IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2013CD00068

BETWEEN	**TEWANI LIMITED**	**CLAIMANT/ ANCILLARY DEFENDANT**
AND	**TIKAL LIMITED (T/A SUPER PLUS FOOD STORES)**	**DEFENDANT/ ANCILLARY CLAIMANT**

Lease - Registration of Titles Act - Whether unregistered lease for ten years enforceable - Whether new owner can enforce lease against original tenant - Whether tenancy terminated or surrendered - Whether tenant liable for unpaid rent – Whether new owner accountable for deposit.

Mr. Emile Leiba and Kristopher Brown instructed by DunnCox for the Claimant.

Mr. Vincent Chen instructed by Chen Green & Co for the Defendant.

Heard: April 4, 2016, April 7, 2016 and May 6, 2016

COR: BATTS J,

[1] The Oasis Shopping Centre in Spanish Town was to be operated as a first class commercial complex populated by several businesses with substantial patronage. In reality this was not so. Apparently, it had insufficient patronage and only a few businesses. To the dismay of the Defendant as time progressed, those businesses became fewer and this reduced traffic flow to its supermarket. The Defendant contends that it was in consequence unable to meet the 'high rental'. In January of 2009, the Defendant vacated the building.

[2] The Claimant wishes to hold the Defendant accountable for what it says is a breach of contract for a fixed term, ten-year lease agreement. A contract which has no clause for termination without cause. The Claimant contends that it "secured the benefit" of the ten year lease upon purchasing the property in question from Pastique Limited on or about July 16, 2007. The Claimant says in its Amended Claim that it is entitled to:

(a) Rent for the period January 2009 to December 2014 in the amount of US$1,638,746.91 plus GCT thereon in the sum of US$270,393.24 pursuant to the terms of the lease agreement;

(b) Interest on the arrears of rent in the amount of US$ 400,224.03 pursuant to clause 4(a) of the lease agreement at the rate of 10% per annum from the 1st January, 2009 to the 31st December, 2014 and continuing to the date of judgment or sooner payment;

(c) Service and maintenance charges in respect of the rented premises in the amount of JA$31,725,834.00 pursuant to clause 3 of the lease agreement and interest thereon in the amount of JA$3,172,583.40 pursuant to clause 4(a) of the lease agreement at a rate of 10% per annum from the September 30, 2012 to 31st December, 2014 and continuing to the date of the judgment of sooner payment; and

(d) Costs

[3] It is the case for the Claimant that on or about July 16, 2007 it purchased the rented premises from Pastique Limited. The premises were registered at Volume 1397 Folio 51 of the Register Book of Titles. It was one of several lots located in a shopping plaza. At the time of purchase the said premises was tenanted and the Defendant was the existing tenant. The Claimant contends that the lease between the Defendant and Pastique Limited was a ten-year lease which commenced in the year 2004. Further that, the Claimant became the landlord entitled to the benefit of the remaining term of the lease. It is further alleged that

in or about January 2009 in breach of the ten-year lease the Defendant vacated the premises and stopped paying rent without the Claimant's consent.

[4] The Defence is to be found in the Amended Defence filed on the 10th December 2015. It is contended that Pastique Limited constructed and developed the Spanish Town Commercial Centre. The Defendant rented one of several units in that development. The lease was a ten-year lease which commenced in 2004. The Defendant says it was entitled to give 30 days' notice in the event the "Claimant" failed to comply with any obligation under the lease. In the alternative, the Defendant contends that because the land, the subject of the ten-year lease, is registered land section 94 of the Registration of Titles Act requires that the lease be registered. The lease was not registered and the transfer of land was therefore ineffectual to pass any estate or interest in such land. In the third alternative the Defendant contends that pursuant to section 63 of the Registration of Titles Act the unregistered lease did not create a term of years and is merely a tenancy from month to month. It is alleged that a month's notice was given to the Claimant. The Defendant contends further that the Claimant was in breach of certain covenants being clause 5(d) (a covenant to insure), clause 5 (c) (pay all property taxes) and clause 5(b) (provide services and an accounting). It was contended that any obligation to pay maintenance charges would be owed to Pastique Limited or its management company and not the Claimant. Finally the Defendant claims to set off an amount of US$60,000.00 paid to the original landlord as a deposit pursuant to the terms of the lease.

[5] In support of their respective contentions the parties presented oral evidence to the Court and an Agreed Bundle of Documents. This was admitted as Exhibit 1. The persons giving evidence were Mr. Gordon Tewani, Mr. Kamlesh Menghani and Ms Sharon Thomas on behalf of the Claimant. Mr Wayne Chen was the only witness called for the Defence.

[6] The witnesses each filed witness statements but I will not restate the evidence contained in their statements nor summarise the evidence given orally. There

was not, at the end of the day, much dispute on the facts of the case. I will state shortly my findings of fact and where necessary explain with reference to the evidence my reason for such finding. At the end of the day, the greater dispute really was a legal one; that is the effect in law, having regard to the circumstances.

[7] In the course of trial, I observed and brought it to the attention of the parties that certain documents contained in the agreed bundle bore no date. Specifically the lease and its Deed of Assignment. This suggested that the documents had not been stamped. I called upon the parties to provide the stamped original (or an undertaking so to do) for otherwise the documents would be inadmissible pursuant to section 36 of the Stamp Duty Act. The result was that the Claimant's Counsel gave an undertaking to stamp the copy lease provided this Court gave a direction or Order that the copy be stamped. In this regard, it was agreed by both Counsel that the original lease could not be located after a diligent search. The Claimant elected not to rely on the deed of assignment. I made an order directing that the copy lease be stamped.

[8] My findings of fact and the reasons therefore will now be shortly stated.

a) In or about the year 2004 Pastique Limited, as landlord, entered into a contract for a ten year lease with the Defendant, as tenant.

b) The lease was for property registered at Volume 1397 Folio 51 of the Register Book of Titles (hereinafter referred to as the said land).

c) The lease was not registered on the Title.

d) The terms of the lease are to be found in a written document: see pages 8 to 34 of the Agreed Bundle.

e) By Transfer No. 1477536 registered on July 16, 2007 the Claimant became the registered proprietor of the said land, (see Title at page 6 of Agreed Bundle).

f) The Defendant acknowledged the existence of the lease and agreed with the Claimant, to be bound by its terms. I make this finding, notwithstanding the strenuous objections of the Defendant's Counsel, primarily because of the content of letters dated 11th June 2007, 14th January 2008 and 7th July 2008 [pages 59, 60 and 61 of the Agreed Bundle]. That correspondence demonstrates that the Defendant regarded itself as bound by the terms of the lease. They were having some difficulties and requests were being made for a reduction of the rental; see final paragraph of the letter dated 7th July, 2008.

"We therefore seek your kind permission to reduce the rental to fourteen thousand United States Dollars [USD $ 14,000.00] per month for the next twelve (12) months at which time we will review the current economic situation." I rely also on Mr Wayne Chen's evidence given in cross-examination:

"Q: That's ok. When Tewani purchased the premises from Pastique did Tikal continue to pay rent in accordance with the schedule on page 22 [of the lease]

A: Yes

Q: Do you agree that Tikal received written notice that Tewani was now landlord in 2007.

A: Yes

Q: Go to page 61, letter of 7th July, 2008

A: Signed by me

Q: Read it, do you agree that the reference to lease is same lease at page 8 [of agreed bundle]

A: Yes

Q: Do you also agree that prior to filing of your witness statement you had never challenged position of Tewani as landlord.

A: No"

And later

Q: When Tewani Limited was purchased from Pastique do you agree Tewani was substituted as the landlord.

A: Yes it was.

And later,

"Q: Do you agree that Tewani Ltd was substituted for Pastique as landlord under the terms of the lease.

A: In the narrowest sense yes.

Q: Do you agree that duration of the lease was for a term of ten years.

A: When you say the lease what has not expired you mean remaining period under that lease."

g) A deposit of US$ 60,000 was paid by the Defendant to Pastique Limited at the commencement of the lease.

h) No Notice to Quit was served on the Claimant by the Defendant. I make this finding notwithstanding the evidence of Mr. Wayne Chen that he instructed his attorney Ms. Jennifer Messado to serve a Notice to Quit on the Claimant. It was the evidence from both Claimant and Defendant that Mrs. Jennifer Messado was the attorney for both Claimant and Defendant at the time. Mr. Chen was unable to say whether or not a Notice to Quit was served. No Notice to Quit was produced and the Claimant denied ever receiving a Notice to Quit. I accept the Claimant's evidence in that regard.

i) In January 2009, the Defendant vacated the premises and stopped paying rent and maintenance.

j) The Claimant made unsuccessful attempts to identify another tenant both prior to and after the Defendant vacated.

[9] These being my findings of fact the following questions arise for determination:

(i) Is the Defendant liable to the Claimant for rental and maintenance in accordance with the fixed term lease?

(ii) If so is the Defendant entitled to the benefit of the deposit paid to the landlord's predecessor in title.

(iii) If the Fixed Term lease is not valid and enforceable as such, is there in existence a monthly tenancy and is there any liability in that regard.

Is the Defendant liable to the Claimant in accordance with the fixed term lease?

[10] If the lease is valid and enforceable, and if it has not been lawfully terminated, the Defendant will be liable to the Claimant for rental in accordance with the fixed term lease. Phillips J.A. in considering remedies for wrongful termination of a fixed term lease in the case of **Leighton Chin-Hing v Wisynco Group Limited** [2013] JMCA Civ. 19 put it thus;

> ***"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."

[11] The Claimant has sought to benefit from the covenant to pay rent in the original lease agreement to which it is not a party. **Spencer's case** (1583) 5 Co Rep 16a, 77 ER 72 was relied upon to support the proposition that : where there is privity of estate the covenants which touch and concern the land are enforceable.

The covenant on which the Claimant relies to support its claim is found in Clause 4 of the lease agreement (Agreed Bundle page 12):

"Clause 4(A) To pay rent and service and maintenance charge

To pay to the Landlord the Rent in United States Dollars, together with the increases as hereinafter provided and the Service and Maintenance Charge payable in Jamaican Dollars, hereinbefore reserved regularly and promptly and as and when due together with the General Consumption Tax payable thereon at the prevailing rate at the times the Rent and Service and Maintenance Charge are payable hereunder and to pay interest to the landlord at ten percent (10%) interest per annum on the due date and charged on any part of such Rent and Service and Maintenance Charge (both before and after any Judgment) accruing as from the due date and charged on any part of such Rent and Service and Maintenance Charge as remains due and unpaid. "

The Rent payable was as follows (Agreed Bundle page 29):

Year 1 – Fixed at US$ 20,000 per month plus GCT payable monthly in advance

Year 2- US$244,800.00 per annum plus GCT

Year 3- US$249,696.00 per annum plus GCT

Year 4- US$254,689.92 per annum plus GCT

Year 5- US$ 259,783.71 per annum plus GCT

Year 6- US$264,979.38 per annum plus GCT

Year 7- US$270,278.96 per annum plus GCT

Year 8- US$275,684.53 per annum plus GCT

Year 9- US$281,198.22 per annum plus GCT

Year 10- US$286,822 per annum plus GCT

The monthly service and maintenance charge, as per the Second Schedule item 4, of the lease(Agreed Bundle page 30) was:

"Year 1 an estimated service and maintenance charge of J$375,000.00 per month (being calculated at J$150.00 per square foot for Year 1) payable monthly in advance. This amount shall be payable in Jamaican Dollars. It is understood and agreed that this amount is to be adjusted when the proper Maintenance Budget is presented, as per the provisions of this lease hereunder."

[12] The principle of privity of contract excludes a third party from suing upon or being sued in relation to covenants in an agreement. There may however be privity of estate. This may occur where there has been an assignment of an interest in land. The Claimant submitted that the original landlord created a privity of estate by transferring his reversionary interest, by way of a sale of the land.

[13] The lease defines the term landlord in the following manner:

"the person or persons for the time being entitled to the reversion immediately expectant on the determination of the term hereby created" (Agreed Bundle page 8)

[14] The Claimant's counsel submitted that the transfer of the reversionary interest endorsed on the Certificate of Title on the 16th day of July, 2007 was the means by which the Claimant as a third party would benefit from the covenants of the lease under the principle of privity of estate. It was the further submission of the Claimant that the Defendant acknowledged, and therefore agreed to be bound by, the term of the lease.

[15] The Defendant' counsel denied that there was a privity of contract or estate and further submitted that the lease is ineffectual to pass any interest in land. This is because sections 94 and 63 of the Registration of Title's Act require a 10 year lease to be registered on the Certificate of Title. The effect of a failure to register

is that the tenancy which existed between the Claimant and the Defendant was a month to month tenancy.

[16] Clause 6 F of the lease agreement expressly stated that the lease would not be registered. It states (Agreed Bundle page 23):

> ***"The parties expressly agree that this Lease shall not be registered on the Title affected by same, but that the Tenant shall be entitled if it so desires, to protect its interest hereunder at its own cost and expense by Caveat at the Office of Titles."***

[17] Section 94 of the Registration of Titles Act states as follows:

> ***"Any freehold land under the operation of this Act may be leased for any term not being less than one year by the execution of a lease thereof in the form in the sixth schedule , and the registration of such lease under this Act; but no lease of any land subject to a mortgage or charge shall be valid or binding against the mortgagee or annuitant unless he shall have consented in writing to such lease prior to the same being registered."***

[18] Section 63 of the Registration of Titles Act states :

> ***"When land has been brought under the operation of this Act, no instrument until registered in manner herein provided shall be effectual to pass any estate or interest in such land, or to render such land liable to any mortgage or charge; but upon such registration the estate or interest comprised in the instrument shall pass or, as the case may be , the land shall become liable in manner and subject to the covenants and conditions set forth and specified in the instrument, or by this Act declared to be implied in instruments of a like nature; and should two or more instruments signed by the same ...."***

[19] For completeness I should indicate that the Act at section 3 defines instrument as including;

> ***"A conveyance, assignment, transfer, lease, mortgage, charge and also the creation of an easement."***

Section 2 of the Act states:

> **"All laws and practice whatsoever, relating to freehold and other interests in land, so far as is inconsistent with the provisions of this Act, are hereby repealed, as far as regards their application to land under the provisions of this Act, or the bringing of land under the operation of this Act."**

[20] Counsel for the Claimant disagreed with the Defendant's submission and cited **Brady & Chen Limited v Devon House Development Limited** [2010] JMCA Civ. 33 as authority for the proposition that the non-registration of a lease on the registered title for property does not affect the validity of the lease. In that case neither of the parties contended that the lease was invalid however the judgment of the Court is quite useful.

[21] In the matter at bar neither Counsel submitted that non-registration makes the lease invalid. I agree that non-registration does not affect the validity of the lease. Non-registration may however affect the ability of a party to transfer land subject to such non-registered interest. A lease for more than one year will not be binding on mortgagees or annuitants unless they have consented in writing prior to its being registered. When regard is had to section 2 of the Act, it is questionable whether the common law doctrine related to privity of estate is relevant to land registered under the Act.

[22] In the **Brady & Chen** case (above) the Court of Appeal stated that,

> ***"It is now settled law that by virtue of section 41 of the Interpretation Act, the English Statute of Frauds 1677 applies to this jurisdiction."***

[23] Section 3 of the Statute of Frauds states that no lease shall after June 24, 1677

> ***" be assigned, granted or surrendered unless it be by deed or note in writing signed by the party so assigning, granting or surrendering the same or their agents thereunto lawfully authorized by writing or by act and operation of law."***

It therefore means that for the interest in land to have passed to the Claimant from Pastique Limited such assignment need not have been by a registered deed. It may be passed by a note in writing signed by the party so assigning.

[24] In the case of **Cowell Anthony Forbes (Representative of Estate of Wilfred Emmanuel Forbes, deceased) and Cowell Anthony Forbes v Millers Liquor Store (Dist) Limited** 2016 JMCA 1, it was argued that a power of sale contained in an instrument of mortgage could only have had effect if the instrument was registered.

The Court of Appeal decided that the submission could not succeed because the clause did not depend on the registration of the instrument of mortgage to be effective. The clause had imported into its provisions, the relevant provisions of section 106 of the Registration of Titles Act. Although the instrument of mortgage was not created as a deed, it was held no less to be an agreement between the parties capable of creating an enforceable contractual power of sale.

[25] It seems to me therefore, that in circumstances where the parties clearly intended and agreed to be bound by the lease the Defendant will be liable notwithstanding its non-registration. There is in law an enforceable agreement. A Court of equity, all other things being equal, will not permit the Defendant to deny its existence.

[26] A fundamental principle of law is embodied in the judgment of Lord Denning MR in **Amalgamated Investment & Property Co. Ltd. V. Texas Commerce International Bank Ltd.** [1982] Q.B. 84 at p 122 :

> ***"The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved in the last 150 years in a sequence of separate developments proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppels. At the same time it has sought to be limited by a series of maxims : estoppels is only a rule of evidence, estoppels cannot give rise to a cause of action, estoppels cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. <u>When the parties to a transaction proceed on the basis of an underlying</u>***

> ***assumption- either of fact or of law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them- neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give such remedy as the equity of the case demands"(emphasis mine)***

[27] Both parties agreed to be bound by the terms of the lease. It was expressly acknowledged by the Defendant that the lease remained valid and binding. The Defendant even went further to acknowledge that the duration of the lease had not expired and paid rent and maintenance in accordance with its terms. In these circumstances, it is clear to me that both parties agreed to be bound by the terms embodied in the lease agreement entered into between Pastique Limited and Tikal Limited. It is as a result of this agreement, and the freedom of parties to contract, that I need not concern myself further with the principles of privity of estate. There is a contract between the Claimant and the Defendant.

[28] The question then arises whether the Defendant lawfully terminated or surrendered the lease. If it did so then its liability to pay rent and maintenance ended. In considering a surrender of a lease which is not registered Smith, J.A. in the case **Brady & Chen Limited v Devon House Development Limited** [2010] JMCA Civ. 33 (see Para 20 above) accepted as a correct statement of law the following passage from Professor Gilbert Kodilinye's Commonwealth Caribbean Property Law at page 18:

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

[29] The Defendant in the matter before me attempted to terminate the lease before it had run its course. He earlier requested that the landlord reduce the rent which the Claimant refused to do. This refusal was not unlawful. There is no evidence, nor indeed was it suggested, that the Claimant agreed to a surrender of the lease. The Defendant therefore breached its contract by not paying rent and vacating the premises before its term had expired.

[30] The Defendant asserted that the landlord was in breach of certain covenants being clause 5(d) (a covenant to insure) ,clause 5 (c) (pay all property taxes) and clause 5(b) (provide services and an accounting and failed in upholding the standard of the plaza).It was also submitted that the Claimant was in breach because as landlord it was not able to "operate" the Spanish Town Commercial Centre in accordance with Clause 5E. There is however no evidence that a notice in reliance on these breaches, or any notice at all, was served on the Claimant prior to the Defendant vacating the premises. Furthermore, the Defendant continued to pay rent even after these breaches were alleged to have occurred. There is no claim to recover damages from the landlord for breach of covenant before me so I need not consider that issue.

[31] I accept as a valid statement of law the words of Sampson Owusu in his text **Commonwealth Caribbean Land Law** at page 626, relied on by Justice Sinclair Haynes in **Leighton Chin-Hing v Wisynco Group Limited** [2013] JMCC Comm. 3 (unreported judgment 14 February, 2013),

> ***"Remedial rights in the landlord and tenant relationship are governed by property law, which does not recognize the principle of mitigation of damages under the law of contract. Where a tenant wrongly repudiates a lease and vacates the premises without giving the requisite notice, the tenant remains liable for rent accruing due during the term, although the premises remain vacant. The landlord is not obliged by law to re-let the property with the view to mitigating the loss to the tenant."***

The author placed reliance on the Australian case of **Maridakis v Kouvarris** (1975) ALR 197, in which the court rejected the tenant's contention that the

landlord failed to mitigate his damages and held that he was under no duty to do so. Sinclair-Haynes J (as she then was), considered the reconciliation of this Australian Authority with the English authorities of **Foster v Wheeler** 1988 Ch Division Vol. 38, 130 and **Oldershaw v Holt** (1840) 12 A.E. 590 which decided that as the landlord was successful in re letting, recovery of damages was limited to the difference between the contractual rent under the broken lease agreement and the new rent. Justice Haynes decided that damages should be calculated by the rent which would have become due and payable for the remaining period of the lease. It is to be noted that the Court of Appeal affirmed the reasoning of Sinclair Haynes J, (see paragraphs 10 and 28 above). There is in any event uncontested evidence that the landlord endeavoured to identify replacement tenants prior to and after the Defendant vacated the premises [pages 58, 63,66,70 and 89 of Agreed Bundle] . The efforts were unsuccessful.

[32] With regard to the issue of outstanding maintenance charges Claimant's Counsel placed reliance on the authority of **Moss' Empires Ltd v Olympia (Liverpool) Limited** [1939] A.C. 544. There it was held that a lessee's covenant to pay maintenance charges was a covenant which touched and concerned the land and so maintenance charges are also recoverable. As I have already stated, the parties agreed to be bound by the terms of the lease, this included the payment of maintenance charges. The Defendant is therefore liable for the rental and maintenance charges for the unexpired period of the 10-year lease agreement.

Is the Defendant entitled to the benefit of the deposit paid to the landlord's predecessor in title?

[33] In addressing the Defendant's counterclaim for recovery of the security deposit counsel for the Claimant submitted that the covenant concerning the security deposit was personal to the parties to the lease as opposed to a covenant that ran with the land. Counsel stated that only covenants which are proprietary in nature are enforceable under the doctrine of Spencer's case.

[34] I have reproduced the relevant covenant below (Agreed Bundle page 11):

> ***"On the signing of this Lease the Tenant shall pay the sum of US$60,000 (being three month's rent) as the security deposit herein and set out in Item 6 of the Second Schedule. The security deposit may be applied by the Landlord during the Term or at the expiration or earlier termination of this Lease (firstly) towards effecting repairs to the leased premises and to the fixtures therein if in accordance with the Tenant's covenants herein contained such repairs should have been carried out by the Tenant; (secondly) towards any rent that shall be owing by the Tenant; (thirdly)towards satisfaction of any amount that may be due and owing by the Tenant in respect of the Monthly Service and Maintenance Charge and for charges for electricity, water and telephone service supplied and not included in the Monthly Service and Maintenance Charge; and (fourthly),the balance (if any) shall be refunded by the Landlord to the Tenant free of interest, payable in Jamaican Dollars calculated at the rate of exchange at the date of receipt of the funds upon the execution of this Agreement."***

[35] Claimant's counsel made reference to the judgment of Lord Oliver in a decision of the Privy Council **Hua Chiao Commercial Bank Limited v Chiaphua Industries Ltd** [1987] A.C. 99, where it was held that a landlord's obligation to return a security deposit was not one which ran with the reversion. That decision contrasts with the House of Lords in **P & A Swift Investments (A Firm) v Combined English Stores Group Plc** (1988) 2 All ER 885, where it was held that a surety's guarantee of the tenant's performance of his covenant touched and concerned the land and was therefore enforceable by a mortgagee. The conditions to be satisfied being ;

a. Whether the covenant benefited only the reversioner for the time being.

b. Whether the covenant affected the nature quality , mode of user or value of the land ; and

c. That the covenant was not expressed to be personal.

It mattered not that the covenant related to the payment of a sum of money. Interestingly although Lord Oliver was the only Law Lord who sat on both decisions, and wrote the leading judgment in each , there was no reference in the

former case to the decision in the latter. Speaking for myself, it is difficult to understand why the obligation to refund a deposit, which is premised on performance of the tenant's covenants, does not touch and concern land, whilst, a surety's obligation given for similar purposes does touch and concern the land. Had it been necessary I would have followed the approach in **P & A Swift Investments (A Firm) v Combined English Stores Group Plc**.

[36] The matter before me however does not turn on whether a covenant runs with the land. The lease is binding because the Defendant agreed with the Claimant to be so bound. There is privity of contract between the Claimant and the Defendant. The Defendant is liable for rental payments for the unexpired term and the landlord is liable to account for the deposit. The landlord cannot obtain the benefit of rent without liability to account for the deposit. It was the intention of the parties that they would be bound by all the terms of the lease. It is against this background that I hold that the Claimant is obliged to pay the security deposit to the Defendant. It is a term of the lease that the sum is refundable and the Claimant having agreed to be bound by the lease cannot choose which terms are enforceable. The sum of US$60,000.00 which was paid as the security deposit should be set off against the sums payable to the Claimant. The Claimant at the time of purchase, having expressly been made aware of the existing lease and its terms, ought to have obtained an account of the deposit from Pastique Limited. Any failure on their part to do so cannot be foisted on the Defendant with whom they have agreed to accept and apply all the terms of the existing lease.

[37] The Defendant in its Ancillary Claimed sought interest on the deposit being 1% above the commercial bank's lending rate. No evidence has been lead in this regard. I have decided nevertheless to make an award pursuant to the Law Reform (Miscellaneous Provisions) Act. In this regard I bear in mind that the lease provided no interest was payable on the refunded deposit for the period of the lease. This necessarily applies only to the period it was lawfully held. It became due at the end of the lease. I bear in mind also that it is in United States

currency and hence is likely to have retained its value over the period of non-payment. In those circumstances, I award interest at 3%.

[38] As I have held that the fixed term lease is valid and enforceable I need not go on to consider whether there is in existence a monthly tenancy and whether liability arises in that regard. Suffice it to say that even a monthly tenancy requires termination. There is no evidence a notice to terminate was served and indeed I found as a fact that none was. Further, there is no evidence of a lawful surrender of the lease or that such surrender was accepted. There is indeed not even evidence that possession was delivered or that the landlord repossessed. In this regard the landlord's efforts to seek alternative tenants predated the Defendant vacating the premises. Those efforts do not demonstrate acceptance of a surrender. Rather, and as the evidence revealed, they were partly motivated by legal advice that a duty to mitigate losses arose. The landlord was aware of the difficulties the tenant was having and may have been prepared to release the tenant from those obligations if another suitable tenant could be identified. Unfortunately, this was not to be.

[39] The Claimant seeks to recover damages for the period of January 2009 – December 2014 (see paragraph 2). The evidence however does not support the recovery of damages for this period. The evidence of Mr. Gordon Tewani is that the lease commenced in 2004 the year of commencement of business by Tikal. As there was no evidence of a precise commencement date of business by Tikal, I have deemed the lease to have commenced on January 1, 2004. Damages will therefore be awarded for the period January 2009 – December 2013. The lease provided for interest to be computed at 10% per annum on rent, service and maintenance charges (page 12 Agreed Bundle). When calculated on a per annum basis it exceeds the amount claimed in the Amended Particulars of Claim. I have therefore only awarded on the amounts claimed.

[40] In the result, and for the reasons stated in this judgment, my decision, is as follows:

1. Judgment for the Claimant on the Claim:

    a. Rent for the period January 2009 to December 2013 in the amount of US$ 1, 378,963.10 plus GCT of US$ 227,528.91.

    b. Interest on arrears of rent in the amount of US $400,224.03 (being 10% per annum from January 2009 to December 2013).

    c. Service and maintenance charges of J$24,860,062.00.

    d. Interest on service and maintenance charges in the sum of JA $3,172,583.40 (being 10% per annum from January 2009 to December 2013).

    e. Interest will run on the United States dollar portion of this judgment debt at a rate of 3% per annum until payment and on the Jamaican dollar portion at the rate of 6% per annum until payment, (Pursuant to the Judicature (Supreme Court) (Rate of Interest on Judgment Debts) Order 2006)

2. Judgment for the Defendant on the Ancillary Claim in the amount of US$60,000.00 being the deposit paid. Interest will run at 3% per annum from the 1st January 2014 until the date of payment or set-off.

3. Two-thirds costs to the Claimant to be agreed or taxed.

David Batts
Puisne Judge
6th April, 2016