

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV2016-03687**

**BETWEEN**

**MOHAN CHABLAL RAMOUTAR**

**RAVI ANAND RAMOUTAR**

**Claimants**

**AND**

**CENTRAL PLUMBING AND HARDWARE LTD.**

**Defendant**

**Before the Honourable Mr. Justice V. Kokaram**

**Date of Delivery: Thursday June 8<sup>th</sup> 2017**

**Appearances:**

**Mr. Terrence Bharath instructed by Ms. Renee Marlene Johncilla for the Claimants**

**Mr. Ronald Dowlath instructed by Mr. Srinivasa Rao Kadem for the Defendant**

**JUDGMENT**

**Introduction**

1. The broad issue that falls for consideration by this Court is whether the Defendant, Central Plumbing and Hardware Limited<sup>1</sup> has a realistic prospect of defending this claim brought by the Claimant, Mr. Ravi Ramoutar, or in pursuing its counterclaim in relation to an agreement to lease with Mr. Ramoutar. Mr. Ramoutar's claim is for certain declaratory reliefs. In particular, he seeks a declaration that he is the owner of the property situated at No. 27 Eastern Main Road, Petit Bourg ("the said property") and that by virtue of a deed of lease<sup>2</sup> made

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<sup>1</sup> Referred to in this judgment as "Central Plumbing".

<sup>2</sup> Dated 16<sup>th</sup> December 2005 exhibited as "R.A.R 4" to the affidavit of Ravi Ramoutar.

between the parties, that Central Plumbing is required to demolish its building which occupies about 40% of the said property.

2. That building is owned by Central Plumbing. Pursuant to clause 2(c) of the said deed of lease, which expired on 30<sup>th</sup> November 2015, Central Plumbing was required to remove and demolish the building and deliver vacant possession of the said property to Mr. Ramoutar.
3. Mr. Ramoutar contends that at the expiration of the term of that lease Central Plumbing held over on a month to month tenancy on the terms set out in a letter agreement dated 4<sup>th</sup> December 2015 made by the parties. By that agreement the parties agreed to enter into a new lease and pending the execution of that lease, Central Plumbing was permitted to remain on the premises paying a revised rent from January 1<sup>st</sup> to 30<sup>th</sup> June 2016<sup>3</sup>. They also agreed that if the new lease was not executed or agreed by 30<sup>th</sup> June 2016 that the tenancy would terminate and Central Plumbing would be required to remove and demolish its building on the premises and deliver vacant possession.<sup>4</sup> Despite the request of Mr. Ramoutar during that period, Central Plumbing did not execute a new lease. In fact Mr. Ramoutar complained that Central Plumbing had parted with possession of the said property to a third party. As a result a notice to quit was issued by Mr. Ramoutar terminating the tenancy on 7<sup>th</sup> July 2016.
4. Central Plumbing by its Defence and Counterclaim in essence contends that it has not parted with possession of the premises to a third party and that they stand ready, willing and able to enter the proposed new lease. They also contend that the notice to quit is “null and void” as it had continued negotiations with Mr. Ramoutar who they allege told them that he was “waiving his rights” under the notice to quit. Central Plumbing’s Counterclaim seeks a declaration that it is entitled to the benefit of the proposed lease rather than specific performance of it. It also contends in their oral submissions that it is the holder of an equitable lease in the terms of the proposed new lease set out in the letter of 4<sup>th</sup> December 2015.
5. In response to this Defence and Counterclaim filed by Central Plumbing, Mr. Ramoutar has filed an application for summary judgment pursuant to Rule 15.2 of the Civil Proceeding Rules 1998 as amended (CPR). Summary judgment is one of the powerful tools of case management

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<sup>3</sup> As well as rent for 1<sup>st</sup> December 2015 to 31<sup>st</sup> December 2015 at the rate of \$3,000.00.

<sup>4</sup> Agreed facts on the pleadings. See paragraph 6 of the Statement of Case and paragraph 2 of the Defence.

which is designed to eliminate hopeless cases<sup>5</sup>. It is where the Court calls upon a party to make good on its pleaded case. In these applications a party's simple assertions on the pleadings cannot be taken at face value and the exercise calls upon the Defendant to demonstrate that there is some merit in these allegations, that there is a realistic prospect the Defendant will succeed in "defeating the claim" or in pursuing its counterclaim. Of course stopping short of conducting a mini trial at this stage the Court's enquiry is still a robust one<sup>6</sup>, as it must consider the evidence which can reasonably be expected to be available at a trial in making its assessment of the case and in exercising its discretion in determining whether the Defendant's chances of success are real or fanciful and whether it carries some degree of conviction.

6. For the reasons set out in this judgment I am of the view that this Defence and Counterclaim does not warrant further investigation at a trial. The issues raised by Central Plumbing can be characterised as hopeless. I have not taken what Central Plumbing has said in its pleaded case at face value. Rather I subjected it to further analysis examining the affidavit evidence and contemporaneous documents stopping short of course of conducting the type of forensic exercise required at a trial. There is absolutely no evidence produced by Central Plumbing in this application to demonstrate that Mr. Ramoutar waived the notice to quit. It is fanciful for Central Plumbing to rely on and plea in aid, the benefit of an agreement to lease when it has palpably observed its terms in its breach and unapologetically failed outright, as gleaned from the available contemporaneous documents, to even enter into formal terms. The evidence produced by Central Plumbing falls short of demonstrating its bona fides in entering a new lease and it is unrealistic to allege in the circumstances of this case that Central Plumbing was ready, able and willing to enter into a new lease. There will be summary judgment for the Claimant in terms of its claim as set out below.

### **The applicable principles**

7. Pursuant to Part 15.2 (a) and (b) CPR the Court may give summary judgment if it is of the view that the defence or claim has no realistic prospect of success. In this case there is both a Defence and Counterclaim. The factual substratum for the Counterclaim is the same as the Defence. The applicable principles in applications for summary judgment are well rehearsed

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<sup>5</sup> **Three Rivers District Council v Bank of England** (No 3) [2001] UKHL 16, [2001] 2 All ER 513.

<sup>6</sup> **Mercury Marketing Limited v VB Enterprises Limited** CV2014-02694.

and have been cited by Kangaloo JA in **Western Union Credit Union Co-operative Society Limited v Corrine Ammon** C.A. CIV. 103/2006<sup>7</sup> citing the passage of **Federal Republic of Nigeria v. Santalina Investment Corp.** [2007] EWHC 437 (CH):

- “i) The court must consider whether the defendant has a “realistic” as opposed to a “fanciful” prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
- ii) A “realistic” defence is one that carries some degree of conviction. This means a defence that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
- iii) In reaching its conclusion the court must not conduct a “mini-trial”: *Swain v Hillman*;
- iv) This does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
- v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for the summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)*[2001] EWCA Civ 550;
- vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceuticals Co 100 Ltd* [2007] FSR 63.”

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<sup>7</sup> **Western Union Credit Union Co-operative Society Limited v Corrine Ammon** C.A. CIV. 103/2006, paragraph 3.

8. More recently in the Court of Appeal decision of **APUA Funding Limited The Government of Antigua and Barbuda v RBTT Trust Limited** Civil Appeal No: 94 of 2010 Mendonca JA affirmed these principles and also noted at paragraphs 20 and 21 :

“20. In *Easyair Ltd. (t/a Openair) v Opal Telecom Ltd.* [2009] EWHC 339 (Ch) Lewison, J. in relation to an application by a defendant to strike out a claim added the following consideration (at para 15) which I think is equally relevant to an application by a claimant for summary judgment:

*“On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and the parties have had an adequate opportunity to address this in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent’s case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant’s case is bad in law, the sooner that it is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it will be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction...”*

21. It is evident from the above that the summary judgment application is not meant to dispense with the need for trial where there are issues which should be investigated at trial, but as Lord Woolf MR noted in *Swain v Hillman* (at 94):

*“It is important that a judge in appropriate cases should make use of the powers contained in Part 24 (the English equivalent to our Part 15). In doing so he or she gives effect to the overriding objectives contained in part 1. It saves expense; it*

*achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is the claimant's interests to know as soon possible that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible."*

9. In determining such an application, the Court is of course exercising a discretionary power carrying out the necessary exercise of determining the prospects of success by assessing the case as a whole. The criteria to apply is not one of probability but the absence of reality. It is sufficient for the Court to make such an assessment by an examination of the pleaded case and the available evidence tendered at this stage. To this extent the judgement of Sykes J in **Herbert Smikle v Patrick Nunes** C.L. S 178 of 2002 reinforces the robust approach of the case managing Judge on these applications in calling for the requisite evidence to assess the realism of allegations made by the party on its pleadings. He stated at paragraphs 10 and 11:

“10.....First, his Lordship stated that merely pleading a legally sufficient case is not the end of the analysis. Second, pleading is based on legally admissible evidence. This second point cannot be over emphasized because some attorneys are resisting enquiries by the case management judge of the evidence they intend to call to support the case. They think that when the judge makes these enquiries they are giving away too much. However, as Lord Hobhouse is saying, a pleaded case assumes that the evidence is indeed available to make good the allegation and that can only be done if the proposed evidence is legally admissible. The pronouncements by Lord Hobhouse, logically, cannot be restricted to cases of fraud or dishonesty since all civil cases are required to be established by legally admissible evidence. Third, even if the evidence is legally admissible, a judge in clear and obvious cases may and should make a decision on the prospects of success. Fourth, when the judge is making this assessment the judge must consider whether the case can be strengthened by requests for information. Fifth, if after taking into account the pleaded case and the possibility of gaining further information if the judge concludes that there is no real prospect of success then the judge should act accordingly and give summary judgment for the other party. Summary judgment is not a device to avoid trial but one of the powerful tools of case management which is designed to eliminate hopeless cases.

11. This case is one such case. It is indeed a matter of regret that the defendant has been subjected to five years of legal expense and anxiety but happily, his ordeal has come to an end. When the difficulties were highlighted to counsel he agreed to discontinue the matter by filing a notice of discontinuance. Had he not agreed to do so I would have given summary judgment for the defendant.”

10. A cursory glance of Central Plumbing’s very bare affidavit filed in response to the application for summary judgment falls short of what is expected as observed by Sykes J. This is the time for the party to produce and not resist enquiries on the evidence they intend to call to support their pleaded case. A convenient starting point then in this exercise is to examine the pleadings.

### **The pleaded case**

11. The parties’ respective claims are uncomplicated. The following facts are agreed from the pleadings:

- a) By Deed of Conveyance dated 29<sup>th</sup> March 1976 registered as Deed No. 8585 of 1976 Mr. Mohan Ramoutar purchased the freehold interest in the property described in the said deed.
- b) Mr. Mohan Ramoutar subsequently conveyed his interest in the premises to himself and Mr. Ravi Ramoutar as joint tenants by Deed of Gift dated 9<sup>th</sup> October 2016 Deed Registration No. DE 201602450910.
- c) Mr. Mohan Ramoutar leased the premises to Central Plumbing by Deed of Lease dated 16<sup>th</sup> December 2005 and registered as Deed No. DE200600136694. It was for a term of ten (10) years commencing from 1<sup>st</sup> December 2005 at a monthly rent of \$2,500.00. From 1<sup>st</sup> December 2010 up to the end of the Lease on 30<sup>th</sup> November 2015 it was at a monthly rent of \$3,000.00. The second recital in the lease acknowledged that the building on the premises belonged to Central Plumbing.
- d) Under Clause 2 (m) of the lease Central Plumbing covenanted with Mr. Mohan Ramoutar to pull down, remove and demolish the said building and deliver up vacant possession to Mr. Mohan Ramoutar upon the expiration or determination of the term granted under the lease. Central Plumbing further covenanted under Clause 2 to

indemnify against Mr. Mohan Ramoutar against any loss, injury damage or inconvenience caused by Central Plumbing's neglect, breach of covenant or condition of the lease.

e) By power of attorney registered as Deed No. DE201303448318 dated 22<sup>nd</sup> November 2013, the Mr. Mohan Ramoutar appointed Mr. Ravi Ramoutar and Nandini Theresa Ramoutar severally to carry out all the powers that Mr. Mohan Ramoutar would have in respect of the premises.

f) When the Lease ended on 30<sup>th</sup> November 2015 Central Plumbing held over on the premises under a month to month tenancy. The terms and conditions were set out under an agreement dated 24<sup>th</sup> November 2015 and amended by letter dated 4<sup>th</sup> December 2015. Permission was granted to Central Plumbing to remain on the premises until 30<sup>th</sup> June 2016 with Central Plumbing paying a rent of \$3,000.00 from 1<sup>st</sup> December 2015 to 31<sup>st</sup> December 2015 and \$11,000.00 for 1<sup>st</sup> January 2016 to 30<sup>th</sup> June 2016. It was agreed between Mr. Ravi Ramoutar and Central Plumbing that the tenancy would terminate if a new lease was not agreed upon by 30<sup>th</sup> June 2016.

12. In response to a chronology of events set out in the Statement of Case from the date that a notice to quit was served on the Defendant the Defence either makes no admission or puts Mr. Ramoutar to proof. The effect of this brings into play the effect of rules 10.5 and 8.6 CPR and the observations of Mendonca JA in **MI5 Investigations Limited v Centurion Protective Agency Limited** CA Civ 244 of 2008 that:

“Where there is a denial it cannot be a bare denial but it must be accompanied by the defendant's reasons for the denial. If the defendant wishes to prove a different version of events ... he must state his own version”.

13. By virtue of this requirement and duty to set out one's case, with the consequences for failing to do so resulting in an implied admission of the opponent's case, the following further main facts are not in dispute from a proper reading of the pleadings:



- a) That a notice to quit was issued on 7<sup>th</sup> July 2016 giving the Defendant three (3) months to demolish its building giving Central Plumbing up to 7<sup>th</sup> October 2016 to give vacant possession.
- b) The building had not been demolished by that date and Central Plumbing has failed to do so to date. As a result of these matters Mr. Ramoutar has suffered loss and damage to the extent of the cost of pulling down the building and mesne profits at the monthly rate of \$11,000.00 from 1<sup>st</sup> July 2016 until the date of delivering up possession. Insofar as Central Plumbing has put Mr. Ramoutar to prove its loss there is no denial nor positive statement by Central Plumbing that it has continued to pay or tender rent to Mr. Ramoutar as their landlord after the notice to quit was served.

14. The following facts are also relevant to the parties' claims as found in their respective Replies. In its Reply Mr. Ramoutar has alleged that:

- a) Kall Properties Limited and Selection Plumbing Hardware Limited unknown to him had acquired an interest in Central Plumbing's business and property at No. 26 Eastern Main Road and had entered into an agreement to purchase the building on No. 27 Eastern Main Road.
- b) That on 27<sup>th</sup> January 2016, Mr. Ramoutar personally submitted the draft lease to Central Plumbing at its business address and between January 2016 to June 2016 neither Mr. Stevenson Madoo nor Central Plumbing acknowledged receipt of the draft lease or responded to numerous efforts to respond to the request to execute the lease. There was no request by Central Plumbing for an engrossed copy of the new lease.
- c) Central Plumbing was in breach of terms of the draft lease in inter alia failing to pay a security deposit, failing to pay the revised rent and failing to pay by manager's cheque in advance. Further, no rent was paid after June 2016.
- d) The only correspondence received Mr. Ramoutar from Central Plumbing was on 8<sup>th</sup> October 2016 and 17<sup>th</sup> October 2016 offering to purchase the property and to reduce the lease rent to \$7,000.00.

15. Central Plumbing was permitted to Reply to Mr. Ramoutar's Defence to Counterclaim and in the main contended that at all material times it acted in accordance with the terms of the letter dated 9<sup>th</sup> December 2015.

16. From the state of the pleadings, the main factual allegations raised by Central Plumbing on its Defence and Counterclaim which now falls for investigation on this application can be identified as follows:

- a) That Central Plumbing has not permitted unknown persons onto the premises to use and occupy same. The Defendant contends it still remains in possession.
- b) That it has continued negotiations with Mr. Ramoutar on the new lease and that on 8<sup>th</sup> October 2016, Mr. Ramoutar informed Mr. Stevenson Madoo a representative of Central Plumbing that the notice to quit is null and void as he was interested in continuing negotiations.
- c) That Central Plumbing has always been ready, willing and able to enter into the proposed lease contained in the letter of 4<sup>th</sup> December 2015 but in breach Mr. Ramoutar never presented the engrossed lease prepared by the Attorney at Law Ms. Renee Johncilla for execution.
- d) Central Plumbing has complied with the payment of rent and rent was duly received.

17. Further from these pleadings the main issues that arise are as follows:

**1. The nature of the tenancy**

- a) What is the effect of the agreement made by the parties on 4<sup>th</sup> December 2015?
- b) Whether as a result of the actions of Central Plumbing it held an equitable lease on the terms of the proposed lease or it became a monthly tenant or a tenant at will whose tenancy is terminable by notice.

**2. Breach of terms**

- a) Whether there was an obligation on Mr. Ramoutar by that agreement to present to Central Plumbing an engrossed lease for execution and was in breach of that term.

- b) Whether Central Plumbing failed to execute the said lease and breached material terms of the parties' agreement.

### 3. Notice to Quit

Whether in any event Mr. Ramoutar "waived" his notice to quit and continued to negotiate with Central Plumbing, the terms of a new lease.

The question of course is, should a Court wait for a trial to determine these issues? Has Central Plumbing demonstrated any realistic prospect of succeeding on these issues? This requires an assessment of the Defendant's case as they have presented it on this application.

#### Assessment of the Defendant's case

18. As pointed out above, it is the task of the Court on hearing an application for summary judgment to investigate the facts stopping short of conducting a mini trial. To determine the realistic prospect of success of the Defence and Counterclaim calls for an analysis of its allegations made and to determine how it has measured up with the evidence that it has put before the Court at this stage. It is not sufficient merely to say that evidence will be forthcoming to defeat the claim or to point to a pleading and say that "Here is a triable issue! I deserve a trial!" At this stage the Court is assessing the relative success of pursuing those issues. In **Bank of Bermuda Ltd v Pentium** (BVI Civil Appeal No.1 of 2003) where Saunders CJ [Ag] observed at paragraph 18 that:

"A Judge should not allow a matter to proceed to trial where the defendant has produced nothing to persuade the Court that there is a realistic prospect that the defendant will succeed in defeating the claim brought by the claimant. In response to an application for summary judgment, a defendant is not entitled, without more, merely to say that in the course of time something might turn up that would render the claimant's case untenable. To proceed in that vein is to invite speculation and does not demonstrate a real prospect of successfully defending the claim."

19. Central Plumbing must condescend to particulars now to demonstrate that the Court's resources ought to be utilised to conduct a full blown trial. I have come to the conclusion in examining the evidence at this stage that Central Plumbing has fallen far short of the mark of

what is required to respond to a summary judgment application to demonstrate that it has a real prospect of success on its Defence and Counterclaim.

20. The affidavit filed in response by Central Plumbing almost mirrors the bare Defence and Counterclaim without condescending to any further details or particulars.
21. The core aspect of Central Plumbing's affidavit in response is so brief it is sufficient to recite its main contentions verbatim. In responding to paragraphs 9 to 25 of Mr. Ramoutar's affidavit which set out the history of the parties' dealings, Mr. Madoo in his affidavit in response stated as follows:

- "a) The Defendant has always been ready, willing and able to enter into the proposed lease as contained in the Claimant's letter dated 4<sup>th</sup> December 2015 referred to in paragraph 9 of Mr. Ramoutar's affidavit and exhibited as "**R.A.R.6**" but in breach of the terms contained therein, the Second Claimant has never presented the engrossed lease prepared by the Attorney at Law Ms. Renee Johncilla for execution by the Defendant.
- b) The terms of the agreement to the lease were agreed to, acknowledged and accepted by me on behalf of the Defendant as evidenced by my signature in exhibit "**R.A.R.6**" attached to Mr. Ramoutar's affidavit.
- c) Pursuant to the agreement to lease the Defendant has always conducted its business and its course of dealings with the Second Claimant in accordance with the terms set out in the said agreement to lease referred to in exhibit "**R.A.R.6**" attached to Mr. Ramoutar's affidavit.
- d) The Defendant has not permitted unknown persons onto the premises to use and occupy the premises. The Defendant remains in possession of the premises.
- e) The Defendant has complied with the payment of rent as contained in the agreement to lease and the said rent has been duly received by the Second Claimant."<sup>8</sup>

22. Importantly in this affidavit in response there is no dispute in relation to the correspondence exhibited by Mr. Ramoutar to his affidavit. Furthermore, there is absolute silence by Central

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<sup>8</sup> Paragraph 5 of the affidavit of Stevenson Madoo filed on 28<sup>th</sup> April 2017.

Plumbing on its allegation that Mr. Ramoutar told Central Plumbing that he waived the notice to quit. It is safe to say that such an allegation is no longer being pursued and that aspect of the defence is fanciful, it never happened and it was a figment of the Defendant's imagination.

23. It would be convenient at this stage to examine the three (3) main issues raised in this action, identified above, and determine whether on any of these issues Central Plumbing has articulated a realistic prospect of success in defending the claim or pursuing its Counterclaim.

### **The nature of the tenancy**

24. In Counsel's oral submissions for the Defendant he contended that Central Plumbing by signing and agreeing to the terms of the letter of 4<sup>th</sup> December 2015, obtained an equitable lease for three (3) years pursuant to the principles of **Walsh v Lonsdale** (1882) 21 Ch D 9. In Central Plumbing's affidavit it contends that the terms of the 4<sup>th</sup> December 2015 agreement "has been agreed to and accepted by Central Plumbing". That agreement however not only makes provision for the core elements of a new lease to be executed but it also goes on to set out the nature of Central Plumbing's tenancy if that formal agreement to lease was not executed. The terms of that agreement of 4<sup>th</sup> December 2015 provided as follows:

"I now confirm that subject to the execution of a fully termed lease between Central Plumbing and the owner of the lands, the owner of the lands is in agreement with proceeding with a new lease with Central Plumbing on the following terms.

1. **Term:** Three (3) years commencing January 1, 2016 to expire no later than December 31, 2016.
2. **Rent:** \$11,000 per month for the period January 1, 2016 to December 31, 2016 with the rent to escalate at the rate of 5% for the next 12 month period (\$11,550 from January 1, 2017 to December 31, 2017) and a further increase to 5% to \$12,127.50 for the period January 1, 2018 to December 31, 2018.
3. **Payments:** The rent reserved must be paid in advance by Central Plumbing on or before the last day of each preceding month.

4. **Security Deposit:** \$11,000 shall be paid to the owner by way of a security deposit which shall be refunded to Central Plumbing net of any expenses incurred by the owner through the default of Central Plumbing. Payment of the Security Deposit must be made no later than the date when the Rent for the first month of the new lease becomes due and payable.
  5. **Legal costs:** The new lease will be prepared by the owner's Attorney-at-Law Ms. Renee Johncilla. The costs of the preparation, stamping and registration of the new lease shall be for the account of Central Plumbing.
  6. **Building:** The building on the property remains the property of Central Plumbing and Central Plumbing shall pull down, remove and demolish the said building upon the expiration or termination of the new lease. The cost of such pulling down, removal and demolition shall be for the account of Central Plumbing.
  7. **Termination:** Either party to terminate the new lease by giving the other no less than 6 months' prior written notice.
  8. **Other terms:** The new lease to include all other standard terms which are applicable to a commercial lease of land."
25. Had the letter stopped there, it may have given credence to the view that an equitable lease emerged simpliciter. However, that was not the parties' intention as the parties' agreement further outlined the terms of the parties' tenancy pending the execution of a new lease and in default of executing that lease the agreement provided as follows:

"I further confirm that pending the execution of the above-mentioned new lease, the continued occupation of the lands by Central Plumbing shall be treated as a commercial tenancy at will, at the rent reserved up to the expiration of the Deed of Lease at caption, such rent to be paid for the period commencing December 1, 2015 to December 31, 2015.

In the event that the new lease is not executed by the owner (or his duly authorized representative) and Central Plumbing by **December 21, 2015, [or such other date as may be agreed by the owner and Central Plumbing]**, Central Plumbing may continue to occupy the said property at the rent proposed above (\$11,000) as a tenant at will, provided

however that such occupation will continue *for no later than June 30, 2016*, by which time Central Plumbing will vacate the property and take all steps required to pull down, remove and demolish the aforementioned building as contemplated under the Deed of Lease at caption. For the avoidance of any doubt, in the event that Central Plumbing should remain in occupation as a commercial tenant at will as described in this paragraph, such occupation shall be governed by the terms of the captioned Deed of Lease, save for the Rent which will be payable.”

26. The parties set a deadline to enter into formal arrangements. In default of meeting that deadline the parties agreed that the tenancy at will continues until the expiration of that tenancy on 30<sup>th</sup> June 2016 or the execution of the new lease whichever is earlier. The effect of this agreement therefore was that pending the execution of a new lease Central Plumbing’s tenancy was treated as a tenancy at will with rent payable at the old rate until 31<sup>st</sup> December 2015 and a revised rate from 1<sup>st</sup> January 2016. The terms of the previous deed of lease governed this tenancy at will save for the increased rent. Clause (c) of that lease prohibited Central Plumbing from assigning, underletting or parting with their interest or possession of the said property.

27. From a proper interpretation of this agreement:

- a) There was no express term in that agreement that Mr. Ramoutar is responsible to issue an engrossed lease to Central Plumbing.
- b) The deadline of 21<sup>st</sup> December 2015 to execute the new lease was not made of the essence nor was it agreed to be a final deadline. It was a target date where the parties made express provision to agree on a later time to execute the lease by using the words “or such other date as may be agreed by the owner and Central Plumbing.” The facts demonstrate that Central Plumbing simply refused to agree a new date far less to acknowledge the requests to enter into a formal lease.

28. This is a far cry from the equitable lease discussed in **Walsh v Lonsdale** where parties operated on the basis of an “agreement to lease”. That is not the case here at all. The parties clearly defined the nature of the tenancy in expectation of a formal lease as well as in the absence of such a lease being executed. Central Plumbing’s claim to be entitled to an “equitable lease” for a period of three (3) years is untenable. Rather it held a tenancy at will on the terms of the

previous lease (save as to rent) until the formal lease was executed. Such tenancy, it was agreed, in the absence of executing the new lease would expire on 30<sup>th</sup> June 2016. Indeed a tenancy at will is a tenancy under which the tenant is in possession and which is determinable at the will of either party. Furthermore, when on the expiration of a lease, a lessee is expressly authorised to continue in possession as tenant at will, in the absence of evidence of a contrary intention, the terms and conditions of the original lease apply to the tenancy at will so far as they are consistent with such tenancy. See **Hill and Redman's Law of Landlord and Tenant** paragraph 2 (c) 87. At best, as agreed in the pleadings by the parties, Central Plumbing enjoyed a monthly tenancy terminable on notice.

29. Whether a party has a lease in equity has been discussed in the authorities referred to me by both parties. The overarching question must be whether there is an equitable lease between the parties which a Court can grant specific performance. The Defendant must demonstrate that it is in a position to say that it has come to the Court with clean hands in seeking to gain a benefit under an agreement to lease. In the discussion on equitable leases in the Law of Real Property by Megarry and Wade it is observed that an intended lessee becomes an equitable tenant under a contract for a lease. If a proper lease ought already to have been executed he is in the same position as if it had been executed save that until he has obtained a proper lease his rights are equitable not legal. To this extent recognising the Defendant's rights in equity to say a contract to lease is as good as a lease is only a generalisation and can be misleading:

“the effect of **Walsh v Lonsdale** in equity depends upon the willingness of the Court to grant the discretionary remedy of specific performance. **If for any reason an agreement for a lease is one of which the Court cannot or will not grant specific performance the position under it is very different from that under a legal lease.** The parties can have nothing more than a right to sue for damage under an agreement though a yearly or other periodic tenancy may arise in the usual way.”<sup>9</sup>

30. The parties were by the agreement careful not to create such an “equitable lease” for a term of three (3) years. The tenancy of Central Plumbing could be terminated by reasonable notice holding on as a tenant at will obliged to pay a monthly rent of \$11,000.00. There is absolutely

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<sup>9</sup> The Law of Real Property by Megarry and Wade, page 752.



no evidence forthcoming from Central Plumbing, nor can they realistically dispute the fact, that the draft formal lease was delivered to it or that an email was sent with its terms as deposed by Mr. Ramoutar.<sup>10</sup> In the Defendant's oral submissions it seemed that they placed more emphasis on the fact that the agreement was sent after the deadline date rather than the fact that it was never sent at all. Further, the fact is Central Plumbing failed to respond to Mr. Ramoutar's requests to execute the agreement despite his many requests. Even more egregiously there is absolutely no evidence of Central Plumbing calling on Mr. Ramoutar to enter into any formal lease prior to June 2016 or at all.

31. There can be no specific performance if the tenant is itself in breach of a condition precedent or breach of one of the terms of the lease. This is consistent with the equitable principle that he who seeks equity must do equity and he who comes to equity must come with clean hands.<sup>11</sup> This is a convenient stage to demonstrate that Central Plumbing is already in breach of the terms of their agreement making any claim to "the benefit of a new lease" a hopeless one.

### **Breach of Terms**

32. Based on the affidavit of Mr. Ramoutar in support of his application, Central Plumbing was in breach of the following obligations: (a) to execute a formal lease, (b) not to sublet pursuant to Clause 2.c (c) to pay the required rent of \$11,000.00.

33. In Mr. Ramoutar's affidavit<sup>12</sup> he exhibits an affidavit of Mr. Harry Harrynarine who deposed that he on behalf of Kall Properties Limited entered into an agreement with Central Plumbing to take possession of the said property. At paragraph 4 (ii-v) of his affidavit, Mr. Ramoutar referred to the following matters addressed in Mr. Harrynarine's affidavit:

“(ii) That his client purchased by way of a Bill of Sale, the building (a warehouse) situated on the said property for the price of \$300,000.00. A copy of the said Bill of Sale was appended to Mr. Harrynarine's affidavit “HH3”.

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<sup>10</sup> See paragraphs 9 and 10 of Mr. Ramoutar's affidavit.

<sup>11</sup> See The Law of Real Property by Megarry and Wade paragraph 17-046.

<sup>12</sup> Filed 15<sup>th</sup> May 2017.

- (iii) That his client Kall Properties Limited had acquired possession of the property known as No. 26 Eastern Main Road adjacent to the said property which was also owned by the Defendant.
- (iv) That Mr. Madoo (a representative of Central Plumbing) gave permission to Kall Properties Limited to “take possession of No.27 Eastern Main Road”.
- (v) Mr. Harrynarine’s acknowledged that Mr. Ramoutar did indeed attempt to take possession of the said property on October 8, 2016 which Mr. Harrynarine further swore as follows: “*Of course, when the Second Claimant attempted to take possession on October 8, 2016, we resisted.....*”

34. Mr. Harrynarine swore to this affidavit in proceedings brought by Mr. Ramoutar to recover possession of the adjoining premises from Kall Properties Limited and Selection Hardware Ltd<sup>13</sup>. That claim also came on for hearing together with the instant claim. In that claim, the Court made an order for possession which order was stayed pending the outcome of these proceedings.

35. The effect of Mr. Harrynarine’s testimony in this affidavit demonstrates, without averment or response by Central Plumbing, the following facts which demonstrate not only breach of clause 2 (c) but Central Plumbing’s lack of bona fides in this matter:

- (a) While Central Plumbing was in occupation of the said property after the lease expired it was negotiating with Kall Properties Limited for it to purchase the said property.
- (b) In those negotiations, Mr. Madoo the principal agent of Central Plumbing represented to Kall Properties Limited that he held a month to month tenancy with Mr. Ramoutar and it had entered into or was contemplating entering into not an agreement to lease but an agreement to purchase Lot 27.
- (c) That evidence fits neatly into Central Plumbing’s own evidence in this claim where its correspondence or response to Mr. Ramoutar after the tenancy had expired was that it was interested in the purchase of the said property. Those letters from Central Plumbing

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<sup>13</sup> High Court Action CV2016-03880.

corroborates Mr. Ramoutar's evidence that Central Plumbing had parted with possession of the said property.

(d) In fact Mr. Harrynarine deposes that Mr. Madoo represented to Kall Properties Limited that he would nominate Kall Properties Limited to be the purchaser of the said property. Based on this arrangement Kall Properties Limited "acquired possession of the warehouse" situated on the said property and entered into an arrangement for Selection Plumbing and Hardware Limited to operate a business there. This evidence further corroborates Mr. Ramoutar's evidence that when he visited the property to regain peaceful possession in October 2016 he discovered that a third party was now operating a business on his property.

36. Counsel for the Defendant made a belated plea that Mr. Harrynarine's affidavit amounts to hearsay evidence and ought not to be considered in this application. However, quite apart from this being a procedural application, the substance of Mr. Harrynarine's affidavit is also contained in the letter written by Kall Properties Limited's attorney-at-law annexed to Mr. Ramoutar's affidavit to which there has been no reply by Central Plumbing in its affidavit in response.

37. Indeed in that letter from attorneys acting on behalf of Kall Properties Limited dated 26<sup>th</sup> October 2016 they responded to Mr. Ramoutar's letter requesting vacant possession by setting out their own negotiations with Mr. Madoo who was acting on behalf of Central Plumbing to justify Kall Properties Limited's occupation of the said property. The terms of that letter deserve repeating:

"During the course of negotiations between our client's principals and representatives and Mr. Steve Madoo, the owner of Central Plumbing and the plot of land located at No.26 Eastern Main Road, Petit Bourg, it was represented to our clients that Mr. Madoo was the owner of the warehouse constructed upon the property located at No.27 Eastern Main Road, Petit Bourg. Mr. Madoo indicated that he owned the warehouse in which the stock material to be sold at his hardware was stored and that he was at the time of discussions a month to month tenant. He represented to our clients that in contemplation of the sale of

his business he had allowed the lease agreement mentioned in your letter to lapse, converting it to a monthly tenancy between himself and your client.

Mr. Madoo as well represented to our client that he had concluded negotiations with your client for the sale and purchase of the land upon which the warehouse is located and that our clients would have nominated purchasers at the time of the completion of the contract and for the same proposed purchase price negotiated between Mr. Madoo and your client.

In fact, upon reliance on the representations made to our clients they entered into a Bill of Sale with Mr. Madoo for the said warehouse, paying the sum of Three Hundred Thousand Dollars. A copy of the said executed Bill of Sale is hereto annexed for your reference.

Further, our clients also had an agreement for sale prepared in draft, in which it was a clear term of the agreement that Mr. Madoo would broker a deal with the owner of the property to have same sold to our clients.

It was never our client's intention to deceive your clients or to broker any deal contrary to their rights or interest. Our client's were unfortunately a victim in a series of misrepresentations. They have acted and have intended to act in good faith for the entirety of this transaction and would like to apologize for any distress or inconvenience caused to your clients.

Given the circumstances as they stand, our clients are still very much interested in securing a lease or purchase of the said property located at No. 27 Eastern Main Road, Petit Bourg. In complete recognition of your client's rights and ownership of the said property, our client has instructed us to kindly request that your client consider entering into negotiations for the sale or lease of the said property.

Our client will of course treat the transactions as a proper conveyance and are willing to pay market value for the said property. They also undertake to comply with any wishes of the owner and to not trespass upon the property. It is our client's hope that your client would seriously consider their proposal and respond favourably.

Should you have any questions or concerns, please do not hesitate to contact our offices.”

38. There has been deafening silence by Central Plumbing to this letter in their affidavit in response. Central Plumbing's bold statement that "it had not permitted unknown persons onto the premises to use and occupy the premises and remains in possession of the premises" has been demonstrated even at this stage to be false at worse and at best a hopeless contention.

### **The notice to quit**

39. In the face of the expiry of the tenancy to occupy the premises as a tenant at will without a formal lease and the breach of Clause 2 (c) of the former lease, Mr. Ramoutar was therefore entitled to serve a notice to quit giving reasonable notice.<sup>14</sup> Central Plumbing contended that the notice did not expire on the anniversary date of the tenancy. That may be the case but even if it was a month to month tenancy the tenant received in fact three (3) months' notice more than is required to terminate such a tenancy.

40. As observed earlier there is no evidence advanced at this stage nor material to suggest that Mr. Ramoutar "waived his rights" under the notice to quit. If so, one would have at least expected Central Plumbing to have said this in its correspondence in October 2016. They did not. Making such an assertion by Central Plumbing in its Defence and Counterclaim is therefore fanciful.

### **Conclusion and Order**

41. Having analysed the main issues raised by Central Plumbing's Defence and Counterclaim there can be no realistic prospect of success of the Defence or Counterclaim and it does not deserve any further investigation at a trial. It would be inconsistent with the overriding objective to further utilize the resources of the parties or the Court to have such a hopeless Defence or Counterclaim advance beyond this stage. The Defence is fanciful or unreal and the Claimant is entitled to summary judgment for the following relief:

### **IT IS HEREBY DECLARED AND ORDERED**

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<sup>14</sup> See paragraph 88 **Hill and Redman Law of Landlord and Tenant:**

"Subject to any applicable statutory provision under which the tenant is afforded security of tenure, a tenancy at will is determinable by either party on his expressly or impliedly intimating to the other his wish that the tenancy should be at an end. A tenant at will has a reasonable time to remove himself and his chattels after the determination."

- a) The Second Claimant is the owner of and is entitled to uninterrupted possession of ALL AND SINGULAR that certain piece or parcel of land situate in the Ward of St. Anns in the Island of Trinidad comprising FIVE THOUSAND FOUR HUNDRED AND THIRTY SIX SQUARE FEET delineated and coloured pink on the plan marked “A’ annexed to Deed registered as No. 8585 of 1976 and thereon numbered “27” and bounded on the North by the Eastern Main Road by Lot 28 and by Lot 26 Eastern Main Road on the South by Lot 18 and by Lot 16 Maloney Street on the East by Lot 26 Eastern Main Road and on the West by Lot 28 Eastern Main Road which said piece or parcel of land is also described in the Schedule to a Deed of Gift made between Mohan Chablal Ramoutar and the Second Claimant, dated the 9<sup>th</sup> October 2016 Deed Registration No. DE 201602450919 (hereinafter referred for as “the Premises.”);
- b) The Defendant, by virtue of Deed of Lease dated the 16<sup>th</sup> December 2005 made between Mohan Chablal Ramoutar and the Defendant and registered as Deed No. DE200600136694, was required to demolish a structure made of steel and concrete which occupies approximately 40% of the total area (or approximately 2,174 square feet) of the Premises;
- c) The Defendant shall demolish and remove the said structure on the said property on or before 30<sup>th</sup> June 2017;
- d) The Defendant to pay to the Second Claimant mesne profits at the monthly rate \$11,000.00 from 1<sup>st</sup> July 2016 until the Defendant delivers up possession of the Premises totalling \$42,909.00 at the date of commencement of these proceedings and continuing at the daily rate of \$367.00;
- e) The Defendant to pay the costs of this Application assessed in the sum of \$30,000.00 as well as the prescribed costs of the action quantified in the sum of \$7,700.00.

**Vasheist Kokaram**  
**Judge**