In the Republic of Trinidad and Tobago

In the High Court of Justice

HCA No. 1430 of 2005

Between

Susan Bain Plaintiff

And

Econo Car Rentals Ltd Defendant

Before The Honourable Mr. Justice Devindra Rampersad

Appearances:

Mr. Karl Hudson- Phillips instructed by Ms. Elaine Green for the plaintiff
Mr. Mark Morgan instructed by Ms. Donielle Charles for the defendant

Delivered on the 22nd day of July 2010

JUDGMENT

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1. This action was begun by writ of summons filed on 21 May 2003. The plaintiff filed its Statement of Claim on 25 June 2003, and the defendant, its Defence and Counterclaim on 17 September 2003. The Reply and Defence to Counterclaim were filed on 14 November 2003.

2. The plaintiff claims against the defendant for recovery of possession of property situate at No. 191-193 Western Main Road, Cocorite, possession for certain reclaimed land, mesne profits in respect of both parcels of land and damages for waste. The defendant disputes each of these claims, and counterclaims for declarations relative to said reclaimed land and for the renewal of its lease relative to No. 191-193 Western Main Road, Cocorite.

The plaintiff's case in her Statement of Claim:

3. The deceased, Percival Bain, was the owner of a parcel of land registered as No. 48110 of 1950 (hereinafter referred to as the "demised premises") which he let to the defendant in or about 1987. The defendant had erected or caused to be erected and affixed several office and other buildings on the said demised premises, which buildings the plaintiff contends became and formed part of the freehold of the demised premises by virtue of their having been affixed to the land.

4. Prior to the year 1987, the deceased reclaimed approximately 19,999.2 superficial feet of land (hereinafter referred to as "the reclaimed land") from the sea at the southern boundary of the demised premises and annexed the same thereto. The reclaimed land therefore lies between the southern boundary of the demised premises and the sea. The deceased took and retained possession of the reclaimed land until his death on 8 June 1997.

5. By clause 6 (b) of the deceased's last will and testament dated 29 May 1997, the deceased devised the demised premises to the plaintiff, who was also appointed an executor and trustee of the deceased's estate. Probate of said estate was granted on 11 September 1998, which grant was registered as No. 1950 of 1998. By this time, the plaintiff had taken possession of the demised premises, as well as the reclaimed land.

6. By lease agreement in writing between the plaintiff and defendant dated 3 November 1999 (hereinafter referred to as "the lease agreement"), the defendant attorned tenant to the

plaintiff in respect of the demised premises. The said lease agreement was renewed on or about the 1 November 2000 and again, on or about the 1 November 2001. Thereafter, the 2001 lease agreement having expired on 30 November 2002, the defendant did not exercise its option to renew, nor was there any mutual agreement by the parties as to renewal.

7. By legal letter dated 12 December 2002, the plaintiff's attorneys-at-law requested that the defendant inter alia, deliver up possession of the demised premises by 31 December 2002. Despite the said letter, the defendant has failed and/ or refused to deliver up possession of the demised premises and wrongfully and unlawfully continues in occupation thereof. A letter of similar content dated 27 February 2003 was again sent to the defendant by the plaintiff's attorneys, this time, in addition, demanding mesne profits for the period 1 December 2002 to 31 December 2003. Notwithstanding the expiry of the lease agreement, and the demands for delivery up of possession thereof, the defendant continues to occupy the demised premises.

8. On or about 28 March 2003, the defendant wrongfully committed waste and/ or trespass by causing the buildings on the demised premises to be destroyed and by reason thereof, the plaintiff has suffered loss and damage and the value of her reversion has been diminished.

9. With respect to the reclaimed land, the plaintiff claims that said land was so reclaimed and annexed for the benefit of the demised premises and that the plaintiff is entitled to possession thereof. Hence, subsequent to the death of the deceased, and while the plaintiff had possession of the reclaimed land, the plaintiff avers that the defendant wrongfully and unlawfully entered thereon and continues to remain in wrongful and unlawful occupation thereof. The plaintiff further contends that the defendant wrongfully and unlawfully constructed buildings on the reclaimed land.

10. The plaintiff claims that she also requested that the defendant deliver up possession of the reclaimed land. However the defendant has failed and/ or refused to so do, in consequence of which the plaintiff has been deprived of the use and enjoyment of the reclaimed land and has sustained financial loss and damage.

Particulars of Special Damage

Mesne profits at the rate of US $8000.00 per month	
from 1 December 2002 to 30 April 2003 and continuing-	US $32 000.00

11. Further, on or about 11 April 2003, the defendant caused a fence to be erected separating the demised premises from the reclaimed land, thereby depriving the plaintiff of her access to and from the sea.

12. On the basis of the above, the plaintiff claims 16 reliefs, *inter alia*, possession of the demised premises and the reclaimed land, mesne profits at the rate of US $8,000.00 per month and continuing in respect of the demised premises, and separately, for the reclaimed land, and damages for waste.

The defendant's case in its Defence:

13. The defendant made no admission as to the deceased's death or that he made a will dated 29 May 1997 in respect of which a grant of probate was made on 11 September 1998, neither does it admit the plaintiff's title to the demised premises.

14. The defendant further denies that the deceased reclaimed the reclaimed land and took possession of it prior to his death in 1997. However if the deceased did reclaim the land in the manner alleged, the defendant denies that the plaintiff took possession of the said reclaimed land after the deceased's death or at all. In fact, the defendant claims that on or before 1987, it entered and remained upon the reclaimed land *nec vi, nec clam, nec precario* and took possession thereof, and that *ipso facto*, it dispossessed the plaintiff and her predecessor in title. It is the defendant's contention that the plaintiff's claim to the reclaimed land is barred by the provisions of the **Real Property Limitation Ordinance**.

15. The defendant further stated that in reliance upon the plaintiff and deceased's acquiescence (and with the plaintiff's full knowledge and consent), it expended considerable expense and effort in constructing several buildings on the reclaimed land. The defendant denies that the plaintiff ever took possession of the reclaimed land after the deceased's death, and that said land was reclaimed for the benefit of the demised land. The defendant therefore claims possession of the reclaimed land, and denies that it wrongfully and unlawfully entered upon the reclaimed land or that its continued occupation thereof is wrongful or unlawful.

16. With respect to the lease agreement made between the plaintiff and defendant in 2000 and thereafter renewed in 2001, the defendant states that the plaintiff breached Clause 3 of the latter agreement when she failed and/ or refused to allow the defendant to exercise its option to renew the said lease.

17. The defendant states that the increase in rent to US $8,000.00 by the plaintiff was excessive and unreasonable given its 600% increase from TT $8,000.00 and, as well, in consideration of comparable rents in the area. Hence negotiations for a rent increase were carried out *mala fides* on the part of the plaintiff. The defendant stated that in effect, it wished to exercise its option to renew, and time not being of the essence in the negotiations for rent increase, the plaintiff was not entitled to determine the agreement and refuse the option to renew upon failure of the parties to agree on a just rent-- particularly in circumstances where the defendant claims that it offered to pay the existing rent to the plaintiff, pending agreement of a new rent, which offer was refused by the plaintiff.

18. While the defendant admitted the plaintiff's demand for delivery up of possession of the demised premises and mesne profits, it denies the plaintiff's entitlement to either. It asserts that it failed to give up possession of the reclaimed land on the basis that the plaintiff has no right or title thereto.

19. The defendant further denies destroying the buildings on the demised premises, stating that the structures thereon were erected with its finances and were intended to be temporary in accordance with the terms of the lease with the deceased. The defendant admits that it caused a fence to be erected separating the demised premises from the reclaimed land, and denies that this was wrongfully done or that the consent of the plaintiff was required.

20. The defendant also denies that the plaintiff has been deprived of the use and enjoyment of the demised and reclaimed land, and denies that the plaintiff has suffered any loss as alleged or at all.

Counterclaim:

21. On the basis of its defence, and the plaintiff's failure to provide a written notice to quit to the defendant on or before 31 May 2002, the defendant counterclaims for the following

declarations: possession of the reclaimed land, or alternatively, an equity therein; that the plaintiff's claim with respect to the reclaimed land is statute-barred; that it had a valid option to renew the lease, and therefore the plaintiff was not entitled to determine same while rent negotiations were ongoing.

The Reply and Defence to Counterclaim:

22. The plaintiff states that the defendant is estopped from denying her title, having acknowledged its tenancy with the deceased, and thereafter attorned tenant to her. She also denies that she or the deceased was dispossessed of the reclaimed land, and further denies that her claim to the reclaimed land is statute-barred.

23. The plaintiff states that she did not deny the defendant its option to renew the lease. In fact, she stated that it was the defendant who failed to exercise said option. She further denies that negotiations for a rent increase were carried out otherwise than in good faith, and said that the suggested rent was reasonable and not excessive. The plaintiff states that the negotiations for rent increase did not preclude her from determining the tenancy as the negotiations were not concluded before the expiry of the term.

24. Insofar as the defendant's denial that it committed waste on the demised premises, the plaintiff denies that it was a term of the lease between the defendant and the deceased that the former could only erect temporary structures on the demised premises.

25. The plaintiff denies that the defendant was entitled by law to any Notice to Quit on or before the 31 May 2002.

The Evidence:

26. The following witness statements were filed on behalf of the plaintiff:

    26.1. (Principal Witness Statement of) Susan Bain filed on 12 May 2009;

    26.2. (Supplemental Witness Statement of) Susan Bain filed on 22 June 2009;

    26.3. Patrick Taylor, General Supervisor of Caribbean Salvage Ltd., filed on 8 May 2009;

26.4. Kenneth Sturge, licenced land surveyor, filed on 8 May 2009.

26.5. Brent Augustus, property valuer and consultant, filed on 8 May 2009.

27. On behalf of the defendant, a witness statement of Richard Jardine, managing director of the defendant, was filed on 20 April 2009.

28. The *viva voce* evidence comprised all the aforementioned witnesses on behalf of the plaintiff, and Mr. Jardine for the defendant.

THE ISSUES:

Preliminary Issues:

29. There are certain issues which were raised by the defendant in its Closing Submissions filed on 16 July 2009 which the Court views as preliminary, and with which it shall deal promptly, in order that the substantive issues may be determined.

29.1. The issue that the plaintiff's title to the demised premises be strictly proved.

29.2. The question of the admissibility of Deed number 4811 of 1950 vs. Deed number 48110 of 1950.

29.3. Whether the plaintiff had a valid cause of action at the date of the writ?

Substantive Issues:

30. The substantive issues for determination are as follows:

30.1. In relation to the option to renew:

30.1.1. Whether the plaintiff was bound by the option to renew clause in the 1999 agreement?

30.1.2. Does a valid option to renew amount to a continuing right of possession for the defendant?

30.1.3. The effect of the increased rent demanded by the plaintiff?

30.2. In relation to the claim for waste:

30.2.1. Whether the buildings erected by the defendant were fixtures?

30.2.2. Whether the plaintiff is entitled to damages for waste and/or trespass as a result of the removal of said buildings by the defendant?

30.3. What is the effect , if any, of **section 3 of the State Lands Act Chap. 57:01** of the Laws of Trinidad and Tobago on the competing claims to possession of the reclaimed land?

30.4. Whether the reclamation was so done for the benefit of the plaintiff or the defendant, and therefore in whom, if either, ought possession in the land to vest?

Determination of the the Preliminary Issues:

The Issue that the plaintiff's title to the demised premises be strictly proved:

31. In its written submission, the defendant states that while it does not dispute the plaintiff's title, its act of highlighting the issue of title is merely to put the plaintiff to strict proof thereof. At paragraph 1 of the defence, it is stated, *"the defendant does not admit either the title of the plaintiff or her predecessor in title and puts the plaintiff to strict proof thereof."*

32. In the view of this Court, this issue became academic the moment it was accepted by the defendant that it had attorned tenant to the plaintiff by virtue of its payment of rent to her. In **Mingur Maharaj v. Theophilus Gill & Ors**;[1] following the death of the landlord in whose name the lease had been executed, rent was paid to the first defendant. At page 2 of the judgment, it was said of the rent payment made subsequent to the death of the original landlord, *"By this payment the Claimant attorned tenant. A new relationship of landlord and tenant was created between the claimant and the first named defendant."*

33. Further, there can be no doubt that at all material times the defendant was a tenant of the plaintiff as evidenced by the written agreement of 3 November 1999 made between *"Susan Bain….("the Landlord") of the One Part and Econo Car Rentals/ Everard Carter/ Richard Jardine…("the tenant") of the Other Part."*

34. Having acknowledged its tenancy with the plaintiff, the defendant fell squarely within the confines of the dictum expressed in **Industrial Properties (Barton Hill) Ltd. & Ors. v. Associated Electrical Industries Ltd**;[2] that, *"if a landlord lets a tenant into possession under a*

[1] HCA CV. 2005/00457
[2] [1997] Q.B. 580 at 596

lease, then, so long as the tenant remains in possession undisturbed by any adverse claim, the tenant cannot dispute the landlord's title."

35. Indeed, the instant is a proper case for the doctrine of tenancy by estoppel, *"for so long as a lessee enjoys everything which his lease purports to grant, how does it concern him what the title of the lessor, or the heir or assignee of his lessor really is."*[3] In most cases, as in **Industrial Properties**[4], a denial of a landlord's title usually occurs contemporaneous with a denial on the lessee's part, of its liability on a certain covenant or of some material obligation in the tenancy agreement with which it wishes to depart.

36. However, that is not the case here. The defendant does seek to deny the plaintiff's title as a defence or proposed waiver of any obligations under its tenancy agreement with the plaintiff. In fact, it says it does not deny the plaintiff's title at all. Rather all it submits is that the plaintiff be put to strict proof of her title in the demised premises.

37. However, to my mind, while this is a perfectly acceptable submission, it is an unnecessary exercise in which to be engaged, since not only has the defendant attorned tenant to the plaintiff, but there is no adverse claim on which to demand that title be strictly proven. As Lord Denning M.R. said in **Industrial Properties** at page 599:

> 37.1. *"The doctrine of tenancy by estoppel has proved of good service and should not be whittled down. It should apply in all cases as between landlord and tenant- no matter whether the tenant is still in possession or gone out of possession- so long as he is not confronted with an adverse claim by a third person to the property."*

38. In the absence of any adverse claim to title, what the defendant has propositioned therefore is an exercise in semantics, that the use of the phrase "does not admit" in the Defence as opposed to "denies" is significant in requiring that the plaintiff be put to strict proof of her title. Counsel for the defendant relied upon the following dictum of Lord Denning in **Warner v. Sampson**[5], where the defence included the standard general denial[6], on which the whole case turned:

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[3] **Cuthbertson v. Irving** (1859) 4 H. & N. 742 at 758 per Martin B.

[4] In that case, the plaintiff company claimed damages against the defendant for breach of covenant to repair the premises. It was later discovered that the trustees of the company, and not the plaintiff company, were the freeholders of the property. The defendant contended that they could deny the plaintiff's title and their liability on the covenant.

[5] [1959] 1 Q.B. 297 at 310.

"The judge has held that by putting in that general denial the defendant denied the plaintiff's title…How must the unfortunate counsel who drafted the defence reproach himself for having brought this on his client! If he had not used the word "denies" but had said "does not admit", there would, it is agreed, have been no forfeiture."

39. What is important to note is what Lord Denning goes on to say at page 316:

"I have no hesitation in holding that a denial in the pleadings of the landlord's title does not today give rise to a forfeiture…This general denial only puts the landlord to proof. It does not affirm the fee to be in the defendant or in a stranger. If it were by some mischance to be so construed, it would be a "mispleader" which would not cause a forfeiture."

40. And then at page 319:

"In my opinion at the present time, although the practice of pleaders may vary, there is no effective line to be drawn between non-admission, on the one hand, and denial on the other. Certainly a general traverse of the kind used in the defence here should not be taken against the defendant as going beyond a putting to proof and ought not to be taken to involve an affirmative contradictory allegation that the title in the land was in himself or in a stranger."

41. The Court recognizes that the defendant's desire is simply to put the plaintiff to strict proof of her title, as it may be perfectly entitled to do had it not been the case that the evidence points overwhelmingly in favour of the presumption of that title- *vis a vis*, the attornment, tenancy agreement and of course, the absence of any adverse claim to said title.

42. In light of the foregoing, the Court is of the view that the instant is therefore not a case in which the fundamental proposition of English law "that a lessee cannot dispute his landlord's title"[7] ought to be subjected to challenge or exception.

The question of the admissibility of Deed number 4811 of 1950

43. The defendant raises objection to the admissibility of Deed 4811 of 1950 (hereinafter "Deed 4811") on the basis that that was not the deed pleaded in the Statement of Case. It contends therefore that the plaintiff is bound by the description of Deed 48110 of 1950 (hereinafter "Deed 48110") in her pleadings, and as a result thereof, Deed 4811 is not admissible as proof of the plaintiff's claim.

[6] At page 310: "Save and except for the admission herein contained the defendant denies each and every allegation in the statement of claim as if the same were specifically set out and traversed seriatim."

[7] Per Lord Roskill in Industrial Properties at p. 599.

44. The defendant states that its objection to admissibility is premised not on a mere technicality, but on the ground of irrelevance- as there are differences between the description of what is claimed to be the Original Parcel (the demised premises) in Deed 4811 and what is set forth in the Statement of Claim. The defendant also submits that since the plaintiff is seeking a declaration of title in terms set out in the pleadings, she must satisfy the court that said title is vested in her. Further, as no amendment was sought in respect thereof, the plaintiff is bound by her pleadings. The defendant has relied upon the plethora of authorities in support of the well-established principle that a party is bound by his pleadings. Indeed, I need not rehash in any significant detail those cases, save to perhaps cite Lord Russell's speech in **London Passenger Transport Board v. Moscrop**[8] (HL) at page 347, which I think, encapsulates the defendant's position on this point:

> *"This appears to me to have been a complete recasting of the respondent's alleged cause of action, and the matter was unfortunately carried through without any amendment of the statement of claim. This should not be so. Any departure from the cause of action alleged, or the relief claimed in the pleadings should be preceded, or, at all events, accompanied, by the relevant amendments, so that the exact cause of action alleged and the relief claimed shall form part of the court's record, and be capable of being referred to thereafter should necessity arise. Pleadings should not be 'deemed to be amended' or 'treated as amended'. They should be amended in fact."*

45. On the other hand, the plaintiff contends that the reference in the statement of claim to Deed 48110 is simply a mis-description, which does not disentitle the plaintiff from proving that the deceased in fact acquired title by Deed No. 4811.

46. I shall dispose of this issue fairly quickly be making a few remarks. First, contrary to the defendant's assertion, and this must be borne in mind throughout the entirety of this judgment, the plaintiff seeks a declaration not of **title** in respect of the demised premises, but of **possession** thereto - hence, any mis-description (which I have determined it is in detail below) of the deceased's title deed to the demised premises does not affect the issue of possession in said premises. Secondly, at the trial of this matter, objection was taken to the admissibility of a copy of the Deed. The plaintiff's attorneys gave an undertaking to produce a properly certified copy of said Deed, which they have since fulfilled. Thirdly, it is to be noted that the defendant was given discovery of Deed 4811 of 1950, so it was long aware of the existence of a Deed "4811". Fourthly, the Deed of Assent registered as No. DE200402552878D001 of 2004 by which property was transferred to the plaintiff, refers at (viii) to *"the parcel of land described in Deed registered as No. 4811 of 1950 and described in the Eighth Schedule hereto."* Fifthly, I have

[8] [1942] AC 332.

examined in detail the description of the parcel of land in the Statement of Claim and compared same to the description contained in the Certified Copy produced to this Court, and have found no material differences between the two. In fact, save for a reference to the property "known and assessed as No. 191 Western Main Road, Cocorite" as opposed to "Numbers 191 and 193 Western Main Road", the two descriptions are identical in style and form. Having looked at each of the documents as a whole, I am satisfied that the property described in the Statement of Claim and referenced as Deed 48110 of 1950 is one and the same as the property described in the Certified Copy as Deed No. 4811 of 1950. Indeed, if there ever was a case to which the doctrine of *falsa demonstratio non nocet cum de corpore constat* (a false description does not vitiate if there is no doubt as to what the subject matter is) applies, this would be it.

47. Whereas ideally an amendment should have been sought in respect of Deed "48110" in the Statement of Claim, a failure to so do, cannot, even at the highest, amount to " a complete recasting" of the plaintiff's cause of action, such as to defeat her claim. In saying so, I am reminded of the case of **Taylor v Doncaster Metropolitan Borough Council** Court of Appeal, Civil Division delivered on the 1st November 1989 in which Slade LJ said:

> "*In many circumstances it would no doubt defeat the ends of justice for a court to reject the claim of a plaintiff which appeared to be well founded in law on the basis of the evidence as to fact which had emerged at the trial, merely because the facts as ultimately established did not precisely correspond with the facts as pleaded. In some circumstances the court may further be justified in taking the view that to require the plaintiff to seek leave to amend his pleading at a late stage in the trial, as the price of acceding to his claim, may be a purposeless formality, if it is obvious that the application would have to be granted."*

48. For the purposes of this judgment, the Court shall forthwith, where applicable, refer to the demised premises as Deed No. 4811 of 1950. The question of the admissibility of Deed 4811 having previously been determined, I therefore see no need to revisit same at this stage.

Whether the plaintiff had a valid cause of action at the date of the writ

49. The defendant's submission is that on 21 May 2003 when the Writ in this action was filed, the plaintiff had no cause of action, and therefore her case cannot now be sustained. The relevant chronology of events is that the grant of probate of the deceased's estate was made on 11 September 1998 to a Mr. Hamel-Smith, a Mrs. Bain-Motley and the plaintiff as joint executors. In May 2003, the plaintiff issued a writ in this matter in her personal capacity. It was only thereafter

on 27 July 2004 that title to the demised premises was transferred to the plaintiff by Deed of Assent.

50. It is the premature institution of proceedings against the defendant a year before the plaintiff was properly vested with title, with which the defendant finds issue. Accordingly, the defendant submits that at the material time, *vis* 21 May 2003, the property of the deceased vested in the joint executors, and as such the action ought to have been brought in their capacity on behalf of the estate of the deceased- and not by the plaintiff in her personal capacity.

51. The effect of the plaintiff's submission is that after the death of the deceased in 1997, she became entitled to the rents and profits of the property, and whether or not the property had yet to be vested in her by Deed of Assent is immaterial to the question of her *locus standi* to institute this action when she did. Queen's Counsel on behalf of the plaintiff argues that what the defendant is attempting to do is defeat the plaintiff's clear right to possession of the property by saying that she is not his landlord because she was not vested with title to the property until 2004. In support of this contention, the plaintiff cited the case of **Stratford v. Styrett**[9], where trustees for sale did not delegate to a tenant for life their powers of leasing under the relevant legislation. The tenant argued that the proper plaintiffs in that action were the trustees for sale, and not the plaintiff-landlord. In rejecting that argument and holding the tenant liable to pay the just rents and profits to the plaintiff-landlord, the issue of tenancy by estoppel was examined. Such an estoppel arises when one or other of the parties wants to deny one of the ordinary incidents or obligations of the tenancy on the ground that the landlord had no legal estate; and the basis of the estoppel is that having entered into an agreement which constitutes a lease or tenancy, he cannot repudiate that incident or obligation. It is the fact that the agreement between the parties constitutes a tenancy that gives rise to an estoppel and not the other way round.

52. In **Rother District Investments v. Corke**,[10] it was held that a forfeiture by a new landlord before it had registered its title was valid. As that case concerned a preliminary issue of law pertinent to the one here under consideration, I shall consider it in some detail. Following a series of previous grants and transfers, the freehold title to property was sold and transferred to Rother, and it was duly registered as proprietor. The sublease was transferred to the defendants, and sometime thereafter, a transfer of sale of the headlease was executed to Rother, but Rother

[9] [1958] 1 QB 107
[10] [2004] EWHC 14 (Ch.)

was not registered as proprietor. In consequence, the legal title did not pass, but Rother was unaware of this. By reason of certain breaches of covenant by the defendants (in particular the non-payment of rent), the sublease became liable to forfeiture and Rother purported peaceably to re-enter and forfeit the sublease, and take steps to re-let the premises. Rother subsequently commenced proceedings against the defendants for sums due under the Sublease, and the defendants put Rother to proof of its title. In consequence, on 19 December 2001 Rother discovered that its title to the Head Lease was not registered. It accordingly applied for registration and was duly registered on the 31 December 2001. Rother discontinued its existing proceedings and commenced fresh proceedings on the 15 January 2002. The defendants raised estoppel- that Rother was precluded from denying that it had forfeited the lease. In contending that there can be no such estoppel, Rother stated that it did not have legal title to the reversion until 31 December 2001, and accordingly there could be no forfeiture until then. Accordingly it must be entitled to the sums which it claims. It was held that when the defendants became aware of the re-entry, forfeiture and their dispossession, *"it remained open to [them] at the date of their election to act and rely on Rother's actions as a valid forfeiture at least unless and until Rother reversed or undid what it had done and placed the defendants once more in possession of the Demised Premises. Rother have never done this, have never intended to do this and have never been able to do so. The defendants are accordingly entitled to treat the Sublease as forfeited when peaceable re-entry took place"*[11].

53. Further, on the question of "feeding estoppel", whatever the legal ineffectiveness of the purported peaceable re-entry when it occurred, on registration of Rother as proprietor of the Head Lease, the action was retrospectively validated as between Rother and the defendants. As Lightman J. stated[12],*"In the language often used in situations such as the present, what had been "a forfeiture by estoppel" between Rother and the defendants was "fed" and became a full legal forfeiture valid as against the world"*.

54. In the instant case, although the institution of these proceedings pre-dated the vesting of title to the demised premises in the plaintiff, it may be said that the righting of that wrong was in the very fact that the title did so vest. At this present time, the plaintiff is not without *locus* in this matter, and therefore any declarations to be potentially made by the Court with respect to the plaintiff's claim cannot fail for want of legal title. Moreover, by virtue of the relationship of

[11] Para. 15 of judgment.
[12] Ibid at para. 16

landlord and tenant, the defendant is estopped from denying the plaintiff's title to the property, as the very foundation of a tenancy by estoppel is that neither the landlord nor the tenant is allowed to deny the other's title: **Bell v. General Accident Fire & Life Assurance Corpn Ltd**.[13]

55. Accordingly, this matter shall proceed on the basis that the plaintiff has a valid cause of action herein.

Determination of the Substantive Issues

The option to renew

Whether the plaintiff was bound by the option to renew clause

56. The broad basis of this issue concerns a claim by the defendant that the plaintiff breached Clause 3 of the tenancy agreement made between the parties on 3 November 1999. The defendant states that it is aggrieved by this breach since it is one that materially impacts upon the *bona fides* of the plaintiff's actions with respect to the rent increase, and as well, its claim for possession to the demised property. Clause 3 is the option to renew clause, the existence of which has itself been the subject of dispute in this matter.

57. Initially, Clause 3 of the 1999 agreement stated, "*Duration of Tenancy: One (1) year*." In his witness statement, Mr. Jardine said that the words "with option for renewal" were added next to paragraph 3 after he and his co-director had *"read through the agreement and noted that it did not contain an option to renew [clause]."*[14] According to Mr. Jardine, the agreement appeared to have already been signed by the plaintiff and the option to renew clause was added after telephone consultation with an officer at Caribbean Salvage (a commercial business of the plaintiff's)[15]. The agreement, having been signed by both directors of the defendant company, was then returned to Caribbean Salvage.

58. The plaintiff's primary position is that she is not bound by the words "*with option for renewal*" endorsed by the defendant without her consent and <u>after</u> she had executed the tenancy agreement dated 3 November 1999.

[13] [1998] 1 EGLR 69
[14] Witness statement of Richard Jardine filed on 20 April 2009 at para. 20.
[15] Ibid.

59. I find this a difficult proposition to accept in light of the fact that in 1999 when the words "with option for renewal" were inserted at clause 3 of the agreement, the plaintiff never objected to the insertion. According to Mr. Jardine, no one, including the plaintiff, "*ever came back to us [Mr. Jardine and co-director] on our changes."*[16] Evidently, the plaintiff must have accepted the insertion, as not only did she raise no objection thereto, but also proceeded in the months that followed to collect rent per the agreement. To my mind, these are clear acts of acquiescence which the plaintiff cannot now rely upon to vitiate her obligations relative to the option for renewal and the tenancy agreement as a whole.

60. In **Jawnani v. Goolab**[17] (1992), Warner J. (as she then was) stated at page 3:

> *"As regards the option to renew, it is clear to me that the Courts are loathe to hold a clause void for uncertainty, if a reasonable meaning can be given to it…"*

61. Could a reasonable meaning be given to the option to renew clause in the 1999 agreement? If the option does not state the terms of renewal (as it did not in the instant case), the new lease will be for the same period and on the same terms as the original lease, so far as those terms arise out of the relationship of landlord and tenant: **Hill and Redman's Law of Landlord and Tenant**. 17th ed. Vol.1. at para. 88. In **Lewis v. Stephenson** (1898),[18] Bruce J. had to consider an option to renew clause in a tenancy agreement expressed as "with the option of renewal", and in following the dictum of Lord Abinger CB in **Price v. Assheton** (1834)[19] stated:

> *"…it seems to me that it is only to give to the language its natural meaning to hold that a renewal of a lease means the renewing of the old lease for the same period and on the same terms. Unless such meaning is given to the word renewal, the words in the present agreement are robbed of legal significance, and I am reluctant to come to the conclusion that the words inserted in a legal document ought to be taken as having no effect."* [Emphasis mine]

62. Therefore, the natural meaning of the option to renew clause in the 1999 agreement was that the tenancy was subject to renewal in 2000 for a period of one year and on the same terms as the original agreement. Further, if ever there was any doubt as to the validity of the option to renew clause, it will be worthwhile to consider the overwhelming evidence throughout the plaintiff's case that speak directly to the said option. For example, bearing in mind that the written tenancy agreement was executed between the plaintiff and the defendant in 1999,

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[16] Ibid.
[17] HCA No. S-1728 of 1992.
[18] 67 L.J.Q.B. 296
[19] 1 Y & CEx 82 at 92

paragraph 10 of the Statement of Claim says, *"The said lease agreement…was renewed on or about the 1st day of November 2000 and again, on or about the 1st day of November 2001"*. Again at paragraph 11, *"The term granted by the plaintiff to the defendant by the renewal of the said lease agreement in 2001 expired on the 30th November 2002 without the defendant having exercised its option to renew or the parties mutually agreeing to its renewal."* Further, paragraph 6 of the plaintiff's witness statement patently declares, *"The rental agreement…contained an option for renewal and the defendant's tenancy was renewed in 2000 and 2001, ultimately expiring on the 30th of November 2002."*

63. In light of such telling evidence from the plaintiff's own case and pleadings, it really is perplexing to understand the plaintiff's bold submission that it was not bound by the option to renew insertion. Indeed it is safe to say, that at the very least, a valid tenancy subsisted until 30 November 2002 by virtue of the exercise of the defendant's option to renew. The plaintiff is therefore estopped from denying the existence and/or validity of the option to renew, at least up until November 2001. The following issue examines the position post-2002.

Does a valid option to renew amount to a continuing right of possession for the defendant?

64. As already determined, the plaintiff at a very minimum, had a valid option to renew in November 2001. This issue therefore concerns the subsistence of that option after November 2002 when the defendant would have held over for one year, and brings to bear the plaintiff's argument in the alternative- that the option was not for perpetual renewal of the tenancy.

65. A preliminary observation needs to here be made. In written submissions, the plaintiff had asked the court not to accept the evidence of the defendant that when the 1999 agreement expired in 2000, the defendant held over until 2002. It seems the plaintiff has claimed the existence of successive lease agreements in 2000 and 2001[20] respectively. This assertion is unsubstantiated by any evidence, although in cross-examination, the plaintiff continued to lay claim to said agreements. Indeed if those agreements did exist, they were never produced for the court's benefit. Further, in light of Mr. Jardine's uncontroverted evidence that he cannot recall the

[20] Plaintiff's List of Documents filed on 9 December 2003 and witness statement of Richard Jardine at para. 22

agreements[21], and the fact that they were never referred to in subsequent correspondence between the parties, I am unable to accept the existence of said agreements.

66. Returning to the issue at hand, the defendant claims a continuing right of possession to the demised premises by reason of its option to renew. In options of the kind present in the instant case, the general rule is stated in **Hill and Redman's** *(supra)* at para. 88:

> *"If no time be stated in which the option is to be exercised, the right to do so will continue so long as the relationship of landlord and tenant exists, even though the original term has expired…"* [my emphasis]

67. Here the relationship of landlord and tenant effectively came to an end by 31 March 2003, which was the deadline imposed on the defendant to deliver up possession of the demised premises, and with which the defendant duly complied. This of course, flies in the face of the defendant's claim as to continuing possession as the right to exercise the option cannot accrue in the absence of a subsisting relationship between landlord and tenant. The defendant, having delivered up possession of the demised premises, has accepted repudiation of the contract/tenancy – that in effect, the tenancy has come to an end, and therefore cannot now seek to pursue a renewal option.

68. The defendant's claim is also defeated by the fact that the option was not one for perpetual renewal, as there can only be a perpetually renewable tenancy where such is intended, and unequivocally expressed. It cannot arise except where there is a tenancy for a term certain with a right of renewal: **Centaploy Ltd. v. Matlodge Ltd. and Another** [1974] Ch. 1, 5. If, as in the present case, the length of the new term is not specified, the court would imply a renewal for the same term, and nothing more. As stated in **Lewis v. Stephenson[22]** at 299:

> *"…it is said that if the terms of the renewed lease are to be the same as the terms of the original lease, the renewed lease must contain a stipulation for a renewal and so on in perpetuity. But such a construction is, I think, manifestly unreasonable. 'With option of renewal' does not mean with continued options of renewal after renewal…The court leans against a construction for perpetual renewal unless there are express words to show that it is clearly intended."*
>
> [my emphasis]

[21] Witness statement of Richard Jardine at para. 22: *"I cannot recall these agreements. I therefore instructed Econo Car's attorneys to request copies of them from Ms. Bain's attorneys who have not been able to produce them and have advised that there are no lease agreements for the years 2000 and 2001."*

[22] Supra at FN 12

69. In the absence of an express intention by the parties that the option be for perpetual renewal, it is difficult to come to terms with the merit of the defendant's claim as to a continuing right of possession. The relationship of landlord and tenant between the parties ceased in 2003, and with it, so too did the option to renew.

The effect of the increased rent demanded by the plaintiff?

70. The defendant's position is that the plaintiff failed to allow it to exercise the option to renew the tenancy by acting unreasonably, failing to carry out negotiations in good faith and demanding a rent of US $8,000.00 (approximately TT $48,000.00) per month for the demised land which was unreasonable and excessive. The plaintiff has asserted the reasonableness of the rent on the basis that it was rent in respect of both the demised premises and the reclaimed land. Clause 1 of the 1999 tenancy agreement described the rented land as "191-193 Western Main Road, Cocorite"- same as the 1989 letter of agreement between the defendant and deceased. It therefore stands to reason that at all material times, rent paid in respect of *"No.191/193 Western Main Road, Cocorite comprising approximately 15,000 square feet…"*[23] contemplated both the demised premises and reclaimed land[24].

71. The proposed rent was subsequently reduced to TT $30,000.00 after the plaintiff had consulted the services of Mr. Brent Augustus, property valuer and consultant. The defendant counter-proposed a rent of TT $10,000.00, which was refused. Paragraph 5 of the witness statement of Brent Augustus states:

> *"From my experience and knowledge of the location [Western Main Road, Cocorite] I am of the opinion that the fair rental value of the entire site, that is, Parcel A and Parcel B would be in the region of $30 000.00 per month which equates to approximately $1.00 per square foot…"*

72. The plaintiff's final rental offer was $30,000.00, and the issue still remains whether the increased rent demanded by the plaintiff was unreasonable and excessive. This of course, affects the issue as to the mesne profits the plaintiff claims in respect of the demised premises for the period 1 December 2002 to 31st March 2003 at the rate of US $8 000.00 per month. It is to be

[23] RJ 2 (1989 letter of agreement between deceased and defendant).

[24] See Issue 5 below. According to Mr. Sturge's plan (to which no objection was raised), the demised lands (parcel A) comprised 9, 934 square feet.

noted that despite this final offer of $30 000.00, the plaintiff has made no application to amend the Statement of Claim to reflect that sum (rather than US $8 000.00) at paragraph 11 of the claim[25].

73. In **Hill and Redman's "Law of Landlord and Tenant"** 16th edition, it is stated at page 539 that :

> "*Mesne profits is the name given for damages for trespass against a tenant who holds over after the lawful termination of his tenancy; consequently they can only be claimed as from the date when the defendant ceased to hold the demised premises as tenant and became a trespasser*."

74. Paragraph 255 of **Halsbury's Laws of England 4th ed.** Vol. 27 states:

> "*In most cases, the rent paid under any expired tenancy will be strong evidence as to the open market value. In the vast majority of cases in which mesne profits are claimed. They are awarded if at all, at the rate of the previous rent, and as a rule of practice, if not at law, it can be taken as being the case that the burden lies upon a party who argues for a different rate of mesne profits (whether higher or lower) to adduce evidence to rebut the inference arising from any reasonably recent rental transaction*."

75. In **Ministry of Defence v. Ashman** (1993) 25 H.L.R.513 at 522, the concept of the measure of damages for mesne profits is defined as follows:

> "*What then is the measure of damages in a claim for mesne profits? In the vast majority of cases it will be at the same rate as the previous rent: see Vol. 27 **Halsburys Law** 4th Ed. para.255, footnote 3. If the market has risen, the landlord may recover more: see Clifton Securities v. Huntley [1948] 2 All E.R. 286. Presumably if the market has fallen, he will recover less. I see no difficulty in the landlord recovering damages at the market rate even though he has adduced no evidence that he would or could have relet the property. That is, as was held in Swordheath Properties, [Swordheath Properties Ltd v Tabet [1979] 1 W.L.R. 285] the appropriate measure of damages in the normal case*."

76. In **Swornheath Properties Ltd. V. Tabet** 1 W.L.R. 285 CA at 288 it is stated:

> *"It appears to me to be clear, both as a matter of principle and of authority, that in a case of this sort the plaintiff, when he has established that the defendant has remained on as a trespasser in residential property, is entitled, without bringing evidence that he could or would have let the property to someone else in the absence of the trespassing defendant, to have as damages for the trespass the value of the property as it would fairly be calculated; and, in the absence of anything special in the particular case it would be the ordinary letting value of the property that would determine the amount of the damages"*.

77. The learned authors of **"Woodfall on Landlord and Tenant"** at paragraph 19.013 say:

[25] See also para. 17 of statement of claim: Particulars of Special Damage [re: the demised premises]- "Mesne profits at the rate of US $8 000.00 per month from December 1st 2002 to April 30th 2003 and continuing= US$32 000.00"

"*The amount of the mesne profits for which the trespasser is liable is an amount equivalent to the ordinary letting value of the property in question. This is so even if the landlord would not have let the property in question during the period of trespass.*

Where the rent payable under the former lease is the fair letting value of the property, mesne profits are awarded at the rate of the rent; but if the rent is less than the true letting value of the premises, then mesne profits may be awarded at a rate exceeding the rent. The precise basis of valuation for the purpose of calculating mesne profits is not the subject of authority. It is considered, however, that the valuation should be on the basis of a short term letting at a rack rent on the terms which would in practice form the terms on which the landlord would let."

78. In the circumstances of this case, and without the benefit of any comparable market rates proffered by the defendant, I have no choice but to accept the evidence of Brent Augustus, which was not challenged, and to find that a reasonable figure for mesne profits would be $30,000.00 per month as per Mr. Augustus' professional opinion.

The Waste issue:

Whether the buildings erected by the defendant were fixtures?

79. The nature and dimensions of the buildings in question were elicited from the cross-examination of Richard Jardine and were described as follows:

79.1. A delivery bay measuring 12 feet by 20 to 25 feet, big enough to hold 3 cars with a concrete base.

79.2. An office 20 feet by 25 feet made of 2 x 4's and ¾ inch plywood with a tiled floor and with roof shingles laid on plywood.

80. The said structures were erected pursuant to the tenancy agreement (hereinafter "the 1989 agreement") made between the deceased and the defendant contained in a letter dated 14 November 1989 at Clause 7, *"That you are allowed to erect temporary facilities for housing office and your Works area of a portable nature and therefore easily removable."*

81. The plaintiff submits that of critical importance is the phrase, "of a portable nature". The buildings were not "portable" and removable at the end of the term. They were annexed to the property for the better enjoyment of the property and to a sufficient degree to make them part of the realty. Therefore upon their destruction the defendant committed waste and the plaintiff is entitled to be compensated in damages for their destruction.

82. While in cross-examination, it was accepted by Mr. Jardine that the buildings were not portable, the defendant argues against the applicability of such a restrictive test in determining whether said buildings were chattels or fixtures, and submits, *"it is clear from the context of the language used in Item 7… [above] that the late Mr. Bain's focus was that at the end of the tenancy, the Original Parcel [the demised premises] should be delivered up to him without Econo Car structures remaining on it, irrespective of whether the structures had to be dismantled or could be removed in one piece."* The defendant in effect argues that the structures were chattels and so did not pass to the owner of the land. Alternatively, if the buildings were fixtures, it was contractually entitled to remove them.

83. Any discussion on chattels and fixtures must begin with the very fundamentals, which are aptly related in the text, **The Law of Fixtures**[26] at page 2 thus:

> *"The general rule of law respecting fixtures is expressed by the maxim: Quicquid plantatur (or fixatur) solo, solo cedit: i.e. whatever is annexed to the land, becomes part of it. The mere fact of the attachment of the chattel to the freehold, or to something which is already annexed thereto, raises the presumption that the owner of the chattel intended that it should henceforth form part and parcel of the freehold and that he should not afterwards have the right to sever and remove the thing, except with the consent of the owner of the freehold. This presumption, of course, like all other presumptions of fact, may be rebutted by evidence of the circumstances showing a contrary intention. In every case, however, whether a chattel has become a fixture is a question of law; the fact that the parties interested in the land and the article in question have agreed that the article shall not be a fixture does not prevent its becoming de facto a fixture, though the agreement may give a right to remove it."* [my emphasis]

84. It is true that the agreement which authorized the erection of the structures contemplated their temporary nature and easy removability. However the subjective intention of both parties is at this stage immaterial in determining whether the structures were chattels and fixtures, as it is a question of law: see also **Melluish (Inspector of Taxes) v. B.M.I. (No.3)**[27]. Any such

[26] By Benaiah W. Adkin and David Bowen. 3rd ed. (1947)

[27] [1996] A.C.454 at page 473: "The terms expressly or implicitly agreed between the fixer of the chattel and the owner of the land cannot affect the determination of the question whether, in law, the chattel has become a fixture and therefore in law belongs to the owner of the soil: see pp. 192-193. The terms of such agreement will regulate the contractual rights to sever the chattel from the land as between the parties to that contract and, where an equitable right is conferred by the contract, as against certain third parties. But such agreement cannot prevent the chattel, once fixed, becoming in law part of the land and as such owned by the owner of the land so long as it remains fixed."

determination will turn on the degree and object of annexation. As stated by Blackburn J. in **Holland v. Hodgson** (1872)[28] and cited in **Mitchell v. Cowie** (1964)[29]at page 121:

> *"There is no doubt that the general maxim of the law is that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question of which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention viz, the degree of the annexation and the object of annexation."*

85. Under the rubric **"Test to determine what are fixtures"**, the authors of **Halsbury's Laws of England** 4th ed. 2006 Reissue. Vol. 27 (1) explain at para. 174 as follows:

> *"Whether an object that has been brought onto the land has been affixed to the premises as to become a fixture (or a permanent part of the land) is a question of fact which principally depends first on the mode and extent of the annexation, and especially on whether the object can easily be removed without injury to itself or to the premises; and secondly on the purpose of the annexation, that is to say, whether it was for the permanent and substantial improvement of the premises or merely for a temporary purpose or for the more complete enjoyment and use of the object as a chattel."* [my emphasis]

86. Without going further, it must be observed that although the defendant has maintained as its primary argument that the structures were chattels, counsel might have erroneously relied on a comparison of a shed in **Webb v. Frank Bevis Ltd**[30] to so conclude. The delivery bay and shed in the instant case were of concrete base, comparable to the shed in **Webb v. Frank Bevis Ltd,** which was built on a concrete floor to which it was attached by iron straps, and was 135 feet long and 50 feet wide. It was however determined that the shed was rather a tenant's fixture, not a chattel. The decision in **Webb v. Frank Bevis Ltd**. was considered by Lord Lloyd in **Elitestone Ltd. v. Morris and Another [HL]**[31] at page 691:

> *"But when one looks at Scott L.J.'s judgment in Webb v. Frank Bevis Ltd. it is clear that the shed in question was not a chattel. It was annexed to the land, and was held to form part of the realty. But it could be severed from the land and removed by the tenant at the end of his tenancy because it was in the nature of a tenant's fixture, having been erected by the tenant for use in his trade".*

87. At this stage, it will be useful to examine in considerable detail the cross-examination of Richard Jardine on the issue of the nature of the buildings on the demised premises. The

[28] LR 7 CP 328
[29] 7 WIR 118 CA
[30] [1940] 1 All ER 247 (C.A)
[31] [1997] 1 W.L.R. 687

following cross-examination makes reference to a plan of Mr. Kenneth Sturge, licenced land surveyor.

Q: The offices on the plan- were they portable?
A: It would be destroyed if it had to be lifted.
Q: It had a concrete base which is still there?
A: Yes
Q: There was steel in the concrete?
A: No
Q: Galvanise roof?
A: Yes
Q: In any event, if it had to be lifted up, it would be destroyed?
A: Yes it was very fragile. The office was separate to the shed. It was an …. office and a shed. It was not portable.
Q: In 2003 when you were moving you broke up the building?
A: We dismantled the building.
Q: You had to break it down to remove it. You could not carry it away without altering its condition drastically?
A: Yes.

88. The cross-examination focused on the removability of the buildings, and this factor has ultimately catapulted to great significance in the instant case. As Lord Lloyd said in **Elitestone Ltd. v. Morris and Another**[32] at page 690:

> *"If a structure can only be enjoyed in situ, and is such that it cannot be removed in whole or in sections to another site, there is at least a strong inference that the purpose of placing the structure on the original site was that it should form part of the realty at that site, and therefore cease to be a chattel."*

89. In **Elitestone Ltd. v. Morris and Another** *supra,* the structure in question was a bungalow, and in examining the purpose of annexation, the following was said at page 692-3:

> *"A house which is constructed in such a way so as to be removable, whether as a unit, or in sections, may well remain a chattel, even though it is connected temporarily to mains services such as water and electricity. But a house which is constructed in such a way that it cannot be removed at all, save by destruction, cannot have been intended to remain as a chattel".*

90. Prima facie therefore, in consideration of the above, it seems that the question of removability is decisive in the present case. The defendant has submitted that it had a right of removal of the structures in accordance with the general rule as regards trade fixtures. This right of removal to which the defendant claims entitlement is an exception to one of the two general

[32] Supra at FN 23

rules as to fixtures, and is explained by Lord Clyde in **Elitestone Ltd. v. Morris and Another**[33] *supra,* where he quoted from Lord Cairns L.C. in **Bain v. Brand (1876)** 1 App. Cas. 762:

> *"one of these rules is the general well-known rule that whatever is fixed to the freehold of land becomes part of the freehold or inheritance. The other is quite a different and separate rule; — whatever once becomes part of the inheritance cannot be severed by a limited owner, whether he be owner for life or for years, without the commission of that which, in the law of England, is called waste, and which, according to the law of both England and Scotland, is undoubtedly an offence which can be restrained. Those, my Lords, are two rules, not one by way of exception to the other, but two rules standing consistently together. My Lords, an exception indeed, and a very important exception, has been made, not to the first of these rules, but to the second. To the first rule which I have stated to your Lordships there is, so far as I am aware, no exception whatever. That which is fixed to the inheritance becomes a part of the inheritance at the present day as much as it did in the earliest times. But to the second rule, namely, the irremovability of things fixed to the inheritance, there is undoubtedly ground for a very important exception. That exception has been established in favour of fixtures which have been attached to the inheritance for the purposes of trade, and perhaps in a minor degree for the purpose of agriculture. Under that exception a tenant who has fixed to the inheritance things for the purpose of trade has a certain power of severance and removal during the tenancy.*"

91. The general rule regarding trade fixtures is that *"a tenant may remove fixtures if they have been affixed for the purposes of trade or manufacture, so long as the lease does not provide to the contrary, and so long as they are capable of being severed from the land without irreparable injury to it."*[34]

92. It appears that the structures on the demised premises were indeed trade fixtures, erected to facilitate the defendant's car rental business. Could they be severed from the demised premises without doing irreparable damage to it? **Halsbury's Laws of England** explains what is meant by this qualification at para. 181:

> *"So long as an article can be removed without doing irreparable damage to the demised premises, neither the method nor the degree of annexation, nor the quantum of damage that would be done either to the article itself or to the demised premises by the removal, have any bearing on the tenant's right to removal, except in so far as they indicate the intention with which the tenant affixed the article to the premises. Where trade fixtures have to be taken to pieces in the removal, in general it is essential that they are capable of being put together in the same form in some other place."*

[33] At page 695
[34] Halsbury's Laws of England 4th ed. 2006 Reissue. Vol. 27 (1) at para 179

93. In **Woodfall's Landlord and Tenant, Vol.1**[35], it is stated at paras. 13.131, 13.141 and 13.146 respectively:

> *"13.131…In the law of landlord and tenant, the category of fixtures is further divided into landlord's fixtures, which must be left by the tenant at the expiry of the lease, and tenant's fixtures which the tenant is permitted to remove."*
>
> *13:141 A tenant's fixture is a chattel which is:…(c) physically capable of removal without causing substantial damage to the land and without losing its essential utility as a result of the removal."*
>
> *13:146 It is of the essence in a tenant's fixture that it is capable of removal without losing its essential utility and without causing serious damage to the property.'*

94. As the risk of repetition, the position is succinctly summed up in **The Law of Fixtures** (supra) at page 24:

> *"It is, therefore, a condition, or qualification of the right of removal of fixtures that this right may only be exercised where the separation will occasion no material injury to the freehold or to the articles removed, but it is immaterial that the article has to be taken to pieces in order to remove it, if it is capable of being put together and set up elsewhere."*

95. So far, the following may be said of the structures on the demised premises:

95.1. They were trade fixtures and *ipso facto*, carried with them a general right of removal.

95.2. They were not portable, and as such lifting them, would result in their demolition.

95.3. They had to be dismantled to be removed, and this could not be done without their condition being drastically altered.

96. What remain significantly absent in the evidence relative to these structures however, are:

96.1. Whether their removal occasioned irreparable damage to the demised premises, in which case the right of removal would be ousted, and

96.2. Whether, their condition having been drastically altered by dismantling for removal, this equated to their having lost their essential utility and/ or were incapable of being put together in the same form in some other place.

97. Having regard to what is before me, I am of the view that the buildings as they were, on the concrete bases, became fixtures in the nature of trade fixtures. In the absence of any evidence

[35] K. Lewison (1993)

suggesting otherwise, I am also satisfied that upon their removal there was no substantial damage to the land.

Whether the plaintiff is entitled to damages for waste and/or trespass

97. Generally, the right to remove fixtures, whether given by law or by the terms of the lease, is to be regarded as a dispensation, *pro tanto*, of the tenant's obligation not to commit voluntary waste[36]. The defendant relies on Clause 7 of the 1989 agreement[37] *(supra)* to assert its obligation and/ or right to remove the structures at the conclusion of the tenancy. In support of its argument, it relies on the case of **Meux v. Cobley**[38] at page 262-3 thus:

> *"A man cannot commit waste, even technically, if he is doing that which he is entitled to do by contract- that is to say, he cannot commit waste as against his landlord if his landlord has entered into a special contract enabling him to do it."*

98. On the other hand, the plaintiff disputes the very fact that the 1989 agreement was applicable to the relationship of landlord and tenant at the time the buildings were removed. Instead she says that the relevant agreement was the 1999 agreement where it was stated at Clause 14:

> *"On the termination of the lease and to the satisfaction of the landlord, the tenant shall replace any walls, windows, woodwork, etc, which might have been damaged due to the installation of any fixtures or fittings on the part of the tenant. The tenant shall carry out all minor repairs to the premises."*

99. It is undisputed that after the plaintiff had signed the agreement and forwarded it for the signatures of the directors of the defendant, the latter wrote the words *"Not Applicable"* across Clause 14, and placed their initials beside the paragraph. What remains unclear however is whether the said clause was in fact rendered invalid by virtue of the words "Not Applicable". It is to be noticed that "SB 6"[39] which exhibits the same 1999 agreement as "RJ 11"[40] contains an extra signature beside Clause 14. To my mind this is very telling as to what transpired after the agreement was returned to Caribbean Salvage- especially in light of the fact that this same

[36] **The Law of Fixtures** at page 53. see also page 206 supra, "an action for trespass to land may be maintained for wrongful interference with fixtures, since they constitute part of the realty".

[37] Supra at page 21 herein. Clause 7:*"That you are allowed to erect temporary facilities for housing office and your Works area of a portable nature and therefore easily removable."*

[38] [1892] 2 Ch. 253 at 262-3

[39] An annexture to the plaintiff's witness statement.

[40] An annexture to the witness statement of Richard Jardine

signature appears next to the insertion, *"with option for renewal*" at Clause 3 of "SB 6", but is strangely absent in the parallel Clause 3 of "RJ 11." The plaintiff's evidence in this regard is that none of the signatures belong to her and she is therefore not bound by the deletion and insertion[41] of the Clauses respectively. In light of such telling evidence relative to a comparison between "SB 6" AND "RJ 11", I find it very difficult to accept that the disputed signature neither belongs to the plaintiff nor her agents, and that for all these years, she never saw it fit to raise an objection to, or query, an alleged unfamiliar signature placed not only once, but twice on such an important document. I therefore find, on a balance of probabilities, that for all intents and purposes, Clause 14 was ousted and effectively did not form a part of the tenancy agreement between the parties.

100. This brings me directly to my next issue, which is key in determining the plaintiff's entitlement to the relief claimed, and which is diametrically opposed to the plaintiff's submission asserting that entitlement. The plaintiff has submitted that even if the 1989 agreement (as opposed to the 1999 agreement) was the governing document that provided for the defendant's right of removal at the end of the tenancy, the contract between the parties cannot determine the legal issue of whether a chattel has become a fixture.

101. Indeed it is true that the terms expressly or implicitly agreed between the fixer of the chattel and the owner of the land cannot affect the determination of the question whether, in law, the chattel has become a fixture[42]. But that is not the issue here[43]. What is now under consideration is the question of the right of removal of that fixture[44], and this is regulated by agreement between the parties, where such agreement exists. It is to be carefully observed, and with the greatest respect to learned Queen's Counsel, this is the fundamental flaw in the plaintiff's submission- the question of whether or not a particular article is a fixture is quite independent of, and distinct from, the question whether that article may be severed and removed from the landlord's property. The first is a question of law to be determined irrespective of the intention of the parties in a contract. The second is resolved exclusively by reference to the contract, and the intention of the parties as reduced in writing is singularly decisive. As stated in **The Law of Fixtures** (supra)[45] at page 2:

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[41] This is discussed under Issue 2 (a) above.

[42] See **Melluish (Inspector of Taxes) v. BMI** supra at page 473

[43] The question of whether the structures on the demised premises were fixtures is discussed under 3 (a) above.

[44] It is important to distinguish the question of the right of removal (now under consideration) vs. whether that removal can occur without substantial damage to the property and article itself. The former is a question of law and/ or agreement. The latter is a question of fact.

[45] See Issue 3 (a) above

"In every case, however, whether a chattel has become a fixture is a question of law; the fact that the parties interested in the land and the article in question have agreed that the article shall not be a fixture does not prevent its becoming de facto a fixture, though the agreement may give a right to remove it."

[my emphasis]

102. The following extract from **The Law of Fixtures**[46] (supra) under the chapter titled *"Right of Removal between landlord and tenant as affected by the contract of Tenancy"* is most instructive:

"Generally: It is a principle of law, applicable to fixtures…that individuals, on entering into a contract, may agree to vary the strict position in which they would otherwise legally stand towards each other, provided that no absurdity or general inconvenience would result from the transaction. Thus leases almost universally contain clauses of a more or less comprehensive character binding the tenant to deliver up the premises at the end of the term 'together with all fixtures etc.'…the tenant, in consequence of the special terms and conditions to which it has agreed, may be placed in a totally different situation, as regards his right to sever and remove fixtures…Thus, he may by contract vary his rights as to the description of the of the articles which he may remove; or he may enlarge the time for their removal; or he may subject himself to greater restrictions or he may secure to himself greater privileges than would ordinarily attach to him…

In all these cases, where the terms of the contract are free from ambiguity, the rights of the parties cannot be determined by the general law of fixtures, but resolve themselves into questions of construction of the terms in question, and the only point for determination is whether the property in dispute falls within the terms of the agreement or exception, or proviso, as the case may be. If by the terms of the lease, or independent agreement, the landlord wishes to restrict the tenant's ordinary right of removal of fixtures, the term or condition or agreement to that effect must be stated in plain language, for if the matter is left in doubt the tenant's ordinary rights, in so far as the doubt extends, will not be affected.

In construing agreements of this kind it must be borne in mind that the rights of the parties do not depend upon the general law as to fixtures, but upon the interpretation of the positive contract that have mutually entered into; if the parties, have by the contract, themselves provided what shall be their respective rights thereunder." [my emphasis]

103. As I have already determined that the 1999 tenancy agreement is inapplicable to this issue, the position between the parties will revert to the general law as to trade fixtures *viz* that a tenant has an indisputable right to remove fixtures which he has annexed to the demised premises for the purpose of carrying on his trade. Having previously determined that the structures were removed from the land without any substantial damage thereto or to the structures themselves, it

[46] See FN 18 above. Page 99.

stands to reason that the plaintiff cannot be entitled to the reliefs claimed in respect of waste and trespass.

What is the effect, if any, of Section 3 of the State Lands Act Chap. 57:01 upon the competing claims to possession of the reclaimed land?

104. *Jus privatum* or the proprietary rights in the use and possession of land beneath tidal waters and navigable fresh waters is often held by the state in tandem with the *jus publicum* interest, but may be conveyed in the form of title ownership or lessor freehold to a private individual or entity[47].

105. Various reasons are assigned for the exercise of a *jus privatum* in the Crown. "*Under the fiction of the feudal law, by which all lands in the kingdom were derived from the King as lord paramount, and held by his bounty, the shores and bed of tide waters, having no other acknowledged owner, are said to remain vested in him in all cases where he has not expressly granted them away. One writer suggests that at the time of the Norman Conquest, William I having acquired by confiscation all the estates in England, retained in his own seisin those lands, including the shore, which were not restricted among his followers. The Crown's right of private property in tide waters within the realm form part of the theory of its dominion upon the sea. Lord Hale considers the King's ownership of the shore to be one other evidence of his ownership of the sea, and Callis says that the litus maris, or shore, taketh its name wholly from the sea, as partaking most of its nature, and that, in point of property and ownership, it is the King's as lord of the seas*."[48]

The recognition of this common law principle is codified in our statute in **Section 3** of the **State Lands Act** which provides as follows:

> *"(1) The dominion of the seashore lying between high water mark and low water mark belongs to and is vested in the State.*
>
> *(2) It shall be lawful for the President, in the name and on behalf of the State, to grant to such persons such part of the sea shore lying between high water mark and low*

[47] See http://www.csc.noaa.gov/ptd/glossary.htm

[48] Gould, John Melville "**A Treatise on the Law of Waters including Riparian Rights and Public and Private Rights in Waters Tidal and Inland**", Chicago: Callaghan & Co. 3rd Edn 1900 at pages 39 and 40; see also Loveland, Richard "**Hall's Essay on the Rights of the Crown and the Privileges of the Subjects in the Sea Shores of the Realm**" London: Stevens & Haynes 1875

water mark on such considerations as to the President may seem fit, and also to grant if he shall see fit licences to reclaim land from the sea.

(3) The dominion in all lands so reclaimed shall belong to and be vested in the State or in the grantee or grantees of the State."

106. Any encroachment upon public lands belonging to the State, in this case upon the seashore, is called a *purpresture*[49]. In such a case, the remedy to the State lies in **section 20 of the State Lands Act Chap. 57:01.**[50] That, however, is not the issue before this court at this moment. The issue is who, if anybody, is entitled to remain in possession of these reclaimed lands and whether **section 3** impacts upon such right of possession?

107. Quite clearly, the issue of the right to possession is different from that of the right to title. As has been established in land law, the right to possession exists and protects the possessor from and against all claims of 3rd parties, save for the person with the right to the title unless that title has been extinguished. To my mind, the principle is the same in *purpresture* and in fact it is an established definite possibility against the State[51].

108. The issue of the application of **section 3** to this case does not necessarily involve a pre-determination as to whether the plaintiff or defendant is entitled to possession of the reclaimed land. **Section 3** deals strictly with the question of title to lands reclaimed from the State and declares, in short, that all such lands reclaimed belong to the State unless a licence has been granted by the President to reclaim said lands- in which case, said lands shall be vested in the grantee (s) of the State. It is undisputed that:

108.1. Neither the plaintiff nor defendant had a licence to reclaim any land from the sea and;

108.2. Title to the reclaimed land still vests in the State.

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[49] Ibid at page 45; see also Blundell v Catterall [1814-1823] All ER Rep 39; [1814-23] All ER Rep 39

[50] 20. (1) Any Magistrate, on information that any person is in possession, without any probable claim or pretence of title, of any State Lands, may issue a summons calling on the person to appear and answer to the information, and if the person, after being duly summoned, does not appear or appearing fails to satisfy the Magistrate that he has or had, or those under whom he claims, have or , had, some probable claim or pretence of title to the lands, the Magistrate shall make an order for putting the person in possession of the lands out of possession, and the delivering of the possession to the Commissioner.

(2) Unless, on the hearing of the information, the person against whom the information is preferred proves to the satisfaction of the Magistrate that he holds the possession of the lands by inheritance, devise, or purchase from some other person, the Magistrate shall make a further order that the person so informed against be imprisoned for such term, not exceeding six months, as the Magistrate sees fit, such term to be computed from the day on which the person is delivered into the custody of the Keeper of the gaol or place of imprisonment to which he is committed.

[51] Ibid at pages 47 to 51

109. That established, had this been a case of title, the party asserting that title against the State would have had to satisfy the requisite period of thirty (30) years to succeed in a claim for adverse possession: see **section 2 of the State Suits Limitation Ordinance Ch. 6 No. 6 as amended by the Law reform (Property) Act 1976.** The issue that would have then engaged the court would have been which party was in a position to plead the benefit of prescription sufficient to defeat the State's title.

110. However as this is a claim **solely** for possession, not title to the reclaimed land, **section 3** is, to my mind, inapplicable.

Whether the reclamation was so done for the benefit of the plaintiff or the defendant?

111. The question of who reclaimed land, and when, is purely one of fact. I have looked at all of the evidence in this regard and have determined that the deceased reclaimed land prior to his death, and that the defendant continued that reclamation process. (This issue is dealt with in detail below).

112. Following this determination, the next issue that falls for consideration concerns the presumption as to encroachments by a tenant. **Halsbury's Laws of England** explains this presumption at para. 195:

> *"Where, during the currency of his tenancy, a tenant encroaches upon, or without title to do so takes possession of the other land, there is a presumption that the land so taken becomes annexed to the demised premises, whether or not it is immediately adjacent to the demised premises, and whether or not it belongs to the landlord or a third person, and on determination of the tenancy, the land must be given up to the landlord together with the demised premises."*

113. It is this presumption, famously established in **Kingsmill v. Millard**[52] (and affirmed in later cases such as **Smirk v. Lyndale Developments Ltd**[53].) upon which the plaintiff relies to

[53] [1975] Ch. 317

assert possession to the reclaimed land. In **Perrot (J.F) & Co. v. Cohen,**[54] Lord Denning attributed the principle to one akin to estoppel:

> *"The principle underlying the cases on encroachment is not perhaps strictly an estoppel, but it is akin to it. If a tenant takes possession of adjoining property and by his conduct represents that he is holding it under the demise, then, if the landlord acts on that representation by allowing the tenant to remain in possession, the tenant cannot afterwards assert that he is holding it on any other footing. The tenant cannot, for instance, claim that he is holding it adversely to the landlord so as to acquire title under the Limitation Act of 1939; nor can he claim that he is only a licensee, who has all the benefits of occupation but none of the burdens of the lease."*

114. The rationale that underlies the rule in **Kingsmill v. Millard** *supra* was explained in **Whitmore v. Humphries**[55] thus:

> *"The rule is based upon the obligation of the tenant to protect his landlord's rights, and to deliver up the subject of his tenancy in the same condition, fair wear and tear excepted, as that in which he enjoyed it. There is often great temptation and opportunity afforded to the tenant to take in adjoining land which may or may not be his landlord's, and it is considered more convenient and more in accordance with the rights of property that the tenant who has availed himself of the opportunity afforded him by his tenancy to make encroachments, should be presumed to have intended to make them for the benefit of the reversioner, except under circumstances pointing to an intention to take the land for his own benefit exclusively. The result is to avoid questions which would otherwise frequently arise as to the property in land, and to exclude persons who have come in as tenants, and who are likely to encroach, from raising such questions."*

115. On the other hand, the defendant claims entitlement to possession on the basis of evidence rebutting the presumption that the land reclaimed by the tenant enured for the landlord's benefit. Basically, the presumption that an encroachment by the tenant enures for the landlord's benefit may be rebutted by proving that the landlord and the tenant so conducted themselves as to show that the landlord treated the encroachment as not enuring for his benefit.[56]

116. Accordingly, where, as here, there are two competing claims to the right to possession, it is necessary for this court to reach a finding in relation to this issue.

Did the deceased reclaim the lands prior to 1987?

117. The issue on the pleadings – the plaintiff:

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[54] [1951] 1 K.B. 705 (CA) at page 701
[55] (1871-2) L.R. 7 C.P.1 at 5.
[56] See Halsbury's (ibid) at para. 197

117.1. Paragraph 2 of the statement of claim says that the deceased, prior to 1987, reclaimed approximately 19,999.2 ft.² of land of which he took and retained possession until his death on 8 June 1997.

118. The evidence:

118.1. In her witness statement, the plaintiff said that in 1989, her father rented the property to the defendant, and exhibited a purported rental agreement dated the 14 November 1989. In that agreement, the property is described as comprising 15,000 ft.² and clause 8 of the agreement gave the deceased the right to enter the property for stockpiling earth fill and aggregate. Over the years, the plaintiff says that she was aware that her father carried out reclamation exercises on the property along its southern boundary with the sea and this reclamation was carried out during the defendant's tenancy.

119. The issue on the pleadings – the defendant:

119.1. Paragraph 3 of the defence is in conflict with paragraph 2 of the defence. At paragraph 2, the defendant denied that the deceased reclaimed the land and also denied that the plaintiff took and retained possession thereof. At paragraph 3, the defendant states that from on or before 1987 they entered and remained upon the reclaimed land and took possession thereof dispossessing the plaintiff and/or her predecessor in title. The defendant went on in paragraph 4 to state that in or about 1987 they constructed several buildings upon the reclaimed land and that they did so in reliance upon the plaintiffs and her predecessor in title's acquiescence.

120. The evidence:

120.1. In 1987, according to Mr. Jardine, the deceased's land was overgrown and had several mounds of fill on it. He estimated that it was about 10,000 ft.² in area at that time and that it was being used to stockpile earth fill and aggregate. The intention expressed at that time was that the deceased would level enough of the land to allow the defendant to move its business there but the defendant would have to allow him to continue stockpiling in a reasonable way that would not disrupt the car rental business, to which the defendant agreed. The deceased leveled the land by moving the mounds of fill to the back of lot 191, which was

bordered by swampland. According to Mr. Jardine, moving the mounds of fill to the back of lot 191 had the effect of reclaiming a portion of the swampland at the back and the deceased continued sending fill which was stockpiled at the back.

120.2. At paragraph 11, Mr. Jardine said that they needed to build longer sheds to store/repair and paint the defendant's vehicles on lot 191. They facilitated this process by trucking in fill and reclaiming the swampland and incorporating stockpiles left by the deceased thereon. After reclaiming the area, they paved it, extended the sheds and constructed a repair and paint shop. He said that by the time they had finished they had created a refilled area which is the 19,999.2 ft.² area shown in Mr. Sturge's plan- the defendant's own reclamation had been completed by the end of the 1989 tenancy.

120.3. At paragraph 13, Mr. Jardine says that the deceased continued to take an interest in their progress and the defendant's business and, so, often visited lot 191. He was fully aware of the reclamation and the extension of the sheds and the building of new structures as he saw the progress during his visits. Mr. Jardine says that they kept the deceased informed of the defendant's financial position and that he, the deceased, was aware that the cost of the reclamation had been a serious financial burden on the defendant who would not have done it unless the reclaimed area was going to be for their benefit.

The resolution of the issue as to the reclaimed lands:

121. Nowhere in her witness statement did the plaintiff mention that her father reclaimed 19,999.2 ft.² of land. However, the plaintiff refers at paragraph 9 of her witness statement to a survey carried out in November 2002 by Mr. Kenneth Sturge and incorporated in a plan, to which there was no objection by the defendants. That plan demarcated the lands as comprising 2 parcels – parcel A comprising 922.9 m² (or 9,934 ft.²) and parcel B comprising 1,858 m² (or 19,999.2 ft.²). The statement in her witness statement that her father did the reclamation during the defendant's tenancy (which, according to her, commenced on 14 November 1989) contradicts paragraph 2 of the defence referred to above and also paragraph 2 of her own statement of claim that her father had reclaimed the entire 19,999.2 square feet prior to 1987. The defendant accepted the plan of Mr. Sturge and Mr. Jardine used the same in his description of the reclaimed land and I therefore am of the view that the description and area of the reclaimed lands are not in issue.

122. On the other hand, Mr. Jardine's evidence contradicted the pleading set out above as to when the reclamation was done. At paragraph 10 of his witness statement, Mr. Jardine relates the events of 14 November 1989 by which the defendant was granted a three-year lease as set out in the deceased's letter of 14 November 1989. Thereafter at paragraph 11, he suggested that the reclamation was done after the letter of 14 November 1989 and not in 1987 or prior thereto as suggested in the defence. On the pleadings, the defendant's case is that when they went into possession in 1987, they took possession of the reclaimed lands thereby suggesting that the reclaimed lands were already in existence to the extent of 19,999.2 ft.². This is contrary to Mr. Jardine's paragraph 11 which suggests that the reclamation allegedly done by the defendant was done during the course of the period November 1989 through November 1992 when the three-year term expired. This is also contrary to the purported letter/agreement of 14 November 1989 annexed at "RJ 2" which is the only contemporaneous document provided in evidence and which document is a joint document signed by the deceased on the one hand and Mr. Carter and Mr. Jardine on behalf of the defendant company **agreeing,** to the terms and conditions set out in the letter. In that letter, the deceased said:

122.1. At paragraph 1:

> "*I refer to your earlier enquiry and to **our meeting today** at my office regarding the subject of a parcel of land owned by me in which you intimated your interest in its rental*." [Emphasis mine]
>
> Clearly, the meeting to discuss the rental only took place that very day. Prior thereto, there was only an enquiry made of Mr. Percival Bain.

122.2. At numbered paragraph (3):

> "*That **upon your acceptance** of the within terms and conditions **you are allowed entry** into the said land."* [Emphasis mine]
>
> This, to my mind, is a clear indication that the defendants were not yet in occupation of the said lands and would only have been let into occupation upon the acceptance of the terms and conditions of the letter. The defendants are therefore estopped from claiming occupation prior to 14th November 1989 by reason of their signed acceptance of this clause.

122.3. At numbered paragraph (7):

"*That you are allowed **to erect** temporary facilities for housing office and your Works area of a portable nature and therefore easily removable."* [Emphasis mine]

This document therefore suggests that the defendants were yet to erect any structures on the lands -- especially when read in conjunction with numbered paragraph (3) above.

122.4. At numbered paragraph (8):

"*That the landlord or his duly elected representative reserves the right of entry onto the said land for routine inspection and also for the stockpiling of earth fill and other products of aggregate within reason and that which is not expected to disturb the operation of your Car Rental business in any way."*

This shows that the deceased retained the right to enter upon the lands for routine inspection and to occupy portions of it once it did not disturb the operation of the defendant's business. The relevance of this, to my mind, is that it gave the deceased the right to enter and inspect the lands which he apparently did on a regular basis according to Mr. Jardine.

123. The contradictions on both sides render the evidence unreliable as to specifics but, in coming to my findings, I have had regard to the evidence as a whole and selected those aspects which correspond to the contemporaneous document (the 1989 letter/ agreement). I have also considered the fact that the defendants did not fence off the reclaimed lands prior to 2003 but enjoyed the entire demised parcel and the reclaimed lands as one continuous parcel forming the common user allowed in the tenancy. Based on the above therefore, I have come to the following findings:

123.1. The defendants moved onto lot 191 in 1989 after the issuance of the letter of 14 November 1989 from the deceased and not from 1987 as they alleged;

123.2. At that time, the lands extended beyond the bona fide demised lands of the deceased by reason of the fact that he averaged the land as comprising 15,000

square ft obviously taking his prior reclamation into account since it has to be presumed that he knew how much land he had title for; (According to Mr. Sturge's plan (to which no objection was raised), the demised lands (parcel A) comprised 9, 934 square feet).

123.3. The defendant continued the reclamation process and the paving of the reclaimed lands to further the stated user of the demised premises i.e. the carrying out of a car rental business and the storage and repair of the defendant's vehicles using its own material and that of the deceased's with his obvious knowledge and approval;

123.4. This user was consistent with the tenancy granted to the defendants and the deceased knew and approved of these works by reason of his constant visits to the said lands;

123.5. The user of the reclaimed lands was not adverse to the interest of the deceased and was intended for the enhanced use and benefit of the demised premises, which was the running of the car rental business and the associated parking, storage and repair of motor vehicles;

123.6. The defendant has failed to prove on a balance of probabilities that its use of the reclaimed lands was intended for its own benefit and was adverse to the interest of the owner of the demised premises- especially since the defendant enjoyed its use as one large parcel for a common approved purpose.

124. The reclaimed lands therefore amount to an encroachment which was intended to enure for the benefit of the demised premises and so falls squarely within the presumption enunciated in **Kingsmill v Millard, Perrot (JF) & Co. Ltd v Cohen** and **Smirk v Lyndale above.**

Closing remarks and observations

125. The court finds and awards in favour of the plaintiff. The defendant's counterclaim is dismissed. The defendant's claim for a declaration of an equity in the land cannot, to my mind, succeed as the defendant has not shown that it is entitled, in this case, to reimbursement for additions or improvements to the subject lands.

126. The plaintiff's submissions did not pray for reliefs in terms of reliefs (7), (8) and (13) of the Statement of Claim and no declarations or orders are made in relation thereto. A claim was made in the submissions for $16,000.00 being outstanding rentals due but that was not pleaded in the Statement of Claim so no order is made in respect thereof. The plaintiff's claim for an order for possession of the demised premises is not required in the circumstances since it is common ground that the defendant delivered up possession thereof in March of 2003.

ORDERS

127. Consequently, the court makes the following orders in this matter in relation to the plaintiff's claim:-

127.1. The following declarations are hereby made:

127.1.1. That the plaintiff is entitled to possession of ALL and SINGULAR the parcel of land comprising 19,999.2 superficial feet which was reclaimed from the sea at the southern boundary of the demised premises ("the reclaimed land") and was annexed to the demised premises.

127.1.2. That the defendant by its servants and/ or agents has wrongfully and unlawfully impeded the plaintiff's access to and from the sea from the southern boundary of the demised premises and continues to do so.

127.2. That the plaintiff is hereby granted an order for possession of the reclaimed lands forthwith against the defendant.

127.3. Mesne profits in respect of the demised premises in the sum of $15,000.00 [57] per month from the 1 December 2002 to 31 March 2003 amounting to $60,000.00.

127.4. Mesne profits in respect of the reclaimed land in the sum of $14,963.20 [58] per month from 1 December 2002 to date amounting to $1,376,614.40 and continuing hereafter at the same rate until delivery of possession.

[57] 15,000 sq. ft. comprising 9,934 sq. ft. of bona fide lands and 5,036 sq. ft of initially reclaimed lands at $1.00 per sq ft as per the valuation of Brent Augustus.

14, 963.20 sq. ft being 19,999.20 sq. ft. on the survey less the original 5036 sq. ft. incorporated in the original demise at $1.00 per sq. ft. as per the valuation of Brent Augustus

127.5. Interest on the mesne profits at the rate of 6 % per annum.

127.6. That the defendant pay to the plaintiff costs of the action certified fit for senior counsel and junior counsel.

128. In relation to the defendant's counter claim:-

128.1. The counterclaim is dismissed with costs fit for senior and junior counsel.

Devindra Rampersad

Judge (Ag.)

Assisted by:
Shoshanna V. Lall
(JRA).