was indeed an agreement for a lease. He further stated that the negotiation stage between the parties had passed when the essential terms were agreed, and the fact that the parties had indicated an intention to execute a formal lease did not prevent the creation of a lease. Accordingly, he found that IL's request for the preparation of a formal lease to be executed by the parties was not a term of the agreement between the parties, but was done "to facilitate a more formal and professional document, and made unnecessary the letter of intent that had earlier been proposed". He also concluded, using the principles espoused by Lord Hatherley and Lord Blackburn in **W J Rossiter and Others v Daniel Miller** (1878) 3 App Cas 1124, that "[i]t would not be expected that the attorneys would be able to change the agreed terms".

[49] The learned judge indicated that another issue was whether any alleged agreement for a lease was "subject to contract". In deciding that issue, he relied on **FBO 2000 (Antigua) Limited v Vere Cornwall Bird Jr and Others** [2008] UKPC 51 to support his finding that:

> "...[The SDC], 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..."

[50] Campbell J also examined the issue of frustration as SDC had contended that even if there had been an agreement for a lease, it had been frustrated because of the "unanticipated and unexplained failure" by IL to secure the COL's written consent and approval. SDC's concern was that any lease between IL and SDC would terminate at the end of the lease between IL and the COL. IL had stated that the COL's failure to give her consent was unreasonable, but in any event, her consent was not a condition precedent for the commencement of the fixed term tenancy between IL and SDC, which subsisted from the date of occupancy of the premises. The learned judge, after canvassing authorities on the subject, concluded that the COL's consent was not a condition precedent to the commencement of the fixed term tenancy. He found that the occupation of the premises by SDC, removed the claim of a complete failure of the fundamental obligation. Additionally, the COL had indicated that she was reviewing her position with a view to resolving the matter of her consent, amicably. SDC could not therefore claim that its termination of the lease was not due to its own action and election. In fact, counsel for SDC had given its reason for the termination of the lease as due to the fact that it no longer required use and occupation of the premises.

[51] The learned judge acknowledged that SDC had accepted that once there was a finding that the agreement for a lease was for a fixed term lease, then SDC could not give one month's notice for termination, as the lease could only be terminated by

effluxion of time. He therefore found that the lease would have terminated on 30 November 2008, but SDC had quit the premises on 30 November 2001. At the time of quitting the premises, SDC owed rent, namely $4,280,000.00, of which $3,440,000.00 had since been paid (relating to the amount due up to May 2001). The learned judge also found that for the remainder of the 10 year term, rent would be calculated from 1 November 2001 to September 2008, which amounted to $15,985,348,27.00.

[52] Campbell J also found that SDC was responsible for regular maintenance of the building, the plant and the equipment, and for the replacement of items lost and/or destroyed. He also made a finding that the cost of reconnection of the electricity was recoverable under that head of damages in the sum of $159,815.94. The cost of repair of external lighting was $71,000.00 and an award of $18,500.00 was made to repair the chain link fence. He noted that in light of the theft of vital infrastructure, the cost of securing the premises in the sum of $1,526,400.00 should also be borne by SDC, particularly, since, that claim had not been challenged by SDC. Since SDC had admitted that it had demolished the VIP stand and vendors' stall, and had covered the amphitheatre with soil, Campbell J made an award of $12,826,128.68 for rehabilitation of the structures.

[53] SDC, in its counterclaim, had contended that it had made modifications which constituted an improvement to the premises. This fact, SDC maintained, had also been acknowledged by IL. The expert listed these modifications as including, *inter alia*, "renovation to the Administrative Block, construction of Arena Road, irrigation works, modification of the front fence and entrance, Civil Works extension of the Artiste

building and landscaping". SDC had therefore claimed that IL was benefitting unjustly from these major construction efforts which were costly and amounted to $17,409,882.07. The court, however, found that SDC had ejected itself from the premises, and prior thereto, had not obtained any approval and/or consent for the alleged construction. Equity, he found, would prevent SDC from benefitting from that claim, and so SDC's counterclaim therefore failed.

[54] On 31 January 2013, when Campbell J gave judgment in this matter, he made the following orders:

> "1. Judgment for [IL] on the Claim and Counterclaim in the following amounts:
>
> (i) Rent due when Social Development Commission Vacated $840,000.00
>
> (ii) Rent due for the remainder of the term $15,985,348.27
>
> (iii) Maintenance
>
> Reconnection of Electricity $159,815.94
>
> External Lighting $71,000.00
>
> (iv) Security to secure premises $1,526,400.00
>
> (v) Demolition rehabilitation $12,826,128.68
>
> 2. Interest on the sum of $1,526,400.00 at a rate of:
>
> a. 6% per annum from December 1, 2001 to June 21, 2006; and
>
> b. 3% per annum from June 22, 2006 to January 10, 2013.
>
> 3. Costs to [IL] to be agreed or taxed."

The appeals

[55] As indicated, both parties lodged an appeal against Campbell J's decision. On a perusal of the pleadings, the evidence adduced in the trial, Campbell J's judgment and the grounds of appeal (as summarised in paragraphs [2]-[4] herein), the issues on this appeal, in my opinion, are as follows:

1. Did the learned trial judge err when he found that SDC ought not to have been permitted to raise a new case at trial (namely, whether the lease was for a fixed term of 10 years, or a monthly tenancy), as this did not appear in its further amended defence?
2. Did IL and SDC enter into an agreement for a lease?
    (i) If so, were the essential terms settled so that the lease could be enforced?
    (ii) If so, what were the agreed terms of the lease?
    (iii) Was one month's notice of termination of the lease valid?
    (iv) What was the effect, if any, on the terms of the lease agreement, of the negotiations, between IL and SDC, relating to the lease, subsequent to SDC's occupation?
3. What was the effect of the covenant in the head-lease (between the COL and IL) not to sublease the

premises, without the consent of the COL, on the lease between IL and SDC?

(i) Was the covenant a condition precedent affecting the efficacy of the sublease?

(ii) What was the effect of the failure of IL to comply with the covenant in the head-lease not to sublease without the consent of the COL?

(iii) Did the failure of the COL to re-enter the premises or forfeit the head-lease have any effect on the efficacy of the sub-lease?

(iv) Was the consent of the COL unreasonably withheld, and if so, were there any relevant consequences?

4. In the circumstances was the lease frustrated?

5. If SDC was in breach of the lease, the notice being invalid, what damages were payable. (This issue is relevant although there is no appeal in relation to the other expenses claimed, it is only the rental relative to the unexpired period of the fixed tenancy.)

6. With regard to the rate of interest awarded:

(i) was the lease agreement between IL and SDC of a commercial nature;

(ii) was it subject to commercial rates of interest;

(iii) was the commercial rate proved, and if so, what was the rate, and for what period should it be applied;

(iv) should that rate be applied on all items of expenses claimed; and

(v) what was the statuary rate of interest at the relevant periods and when should that rate have been applied?

[56] There is no appeal in respect of the finding made on the counterclaim, and so no more will be said on it.

[57] The submissions of counsel before this court were very detailed and comprehensive. I will therefore, without doing any injustice to counsel's industry, I hope, endeavour to capture the positions adopted in this court within the framework, and against the backcloth of what I have recognised and identified as the relevant issues in the case.

Analysis

Issue 1: Raising a case at trial different from that stated in the pleadings

[58] Mr Ransford Braham QC for IL submitted that when one reads SDC's pleadings it is clear that SDC admitted that it had sublet the premises pursuant to an agreement for a lease for a fixed term of 10 years. However, during the trial and on appeal, Queen's

Counsel noted that SDC denied the existence of such a lease. Mr Braham relied on **McPhilemy v Times Newspapers Ltd** for the principle that although extensive pleadings may no longer be required, the pleadings are still necessary to set out the parameters of the case in respect of which there is controversy between the parties. He asserted that although there was no written lease agreement signed by both parties, the fact that there was an agreement for a lease with clear terms was accepted by SDC, and it should not now be permitted to argue issues that it had not raised previously.

[59] In response, Ms Carla Thomas for SDC posited that there was no admission on the pleadings to the existence of a lease for a fixed term of 10 years. She submitted that on an examination of the entire pleadings it is clear that important terms of the lease were still being finalised, and further, IL had requested a letter of intent outlining the terms of the agreement between the parties that was never produced. The payment of a monthly rent, she submitted, suggested that a monthly tenancy existed determinable by one month's notice on either side. Counsel noted IL had covenanted with the COL not to, *inter alia*, "assign, underlet, grant licence or otherwise part with possession" of the premises without first obtaining the COL's prior written consent, which should not be unreasonably withheld. Since IL had not obtained the COL's consent to sublet the premises, there could be no valid fixed term lease between the parties.

[60] In my view, there is no question that regardless of how much the advent of witness statements may have assisted in giving further detail and clarity to the matters in controversy between the parties to the action, the respective pleading of each party,

nonetheless, has an important role to play in setting out their competing contentions, and in outlining the case each party has to meet. Lord Woolf MR, who can be credited with the role of spearheading the development of the civil procedure regime that came into being in 1998, made it clear in **McPhilemy v Times Newspapers Ltd**, which was decided shortly after the issuance of the UK Civil Procedure Rules, that:

> "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 statements, 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." (pages 792-793)

[61] So, one cannot expect to discern the opponent's case from witness statements. The case must be properly pleaded in sufficient detail for each party to know, from the statement of case, what are the allegations that one is required to meet. As a consequence, if the amended statement of claim makes reference to and relies on a particular state of affairs, and the amended defence admits that state of affairs, it is accepted and acknowledged on the pleadings that that set of facts is not an issue in the action between the parties. The parties ought to be able to rely on that. Witness statements thereafter cannot produce a different set of facts contrary to those in the

initial pleadings, or to any admission made, resulting in a different scenario before the tribunal for determination at trial.

[62] In the instant case, paragraph 2 of IL's initial statement of claim filed 1 March 2002, referred to the sublease entered into between it and SDC. This was evidenced in written correspondence between them, which set out the terms and conditions of the sub-lease, including the period of the lease (for a fixed term of 10 years renewable for a further period of five years), the rent, the fact that SDC would be responsible for all utility payments, and the date of commencement of the sub-lease. IL pleaded in paragraph 3, that in accordance with the sublease, SDC took possession of the premises and paid rent. The statement of claim was amended on 17 January 2003, 22 September 2004 and further amended on 9 February 2006. In SDC's defence filed on 30 March 2004, it admitted paragraphs 1, 2 and 3 of IL's amended statement of claim. SDC amended its defence on 14 July 2006 and 16 December 2005, only admitting to paragraphs 1 and 2 of IL's amended statement of claim. The assertions initially made by IL in its statement of case, and by SDC in its defence thereto were not affected by the filing of later amendments to their respective pleadings.

[63] At the hearing of the appeal, SDC through written and oral submissions made by its counsel, endeavoured to say that since it had also pleaded that it had lawfully given one month's notice to quit the premises, the defence, when read as a whole, must have meant that there was no admission to the 10 year fixed term lease. I cannot agree with this submission. I accept the reasoning of the learned judge in paragraph [16] of his reasons for judgment, that, on the pleadings, the only issue remaining was whether in

circumstances where a fixed term lease could only be terminated by effluxion of time, one month's notice could be valid.

[64] It is of significance that in IL's statement of facts and issues, filed 14 September 2009, it restated the facts of the sublease between the parties for a fixed term of years, the payment by SDC of rent and other utilities, and identified the issues for trial as follows:

1. whether SDC was permitted to terminate the sublease by giving one moth's notice;
2. whether SDC had permission to demolish certain structures (including the VIP stand and vendor's stalls), and place top soil on the surface of the amphitheatre;
3. whether SDC had permission to carry out certain "improvements" to the premises; and
4. had IL been unjustly enriched by the works carried out by SDC?

[65] Not surprisingly, SDC's statement of facts, filed 23 September 2009, in the main, mirrored those of IL. The issues stated therein were:

1. had SDC breached the contract with IL;
2. was one month's notice sufficient in the circumstances;

3. had IL granted SDC permission to make improvements to the premises;
4. had IL been unjustly enriched; and
5. was SDC entitled to recover the value of the improvements to the premises.

[66] It was noticeable that there was no specific mention of whether the parties had entered into a sub-lease for a fixed term of 10 years, renewable for five years. It was also of some significance that it was in SDC's pre-trial memorandum, which was filed contemporaneously with its statement of facts and issues on 23 September 2009, that SDC, at paragraph 7, first queried and/or mentioned the issue as to whether the sub-lease was for a monthly tenancy or for a tenancy of a fixed term of 10 years. Yet, the list of issues for the court did not specifically embrace that contention, but generally adopted the issues stated in the statement of facts and issues as set out above, which were focused on whether SDC had breached its contract with IL, and whether one month's notice was sufficient in the circumstances.

[67] The learned judge, having identified the issue in controversy between the parties as the validity of the one month's notice to quit, referred to the fact that counsel for SDC had accepted in written submissions, that the fixed term lease could only be determined by the effluxion of time, and on that basis, the defence appeared to falter from the outset, and on this point had no chance of success. His conclusion, therefore, that SDC ought not to be permitted to raise a matter at the late stage of the trial of the proceedings that had not been pleaded in its further amended defence, would not

appear to be unreasonable in all the circumstances, nor could I say that the finding was palpably wrong.

[68] That having been said, the judgment ordered by Campbell J would therefore be correct with regard to the sums ordered to be paid, save for the amount of $18,500.00 for repairs to the chain link fence, which Campbell J found was due to IL, and which, although referred to in his reasons for judgment, had not been stated in the formal order signed by the court. Although, there is no appeal from that finding, I would recommend that the order be amended to include that amount. This, in my view, would be an exercise of the powers of the Court of Appeal to make an order that could have been made in the court below (see section 10 of the Judicature (Appellate Jurisdiction) Act).

[69] However, in case I too am wrong in my approach to the pleading point, I will also examine the issues relating to whether a valid sublease existed between the parties, what were the terms, what was the effect, if any, of the subsequent negotiations and conduct on the sublease (issue 2); the effect of the covenant in the head-lease not to sublease the premises (issue 3); and was the contract frustrated (issue 4). If I accept that the contract was indeed breached, the final issue to be determined would be the award of interest, with respect to the rate to be applied, for what period, and on what sums (issues 5 and 6).

Issue 2: Was there an agreement for a lease with all the essential terms; and what was the effect of subsequent negotiations/conduct on the sub-lease

[70] Mr Braham, relying on the principle enunciated in **Walsh v Lonsdale** (1882) 21 Ch D 9, submitted that it was settled law that an agreement for a lease was as good as a lease. He referred to specific items of correspondence, namely, letters dated 27 April 1998, 14 May 1998, 27 August 1998, 5 September 1998 and 4 December 1998, which, in his view, showed that a sublease was agreed as at 30 September 1998. These terms, he submitted, had been agreed before SDC took possession of the premises.

[71] Queen's Counsel further contended that Campbell J was correct to find that the relevant correspondence did not require a formal sublease or a letter of intent signed by both parties to be effective. This he said was because authorities such as **RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)** [2010] UKSC 14; [2010] 3 All ER 1; **FBO 2000 (Antigua) Limited v Bird**; and **Immingham Storage Company Ltd v Clear plc** [2011] EWCA Civ 89 show that once the essential terms were agreed, the parties would have committed themselves to an agreement for a lease. He also asserted, relying on **British Guiana Credit Corporation v Clement Hugh Da Silva** [1965] 1 WLR 248 and **James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd** [1970] AC 583, that negotiations and conduct subsequent to the agreement were irrelevant and ought not to be considered when determining whether there was indeed an agreement. He also posited that the fact that IL attempted to determine the fixed term lease by notice is irrelevant in determining the type of tenancy which was created by the parties.

[72] Though Ms Thomas agreed with the general principle of law that an agreement for a lease was as good as a lease, she nonetheless argued that for the agreement to

be enforceable it must possess the requisite elements. The fact, she said, that certain clauses in the proposed lease were "subject to contract" meant that the correspondence exchanged between the parties cannot be construed to acknowledge the existence of an agreement for a lease. Counsel also posited that Campbell J had erred in his finding that a letter of intent was not required for the lease to be effective, as both parties had expressed an intention to sign either a letter of intent or a formal lease document as a precondition to the lease document coming into existence. No such letter or formal lease document was ever signed by both parties, and so a fixed term lease did not exist. She further posited that correspondence exchanged between the parties after SDC had entered into possession of the premises showed that other terms of the lease had not yet been agreed, and those terms required agreement before the lease could be formalised. The fact that negotiations continued, she submitted, were proof that the agreement for a lease did not contain all the material terms.

[73] There were several authorities submitted to us on this second issue and in these reasons, I will only refer to a few. I would wish to state that that approach means no disrespect to counsel and I take this opportunity to applaud them for their industry, which has been most helpful in unravelling the issues between the parties on appeal, and in respect of which I am indeed grateful.

[74] The first question to be posed is, was there an agreement for a lease? In chapter 4 of the leading text, Woodfall, Landlord and Tenant, at paragraph 4.001, the learned authors said this:

> "An agreement for lease is a legally enforceable agreement by which one person agrees to grant, and another agrees to take a lease. The agreement may be immediately enforceable or may be enforceable only on the occurrence of some event, or the fulfilment of some conclusion. The phrases 'contract for a lease' and 'agreement for lease' are usually interchangeable, but in modern practice it is more common to speak of an agreement for lease...
>
> [T]he creation of an agreement for lease is itself the creation of an equitable interest in land, because the present right to call for a future grant is such an interest."

The authors made it clear that, nonetheless, in order to constitute a valid agreement for lease, one must find an offer, acceptance, intention to create legal relations, and consideration. In some cases, the agreement must be in writing.

[75] In the Halsbury's Laws of England, 4th edition, volume 27, paragraph 57, the learned authors stated the essential terms of an agreement for a lease, namely: "(1) the identification of lessor and lessee; (2) the premises to be leased; (3) the commencement and duration of the term; and (4) the rent and other consideration to be paid". The authors also stated that, if those "matters are ascertained to be offered and accepted, it is sufficient". If these essential terms are not mentioned by one side and accepted by the other, the matter rests in incomplete negotiation, and there is no concluded contact.

[76] In **Walsh v Lonsdale**, Jessel MR, at pages 14 and 15, made the following statement which has withstood the test of time:

> "There is an agreement for a lease under which possession has been given. Now since the *Judicature Act* the possession is held under the agreement. There are not two estates as

> there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted. On the other hand, he is protected in the same way as if a lease had been granted; he cannot be turned out by six months' notice as a tenant from year to year. He has a right to say, 'I have a lease in equity, and you can only re-enter if I have committed such a breach of covenant as would if a lease had been granted have entitled you to re-enter according to the terms of a proper proviso for re-entry.' That being so, it appears to me that being a lessee in equity he cannot complain of the exercise of the right of distress merely because the actual parchment has not been signed and sealed."

[77] On a true and proper construction of the correspondence exchanged between the parties between April and September 1998, as outlined in paragraphs [8]-[12] herein, and upon a review of the viva voce evidence given before Campbell J, the parties were clear, the premises known, the rent agreed at $140,000.00 per month, and subsequently paid by SDC to IL for months after taking possession. On an examination of the correspondence, there also does not seem to be any issue taken by any party as to whether the lease would be for a fixed term of 10 years or a monthly tenancy. There was no mention, and so no discussion on that. So, once it can be said that the terms proposed and so indicated in IL's offer letter had been agreed by SDC in its correspondence in response, the parties, in my view, would have agreed to the essential terms of a lease, and there would have been an agreement for a lease.

[78] As indicated, SDC had contended that an agreement for a lease did not exist because the agreement itself was subject to certain pre-conditions, such as, the issuance of a letter of intent or the execution of a written lease.

[79] In **Rossiter v Miller**, the issue before the court was whether correspondence passing between the parties constituted a complete contract. On page 1139, Lord Cairns LC cautioned:

> "...I entirely acquiesce in what he says, that if you find, not an unqualified acceptance of a contract, but an acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise, then undoubtedly you cannot, upon a correspondence of that kind, find a concluded contract. But, I repeat, it appears to me that in the present case there is nothing of that kind; there is a clear offer and a clear acceptance. There is no condition whatever suspending the operation of that acceptance until a contract of a more formal kind has been made..."

[80] Lord Hatherley said at page 1143:

> "...It has been established for far too long a time, and by some precedents in your Lordships' House, that if you can find the true and important ingredients of an agreement in that which has taken place between two parties in the course of a correspondence, then, although the correspondence may not set forth, in a form which a solicitor would adopt if he were instructed to draw an agreement in writing, that which is the agreement between the parties, yet, if the parties to the agreement, the thing to be sold, the price to be paid, and all those matters, be clearly and distinctly stated, although only by letter, an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties, merely because that letter may say, We will have this agreement put into due form by a solicitor. If it is stated in so many plain and express terms (and in *Chinnock v. The Marchioness of Ely* [4

> De G. J. & S. 638] that was the ground on which that case proceeded) that one of the very terms of the agreement itself was that it should not be concluded by the agent employed in the first place to enter into the negotiation, and that it should not be a concluded agreement until a solicitor intervened and drew a formal agreement; if you find that to be a term of the agreement itself, well and good, if not, the agreement stands..."

[81] Indeed, Lord O'Hagan, in adding to the debate at page 1149, commented on the fact that it had been said that until execution of that agreement the transaction was inchoate and incomplete. He made the point that:

> "...undoubtedly, if any prospective contract, involving the possibility of new terms, or the modification of those already discussed, remains to be adopted, matters must be taken to be still in a train of negotiation, and a dissatisfied party may refuse to proceed. But when an agreement embracing all the particulars essential for finality and completeness, even though it may be desired to reduce it to shape by a solicitor, is such that those particulars must remain unchanged, it is not, in my mind, less coercive because of the technical formality which remains to be made..."

[82] And finally, on this very important point, for the purposes of this case, Lord Blackburn said at page 1151:

> "...I quite agree with the Lords Justices that (wholly independent of the *Statute of Frauds*) it is a necessary part of the Plaintiff's case to [show] that the two parties had come to a final and complete agreement, for, if not, there was no contract. So long as they are only in negotiation either party may retract; and though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remain to be settled afterwards, there is no contract. The parties, in such a case, are still only in negotiation. But the

> mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, [show] that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed..."

[83] In **FBO 2000 (Antigua) Limited v Bird**, an appeal from Antigua and Barbuda to the Privy Council, the issue was whether FBO was entitled to specific performance of an agreement in relation to a lease of certain premises, and/or whether it was entitled to any compensation. The Board reiterated, in relation to the issue as to whether there was a sufficiently complete agreement to warrant a decree for specific performance, that, "[t]o 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". There was a debate surrounding the identity of the land to be leased. The Board found that the parties were very familiar with the location of the plot purchased, and from the evidence, the fact that at a relevant point, FBO was in occupation, the parties knew very well where the plot of land was.

[84] The question before their Lordships was whether, as the learned trial judge had found, identification of the land by survey was a precondition of the agreement. The Board discussed whether other special terms and conditions ought to have been settled for the agreement to be complete, and concluded that "[i]t does not necessarily follow,

however, that a sufficiently binding agreement for a lease could not be reached without encompassing such terms". Lord Carswell, on behalf of the Board, referred to the position taken by Parker J in **Von Hatzfeldt-Wildenburg v Alexander** [1912] 1 Ch 284, where he stated at page 288-289:

> "It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

[85] The Board found that the parties "had reached a sufficiently firm agreement on the essential terms" and was not subject to a precondition of an approved survey. The Board ultimately upheld that agreement.

[86] It is of significance that in **Von-Hatzfeldt**, the correspondence between the parties contained a stipulation by the purchaser that her acceptance was subject to, *inter alia*, a condition that her solicitors should approve the title to any covenants contained in the lease, the title for the freehold and the form of contract. In that case, the court held that on the construction of the document, the contract was incomplete and could not be specifically enforced.

[87] This particular issue was raised yet again in the English Court of Appeal case of **Immingham Storage Company Ltd v Clear plc**, where a quotation sent to Clear plc by Immingham for the provision of storage facilities for petroleum and petro-chemical products, was headed "Subject to board approval and tankage availability", and ended with "A formal contract will then follow in due course". Clear plc returned the quotation with the signature at the bottom and e-mailed to confirm that it wished to contract on the terms offered. Immingham indicated that it would seek board approval and confirm availability of the necessary storage capacity by the end of the week. It did so. It sent an e-mail entitled "Contract confirmation" and assured certain storage space, with the directive that Clear plc could proceed to source its products. It indicated that a full contract would be provided by way of "further confirmation". The contract sent to Clear plc, however, was returned unsigned. Clear plc was unable to source the products and refused to pay for the sums invoiced for the provision of the storage capacity. Immingham sued for payment. The trial judge found that a contract had been concluded. The appeal was dismissed.

[88] The head note contains two points which can be derived from the facts of this case. They are:

> "Firstly, a party wishing to make the formation of a contract subject to the execution of a formal written document must use wording which clearly conveys this conditional nature. In this case, the claimant had said that a contract was to follow in due course, and that a written contract would be sent by way of 'further confirmation', but it never used language which connoted that no contract would be in place until the written document was executed. On the contrary, the term

> 'confirmation' implies that the document will reinforce, but not change, the legal position which already exists.
>
> Secondly, the case shows, yet again, that if both parties proceed to act as if there is a contract in place (even if on these facts one party could not perform its part), the court is likely to find such a contract. This is not a particularly surprising outcome. Whilst it is, of course, the case that a strict legal analysis can lead to an outcome which is contrary to the contemporaneous understanding of both parties, the courts are keen to give effect to the objective intention of the parties and if both parties act as though a contract is in place, the court is likely to treat that as strong evidence of that intention."

[89] And finally, on this particular aspect, I would wish to refer to the United Kingdom Supreme Court case of **RTS Flexible Systems Ltd**, which I found to be very instructive. The facts of the case are a little complicated, but suffice it to say, the claimants specialized in the supply of automotive machines for packaging and product handling in the food industry. The defendant was a supplier of dairy products which wished to automate some of its production. There were negotiations. The claimants sent an offer, and the defendant sent a letter of intent, which confirmed that it wished to proceed with the project as set out in the offer, subject to certain specific terms including that the contract would be based on the defendant's contract terms. There were other terms including that a full contract would be supplied for signing within four weeks containing a term that only the defendant had the right to terminate the contract.

[90] Thereafter negotiations ensued. A draft contract was provided by the defendant. It contained a condition that the contract would only come into existence if a written

agreement was entered into by the parties. The contract, which had been formed by the letter of intent, expired on 22 March 2005, but the parties agreed to extend it until 27 May 2005, to allow for execution of the full contract. By 26 May 2005, the contract was substantially agreed save for some issues requiring further negotiation. Subsequently, the contract was agreed as at 5 July 2005, but was never signed. The parties then agreed variations to the contract in August. The claimant later issued invoices for work done calculated on the agreed price and those invoices were paid by the defendant.

[91] A dispute arose and the claimant initiated proceedings for "work done under a contract" or alternatively for damages. Preliminary issues were directed to be tried. The High Court judge held that the parties had concluded a contract that had not incorporated the defendant's contract terms. On appeal, the Court of Appeal held that no contract existed as none had come into existence after the expiry of the contract on 22 March 2005. The defendant appealed. The issues were: (1) whether the parties had made a contract after the expiry of the contract on 22 March 2005; and (2) was the contract subject to some or all of the defendant's contract terms. It may be more prudent, on these complicated facts, to set out in detail the decision of the Supreme Court as reflected in the headnote of the case. It reads thus:

> "Whether there was a binding contract between parties and, if so, on what terms, depended upon what they had agreed. It depended upon a consideration of what had been communicated between them by words or conduct and whether that led objectively to a conclusion that they had intended to create legal relations and had agreed upon all the terms which they regarded, or the law required, as

> essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties had not been finalised, an objective appraisal of their words and conduct could lead to the conclusion that they had not intended agreement of such terms to be a pre-condition to a concluded and legally binding agreement. The question to be asked in a 'subject to contract' case, was whether the parties had nevertheless agreed to enter into contractual relations on particular terms notwithstanding any earlier understanding or agreement; it was possible for an agreement 'subject to contract' to become legally binding if the parties later agreed to waive that condition as they were in effect making a firm contract by reference to the terms of the earlier agreement. In the instant case the parties had agreed to be bound by the agreed terms without the necessity of a formal written contract. The August variation had been agreed without any suggestion that it was subject to contract, and the inference was that the parties had agreed to waive the 'subject to contract' clause. The terms that the parties had treated as essential were agreed and they had performed the contract without a formal contract being signed or exchanged. The parties had negotiated cll 8-48, which comprised the MF/1 terms as amended, in some detail and the clauses had been essentially agreed. They had reached a final draft of the contractual terms and conditions which contained the general MF/1 terms as amended in written correspondence. The clauses had, therefore, been agreed as at 5 July and were varied in August. Although the parties had not proceeded on the basis of all of the agreed conditions and not all of the schedules had been agreed, that failure did not prevent the contract from having binding effect. Accordingly, the appeal would be allowed".

[92] In the instant case, as stated at paragraph [77] herein, all the essential terms of the lease had been agreed. There was indeed a stipulation at condition number (iv) in the letter dated 14 May 1998, quoted at paragraph [9] herein, that the lease was to commence on 1 July 1998, subject to both parties signing a letter of intent or a final lease document. However, there was no stipulation, as was said by Lord Cairns LC in

Rossiter v Miller and by the court in **Immingham Storage Company Ltd v Clear plc** that that condition had to be fulfilled before a contract could arise. As was stated by Lord Hatherley above, the signing of a letter of intent or a final lease document was not a necessary pre-condition for a valid lease. Accordingly, as the essential terms of the lease were all agreed, in my view, the fact that the "technical formality" of issuing a letter of intent or signing a final lease was not completed, does not mean that no agreement for a lease existed between the parties.

[93] After SDC took possession of the premises on 1 October 1998, negotiations continued in respect of other terms, such as SDC's acquisition of IL's interest in the premises, in relation thereto. The nest issue which arose, therefore, was what was the effect of those subsequent negotiations on the sub-lease?

[94] I accept the decision of the Judicial Committee of the Privy Council in **British Guiana Credit Corporation v Clement Hugh Da Silva** and that of the House of Lords in **James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd** that subsequent negotiations and conduct will not affect the existence of a previously concluded contract. Also, even if the negotiations continued, the court would have to decide whether any further terms of the contract were mere expressions of the desire of the parties as to how they may better proceed in the future, but do not affect the agreement that they have already made, which can stand on its own, and is not made ineffectual by the other further terms not having been settled. That is the case here. Perhaps, that is also why SDC remained in possession after the notice to quit

given by IL, and continued to perform its obligations to pay rent and to comply with the other terms of the lease.

[95] I am therefore of the view, that the parties had agreed to a 10 year fixed term contract which could not be terminated by a month's notice to quit, but would be properly determined by the effluxion of time. Accordingly, neither notice to quit issued by the parties was effectual in terminating the lease. The learned judge could not therefore be faulted on his decision on this aspect of the case. IL would therefore have been entitled to damages for the unexpired period of the fixed term lease calculated by reference to the amount payable for rent.

Issue 3: The effect of a breach of a covenant in the head-lease on the sublease

[96] The conclusion that the parties had agreed to a 10 year fixed term contract which could only be terminated by the effluxion of time would be another aspect of the appeal which could be determinative of its outcome. However, it was an important part of SDC's contention that the sublease granted by IL to it was invalid, as the provision in the head-lease between the COL and IL, required the consent of the COL for IL to sublet the premises to SDC, which was a condition precedent of the sublease coming into existence. So, the consent having not been obtained prior to the sublease being granted, the sublease was invalid. SDC also submitted that this was to be concluded from the service of IL's notice to quit on it, which stated that the COL's lack of consent was the basis on which the notice had been issued. Queen's Counsel, on IL's behalf, contended that any covenant not to lease the premises would remain binding between

the COL and IL, and the redress for the COL would be against IL for breach of the covenant. As such, the breach of the covenant would not have the effect, he submitted, of terminating the sublease.

[97] The issue here is whether a breach of covenant in the lease between the COL and IL affects the validity of the lease between IL and SDC. In my view, any breach of an agreement or covenant between the parties to the head-lease will result in a potential forfeiture of that lease, which if effected, could put an end to it, but will not affect any previous existing sublease.

[98] In **Cuthbertson v Irving** (1859) 4 H&N 742; 157 ER 1034, Martin B said:

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

In that case, the tenant was estopped from denying the title not only of his lessor, but also the title of the lessor's assignee. The tenant was also estopped from denying the lessor's title, even after he had gone out of possession; and was being sued by the assignee on the covenant to repair, as the tenant had allowed the premises to fall into a state of great disrepair. So, the law is that once the tenant has received the full consideration for the contract into which he has entered, he should perform his part of

it. It should not matter what is the state of the lessor's title, legal or equitable. It should make no difference as long as there is no adverse claim by anyone else.

[99] In **Industrial Properties (Barton Hill) Ltd and Others v Associated Electrical Industries Ltd** [1977] QB 580, the circumstances were that the plaintiff, who was the equitable owner of the property, sued the tenant, Associated Electrical Industries Ltd, for leaving the premises in disrepair. The plaintiff had purchased from the freehold trustees, but the property had not yet been conveyed to them, no conveyance having been extracted or registered (the reason being merely to avoid the payment of stamp duties). Lord Denning MR stated the correct legal position at page 596 in his judgment that:

> "If a landlord lets a tenant into possession under a lease, then, so long as the tenant remains in possession *undisturbed by any adverse claim* - then the tenant cannot dispute the landlord's title." (Emphasis as in original)

[100] So, if the tenant leaves the premises failing to comply with the covenant to repair, and is sued, he cannot say, "you are not the true owner of the property". Equally, Lord Denning MR posits, that if the landlord sues for possession, or use and occupation, or mesne profits, the tenant cannot say, "the property does not belong to you but to another". If, however, the tenant is evicted by title, paramount or equivalent, then he can dispute the landlord's title. So, if evicted by a third person, the tenant is no longer estopped from denying the landlord’s title, as he can say "you were not the owner when you demanded rent from me", and as I am liable to pay someone

else, you must refrain from making any claim. Then the tenant would not be estopped from denying the landlord's title.

[101] Of course Stamp LJ in **Warmington and Another v Miller** [1973] 2 All ER 372) also stated that if in respect of the lease between A and B, the relevant parties stipulate an unqualified covenant, "not to assign underlet or part with possession of part only of the demised premises", and one of the parties, the lessee B, is in direct breach of the covenant not to underlet, and leases a part of the premises for a commercial endeavour to C, then C would not be permitted to obtain a decree of specific performance, or alternatively, a declaration that he was in possession of the premises on the terms of the agreement with B.

[102] Stamp LJ explained that this was because the court would not order B "to do that which he cannot do under the terms of the lease under which he holds the premises and which, if he did, would expose him to proceedings for forfeiture". The court continued "that a [party] must show, that in seeking specific performance, he does not call upon the other party to do an act which he is not lawfully competent to do". The basis for this is that if the remedy prayed for, would, if granted compel a party to continue to break the covenant not to part with possession, it would be an invitation to the court to grant part performance, in circumstances that would be objectionable, which the court would not do.

[103] In the instant case, there was no complete prohibition, but one that said that the subletting should not take place without the consent of the COL which should not be

unreasonably withheld. In my view, that makes the situation different, and the principle would have different application.

[104] Based on the above authorities, SDC is estopped from denying IL's title. The fact that IL breached the covenant not to sublet or assign prior to receipt of consent from the COL cannot concern SDC. SDC has enjoyed everything that the lease had to grant. SDC must therefore perform its obligations and pay rent. There is no evidence that the COL made any effort to evict SDC from the premises. So, there was no issue of SDC being evicted by title paramount. SDC is estopped from denying IL's title and cannot claim the failure of any condition precedent voiding the sublease. That is not, in my opinion, an option open to SDC on a true and proper construction of the lease, and in any event, SDC was in possession from 1998-2001. The COL, also on the evidence, did not make any effort to terminate the lease with IL and/or to forfeit the same. This claim by SDC, in my opinion, has no merit and cannot succeed.

Issue 4: Was the contract frustrated?

[105] As indicated, SDC had claimed that IL's failure to obtain consent from the COL led to the contract being frustrated. However, based on my finding on issue 3 above, I find that claim to be entirely without merit. In fact, I do not think that counsel for SDC pursued this contention with any great vigour or confidence.

[106] The law with regard to frustration of a contract was canvassed in **J Lauritzen A S v Wijsmuller B V (The "Super Servant Two")** [1990] 1 Lloyd's Rep 1, which dealt with the obligations of the defendant to transport, for the plaintiff, a drilling rig from

Hitachi shipyard at Aryake Japan to a delivery location off Rotterdam, in circumstances where the means by which the defendant intended to do so was by using its "transportable unit the "Super Servant Two". The delivery was to be carried out between 20 June 1981 and 20 August 1981. The "Super Servant Two" sank on 29 January 1981. The defendant had another unit the "Super Servant One" which, by choice, it utilised to do other jobs and delivered the rig using a barge towed by a tug. The plaintiff sued for losses it had incurred due to its inability to use the rig in Japan, and the defendant counterclaimed for increased expenses incurred. A preliminary issue was posed to the trial court and later to the Court of Appeal, namely:

1. whether the defendants were entitled to cancel the contract under the force majeure clause, if the loss of the Super Servant Two was caused by their negligence? To which the court said they could not; and
2. whether the contract was frustrated:
    (a) if the loss of the Super Servant occurred without the negligence of the defendants or
    (b) if the loss was caused by the negligence of the defendants.

The court held that even if the plaintiff alleged negligence on the part of the defendants, and they were wrong (or at this stage no negligence was assumed), they would not be able to rely on the doctrine of frustration.

[107] For these purposes the court made several specific statements with regard to the law of frustration, which I adopt wholeheartedly and repeat them below for emphasis. Bingham LJ indicated that the classic statement in respect of frustration was that made by Lord Radcliffe in **Davis Contractors Ltd v Fareham Urban District Council** [1956] AC 696, at page 729, where he said:

> "...frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do."

[108] Bingham LJ also quoted Lord Reid in **Davis Contractors Ltd** at page 721 that:

> "...there is no need to consider what the parties thought or how they or reasonable men in their shoes would have dealt with the new situation if they had foreseen it. The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end."

[109] Lord Bingham in **The Super Servant Two** mentioned certain well settled propositions of law, namely:

> "1. The doctrine of frustration was evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises (*Hirji Mulji v. Cheong Yue Steamship Co. Ltd. (sub nom. Dharsi Nanji v. Cheong Yue Steamship Co.* Ltd.), (1926) 24 L1.L.Rep. 209 at p. 213, col. 2;... The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result,

> to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances...
>
> 2. Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended...
>
> 3. Frustration brings the contract to an end forthwith, without more and automatically...
>
> 4. The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it...
>
> 5. A frustrating event must take place without blame or fault on the side of the party seeking to rely on it..."

[110] In essence, the court found that although there was a supervening event, namely, the sinking of the Super Servant Two, there was no specific requirement that that carrier alone was to be used, and there were alternatives within the control of the defendants. The doctrine was therefore not applicable.

[111] In the instant case, I agree with counsel for IL that the doctrine is also not applicable. The law embraces the circumstances that arose in this case. As stated in **Cuthbertson v Irving** and **Industrial Properties v Associated Electrical**, the law provides that when a covenant in the head-lease is breached, the sub-lease remains effective. SDC was aware of the provisions of the head-lease. It was also aware that consent of the COL was necessary, and should not be unreasonably withheld. The COL could have exercised re-entry and forfeited the lease, but she did not do so. As a consequence, the claim that the contract had been frustrated cannot succeed.

[112] Indeed, SDC enjoyed possession of the premises pursuant to the sublease, and only left the premises as it said that a change of policy direction with regard to its involvement in the development of community economic enterprises had resulted in its inability to continue funding projects such as the Rio Cobre Park. Thereafter, SDC's counsel gave one month's notice on its behalf that it would quit and deliver up possession of the premises. SDC cannot therefore rely on any act effected by it, which brought about the termination of the contract, and then attempt to rely on the doctrine of frustration. The COL appeared to be willing to reconsider her earlier position, and in any event, her consent, pursuant to the head-lease, should not be unreasonably withheld. A sublease to another government agency would, in my view, on the face of it, not be seen as an unreasonable contractual arrangement, and so would no doubt readily be subject to challenge. Finally, to succeed on this point, in my opinion, it would be incumbent on SDC to prove that the contract was incapable of being performed, and in the circumstances of this case, it had clearly failed to do that.

Issues 5 and 6: Is interest payable, and if so, on which sums, and for what period and at what rate?

[113] Mr Braham contended that since IL and SDC were in a commercial relationship, the learned judge erred in failing to award interest at the commercial rate as pleaded. He further posited that the learned judge erred in failing to give reasons as to why he had refused to award interest at the commercial rate. Queen's Counsel pointed to an anomaly in the order of the court with regard to the award of interest. He stated that Campbell J, in his reasons for judgment, awarded interest for all sums claimed, but in the order of the court, interest was only given on the sum of $1,526,400.00 for

payment of security services. Queen's Counsel posited that that was an error in the judgment that ought to be corrected. He suggested that the rates to be utilised were the average borrowing rate up to 2008 of 23.77% per annum, and a rate of 3% per annum from November 2008 to the date of judgment in January 2013. He further suggested that with regard to the reconnection of electricity, interest should run from the date that expense was incurred, namely, 18 December 2002, until the date of judgment, 31 January 2013.

[114] Counsel for SDC did not take issue with the principles of law, and the authorities cited by Queen's Counsel for IL with regard to the award of interest in commercial transactions. However, she indicated that there was no evidence to support the presumption that the relationship between the parties was commercial in nature and therefore should attract a commercial interest rate. She contended, in the alternative, that if this court were to accept that there was indeed a commercial relationship, a commercial rate of interest should only be awarded in relation to the rent due when SDC vacated the premises, "as this sum would represent income which [IL] would have been deprived of investing at a likely commercial rate", and such a rate of interest should not apply to the other expenses.

[115] Both parties agreed that interest is a discretionary remedy. Section 3 of the Law Reform (Miscellaneous Provisions) Act deals with the power to grant interest, and endorses that principle as follows:

> "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 or any part of the period between the date when the cause of action arose and the date of the judgment:
>
> Provided that nothing in this section-
>
> (a) shall authorise the giving of interest upon interest; or
>
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
>
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange."

[116] Both parties also agreed that an award of interest is not to punish, but to compensate a claimant, and is granted on the basis of *restituo in integrum*, that is, to return one to the position they would have been in had the action complained of not occurred. In **Tate & Lyle Food and Distribution Ltd v Greater London Council and Another** [1981] 3 All ER 716, Forbes J opined specifically on this aspect at page 722, where he stated:

> "Despite the way in which Lord Herschell LC in London*, Chatham and Dover Railway Co v South Eastern Railway Co* [1893] AC 429 at 437 stated the principle governing the award of interest on damages, I do not think the modern law is that interest is awarded against the defendant as a punitive measure for having kept the plaintiff out of his money. I think the principle now recognised is that it is all part of the attempt to achieve restitutio in integrum. One looks, therefore, not at the profit which the defendant wrongfully made out of the money he withheld (this would indeed involve a scrutiny of the defendant's financial position) but at the cost to the plaintiff of being deprived of

> the money which he should have had. 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 withheld. I am also satisfied that one should not look at any special position 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 plaintiffs in general could borrow money."

[117] There was also no challenge to the dictum of Carey JA in **British Caribbean Insurance Company Limited v Delbert Perrier** (1996) 33 JLR 119 where he provided some assistance to courts when determining the rate at which interest should be awarded in commercial cases: At page 127 he said:

> "It seems clear to me that the rate awarded must be a realistic rate if the award is to serve its purpose... In summary, the position stands thus:
>
> (i) awards should include an order for the defendant to pay interest;
>
> (ii) the rate should be that on which the plaintiff would have had to borrow money in place of the money wrongfully withheld by the defendant; and
>
> (iii) the plaintiff is entitled to adduce evidence as to the rate at which such money, could be borrowed."

[118] The actual sums awarded for damages by Campbell J were not being challenged. It seems to me that the real challenge in this aspect of the appeal was whether a purely commercial relationship existed between IL and SDC. Campbell J gave no reasons as to

why it is that he refused to grant interest at a commercial rate and so, in determining whether he erred in failing to do so, I must first decide whether a commercial relationship existed between the parties.

[119] There are no hard and fast rules as to what constitutes a commercial relationship. The learned authors of Stair Memorial Encyclopaedia, Reissue, paragraph 51, in giving guidance as to what constitutes a 'business' for the purposes of determining value added tax, indicated that for an activity to constitute a business, its intrinsic nature must be economic in content and not social or charitable. The intrinsic nature of the activity, they said, can be gleaned from the facts and all the circumstances.

[120] In the instant case, in SDC's letter to IL dated 27 April 1998, outlined at paragraph [8] herein, SDC's objective was not only to earn an income, but also to aid in community and infrastructure development. In IL's letter to SDC dated 14 May 1998, as stated at paragraph [9] herein, at condition number xii, IL not only sought a financial benefit from its relationship with SDC, but it also sought SDC's approval for JamWorld to participate in the "organisation and promotion of the annual Caribbean Heritagefest Festival held during the National Heroes Day celebrations".

[121] In its letter to the COL dated 23 September 1999, as stated at paragraph [23] herein, counsel for IL indicated that SDC had approached IL to lease JamWorld Centre "in order to incorporate it as part of their community development plans for the Portmore Community". It is therefore apparent that SDC wished to lease the premises

for some economic gain and also to facilitate community development, and while IL also expected to gain financially, it sought other benefits from its relationship with SDC.

[122] Although Mr Jeremy Brown, IL's director, had exhibited economic data from the Bank of Jamaica outlining commercial interest rates, it would have assisted the court if there had been some evidence that IL had to borrow money or had been put out of money due to SDC's conduct. There was no evidence to this effect.

[123] Upon a review of these facts, I must say, I am not convinced that the relationship between IL and SDC was intrinsically economic in nature as both SDC and IL recognised that there was some social component to it. As a consequence, it cannot be said that a purely commercial relationship existed between the parties, and therefore, in those circumstances, Campbell J would not have erred in failing to award commercial interest on all sums claimed.

[124] The pertinent questions that remain are whether any interest should be awarded, and if so, at what rate, on what sums and for what period. The learned judge made awards of interest, but he failed to specifically indicate how he arrived at the said awards. On the face of it, it would appear that he failed to examine and fully consider the evidence before him with regard to the issue of interest. In the light of the powerful dictum in **Hadmor Productions Ltd and Others v Hamilton and Another** [1982] 1 All ER 1042, and the several cases out of this court which have endorsed the principles enunciated therein, in my view, there are instances in which the learned judge would

have been palpably wrong in the exercise of his discretion with regard to the award of interest, which I will set out below.

[125] There seems to have been some ambiguity between Campbell J's reasons for judgment and the actual court order. In his reasons for judgment at paragraph [41] Campbell J awarded interest on all sums at a rate of 6% from 1 December 2001 to 21 June 2006, and 3% from 22 June 2006 to 19 January 2013. However, in the order of the court, interest was payable only with respect to the cost for security for the premises at a rate of 6% per annum from 1 December 2001 to 21 June 2006, and 3% per annum from 22 June 2006 to 10 January 2013. No interest was awarded on any of the other sums. While it is clear that the learned judge accepted that IL was entitled to some interest, he failed to demonstrate how he arrived at his award of interest.

[126] In all the circumstances, it would seem that Campbell J's decision to award interest at rates of 6% and 3% would not be unreasonable. Although **Central Soya of Jamaica Ltd v Junior Freeman** (1985) 22 JLR 152 was a case dealing with personal injuries (which is entirely different from the facts in the instant case), the court's statement on interest was that interest should not be awarded at a rate that would allow a claimant to reap a windfall. In that case, the court found that half of the judgment debt interest rate of 6% was reasonable, and was to be applied on outstanding amounts due for special and general damages. Pursuant to the Judicature (Supreme Court) (Rate of Interest on Judgment Debts) Order, 1999 and the Judicature (Supreme Court) (Rate of Interest on Judgment Debts) Order, 2006, the rate of interest payable on judgment debts between 1999 and 21 June 2006 was 12% per annum, and

thereafter, it was 6%. Additionally, as indicated, since the contractual relationship between the parties was not purely commercial, the awards made would not attract a commercial rate of interest. Accordingly, it cannot be said that Campbell J erred in the exercise of his discretion to award 6% and 3% in the respective applicable periods.

[127] The next questions to be answered are on what sums are these rates of interest payable and from what dates.

[128] Campbell J made an award for damages for the remainder of the term of the lease, and in his reasons for judgment, seemed to have made an award for interest to be payable thereon. Because, as indicated, SDC had prematurely terminated the lease, IL would have been entitled to damages for the remainder of the term. But is IL also entitled to interest on that sum?

[129] The learned authors of Halsbury's Laws of England, Volume 11, 2015, paragraph 1242 state that:

> "[a]s interest is intended to make good deprivation of money, or its equivalent if, on the facts, there is no deprivation or, because there is an award of restitutionary damages, all loss is otherwise made good, there will be no award on interest."

[130] SDC had only been in possession of the premises for three years and one month of the 10 year fixed term lease period. IL could have benefitted from being in possession of the premises for approximately seven years prior to when its lease with SDC was set to expire. IL would not necessarily therefore have been deprived of

money, as it was free to continue operation of the premises after SDC had vacated it. There is no evidence that IL had rented the premises to any other person, as in that case, such sums would have to have been deducted from the damages awarded. Moreover, in its claim for damages for the unexpired portion of the lease, IL included the increase in rent to which it would have been entitled pursuant to the agreement for a lease. By the award of damages, IL would have therefore been compensated for all losses it would have suffered, and so that sum ought not to attract any interest at all. Accordingly, in my view, Campbell J erred when he made an award of interest on the damages given to IL for the remainder of the term.

[131] With regard to the sum awarded for demolition rehabilitation, there is no evidence that those sums were ever expended, but funds for rehabilitation were required as stated by the quantity surveyor, Mr Errol Spence. No interest would therefore be payable on the sum awarded for demolition rehabilitation as it represented the full value of the loss.

[132] With regard to the remaining sums awarded, and the sum to be added for the chain link fence, as indicated previously, I take no issue with the rates of interest awarded. However, the dates when the rates of interest are applied should be reflective of the dates when the sums were expended. As a consequence, simple interest should be awarded at a rate of 6% on:

(i) rent due when SDC vacated the premises and the cost to secure the premises, from 1 December 2001 to 21 June 2006;

(ii) reconnection of electricity and external lighting, from 18 December 2002 (see invoice attached to witness statement of Jeremy Brown filed 4 September 2009, exhibits JB 15 and 17) to 21 June 2006; and

(iii) repairs to chain link fence, from 30 December 2002 (see invoice attached to witness statement of Jeremy Brown filed 4 September 2009, exhibit JB 18) to 21 June 2006.

Simple interest ought to be calculated on the sums awarded at a rate of 3% per annum from 22 June 2006 to 10 January 2013.

Conclusion

[133] In the light of the above, in my view, both appeals ought to be allowed in part. I agree with the findings of Campbell J that SDC had accepted on the pleadings that there was an agreement for a lease of a fixed period of 10 years. However, I also agree that in any event, on all the documentary and viva voce evidence before him, and on all the authorities, it was clear that by 4 December 1998, the essential terms having been agreed, and there being no stipulation that the lease was to commence subsequent to both parties signing a letter of intent or a final lease document, it was evident that a valid and enforceable agreement for a lease existing between the parties. The nature of the transaction was not purely commercial and so could not attract a commercial rate of interest. Simple interest was, however, indeed payable at the rates and dates stated by Campbell J on all the sums with the exceptions as stated. Interest was not payable on

the sum awarded for the unexpired portion of the lease, as that award was restitutionary, and with the award of damages in respect of the unexpired term, IL's losses would have been satisfied. It was also not payable on the sum awarded for demolition rehabilitation as that expense had not yet been incurred.

[134] It was not entirely clear as to how the ambiguity arose between the reasons for judgment given by Campbell J and the order of the court. So, in my view, adjustments would have to be made to reflect the intent expressed in Campbell J's written judgment, with respect to the award for repairs to the chain link fence, and the payment of interest by the learned judge. Since the dates when the rates of interest are applied should be reflective of the dates when the sums were expended, adjustments should also be made, in keeping with those stated in paragraph [132] herein, to so indicate.

[135] In my opinion, as indicated, both appeals should be allowed in part. As a consequence, each party ought to bear its own costs, and so I would therefore suggest that there should be no order as to costs.

[136] Therefore the orders that ought to be made by the court are as follows:

1. Appeal No 24/2013 is allowed in part, and the order made by Campbell J on 31 January 2013 is varied as follows:

    "1. Judgment for [IL] on the Claim and Counterclaim in the following amounts:

        (i) Rent due when Social Development Commission Vacated $840,000.00

(ii) Rent due for the remainder of the term $15,985,348.27

(iii) Maintenance

Reconnection of Electricity $159,815.94

External Lighting $71,000.00

(iv) Security to secure premises $1,526,400.00

(v) Demolition rehabilitation $12,826,128.68

(vi) Repairs to chain link fence $18,500.00

2. Simple interest on the sums awarded as follows:

(a) 6% per annum from 1 December 2001 to 21 June 2006 with respect to the sums awarded in orders numbered (i) and (iv) for rent owing and for security for the premises;

(b) 6% per annum from 18 December 2002 to 21 June 2006 with respect to the sum awarded in order number (iii) for reconnection of electricity and external lighting; and

(c) 6% per annum from 30 December 2002 to 21 June 2006 with respect to the sum awarded in order number(vi) for repairs to chain link fence;

(d) 3% per annum from 22 June 2006 to 10 January 2013 on sums awarded in orders numbered (i), (iii), (iv) and (vi).

3. There shall be no interest on orders numbered (ii) rent due for the remainder of the term; and (iv) for demolition rehabilitation.

4. Costs to [IL] to be agreed or taxed."

2. Appeal No 32/2013 is allowed in part, and the orders made by Campbell J are varied as stated in order number 1 above.

3. There shall be no order as to costs in respect of both appeals.

[137] Finally, I wish to apologise profusely to the parties on behalf of the court for the lengthy delay in delivering this judgment. It was, for reasons that it is not necessary to state, unavoidable in the circumstances.

F WILLIAMS JA

[138] I have had the opportunity of reading the draft judgments of Phillips and Edwards JJA. Having done so, I am in agreement with the orders proposed by Phillips JA; and for the reasons outlined in her judgment.

EDWARDS JA (AG) (DISSENTING IN PART)

Introduction

[139] I have read in draft the judgment of Phillips JA. Whilst I agree with her reasoning and conclusion on some of the issues raised in this appeal, for the reasons discussed below, regretfully, I cannot agree with her reasoning and conclusion specifically dealing with issues 1, 2 and 3 which relate to the pleadings and whether there was in fact an enforceable agreement for a lease. Based on the conclusion I have arrived at on those issues, I find that I can only agree in part with her reasoning and conclusions on issues 4, 5 and 6. Based on the decision I have come to on issues 1, 2 and 3, which form grounds of appeal by the Social Development Commission (SDC) in this case, I believe that SDC's appeal should be allowed, and the judgment of Campbell J ought to be set aside with costs to SDC to be taxed if not agreed.

[140] Whilst I do not agree with the majority's decision as to the outcome of this matter, with respect to Implementation Limited's (IL) appeal, I agree that it is not

entitled to commercial interest on the items of special damages claimed and awarded. I also agree that interest should be awarded as outlined in the judgment of Phillips JA.

[141] The facts of this case were fully outlined in the judgment of Philips JA. I would only state briefly those facts which are necessary to my short discourse. IL is a private entity. The SDC is a public body set up under the Jamaica Social Welfare Commission Act 1958.

[142] Sometime in the year 1990, IL entered into a long term lease arrangement with the Commissioner of Lands, for the lease of approximately 84 acres of land located at Stonehole and Cumberland Pen in the parish of Saint Catherine, being land registered at Volume 1159 Folio 500 and Volume 87 Folio 24 of the Register Book of Titles (the premises), for a period of 25 years, with an option to renew for a further period of 24 years. The initial cost of the lease to IL was the peppercorn rental of $6,000.00 per annum, subject to revision in a manner provided for in the lease, every seven years. The first revision would, accordingly, have been effected on 10 December 2007.

[143] After leasing the premises from the Commissioner of Lands, IL, operating as JamWorld Limited, developed a part of the leased premises into an entertainment complex known as the JamWorld Entertainment Centre.

[144] In 1998, IL (without the consent of the Commissioner of Lands, whose consent was required under the head-lease), entered into negotiations with SDC to sublet the premises to them at a cost of $140,000.00 per month, inclusive of the $10,000.00 per month IL was obligated to pay to the Commissioner of Lands under the head-lease.

Much of the negotiations for this sublease were contained in written correspondence passing between the representatives of the parties. Both parties, at a point in their negotiations, agreed that certain terms ought to be contained in a formal executed lease agreement. IL, thereafter, agreed to permit SDC to enter into possession of the premises upon the issue of a letter of intent. SDC went into possession in October 1998, without the letter of intent being issued and without an executed lease agreement, but paid rent monthly. IL sent a lease agreement, signed by them, to SDC for signature but this was not signed by SDC. The parties continued to negotiate further terms, and yet again, an amended lease agreement, incorporating those new terms, was signed by IL, but not SDC.

[145] The Commissioner of Lands, having found out about the subletting, questioned the value of the sublease, on the basis that the capital improvements made by IL did not justify it. Faced with the objections put forward by the Commissioner of Lands, IL gave SDC notice to quit on 30 September 1999, on the basis of the lack of consent from the Commissioner of Lands. SDC did not immediately vacate the premises but held over for several months, finally giving one month's notice to IL that they were leaving the premises, and ultimately vacating it on 30 November 2001.

[146] IL successfully filed a claim against SDC for, *inter alia*, damages for breach of a fixed term lease. It was, however, dissatisfied with certain aspects of Campbell J's, decision, including, *inter alia*, his refusal to grant commercial interest on all the sums awarded, as a result of which it filed this appeal challenging that aspect of the award.

Not to be outdone, SDC also filed notice and grounds of appeal on 5 April 2013, which was subsequently amended, complaining that the judge had erred:

(a) in his treatment and/or interpretation of SDC's pleaded case, and its effect on the case advanced at trial;

(b) his finding that a fixed term tenancy was in force at the time that SDC vacated the premises in question; and

(c) in not treating the arrangement between the parties as a monthly tenancy.

Issue 1- Raising a case at trial different from that stated in the pleadings

[147] It was submitted by counsel for IL that SDC admitted, in its amended defence, that there was an agreement for a fixed term lease. The judge below accepted that this was the case and held that it could not plead a different case at trial as it would be tantamount to an ambush. For its part, SDC submitted to this court that the judge was wrong in that finding. Counsel for SDC pointed out that although they had admitted to taking possession in accordance with an agreement for a lease, they had denied that there was a lease or any breach of a lease. Counsel for the SDC argued that when the statement of case is considered in full, it is clear that the admission made by SDC was to an agreement for a lease and not to a lease. He said the judge was wrong to interpret the pleadings in any other way, as it was plain that what SDC was arguing was that the agreement, though it existed, was not enforceable. Counsel also argued, that

based on IL's own position on the matter, it would have been aware that there was no enforceable sublease.

[148] The question of whether the agreement for a lease which was in place was enforceable was a question of law which SDC was entitled to have determined. For my part, I do not find the admission by SDC that there was an agreement for a lease fatal to its case, as there was in fact an agreement to enter into a fixed term lease. The issue was whether that agreement to enter into a fixed term lease agreement, was a valid enforceable one, to make it in law "as good as a lease". Nowhere in the original statement of case or the amendments thereto did IL claim that the agreement for a lease it negotiated with SDC operated as a valid lease. That the agreement operated as a valid lease is an equitable claim which ought to have been pleaded so that SDC, whose case it is, that although terms were agreed it did not operate as a valid lease, could specifically answer that claim.

[149] IL, having failed to specifically plead that claim, it is not surprising to me, therefore, that SDC admitted to an agreement to sublease and having taken possession based on that because that is a truthful factual statement. A party who takes possession under an agreement for a lease enters into a landlord and tenant arrangement, upon the terms of the intended lease, and under the rule in **Walsh v Lonsdale** (1882) 21 Ch D 9, if the contract is capable of being enforced by specific performance, he holds on the same terms, as if a lease had been granted. This is so, unless the agreement itself shows a contrary intention. Either party to a valid and enforceable agreement for a lease may recover damages for breach of contract. There

is nothing in the statement of case of IL which indicates that its claim was that it had a valid and enforceable contract for a lease which was as good as a lease, therefore, it cannot be said that SDC agreed to that in its defence.

[150] It was important for IL's claim to be framed in that way because a contract for a lease is distinguishable from a lease. "A lease is a formal conveyance of an estate in land, whereas a contract for a lease is merely an agreement that such a conveyance will be entered into at a future date" (see definition in Woodfall Landlord and Tenant, 27th edition, at paragraph 316). Although the contract for a lease may operate as if it were a lease, certain circumstances must exist. To my mind, a person relying on such circumstances to claim that a contract operated as a lease, is obliged to plead his case in that manner so a proper defence can be mounted to it. One of the circumstances for that agreement for a lease to be effective and enforceable is that it must not be "subject to contract". For, where it is subject to contract, there is of course no binding enforceable contract, as the terms in the agreement are intended merely to form the basis of a more formal contract, and the agreement is not the contract itself. The issue whether such an agreement is subject to contract is a question of construction. A claimant who has inserted such a clause into his contract and now wishes to claim that it is ineffective, to my mind must clearly so plead, so that the defendant will know that that is the issue between them.

The law

[151] Rules 8.7, 8.9 and 8.9A of the Civil Procedure Rules 2002 (CPR) set out what must be included in a claim, including a description of the nature of the claim, and all

the facts on which the claimant relies. It also states in rule 8.9A, that a claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court permits. Rule 10.7 of the CPR sets out the consequences of not setting out one's defence. It states that the defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court permits it.

[152] To better understand the current or modern approach to pleadings, I believe it is sufficient to quote from The Caribbean Civil Court Practice 2011 Note 17.6. There it states in full that:

> "Under the CPR regime, the function of any statement of case has changed from that of pleadings which previously were at the core of the conduct of litigation. In *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775, CA, Lord Woolf MR gave guidance upon the function of statements of case under the new regime. The need for extensive statements of case, including particulars, should be reduced by the requirement to exchange witness statements. **In the majority of proceedings, identification of the documents upon which a party relied, together with copies of that party's witness statements, made the detail of the nature of a party's case obvious to the other side.** The need for particulars in statements of case, in order to avoid taking another party by surprise, was now reduced. Statements of case should make clear the general nature of a party's case. They were not, however, superfluous. They were critical to identify the issues and the extent of the dispute between the parties." (Emphasis added)

[153] The editors then went on to discuss the case of **East Caribbean Flour Mills Limited v Ormiston Ken Boyea and Another** Court of Appeal, Saint Vincent and the

Grenadines, Civil Appeal No 12/2006, judgment delivered 16 July 2007, where one of the "fundamental" issues before the court was the extent of the parties' obligation to set out in their pleadings all the facts on wish they wish to rely. A question arose on the case as to whether the contents of certain documents, witness statements and expert reports were particulars of the allegations raised in the pleadings or whether they were new allegations, amounting to a change in the statement of case. On that issue, the Eastern Caribbean Court of Appeal upheld the learned judge's decision to exclude certain documents that had not been included in the pleadings, but indicated that she had erred in deciding that the pleadings were the only documents she could consider in assessing what was the issue between the parties. The judgment of Barrow JA is quoted extensively in the text and I find it necessary to repeat it here. At paragraphs [42] to [45] Barrow JA said this:

> "[42] …Lord Hope's paragraph 55 [in **Three Rivers District Council v Governor and Company of the Bank of England** [2001] UKHL 16], draws a distinction between making an allegation of fraud, dishonesty or bad faith and the particulars of the allegation that must be given. His Lordship stated in the paragraph that followed that in the case before him 'it is clear beyond a peradventure that misfeasance in public office is being alleged.' Throughout the remainder of His Lordship's consideration of the pleading issue, which went on for a further fourteen paragraphs, the constant theme was the sufficiency of the particulars of the allegation. The distinction between an allegation and particulars of an allegation could not have been clearer.
>
> **Witness statements**
>
> [43] Lord Hope's reproduction and approval of the exposition by Lord Woolf MR in McPhilemy v Times

News Papers Ltd [1999] 3 All ER 775] on the reduced need for extensive pleadings now that witness statements are required to be exchanged, should be seen as a clear statement that there is no difference in their Lordships' views on the role and requirements of pleadings. The position, as gathered from the observations of both their Lordships, is that the pleader makes allegations of facts in his pleadings. Those alleged facts are the case of the party. The 'pleadings should make clear the general nature of the case,' in Lord Woolf's words, which again I emphasize. To let the other side know the case it has to meet and, therefore, to prevent surprise at the trial, the pleading must contain the particulars necessary to serve that purpose. But there is no longer a need for extensive pleadings, which I understand to mean pleadings with an extensive amount of particulars, because witness statements are intended to serve the requirement of providing details or particulars of the pleader's case.

[44] It is settled law that witness statements may now be used to supply details or particulars that, under the former practice, were required to be contained in pleadings. **The issue in the Three Rivers case was the need to give adequate particulars, not the form or document in which they must be given. In deciding that it was only the pleadings that she should look at to decide what were the issues between the parties the judge erred, in my respectful view. If particulars were given, for instance, in other witness statements the judge was obliged to look at these witness statements to see what were the issues between the parties. It follows, in my view, that once the material in Mr. McAuley's witness statement and Report could properly be regarded as particulars of allegations already made in the pleadings such material was relevant and, therefore, admissible...**

No change of case

> [45] Before considering whether the challenged material were particulars of existing allegations or were new allegations I consider the related objection by the claimants that the defendant was not permitted to change its statement of case after the first case management conference unless it obtained permission... However, I am firmly of the view that additional instances or particulars of a sufficiently made allegation do not constitute a change in the statement of case." (Emphasis added)

Discussion and analysis on the pleadings in this case

[154] I will summarize the pleaded case of IL in its amended statement of case filed 9 February 2006. Paragraph 1 outlines that it is the lessee of the premises from the Commissioner of Lands. This, SDC admitted in its defence. Paragraphs 2 to 4 are as follows:

> "2. By an agreement for a lease made in or about 1998 and the terms and conditions thereof are evidenced in writing in correspondence between [IL] and [SDC], [SDC] subletted the said land from [IL] on terms and conditions, inter alia as follows:…
>
> 3. In accordance with the said sublease [SDC]took possession of the said land and paid the plaintiff rent from October 1998 to March 1999.
>
> 4. [SDC] in breach of the agreement for sublease left the premises on or about 30 November 2001." (Underlined as in original)

The remaining paragraphs claim that SDC, in breach of contract, failed and or neglected to pay rent and utilities, or in the alternative, failed to pay for use and occupation.

[155] As previously stated, paragraph 2 was admitted by SDC. It is being claimed that this admission shows that SDC admitted to the claim that it had a valid fixed term lease of ten years with IL. I beg to differ.

[156] Firstly, nowhere in the claim does IL claim to have a valid sublease with SDC. Equally, nowhere in IL's pleadings does it state that the agreement for a lease, pleaded at paragraph 2 of its statement of case, was "as good as a lease". The claim SDC was left to meet was a claim that there was an agreement for a lease which formed the basis on which the premises was sublet and on which basis, SDC was let into possession. All this is true, and SDC was obliged to admit to that claim. It denied it owed rent and denied it was in breach of the subletting because it gave the requisite notice to quit. There was no allegation in the claim of when the agreement for the lease crystallized into a valid agreement. SDC, knowing that it had not executed a formal lease, and that the agreement it had entered into was made subject to contract, SDC could not have been alerted by the pleadings as framed, that IL was in fact claiming that a valid enforceable lease existed.

[157] It is clear from the way the pleadings were framed that what IL seems to have been claiming was a breach of the tenancy agreement and not a breach of a valid and enforceable lease. A lease being different from a contract for a lease, to my mind, a claimant who is relying on a contract for a lease to say that it was valid and enforceable as if a lease operated, must state so in clear terms so that the defendant can know that that is the claim. In the context of a relationship between parties where, at no time before this claim was filed did IL charge that there was a valid lease, it is impossible to

say that on this claim, as filed, SDC ought to have known that it was answering a claim that the agreement for a lease operated as a lease, with all the ramifications and remedies attached to such a claim, to which IL would have been entitled.

[158] In its further amended defence filed 16 December 2005, SDC stated that it gave the requisite notice and pointed out that IL had also tried to evict them by giving them one month's notice. The entire tenor of the defence of SDC is that it was a tenant who had paid all its rent and had given the requisite notice.

[159] The witness statement of Mr Robert Bryan, filed and exchanged on 3 November 9 2009, comprehensively outlined the case for SDC. Mr Bryan was the man in charge of the entire negotiations between IL and SDC, and who, on the documentary evidence, conducted much of the negotiations for the sublease between IL and SDC. Based on his witness statement, IL knew exactly what the case for SDC was.

[160] At paragraph [8] of his written judgment the learned judge referred to IL's case in this way:

> "It was [IL's] contention that there was a fixed term lease agreement between [IL] and [SDC] under the lease agreement. There was no provision permitting [SDC] to terminate the lease agreement by giving one month's notice or by giving any notice. Accordingly, [SDC] breached the lease agreement by abandoning the premises on the 30th November 2001. [IL] 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."

These contentions outlined by the judge were submissions made at the trial and do not explicitly and I would venture to say not implicitly, either, appear anywhere in the claim.

[161] In paragraphs [13] and [14], Campbell J stated that SDC had admitted that it had entered into a sublease. But this is not correct, as, in my view, the admission was to the pleading that there was an agreement for a lease, which is a fact that is not in contention. At paragraph [16], after referencing the cases dealing with the basic purpose of pleadings, he goes on to state:

> "[SDC] should not permitted at this late stage, to raise a case that did not appear in its Further Amended Defence. To allow [SDC's] case to proceed in disregard to its own pleadings is to permit [IL] to be ambushed and surprised. The general nature of the case that had been known to [IL] all throughout the pre-trial process is not the case [IL] has to meet here. New issues have been thrust upon [IL]."

It appears to me, by this statement, that the irony was lost upon the judge that he had allowed new issues, as contended in paragraph [8] of his judgment, which do not appear anywhere in the claim or particulars of claim, to be thrust upon SDC.

[162] In my view, in light of IL's statement of case, and in particular, the ambiguities attendant on how it was framed, it would have been perfectly proper for SDC to either be allowed to amend its claim to meet the facts of the case that IL was claiming was a part of its pleadings, or for the judge to allow the case to proceed on the further and better particulars in both parties' witness statements.

[163] Although the facts of this case are different from those of **East Caribbean Flour Mills Ltd v Ormiston Ken Boyea**, it is clear that SDC's defence was that it did enter into the agreement for a lease, but it was not in breach because it gave the requisite notice. Since an agreement for a lease is only valid and enforceable as a lease, in certain circumstances, in my view, it was a perfectly valid defence, in the absence of any assertion by IL, in the pleadings, that it had a valid and enforceable contract which operated as a lease with SDC. Since SDC made a factual assertion that it was not in breach because it gave notice, it should have been entirely allowable for it to give further and better particulars as to why it was not in breach and why it gave a month's notice. Those factual particulars are that the agreement for the lease it entered into with SDC did not operate as a lease, as it was subject to contract, in which case, the requisite notice was given. To my mind, no issue has arisen of SDC changing its case.

[164] The issue for SDC was that it was in a monthly tenancy arrangement with IL until the lease was formalised, which it did not breach because it gave the requisite notice. Any cursory glance at IL's pleadings would show that there was no other claim for SDC to meet but that. It is only on a full reading of the witness statements exchanged by the parties that the court can discern the true issues joined. From the witness statements it becomes clear, that IL was not claiming a breach of a tenancy contract and payments for outstanding rent but was claiming that the agreement for the lease operated as a lease. The witness statements from SDC answered that case. IL merely pleaded that there was an agreement for a lease. That is a fact. But that agreement required construction of the subject to contract clause and its ineffectiveness, which

was never pleaded. IL failed to plead that the clause it inserted in the contract was ineffective and thus it had a valid and enforceable contract for a lease which was as good as a lease. It is possible to have an agreement for a lease which is not binding at all.

[165] In my view, it would be unjust to say that IL is allowed to buttress its pleadings, which it did not make clear its claim, by factual particulars in the witness statements filed and exchanged, but SDC, which answered the claim, which on the face of it, was what was claimed by IL, cannot be allowed to allege further particulars to answer the better and further particulars in IL's witness statements. This is not in keeping with the overall objective of dealing with cases justly, and is not in keeping with the authorities to which I will now refer.

[166] There is no allegation in the claim filed by IL that the agreement for a lease operated as a lease. This is both a legal and factual assertion. It is an equitable principle upon which IL was relying without clearly stating in its claim that it was doing so. In my view, SDC did not admit in its defence that there was a valid lease because no assertion had been made that there was a valid enforceable lease in place. It admitted to a factual assertion that there was an agreement for a lease. Nowhere in the pleadings did IL claim the agreement operated as a lease. Particulars of the factual allegations of the relationship of landlord and tenant which SDC admitted to, are to be found in SDC's witness statement, which indicates, that although there was an agreement for a lease, and possession of the premises granted, there was no intention for that to operate as a lease, because the agreement was subject to contract.

Paragraph 10 of the witness statement of Jeremy Brown indicates that IL was the one who proposed the "subject to contract" clause. That proposed clause was accepted by SDC as part of the agreed terms and conditions of the agreement. Therefore, the judge was wrong to find that SDC admitted the claim that there was a lease and could not at trial rely on a different averment. I, therefore, cannot agree with the majority that the judge was correct.

Issue 2- Was there an agreement for a lease with all the essential terms; and what was the effect of subsequent negotiations/conduct on the sub-lease?

[167] Although the issue is framed in this way, the real issue joined between the parties is not whether there was an agreement for a lease with all the essential terms, but was whether that agreement was "subject to contract".

[168] The negotiations between SDC and IL played out largely in written correspondence between agents of both entities. It is to those documents that the court must look to see what the parties agreed.

[169] Counsel for SDC submitted that the learned judge had erred in his findings that there was no requirement for a letter of intent, as, counsel maintained, it was the intention of the parties that the lease would come into existence, subject to both parties signing the letter of intent, "if a fixed term lease document was not available for signing".

[170] To my mind, based on the correspondence between the parties, the lease agreement would only come into effect on the happenstance of one of two events: (a)

the signing of a letter of intent by both parties with possession granted by IL; or (b) the signing of formal lease document. In this case, no letter of intent was issued with possession, and the formal lease document was never signed by SDC. The question whether the negotiations between the parties culminated in a concluded agreement and were not "subject to contract" is of vital importance to the determination of this issue in the appeal. The ultimate question is whether Campbell J was wrong to find in favour of IL on this point.

The applicable law

[171] In Halsbury's Laws of England, 3rd Edition, Volume 23, at paragraph 1041, it states that:

> "**Essentials of informal contracts**. If documents or letters are relied on as constituting an enforceable contract, it must appear, as a matter of construction, that the parties intended to be bound and did not enter into an arrangement 'subject to contract' that is to say an informal arrangement not intended to be binding unless and until a formal document has been signed and exchanged." (Emphasis as in the original)

[172] I take no issue with what is said in the text Woodfall, Landlord and Tenant at paragraph 4.001, relied on by IL, with regard to the effect of an agreement for a lease. I seize, however, on the words appearing in the said paragraph that:

> "...The agreement may be immediately enforceable or may be enforceable only on the occurrence of some event, or the fulfilment of some condition..."

[173] I also bear in mind the caution by Lord Cairns in **W J Rossiter and Others v Daniel Miller** (1878) 3 App Cas 1124 at page 1139, to the extent that it is relevant, that:

> **"[I]f you find, not an unqualified acceptance of a contract, but an acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise, then undoubtedly you cannot, upon a correspondence of that kind, find a concluded contract**." (Emphasis added)

[174] It is true that, in that case, Lord Cairns did go on to find that there was a clear offer and acceptance, and that there was no provision suspending the operation of the contract until a formal agreement had been made, but the principle remains the same. At page 1143 he says further:

> "It has been established for far too long a time, and by some precedents in your Lordships' House, that if you can find the true and important ingredients of an agreement in that which has taken place between two parties in the course of a correspondence, then, although the correspondence may not set forth, in a form which a solicitor would adopt if he were instructed to draw an agreement in writing, that which is the agreement between the parties, yet, if the parties to the agreement, the thing to be sold, the price to be paid, and all those matters, be clearly and distinctly stated, although only by letter, an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties, merely because that letter may say, We will have this agreement put into due form by a solicitor. **If it is stated in so many plain and express terms** (and in *Chinnock v. The Marchioness of Ely* [4 De G. J. & S. 638] that was the ground on which that case proceeded) **that one of the very terms of the agreement itself were that it should not be a**

concluded agreement until a solicitor intervened and drew a formal agreement, if you find that to be a term of the agreement itself, well and good, if not, the agreement stands." (Emphasis added)

[175] Lord O'Hagan in **Rossiter v Miller** at page 1149 added that:

> **"[I]f any prospective contract, involving the possibility of new terms, or the modification of those already discussed, remains to be adopted, matters must be taken to be still in a train of negotiation and a dissatisfied party may refuse to proceed.** But when an agreement embracing all the particulars essential for finality and completeness, even though it may be desired to reduce it to shape by a solicitor, is such that those particulars must remain unchanged, it is not, in my mind, less coercive because of the technical formality which remains to be made." (Emphasis added)

[176] Lord Blackburn's' contribution to the debate at page 1151 was that:

> "**So long as they are only in negotiation either party may retract; and though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remain to be settled afterwards, there is no contract. The parties, in such a case, are still in negotiation.** But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, [show] that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed." (Emphasis added)

[177] Later at page 1152 he says:

> "Parties often do enter into a negotiation meaning that, when they have (or think they have) come to one mind, the result shall be put into formal shape, and then (if on seeing the result in shape they find they are agreed) signed and made binding; **but that each party is to reserve to himself the right to retire from the contract, if, on looking at the formal contract, he finds that though it may represent what he said, it does not represent what he meant to say. Whenever, on the true construction of the evidence, this appears to be the intention, I think that the parties ought not to be held bound till they have executed the formal agreement. If I thought with Lord Justice *Baggallay* that the letters here 'left the Defendant a right to believe that the signing of a formal contract was necessary to create a binding agreement' I should also think the Plaintiffs failed**; but I cannot put that construction of the letters." (Emphasis added.)

[178] I would also rely on the words of Parker J in **Von Hatzfeldt-Wildenburg v Alexander** [1912] 1 Ch 284 at page 288-289, where he said:

> "It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, **it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract**. In the latter case there is a binding contract and the reference to the more formal document may be ignored." (Emphasis added)

[179] In most of the decided cases where it has been held that there was no contract, reliance was being placed on an informal agreement, where there was no clear intention that the parties intended to be bound because that agreement carried the term that it was "subject" to one thing or the other, that is to say, that it was not binding unless and until a formal document had been signed or executed, for example, in **Winn v Bull** (1877) 7 Ch D 29 (subject to the preparation and approval of a formal contract); **Wilcox v Redhead** (1880) 49 LJ Ch 539 (provided the terms of the draft lease are reasonable in our estimation); and in **Spottiswoode, Ballantyne & Co Ltd v Doreen Appliances Ltd and Another** [1942] 2 ALL ER 65 (subject to the terms of a formal agreement to be prepared by the defendant's solicitors).

[180] In the instant case, the agreement between the parties, in my view, was subject to the issuing of a letter of intent with possession or the execution of the formal lease by both parties. The parties had no intention to be bound until either of those events occurred.

[181] In **Von Hatzfeldt–Wildenburg v Alexander**, there was a stipulation that the purchaser's acceptance was subject to her solicitors' approval of the title to and any covenants contained in the lease, the title from the freeholder and the contract itself. It was held that the contract could not be specifically enforced, as it was incomplete and conditional on the execution of a more formal contract.

[182] In the case of **Immingham Storage Company Ltd v Clear plc** [2011] EWCA Civ 89, the court found that the parties had acted as if a confirmed contract was in

place, and found that the documents sent as "further confirmation" implied a reinforcement of the legal position which already existed. It was held that clear words must be used in order to rely on the condition that the contract was "subject to contract". The instant case is distinguishable from that case, since in the instant case, SDC is relying on a clear "subject to contract" clause in the negotiated agreement.

[183] In **FBO 2000 (Antigua) Limited v Vere Cornwall Bird and Others** [2008] UKPC 51, the Judicial Committee of the Privy Council found that the parties had agreed the essential terms of the lease, and that a binding agreement could reached without the identification of the land by survey. This was based largely on the Board's finding that the parties already knew the land in question. The identification of the land by survey did not make the contract uncertain, neither was its enforceability dependant on the identification of the land. This case is also distinguishable from the instant case, in that, although there were agreed terms in the instant case, the agreement was "subject to contract".

[184] **RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK) Production)** [2010] UKSC 14 is also a case where the United Kingdom Supreme Court found that the parties had agreed to be bound by the agreed terms without the necessity of a formal contract. There was a variation of the agreement under a signed letter of intent which the court referred to as the "August variation", and found that it was agreed without any suggestion that it was subject to contract. The court found that from this, the inference could be drawn that the parties had agreed to waive the 'subject to contract' clause. The court said:

> "it was possible for an agreement 'subject to contract' to become legally binding if the parties later agreed to waive that condition as they were in effect making a firm contract by reference to the terms of the earlier agreement."

[185] In that case, therefore, although there was a "subject to contract" clause, the court found that it was waived. In the instant case, in my view, there is no evidence of a waiver of the "subject to contract" clause, neither do I accept that the fact that SDC went into possession and started paying rent monthly is evidence from which the court could draw an inescapable inference that the "subject to contract" had been waived.

[186] In **Rossiter v Miller**, there was no condition which operated to suspend the validity of an offer and acceptance until a formal contract was drafted. Such a stipulation has to be a term of the agreement.

Discussion and analysis on whether the parties intended to be bound by the agreement for a lease

[187] In order to determine whether the parties intended to be bound by the agreement for a lease in their negotiations, without further formalities, it is necessary to set out the various items of correspondence between the parties. I will start with the letter of 14 May 1998, from Mr Jeremy Brown, director of JamWorld to Mr Robert Bryan, executive director of SDC. There were 12 distinct terms proposed. I will only mention those I consider to be the essential terms.

[188] In that letter, Mr Brown proposed terms of a long term sublease to SDC. He offered a sub-lease for an initial term of 10 years, with an option to renew for a further five years. The lease payment was to be for $140,000.00 being $130,000.00 plus the

$10,000.00 IL was obligated to pay the Commissioner of Lands. The price was fixed for a period of five years. The lease was to commence on 1 July 1998 "subject to both parties signing a letter of intent, if a final lease document is not available for signing". After five years, the lease payment was to be increased by a formula contained in the proposed terms. SDC was to be responsible for all utility payments, and regular maintenance of buildings, plant and equipment. SDC was also to agree to the participation of JamWorld Limited in the organization and promotion of the annual Caribbean Heritagefest Festival.

[189] Mr Bryan responded to Mr Brown's proposal by letter of 27 August 1998. In that letter, he confirmed his agreement to the lease price of $140,000.00, and all other terms, except, the annual increase and the commencement of the lease. He instead proposed 1 October 1998 as the commencement date, and an annual increase of the lease payment by 20% after five years.

[190] It is clear at this point that, firstly, Mr Brown's offer carried with it a standard classic "subject to contract" clause. Secondly, when Mr Bryan made his counter proposal on 27 August 1998, he did so having accepted all other clauses except the two he counter proposed. It is my view that a clear inference may be drawn that Mr Bryan accepted that the negotiations were "subject to contract." Thirdly, with the introduction of Mr Bryan's counter proposal, there was no agreement between the parties. He in fact said, "I trust you will find my counter proposals agreeable and will proceed with the preparation of the necessary documents for signing". At this point, my interpretation of the effect of what Mr Bryan was saying is that, if IL agreed to the terms of counter

proposals made, then the parties could proceed subject to the already agreed position the agreement was "subject to both parties signing a letter of intent, if a final lease document is not available for signing". It is clear to me, therefore, from this response, that Mr Bryan accepted that no agreement would come into being until the letter of intent or the formal lease documents were signed.

[191] There is nothing in the correspondence thus far which would suggest to me that either party had waived clause iv of Mr Brown's proposed terms, to which Mr Bryan agreed, that the proposal was "subject to the signing of a letter of intent if a final lease document is not available for signing". In fact, it was confirmed to be so by Mr Bryan's hope that his counter proposal would be accepted so that the documents could be prepared for signature.

[192] On 5 September 1998, Mr Brown wrote to Mr Bryan. He outlined his understanding of the position of the parties to date. He then indicated his acceptance of the revised commencement date to 1 October 1998. He also proposed a means of computing an increase in the lease rental to account for the impact of inflation. He made no other changes to his original proposal. In his letter of the 5 September 1998, Mr Brown also proposed the following:

> "[w]hen we have received your response to this letter we will instruct our attorneys to prepare a formal lease document but **will accept its commencement as October 1, 1998 by issuing a letter of intent with possession being granted**. We look forward to your early response." (Emphasis added)

To my mind, this is a clear indication that as at 5 September 1998, the negotiations were still "subject to contract", and there was no final agreement of all the terms.

[193] At this stage, the state of play is this: Mr Brown had proposed new payment terms, and had agreed to the offer of a new commencement date. Mr Brown had also confirmed that the "subject to contract" clause in his 14 May 1998 offer still stood. What was left was for Mr Bryan to accept the new means of computing the increased rental payment terms after which the lease would commence 1 October 1998, with the issue of a letter of intent, the formal lease to come after. In my view, the offer by Mr Brown, therefore, was at this stage still conditional on the lease taking effect after formal documentation. This was the original position of the parties from the start of negotiations comprised in Mr Brown's letter of 14 May 1998, and was never varied or waived. The issuance of the letter of intent, if the formal lease document was not available, was not meant to govern the possession date, but was intended to mark the commencement of the lease.

[194] On 30 September 1998, Mr Bryan accepted Mr Brown's proposal, and asked that the formal documents be drawn up for signature. Again, in my view, his acceptance of all the terms at this point, was still dependent on the original "subject to contract" terms in clause iv of the proposed terms on 14 May 1998.

[195] By letter dated 4 December 1998, Mr Bryan wrote enclosing the two copies of the formal lease already executed by IL. SDC was requested to execute the same.

[196] It must be noted that SDC entered into possession in October 1998. In the absence of the letter of intent, the basis for them doing so, only became clear in subsequent correspondence between the parties. What is clear is that no letter of intent was ever issued with the grant of possession, as contemplated by the letter of 5 September 1998.

[197] That was the position then on 4 December 1998, when Mr Brown wrote to Mr Bryan enclosing two copies of the formal lease executed by IL. SDC did not sign the lease document but instead continued negotiations with IL for new terms to be added. IL fully participated in those negotiations, and presented an amended lease document encompassing the new terms for SDC's signature.

[198] In light of the correspondence and a specific clause in the proposed terms which indicated, in clear words, that negotiations were subject to contract, there was no basis on which the court could find that there was a binding agreement for a lease between the parties.

[199] As the authorities will show, clear words are necessary, to show that an agreement is subject to contract. The words in clause iv of the letter of 14 May 1998 from IL, are as clear as clear can be, that the agreement was "subject to the letter of intent if the formal document was not available for signature". This is the only interpretation that I could place on Mr Brown's letter of 5 September 1998 as outlined at paragraph [32] herein. I fail to see how any other interpretation could be placed on that statement.

[200] It is my view, that this was the accepted position known both to IL and SDC, and IL could never say that it was led to believe that it had an enforceable agreement for a lease, based on its own correspondence. When Mr Bryan wrote on SDC's behalf on 30 September 1998, accepting Mr Brown's proposal of 5 September 1998, he could only have accepted the new terms with the understanding that the lease would commence by the letter of intent with possession or the execution of the formal lease document as per his original offer.

[201] This is not the same situation as one where the parties are agreed but were awaiting the draft of the more formal document. A letter of intent is exactly as it connotes, a document signalling an intention to be bound at that stage. If such a signal is not given, then until it is given, there is no such intention to be bound. It is clear from the dicta in all the authorities cited, that one of three situations may arise as follows:

i) A binding agreement may be culled from correspondence between the parties once all the essential terms are agreed;

ii) A binding agreement may be culled from the correspondence between the parties where all the essential terms are agreed, even though the parties or any one of them require that a formal document be drawn up;

iii) There will not be a binding contract even though all the essential terms are agreed if the parties make it clear that they do not intend to be bound until there is a formal document drawn up.

In my view, on a true construction of the correspondence between the parties, the instant case before us falls into the third category (see **Spottiswoode, Ballantyne & Co Ltd v Doreen Appliances Ltd)**.

[202] I have also considered whether it is possible to find that, when SDC took possession in October 1998, without the letter of intent, it waived the requirement for a letter of intent or the formal lease. It is clear, however that, from the conduct of the parties, there was no waiver of that requirement. IL, in any event, has not claimed any such waiver.

[203] After SDC took possession of the premises, it had not signed the formal lease, and IL had not issued any letter of intent when SDC went into possession. The majority, in agreeing with the judge below, take the view, that all the terms having been agreed, prior to possession, then the agreement for the lease had been concluded and the parties were bound. In the case of the judge, he seemed to have taken the view that once all the terms are agreed the "subject to contract" clause become inapplicable. This is not the law. In the case of the majority, they seem to take the view that the agreement was not subject to contract at all, and all the terms having been agreed, it was a valid enforceable contract, as at the date of agreement. However, in my view,

the correspondence clearly showed that the parties did not yet intend to be bound, and had specifically agreed by clear words in the proposals, that their negotiations were "subject to contract". The letter of intent from IL which would have shown their intention to be bound by the commencement of the lease had not been issued. They were the ones who drafted the "subject to contract" clause. The signing of a formal lease by SDC which would have shown their intention to be bound had not been signed.

[204] I accept that subsequent conduct of the parties cannot be used to construe an agreement. However, it seems to me, that having not executed a letter of intent or a formal lease, there could never have been an agreement for a lease to which the parties intended to be bound in the first place. In my view, the absence of an agreement makes it wholly permissible for me to review evidence of continuing negotiations between the parties. This review has revealed, in my view, a lack of intention by the parties to be bound by the agreement.

[205] By 4 May 1999, IL had drafted a new lease agreement evidencing the further negotiations by the parties for SDC to acquire an interest in the premises. By 10 June 1999, IL had executed this new lease agreement giving SDC an option to purchase an interest on the agreed terms.

[206] Between June and July 1999, the parties continued to negotiate for an option to assign the head lease from the Commissioner of Lands to SDC, or a surrender of the lease to SDC. It is to be noted that at no time did SDC ever sign a formal lease.

[207] The fact that the parties had not concluded a lease agreement, and at no time felt themselves bound by any agreement for a lease is borne out by IL issuing a notice to quit and deliver up the premises to SDC on 30 September 1999. Here it is, that IL is claiming that it had a lease with SDC determinable by effluxion of time, yet when it failed to get the consent of the Commissioner of Lands for it to sublet, it immediately issued one month's notice to quit and deliver up possession. This, to me, was clear evidence that IL, who had drafted the "subject to contract clause", knew and accepted that there was no agreement for a lease, and that SDC was in possession on a month to month tenancy until the formal lease agreement was signed.

[208] Further, the letter from IL to SDC on 20 March 2000, enclosing an invoice for "the use and occupancy" of the premises for a six month period, is even further evidence that, at that date, they knew and accepted that there was no fixed term lease agreement arrived at. In that letter, IL recited the history of the negotiations between the parties, and the fact that SDC had remained in possession despite being given notice to quit. At no time did IL claim that there was a lease or an agreement for a lease. That letter also referred to the negotiations and IL's issues with SDC's option to purchase, but indicated they were still prepared to "honour their agreement".

[209] In June 2000, IL indicated that SDC had failed to pay for the "use and occupancy" of the premises, and urged SDC to "finalize its intention to lease the facility either with or without the option to purchase".

[210] By October 2001, SDC wrote to IL indicating that it had been put in possession pending "an assignment to it of the lease agreement between Implementation Limited and itself", and gave one month's notice to quit as it no longer required the use and occupation of the premises.

[211] The correspondence between the parties, to my mind, does not support a finding that there was a fixed term lease agreed by the parties. It is clear from the correspondence that neither side thought there was an agreement in place in the first instance.

[212] I do not accept that this case can be determined on the basis of whether, on 30 September 1998, the parties had agreed the terms of the lease. The proper question is whether the parties intended to be immediately bound by those terms. It is clear that the agreement was "subject to contract", and the parties not only did not intend to be bound but did not consider themselves so bound.

[213] On a final note, as I said previously, although conduct post negotiations cannot be used to determine whether a contract had been concluded at the time of negotiations, it is difficult to ignore the expressed statement of its position made by IL and its agents. On 23 September 1999, the attorneys for IL wrote to the attorneys for SDC in this vein:

> "**The SDC was put in possession of our client's premises pending finalisation of arrangements to assign the lease in order to accommodate your client's urgent plans for the Portmore Community.**

> We have by letter dated August 23, 1999, been advised that the Commissioner of Lands will not assent to our arrangements with the SDC for the premises as the Commissioner wishes to deal with your client directly. This position has serious legal implications. Accordingly, we are putting the SDC on notice that we will reluctantly terminate its possession unless the Commissioner of Lands withdraws its letter and Notice of Breach and consents to the assignment of our client's interests to the SDC…" (Emphasis added)

[214] In IL's letter to the Commissioner of Lands dated 23 September 1999, following the Commissioner's objection to the subletting, IL said *inter alia*:

> "With regard to your allegation that our client has breached clauses 1(d) and (i) of our client's Lease we would say that our client did not approach the Social Development Commission (SDC). The SDC approached our client to lease the Centre to incorporate it as part of their community development plans for the Portmore Community. Our client's Lease gives them the right to assign its interest to a sub-lessee in the case of a reliable and responsible person and you are prohibited from unreasonably withholding your consent. We do not for a moment believe that you could be suggesting that the SDC, a responsible arm of Government is not a fit and proper person to take an assignment. Your contention, therefore, must be that we put the SDC in possession in late 1998 before requesting your consent**. For this our client apologises but by way of explanation would say that the SDC was insistent for our client to accommodate them even before the lease was finalized as they had immediate plans that involved the forthcoming Labour Day of which you must be aware as the Prime Minister made the project his centrepiece for Labour Day 1999.**
>
> In the circumstances we would ask you to withdraw your letter and Notice above referred to by the 29th instant failing which we will reluctantly comply with your request and remedy the alleged breach of clause 1(d) and (i) **by**

> **withdrawing our permission for the SDC to use the premises**." (Emphasis added)

[215] On 30 September 1999, IL's attorney again wrote to the attorneys for SDC in the following vein:

> "We have had no response from the Commissioner of Lands as required in our letter of September 23, 1999, a copy of which was sent to you.
>
> Prior to putting the Social Development Commission in possession, our client provided your client with a copy of its Lease with the Commissioner of Lands and therefore you are aware of the terms therein requiring his consent. Due to the unexpected position taken by the **Commissioner we must terminate your client's use and occupation of our client's premises. We must also terminate the current negotiations until the matter is settled with the Commissioner of Lands**.
>
> We hereby give you one (1) calendar months' notice with effect from October 1, 1999 to quit and deliver up possession of the above premises on or before October 31, 1999." (Emphasis added)

[216] In correspondence up to and including 2 June 2000, IL still maintained that SDC was using and occupying the premises, and that the intention to lease the premises was yet to be finalised. In August 2000, IL was contemplating suit for outstanding rent for use and occupation and for possession. There was no mention of a lease being in place.

[217] It seems to me that the position taken by IL in both these correspondence, first to SDC, and secondly to the Commissioner of Lands, is consistent with the interpretation I have placed on the arrangements between the parties. They also

explain the urgent basis upon which SDC was put in possession in October 1998 (which judicial notice can be taken that that is the month in which Heroes Day holiday falls) before the letter of intent or the formal lease was executed, and that it was pending the finalization of arrangements. Those arrangements were never finalized, and SDC remained in possession on a month to month tenancy. I am unable to discern any legal basis upon which this court should ignore the clear statements in these further correspondence, of the conduct of the parties consistent with their legal position, and the clear acceptance of both parties that that was their intention.

[218] I hold the view that there was no enforceable agreement for a lease, and that Campbell J was wrong. The correspondence forming the basis of the negotiations between the parties, clearly showed that whatever was agreed in the negotiations was "subject to contract", and that at no time was this intention waived by both or either of the parties involved.

[219] I find, therefore, applying the principles in **Hadmor Productions Limited and Others v Hamilton and Another** [1983] 1 AC 191 and **Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, that the judge misunderstood and misapplied the law and the evidence, and was therefore palpably wrong in finding that SDC was raising a new case and that there was a valid enforceable agreement for a lease. The appeal brought by SDC should therefore, be allowed, and Campbell J's judgment ought to be set aside.

Issue 3- The effect of a breach of a covenant in the head lease on the sub lease

[220] SDC argued that, in any event, the subletting of the premises by IL was invalid because the head-lease called for the consent of the Commissioner of Lands and that consent had not been obtained. Counsel for SDC argued that this was recognised by IL when it issued its notice to quit to SDC citing the lack of consent from the Commissioner of Lands. Queen's Counsel for IL argued that the covenant not to sublet was binding as between IL and the Commissioner of Lands but did not affect the sublease between IL and SDC.

[221] I accept the statement of the law in **Cuthbertson v Irving** (1859) 4 H&N 742 as well as in **Industrial Properties (Barton Hill) Ltd and Others v Associated Electrical Industries Ltd** [1977] QB 580. However, it seems to me that there is a tension between those two cases, and the reasoning in the case of **Warmington and Another v Miller** [1973] 2 All ER 372 as well as the rule in **Forrer v Nash** (1865) 35 Beav 167; (1865) 55 ER 858. The former two cases are authorities for the principle that if the lessee enjoys everything the lease purports to grant and he is let into possession, he cannot then question the landlords defect in title.

[222] The first of the latter two cases, **Warmington**, holds that where there is a covenant not to sublet, the sub lessee cannot sue for specific performance of the sublease or for a declaration that he was in possession of the premises on the terms of the sublease. The second of the latter two cases, **Forrer v Nash**, is authority for the

principle that if consent is required to sublet, it must first be obtained otherwise the intending sub lessee can repudiate the agreement.

[223] The effect of these quartet of cases in my view is this. The remedy for the breach of the covenant not to sublet is between the head-lessor and the head-lessee. The effect of a subletting in breach of such a covenant is that a sub lessee cannot sue for specific performance, but where consent is required but not sought prior to the issue of the sublease, the sub lessor can repudiate the contract. This is so even if consent could not properly be withheld. See VC Robert Megarry's judgment in **Pips (Leisure Productions) Ltd v Walton** [1981] 2 EGLR 172 which approved and applied the rule in **Forrer v Nash** in holding, on the facts in that case, that lack of title is an answer to a claim for damages.

[224] This means that even if a valid contract existed between IL and SDC, SDC had the right to repudiate it on the basis that IL had failed to secure the necessary consent before entering into the agreement. This to my mind is a remedy open to SDC, regardless of whether they had been put into possession and regardless of whether, the consent of the Commissioner of Taxes could not properly be refused.

[225] In Halsbury's Laws of England, 3rd edition, Volume 23 at paragraph 1050 it states:

> "**Consents necessary**. If the property to be demised is held under a lease which contains a covenant against underletting without consent, the head landlord's consent in writing must be obtained by the intending under landlord before the date when the underlease is to be granted. If this

> is not done, the intending under–tenant can repudiate the agreement."

It then cites the rule in **Forrer v Nash** in support of that proposition. It is clear that when IL gave SDC notice citing its failure to gain the consent of the Commissioner of Lands, it became open to SDC to repudiate the agreement, despite being let into possession, because at that point the sublease was voidable and it need not have waited to see if IL would gain consent. That is the rule.

[226] The only remaining issue is whether SDC had repudiated the contract. To my mind when SDC gave notice to quit, it had by that means implicitly repudiated the contract. Therefore, IL is not entitled to claim any damages for breach of a lease it was not properly entitled or able to grant.

Issues 5 and 6- Is interest payable, and if so, on which sums and for what period and at what rate?

[227] I agree in part with the reasoning and conclusion of Phillips JA in regard to this issue. I will only add a few thoughts of my own.

[228] Firstly, let me state clearly, that I disagree that IL is entitled to the award of $15,985,348.27 for the remaining portion of the lease with interest, for the reasons given above, that the agreement for a lease, being "subject to contract", did not operate as a lease. There was, therefore, no breach of lease giving rise to damages in that sum.

[229] IL had submitted in the court below that it was entitled to interest at the commercial rate on all the sums claimed. Campbell J, exercising his broad discretion,

had not granted that request. In his judgment, he gave interest on all sums awarded at 6% from 1 December 2001 to 21 June 2006 and thereafter at 3% from 22 June 2006 to 10 January 2013.

[230] However, in the signed formal order, the learned judge gave interest on the sum of $1,526,400.00 for payment of security to secure the premises, at a rate of 6% per annum from 1 December 2001 to 21 June 2006 and at 3% per annum from 22 June 2006 to 10 January 2013 only. The question is whether his discretion not to award interest at the commercial rate on any of the sums awarded was wrongly exercised. The second issue is whether, having made the award in his judgment, which was omitted in the formal order, this court should correct that error or omission.

[231] This court ought not to lightly set aside an order for interest to be paid at a particular rate, made at the discretion of a judge, unless, in doing so, he took into account irrelevant material, or ignored relevant material, or applied an incorrect principle of law.

[232] Campbell J, in this instance, gave no reason for not awarding interest at the commercial rate. It is also important to note that the payment of interest on overdue rental did not form part of the terms of the agreement for a lease, neither does it form any part of any implied covenant in a lease. On what basis then could Campbell J have awarded commercial interest on rental sums?

[233] The starting point for the award of interest outside of contract is section 3 of the Law Reform (Miscellaneous Provisions) Act which empowers the court to order the payment of interest. It reads as follows:

> "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 or any part of the period between the date when the cause of action arose and the date of the judgment.
>
> Provided that nothing in this section-
>
> (a) shall authorise the giving of interest upon interest; or
>
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
>
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange."

[234] The award of interest under section 3 of the Law Reform (Miscellaneous Provisions) Act is discretionary. The type of interest awarded is also at the discretion of the court. This court would have to say that the judge below was wrong to exercise his discretion not to award commercial interest, or why this arrangement was of such a commercial contractual nature that it ought to attract commercial interest.

[235] IL relies on the decisions in **Tate & Lyle Food and Distribution Ltd v Greater London Council and Another** [1981] 3 All ER 716, and **British Caribbean Insurance Company Limited v Delbert Perrier** (1996) 33 JLR 119, to support its

claim for award of interest at the commercial rate on what it claims to be, is a commercial contract between itself and SDC.

[236] I take no issue with the principles set out in those cases. My concern is that Campbell J did award interest at a rate he saw fit, despite the submission of counsel for a commercial rate to be applied. It is, therefore, clear that despite the lack of reasons for doing so, in not making that award, Campbell J must have rejected any notion that IL was entitled to commercial interest.

[237] Apart from the mere assertion by IL that this is a commercial case, no evidence was led, neither in the court below, or in this court, to indicate why this case ought to be classified as a commercial case, and why Campbell J was wrong for not classifying it as such.

[238] It seems to me that before the court can say that Campbell J was wrong in the exercise of his discretion, we must consider what evidence he had before him that this was a commercial transaction between commercial men. It is not sufficient just to find that he had evidence of what was the applicable interest rate at the time. Before deciding whether to apply a commercial rate of interest, the court should embark on an enquiry as to whether the transaction was a commercial transaction. In my view, it is not sufficient to simply say rent was payable therefore it is commercial.

[239] In **Tate & Lyle**, Forbes J opined that:

> "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 withheld." (Emphasis added)

[240] If IL's position is accepted, it would mean that for every debt arising out of an agreement where money is owed, including rent between landlords and tenants, the creditor would be entitled to claim that it is a commercial contract, and therefore they are entitled to commercial interest. This would be so, even where there was no evidence that the claimant would have had to, or had borrowed money to replace that which was withheld. It is clear, to me at least, that it could only be in the rarest of case that the ordinary landlord would be borrowing money at high interest rates to replace the rental income which was withheld.

[241] Carey JA in **British Caribbean Insurance Company Ltd v Perrier** said that:

> "This leads me to venture the rate which a judge should award in what may be described as commercial cases."

[242] It seems clear to me that the only cases which should and could attract interest at the commercial rate are commercial cases, otherwise, any such award would amount to a windfall. I think we must be careful not to determine that because a civil dispute may involve payment of money, it thereby constitutes a commercial case. In the ordinary sense, a commercial case involves one of trade and industry. Commercial means to be engaged or concerned with commerce. It involves trade, trading, business, private enterprise, mercantile or merchandising. In **Tate and Lyle,** the plaintiff was engaged in trade, and the 1st defendant was engaged in construction. In **British Caribbean Insurance Company v Perrier**, there was an insurance claim for

fire loss to building materials and for electrical generators at the accused premises. That case relied on **Tate & Lyle**.

[243] Part 71 of the CPR deals with rules concerning the Commercial Division of the Supreme Court. Rule 71.3 of the CPR refers to commercial proceedings, and defines 'commercial claims' as including "any case arising out of the trade and commerce in general…". There is nothing there which refers to lease agreements or rental agreements, worse yet, of non-commercial lands.

[244] Were the parties in a commercial agreement as claimed? I do not think so. The negotiations were for a lease of land with monthly payments. The claim was for a breach of that lease agreement. The arrangement between IL and the Commissioner of Lands was for the lease of 84 acres of Government lands, at a peppercorn rent of $6,000.00 per month initially, subject to revision every seven years, which was later increased to $10,000.00. Under no circumstances could that be considered a commercial rent at market value. It is true that they had developed a part of the leased premises into an entertainment complex known as JamWorld Entertainment Centre. However, it was not the entertainment centre, nor the business that was the subject of the lease to SDC, it was the land, plant and equipment (the entire premises).

[245] IL was a registered company under the Companies Act 1967 and provided "real estate consulting services". It also undertook projects and did construction management. SDC was "incorporated pursuant to Jamaica Social Welfare Commission

Act 1958 with powers to purchase, hold and dispose of land, and to sue and be sued". It is clear that SDC did not have a commercial mandate.

[246] The **Tate & Lyle** case made a distinction between interest in commercial cases and interest awarded on damages in personal injury cases or on debts. This claim was merely for a debt for outstanding rent. It was not a financial arrangement between commercial men. In most cases where commercial rate of interest is claimed, the claimant was able to show that it had to borrow money at prevailing rates. There was no evidence from IL in the court below or in this court that it had to borrow money to replace the money owed by SDC. I also cannot envisage any scenario or likelihood of IL borrowing money to replace the rental it claimed was due from SDC. Of course, I accept that it may well not be necessary in all cases for the claimant to have to show that he borrowed money in order to successfully claim commercial interest. See the discussion in the English Court of Appeal in **British Coal Corporation v Gwent County Council** [1995] NPC 103, where in considering whether the council ought to be allowed to claim interest on compensation ordered by the Land Tribunal exercising powers under section 2(4)(a) of the Coal Industry Act, it held that a claimant should be allowed to claim interest providing he can show proper proof of financing loss such as having to borrow money to carry out works.

[247] In **Tate & Lyle**, it was also accepted that the award of interest is a discretionary matter, and in approaching the task of deciding on such an award, judges are entitled to adapt a broad approach. It cannot be, that this broad approach involves giving

commercial interest simply because the claimant states it was a commercial contract, and this is the rate of interest.

[248] In McGregor on Damages, 17th Edition, paragraphs 15-092 to 15-104, the learned editors discuss the application of interest rates in commercial and analogous cases. In all these cases, involving some commercial elements, in which there was a claim for commercial interest, there was evidence that the claimant had to borrow money at commercial rate during the period it was kept out of pocket by the defendant. The justification for the application of commercial interest was that it was only fair to claimants that, if they have to borrow, the interest rate awarded should reflect their borrowing rate. The editors left open the question of what interest rate would be applied where there was no borrowing or loss of investment opportunities.

[249] SDC entered into the arrangement with IL to use the property for social development in the community. It was not a commercial arrangement. SDC had no plans to do anything commercial with the lands. There was no basis to find that the arrangement was commercial, and the judge below was correct, on that basis alone, not to award any commercial interest.

[250] While Campbell J was correct in refusing to order commercial interest, in my view, he would have erred in awarding any interest at all on the sums awarded for the outstanding period of the lease, that is, the award of $15,985,348.27. On settled principles of law, IL is not entitled to any interest at all for rent for the outstanding

period of the lease. In McGregor on Damages, at paragraph 15-030, the learned authors, in discussing cases in which interest would be payable, said this:

> "...The second question is to see whether the claimant nevertheless retains property which, had the defendant paid over the money, would have been transferred by the claimant to the defendant or some third party. Thus in the case of a sale of land by the claimant to the defendant, the rents from the land which the claimant will reap by continuing possession of the land will offset the amount of interest that could have accrued to him on the purchase money."

[251] In this case, it would be inappropriate to award interest on the outstanding rent because IL had the value of the property for the entire remaining period of the lease. SDC having vacated the premises, IL elected to treat the agreement as repudiated, took possession and sued for the rent for the remainder of the term. The value of the use and occupation of the property by IL, during the remainder of the period, is the interest in the property, and to give further interest would be to award interest on interest, which is not allowed by law.

[252] The learned authors of McGregor on Damages go on to state at paragraph 15-032 that:

> "Where the defendant has failed to deliver goods, as under a contract of sale, manufacture or carriage, or has failed to deliver them upon time, the claimant is also entitled to claim the loss of the value of the use of the goods up till the time when he could reasonably have obtained substitute goods or during the period of delay, as the case may be. However, this award of the value of the use of the goods takes the place of interest, namely the value of the use of the money,

> and accordingly it is not required, and would be improper, to award interest as well..."

[253] They state further at paragraph 15-033 that:

> "The situation with obligations relating to land is in some ways similar to that with obligations relating to goods. Thus where there has been no, or delayed, conveyance of land under a contract of sale or lease, the value of the loss of use or loss of profit has been awarded as damages in some cases. It would be a double recovery to award interest as well..."

[254] In this case, IL recovered possession of the property, the subject of the lease. They, therefore, lost nothing more than the value of the contract, recoverable in money, and representing the difference between the monthly rental for the outstanding period of the lease, less any sums they did receive for actual rent of the property to a third party. That is the measure of damages in cases such as these.

[255] The value of the lease is based on the value and use of the land. Having recovered the land after the breach, IL cannot claim interest on the costs of the value of the land from the date of its return. To award interest on the rental, after the return of possession, would put the defendant in a better position than he would have been in, had the breach not taken place. In McGregor on Damages, at paragraph 15-040, the value of the loss of property is treated as equivalent to interests, and where interest is held to be payable, it is only payable for the loss of the money representing the loss of the use of the product. Therefore, to be entitled to interest on the rent for the

outstanding period, IL would have had to have been kept out of the use of the property for that period, and therefore lost out on the value of the property for the said period. This was not the case.

[256] At paragraph 15-043 of McGregor on Damages, the learned authors when discussing the issue of torts affecting land said this:

> "...In so far as the normal measure of damages in cases of wrongful occupation or wrongful use of land is the reasonable rental value of the occupation or user, there is no call to award interest; if given it would spell a double recovery. So in *Whitwham v Westminster Brymbo Co* [1896] 1 Ch. 894] Chitty J. refused to award interest upon the damages given for wrongful user of land; this, he said, 'would be to treat the plaintiffs as having invested their damages at interest in the hands of the defendants'. It would in effect be awarding interest upon interest: even the 1981 Act does not authorise this."

[257] At paragraph [26] of the judgment of this court in **Leighton Chin–Hing v Wisynco Group Limited** [2013] JMCA Civ 19 Phillips JA said:

> "I also agree with the respondent that regardless of the name given to the relief sought, if the lease is valid, damages would be the appropriate remedy to be awarded to the appellant. It is true that if there is a breach of a contract a party may elect to continue the contract and may recover damages for the breach. But, in my view, where the breach is of a fixed term lease and involves giving up possession of the property before the expiration of the term, there is no further occupation and rent, properly speaking, would no longer apply. The lessor may, however, be entitled to the amount that would be payable under the lease, save and except for the existence of any circumstance rendering the lease void, but the lease having been brought to an end and there is no longer possession of the premises, any amount

> payable would be in the form of damages for breach, to be calculated by reference to the amount payable for rent."

[258] This is not only the case in breach of contracts but also in cases involving the tort of wrongful interference with land. As indicated, at paragraph 15-043 of McGregor on Damages, the learned authors indicate that where the normal measure of damages for wrongful occupation or user is the reasonable rental value of the occupation or user, "there should be no award of interest, if given, it would spell double recovery." McGregor on Damages refers to the case of **Whitwham v Westminster Bymbo Co** [1896] 1 Ch 894 (affirmed at [1896] 2 Ch 538 without reference to this point) where Chitty J refused to award interest upon the damages given for wrongful user of land, where he said to do so, "would be to treat the plaintiffs as having invested their damages at interest in the hands of the defendants". It would in effect be awarding interest upon interest. With respect to claims for breach of an agreement for a lease where possession has been recovered by the landlord, the situation is no different. The claim is one for damages for any loss in income during the remaining period of the lease.

[259] In this case, where IL claims that SDC refused to proceed with the lease and was, therefore, in breach, and where it has accepted the surrender of possession by SDC, the normal measure of damages is the contractual rent for the period of the lease less the rental value of the premises at the time of the breach. In **Oldershaw v Holt** (1840) 113 ER 935, it was held that the jury could award an amount as the estimate of the plaintiff's real damage which took into account the increased rent he received from

the rental of the premises to a new tenant, after ejectment of the old tenant but during the residual remaining period of that tenancy. **In re Hide: Ex parte LLynvi Coal and Iron Company** (1871) LR 7 Ch App 28, it was held that, in a case of a breach of a lease agreement, the court will assess damages as it would in an action for breach of contract and that the measure of damages, in such a case, was the difference between the rent to be paid under the agreement and what rent could now be obtained for the property from another tenant. That is, the fair rental value of the premises now and for the remainder of the term. He cannot have the land and its full value too. Please also note the reasoning in **Laird v Pim and Another** [1835-42] All ER Rep 67.

[260] **Marshall v Mackintosh** (1898) 14 TLR 458; (1898) 42 Sol Jo 553 is an example of how the court applies that principle. In that case, there was an agreement for a lease at peppercorn rate in the first year, and thereafter for £1,100 per year for a term of 80 years. The lessee took possession but breached the agreement shortly thereafter. The lessor re-entered and re-let the premises for £900 per year two years after the lessee had vacated the premises. It was held that the lessor could recover damages measured as the loss of two years rent at £1,100 (for the period before the premises was re-let) and the loss of £200 a year for 25 years. That case considered and applied **Oldershaw v Holt**.

[261] In this case, SDC surrendered possession on 30 November 2001. Thereafter, IL was in possession of the property to do with as it pleased. There was no evidence whether they rented the property to anyone else subsequently, and if so, at what rate. There is some authority that it may not have been obliged to mitigate its loss by re-

letting the premises: see Sampson Owusu in Commonwealth Caribbean Land Law at page 626-627. However, it is not necessary to this decision to deal with that, as there is no claim that IL ought to have mitigated. The issue is a strict one of law as to the measure of damages to be awarded in a claim for breach of an agreement for a lease. Be that as it may, it is clear, however, that if IL had rented out the premises during the remainder of the term of the lease, their claim in damages would have to be calculated subject to that rental income, or else they would benefit from a windfall. In any event, they were in possession of the interest in the premises expressed as rental value and were, therefore, not entitled to any further interest on the contractual sums, commercial or otherwise.

[262] Note should also be taken of the fact that lease agreements usually carry a formula for annual or periodic increases which are generally meant to take account of inflation, interest and costs. Any addition of interest on such outstanding sums would, in any event, also result in an undeserved windfall.

[263] This is a case in which IL was not entitled, as of right, or on principle to any interest on its claim for rental income arising from the breach of an agreement for a lease. The trial judge, in his unfettered discretion awarded interest which was not commercial interest. I do not believe that based on the authorities and on the circumstances of the case, IL was entitled to any interest at all. However, I see no basis on which to say that the discretion to grant interest, other than commercial interest, was exercised in such a manner that it could be said it was palpably wrong so this court is bound to interfere. The claimant was not entitled to interest as of right. Section 3

gives the judge the power to award interest as he thinks fit. Can we say that Campbell J could not reasonably have thought it fit to order the level of interest which he did in fact order in these circumstances, simply because IL says it was a commercial contract?

[264] In a case such as this, where IL not only had the value of the property but the measure of damages erroneously awarded to him was the full rental outstanding, without any account being taken of any rent it may or may not have received during the unexpired period of the tenancy, and any possible increase in the value of the tenancy to a third party, over the period, and where it also received interest on the said sums, where it was not entitled to it at all, in my view, an award of commercial interest would not be appropriate in the instant case. If this court were to subscribe to that proposition, it would be saying that it is ok for a claimant to have the value of his property while investing the outstanding payments with the defendant at commercial interest rates. As a matter of law, this is the wrong approach.

Conclusion

[265] For the reasons I have given, I take the view that there was no admission made by SDC, in its defence to the claim brought by IL. I also hold the view that there was no valid and enforceable agreement for a lease as the parties contracted "subject to contract", and this clause was never waived. I agree that the doctrine of frustration is not applicable to this case (as stated by Phillips JA in issue 4 of her reasons). However, I disagree that, because SDC had been in possession, the breach of covenant by IL not to sublet without the consent of the Commissioner of Lands afforded SDC no remedy. In such a case, IL, having not sought the consent before entering into the agreement to

sublet, and having not been able to secure consent, entitled SDC to repudiate the agreement under the rule in **Forrer v Nash**. This is so, even if the consent could not properly be refused.

[266] I agree that IL is not entitled to commercial interest on any of the sums claimed, and I agree with the interest to be awarded as stated by Phillips JA in her judgment.

PHILLIPS JA

ORDER

By Majority (Edwards JA (Ag) dissenting)

1. Appeal No 24/2013 is allowed in part, and the order made by Campbell J on 31 January 2013 is varied as follows:

    "1. Judgment for [IL] on the Claim and Counterclaim in the following amounts:

        (i) Rent due when Social Development Commission Vacated $840,000.00

        (ii) Rent due for the remainder of the term $15,985,348.27

        (iii) Maintenance

        Reconnection of Electricity $159,815.94

        External Lighting $71,000.00

        (iv) Security to secure premises $1,526,400.00

        (v) Demolition rehabilitation $12,826,128.68

        (vi) Repairs to chain link fence $18,500.00

    2. Simple interest on the sums awarded as follows:

        (a) 6% per annum from 1 December 2001 to 21 June 2006 with respect to the sums awarded in orders

numbered (i) and (iv) for rent owing and for security for the premises;

(b) 6% per annum from 18 December 2002 to 21 June 2006 with respect to the sum awarded in order number (iii) for reconnection of electricity and external lighting; and

(c) 6% per annum from 30 December 2002 to 21 June 2006 with respect to the sum awarded in order number(vi) for repairs to chain link fence;

(d) 3% per annum from 22 June 2006 to 10 January 2013 on sums awarded in orders numbered (i), (iii), (iv) and (vi).

3. There shall be no interest on orders numbered (ii) rent due for the remainder of the term; and (iv) for demolition rehabilitation.

4. Costs to [IL] to be agreed or taxed."

2. Appeal No 32/2013 is allowed in part, and the orders made by Campbell J are varied as stated in order number 1 above.

3. There shall be no order as to costs in respect of both appeals.