BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No: 485 of 2015

BETWEEN:

LIONEL LASHLEY **CLAIMANT**

AND

MARVIA TROTMAN **DEFENDANT**

Before: The Hon. Madam Justice Shona O. Griffith, Judge of the High Court

Date of Hearing: 2020: **24th November**
(12th & 24th March Written Submissions)
2021: **(28th January Written Submissions, Claimant)**

Date of Decision: 2021: **19th April**

Appearances:

Mr. Larry Smith QC; Mr. Junior Allsopp QC in association with Ms. Makala Broome for the Claimant

Mr. Emmerson Graham QC for the Defendant

Landlord and Tenant - Recovery of rent and mesne profits – Landlord and Tenant (Registration of Tenancy) Act, 230A - Failure to register tenancy – Effect of Non-compliance with Act on Recovery of Rent

Civil Procedure - Pleadings – Application to Strike Out Case at Trial – Overall Fairness and Overriding Objective of CPR

DECISION

INTRODUCTION

[1] The Claimant filed a claim for possession of premises situate in Jackson Development, St. Michael, along with arrears of rent and mesne profits. The premises had been rented to the Defendant from June, 2013 for one year until 1st July, 2014, and thereafter renewed for a further year, until 1st July, 2015. The Claimant alleges that from 1st October, 2014 the Defendant failed to pay rent as a result of which he issued a Notice to Quit which determined the tenancy with effect from the 31st December, 2014. Possession was given up during the course of the proceedings thus the Claim remained for arrears of rent and mesne profits, which were capped within the circumstances of the Claim, to the sum of $23,200.00 plus interest.

[2] The Defendant's response to the Claim denied the entitlement to recover rent based on the fact that the tenancy had not initially been registered as required by the Landlord and Tenant (Registration of Tenancies) Act, Cap. 230A. Additionally, the Defendant counterclaimed for damages for loss and inconvenience arising out of two incidents caused by faulty plumbing at the premises. Specifically, the Defendant alleged that in June, 2014, leaks from faulty plumbing caused damage to items belonging to the Defendant and the Defendant was required to do clean-up following extensive repair works by

the plumber. In September, 2014, the Defendant alleged that a plumbing issue occurred resulting in flooding of the bottom floor of the premises and caused damage to items belonging to the Defendant in the sum of $10,111.37. This amount was claimed under the counterclaim, in addition to an unspecified amount arising from the June, 2014 incident. The Counterclaim also prayed relief by way of damages for breach of the covenant of quiet enjoyment. The Claimant joined issue in his reply and put the Defendant to strict proof of all allegations of the Counterclaim.

Brief Background and Issues

[3] The procedural history in terms of the filing of the claim and pleadings is unremarkable. Of note however was the filing of an Application by the Defendant in March, 2017 which sought orders to the effect that the Claimant was in breach of the Landlord and Tenant (Registration of Tenancies) Act, Cap. 230A ('the Act') in that he failed to register the premises as required, and so collected rent in respect of the premises in breach of section 15 of the Act. The order sought seemed to have been declaratory in nature. The Claimant's position in response to the Application was that the premises were registered in February, 2015 and therefore no issue arises in relation to any non-compliance with the Act.

By order of this Court, written submissions were filed by both sides in respect of the Application, however the issue raised was left for determination at the trial. The trial was conducted on the 25th November, 2020. As per the direction of the Court, written closing submissions were filed on behalf of the Claimant in January, 2021, but no submissions were received on behalf of the Defendant. Having received no closing submissions on behalf of the Defendant, or received any explanation for the failure to file same, the Court has proceeded to render its decision in the absence of such submissions.

[4] The issues for the Court to determine are as follows:-

(i) Was the Claimant in breach of the Landlord and Tenant (Registration of Tenancies) Act, Cap. 230A and if so what if any effect does that breach have on his claim for arrears of rent and mesne profits?

(ii) Is the Claimant liable on the Defendant's counterclaim for the loss and damage to items alleged to have been occasioned by water damage caused by faulty plumbing?

Issue (i) – The registration of the premises under Cap. 230A

[5] The Defendant asserted that the Claimant was in breach of Cap. 230A, having failed to give notice of his intention to rent the property as required by section 3 of the Act. The Defendant also asserted that the Claimant breached section 15 of the Act, by collecting rent for the premises which was

unregistered. The Claimant averred that there was compliance with the Act, albeit after the commencement of the tenancy; alternatively, that based on prior authorities of **Gulf Rentals Ltd. v Evelyn & Carvalho (Trading as Buccaneer Restaurant)**[1]**,** and **Renaldo White v Kieran Holdings Ltd**.[2], that the Defendant was nonetheless obliged to pay the rent despite any non-compliance with the Act. This issue was addressed by respective Counsel in earlier written submissions filed in support of and response to the Defendant's Application.

[6] The Court determines the issue with the benefit of those submissions and the relevant evidence filed in pursuance of the Claim. There was no cross-examination on any facts pertinent to this issue, however the Court's order of 29th June, 2020[3] reserved the issue for determination at trial. It is therefore assumed that Counsel were of the view that there were no facts in dispute in relation to the issue. The pleadings reveal the undisputed fact that the Claimant had not complied with section 3 of the Act (notice of intention to rent the premises) at the time the rental agreement was made. Also not in dispute is that at worst, the Claimant sought to register the premises in February, 2015.

---

[1] Barbados HC No. 538 of 1982
[2] BB 2019 HC 7
[3] Entered on 2nd September, 2020

On the clear facts of the matter however, the Court notes that the registration referred to by the Claimant, was effected subsequent to the valid notice to quit, which expired on 31st December, 2014.

[7] The Claimant's case is that the Defendant was a trespasser as of 1st January, 2015 (hence the claim for mesne profits), so on the Claimant's case alone there was no compliance with the requirement to issue the notice of intention to rent. Also evident from the Claimant's case, is that rent was collected in contravention of section 15 of the Act, until September, 2014 (that being the last time rent was paid). The question for the Court is what effect if any, do such breaches of the Act have on the Claimant's claim for rent and mesne profits. Counsel for the Defendant's submissions[4] on the issue relied on the plain reading of the Act and the facts pleaded by the Claimant. It was submitted that the Claimant was guilty of wrongdoing and ought not to be permitted to benefit from such wrongdoing. It was not expressly stated what relief or consequence was being sought, however as the claim is one for payment of arrears of rent and mesne profits, the Court understands the Defendant's position to be that the Claimant ought not to be able to recover the amounts owed, as a consequence of such wrongdoing.

[4] Filed March 12th 2020

[8] Counsel for the Claimant, by written submissions on the issue[5] firstly adverted to the obligation to pay rent as being consequent upon the right of occupation of the premises afforded under the tenancy. Primarily, Counsel's position was that **Gulf Rentals**[6] conclusively determined the issue, insofar as it decided that section 14 of the Act (now repealed), was unconstitutional. Section 14 of course entitled the tenant to a refund of rent paid over and collected by a landlord in breach of the requirement of registration of the premises. The argument on behalf of the Claimant, was that whilst not claiming a refund of rent, the Defendant's assertion that the landlord was not entitled to rent accruing by virtue of her occupation, would if successful, amount to the same result as if the section had not been declared unconstitutional and subsequently removed.

[9] This argument was further illustrated by reference to **Renaldo White v Kieran Holdings Ltd**[7], in which the issue to be decided was whether the claimant (tenant) was entitled as claimed, to recover all rents paid under the tenancy therein, having regard to the defendant's (landlord's) failure to register the rented premises. Counsel for the Claimant herein refers to the trial judge's decision which cited ***Gulf Rentals*** in the following terms:-

---

[5] Filed March 24th, 2020
[6] *Gulf Rentals v Evelyn & Carvalho* supra
[7] Supra

> *"This issue was raised in the case of Gulf Rentals Ltd…where it was stated that 'money is property within the meaning of sections 11 and 16(1) of the Constitution and is therefore protected, therefore for a landlord to be deprived of his right to rents would be a deprivation of the property of the landlord.*
> *[15] The court went on to hold that section 14 of the Act was not only arbitrary and excessive, but that it was confiscatory, not regulatory and therefore violated the constitution. The Act was subsequently amended following the severing of that provision…"*

Counsel for the Claimant herein goes on to cite the conclusion of the trial judge in ***White v Kieran Holdings Inc***.:-

> *"…even if it is established that the Defendant is in breach of section 12 of the Act, the appropriate authority or agency to seek recovery would be those deprived of the benefit of these taxes and not the Claimant. The Claimant having occupied the premises during the tenancy and having failed to pay the stipulated rent, cannot be allowed to deprive the Defendant of their property, even if it were accepted that the Defendant had fail (sic) to comply with some of the provisions of the Act."*

[10] Having referred to ***Gulf Rentals*** and ***White v Kieran Holdings Ltd.***, Counsel for the Claimant sums up the position thus:

> "Therefore, it is our submission that the Act is one aimed at revenue collection and not intended to confer on any tenants' (sic) the right to deprive a landlord of his property after the tenant

> has occupied the landlord's rented premises. We further submit, that the Act is intended to provide a benefit to the state who is the only person (sic) to seek to recovery (sic) for the Claimant's failure in the non-registration of the property at the commencement of the tenancy."

[11] The Court understands the argument and the authorities of ***Gulf Rentals*** and ***White v Kieran Holdings Ltd***., but has a different interpretation of the respective judgments and their application to the case at bar. **Gulf Rentals**, firstly determined the constitutionality of then section 14, flowing from which the section was repealed. As a consequence, no discussion arises in relation to the fact that a tenant cannot sue a landlord for a return of rents paid by the tenant in respect of a tenancy not registered under the Act. Indeed, as pointed out by Counsel for the Claimant, the instant case, is not such a case, but one in which the landlord is suing the tenant for recovery of arrears of rent and mesne profits. That difference notwithstanding, Counsel for the Claimant submits that the right of the landlord to sue to recover rents when in breach of the Act, is enforceable on the same basis upon which the tenant's cause of action to a refund of rent paid, was struck down as unconstitutional.

[12] That basis of course is that the tenant's right to refund - within the context of the Act being a taxing Act in which the obligations of the landlord exist for the purpose of aiding the state's administering of the tax regime created under

the Act - amounted to an arbitrary, excessive and unjustified deprivation of the landlord's property, in contravention of section 16 of the Constitution. The court's finding of unconstitutionality was affirmed by the consequent repeal of section 14. The court's dictum regarding the nature and objects of the Act as a taxing statute along with the views expressed as to the Act not being a rent control Act nor one intended for the protection of tenants, are accepted and adopted by this Court. This Court's point of departure however, is in relation to the application of the **Gulf Rental** decision as authority for the wider contention, that a landlord in breach of the Act, is entitled irrespective of that breach, to sue on and thereby enforce a rental agreement to recover arrears of rent from a tenant.

[13] The cause of action before the Court, unlike in ***Gulf Rental Ltd.*** as well as in ***White v Kieran Holdings Ltd.***, is firstly not at the instance of the tenant seeking to obtain monies already paid over to a landlord. The cause of action, is that of a landlord, seeking the Court's sanction to enforce a contract, in circumstances where the contract has been performed by the landlord in contravention of the relevant statute. This is considered an entirely different issue, which was not decided by either case. The current situation as the Court sees it, raises a question of the enforcement of a contract and a possible limitation on such enforcement, on account of public policy.

It is clear, that the contract itself in this case (the rental agreement) is quite lawful and in no way prohibited by the Act. It is also clear that the prohibition against collecting rent in relation to unregistered premises does not render the contract (the rental agreement) unlawful.

[14] The question that does arise is whether the Court ought to give sanction to the landlord's breach of the Act in a manner which is rendered a criminal offence, by enforcing the contract by an order for payment of arrears of rent. The Defendant did not specifically plead any issue of public policy, however the Defendant did put in issue the Claimant's non-compliance with the Act as a bar to recovery of the claim. In any event, as stated in **Beresford v Royal Insurance Co. Ltd**[8] with reference to public policy not having been pleaded but raised in argument in a case concerning the payout of a life insurance policy upon a suicide, the court would have been bound to raise the point on its own initiative, as is done in the instant case. In ***Beresford***, a general principle is stated to the effect that the Court would not enforce a contract where the benefit sought to be enforced accrues as a result of the crime of the person seeking to enforce that right.

[8] [1938] AC 586 per Lord Atkin @ 594

[15] Lord Atkin said as follows[9]:-

> *"The contract between the parties has thus been ascertained. There now arises the question whether such a contract is enforceable in a court of law. In my opinion it is not enforceable. The principle is stated in the judgment of Fry L.J. in* Cleaver v. Mutual Reserve Fund Life Association *(1):*
>
> *'It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person.'"*

This case concerned a contract of insurance in which the insurance company covenanted to pay the insured sum under a life policy, even upon suicide, provided the same to have been committed in excess of one year of the policy. The House of Lords found that the contract was unobjectionable, but held that the court would not enforce it on the basis of public policy. Lord McMillan expanded upon the principle stated above by Lord Atkin, identifying the public policy under consideration to be that the courts should not aid a criminal to derive a benefit from a crime[10].

[16] The application of the above stated principle however, is not always straightforward.

---

[9] Ibid @ 596
[10] Beresford v Royal Insurance Brokers, supra, @ 603.

The case of **St. John Shipping Corporation v Joseph Rank Ltd**.[11] concerned a charterparty for carriage of loads of grain between a shipowner and a charterer. The charter was perfectly valid, however due to the ship taking on bunkers (provision made for fuel) the ship became submerged well below its load line and it executed its charter in contravention of applicable regulations relating to the permitted level of its load line. The shipowner was prosecuted and convicted for the contravention, and the defendant (a consignor of cargo on the journey) sought to withhold payment of that proportion of their cargo fee equivalent to additional profit earned from the overload in cargo. The defendant's counsel acknowledged that that case was not one concerning a contract formed for an illegal or prohibited purpose. Instead, he submitted, the contract whilst valid, was rendered illegal by virtue of its performance in contravention of the law.

[17] It was held that the shipowner was entitled to recover the full cost of the freight. In his *ratio*, Devlin J found that the second proposition relating to the effect of the performance of the contract, was incorrectly stated by the defendant's counsel. Devlin J identified the principle relating to performance rendering a legal contract illegal as being based on the ultimate question of whether the contract itself as performed, was prohibited by the statute.

[11] [1957] 1QB 267

In particular, the fact that the statute is one for revenue collection or otherwise for the protection of the public interest, is only part of the test the court has to determine.[12] This somewhat difficult principle is perhaps better explained by illustration. Devlin J. illustrated the principle with reference to ***Cope v Rowlands***[13], in which an unlicensed broker was precluded from seeking to recover fees for services performed. It was found that the contract for services was per se not illegal, however the provision of services by the unlicensed broker rendered the contract illegal as it was the provision of services by an unlicensed broker that was the object of the prohibition, for the purposes of protection of the public. By contrast, Devlin J also referred to ***Wetherell v Jones***[14] which concerned a suit by a supplier for the price of spirits sold and delivered. In contravention of regulations, the supplier failed to deliver the spirits with a permit, and the customer refused to pay.

[18] The court held that the contract for sale of spirits was not prohibited albeit the supplier was guilty of a violation of the law. The following[15] was extracted by Devlin J:-

> *Where a contract which a plaintiff seeks to enforce is expressly, or by implication, forbidden by the statute or common*

[12] St. John's Shipping v Joseph Rank Ltd, supra @ 284-285
[13] (1836) 2 M. & W. 149
[14] (1832) 3 B. & Ad. 221.
[15] St. John Shipping Corporation v Joseph Rank Ltd. supra @ 286

> *law, no court will lend its assistance to give it effect: and there are numerous cases in the books where an action on the contract has failed, because either the consideration for the promise or the act to be done was illegal, as being against the express provisions of the law, or contrary to justice, morality, and sound policy. But where the consideration and the matter to be performed are both legal, we are not aware that a plaintiff has ever been precluded from recovering by an infringement of the law, not contemplated by the contract, in the performance of something to be done on his part."*

Of this statement in *Wetherell v Jones*, Devlin J said "*The last sentence in this judgment is a clear and decisive statement of the law; it is directly contrary to the contention which Mr. Wilmers advances, which I therefore reject both on principle and on authority*"[16]. On this basis, the result in ***St. John's Shipping v Joseph Rank***[17], is understood, notwithstanding the statement of general principle that the court will not enforce a contract that permits a profit from wrongdoing.

[19] With reference to the instant case, the Court recalls the fact that the ***Gulf Rentals'*** as applied in ***White v Kieran Holdings Ltd*** decisions were both decided in relation to the issue of an attempt by a tenant to recover monies already paid over to the landlord.

[16] St. John's Shipping supra @ 286
[17] Ibid.

The constitutional basis of the landlord being deprived of property already in his hands (the rent collected from the tenant), is not in issue in the instant case; and in the Court's view, the matter is not appropriately considered on that basis. The applicable basis upon which this case must be decided arises from the landlord's quest to enforce his contractual entitlement to recover rent in light of his violation of the provisions of Cap. 230A. Following the reasoning and line of authorities outlined by Devlin J in ***St. John Shipping Corporation v Joseph Rank Ltd***. above, the Court herein must determine whether the contract sought to be enforced is in fact that which is prohibited by the statute. The Court finds that the following extract from Devlin J in **St. John Shipping Corporation v Joseph Rank** provides final guidance on the matter[18]:-

> *"If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that is a clear implication. But unless you get a clear implication of that sort, I think that a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract. Caution in this respect is, I think, especially necessary in these times when so much of commercial life is governed by regulations of one sort or another, which may easily be broken without wicked intent.*

[18] Supra, @ 286-287

> *Persons who deliberately set out to break the law cannot expect to be aided in a court of justice, but it is a different matter when the law is unwittingly broken. To nullify a bargain in such circumstances frequently means that in a case - perhaps of such triviality that no authority would have felt it worth while to prosecute - a seller, because he cannot enforce his civil rights, may forfeit a sum vastly in excess of any penalty that a criminal court would impose; and the sum forfeited will not go into the public purse but into the pockets of someone who is lucky enough to pick up the windfall or astute enough to have contrived to get it. It is questionable how far this contributes to public morality."*

[20] In the instant case, the Court applies the dictum of Devlin J. in **St. John Shipping Corporation v Joseph Rank Ltd.** as follows:-

(i) The contract sought to be enforced is a rental agreement which is not a prohibited endeavour;

(ii) The prohibition against collecting rent for premises not registered, affects the performance of the contract by the landlord; however it is still not the contract itself (namely, rental of premises) that is prohibited by the Act;

(iii) On the accepted authority of ***Gulf Rentals v Evelyn & Carvalho***, the object of the law in question is for purposes of aiding revenue collection and not the protection of tenants;

(iv) There is no evidence that the Claimant was aware of the requirement to register the premises or that the rental agreement was made with any intent on the part of the Claimant to evade the requirements of the Act;

In the above circumstances, the Court finds that the civil contractual rights under the agreement nonetheless remain enforceable by the landlord. The Court observes however that the Act expressly saves the tenant's civil remedies whilst it is silent in relation to the landlord's remedies. This omission however does not prevent the Court from applying the principle in the manner reasoned above.

[21] Subject to the determination of the Defendant's Counterclaim, the Claimant is entitled to his arrears of rent in addition to his mesne profits. The following facts pertinent to the Claim were not in dispute and form the basis of the determination of the Claim.

(i) The subject premises is that described as #27 Harvest Close, Apartment A, Jackmans, St. Michael, rented at the sum of $1,800;

(ii) A valid notice to quit was issued effective 31st December, 2014;

(iii) The Defendant was in arrears of rent from the 1st October, 2014 to the 31st December, 2014 and vacated the premises on 30th September, 2015;

(iv) The quantum of arrears of rent would therefore be 3 months at $1800, namely $5400.

> The amount claimed for mesne profits would be 9 months at $1800, namely $16,200. The total amount claimed is $21,600.

It is worth stating that the Claimant would have been entitled to mesne profits irrespective of the Court's finding in relation to the arrears of rent, given that the tenancy was determined as of the 31st December, 2014. The question now remaining for determination is the proof or not of the Defendant's counterclaim.

Issue 2 – The Counterclaim

[22] By way of brief recall, the Defendant counterclaimed for damages for items from her home, which were destroyed or damaged as a result of water leaks due to faulty plumbing, on two different occasions. In relation to the first occasion in June, 2014 the Counterclaim alleged referred to attachment MT1 in which the items damaged were particularized. The Counterclaim also alleged inconvenience in relation to the resulting clean-up required upon the repair of the faulty plumbing. The Claimant's response was that he was notified only of damage to a chest of drawers which was replaced in the sum of $1300 and discounted from the Claimant's rent. In relation to the second incident, the Counterclaim pleaded loss of $10,116.37 but did not particularise in the pleading, the items, loss or damage.

The Counterclaim stated that the amount sought was communicated on behalf of the Defendant by her attorney's letter to the Claimant.

[23] The Claimant in his defence to the Counterclaim acknowledged damage alleged to three rugs, which were cleaned at the Claimant's expense, but alleged to having become aware of damage to other items only upon receipt of the attorney's letter, after the flood. The Defence to the Counterclaim denied such damage to other items and put the Defendant to strict proof. By way of witness statements, the Defendant says she notified the Claimant of damage to the items in addition to her rugs when he came to the premises on the 22nd October, 2014 to inspect her damaged items.

[24] The Claimant acknowledged in his witness statement that the Defendant did provide him with a list of items allegedly damaged by the water and his witness, his sister Deborah Lashley confirmed in her witness statement that the Defendant did provide such a list on the said day. Further, Deborah Lashley attached that list to her witness statement. The list was typewritten and according to the Defendant, comprised the items lost or damaged and their value, to a total sum of $7830. The Defendant attached a similar list to her own witness statement in the sum of $10,116. That itemized list was not pleaded in the actual Counterclaim, but the sum of $10,116 was specified.

Consideration of the Counterclaim

[25] Counsel for the Claimant submitted that the Defendant failed to effectively plead her counterclaim by particularizing the damage suffered. Counsel referred to **Perestrello v United Paint Co**.[19] in support of the requirement to plead and particularise special damages. The point made was that a plaintiff is obliged to show a defendant what case is to be met given the nature of special damages as outside the bounds of the known heads of loss which comprise general damages. The requirement to specifically plead and particularise is also said to enable a party to make a payment into court. In the instant case Counsel for the Claimant points out that the Defendant merely attached a list which she personally compiled, of items and their values but submitted no proof in support of the items damaged or their value. Counsel also made reference to **Bonham Carter v Hyde Park Ltd**[20]. in support of the point that plaintiffs are required to prove damage and it is insufficient to merely write down particulars for the benefit of the Court. In these circumstances it was submitted that the Defendant had entirely failed to plead or prove her counterclaim for damages.

[19] [1979] 1 WLR 570
[20] (1948)TLR 177

[26] In relation to the claim for damages for breach of the covenant of quiet enjoyment, Counsel for the Claimant submitted that the basis of the claim was not supported in the pleading in terms of what constituted the breach or whether the covenant was express or implied. Counsel cited **Green v Thomas**[21] in support of the submission as to the insufficiency of the pleading on the issue of breach of quiet enjoyment. Aside from any question of pleading however, reference was made to **Southwark London Borough Council v Mills; Baxter v Camden LBC (No. 2)**[22] as authority for the submission that the meaning of 'enjoyment' in relation to the covenant is not literal. Instead, what is meant by quiet enjoyment as explained in **Jenkins v Jackson,**[23] is the right to possession without interruption or interference of same by the landlord; also, the right to the full use and benefit of the property, as explained in **Kenny v Preen**.[24] Within the context of the interruption to user or possession of the premises having to be substantial, Counsel for the Claimant submits that on the evidence, the plumbing issues which occurred were temporary and repaired by the Claimant within a short time. As a result, there is no evidence of any interference with user or possession which could be regarded as substantial enough to amount to a breach of quiet enjoyment.

[21] TT 1977 HC 31
[22] [2011] 1 AC 1
[23] [1888] 40 Ch. D 71
[24] [1963] 1QB 499

[27] As stated before Queen's Counsel for the Defendant failed to file written submissions, however, the issue to be decided on the Counterclaim was not a complex one and was heavily dependent on findings of fact. In relation to the Counterclaim, the Court made the following findings:-

(i) There were two plumbing incidents at the Defendant's premises involving water leakage from pipes. The first in June, 2014; the second in September, 2014;

(ii) The Defendant called in the Claimant (as landlord's agent) promptly on both occasions, the Claimant attended promptly on both occasions and the physical issues were remedied immediately and at no cost to the Defendant;

(iii) Arising from the June, 2014 incident, the Claimant replaced a chest of drawers for the Defendant at a cost of $1300, by means of abatement of rent;

(iv) There is no other damage or amount in special damages pleaded in relation to the incident of June, 2014. No sustainable claim is before the Court arising out of the June 2014 incident;

(v) The only evidence before the Court in relation to any loss arising from the incident of September, 2014 is the oral evidence (witness statement and cross examination of the Defendant and her son) and the list written

by the Defendant's hand comprising items allegedly lost or damaged and estimates of value or costs of replacement. There was no other form of proof in respect of the loss and damage claimed in the sum of $10,116.

The Counterclaim and the 'In limine Challenge'

[28] On the morning of the trial, Queen's Counsel appearing as advocate attorney (and for the first time in the entire proceedings which commenced in April, 2015), made an oral application to strike out the Counterclaim. The application was made on the basis that the Counterclaim failed to plead any special damages; and that notwithstanding the relief claimed for damages for breach of the covenant of quiet enjoyment, there were no facts pleaded in support of that claim. As such it was submitted that the counterclaim was bound to fail. The Court declined to entertain the oral application and proceeded with the trial. In brief, the Court's reasons for doing firstly derive from the fact the application which pertained to pleadings, was inappropriately made at the commencement of the trial as opposed to at the Case Management Conference or at the Pre-trial Review.

[29] Queen's Counsel regarded the Court's position as contra to the overriding objective and mired in the technicality of the Rules. The Court's position is that as a general rule, an application to strike out a statement of case should

be made before or at a case management conference. Where as in this instance, the charge is that the case to be struck, (the counterclaim) was insufficiently pleaded and therefore bound to fail, the mischief which a strike out captures has to be viewed within the context of the role and function of pleadings. As attributed to the well-known statement in **McPhillemy v Times,**[25] cited with approval in **East Caribbean Flour Mills v Ken Boyea**[26] per then Barrow JA, the purpose of pleadings (post CPR) is that the general nature of a parties' case must be made clear, and thereafter particulars are provided by witness statements. Whilst the provision of witness statements lessens the need for lengthy particulars, pleadings remain important in order to set parameters of cases, and a party remains bound by his or her pleadings.

[30] Where as in this case, a party filed pleadings in answer to the claim and filed witness statements, it is certainly startling to have an application to strike out a case based on lack of sufficiency of pleading, being made on the morning of the trial. By way of illustration, (strength of case aside), the Counterclaim is for $10,116 in relation to items lost and damaged in the September, 2014 water incident. At paragraph 10 of the Defence to the Counterclaim, the Claimant pleads that:

[25] [1993] 3 All ER 775
[26] SVG Civ. App. No. 12/2006 per Barrow JA

"10. The Claimant only later became aware of other alleged damaged items in letter from the defendant sometime after the flooding. As to the Defendant's claim of damage to other items, this is neither admitted nor denied because the Claimant does not know whether it is true, but wishes the Defendant to be required to prove"

The list of items referred to in this paragraph of the Defence to the Counterclaim was attached to the Counterclaim, but more importantly it was attached to the Claimant's witness Deborah Lashley's witness statement. The Claimant's witness statement also referred to having received the list.

[31] The Claimant therefore in his pleading and witness statement, clearly knew how much money the Defendant was claiming as damages for her lost or damaged items and what those items were. Whether or not the claim was a strong one capable of being elevated to the level of proof required, was by that time, a matter for assessment of the evidence at the trial. Whilst an application to strike out a statement of case can be made at any stage of the proceedings, the Court bears in mind the purpose of pleadings, so that a party who answers a case and marches on to trial, ought not at the morning of the trial seek to attack the opposing case on the basis of insufficiency of pleadings.

Further, there was an element of ambush to the oral application to strike out which has to be called out as inconsistent with the spirit and intended operation of the CPR.

[32] The Court prefaces its words by acknowledging that in an appropriate case, an application to strike out a statement of case or for summary judgment can be made at the commencement of a trial, thereby obviating the need for the actual trial. Where that happens, it will often be indicative of a lack of effective case management by the Court, as well as a failure by counsel to have made use of opportunities for early or summary disposal of the case. That aside, the Court's observation in relation to ambush is illustrated with reference to **St. Kitts Development Ltd. v Golfview Development Ltd. et anor**.[27] This case concerned an appeal against an order made on the morning of the trial which struck out a late witness statement filed without the permission of the court.

[33] The claimant had filed a late witness statement about five (5) weeks prior to the scheduled trial date in the circumstance of there having been several prior extensions of time for doing so. After the late statement was filed, the parties exchanged witness statements and counsel for the claimant wrote to opposing counsel to the effect that all filings had been completed and inviting

[27] St. Kitts/Nevis Civ. App. No. 24 of 2003

engagement on any matters pertinent to the trial. There was no response from opposing counsel to this letter. On the morning of the trial, opposing counsel made an oral application to strike out the late witness statement and its attachments. The trial judge granted the application and awarded costs, and the claimant appealed. Alleyne JA, reversed the ruling, permitted the witness statement to stand and set aside the order for costs. The learned Justice of Appeal's orders were based on his view that the trial judge failed to address his mind to the discretion that was available to him under the OECS equivalent to Barbados' Rule 26.4 (power to set an irregularity right).

[34] In the face of the available discretion which was not considered, the learned Justice of Appeal took a dim view of the fact that the oral application to strike was made on the morning of the trial, with no notice, against the backdrop of the belated exchange of witness statements, and the unanswered letter inviting engagement on any issues ahead of the trial. The learned Justice of Appeal stated as follows[28], emphasis mine:-

> *"15. Notwithstanding that the filing and service of the witness statement of Alvin Shidlowski out of time without an order for relief from sanctions was ·therefore irregular, <u>nevertheless the Respondent had ample notice of it, was not taken by surprise, could and should have raised the issue ahead of the date of trial,</u>*

[28] St. Kitts Development Ltd. v Golfview Development Ltd. et anor supra, @ paras 15-16

> *but sought instead to take advantage of a technical breach, a reversion to the technique of trial by ambush which the CPR seeks to discourage.*
>
> *16. By failing to respond to the Appellant's letter concerning settlement of pre-trial issues, or to raise the issue of irregularity in filing the witness statement without an order of the Court prior to the date of trial notwithstanding the Appellant's Attorney's invitation to resolve any outstanding pre-trial issues, the Respondent may be taken to have waived the irregularity and lulled the Appellant's Attorney into acting on that basis. The Respondent should not be allowed to benefit from this behaviour."*

[35] The Court is of the view that the above paragraphs speak for themselves. It is appreciated that in the above case, the court was dealing with a breach of the rules which had nothing to do with the merits of the case. In the instant case, the Court appreciates that Queen's Counsel's position was that there was not a case before the Court which could be successful as there was a failure to plead in the manner required by law. The Court considers that the Claimant answered the Counterclaim and that quite aside from any question of relative strength, clearly proceeded on the basis that he knew what case he had to answer and as such any deficiency in pleading ought not to be countenanced on the morning of the trial.

The Court also notes that in truth, the counterclaim most likely is one which might have succumbed to a pre-trial application for summary judgment. The failure to have sought summary judgment was that of the Claimant as well an illustration that the overriding objective might have been better served by more robust case management by the Court forcing the application for summary judgment instead of letting the matter continue to trial.

[36] On the morning of the trial however, the situation was that there was nonetheless a case on the counterclaim, albeit a tenuous case due to weak pleadings and a lack of any proof as to the claim outside of bare assertions made by the Defendant. The list was prepared by the Defendant and amounted to evidence whether weak or strong. As pertains to the claim for damages for breach of covenant of quiet enjoyment, this claim was unhappily pleaded, as the Court has been left to assume that the act complained of was the disruption caused by the leaks and escaped water. Notwithstanding, a dismissal of the counterclaim by means of summary assessment arising from an oral application on the morning of the trial was undesirable for several reasons.

(i) Firstly, last minute surprise applications beyond matters of mere formality are to be discouraged, particularly when there was ample opportunity (in a measure of years), to have disclosed one's position before the trial day.

(ii) Secondly, in this particular case, a summary disposal on the morning of the trial would most likely have been viewed by the Defendant as a denial of due process.

(iii) Lastly, albeit weak, there was evidence in support of the counterclaim and a basis pleaded to support the claim of breach of quiet enjoyment so that a strike out of the case (as distinct from summary judgment) was not warranted.

Determination of the Counterclaim

[37] Queen's Counsel for the Claimant was not incorrect in relation to the nature of evidence required for proof of special damages and the Court accepts the authority cited of **Perestrello v United Paint Co**[29]. in support of this point. The Defendant's list of items falls short of the mark in that having been put to proof by the Claimant, it was incumbent on her to have elevated her claim for special damages with reference to provision of actual invoices from vendors or service providers, receipts of monies expended for cleaning and perhaps photographs of damaged items. The list provided went no further than the Defendant's bare assertions of the loss she was claiming, which as a general rule does not assist a claim that has been put to proof.

[29] [1979] 1 WLR 570

The Defendant has therefore failed to prove her claim for $10,116 as special damages for loss of and damage to items in her home following water leaking into her apartment as a result of a burst pipe.

[38] The remaining aspect of the Counterclaim is that for breach of the covenant of quiet enjoyment. Albeit identified by Counsel for the Claimant as a deficiency in the counterclaim, the failure to identify whether the covenant relied on was express or implied is not fatal. The presumed factual basis of the claim is the disruption caused as a result of the plumbing issues on both occasions in June, 2014 and September, 2014. The Court finds the submissions made on behalf of the Claimant as to the interpretation of the covenant for quiet enjoyment to be correctly stated. As per the authorities cited of **Southwark London Borough Council v Mills; Baxter v Camden LBC (No. 2)**[30] and **Jenkins v Jackson,**[31] the Court accepts the principles stated therein, particularly, that a breach of the covenant of quiet enjoyment means a substantial disruption of the tenant's user or possession of the premises.

[39] The disruption to user or possession must also be referable to a specific act of the landlord or person acting through or for him.

[30] Supra
[31] Supra

In this case, the asserted breach of covenant of quiet enjoyment as a result of faulty plumbing, was not shown to have been caused by any deliberate act, omission or negligence of the landlord, nor was any such cause pleaded. In any event, the Court agrees with the submission on behalf of the Claimant that the circumstance of water escaping due to plumbing issues could not amount to a breach of the covenant of quiet enjoyment as the disruption to user of the premises was not substantial. The plumbing issues were repaired without delay, at the expense of the landlord. In the circumstances the Defendant has failed to establish any breach of the covenant of quiet enjoyment. The Counterclaim is therefore dismissed in its entirety.

Disposition

[40] The Claim is disposed of as follows:-

(i) The Claimant is granted judgment for arrears of rent in the sum of $5,400.00 for the period 1st October, 2014 to 31st December, 2014 at $1,800 per month;

(ii) The Claimant is granted judgment for mesne profits in the sum of $16,200.00 for the period 1st January, 2015 to 30th September, 2015 at $1,800 per month;

(iii) The Defendant's counterclaim is dismissed in its entirety;

(iv) The total award of judgment amounts to $21,600 and prescribed costs thereon in the sum of $7,614.00 (including VAT) are awarded to the Claimant;

(v) Statutory interest at the rate of 6% is granted on the judgment sum and prescribed costs from the date of judgment until payment.

SHONA O. GRIFFITH
Judge of the High Court