THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

(Sub-Registry, Tobago)

Claim No. CV 2018 –01115

Between

MARTIN JOHN

HAZEL YEARWOOD

Claimants

And

ALBERT MCNEIL

EUNICA MC NEIL

Defendants

Before the Honourable Madam Justice Eleanor J. Donaldson-Honeywell

Delivered on: 11th July 2019

Appearances

Ms. Samantha Lawson, Attorney- at-Law for the Claimants

Ms. Tecla Duncan-Caines, Attorney-at-Law for the Defendants

Judgement

A. Introduction

1. This matter concerns alleged breaches of contract by Tenants, the Claimants and trespass and breaches of covenant by Landlords, the Defendants, when on

April 3, 2018 they re-entered premises used as a Home for the Aged. The Claimants and their belongings were forcibly removed on this date.

2. The Claim to be determined is by the tenants for damages for having been evicted from premises they paid rent to occupy, in a manner they deem to be trespass and in breach of their Agreement for Lease. The Defendants plead in their Defence that the Claimants were in breach of the Agreement that allowed them to occupy the premises and also Counterclaim for damages on that basis. They say the alleged breaches were set out in a letter sent to the Claimants by the Defendant's Attorney on February 27, 2018. That letter further gave the Claimants one-month notice to quit the premises on March 31, 2018.

3. The Defendants contend that the Agreement was not a Lease but a management arrangement. The Counterclaim is for damages for breach of the Agreement. In particular, the Defendants allege that items were missing when the premises were re-possessed and the premises were in an unsanitary condition. They claim they suffered a loss of reputation as well as distress due to the Claimant's treatment of the premises and the aged residents occupying it.

4. The Claim arises from decisions made by the Second Defendant and her husband the First Defendant as to the rental of the lower floor of their residence where they had operated a home for the aged for many years. The Second Defendant was not well enough to keep running it herself and the couple frequently resided abroad. Arrangements for a relative, Keron Osmond who resided with them at the premises, to manage the home had to be discontinued based on his work commitments. He remained resident in the upper part of the building where the Defendants reside whenever they are in Tobago.

5. The Defendants, from July 2017, entered into an Agreement whereunder the premises were to be occupied by the Claimants for five years, paying a monthly

rent starting at $15,000.00 per month. There is no clear description of the premises in the written Agreement entered into by the parties on July 11, 2017. However, it is not in dispute that the premises the Claimants paid rent to occupy was the lower floor of the Defendants' residence where the "Nicare Home for the Aged" was operated.

6. The Defendants included a clause in the Agreement requiring that the Claimants "use the premises for the purpose as a home for the aged known as "Nicare Home for the Aged". There is no heading to the Agreement describing it as a Lease and it was never registered. The parties are however referred to in the Agreement as Landlords and Tenants. The provisions in the Agreement are consistent with the type of terms included in Lease Agreements.
7. Counsel for the Defendant has identified the issue as to what the July 11, 2017 Agreement purported to transfer as a matter for determination. At the outset my finding is that there is no basis for any interpretation of that Agreement other than that it was a Lease Agreement purporting to transfer the lower floor to the Claimants for five years.

8. The fact that the premises were to be used as the Nicare Home for the Aged was merely one of many covenants in the Lease. The inclusion of that covenant as to user could not of itself be interpreted as creating either a transfer of the business or a management contract whereby the Claimants were to be employed by the Defendants. No consideration for such an arrangement was provided for in the Agreement and there was no evidence of it before the Court. Accordingly, the July 11, 2017 Agreement is hereafter referred to as "the Lease Agreement".

B. <u>Issues</u>

9. There is agreement between the parties as to all other to issues to be determined. These include issues of fact concerning alleged breaches of the Agreement that must be determined by the Court. According, to the Claimants' Attorney in closing submissions, it is only the alleged breaches listed

in the letter sent to them by the Defendants' Attorney on February 27, 2018 that are to be considered. This in my view is the correct approach. Clearly any breaches referred to only in the pleadings to this case but not brought to the attention of the Claimants before re-entry could not justify the said re-entry.

10. Additionally, issues of fact and law are to be determined as to:
    a. Whether the Agreement was duly determined by the Defendants based on breaches of contract when they re-entered the premises on April 3, 2018; or
    b. Whether as alleged by the Claimants, the Defendants trespassed unlawfully on their leased premises; and
    c. What is the quantum of damages and loss to the parties, if any.

C. Background facts

11. The Second Defendant's sister Yvette Denoon introduced her to the Claimants. There were discussions whereby it was agreed that they would reside in the premises and operate the home and they did so from July 2017. It is not in dispute that around that time an inventory of the premises was conducted by the Defendants' Agent Mr. Osmond with Yvette Denoon and the Second Claimant.

12. Mr. Osmond and the Second Claimant each prepared duplicate lists of household items. However, only the list prepared by the Second Claimant was disclosed for these proceedings. Mr. Osmond admitted that he also prepared a list, kept it and then gave it to the Defendants. However, his list was neither disclosed by the Defendants nor referred to or tendered in written evidence.

13. Ms. Denoon gave instructions based on which Mr. Osmond typed the five-year Lease Agreement. It was signed by both sides, admittedly not in the presence of Commissioner of Affidavits, Cewill Denoon who signed it afterwards. The Lease was never registered. It therefore serves only to be enforced as an

Agreement for a Lease in keeping with **Section 3 Landlord and Tenant Ordinance Ch. 27 No. 16:**

> *"No lease for a term exceeding three years or surrender of any land shall be valid as a lease or surrender, unless the same shall be made by deed duly registered; but* ***any agreement in writing to let or surrender any land shall be valid and take effect as an agreement to execute a lease or surrender, and the person who shall be in the possession of the land in pursuance of any agreement to let may, from payment or rent or other circumstances, be construed to be a tenant from year to year****."*

14. According to the Claimants there was a meeting held on December 10, 2017 with the Defendants and a sister of theirs. At that meeting they say permission was given for the Claimants to put all unused items in storage.

15. The Lease Agreement provided for the Tenants to permit the Landlords to enter "at reasonable times to view and inspect the state and condition thereof which will be the second week of January and the second week of July". In keeping with this term of the Lease Agreement an inspection was conducted on January 10, 2018.

16. The Defendants plead that they then observed breaches including beds and other items having been moved from a storeroom to outside the Home and exposed to the elements. According to the Defendants, as pleaded at paragraph 9 of the Defence, a follow up visit was made two weeks later "*for the sole purpose of seeing whether the bed, wheelchairs and other items which were placed outside the Home were removed*." The Claimants' version of events is that after the inspection the First Defendant was often seen peering through windows of the premises

17. On February 27, 2018 the Defendants' Attorney wrote to the Claimants giving them a deadline of March 31 to vacate the premises. The letter cited a list of alleged breaches of the Contract. These were mainly said to be breaches of

Clause 4(e) of the Lease Agreement "not to make alterations or additions to the premises without the written consent of the Landlord". Clause 4(f), prohibiting nuisance, was also cited. However, the only action that could be considered nuisance referred to in the letter was alleged improper disposal of waste.

18. The letter further alleged that requests made "*to return the items taken from the home and to desist from making changes to the premises without their consent or permission*" were responded to by the Claimants disrespectfully. It is my observation that no mention was made in the letter of a request that any alleged alteration or other breach of covenant be remedied or that the Claimants pay compensation for same.

19. There was no demand for outstanding rent in the letter but there was a complaint that rent was always paid late. This included the payment made in the said month February 2018 which was made on the 6th instead of the 1st of February.

20. On March 29, 2018 the Claimant's Attorney responded to the Defendants' letter denying, with detailed explanations, all allegations of breaches and enclosing a payment for rent.

21. On March 31, 2018, the date specified for the Defendants to vacate the premises, the Defendants and their agents entered and changed the locks. The Claimants reported this to the Police who attended at the premises. The Defendants then left keys for the new locks with the Claimants. The Claimants thereafter installed additional locks to secure the premises.

22. Counsel for the Defendants responded to the Claimants' Attorneys letter on April 3, 2018. She enclosed in the letter the uncashed rent cheque that had been sent by the Claimants and invoked the right of the Defendants to re-enter the premises. According to Counsel for the Defendants in submissions this

right to re-enter was invoked based on Clause (i) at the last page of the Lease Agreement ["the re-entry clause"] which provides

> "*if any part of the rent…..shall at any time remain unpaid (whether formally demanded or not) or if the tenant shall neglect to observe any stipulation on his part herein contained ……………….the landlord may at any time thereafter re-enter upon the demised premise and thereupon this demise premises shall absolutely determine but without prejudice to the landlord's right in respect of any breach or non-observance of any stipulation herein contained*. [Sic]"

23. Apart from invoking the right to re-enter the letter comprised a bare denial of all the detailed responses given by Counsel for the Claimants to the allegations of breaches of the Contract.

24. Upon having sight of this letter indicating an intention to re-enter the premises Counsel for the Claimants emailed the Defendants' Attorney advising her that an injunction would be sought to prevent re-entry. However, on that same day the Defendants hired a Bailiff who came with them and two police officers to the premises. They forcefully removed the Claimants, their goods and servants but left the aged residents of the Home in place.

25. The Defendants admit that they took no inventory of the goods removed on that day of re-entry. They claim however that the Claimants were free to collect same from that day and continuing as the gate was not locked. The Claimants contend that the gate was closed debarring entry to remove the goods and a truck driver they sent was turned away on April 3, 2018. There is no evidence before the Court as to subsequent efforts to retrieve the goods even after the hearing date of injunctive relief on 23 April, 2018. The Claimants were then asked to come and collect their possessions. This request was put in writing by Counsel for the Defendants on April 23, 2018.

26. The Claimants plead that eventually, on May 1, 2018, they went to collect the goods. They say some were missing and some were damaged. They accordingly seek damages for same. The Defendants contend that while no list of the Claimants' goods was made on the re-entry date they did a month later try to get the Claimants to sign a list of the items they retrieved on May 1, 2018. According to the Defendants, the Claimants refused to sign such a list.

27. There is no list of items returned to the Claimants entered into evidence in this matter. The Claimants have however compiled a list of damaged and missing items the value of which they say amounts to $80,098.00. The said list is not fully supported by receipts or other documentary proof.

    The Defendants counterclaim that on re-entering the premises there were items missing valued at $45,306.40. Under cross-examination however, the Defendants' Agent who would have prepared an inventory before the Lease commenced did not enter it into evidence. The only pre-lease inventory was the Claimants' list and it did not include the items claimed by the Defendants. Accordingly, there was effectively no proof of the Defendants' loss. No evidence was presented as to loss of reputation or injury to health. The closing written submissions of Counsel for the Defendants did not put forward any persuasive arguments to justify an award of damages to the Defendants. It is clear that there being no proof of damage or loss, the Counterclaim must be dismissed. The Claim however remains to be determined.

D. <u>Analysis of evidence and law as to Claimants alleged breaches of the Lease</u>

28. The complaints of breaches of the Lease Agreement listed in the February 27, 2018 letter related mainly to alleged alterations. It is clear however, from a review of these allegations and the evidence, that there is no merit to the contention that any action of the Claimants amounted to an alteration of the premises. This is so in all instances because even if the actions are admitted or proven to have taken place they do not amount to alterations.

29. The clause of the Lease Agreement that prohibits alterations by the Tenants without permission from the Landlords does not define alteration. Accordingly, a fair construction of the covenant against alterations must be determined according to the intention of the contracting parties. Pursuant to the re-entry clause, breach of this alterations covenant can result in forfeiture of the Lease. Accordingly, as explained in **Hill and Redman's Law of Landlord and Tenant, 17th Edition at Para 383:**

> "*The Court has to ascertain the meaning of the covenant without regard to the forfeiture, and then see, upon the ascertained meaning, whether a forfeiture had been incurred….The Court leans towards a literal or strict construction of a clause of forfeiture; and since the clause destroys or defeats the estate, it is subject to the subsidiary rule of construction that it is to be taken most strongly against the person at whose instance it is introduced, that is, the lessor*"

30. In the instant case the re-entry clause was inserted for their benefit when the Agreement was typed by the Landlords' agent on instructions from the Landlords' sister. It is clear that the Landlords were the authors of this Lease Agreement so that construction as to whether the alterations covenant was breached resulting in a right of re-entry must be taken strongly against them.

31. There being no definition of alterations in the Lease Agreement, Counsel for the Claimants has cited useful guidance from **Halsbury's Laws of England 5th Edition Volume 62 Landlord and Tenant** on the meaning of alterations for purposes of finding that there has been a breach of contract. The extract cited was as follows:

> *"(5) ALTERATIONS AND IMPROVEMENTS*
>
> *(i) Position at Common Law*
>
> *363. Position at common law regarding alterations etc.*
>
> *It is prima facie a breach of the covenant to repair if the tenant pulls down any part of the premises or makes alterations in them, unless he is expressly or impliedly given power to do so by the lease. Further, if*

the pulling down or alteration changes the nature of the demised premises, the tenant may also be guilty of waste.

In order to determine whether the pulling down or alteration constitutes a breach of the covenant, regard must, however, be had in each case to the user of the premises which is permitted by the lease. <u>It may be that the demised property may be used for a variety of purposes, and that alteration and adaptation is required to make it suitable for any such use, in which case a right on the part of the tenant to adapt the premises is to be inferred.</u>

An express covenant against making alterations or erecting new buildings is often found in leases; and a breach of any such covenant may be restrained by injunction. Moreover, the court will grant a mandatory injunction requiring reinstatement where the tenant has interfered with the structure of the demised premises in breach of covenant. <u>In general, the covenant will be construed so as only to forbid alterations which would affect the form or structure of the building.</u>

<u>The tenant of a furnished house is not bound to keep the furniture and pictures in their original positions during the tenancy; and he is at liberty to store pictures or other articles in part of the house</u>." [Emphasis Added]

32. None of the actions complained of by the Defendants amounted to alterations that would affect the form or structure of the premises. Instead the actions amounted to addition of removable items like locks and movement of furniture that did not amount to alterations. In addition to there being no allegation of an action that could amount to alteration, in some instances there is no cogent evidence of these alleged actions.

33. The first allegation, that locks were changed, is admitted by the Claimants. They say this had to be done because the Defendants did not provide keys to a certain access point to the premises they were occupying exclusively.

Changing of the locks is not an alteration so it is my finding that this was not a breach of the contract.

34. The second allegation if that a doorbell was installed without permissions. The Claimants admit to attaching a doorbell using double-sided tape. That is not an alteration to the premises so it is my finding that this was not a breach of the contract.

35. The third allegation is that a storeroom adjacent to the staff toilet was converted to a bathroom. The allegation is denied as the Claimants plead that the said room was always a bathroom but the Defendants used it as a storeroom. This is not denied by the Defendants. Merely using the room which had been a bathroom before as a bathroom is not an alteration so it is my finding that this was not a breach of the contract.

36. The fourth allegation is that taps at the back of the premises have been changed and now have locks on them. This is not admitted by the Claimants and no cogent evidence of it was presented by the Defendants. In any event merely changing taps and adding locks is not an alteration so it is my finding that this was not a breach of the contract.

37. The fifth allegation is that a computer desk was moved and placed behind an exit door. This movement of furniture is admitted by the Claimants. They say they moved the desk to block off entry to their occupied premises from upstairs. This is not an alteration so it is my finding that there was no breach of the contract.

38. The sixth allegation is as to placement of four beds and a metal cart outside, exposed to the elements. The Claimants admit moving these items outside because they had to be repaired but deny they were exposed to the elements. This movement of furniture does not amount to an alteration to the premises.

39. The seventh allegation, that five patio chairs were moved out of a storeroom, is admitted by the Claimants who say they were moved to be used. This does not amount to an alteration to the premises and was not a breach of the contract.

40. The eighth allegation is that a dryer was relocated from inside the laundry. This is admitted and the Claimants say it was done to reduce the heat emanating from the dryer. Such movement of itself clearly is not an alteration. Additionally, though not specifically referred to in the letter the movement of the dryer would not be in breach of Clause 4(l) which is so imprecise as to be unenforceable. It provides that electrical work is "to be done by the buildings electrician". No such person is identified and there is no indication as to how to initiate the work. In any event the Claimants' evidence is that the Defendant's agent Mr. Osmond was aware of the electrical work.

41. It is also noted that the Lease Agreement provided for a $15,000 security deposit that could be retained at the end of the Lease to cover loss and damage. In the event that the electrical wiring required to relocate the dryer is viewed as an alteration then the Defendants could have demanded that it be put back as it was at the end of the Lease, failing which the security deposit may have been forfeited.

42. The ninth allegation is that two washing machines cannot be accounted for. The Claimants answer is that one was removed by Mr. Osmond the Defendants' agent. He admitted under cross-examination that he removed one machine. The Claimants say the other machine was discarded with Osmond's permission because it was defective.

43. Even if, which has not been proven on a balance of probabilities by the Defendants, the Claimants disposed of a working machine, that would not amount to an alteration of the premises. The alleged disposal could be addressed by a written demand for replacement or repayment. This could

have been sent with a warning that failing compliance the eviction of the Claimants would follow or the cost would be deducted from the security deposit.

44. The tenth allegation, that a Christmas tree and other items were thrown in the garbage, is denied by the Claimants who say the items were placed in a storeroom. The Claimants say they discussed this placement of these unused items in storage and were given permission to do so at their meeting with the Defendants on December 10, 2017. The discarding of the items referred to would not in my view, even if there were proof of same, have amounted to an alteration.

45. I have found that no alterations were made to the premises. Accordingly, there is no breach of the non-alteration covenant that would justify the Defendants re-entry. It is therefore unnecessary to consider whether, had there been such alterations, the Defendants approach to terminating the Lease Agreement was correct in law.

46. However, there is merit to the submission of Counsel for the Claimants that even if there had been alterations the Defendants actions would not have been justified. This is so because the proper approach of first making a demand that the alterations be remedied or paid for within a reasonable time was not followed by the Defendants. There was no such request in the letter sent on February 27, 2019.

47. The approach that should have been taken by the Defendants is outlined by **Kodilinye in Commonwealth Caribbean Property Law, Fourth Edition** cited by the Claimants. It is explained at page 45, under the heading "Forfeiture for breaches of other covenants", that "*Before a lessor can proceed to forfeit a lease for a breach of any covenant other than the covenant to pay rent, he must first serve on the tenant a statutory notice:*

(a) *specifying the particular breach complained of: and*

(b) *if the breach is capable of remedy, requiring the lessee to remedy the breach; and*

(c) *requiring the lessee to make compensation in money for the breach….*"

48. This explanation reflects the law of Trinidad and Tobago as set out at **Section 70 of the Conveyancing and Law of Property Act Chap 56.01.** The learned author explains further that after serving such a notice a reasonable time must be afforded the tenant to remedy the breach or pay compensation. As to what is meant by a reasonable time the following is said:

    "*Where a breach is capable of remedy (for example, where there is a breach of repairing covenant), three months is usually regarded as a 'reasonable time' for the tenant to comply with the notice…."*

49. In this case there is neither evidence of any breach by way of alterations nor of time given to remedy the breach. Counsel for the Claimant in closing submissions sought to persuade the Court that the February 27th 2018 letter listing complaints and simultaneously giving notice to quit served as a letter giving an opportunity to remedy the alleged breaches. Clearly this is not so. Two letters would have been required to achieve that purpose.
    - Firstly, a notice setting out the alleged breaches and seeking to have them remedied or compensated for.
    - Secondly, a notice to quit if after a reasonable time there has been no remedy or compensation for the alleged breaches. Alternately, the act of re-entry may have been permissible after a reasonable time period for remedy or compensation was afforded the tenants.

    The required approach was not taken. Thus even if there had been breaches by alteration in this case the re-entry was unjustified.

50. In addition to the ten listed allegations mentioned above the Defendants' February 27, 2018 letter also made other complaints. They claimed that there was breach of clause 4(c) of the Lease Agreement which provided for the premises to be used as Nicare Home for the Aged. This they say was breached by the Claimants changing the sign.

51. The Claimants admitted this was done but only to change the visiting hours. Though not in the letter of complaint they also said there were flyers issued with the word "Nightcare" instead of "Nicare". The Claimants admitted such flyers existed but said that was a printer's error.

52. Perhaps the more significant allegation regarding change of user was that the Claimants were said to have used the premises in a manner not associated with a home for the aged. This the Defendants said was so because "strange persons" were observed staying at the premises.

53. No evidence of strange persons was presented by any of the Defendants' witnesses. Instead much was made of the fact that the Claimants kept a room at the premises where they would stay overnight and keep possessions. It was alleged the Claimants' visitors sometimes stayed over as well

54. It is my finding that reserving a room to stay in while caring for the elderly in the home is in keeping with using the premises as a home for the aged. Furthermore, there was evidence that other persons employed in the home had to sleep there sometimes as well as their children. This evidence came from one of the Defendants' witnesses under cross-examination. There was no evidence that the Claimants used the premises as their own residence to the extent that the user as a home for any of the elderly residents was adversely affected. It is my finding that this was not a breach of the term of contract as to user as a home.

55. The Defendants also alleged that the Claimants obtained cable without permission. The Claimants admitted installing cable but said this had to be done because the Defendants removed a phone line provided for in the Lease Agreement. Further, they stopped paying for cable.

56. The February 27, 2018 letter complained that waste was incorrectly disposed of to the detriment of the health of the Defendants and their neighbors. No proof of such health hazards was presented and no neighbors were called to give evidence as to nuisance. Additionally, though health guidelines are referred to by the Defendants as having been breached by the Claimants no such guidelines were particularized or disclosed. Further, there was no evidence that health authorities had determined that the waste disposal was incorrectly done or caused harm to others. It is my finding that there has been no proof of breach of clause 4(f) of the contract as it relates to nuisance.

57. Finally, as aforementioned, the February 27th 2018 letter complained of late payment of rent every month. However, there was no demand for rent in the letter as no payment then remained outstanding. It is clear therefore that although there may have been non-compliance in paying rent in a timely manner there was no existing breach at the time of re-entry that would justify termination of the Lease Agreement. Late payments were, according to the Lease Agreement, to have been addressed by a penal interest of 10%. The Defendants and their agent admitted to never claiming the penalty interest from the Claimants. The inference I draw from such inaction when looked at in the context of the relatively short periods of delay cited in the letter is that the Defendants' agent may, as alleged by the Claimants, have caused the late payments by collecting rent a few days after the first of the month. In any event, the late payments did not justify re-entry.

58. In addition to the matters listed in the pre re-entry letter on February 27, 2018 the Defendants added other complaints in their pleadings. These included a specific allegation as to electrical repairs being done without consent. In

evidence it was clear that this related to mere relocation of the dryer, installation of cable and replacement of bulbs. No breach was established as the provision regarding who should conduct electrical work was not contravened.

59. The Defendants also raised the entirely new allegation in their pleadings that the elderly residents had complained of the quality of food, lack of hygiene and oversight afforded them in the care of the Claimants. As aforementioned these belated complaints cannot in my view be used to justify the termination of the Lease Agreement.

60. The evidence of the elderly residents and staff called by the Defendants, their current hosts at the Nicare Home for the Aged, failed to prove these complaints. It was clear that at no time prior to the termination of the Lease had any of the residents complained to the Claimants or the relevant authorities about any concerns. By and large the residents, the staff and the Defendants admitted that the Claimants were easy to talk to yet they never raised these alleged issues with them. These belated allegations did not justify the prior untimely termination of the Lease Agreement.

61. On the Counterclaim the Defendants, having failed to prove any breaches of contract by the Claimants, were also unsuccessful. In any event there was no cogent evidence presented as to loss of any property itemized in the initial inventory. Neither the alleged pecuniary loss nor loss of reputation was proven by the Defendants.

E. **Analysis of facts and law concerning the Defendants' alleged Trespass/ breach of the covenant of quiet enjoyment in the Lease Agreement**

Covenant of quiet enjoyment

62. The Claimants at paragraph 13 of submissions submit that the contract to let the premises included an implied covenant for quiet enjoyment of the

premises and that the deliberate acts of the Defendant to terminate the lease and remove the Claimants amounted to a breach of such covenant. There is in fact an express covenant of quiet enjoyment in the Lease Agreement at (ii) under the landlord's outlined obligations. The Defendants argue that such a breach was not specifically pleaded. However, the Claimants pleaded generally a breach of contract, not limiting their claim to any specific aspect of the contract. Therefore, the breach of the implied term is considered sufficiently pleaded.

63. The Claimants cite the decisions of **Ram v Ramkissoon [1968] 13 WIR 332** and **Kenny v Preen [1962] 3 All ER 814** which involve the breach of such an implied term. In **Kenny**, Pearson, L.J. explained the implication of a term for quiet enjoyment into a lease:

> *"The implied covenant for quiet enjoyment is not an absolute covenant protecting the tenant against eviction or interference by anybody, but is a qualified covenant protecting the tenant against interference with the tenant's quiet and peaceful enjoyment of the premises by the landlord or persons claiming through or under the landlord. The basis of it is that the landlord by let confers on the tenant the right of possession during the term and impliedly promises not to interfere* with the tenant's exercise and use of the right of possession during the term."

64. The court held in that case that the conduct of the landlord amounted to direct physical interference with the tenant's enjoyment of the premises and therefore a breach of the implied covenant was established. In **Ram**, acts of property removal were considered a violation of the implied covenant of quiet enjoyment.

65. In the present case, it is clear that the acts of the Defendants and the hired bailiff and/or his agents in removing the Claimants' goods without valid termination of the lease would amount to a breach of the covenant of quiet

enjoyment and the Claimant would therefore be entitled to recover damages in the amount of loss suffered.

F. Assessment of damages

General Damages for Trespass

66. In a claim of trespass, if the claimant proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss. If the trespass has caused the claimant actual damage, he is entitled to receive such an amount as will compensate him for his loss – **Halsbury's Law of England (Vol. 97 (2015) at [591]**. The losses suffered by the Claimants have been outlined to be loss of profits from carrying on the business at the home and the damage and misplacement of goods as a result of the seizure. The loss of profits arises from the same acts as the breach of the implied covenant for quiet enjoyment, therefore one measure of damages will be applied.

Loss of Profits

67. Where a lessee is unlawfully evicted the normal measure of damages is the value of the unexpired term, which will be calculated as the rental value of the premises less the contractual rent which would have fallen to be paid in the future - **McGregor on Damages 14th Edn. Paragraph 770**. In the case of **Ali v Ramnarine HCA No. 170 of 2002** the court examined the plaintiff's claim that the value of the term lost could be calculated by the amount of income that would have been earned. In that case, very much like the present, there was a dearth of documentary evidence substantiating the amount of income claimed by the plaintiffs and the learned judge concluded:

> *"Despite the plaintiff's claim that he earned such substantial income, he was not registered for VAT. He produced no income tax returns and no accounts for the business. Further, no bank statements have been tendered into evidence to support the plaintiff's contention that the business was earning such income. While the Court accepts that the*

plaintiff's books may have been lost in the re-entry, something more is required if the Court is to award the plaintiff over a million dollars for loss of income. The claim for loss of income is therefore refused."

68. **Ali v Ramnarine** also suggests there may be a successful claim for the expense of setting up a new place of business by a lessee who was unlawfully evicted. There has been no such claim or evidence presented in the present claim, however.

69. In the unreported case of **Nalene Mohammed v Barry Dwarika CV 2005 - 00347**, Smith J. considered the wrongful termination of the claimant's tenancy by a landlord who locked her out of the premises. In assessing the quantum of damages to be awarded to the claimant, Smith J. noted that the lack of any supporting documentary proof of the claimant's claim made her evidence less reliable:

    "Secondly, while I accept that the Claimant has been locked out of the premises since 31st October 2005 and that she does not have the actual records of the business, I do not think that this absolves the Claimant from producing any documentary proof of her loss. She could have produced bank records or documents from her suppliers (for example) to support her claim. The lack of any supporting documentary proof of her claim makes her evidence less reliable".

70. The Claimants claim that they earned an average monthly income of $75,000.00 and had average monthly expenses of $40,000.00 and therefore earned an approximate profit of $35,000.00. They claim a total of $1,785,000.00 as profits calculated at 51 months by $35,000.00 per month.

71. In the present circumstance, the Claimants have not provided sufficient documentary evidence of their monthly income apart from some handwritten notes by the Second Claimant. The evidence presented on expenditure and cross-examination on that evidence was of little assistance in determining the profits of the home. The most valuable evidence would have been the

provision of bank records and this was not provided. Further, it was admitted under cross-examination that a new home was set up by the Claimants at some point thereafter which would have mitigated some of their losses. It is, however, reasonable to infer that some loss of income would have been incurred by the actions of the Defendant and a nominal sum of $120,000 should be awarded in the circumstances.

Lost/Damaged Goods

72. The items of the Claimants allegedly seized and/or misplaced by the Defendants on 3 April, 2018 are outlined in their amended claim and in submissions:

Damaged Goods:

a)	Damage to three (3) piece chair set value approximately	$2,000.00.
b)	Damage to wares valued approximately	$1,500.00.
c)	Damage to Digicel landline phone	*(in the process of getting the replacement value)*
d)	Damage to Digicel internet router	*(in the process of getting the replacement value)*
e)	Damage to food items value approximately	$5,000.00
f)	Damage to two (2) beds and mattresses value approximately	$15,000.00
	TOTAL:	$23,500.00

Lost/Missing Goods:

	Item		Value
a)	1 Gold bracelet		$6,000.00
b)	2 Pair of tear drop earrings		$2,200.00
c)	1 Gold band		$4,500.00
d)	3 flat top gold rings		$7,500.00
e)	1 water dispenser value approximately		$700.00
f)	Two (2) cases of smalta valued approximately		$170.00
g)	Six nurse uniforms valued approximately		$1,200.00
h)	Unused Camera surveillance system valued approximately		$1,500.00
i)	Six (6) handbags- 2 Gucci, Michael Kors valued approximately		$10,000.00
j)	1 wheelchair valued approximately		$1,500.00
k)	1 blu mobile phone valued approximately		$600.00
l)	1 remote controller for Samsung television value approximately		$300.00
m)	Perfumes -	Paris J'dor value approximately	$525.00 (75US)
		Jean Paul value approximately	$700.00 (100US)
		Giovinci x 4 value approximately	$483.00 (69 US)
		Perry Ellis 360 (male and female)	$700.00
n)	Several underwear, socks, shirts and other clothing approximately		$5,000.00
o)	1 small table value approximately		$700.00
p)	Six pairs of shoes (Pierre Dumas) valued approximately		$1,200.00
q)	Curtains, sheets and towels value approximately		$4,600.00
r)	Pampers, wipes, pulls and toiletries valued approximately		$5,000.00
s)	Two (2) emergency torchlights		$840.00
t)	1 pressure cooker value approximately		$350.00

u) 1 knife set value approximately $150.00

v) 2 basins value approximately $180.00

TOTAL: $56,598.00

73. On 23 April, 2018 the Defendants informed the Claimants by letter that they could no longer guarantee the safekeeping of their belongings and instructed that the Claimants collect all items before 27 April, 2018. On the 1st May 2018, the Claimants visited the said premises to retrieve the goods which they allege were left outside the premises exposed to the elements.

74. The Claimants claim their goods were damaged to the value of $23,500.00 and that items were missing which were on the said premises on the 3rd April 2018 to the value of $56,598.00. The total sum claim is therefore $80,098.00. The Defendants submit that trespass to goods was not sufficiently pleaded, however, the claim for damages for trespass to the premises sufficiently covers the damage and loss to the Claimants' goods that the trespass caused. Further, the Defendants were aware of these claims from the outset and would not have been prejudiced by their inclusion.

75. The Defendants, having seized the Claimants' goods, failed to make an inventory of the items or to take photos of the items to show that no damage was done during removal. On the other hand, the Claimant has not provided any documentary proof of the purchase of many of the items, or expert assessments as to the value of the damaged items before or after damage. There are some photographs showing certain stains on mattresses and the chair set. However, these photographs are not very helpful in assessing their decrease in value. They also did not attempt to collect their items at an earlier time in an effort to mitigate damages.

76. The Claimants submitted only two receipts for jewelry purchases in the amounts of $4,500 and $14,100. Counsel for the Defendants points out that the receipts do not match up with the items of jewelry claimed. Counsel for

the Defendants also submits that the Claimant's' third witness could not support whether the Second Claimant wore gold jewelry. On the other hand, the Defendants' witness Ms. Natalie Jeffers acknowledged that the Second Claimant often wore jewelry and perfumes.

77. Overall, in the absence of documentary evidence, the items claimed by the Claimants appear to be reasonable sums claimed for items that would reasonably be expected to be housed in the building at which the Claimants operated the business of the home for the aged. There are kitchen items, some toiletries and accessories that appear to be for the operation of the home such as pampers, cases of drinks, nurses uniforms, basins, a wheelchair and a security camera system, common household items and clothing. The higher priced personal items such as jewelry, designer handbags and perfumes appear to accord with the lifestyle of the Second Claimant even on the evidence of the Defendants' witness, Ms. Jeffers. Both the First and Second Claimant gave credible evidence that these items were indeed purchased.

78. Some compensation, though not proven through documentary evidence, should be allowed for the loss of these items. The Defendants' actions in seizure of goods without taking an inventory has placed them in a position where they are unable to refute that these items were present. Therefore, a nominal sum of $50,000 will be awarded to cover the loss of items that would have remained in the home upon seizure by the Defendants and have not been recovered.

79. Regarding the items that were alleged to have been damaged, it is my finding that the Claimants have failed to prove such damage in a case where further evidence in the form of expert assessment could have been provided. The photographs attached show small stains on the mattresses and it is unclear whether these stains will be removed by cleaning. Therefore, the Claimants failed to prove this head of loss sufficiently and no sum shall be awarded.

<u>Aggravated Damages</u>

80. The Claimants submit that they were embarrassed, suffered mental distress and severely inconvenienced and should be compensated by way of aggravated damages.

81. The act of the Defendants using a bailiff, the Police and other agents to enter the premises in the absence of the Claimants and remove the goods was deliberate, unlawful and excessive.

82. In **Ali v Ramnarine**, a Landlord had illegally re-entered his Tenant's premises on a busy Saturday morning in the presence of the tenant's customers, and had removed his goods and left them on the roadside where rain had destroyed some of the goods. The Judge thought such action warranted the granting of aggravated damages in the sum of $20,000.00.

83. In this case, no mental distress has been proven and the Claimants have not detailed any feelings of embarrassment but the overall conduct of the Defendants was excessive and likely resulted in the embarrassment and distress of the Claimants who had not breached the Agreement for Lease. In the circumstances a sum of $15,000 will be awarded as general damages.

G. Order

84. The Court therefore orders as follows:

1. There shall be judgment for the Claimants against the Defendants as follows:

   i. The sum of $120,000 as nominal damages representative of the loss of profits occasioned by the Claimants due to the unlawful re-entry by the Defendants.

ii. The sum of $50,000 as nominal damages for the Claimants' items that were lost/misplaced in the re-entry by the Defendants.

iii. The sum of $15,000 as general damages assessed on the basis of aggravated damages.

iv. Prescribed costs of the Claim to be paid by the Defendants to the Claimants in the amount of $36,750.00.

2. The Counterclaim is dismissed and the Defendants are to pay the Claimants prescribed costs in the amount of $14,000.00
3. There is a stay of execution for 28 days.

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Eleanor Joye Donaldson-Honeywell
Judge.

Assisted by: Christie Borely JRC 1