REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
(Sub-Registry, Tobago)

CV 2007-04633

BETWEEN

HOLLIS RALPH LYNCH

Claimant

AND

THE TOBAGO HOUSE OF ASSEMBLY

Defendant

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES

Mr. Martin George for the Claimant.

Mr. Mervyn Campbell instructed by Mr. Pascal for the Defendant.

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Judgment

Background

The Claimant's claim is based on contract and arises out of a lease for a term of 3 years entered into on the 31st of July 2003 between the Claimant and the Tobago House of Assembly (THA) in respect of a property known as the Richmond Great House.

It is common ground between the parties that ***"the Richmond Great House (*** the subject property) ***is regarded as the most prestigious small property in Tobago. It dates back to the late eighteenth (18th) century and is of the period of timbered Georgian colonial architecture. It is the oldest and most beautiful surviving plantation house in Tobago and is set on a virtually perfect location."-*** Report of Executive Business Services - Commissioned by the THA.

The Claimant's evidence is to the effect that:

(i) The Richmond Great House was of historical value.

(ii) The Claimant had maintained the building up to the time he entered into arrangements for the lease thereof with the Tobago House of Assembly.

(iii) In the course of the said lease to the Tobago House of Assembly the property was left to deteriorate and fell into such a state of disrepair that he was entitled to enter into possession and carry out repairs to the said property at his own expense.

(iv) He notified the THA but he received no response to his request for repairs to be effected.

(v) In order to prevent the building from falling into further disrepair he conducted repairs at his own expense via his own contractor Mr. Duncan and submitted the bill to the Tobago House of Assembly thereafter.

He claims for:

(a) Reimbursement for that expenditure under the terms of the lease in the amount of $375,440.00

(b) Arrears of rent for 10 months

(c) Damages

(i) for breach of covenant in respect of clauses 5 (b), 5(c) and 5(k) of the lease,

(ii) for loss of profit on the Richmond Great House in the sum of $800,000.00 and continuing, and

(iii) for the loss of Goodwill resulting inter alia from the Tobago House of Assembly's allowing the property to fall into the alleged state of disrepair.

Chronology

The chronology of events is relevant:

(i) A report of Executive Business Services was commissioned by the Tobago House of Assembly in which the historical value of the property was described. This report with attached valuation dated November 19th 2002 was received by the THA prior to the execution of the lease.

(ii) Execution of the lease dated 30th of June 2003 by the claimant and the defendant

(iii) The handing over of the keys to the property on June 21 2004 by the claimant's agent Mr. Ashton Collette.

(iv) Complaints were made by the claimant to the Tobago House of Assembly concerning the state of repair /disrepair of the subject property dated inter alia July 19th 2004, and February 28th 2005. In the letter dated July 19th 2004 from the claimant himself he referred to the report of Executive Business Services suggesting that those repairs were estimated to cost one hundred thousand dollars**.**

(v) The report of Mr. Mark Raymond, architect dated April 2005 setting out his recommendations was received.

(vi) The claimant indicated to the Tobago House of Assembly via letter from his attorney at law dated October 10th 2005 that he would commence repairs, for the account of the Tobago House of Assembly and enclosed an estimate of the cost of those repairs.

(vii) Repairs by the claimant's agent Mr. Duncan commenced in or around November 2005 to May 2006 after issue of that letter from the claimant's attorneys dated October 10th 2005.

Those repairs in fact cost $375,440.00.

Disposition

I find as follows:

1. The claimant is entitled to reimbursement of that part of the expenditure by his contractor as represents repairs. This is assessed in the sum of **$151,600** to be paid by the defendant to the claimant. I further order that this sum bear interest at the rate of 8 % per annum from March 7 2006 until judgment July 31st 2009 and thereafter at the rate of 12 % per annum.

2. The Claimant is not entitled to any sum in respect of unpaid rent, as the one month's rent that I find outstanding is deductible from the rent for the 3 months prior to termination of the lease when the Defendant was deprived of the use of the subject property.

3. There is insufficient evidence of loss of goodwill and I make no award under this head of claim.

4. The evidence does not support the claim for loss of profits, nor in respect of further damages for breach of any covenant in the lease and I make no award under these heads.

5. The Defendant is entitled, after set off, to damages for breach of the covenant for quiet enjoyment in the sum of $35,000.00 to be paid by the claimant to the defendant. I further order that this sum bear interest at the rate of 8 % per annum until judgment from January 1 2006 and thereafter at the rate of 12 % per annum.

6. I order that each party bear his own costs.

7. Liberty to apply.

Issues and Findings

Counsel for the Tobago House of Assembly filed a list of issues which it is claimed arises in this matter. These are set out hereunder but reordered for convenience. My findings are set out immediately after each one:

1. **Whether at the time of entering the leasehold agreement the property was well maintained. If not, nature and extent of repair.**

   Finding – It required repairs estimated to cost around $100,000.00

2. **Whether the defendant failed to maintain the property in a tenantable manner or repair as alleged?**

   Finding - Yes

3. **Did the Defendants do all that was reasonable in the maintenance of the property?**

   Finding - No

4. **Whether there was any breach of covenant by the Defendant?**

   Finding - Yes

5. **Whether the purported breach by the Defendant entitled the Claimant to a right to entry of the property;**

   Finding – Yes, but not to retake complete possession nor to breach the covenant for quiet enjoyment**.**

6. **Whether the repairs executed by the Claimant went beyond the scope of the repair covenant?**

   Finding - Yes

7. **Was there a breach of quiet enjoyment by the Claimant?**

   Finding - Yes

8. **Whether re-entry by the Claimant entitled the Defendant to terminate the contract for leasehold tenancy?**

   Finding - Yes

9. **Is the Claimant entitled to the remainder of rents owing for the unexpired period of the tenancy agreement?**

   Finding - No

10. **Was the implication of term "going concern" part of the contract between the parties?**

    Finding - No

11. **Was there a duty by the defendant to maintain the goodwill of the premises?**

    Finding - No**.**

Claimant's attorney also filed a list of Factual and Legal issues as follows: My findings in relation to those issues are as follows:

Findings:

1. **Whether there were any oral terms of the tenancy agreement.**

   There is no reason to conclude there were any oral terms of the tenancy and I find the lease embodied all the terms of the arrangement between the parties.

2. **Whether the demised premises were kept in good and tenant like manner condition and repair by the Defendant at all material times.**

   The premises were to some extent in a state of disrepair even when they were initially leased to the defendant as it was contemplated that $100,000 worth of repairs were required. In addition during the course of the lease other dilapidations occurred, for example, the swimming pool fell into disrepair. Some of the dilapidations predated the lease- for example the rusting galvanize on the roof. It is not necessary to work out precisely what dilapidations occurred when, even if it were possible to do so, as under the covenant to keep in repair as I have construed it in this case, there is imported an obligation to **bring** the premises into repair and then **keep them** in that condition. But it is clear and I expressly find that by their very nature, many of the dilapidations, repairs for which were effected by Mr. Duncan, did not

arise over the course of the lease but predated it, and some of that work, though described as repair, was in fact renewal.

3. Whether the Defendant made any repairs at all to the demised premises.

It is not necessary for a determination of this matter to ascertain whether the Defendant made any repairs to the demise premises as this case is not concerned primarily with those repairs. Nevertheless I find that some repairs were carried out by the THA.

4. Whether the breach of the Defendant Lessor has resulted in loss of goodwill in the demised premises.

There is no evidence that any breach by the lessor resulted in loss of goodwill. The nexus between any alleged dilapidations and loss of goodwill is unclear. The non functioning state of the pool and any cosmetic disrepair may have had an impact on the perception of the public as to the quality of the premises as a Guest House but the property required repair prior to the entry by the THA and the nexus between any disrepair and the claim for loss of goodwill is not established by the evidence.

6. Whether the Defendant as Lessee undertook to use the demised premises as a Guest House and whether the defendant breached clause 5(b) of the lease

agreement in its failure to use the demised premises as a resort, guest house and hotel.

It appears that the property was not used as a resort, guest house and hotel. There is no evidence that it was used in any other manner. The complaint is that the property was simply not used and allowed to fall into disrepair. Though I find that it is a term of the lease that it be so used, I find in the circumstances of this matter that once the landlord received his rent of $35,000.00 per month it was open to the THA to commence that use when they chose. The lease contemplated keeping the premises in repair, which included bringing it into repair. Clearly therefore there would have been a period contemplated when the THA would have had to carry out those repairs. There is in fact some evidence that they did so. It could not be the case that during any period when the THA were complying with that obligation the THA would simultaneously have been in breach of the covenant to use as a resort, guest house and hotel. There is insufficient evidence as to the period of time when the property was not being repaired either by the claimant or the THA.

However the actions of the Claimant himself in reentering the premises put it beyond the ability of the THA to use the premises as a guest house, at least during the period November 2005 to January 2006 and beyond, and itself gave rise to a breach of this covenant.

In the totality of these circumstances, as the Defendant was paying the rent for the relevant period, there is no sufficient evidence of additional loss by the Claimant for the breach thereof. I would only have been prepared to award nominal damages for any breach of this covenant but decline to do so in light of the breach by the Claimant of the covenant for quiet enjoyment.

5. Whether the Defendant Lessor failed to keep the demised premises in good and substantial repair as required by clause 5(k) of the lease agreement.

I find the tenant did fail to keep the premises in good and substantial repair as required by clause 5k of the lease agreement. As I have construed that clause it required the THA to bring the premises into a state of repair and then keep them in that condition. But the premises were handed over in a state of less than perfect repair and the fact of breach must be construed in this context. Some breaches did occur in the course of the lease e.g. failure to maintain the swimming pool.

7. Whether it is an implied term of the agreement that the repair covenant would not exceed $100,000.00.

There is no implied term in the lease that that repair would not exceed $100,000.

8. Whether the Claimant's entry onto the premises to carry out repairs was a breach of the tenancy agreement and in particular a breach of the covenant of quiet enjoyment, sufficient to make this an unlawful re-entry.

The Claimant's entry onto the premises amounted to a breach of the covenant for quiet enjoyment sufficient to make this an unlawful re-entry.

9. Whether the Claimant's entry on to the premises to carry out repairs was a fundamental breach of the tenancy agreement for which the fixed term tenancy could be legally terminated by the defendant Lessor.

I find this reentry in the manner it occurred, effectively dispossessing the Tenant, was a fundamental breach and entitled the tenant to terminate the lease.

12. Whether the Claimant Landlord is entitled to special damages for repair works in the sum of $375,440.00.

I find the Claimant is not entitled to reimbursement of the full sum of $375,440.00 expended on works, but only the portion thereof that relates to repair, not renewal in the sum of **$151,600**. I recognize that even this sum, derived from subtotals in the Duncan estimate, was not the product of competitive bidding. However there is no evidence before me that it is inflated.

13. Whether the Claimant is entitled to damages for loss of profit in the sum of Fifty Thousand Dollars per month and continuing.

I find the Claimant is not entitled to any sum for loss of profits as the claim is predicated upon the premises not yet being fully restored. Duncan's evidence however that is after he finished his works the premises could have been used. Further the Claimant‘s own act has brought the use of the premises to an end.

14. Whether the Claimant Landlord is entitled to special damages for arrears of rent in the sum of Three Hundred and Fifty Thousand Dollars ($350,000.00).

I find that no rent is payable after the THA's termination of the lease with effect from January 30th 2006, which accepted the Landlord's repudiation by his unjustified act of reentry, and that the deposit of 3 months rent became repayable on termination of the lease.

Analysis of the Evidence

The Claimant's Evidence:

The Claimant's evidence is as follows:

In his witness statement Claimant - Professor Hollis Lynch states [underlining mine] that**:**

“Clause 5(k) of the said Tenancy Agreement expressly stipulated that the Defendant “covenants to keep the premises in <u>good and substantial decorative repair and condition</u> throughout the term of the lease and so often as the occasion shall require, well and substantially repair, uphold, support, cleanse and <u>keep in good and</u> <u>substantial repair and condition</u> the premises, including but without limitation on the generality of the

foregoing, the walls, floors, ceiling, doors, windows, window frames, all sanitary fittings and all pipes, ducts, drains, cables and the grounds of the demised premises.

Richmond Great House is of particular archival (sic) value and historical significance, and the preservation of its intrinsic historical nature, and innate architectural design and structure, were essential to the foundation of the contract between the Defendants and myself. In pursuit of this objective, the Defendant prior to entering into the contract with me, commissioned a survey and report from a firm of management consultants by the name of Executive Business Services.

The Richmond Great House was featured in a film on the BBC and has had several magazine articles written about it. All of this information was captured in the report which the Defendants commissioned before they entered into the lease agreement with myself and in the circumstances, it was of fundamental importance to both parties entering into the agreement, for the Defendant to preserve and scrupulously maintain the building and demised premises in accordance with clause 5(k) of the agreement.

Within a year or so after the commencement of the tenancy I discovered that the Defendant failed to observe the covenant to keep the premises in good repair. The premises were discovered to be unkempt, dirty, and in a dilapidated condition and were not being used for the express purposes of running it as a functioning Guest House and hospitality training facility.

On or about the 19th day of July, 2004 I wrote to Dr. Anslem London, Secretary in the Division of Finance in the Tobago House of Assembly, informing him of the state of disrepair of the property since the commencement of the lease agreement. I also proposed to the Defendant to either have a long lease or to purchase the property from me since I was then based in New York and due to medical and health reasons I did not envisage myself soon resuming active overseeing and management of the property. No response was forthcoming from the Defendants.

On 28th February 2005 I wrote to the Secretary for Tourism Mr. Neil Wilson, in which I again sought to inform the Tobago House of Assembly of the state of disrepair of the demised premises and requested the permission of the Defendant, for my agent Mark Raymond, an architect, to be allowed to enter the premises and report on the repairs as necessary. This was granted and upon receipt of the report from Mr. Raymond on the condition and state of dilapidation of the Richmond Great House and the repairs necessary to restore the property, I forwarded a copy of same to the Defendant.

On the 7th June 2005, based on the result of the findings of the report of Mr. Mark Raymond, I caused my then Attorney at Law, Messrs. Lex Caribbean, in accordance with the terms of the tenancy agreement, and in particular clauses 5(e) and 5© of the said agreement, to write to the Defendant giving it notice to commence within fourteen(14) days, the repairs as highlighted as being of necessity in the report of Mr. Mark Raymond. The Defendant failed to respond to this letter and my then Attorneys, by letter dated 10th October 2005 again wrote to the defendants and requested repairs to be made as

required by the Raymond report failing which, the Defendant was put on notice that I would perform the repairs through my agent, Mr. Roger Duncan of RMR Construction and Property Management and seek compensation from them for the same.

Time passed and the Defendant again failed to respond to my requests. I therefore commenced the repairs myself since I was fearful of my property falling into further disrepair and I contracted with the construction company of RMR Construction and Property Management who undertook and completed the repair works between November 2005 and May 2006 at a cost of Three Hundred and Seventy Five Thousand Four Hundred and Forty Dollars ($375,440.00). This information was forwarded to the Defendant.

On the 7th December 2005 the Defendant responded, claiming that I illegally entered onto the property and rather disingenuously also attempted to give notice of the termination of the tenancy on or before January 30th 2006. I had my then Attorneys at Law, LEX Caribbean respond by letter to the Chief Secretary of the Defendant, notifying the Defendant that I was <u>not in breach</u> and that otherwise, the said lease could not be terminated but by the effluxion of time.

I then made numerous requests through my then attorneys, Messrs. LEX Caribbean for the Defendant to reimburse me for the expenses that I incurred for repairs to the property which they allowed to fall into disrepair and dilapidation through <u>neglect</u> and <u>misuse</u> and <u>abuse.</u>

In addition to failing to use the property for the intended purpose and failing to repair, the defendants also failed to properly live up to their commitment to pay rent. The Defendant was supposed to pay the rent into my Unit Trust Account but defaulted in payment of the rent for ten months during the term of the lease, being the months of March 2004, June 2004, July 2005, September 2005, October 2005 and March 2006, April 2006, May 2006, June 2006 and July 2006 in the total sum of Three Hundred and Fifty Thousand Dollars ($350,000.00). I instructed my then Attorneys at Law, LEX Caribbean to write to the Defendant's Attorney Alvin Pascall, notifying that the Defendant's rent was in arrears."

The evidence of Mr. Mark Raymond

Mr. Mark Raymond, an Architect, provided the report in which he made recommendations for, inter alia, immediate action with respect to the property. Mr. Raymond has indicated that his recommendations for immediate action were necessary to keep the building from eventually becoming uninhabitable although he was not in a position to state in what time frame the building would become uninhabitable if those repairs were not effected. In his covering letter dated April 29th 2005 he made it clear that his recommendations were for the localized remedying of the dilapidations he identified.

His recommendations are set out as follows:

"3 Condition

3.5 *There is evidence of the deterioration of **the painted surface externally** and this has had the effect of exposing or partially exposing and compromising the timber. The deterioration is evident in the **specific areas** but is indicative of the need for comprehensive repainting of the property. If this is not addressed the consequences are the compromising of the condition of the timber **over time** and eventual potential failure of the structure.*

3.7 Along the eastern elevation the closing board of the roof has collapsed and certain frames have begun to fail with the loss of panes of glass.

3.8 This failure has consequently exposed the roof structure to the constant blast of the wind and salt, and moisture. The roof structure was not inspected but it is anticipated that this level of exposure is likely to impact on the structural condition of the roof unless the roof is sealed and the closing board repaired and more importantly regularly maintained.

3.9 The failure of the paint and exposure of the timber is also evident on the columns supporting the roof over the entrance on the southern elevation. There is a stripping of the paint on the upper levels and the timber splicing is exposed at this point. Without repair and repainting this condition will deteriorate and require structural repair.

3.10 The structure and fabric of the awnings protecting the windows has begun to fail and appears to be rapidly deteriorating over a number of openings. The timber

work of the fenestration has begun to deteriorate in parts as a result of exposure. The awnings should be replaced with more durable device consistent with the architecture of the house."

Mark Raymond's report contained the following observations:

"Immediate

Immediate repair of damaged and exposed structural timber work with approved quality timber.

Replacement of awnings.

Repair of damaged window frames to eastern elevation and replacement of glazing where required.

Rubbing down, treatment and repainting of all external painted surfaces using high quality protective approved paint.

Draining of swimming pool, repair and maintenance of pump equipment, repainting of pool, and implementation of regular maintenance programme.

Medium Term

A comprehensive architectural survey of the property with the view to establishing a strategy for thorough restoration.

Long Term

*Comprehensive preservation/restoration strategy***"**

Mr. Duncan

Mr. Duncan indicated that he performed the repairs that were pointed out to him by the claimant, that although he gave him an estimate before he conducted the repairs he did not look for that estimate, or provide that estimate as an attachment to his witness statement. From his recollection the estimate was in excess of three hundred thousand dollars and he was paid for the repairs that he effected. The estimate he did provide was dated March 7 2006**,** after the commencement of the repairs.

Items 1-20 of the estimate showing the repairs performed by Mr. Duncan on the instructions of the claimant were as follows:

1.	*Changing damaged ceiling boards*	*$ 9,000.00*
2.	*Complete repair of roof on main building*	*$53,000.00*
3.	*Replacing damaged wooden shingles on wooden porch*	*$30,000.00*
4.	*Repairing damaged columns on southern side of main building*	*$ 8,000.00*
5.	*Repainting main building, hall, annex and pool side*	*$66,500.00*
6.	*Sanding and polishing wooden floors of main building*	*$18,826.00*
7.	*Replacing damaged awnings*	*$15,500.00*
8.	*Replacing damaged guttering and fittings*	*$ 5,000.00*
9.	*Plumbing repairs*	*$19,500.00*
10.	*Electrical repairs*	*$25,000.00*
11.	*Replacing damaged Celotex in main building with gypsum*	*$10,000.00*
12.	*Replacing damaged Fly screens (4), re-roofing of the thatched*	

bar-side Tables, replacing rotten posts at the bar and		
re-tiling damaged bathroom floor of western front room		*$10,000.00*
13.	*Repairing kitchen cupboards*	*$16,500.00*
14.	*Replacing windows at kitchen*	*$ 1,100.00*
15.	*Power washing of concrete yard*	*$5,000.00*
16.	*Pest control of main building*	*$6,000.00*
17.	*Replacing unserviceable pool pump and timer*	*$6,000.00*
18.	*emptying neglected pool, acid and power washing,*	
chlorinating and revert to clarity		*$6,000.00*
19.	*Transportation*	*$5,000.00*
20.	*Rental of scaffolding*	*$3,500.00*

Roger Duncan in his witness statement at paragraphs 3-12 stated:

> *"Prior to carrying out the repairs, I visited the property to have a first hand view of the repairs to be carried out. I have never been to the property before. When I visited the compound I noticed that there were government workers on it. I also noticed that the swimming pool showed signs of neglect as it was over-ridden with algae. Although the pool was filled with water, it was out of order due to a malfunctioning pump. There was moss growing on the pool deck and the huts on the pool deck had some umbrella shades and the shades were missing parts.*

It was my assessment that the property was in a state of disrepair. The first thing that caught my attention was the awnings, of which most of them were missing. The guttering was also missing in some areas. The roof was in a bad condition and most of the galvanize were rusty and had become loose due to the deterioration of the nails.

As a result of my observations, I concluded that the degradation of the structure started ***at least a year prior*** *to my visit to the property. The signs of disrepair that I saw all indicated that the problems were a result of neglect and a failure to upkeep and maintain the property as I noticed in the Main house that there were leaks in two of the rooms as shown by the water stains on the ceiling. This in itself is an indication that the property was being neglected and not enough attention was being paid to the upkeep and maintenance of the property.*

The repair done included repair work on the roof and the main building and restoration of the floor. In undertaking restoration work to the floor we re-nailed the loose floor boards as well as polish the floors. The kitchen cupboards were changed as they had started to deteriorate as a result of attacks from termites. The paintwork on the outside of the building was fading and peeling and new paintwork was carried out.

The shingle roof was changed as they were moldy, rotten some of the shingles were missing which caused leaks. The thatched roof by the bar were also repaired as they were all blown off.

The toilets were all in need of repairs with some of them not functioning and the ones that worked were also changed as they were discolored and missing seats.

Repair work was carried out on the annex which was discoloured. The tennis court which we repainted contained surface cracks. In the main hall we vanished the ceiling, rafters and laths. These had lost its hue. At the end of the repairs the entire structure was re-painted.

It is my belief that the property was neglected. There were no signs that any work was done on the property in terms of maintaining it. The windows were working well but a few window panes were missing. I did notice that some of the hinges were replaced. Apart from the yard, there were no other sign that the property was being continuously repaired.

Admittedly some of the work to be done was not visible to the naked eye as we encountered rotten boards. By looking at the boards they appeared to be good and sturdy but while conducting a thorough assessment we discovered the boards were rotten. Therefore, if occasional checks were done while carrying out

maintenance, these rotten boards and many other problems would have been uncovered.

Apart from the structural repairs that needed to be carried out on the house, I did notice that the inside of the house was kept clean. I also saw signs that the yard was cut and raked however, there was no structural maintenance and it was this lack of structural maintenance that is most costly. In addition the Claimant was informed of all repair works done on Richmond Great House …"

The defendant's evidence was via its witness Mr. Keens Dumas, an Administrator and Acting Chief Administrator of the Tobago House of Assembly at the material time

Mr. Keens Dumas

Mr. Keens Dumas gave evidence from the records of the Tobago House of Assembly that:

(a) the Executive Business Service Report referred to earlier was commissioned by the Tobago House of Assembly, that this was the only report that the Tobago House of Assembly had before it prior to execution of the lease, that via that report the Tobago House of Assembly was fully informed of the matters contained in that report including:

(i) the historical value of the building;

(ii) the financial implications involved in running the business as guest house;

(iii) the possibility/intention of running the building as a training site for the hospitality industry.

I note that that report estimated the cost of bringing the building into repair at a cost of one hundred thousand dollars. This would therefore also have been within the contemplation of the Tobago House of Assembly.

Mr. Keens Dumas gave evidence that the claimant only handed over the keys by his agent almost a year after the entry, after the execution of the lease. However, he admitted to the court that the handing over the keys was merely an administrative matter, and that in fact it might have been an oversight on the part of the property manager. He confirmed that the Tobago House of Assembly in fact had access to the premises via the staff of the building, who were formerly staff of the claimant but some of whom were taken over and placed on the pay roll of the Tobago House of Assembly.

The question of the handing over of the keys therefore ceased to be a material issue in this case.

Mr. Keens Dumas further indicated however that when the claimant commenced repairs via Mr. Duncan, the Tobago House of Assembly was not able to utilize the

premises for the purpose for which it was leased, namely the operation of a guest house and training facility for the hospitality industry.

It is undisputed and in fact admitted that when Mr. Duncan commenced his repairs in November 2004 ending in April or May in the following year -2005- that the premises could not be utilized by the Tobago House of Assembly.

Relevant parts of the affidavit of Michael Jerome Keens-Dumas filed on the 30th day of July 2008 (which was accepted as his witness statement) are as follows:

Paragraph 10

"The State Counsel advised on the retention of the repair covenant in the lease so as to give the Defendant the right to spend such moneys reasonable necessary over the three (3) year period to keep the premises in a tenant-like manner. It was mooted to me that the Assembly was not expected to spend more than one hundred thousand dollars ($100,000.00) over the period in remedial works."

Paragraph 11

"The lease is dated the 31st July, 2003, but the Assembly only took possession on the 21st day of June 2004, previous to that date the premises remained in the control of the Claimant."

Paragraph 13

"The Tobago House of Assembly later commissioned a team or committee of persons in the hospitality and tourism sector to advise on the way forward for the management of the great house. I dare say that that committee met nothing in operation at Richmond Great House; the personnel were ill-equipped in that those personnel did not meet public health act requirement e.g. food badges and that the place was not equipped for real hospitality business. ***The committee commenced expenditure in an attempt to commence a level of operation,*** *I am informed and verily believe that One Hundred and Forty Eight Thousand Dollars ($148,000.00) was spent on development work."*

Paragraph 14

"….The Defendant entered on the 21/06/04 and by the 19/07/04 the Claimant commenced the discussion about dilapidation and disrepair over the past years; I am now shown….a true copy of a missive from the Claimant to the Secretary for Finance and the discussions about disrepair continued; the Claimant failing to realize that he was in occupation by his agent up to 21/06/04…."

Paragraph 15

"Notwithstanding that the Assembly took the initiative to insert a repair covenant in the lease to give its functionaries the flexibility in spending reasonable sums for the upkeep of the Claimant's property in a tenant like manner and meet its obligation to potential users, the Claimant saw the repair covenant as a "cash cow". I am now shown…letter dated June 7th 2006, the Claimant making demands of the Defendant for the Defendant to

commence repair works and whilst the parties continued to discuss the question of the scope of the repair covenant; the Claimant re-enters the premises purporting to carry out extensive renovations, the Claimant having re-entered the premises and purported to carry out substantial works of renovation to the detriment of the Defendant user left the Defendant with no alternative than to treat the tenancy as at an end and cease further payment for the period beyond the date of the said termination."

Law

The law with respect to repairs is set out in inter alia in the text **Drafting and Negotiating Commercial Leases, Murray J Ross 2nd Edition Chapter 8 at pages 142-143** as follows: (emphasis mine)

However large the words of the covenant may be, a covenant to repair…is not a covenant to give a different thing from that which the tenant took when he entered into the covenant: ***Lister v Lane*** *[1893] 2 Q.B. 212 per Lord Esher MR at 216*

Repair is restoration by renewal or replacement of ***subsidiary parts of a whole***. ***Renewa****l, as distinguished from repair, is* ***reconstruction*** *of the entirety, meaning by the entirety not necessarily the whole but* ***substantially the whole****:* ***Lurcott v Wakely and Wheeler*** *[1911] 1 KB 905 per Buckley LJ at 924*

It is always a question of degree whether that which the tenant is asked to do can properly be described as a repair, or whether on the contrary it would involve giving

back to the landlord a wholly different thing from that which he demised: ***Ravenseft Properties Ltd v Davstone (Holdings) Ltd*** *[1980] Q.B. 12 per Forbes J.*

It seems to me the correct approach is to look at the particular building, look at the state which it is in at the date of the lease, look at the precise terms of the lease, and then come to a conclusion whether, on a fair interpretation of those terms in relation to that state, the requisite work can be fairly called repairs. However large the covenant it must not be looked at in vacuo: **Brew Brothers Ltd. v Snax Ross Ltd. [1970] 1 Q.B. 612 per Sachs J at 640.**

Thus if the work in question looked at in this way, involves a reconstruction of substantially the whole, or giving back to the landlord ***a wholly different thing from that demised****, then the party who has covenanted to repair will not be required to undertake that work.*

Sachs LJ continued

Quite clearly this approach involves in every instance a question of degree…and I would in this behalf echo the words of Sir Raymond Evershed MR in Wates v Roland when dealing with an analogous problem relating to ….he said: "Between the two extremes, it seems to me to be largely a matter of degree, which in the ordinary case the county court judge could decide as a matter of fact, applying a common-sense man-of-the-world view."

More recently, an Official Referee has held that the addition of "renew" adds nothing to a covenant to repair. Nevertheless there is clearly nothing to prevent the covenant imposing a greater obligation on the tenant, providing much stronger and more specific words are used.

"Where the lease relates to an old building particular care is needed because if on a true view of the facts the works required were repairs within the meaning of the covenant, it matters not…that the property was in these respects in a defective state at the time of the demise. As Lord Esher MR said in ***Proudfoot v Hart***

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

Nevertheless, the covenant will be construed in the light of the principles set out in paragraph 8.1 above and thus the tenant will not be required to reconstruct substantially the whole or give back a wholly different thing from that demised."

The principle in the case of ***Ravenseft Properties Limited v Davstone (Holdings) Ltd [1980] Q.B. 12*** is useful*. "It was held that it was a question of degree whether work carried out on a building was a repair or work that so changed the character of the building as to involve giving back to the landlord a wholly different building to that demised; that, in rendering the building safe the inclusion of expansion joints was such a trivial part of the whole building that their insertion could not amount to an improvement which changed the nature of the building so as to take all the work of reparation out of the ambit of the covenant to repair."*

And at page 21 Forbes J said "…The true test is, as the cases show, that it is always a question of degree whether that which the tenant is being asked to do can properly be described as repair, or whether on the contrary it would involve giving back to the landlord a wholly different thing from that which he demised.

In deciding this question, the proportion which the cost of the disputed work bears to the value or cost of the whole premises, may sometimes be helpful as a guide."

It is clear from the authorities the following principles can be extracted in relation to the instant covenant to repair which is *"to keep the provisions in good and substantial*

decorative repair and condition throughout the term of the lease …. substantially repair ….. and keep in good and substantial repair and condition the premises including but without limitation of the generality of the foregoing, the walls, floors, ceiling, doors, windows, window frames, all sanitary fittings and all pipes… and cables… and the grounds…"

The covenant to repair

Paragraphs 5 (c), and 5 (k) of the lease are as follows:

5 (c) *To execute all such works as are or may become necessary by the requirement of the Lessor or any lawfully authorized body or bodies.*

5(k) To keep in good and substantial decorative repair and condition through out the term and so often as the occasion shall require well and substantial repair uphold support cleanse and keep in good and substantial repair and condition the premises including but without limitation on the generality of the foregoing the walls floors ceiling doors windows window frames all sanitary fittings and all pipes ducts drains cables and the grounds.

Principles:

(i) the covenant to repair is distinguishable from a covenant to renew. A covenant to repair does not extend to making the building or an aspect of a building into a new building;

(ii) the extent of repair required is a question of fact in each case, depending on various factors including the type of building;

(iii) a covenant to keep a building in repair and to hand over that building in good repair imports upon the lessee an obligation to bring that building into repair, even if the building is handed over to him in the state of disrepair;

(iv) in order to avoid disputes concerning the extent of repair necessary under a covenant to repair one mechanism employed is for the lessor and the lessee to agree a schedule setting out the state of repair of a property before the entry into possession of a lease. This was not done in this case.

Findings

Applying the above principles to the instant covenant to repair and the facts of this matter I find as follows:

(1) The instant covenant to repair is not in the same terms as a covenant to keep and deliver premises in repair. However in effect it is similar- to keep premises in repair implies that the premises are to be kept in repair, and if they are not already in repair, that they will be put into a state of repair,

and thereafter kept in repair. I am fortified in this conclusion and construction by the fact that in this case the THA was aware the premises needed work to be done estimated to cost $100,000 to it. It would have been open to the THA to prepare a schedule of the works required to be done and to specifically exclude these from the scope of a covenant to repair. This was not done. The evidence of Mr Dumas was that the THA in fact spent $148,000.00 on the premises - acknowledging that under the covenant to repair the possibility of substantial expenditure was envisaged and accepted.

(2) I accept the evidence of Mark Raymond as to the type of work that was required immediately as set out in his report referred to above. I accept less readily the evidence of the contractor who carried out the repairs. I do not accept that he was independent, and in fact he had an interest to serve in justifying his charges and the extent of work that he performed for the claimant. Where there is conflict I prefer the evidence of Raymond.

(3) The covenant to repair itself sets out, non exhaustively, the type of repairs contemplated, - which included walls, floors, ceilings, windows, window frames, sanitary fittings, cables, pipes

Acceptable items of repair

When the report of Mark Raymond is compared to the type of work actually carried out by by the contractor the following items of work - 1, 4, 7, 8,14,16,17,18, from Duncan's estimate,(separate and apart from the quantum charged), are demonstrated to fall squarely under the covenant to repair. Further, items 19 and 20 may be incidental to some of the covered items. These items on Duncan's estimate total $65,100.00

I am left in doubt as to whether the claimant has satisfied this court that the sum he says he expended on this property for the ultimate account of the THA was for services rendered at fair value - that is - without excessive mark up. It was open to the parties to commission expert opinion on the value of work done but this was not a course chosen. In the absence of evidence to the contrary however, I accept on a balance of probability that these were the sums paid by the claimant, whether they represented fair value or not.

Items under query

With respect to the other items on Duncan's estimate however it is necessary to examine these to see whether they fell within the scope of the instant covenant to repair, bearing in mind-

1. The ambit of work defined as necessary in the Mark Raymond report.

2. The scope of the covenant to repair.

3. Whether these items constitute a repair or a renewal, the first being capable of being reimbursable expenditure under the covenant to repair, and the second being outside of the scope thereof.

I have little doubt that the effect of Item 2 - **complete repair of roof on main building** $53,000.00 -is to provide a renewal. This is not contemplated as necessary in the Raymond report, and as itemised suggests that a renewal rather than a repair occurred in relation to this item. The necessity for such extensive work on this area has not been demonstrated.

I find the burden of proving that work done falls within the covenant to repair lies on he who relies on that covenant and alleges it does. I find that in the absence of such proof the work is prima facie a renewal.

In the absence of evidence that such extensive repairs were necessary I find on a balance of probability that the work was carried out without regard to whether it was a repair or a renewal and in this instance the work amounted to a renewal , beyond the scope of the covenant to repair.

With respect to the other items I find as follows:

Item 3 - replacing damaged wooden shingles on wooden porch $30,000.00

This expenditure has not been proved to have been immediately necessary based on the Raymond report, nor has it been proved to be repairs rather than renewal.

This is not contemplated in the Raymond report as being necessary, and as itemised suggests that a renewal rather than a repair occurred in relation to this item. The necessity for such extensive work on this area has not been demonstrated.

In the absence of evidence that such extensive repairs were necessary I find on a balance of probability that the work was carried out without regard to whether it was a repair or a renewal and in this instance the work amounted to a renewal, beyond the scope of the covenant to repair.

Item 5- repainting main building hall, annex and pool side -$66,500 -

Mark Raymond noted *deterioration of the painted surface with the effect of exposing or partially exposing the Timber. The deterioration is evident in the specific areas but states this is indicative of the need for comprehensive repainting*. He further stated this included the columns supporting the roof over the entrance to the southern elevation.

This suggests that the tenant could have complied with the covenant to repair by repainting specific areas rather than the whole. I recognise that some part of this claim for reimbursement may have been rendered unnecessary if the tenant had painted the specific parts where the paint surface had deteriorated. The fact is it did not do so

There is in addition no evidence that value was rendered for the sums allegedly paid - for example - there is no breakdown as to how the sum of $66,500.00 for painting or in fact any item was arrived at, nor was there any evidence that competitive bidding was used for any of the subcontractors - a step necessary for transparency if, as was clearly the intention, the bill was to be submitted for payment by another party.

On balance, taken together with the obligation to keep in decorative repair, I find that the complete repainting, in the circumstances where Mr. Raymond suggests that in time it would have become necessary, would constitute repair. I would therefore allow reimbursement for the whole of this item, devoid though it is of any breakdown.

Item 6 - sanding and polishing wooden floors of main building $18,826.00

This is not contemplated in the Raymond report as being necessary, and as itemised suggests that a renewal rather than a repair occurred in relation to this item. The necessity for such extensive work on this area has not been demonstrated.

In the valuation report attached to the Executive Business Services Report it is noted that repairs to some areas of the wooden floor were required and the overall condition of the main house was average/fair.

I find the burden of proving that work done falls within the covenant to repair lies on he who relies on that covenant and alleges it does. I find that in the absence of such proof the work is prima facie a renewal.

In the absence of evidence that such extensive repairs were necessary I find on a balance of probability that the work was carried out without regard to whether it was a repair or a renewal and in this instance the work amounted to a renewal , beyond the scope of the covenant to repair.

Item 9 - plumbing repairs $19,500.00

This is not contemplated as being necessary in the Raymond report, and as itemised suggests that a renewal rather than a repair occurred in relation to this item. The necessity for such extensive work on this area has not been demonstrated.

In the absence of evidence that such extensive repairs were necessary I find on a balance of probability that the work was carried out without regard to whether it was a repair or a renewal and in this instance the work amounted to a renewal , beyond the scope of the covenant to repair.

Item 10 Electrical repairs - $25000

This is not contemplated as necessary in the Raymond report, and as itemised suggests that a renewal rather than a repair occurred in relation to this item. The necessity for such extensive work on this area has not been demonstrated.

I find the burden of proving that work done falls within the covenant to repair lies on he who relies on that covenant and alleges it does.

In the absence of evidence that such extensive repairs were necessary I find on a balance of probability that the work was carried out without regard to whether it was a repair or a renewal and in this instance the work amounted to a renewal , beyond the scope of the covenant to repair.

Item 11 and Item 12

11.	*Replacing damaged Celotex in main building with gypsum*	*$10,000.00*
12.	*Replacing damaged Fly screens (4), re-roofing of the thatched bar-side Tables, replacing rotten posts at the bar and re-tiling damaged bathroom floor of western front room*	*$10,000.00*

These are not contemplated as necessary in the Raymond report. However Mr. Raymond only reported on the condition of the main building. Although as itemised item 11 suggests that a renewal rather than a repair could have occurred in relation to this

item, it is capable of constituting a repair, especially if there were leaks. On balance this item and item 12 are accepted as described and held to be repairs.

Item 13 Repairing kitchen cupboards

This is not contemplated as necessary in the Raymond report, and as itemised suggests that a renewal rather than a repair occurred in relation to this item. The necessity for such extensive work on this area has not been demonstrated.

As before I find the burden of proving that work done falls within the covenant to repair lies on he who relies on that covenant and alleges it does. I find that in the absence of such proof the work is prima facie a renewal.

In the absence of evidence that such extensive repairs were necessary I find on a balance of probability that the work was carried out without regard to whether it was a repair or a renewal and in this instance the work amounted to a renewal , beyond the scope of the covenant to repair.

The expenditure on the items that I have found acceptable amounts to $151,600 being the sum of expenditure on items 1, 4, 5, 7, 8,14,16,17,18, 19 and 20 in addition to items 11 and 12.

Included in these figures is an element of enrichment, that is an element for reimbursement in excess of that which may have been necessary if competitive bids had

been obtained, and in excess of that necessary if the THA had itself performed the partial work necessary, for example, on painting, to comply with its covenant rather than having to meet expenditure on the entirety. It is not possible to quantify this as no evidence was led and I ignore it in my assessment.

It may be that some part of these expenditures that I have disallowed might have qualified as repairs and therefore be liable to be reimbursed. However there is no evidence of which part that would be and the claimant has failed to discharge the burden of proof in this regard. It is the augmentation of items of repair to the extent that they constitute renewal - rendering a reconstruction of the whole thing - that takes the expenditure out of the covenant to repair. So for example if some of the sheets of galvanise were rusty and leaking that would not permit, under the covenant to repair, the replacement of all the sheets. Even its description as complete repair of roof on main building, would not bring it within the scope of the repair covenant. It is the scope of the work done and whether it amounts in substance to a renewal that is important, not the use of the word repair. There is no evidence that a complete repair of the roof on the main building was necessary at the time that the works were effected.

There is no evidence also that the THA was responsible, by its act or default for these items needing to be repaired in the first place. However as I have found from my construction of the covenant, that is not a necessary element in order for the THA to be liable for the cost of bringing the property into repair.

The claimant suffers minimal prejudice however, even if disentitled to be reimbursed for some items of expenditure, as the benefit of these items remains with him as owner of the property.

The covenant for quiet enjoyment

The issue arises therefore as to whether the commencement of those repairs by Mr. Duncan gave rise to breach of the covenant for quiet enjoyment on the part of the claimant sufficient to terminate the lease.

In the case of **Southwark London Borough Council v Tanner and Others [2001] 1 A.C. 1** Lord Hoffman said at page 10

> *"The covenant for quiet enjoyment is therefore a covenant that the tenant's lawful possession of the land will not be substantially interfered with by the acts of the lessor or those lawfully claiming under him. For present purposes, two points about the covenant should be noticed. First, there must be a substantial interference with the tenant's possession.*
>
> *On the other hand, it is a question of fact and degree whether the tenant's ordinary use of the premises has been substantially interfered with."*

At pages 22-23 Lord Millet reviewed the law in this area stating

"The covenant for quiet enjoyment is one of the covenants of title formerly found in a conveyance of land, and the only such covenant found in a lease of land. It has long been understood that the word "quiet" in such a covenant does not refer to the absence of noise. It means without interference. The covenant for quiet enjoyment was originally regarded as a covenant to secure title or possession. It warranted freedom from disturbance by adverse claimants to the property: see Dennett v Atherton LR 7 QB 316 ; Jenkins v Jackson 40 ChD 71 ; Hudson v Cripps [1896] 1 Ch 265 . But its scope was extended to cover any substantial interference with the ordinary and lawful enjoyment of the land, although neither the title to the land nor possession of the land was affected: ***Sanderson v Berwick-upon-Tweed Corpn*** *(1884) 13 QBD 547, 551.*

Despite this there has lingered a belief that, although there need not be physical irruption into or upon the demised premises, there must be "a direct and physical" interference with the tenant's use and enjoyment of the land.

I can see no sound reason for confining the covenant for quiet enjoyment to cases of direct and physical injury to land.

Once these artificial restrictions on the operation of the covenant for quiet enjoyment are removed, there seems to be little if any difference between the scope of the covenant and that of the obligation which lies upon any grantor not to derogate from his grant. The principle is the same in each case: ***a man may not give with one hand and***

take away with the other. *Whether a particular matter falls within the scope of the covenant for quiet enjoyment depends upon the proper construction of the covenant."*

Mr. Duncan testified that the premises could not be used while he was carrying out his works. No evidence was led of any efforts to minimize disruption or to schedule works so as not to disrupt the use of the entire premises. The works by their nature and duration amounted to a reentry by the Landlord and repossession by him of the entire premises which I find was not necessary or justified.

It is clear that there has been a breach of the covenant for quiet enjoyment by the Landlord's action in effecting work through his agent, Mr. Duncan, in such a way and for such a period that it deprived the tenant of the use of the premises, even when the tenant was paying the rent for the premises during a period when it was not able to use the property.

Whether re-entry was permitted under clauses 5 (e) or 5 (c)

Clause ***5 (c)*** **-** *To execute all such works as are or may become* ***necessary by the requirement of the Lessor*** *or any lawfully authorized body or bodies*

5 (e) *To permit the Lessor and its duly authorized agents at all reasonable times* ***to enter upon the demised premises*** *and/or any building erected thereon* ***for the purpose of viewing and inspecting the state and condition thereof*** *and* ***immediately at the Lessee 's own costs and expenses rectify and make good any defects*** *which may be found thereon*

or otherwise pointed out to the lessee by the Lessor or its authorized agents and permit entry ***to*** *the Lessor and/or his authorized agent upon reasonable notice should he be required* ***to carry out repairs to any adjoining premises*** *upon the understanding that the Lessor will make good any damages to the Demised Premises as a consequence of the Lessor's entry.*

According to **Woodfall Landlord and Tenant 27th Edition** at page 667 paragraph 1509

> *"…A further stipulation is not infrequently added that the landlord may upon breach of the tenant's covenant himself execute the necessary repairs at the tenant's expense."*
>
> *Where no right of entry is reserved "the landlord has an implied right to enter for the purpose of complying with his <u>own</u> repairing obligations."*

It was contended that clause **5 (e)** in fact did not permit reentry in relation to the said premises and only permitted re-entry in relation to adjoining premises. The language of the clause does not bear that interpretation.

Alleged breach of Clause 5 (b)

It appears that the property was not used as a resort, guest house and hotel. There is no evidence that it was used in any other manner. The complaint is that the property was simply not used and allowed to fall into disrepair. Though I find that it is a term of the lease that it be so used, I find in the circumstances of this matter that once the landlord received his rent of

$35,000.00 per month it was open to the THA to commence that use when they chose. The lease contemplated keeping the premises in repair, which included bringing it into repair. Clearly therefore there would have been a period contemplated when the THA would have had to carry out those repairs. There is in fact some evidence that they did so. It could not be the case that during any period when the THA were complying with that obligation the THA would simultaneously have been in breach of the covenant to use as a resort, guest house and hotel. There is insufficient evidence as to the period of time when the property was not being repaired either by the claimant or the THA.

However the actions of the Claimant himself in reentering the premises put it beyond the ability of the THA to use the premises as a guest house, at least during the period November 2005 to January 2006 and beyond, and itself gave rise to a breach of this covenant.

In the totality of these circumstances, as the Defendant was paying the rent for the relevant period, there is no sufficient evidence of additional loss by the Claimant for any breach thereof. I would only have been prepared to award nominal damages for any breach of this covenant but decline to do so in light of the breach by the Claimant of the covenant for quiet enjoyment.

Whether rents due and unpaid

The subsidiary issue also rises as to whether or not all rents due under the lease were paid by the defendant to the claimant.

The Tobago House of Assembly was not in a position to dispute the non payment of rent or to contradict the account supplied by the claimant showing non receipt in the designated account of rental due for certain matters. It would be expected that if it were in a position to do so suitable evidence would be tendered. None was.

However I have found that the THA was entitled to terminate the lease for breach of this covenant for quiet enjoyment. No rent is payable for the period from January 2006 .In fact from the month of November 2005 to January 2006 the THA was effectively deprived of possession. Of the claim for 10 months rent 5 of those months were after the THA's lawful termination. I note that 3 months rent was paid in advance and which was repayable at the end of the lease. I find that 2 months' rental would therefore have been outstanding – that is the sum of $70,000.00.

Counterclaim

There is a counterclaim for inter alia damages for breach of the covenant for quiet enjoyment. The counterclaims for damages for nuisance and breach of contract do not add anything to the counterclaim. I find that for the 3 months of November 2005 to January 2006 the THA was unlawfully deprived of the use of the premises. . I would

assess the damages for breach of covenant for quiet enjoyment in a sum equivalent to rent for the period of dispossession -3 months rent – that is in the sum of $105,000.00.

The sum outstanding for 2 months unpaid rental- $70,000.00- can be set off against this sum payable as damages leaving $35,000.00 payable by the Claimant .

Was there loss of Goodwill?

As the repair carried on by the claimant amounted to a breach of the covenant for quiet enjoyment then a claim for loss of goodwill after the works of Mr. Duncan could hardly be attributable to the Tobago House of Assembly. In addition I find that the premises were in a state of disrepair to a certain extent at the commencement of the lease and in fact that motivated the inclusion of the covenant to repair in the lease. I accept that the THA did expend sums on the repair of the premises in an effort to bring the property into a condition when it could have been used as a functioning guest house in an effort to enhance or preserve any goodwill associated with the premises.

Further Mr. Duncan testified that the premises could not be used while he was carrying out his works. The effect of that on the goodwill associated with the operation of the property must also be taken into account.

In any event there has been no evidence to substantiate the quantum claimed in this regard. I decline to make any order in respect of this claim.

Costs

The Claimant has only partially succeeded, being unsuccessful on the majority of the many issues raised by him. The defendant has succeeded on its counterclaim. . Rather than awarding each party his/ its respective costs on the claim and the counterclaim, in the exercise of my discretion I order that each party bear his own costs.

Conclusion

I therefore find as follows:

1. The claimant is entitled to reimbursement of that part of the expenditure by his contractor as represents repairs. This is assessed in the sum of $ **$151,600** to be paid by the defendant to the claimant. I further order that this sum bear interest at the rate of 8 % per annum from March 7 2006 until judgment July 31st 2009 and thereafter at the rate of 12 % per annum.

2. The Claimant is not entitled to any sum in respect of unpaid rent, as the 2 months' rent -$70,000.00 - that I find outstanding is deductible from the $105,000.00 damages for the breach of quiet enjoyment for 3 months prior to termination of the lease when the Defendant was deprived of the use of the subject property.

3. There is insufficient evidence of loss of goodwill and I make no award under this head of claim.

4. The evidence does not support the claim for loss of profits, or the claim for further damages for breach of any covenant in the lease and I make no award under these heads.

5. The Defendant is entitled after set off for unpaid rent, to damages for breach of the covenant for quiet enjoyment in the sum of $35,000.00 to be paid by the claimant to the defendant. I further order that this sum bear interest at the rate of 8 % per annum from January 1 2006 until judgment and thereafter at the rate of 12 % per annum.

6. I order that each party bear his own costs.

7. Liberty to apply.

Dated this 31st day of July 2009

……..

Peter A. Rajkumar

Judge